SELECTED JUDGMENT NO. 6 OF 2018

IN THE CONSTITUTIONAL COURT OF ZAMBIA — Appeal No. 12/2016

HOLDEN AT LUSAKA — 2016/CC/A020

IN THE MATTER OF: THE PARLIAMENTARY PETITION RELATING TO THE PARLIAMENTARY ELECTION FOR SENGA HILL CONSTITUENCY HELD ON 11TH AUGUST, 2016

IN THE MATTER OF: SECTION 81, 92, 96, AND 97 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

BETWEEN

GILES CHOMBA YAMBA YAMBA — APPELLANT

AND

KAPEMBWA SIMBAO — 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT

ATTORNEY GENERAL — 3RD RESPONDENT

CORAM: Sitali, Mulenga, Mulembe, Mulonda and Munalula, JJC

on 26th June, 2017 and 29th January, 2018.

For the Appellant: Mr. C. Sianondo of Messrs Malambo & Company

For the 1st Respondent: Mr. B. Mutale, SC and Ms. M. Mukuka of Messrs Ellis & Company

For the 2nd Respondent: Mr. R. Mwala and Mr. K. Wishimanga of Messrs A. M. Wood & Company

For the 3rd Respondent: No Appearance

JUDGMENT

Mulembe, JC, delivered the Judgment of the Court.

Cases referred to:

1. Michael Mabenga v Sikota Wina, Mafo Wallace and George Samulela (2003) Z.R. 110
2. Mlewa v Wightman (1995/1997) Z.R. 171
3. Reuben Mtolo Phiri v Lameck Mangani, SCZ Judgment No. 2 of 2013
4. The Minister of Home Affairs and Attorney General v. Lee Habasonda (2007) Z.R. 207
5. Leonard Banda v Dora Siliya, SCZ Judgment No. 127 of 2012
6. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
7. Steven Katuka and Law Association of Zambia v The Attorney General and 64 Others, selected Judgment No. 29 of 2016
8. Justin Chansa v Lusaka City Council (2007) Z.R. 256
9. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138
10. Sablehand Zambia Limited v Zambia Revenue Authority (2005) Z.R. 109
11. Attorney General v Marcus Kapumba Achiume (1983) Z.R. 1
12. Saul Zulu v Victoria Kalima (2014) Z.R. 14
13. Brelsford James Gondwe v Catherine Namugala Appeal No. 175 of 2012
14. Mubita Mwangala v Inonge Mutukwa Wina Appeal No. 80 of 2007

Legislation referred to:

1. Electoral Process Act No. 35 of 2016
2. Constitution of Zambia (Amendment) Act No. 2 of 2016

Other works referred to:

1. Concise Oxford English Dictionary, 12th Edition, Oxford University Press
2. Halsbury's Laws of England, 5th Edition, Volume 38A, LexisNexis

This is an appeal against the judgment of the High Court dismissing the Appellant's election petition which challenged the election of the 1st Respondent as Member of Parliament for Senga Hill Constituency.

The Appellant and the 1st Respondent were contestants in the 11th August, 2016 election for Member of Parliament for Senga Hill Constituency. The Appellant contested the seat on a United Party for National Development (UPND) ticket, while the 1st Respondent was a candidate on a Patriotic Front (PF) ticket. The 1st Respondent emerged victorious with 9,410 votes, while the Appellant polled 8,345 votes. Aggrieved by the results of the election, the Appellant petitioned the High Court with a view to have the election of the 1st Respondent declared null and void on grounds that the elections were held in an atmosphere which was not free and fair due to widespread malpractices and corrupt practices by the 1st Respondent. He alleged that the 1st Respondent, using his position as Cabinet Minister, graded two major feeder roads and erected Zambia Electricity Supply Corporation (ZESCO) poles, using workers who openly campaigned for him. It was also alleged that the 1st Respondent engaged in vote buying, bribery, and corruption during his campaigns; that the 1st Respondent gave out 100 roofing sheets to various named villages and 100 bags of cement as well as door frames, football jerseys and footballs.

It was further alleged that the 1st Respondent, at a meeting, promised to construct a health care service centre in Mutitimya village in the event that he was elected. The Appellant also alleged that the 1st Respondent was seen giving out 30 bags of cement in Kamyanga Village and more than 200 bicycles to headmen across the constituency in an attempt to coerce them to solicit votes for him from their subjects. Further allegations against the 1st Respondent were that his agents went around collecting voter's details and promising them money and farming input support in exchange for their support in the election. It was also alleged that the 1st Respondent, on the day of the election, hired several trucks to transport voters to the polling station.

Allegations against the 2nd Respondent were that it neglected or failed to provide the GEN 12 Form as per Electoral Commission of Zambia (ECZ) Regulations in all 56 polling streams in Senga Hill Constituency.

At the trial, the Appellant, who testified as PW1, called 10 witnesses. The 1st and 2nd Respondents together called seven witnesses. After considering the evidence and submissions of the

parties, the trial court narrowed down the issues for determination as follows:

1. **Whether or not there were widespread electoral malpractices connected to the 11th August, 2016 parliamentary election in Senga Hill;**
2. **Whether or not the widespread malpractices prevented or may have prevented the majority voters from voting for their preferred candidate;**
3. **Whether or not the 2nd Respondent (ECZ) failed to provide the GEN 12 Form to the detriment only of the petitioner (now Appellant); and,**
4. **Whether or not the failure to provide the GEN 12 Forms affected the result of the election.**

The learned trial judge made it clear that for the petition to succeed, all four issues must be established to the required standard in election petitions. The learned trial judge cited the case of **Michael Mabenga v Sikota Wina and Others**[1], where the Supreme Court stated that the burden of proof in election petitions lies with the petitioner to prove to a standard higher than a mere balance of probability. She took the view that the current legal regime requires courts to construe election petitions more strictly than disputes in ordinary civil suits. She stated that under the old law, one just needed satisfactory proof of any one corrupt or illegal practice or misconduct in an election as enough to nullify an election. The learned judge observed that a construction of section 97 of the **Electoral Process Act**[1], which outlines the circumstances where an election can be declared

void, is that mere satisfactory proof of any one corrupt or illegal practice, misconduct or non-compliance with the electoral law is no longer sufficient to nullify an election. That, in addition, the petitioner is now required to prove that such corrupt practice or illegal practice or misconduct prevented or may have prevented the majority of the electorate from voting for their preferred candidate; that to do so the petitioner had to discharge cogent evidence before the court and it is not enough to simply make bare allegations.

The trial court went on to state that section 97(3) and (4) of the Electoral Process Act are a clear departure from the old regime which made any attempt to commit an election offence punishable. It was the trial court's view that the current legal regime has more or less softened the provisions for non-compliance with the Electoral Process Act and, as such, is a clear departure from the position in **Mlewa v Wightman**[2] where proof of a single corrupt practice was enough ground to nullify an election. Further, the trial court found that the alleged events against the 1st Respondent were isolated and not widespread so as to affect the outcome of the elections or to prevent the

electorate from choosing a candidate that they preferred. The court was of the view that the ZESCO and road construction projects could not be considered to be corrupt or illegal practices as they were developmental programmes undertaken by the Government. On the alleged use of Government resources by the 1st Respondent, the trial court held that there was insufficient evidence adduced by PW2 who merely said he saw a GRZ number plate but could not recall the registration number of the said vehicle.

In regard to allegations against the 2nd Respondent, the trial court found that they were not proved to the required standard; that the 2nd Respondent, in its defence through its witnesses, had shown that where the GEN 12 form was missing, the "zero form" was used to display the results at polling stations. The trial court found that the evidence of PW10 was weak as he had conceded to visiting only five out of 56 polling stations and may therefore not have known what was going on at the other polling stations. The court further found that, despite being aware of the

complaints procedure, PW1 and PW10 did not file a complaint on the lack of electoral materials.

The trial court, having found that the allegations had not been established to the required standard of proof, dismissed the petition and declared that the 1st Respondent, Kapembwa Simbao, was duly elected as Member of Parliament for Senga Hill Constituency.

Aggrieved with the decision of the court below, the Appellant appealed to this Court advancing the following 14 grounds:

Ground 1

The learned trial Judge erred in law and in fact when she failed to include as one of the issues for determination by the Court the question as to whether the election was conducted in a free and fair manner as required under the Laws of Zambia.

Ground 2

The learned trial Judge misdirected herself when she failed to include as one of the issues for determination by the Court the question as to whether or not the election was conducted in accordance with the principles laid down in the Electoral Process Act No. 35 of 2016 such that the results of the election could have been affected in the manner contemplated under section 97 (2) (b) of the Act.

Ground 3

The learned trial Judge misdirected herself when she held, without having due regard to the full import of section 97 of the Act, that under that section it is no longer sufficient to prove only one corrupt or illegal practice or misconduct in order to nullify an election and that it is now required to prove that the majority of voters were or may have been prevented from voting for their preferred candidate.

Ground 4

The Court below fell into grave error when it held that the incidences complained about by the Appellant in his petition in the Court below did not affect the outcome of the election in the whole constituency and when it consequently went on to dismiss the Petition on the basis, inter alia, of that holding.

Ground 5

The learned trial Judge misdirected herself when she interpreted section 97(3) and (4) of the Act in the manner that she did and consequently when she held that the current legal regime had "softened the provisions for non-compliance with the Act and that one can clearly get away with non-compliance of (sic) electoral offences."

Ground 6

The learned trial Judge erred in law and in fact when, despite the overwhelming evidence before her to the contrary, she held that the incidence of illegal and corrupt practices complained of by the Appellant were isolated and not wide spread enough to affect the outcome of the election and further when she failed to consider the full import of section 97 of the Act in arriving at her decision to dismiss the Petition.

Ground 7

The learned trial Judge erred in law and in fact when she upheld the 1st Respondent's defence to the effect that the election was not amenable to nullification on the ground that he was not personally involved in the offences complained of and that they were done without his knowledge or consent.

Ground 8

The learned trial Judge erred in law and in fact when she held that the allegation that the Gen 12 forms were not signed by presiding officers and that they were not given to polling agents was neither here nor there and consequently when she failed to recognize the importance of the Gen 12 to the outcome of the election.

Ground 9

The learned trial Judge fell into grave error when she failed to consider the import of the 1st Respondent's continued exercise of the office and function of Minister on the outcome of the election.

Ground 10

The learned trial Judge erred in law and in fact when she held, as regards the illegality of the 1st Respondent's continued stay in the office of Minister, that it was an issue to be determined by the Constitutional

Court and consequently when she failed to consider the import of such illegality on the outcome of the election.

Ground 11

The learned trial Judge fell into grave error when she failed to declare the election of the 1st Respondent null and void despite finding as a fact that there were acts of illegality, corruption or misconduct that had taken place during the election period.

Ground 12

The Court below erred in law and in fact when it held that the Petition had not been proved to the required standard and consequently determined that the 1st Respondent had been duly elected as Member of Parliament of Senga Hill Constituency.

Ground 13

The learned trial Judge misdirected herself when she ignored evidence brought before her without giving any reason for so doing and without revealing her mind as to why she chose to disregard certain evidence.

Ground 14

The trial Judge misdirected herself when she dismissed the Petition.

The parties herein filed detailed heads of argument and made oral submissions in support of their respective positions on this appeal.

The Appellant argued grounds one, two, three and five together. He took issue with the approach of the trial court to narrow down the issues for consideration in the petition. It was contended that the learned trial Judge fell in grave error in interpreting and applying the law; that by construing section 97 of the Electoral Process Act narrowly when she outlined the issues for determination, the learned trial Judge effectively closed

her mind to its wider import, in consequence of which her final determination of the matter was erroneous. It was argued that, on a critical reading of section 97 and contrary to the learned trial Judge's opinion, a single incident of electoral malpractice is sufficient for an election to be nullified. For this point, the Appellant specifically cited section 97(3) of the Electoral Process Act, arguing that the words used in that provision were unambiguous and mandatory and must be construed in their natural meaning. The Appellant added that the reason for the word "despite" at the commencement of section 97(3) is intended that the provisions of section 97(2) thereof be excluded when applying section 97(3); that the provisions of section 97(2) are separate and distinct, and are to be applied in different circumstances from those comprised in section 97(3).

The Appellant proceeded to contend that section 97(3), by repeatedly using the singular "a corrupt practice or illegal practice", recognises the possibility of the court or tribunal finding that a singular such act had been committed by the respondent. It was submitted that in order for the court to proceed in the prescribed manner, the three conditions

prescribed in paragraphs (a) to (c) have to be satisfied, otherwise the court shall declare the election of the candidate void.

The Appellant proceeded to submit that the 1st Respondent committed electoral malpractices and failed to avail himself of the defences set out in section 97(3)(a) to (c), leaving the court with no discretion but to nullify the election despite the requirements of section 97(2), even where the majority had not been prevented from electing a candidate of their choice or where the incident is a single one. It was argued that section 97(3) preserves the power of the court to punish the candidate by declaring the election void.

It was contended that if section 97 of the Electoral Process Act was construed differently from the manner suggested, a lacuna would exist in the law which would allow a candidate to engage in any singular or multitude corrupt or illegal practices without sanction provided that such acts did not affect the majority of voters. The Court would, thus, be used to abet illegal acts and, it was submitted, that could not have been the intention of the Legislature. We were invited to adopt the interpretation on section 97(3) as prayed and find that the

learned trial Judge failed to give full effect to the provisions of the law.

In regard to section 97(2)(b) of the Electoral Process Act, it was submitted that the learned trial Judge closed her mind to the fact that the provision is open ended and is not specific that non-compliance need not be attributed to a candidate or the ECZ in order for an election to be nullified. The Appellant maintained that the learned trial Judge failed to consider that an act of corruption, illegal practice or misconduct itself amounts to an act of non-compliance capable of affecting the result of the election within the meaning of section 97(2)(b). That the wording in section 97(2)(b) is such that it refers only to the result of the election being affected without any qualification and without requiring that the majority of the voters should be affected or that there should be a multiplicity of incidents. The Appellant maintained that the only test under section 97(2)(b) is that even one incident of non-compliance is sufficient to trigger nullification if it relates to the conduct of an election and if it affects the result of that election. It was further contended that

the learned trial Judge misdirected herself when she went so far as to link the provisions of section 97(2)(b) with those of 97(2)(a), thus placing a heavy burden of proof on the Appellant and ultimately rendering her Judgment erroneous.

Further, that there was failure on the part of the court below for not appreciating the import of section 97(2)(b) given that the disputed result had a minimal gap in terms of the votes received by the Appellant and the 1st Respondent which, it was submitted, could easily have been affected by any one incident of non-compliance with the law. Referring further to section 97(2)(b), the Appellant asserted that what strikes one is its simplicity and clarity of words used; that being clear and unambiguous, it ought to be construed in its pure and natural form. The Appellant stated that it was worth noting that as there is no conjunctive word such as "and" used, section 97(2)(b) is to be read and construed in its own terms and not conjunctively with 97(2)(a).

In the Appellant's view, the qualification in section 97(2)(b) of the Electoral Process Act, to the effect that it is subject to the provisions of section 97(4), makes it clear that subsection (4)

applies were the non-compliance in issue is committed by an election officer in breach of his or her official duty. In other instances not attributed to an election officer, it was submitted that section 97(2)(b) ought to be applied in accordance with its natural unqualified meaning.

Pressing the argument further, it was the Appellant's view that it is significant that there is no limitation of section 97(2)(b) in relation to the majority of voters being affected in their choice or in relation to the incidents of non-compliance being widespread; that provided the non-compliance relates to the conduct of the election, it falls within the ambit of that provision. Further, that the use of the word "shall" made it mandatory and left no discretion for the court below where the requirements prescribed therein were proved.

To conclude on this aspect of the submissions, the Appellant took issue with the lower court's position that the authorities in **Mlewa v Wightman[2], Mabenga v Wina and Others[1]** and **Reuben Mtolo Phiri v Lameck Mangani[3]** no longer applied in view of the new legislation as contained in section 97 of the Electoral Process Act. It was contended that since the law still

recognizes that a single instance of malpractice is sufficient to annul an election, it must follow that the said authorities were still good law, albeit of persuasive value only before this Court. We were urged to find that the court below erred in its dismissal of authorities that were otherwise binding upon it and to give due consideration to the same in determining whether or not the learned trial Judge was on firm ground when she declared the 1st Respondent duly elected.

Grounds four, six and seven were also argued together. The Appellant opened submissions by stating that the grounds were anchored, *inter alia,* on the conclusion arrived at by the learned trial Judge at page 69 of the Record of Appeal. It was submitted that prior to arriving at the said conclusion, the learned trial Judge analysed all the evidence on malpractice led by the petitioner in a cursory fashion. The Appellant contended that by glossing over these aspects of the Petition, the court below committed a grave miscarriage of justice thereby falling into grave error.

In regard to allegations of vote buying, bribery and corruption, the Appellant agreed with the trial court that the

relevant provisions of the law are section 81(1)(c) of the Electoral Process Act and Regulation 15(1)(h) of the Code of Conduct. It was submitted that each of the foregoing provisions creates a general offence whose non-compliance inevitably entails non-compliance with the Electoral Process Act in relation to the conduct of an election.

The Appellant proceeded to highlight the evidence allegedly largely ignored or glossed over by the learned trial Judge despite, it was argued, being crucial to the determination of the allegations in issue. We were pointed to the evidence of PW1 (the Appellant herein) to the effect that whenever he held campaign meetings he would be asked what he would give the people and that it was through such interaction that PW1 got to know that items had been delivered to the people by the 1st Respondent. It was submitted that the electorate, to all intents and purposes, expected to receive something from the Appellant in exchange for their vote. It was further submitted that the collective evidence of PW2, PW4, PW5, PW6 and PW7 corroborated the evidence of PW1. That each of those witnesses personally saw various items being offloaded and donated at their villages within the

constituency; that they spoke directly to recipients of the items and were informed that the materials came from the 1st Respondent.

We were also referred to the evidence of PW2 at page 333 of the Record of Appeal to the effect that the 1st Respondent personally instructed a councillor named Vaki Siuluta to offer inducement to voters in the form of money. The Appellant also referred to page 336 of the Record of Appeal to show that the 1st Respondent was personally present at the donation of bicycles to headmen at Nsokolo village for campaign purposes to solicit votes for himself, and that this evidence was never challenged in cross-examination. Neither did the lower court express any doubt as to the credibility of PW2 or the veracity of his testimony. Further, the Appellant highlighted the testimony of PW4 narrating an incident during which the 1st Respondent donated footballs and football jerseys to some youth during the campaign period.

It was asserted that no evidence, other than that of RW2 (the 1st Respondent) was led to directly contradict the evidence of PW1 to PW7. It was contended that the evidence of RW2 consisted of bare denials and was without any corroboration thus

rendering his evidence unreliable.

The Appellant reiterated that the trial Judge made no serious attempt to analyse the evidence nor did she reveal why she chose to ignore it. That by proceeding in the manner that she did, the learned trial Judge misdirected herself and, therefore, rendered her Judgment amenable to reversal by this Court in the exercise of its appellate jurisdiction. To support the point, the Appellant called in aid the case of **The Minister of Home Affairs and The Attorney General v Lee Habasonda**[4], where the Supreme Court opined that every judgment must reveal a review of the evidence.

The Appellant contended that had the court below properly addressed its mind to the facts, the evidence and the law, it would have taken note of the cogent and unchallenged evidence showing acts of corruption and bribery in the constituency during the campaign period and ought to have accepted the evidence of PW1 as corroborated by PW2, PW4, PW5, PW6 and PW7. It was the Appellant's further contention that the only logical inference the court below ought to have reached was that "a person" had, directly or indirectly, made gifts to the

constituents during the campaign period in violation of section 81(1)(c) and (d) of the Electoral Process Act and in contravention of Regulation 15(1)(h) of the Code of Conduct.

The Appellant added that the evidence was clear that the gifts were linked to the election and fell within the contemplation of section 97(2)(b) of the Electoral Process Act. The Appellant reiterated the point that section 97(2)(b) applies even where the malpractice is not attributable to a candidate and the lower court erred in not applying the law as prescribed.

The Appellant maintained that his unchallenged evidence showing that he interacted with voters who expected inducement in order to receive their vote created an atmosphere that was not conducive for holding free and fair elections. It was submitted that it was irrelevant that none of the people spoken to were called to testify; that the issue was that the election took place in a non-compliant environment which, in terms of sections 81(1)(c) and 97(2)(b) of the Electoral Process Act and Regulation 15(1)(h) of the Code of Conduct, need not be attributable to the 1st Respondent (directly or indirectly) but merely to a person. The Appellant argued that the law was not concerned with the person

causing the non-compliance but with the non-compliance itself and that the overwhelming evidence of non-compliance places this case firmly under the umbrella of section 97(2)(b). To stress the argument, the Appellant called in aid the case of **Leonard Banda v Dora Siliya**[5], where the Supreme Court held:

> **"A distinction must be drawn between paragraph (a) and paragraph (c). Under paragraph (a) it does not matter who the wrong doer is. The election will be nullified if there is wrong doing of the type and scale which satisfies the Court that the electorate were or could have been prevented from electing the candidate whom they preferred." (emphasis theirs)**

Although the Appellant noted that section 93(2) of the Electoral Act 2006 to which the above holding refers is different in its terms from Section 97 of the Electoral Process Act, he maintained that the above authority still applied with equal force in as far as Section 97(2)(b) leaves it open for anyone to commit a malpractice, provided the requirement that the result of the election was affected is met. We were urged to adopt the above authority with the necessary modification.

The Appellant further submitted that it is trite law that where a witness, such as the Appellant and the 1st Respondent, has an interest to serve, the evidence of that witness cannot be readily relied upon by the court in the absence of corroborative

evidence. It was added that the court below ought to have accepted the Appellant's version of events over that of the 1st Respondent as the latter's version of events in relation to the issue at hand comprised uncorroborated bare denials while that of the Appellant was corroborated by at least six witnesses. That on the whole, the court below should have nullified the election pursuant to section 97(2)(b) as all conditions under that provision were met.

On the undertaking of development projects during the campaign period, it was the Appellant's submission that it was never in dispute in the court below that developmental projects in the form of road construction and electricity infrastructure took place in the constituency. To buttress the argument, the Appellant referred to the following portion at page J52 of the judgment, where the trial Judge said:

> **"It may be said that the timing of the implementation of the said projects was not right as the said projects were being undertaken during the election campaigns, according to PW3's testimony, but the fact is that the projects were undertaken under Government initiative."**

It was argued that the court misdirected itself by ignoring crucial pieces of evidence such as the evidence of the Appellant to the effect that the developmental projects took centre stage in the

Constituency. That one feeder road from Chikoka to Mukunta via Tanzuka was located where there were five major polling stations. Further, that the Appellant testified that another feeder road, the Kamuzwazi to Kavumbo road, was constructed day and night in an unprecedented manner up to polling day.

In regard to the alleged abuse of the position of Cabinet Minister, it was also submitted that PW3 testified that the 1st Respondent promised to install a network tower and to construct a road as it was easy for him to do so as a Minister of Transport and Communications. Also, that a week later, Chinese nationals were found working on the said road. No evidence, it was submitted, was led to rebut PW3's testimony and that the court below should have accepted his testimony as there was nothing to show that he lacked independence as to require his evidence to be corroborated. Instead, PW3's evidence corroborated that of PW1. We were invited to reverse the lower court's decision on the ground that its conclusions were perverse and, on a proper view of the evidence and the law, ought not to have been made.

It was the Appellant's further argument that it was immaterial that the activities in issue were developmental in nature, citing the case of **Akashambatwa Mbukisita Lewanika v Fredrick Titus Jacob Chiluba**[6], where the Supreme Court had occasion to say:

> **"During election period there should be a closed season for any activity suggestive of vote buying, including any public and official charitable activity involving public funds and not related to emergencies or any life-saving or life-threatening situations."**

That even assuming the developmental activities were a necessity, the conduct of the 1st Respondent of linking the same to his campaign and to his status as Minister took them out of the realm of philanthropic activity. We were, accordingly, invited to reach our own conclusion on the issues, that the election was not conducted in a free and fair manner.

In regard to ground eight, touching on the alleged non-availability of the GEN 12 form, the Appellant submitted that it stemmed from the finding of the lower court at page 70 of the Record of Appeal. That a reading of the relevant portion shows that the learned trial Judge glossed over this very important issue, thus committing a miscarriage of justice in the process. On this aspect of the appeal, the Appellant relied on its

submissions in the court below. We refer to the same later in this Judgment.

Grounds nine and ten were also argued together. The Appellant indicated that these grounds found their root at Page 71 of the Record of Appeal, arguing that the learned trial Judge's approach was essentially to wash her hands off the matter, contrary to the principles espoused in a plethora of authorities, which enjoin courts to render judgments which deal concisely and conclusively with all matters before them.

It was argued that it was not in contention that throughout the campaign period until the last but one day before the poll, the 1st Respondent illegally continued to hold the office of, and to perform the functions of, Minister of Transport and Communications. It was submitted that the foregoing disadvantaged the Appellant as the official Government projects were linked to the 1st Respondent's campaign and the Appellant could not equally boast of being a Minister who was delivering projects for the people. It was contended that by holding himself out to be a Minister during the campaign, the 1st Respondent's conduct came within the ambit of section 97(2)(a) of the Electoral

Process Act and Regulation 15(1)(i) of the Code of Conduct, warranting nullification of the election. The Appellant called in aid this Court's decision in **Steven Katuka and Another v The Attorney General and 64 Others**[7] to support the argument that the 1st Respondent was illegally in office as a Cabinet Minister during the campaign period. Further, that since in terms of Article 2 of the Constitution every person has a duty to defend the Constitution and to resist its abrogation, which, it was submitted, the 1st Respondent had failed to do, the fact that this Court's Judgment was only handed down on 9th August, 2016 is immaterial as the illegality in issue subsisted from 11th May, 2016 when Parliament was dissolved.

It was the Appellant's argument that the 1st Respondent was seen driving a Government owned vehicle when he attended a funeral within the constituency during the campaign period, evidence which the learned trial Judge discarded for being unreliable as the witness who testified to this fact could not recall the number plate of the subject vehicle. It was submitted that the trial Judge was wrong to set such a high standard for the witness, being in effect a standard that required the witness to

prove his assertion beyond reasonable doubt. That on a proper view of the evidence, the correct finding should have been to accept that the 1st Respondent was indeed sighted using a GRZ vehicle in breach of Regulation 15(1)(k) of the Code of Conduct.

The Appellant submitted that the only conclusion that this Court can arrive at is that the above highlighted illegal acts and conduct of the 1st Respondent disadvantaged the Appellant and that the voters in the constituency were induced to vote for the 1st Respondent due to the unfair advantage the 1st Respondent enjoyed, meeting the threshold under section 97(2)(a) of the Electoral Process Act.

In respect of grounds eleven to fourteen, the Appellant indicated that they comprised a summary based on the ultimate decision of the lower court to dismiss the petition and to declare the 1st Respondent duly elected. The Appellant maintained that the learned trial Judge ignored evidence that was before her without saying why and that that in itself renders the Judgment a nullity because a Judge that proceeds in the manner in which the learned trial Judge proceeded is guilty of misdirection, citing the case of **Justine Chansa v Lusaka City Council**[8] for authority.

Further, that in view of the total misapprehension of the law by the court below, the Appellant invited this Court to uphold the appeal and declare that the 1st Respondent was not duly elected as Member of Parliament for Senga Hill Constituency.

At the hearing of the appeal, learned counsel for the Appellant, Mr. Sianondo entirely relied on the heads of argument. At the behest of the Court, learned Counsel submitted that section 97(3) of the Electoral Process Act applies where the petitioner has satisfied the requirements of section 97(2)(a) and that the burden of proof falls on the person whose results have been petitioned. Mr. Sianondo added that even one incident qualifies to nullify an election under section 97(3) and that it could be done independent of section 97(2)(a). Learned Counsel further submitted that section 97(2)(b) was independent of section 97(4); that it does not only apply to the ECZ. He clarified that, in his view, candidates were involved in the conduct of elections as participants while the ECZ was involved as managers.

The 1st Respondent also filed written submissions and chose to adopt the same pattern in which the grounds of appeal were

argued by the Appellant. In regard to grounds one, two, three and five, the 1st Respondent submitted that the learned trial Judge was on firm ground in the context of the case before her, when she narrowed down the issues for consideration as shown in the portion of the judgment to which the Appellant took issue. It was submitted that the learned trial Judge merely summarised what fell to be determined in the petition.

In response to the Appellant's submission that the learned trial Judge erred when she failed to consider that under section 97(3) of the Electoral Process Act, even one incident of electoral malpractice is sufficient for an election to be nullified and that she consequently failed to consider that authorities from the previous legal regime continued to be good law, the 1st Respondent contended that the law on avoidance of parliamentary elections at the time the Judgment in the court below was delivered is set out in section 97 of the Electoral Process Act. It was submitted that the passages in the cases relied on by the Appellant were decided on the law as it stood at the time. It was the 1st Respondent's submission that previous electoral law was couched in terms that would support the

Appellant's submissions. The 1st Respondent submitted that as was held in **Mlewa v Wightman[2], Reuben Mtolo Phiri v Lameck Mangani[3]** and **Leonard Banda v Dora Siliya[5]**, the law then provided for four independent and separate grounds. It was argued that the Electoral Process Act constitutes a departure from the previous statutory framework as it combined what formed paragraphs (a) and (c) of the previous law into paragraph (a) of the law currently in force and connected them with the conjunctive 'and', instead of the disjunctive 'or'.

The 1st Respondent argued that in terms of section 97(2) of the Electoral Process Act, the High Court may not nullify the election of a candidate as Member of Parliament on the basis of wrongdoing by the candidate, or the candidate's election agent or polling agent unless it has been proved by the Petitioner that the said wrongdoing prevented or may have prevented the majority of voters in the constituency from electing the candidate preferred.

Turning to the Appellant's submissions in respect of section 97(2)(b), the 1st Respondent submitted that it clearly stipulates that a parliamentary election is not nullified merely on an allegation or even proof that there has been non-compliance with

a provision of the Act. That it must be proven that such non-compliance affected the result of the election. It was argued that the petitioner must go beyond demonstrating his suspicion or belief that the result was or may have been affected, and show that the results were actually affected.

Citing the case of **Mazoka and Others v Mwanawasa and Others**[9], the 1st Respondent added that it is trite law that non-compliance with any provisions of the law that does not operate in favour of one candidate, but affects all candidates equally cannot form the basis for the avoidance of an election. It was submitted that the court below was on firm ground when it held that there existed a duty on the Appellant to prove not only that the 2nd Respondent failed to provide Form GEN 12, but that such non-compliance actually affected the result of the election particularly in relation to the Appellant, and did not affect the 1st Respondent, or indeed any other candidate, equally.

The 1st Respondent proceeded to submit that the Appellant's argument in respect of section 97(3) and 97(2)(b) of the Electoral Process Act that the election of the 1st Respondent ought to have been nullified on account of the wrongdoing of a person other

than the 1st Respondent personally, or the 2nd Respondent, was misconceived. And referring to the Petition in the court below, the 1st Respondent contended that the Appellant made allegations of wrongdoing only against the 1st Respondent and the 2nd Respondent and no one else. The 1st Respondent argued that it has long been a feature of Zambian jurisprudence that matters stand or fall on their pleadings, citing the cases of **Mabenga v. Wina and Others**[1] and **Mazoka and Others v. Mwanawasa and Others**[9] for support. It was the 1st Respondent's position that the Appellant cannot say that the election of the 1st Respondent ought to have been nullified on the basis of the alleged wrongdoing of anyone besides the 1st Respondent personally or the 2nd Respondent. It was the 1st Respondent's prayer that grounds one, two, three and five, having been argued on a misapprehension of the law and without regard to the parameters set by the pleadings be dismissed with costs to the Respondents.

In response to grounds four, six and seven, and particularly in reaction to the Appellant's taking issue with the finding by the lower court that the incidents complained about by the Appellant

were isolated and not widespread enough to affect the outcome of the election; and that the trial Judge failed to consider the full import of Section 97 of the Electoral Process Act in arriving at her decision, the 1st Respondent chose to rely on his submissions in the court below.

It was submitted that there was no evidence on record to show that the wrongdoing alleged against the 1st Respondent was so widespread as to have prevented the majority of voters in Senga Hill Constituency from voting for the candidate whom they preferred. It was argued that it was a misdirection on the part of the Appellant to argue that the trial Judge should have accepted the "cogent" and "uncontroverted" evidence of the Appellant's witnesses.

Further, the 1st Respondent submitted that there is no requirement under the law for the respondent to disprove the allegations of the petitioner, citing the affirmation of the Supreme Court in the cases of **Mazoka and Others v Mwanawasa and Others**[9] and **Lewanika and Others v Chiluba**[6] as to where the burden of proof lies. It was the 1st Respondent's view that the Appellant seemed to suggest that the standard of proof in election

petitions is on a balance of probabilities which, it was submitted, is a misdirection. The 1st Respondent went on to submit that in the instant case, the Appellant had alleged that the 1st Respondent violated section 81 of the Electoral Process Act which deals only with the offence of bribery. That it followed that the allegations against the 1st Respondent were essentially criminal in nature and the standard of proof ought to be higher than a mere balance of probability, citing **Sablehand Zambia Limited v Zambia Revenue Authority**[10] for authority.

It was submitted that the Appellant's arguments were misplaced and that the learned trial Judge correctly directed herself on the law, including on the burden and standard of proof in election petitions. It was the 1st Respondent's position that no basis exists for overturning of the Judgment.

On ground eight, the 1st Respondent relied on his arguments in regard to the implication of section 97(2)(b) and contended that the learned trial Judge was on firm ground when she dismissed the Appellant's allegation.

The 1st Respondent asserted that Form GEN 12 is merely an announcement form and there was no evidence of any alleged

irregularities in the counting of the votes or handling of the ballot boxes or paper, so as to lead to a conclusion that the alleged failure of the 2nd Respondent to provide copies of the form affected the result of the election. Further, that no evidence was adduced to show that the alleged failure affected the Appellant, to the exclusion of the 1st Respondent or any other candidate.

The 1st Respondent's approach in regard to grounds nine and ten was to rely on submissions in relation to grounds one, two, three and five above and submissions in the court below at pages 283 and 284 of the Record of the Record of Appeal which were to the effect that the Petitioner, now the Appellant, admitted that he had not witnessed the 1st Respondent making use of Government vehicles or Government facilities and that he had not been present at any meeting at which the 1st Respondent claimed to be a better candidate than the Appellant. Further, that the Appellant had not provided an iota of evidence that the 1st Respondent used his Government salary and allowances on the campaign. It was submitted that it is common knowledge for political candidates to mobilize campaign funding from well-wishers as well as personal savings and other streams of income

and that there was no basis for a presumption that the 1st Respondent had used remuneration received by him between the end of May 2016 and 11th August, 2016.

Further submissions on these grounds were to the effect that though PW2 claimed to have seen the 1st Respondent attending a funeral in a white GRZ Toyota Hilux, he did not take note of the registration number. And that not only was the allegation refuted by the 1st Respondent but, it was submitted, it cannot be reasonably said that attending the funeral of a party official constitutes campaigning. That as the 1st Respondent and RW5's evidence showed, none of the vehicles allocated to the 1st Respondent as Minister of Transport and Communications was a Toyota Hilux and that he did not use his two allocated vehicles in the campaign.

And in regard to grounds eleven to fourteen, the 1st Respondent relied on his submissions outlined above on the burden and standard of proof.

State Counsel Mutale, on behalf of the 1st Respondent, also entirely relied on the heads of argument filed into Court on 9th June, 2017, which he augmented. He argued that the appeal

was devoid of merit and should be dismissed. By way of amplification, Mr. Mutale, SC, submitted that the learned trial Judge was on firm ground in regard to grounds one, two, three and five which mainly focused on the interpretation of section 97 of the Electoral Process Act. State Counsel submitted that the learned trial Judge had correctly interpreted the three instances on which an election can be avoided. It was his further submission that the court below was on firm ground not to refer to the old regime relating to electoral laws as they were not helpful in interpreting section 97. Also, that the learned trial Judge's findings of fact were not perverse and the Appellant had not advanced any arguments to that effect. Mr. Mutale, SC, maintained that the court below was on firm ground to dismiss all the 12 grounds on the basis that they were unsubstantiated. Referring to various portions of the Record of Appeal, learned State Counsel argued that the Appellant, as petitioner in the court below, failed to call witnesses on allegations pleaded, leading the trial Judge to hold that the allegations had not been substantiated.

The 2nd Respondent filed its submissions in response to ground eight only. Essentially, it disagreed with the Appellant's assertion that the court below glossed over the issues relating to the issue of GEN 12 forms, thus committing a miscarriage of justice. It was submitted that the court below found that the evidence of the Appellant on the allegation that the 2nd Respondent failed, refused or neglected to provide the GEN 12 Form was weak and that in cross-examination, the Appellant had conceded that he was not present to see what was happening in all the 56 polling streams. It was submitted that the 2nd Respondent's witnesses testified that it did provide sufficient copies of the GEN 12 Form. RW7, Returning Officer for Senga Hill Constituency, testified that he was given in excess of 20 copies to provide to each of the presiding officers and they were sufficient to distribute to all polling agents, monitors and party representatives present.

It was the 2nd Respondent's further contention that PW10, who had testified to visiting some named polling stations and allegedly not finding any GEN 12 forms, conceded in cross-examination that he had visited only five out of 56 polling

stations. Thus, the lower court found his evidence as weak as he could not have known what was going on at the other polling stations he did not visit.

It was the 2nd Respondent's position that ground eight challenges findings of fact which can only be reversed by an appellate court in very limited circumstances and cited **Attorney General v Achiume**[11] for authority. That the court below found as a fact that the 2nd Respondent in its defence categorically stated through its witness that where Form GEN 12 was missing, the "Zero Form" was used to display results at the polling stations in the Constituency.

It was contended that the learned trial Judge clearly stated that the Appellant failed to prove the allegations against the 2nd Respondent to the required standard of proof in an election petition and it could not be said that the findings of the lower court were perverse or made in the absence of any relevant evidence. Citing the case of **Saul Zulu v Victoria Kalima**[12], the 2nd Respondent submitted that the Appellant failed to meet the requirement of convincingly establishing and substantiating allegations in election petitions.

[illegible] proceeded to argue that if there was non-

compliance with the provisions of the law, the Appellant ought to have shown that the alleged non-compliance affected the results of the election, citing the case of **Mazoka v Mwanawasa[9].**

Rounding off its submission, the 2nd Respondent contended that the Appellant did not adduce any evidence whatsoever to show how the alleged non-compliance with the provisions of the Electoral Process Act affected the election results. It was submitted that the alleged non-compliance with the law affected both the Appellant and the 1st Respondent and, it was contended, the Court cannot nullify an election on that basis. The 2nd Respondent argued that it is trite law that where non-compliance with any provisions of the law does not operate in favour of one candidate but affects all candidates equally, an election petition cannot be nullified. That the allegation of the GEN 12 Form not being distributed to all parties not only affected the Appellant but the 1st Respondent as well and, as such, cannot be the basis for the avoidance of the election.

It was the 2nd Respondent's prayer that the appeal be dismissed as the Appellant had failed to prove the allegation

against it and that there was no proof of non-compliance with the provisions of the law.

On behalf of the 2nd Respondent, learned Counsel Mr. Mwala entirely relied on the heads of argument filed in response to ground eight of the appeal.

No submissions were filed on behalf of the 3rd Respondent.

In reply, Mr. Sianondo stated that there was nothing in section 97(2)(a) to show that it should be proved that the electorate were actually prevented from electing a preferred candidate but that they may have been prevented from voting. He argued that there was plenty of evidence on record that materials were distributed capable of making people refrain from choosing a candidate of their choice. It was Counsel's further submission that the intention of an election should always be achieved and that people should be free from any motivation of material assets to choose their own person.

We have carefully considered the Judgment of the court below, the grounds of appeal, the evidence on record and the oral and written submissions of the parties to this appeal. From our

perspective, the appeal questions the lower court's findings on aspects of both law and fact. In particular, the Appellant's main contention is that the court below failed to give due consideration to the evidence of malpractice before it and fell into grave error in its interpretation and application of the relevant provisions of the Electoral Process Act.

As noted, the Appellant argued his 14 grounds of appeal in clusters and the 1st and 2nd Respondents followed the same arrangement in their responses. We find it convenient to take the same approach in addressing the grounds of appeal.

Grounds one, two, three and five were argued together. It is clear to us that the key issue that falls for our consideration under these grounds of appeal relates to the interpretation and application of section 97(2)(b) and (3) of the Electoral Process Act. The thrust of the Appellant's argument is that the trial court's approach in narrowing down the issues for consideration in the petition, resulted in the lower court employing a cursory approach to the evidence before it and misdirecting itself on the full import of section 97 of the Electoral Process Act. In particular, the Appellant contended that the lower court

misdirected itself in not finding that the results of the election could have been affected even by a single act of malpractice in a manner contemplated by section 97(3). The Appellant also argued that section 97(2)(a) and (b) must not be linked; that an election can be annulled sorely on section 97(2)(b) as long as the malpractice in question affects the result of the election and that the malpractice in issue can be attributed to "any person".

In response, the 1st Respondent disagreed, contending that the court below was on firm ground when it narrowed down the issues for consideration in the manner it did. It was the 1st Respondent's view that the Appellant's arguments with respect to sections 97(2)(b) and 97(3) of the Electoral Process Act were misconceived.

We begin, as argued by the Appellant, with section 97(3). We note that there are two aspects to the Appellant's arguments on section 97(3). Firstly, the Appellant argued to the effect that subsections (2) and (3) of section 97 are separate and not linked. Secondly, it was the Appellant's contention that the learned trial Judge failed to consider that even a single incident of malpractice is sufficient to cause the avoidance of an election. In regard to

the first aspect, a key point in the Appellant's argument is that the use of the word "despite" at the commencement of subsection (3) of section 97 entails that subsection (2) was intended to be excluded when applying subsection (3). The Appellant advanced the view that in a case where the candidate has committed electoral malpractice and cannot avail himself of the defences in paragraphs (a) to (c) in subsection (3) aforesaid, the court is left with no discretion but to nullify the election "despite" what subsection (2) requires in terms of the majority being prevented from electing a preferred candidate.

Section 97(3) reads:

> **"97. (3) Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court or a tribunal further finds that such candidate has proved that-**
>
> **(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;**
>
> **(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and**
>
> **(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;**

> **the High Court or tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void."**

We have perused the relevant portion of judgment of the court below. From the record, we note that in regard to section 97(3), the learned trial Judge's views on pages J43 to J44 were as follows:

> **"In terms of section 97(3), despite finding that a corrupt practice or illegal practice has been committed by a candidate directly or indirectly, the High Court is precluded from declaring an election of a candidate void by reason only of such corrupt practice or illegal practice if the affected candidate has proved that a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent or with the knowledge and consent or approval of such candidate or that candidate's election agent; such candidate and that candidate's election agent took all reasonable steps to prevent the commission of a corrupt practice or illegal practice at the election; and in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent."**

We are of the considered view that the learned trial Judge correctly stated the import of section 97(3) of the Electoral Process Act, contrary to the assertions of the Appellant. Further, the provisions of section 97(3) are not strange to Zambia's electoral legal regime. Section 93(3) of the Electoral Act No. 12 of 2006, the precursor to the Electoral Process Act, was couched in exactly the same language, save for the word "notwithstanding" which was changed to "despite". In **Brelsford James Gondwe v**

Catherine Namugala[13], the Supreme Court provided the following interpretation to section 93(3) aforesaid:

> **"It is our understanding that subsection 3 will only come into question after any one of the grounds set out in subsection 2 has been established. It is not mandatory that in every election petition the High Court must call upon the person whose election is being challenged to establish that no corrupt practice or illegal practice was committed by him or her personally or by that person's election agent, or with the knowledge and consent or approval of such person or that person's election agent; or that such person and that person's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election. It is our considered view that the High Court will only be duty bound to do so in the event that the Petitioner establishes any one of the grounds aforementioned to the requisite standard in election petitions."**

We are persuaded. There is a clear nexus between subsection (2)(a) and subsection (3). For subsection (3) to be triggered, the requirements of subsection (2)(a) must be fulfilled. The commencement of subsection (3) itself is helpful. It opens with the phrase "despite the provisions of subsection (2)". The key word in that phrase is "despite". According to the **Concise Oxford English Dictionary**[1] "despite" means "without being affected by". In our understanding, if a candidate's election falls afoul of subsection 2(a) of section 97 of the Electoral Process Act following a trial in the High Court or tribunal but the candidate successfully invokes the defences available in subsection (3), then his election will not be nullified. Thus, the operation of

subsection (3) is contingent upon the petitioner meeting the threshold in subsection (2)(a). It does not create a stand-alone ground upon which an election can be annulled. If it were so, the legislators of the law would have made it expressly clear.

The Appellant also argued that the learned trial Judge misdirected herself by not finding that even one incident of malpractice could render the election a nullity under section 97(3). It was submitted that the use of the singular "a corrupt practice or illegal practice" recognizes the possibility of the court finding that a singular such act had been committed by the Respondent. It was further contended that she failed to take into account authorities that remained good law.

The record shows that the learned trial Judge, at page J50 of the judgment, opined as follows:

> **"With regard to the old electoral law, the position was that satisfactory proof of any one corrupt or illegal practice or misconduct in an election petition was sufficient to nullify any election. This was the principle enunciated in the celebrated case of *Mlewa v Wightman* and religiously followed in later cases such as the cases of *Mabenga, Mubanga* and *Phiri*. In my view the Electoral Process Act is a complete departure from the aforesaid position. The new legislation has tilted towards strict construction of petitions. This is clear from the tenor of section 97 of the Electoral Process Act."**

It is clear from the above excerpt that the learned trial Judge was simply restating the position of the old law, how it was

interpreted and applied by the courts and the shift brought about by the Electoral Process Act. In our view there is nothing on the record that confirms the Appellant's assertion that the learned trial Judge held that one incident of electoral malpractice cannot cause an election to be declared a nullity. More so because earlier in her decision, the record shows that the learned trial Judge had clarified the new legal requirements for the nullification of an election according to section 97(2) of the Electoral Process Act. From our perspective, we find no ground upon which to fault the Judge. Therefore, based on the foregoing, we do not agree with the Appellant that the learned trial Judge misdirected herself in the interpretation of section 97(3) of the Electoral Process Act.

We now turn to section 97(2)(b) of the Electoral Process Act. The Appellant contends that the learned trial Judge closed her mind to the fact that section 97(2)(b) is open-ended and does not specify that the non-compliance in issue should be attributed to the parties. The Appellant took issue with the following portion of the judgment of the court below at pages J50 to J51:

> **"My construction of section 97 already highlighted in this judgment, is that mere satisfactory proof of any one corrupt or illegal practice or**

misconduct and or non-compliance with the Electoral law in an election petition is no longer sufficient to nullify any election. The petitioner is now required in addition to satisfactory proof of any one corrupt or illegal [sic] or misconduct to prove that such corrupt practice or illegal practice or misconduct prevented or may have prevented the majority of the voters from voting for their preferred candidate. In the case of non-compliance with the law, the Petitioner is required in addition to prove such non-compliance, and that the non-compliance with the law affected the election result."

From the above excerpt, the Appellant put emphasis on the words **"is that mere satisfactory proof of any one corrupt or illegal practice or misconduct and or non-compliance"**, **"is no longer sufficient to nullify any election"**, **"in addition to satisfactory proof"** and **"in addition"**. That by the repeated use of "in addition", the learned trial Judge misdirected herself by seeking to link section 97(2)(b) to 97(2)(a), thus placing a heavy burden on the Appellant of proving that the non-compliance in issue prevented the majority voters from electing their preferred candidate and that it affected the election result.

We find the Appellant's assertion rather curious. We say so because at page J43 of the Judgment, in her elucidation of the new electoral regime for the avoidance of an election as stipulated in section 97(2) of the Electoral Process Act, the learned trial Judge identified circumstances in which the court can nullify an election. It is very clear in that portion that she identified subsections 2(a) and (b) of section 97 as separate instances.

Further, we see no hint in the above excerpt that shows a shift in the learned Judge's position.

Section 97(2)(b) reads:

> **"97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that- ....;**
>
> **(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or (emphasis added)**

The question is, what are the key elements of the above provision? In our view, the key ingredients are as follows:

(i) there must be non-compliance with the provisions of the Act relating to the conduct of an election and it must appear to the court or tribunal that the electoral principles as laid down by the law have not been adhered to; and,

(ii) the non-compliance must affect the result of the election.

It is unequivocal that section 97(2)(b) relates to non-compliance with the provisions of the law in the "conduct of

elections". It calls for the annulment of elections in the event that there has been non-compliance with the principles laid down in the Electoral Process Act in as far as the conduct of elections is concerned. The question then arises, who has conduct of elections? The answer, in our view, lies in Article 229(2)(b) of the **Constitution of Zambia**[2]. It reads:

> **"(2) The Electoral Commission shall -....(b) conduct elections and referenda;"**

Thus, the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia (ECZ). According to its preamble, the Electoral Process Act was enacted to, *inter alia*, **"provide for the conduct of elections by the Electoral Commission of Zambia".** The ECZ must fulfil this function by ensuring that the requirements of the Electoral Process Act are respected and observed in the electoral process. Section 97(2)(b), therefore, concerns non-compliance to the provisions of the Act by the ECZ, the body charged with the conduct of elections under Article 229(2)(b) of the Constitution, and not the candidates to an election or their agents. Our view is confirmed by section 97(2)(b) itself, which is made **"subject to the provisions of subsection (4)".** Subsection (4) is in these terms:

(4) An election shall not be declared void by reason of <u>any act or omission by an election officer in breach of that officer's official duty in connection with an election</u> if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such an act or omission did not affect the result of that election. (emphasis added)

The words **"any act or omission by an election officer in breach of that officer's official duty in connection with an election"** confirm that the nexus between subsection 2(b) and (4) of section 97 relates to performance of the statutory and constitutional functions of the ECZ relating to the conduct of elections through its officers. In terms of section 2 of the Electoral Process Act, an election officer is a person appointed by the ECZ to assist in the carrying out of its functions under the law. Therefore, where there is a breach of this statutory duty and such breach substantially affects the results of an election, the election can be declared a nullity pursuant to section 97(2)(b). This is one of the instances the learned trial Judge identified in section 97(2) of the Electoral Process Act.

In regard to the Appellant's claim that the learned trial Judge ignored the old authorities which confirmed that an election can be avoided upon proof of one act of malpractice, our view is that those cases set out important principles that shaped

the adjudication of electoral disputes in Zambia. While this Court will not underplay the guidance that past jurisprudence provides on the handling of electoral disputes, the old case authorities must now be looked at in the context of the new electoral regime as far as the annulment of election results is concerned. We have already stated above that an election can be annulled on the strength of one incident of corrupt or illegal practice or misconduct provided that, under section 97(2)(a), such is attributable to the candidate or his duly appointed agent or with their knowledge and consent or approval and the majority of the electorate were or may have been prevented from electing a candidate they preferred; or if it is an allegation pursuant to section 97(2)(b) on non-compliance, cogent evidence must be proffered to show that the results were affected. That is the new threshold.

On the whole, we do not agree that section 97(2)(b) is open-ended as asserted by the Appellant and find this claim misconceived. We find grounds one, two, three and five of the appeal unmeritorious and dismiss them accordingly.

In regard to grounds four, six and seven, the Appellant invites this Court to find that the learned trial Judge approached the evidence on alleged electoral malpractices attributed to the 1st Respondent in a casual manner and, thus, misdirected herself in her conclusions and application of the law. As noted earlier, the allegations against the 1st Respondent involved bribery and vote buying, inducement and abuse of ministerial position and Government resources.

The Appellant's evidence was that the 1st Respondent engaged in corrupt acts through donation of various items to the electorate such as cement and roofing material, bicycles, footballs and football jerseys. The Appellant also testified that unprecedented developmental activities, such as the grading of feeder roads in the vicinity of five key polling stations and putting up of ZESCO electricity poles took centre-stage in the constituency during the campaign period. It was the Appellant's further testimony that the 1st Respondent abused his ministerial position through use of Government vehicles and promises based on his position as Minister of Transport and Communications. The Appellant conceded that he did not personally witness the

donations of items or the use of Government vehicles by the 1st Respondent. He also conceded that he did not attend any meeting where the 1st Respondent made promises in his capacity as Minister. PW2, PW3, PW4, PW6 and PW7 also testified variously to the alleged electoral malpractices attributable to the 1st Respondent. In his submissions, the Appellant argued that the malpractices need not be attributable to the 1st Respondent.

The 1st Respondent, who testified as RW2, denied making any donations of the alleged items either personally or through other persons. He also denied holding any meetings at which he boasted about being a Minister or using government vehicles and resources. The 1st Respondent also denied being involved in the road and electricity projects that were undertaken in parts of the Constituency. In his submissions, the 1st Respondent maintained that the court below was on firm ground and correctly interpreted the law on the standard of proof required in election petitions. RW1, David Silavwe, expressed ignorance about the donation of bicycles to headmen in his testimony. The record shows that his testimony on this aspect was never seriously tested in cross-examination. RW3, Alfred Munyimba,

Senior Engineer with the Road Development Agency (RDA), confirmed that the Kamuzwazi-Kavumbo road rehabilitation project was an initiative of the Road Development Agency (RDA); RW5, Muntungwa Mugala, Director of Distribution and Customer Service at ZESCO, testified that the Lapisha electricity project for the electrification of Chiefs Nsokolo and Mpande areas was conceived in 2014 though implementation was effected in June 2016. Both RW3 and RW5 stated that the 1st Respondent had no role in the projects in issue.

The learned trial Judge considered the evidence and reached the following conclusion at page J57 of the judgment:

> **"Coming to the case at hand, the issues to be resolved are whether the events where it is alleged the 1st Respondent donated cement, roofing sheets, football jerseys/balls, bicycles and door frames to the electorate in some wards or villages within the constituency or where it is alleged that he transported voters to polling stations, amounted to illegal and corrupt practices as provided for under section 97(1) and (2) of the Act, thereby rendering the whole election void. I find that these events were isolated and not widespread so as to affect the outcome of the elections or to prevent the electorate from choosing a candidate that they preferred. I am also of the considered view that the ZESCO and Road construction projects cannot be considered to be corrupt or illegal practices as these were developmental programmes undertaken by the government of the day and as held in the case of Matildah Macarius Mutale v Serbio Mukuka and Electoral Commission of Zambia, the 1st Respondent could not stop the government or indeed ZESCO or RDA from implementing their developmental programmes which did not require the 1st Respondent's consent or approval. In any case I find that these donations, if any, were not widespread or adverse as to affect the outcome of the result in the whole election in the Constituency."**

The record shows that before arriving at the above conclusion, the learned trial Judge considered the implications of the new electoral legal regime in light of the evidence before the trial court. She restated the standard of proof required in election petitions and found that there was insufficient evidence that the alleged corrupt or illegal acts took place and that the road and electrification projects were government projects which did not require the approval of the 1st Respondent.

We have reviewed the evidence on record and the judgment of the court below. The two issues that fall for our consideration are, firstly, whether the learned trial judge did misdirect herself in the manner she treated the petitioner's evidence leading to a miscarriage of justice as claimed by the Appellant. Secondly, whether the learned trial Judge correctly applied the standard of proof in light of the evidence before her.

To begin with, we agree with the learned trial Judge that section 81(1) of the Electoral Process Act is relevant to the alleged wrongdoing on the part of the 1st Respondent. Section 81 creates the offence of bribery and subsection (1) paragraph (c) in particular provides:

"(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly –

...

(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;"

Thus, the law is clear.

The Appellant's testimony was to the effect that the alleged corrupt or illegal acts on the part of the 1st Respondent had a big impact on the voters in Senga Hill. The court below found that the activities were isolated and not widespread or adverse as to affect the outcome of the result in the whole election in Senga Hill Constituency.

As the learned trial Judge rightly observed, the Electoral Process Act has brought about a major shift in the law in as far as the annulment of elections is concerned. As we pointed out above, according to section 97(2)(a) of the Electoral Process Act, in order for an election to be declared a nullity, it must be shown to the satisfaction of the court that a corrupt or illegal practice or other misconduct had been committed and that such malpractice is attributable to, or committed with the knowledge and consent or approval of a candidate or that of his election or polling agent.

Additionally, it must be established through evidence that the majority of voters in a constituency were or may have been prevented from electing the candidate whom they preferred.

In regard to the alleged corrupt or illegal practices, that is, the donation of building materials, footballs and football jerseys and bicycles, the trial court found that the incidents were isolated and not widespread so as to affect the outcome of the elections. She further found as a fact that there was insufficient evidence to back the allegations. In regard to the allegation of corrupt or illegal acts in the form of donations of various items, we note from the record that the 1st Respondent denied all the allegations. His evidence to the effect that he knew nothing about the donations was never seriously tested in cross-examination.

We note that the trial court did not make a specific finding as to whether the "isolated incidences" were linked to the 1st Respondent or his duly appointed agents. The learned trial judge was not categorical on whether the illegal or corrupt practices of donating cement, roofing sheets, door frames, football jerseys and footballs and the transporting of voters were actually shown to

have been done by the 1st Respondent or his agents but merely stated that the incidents were not widespread and did not affect the outcome or prevent the electorate from electing a candidate of their preference. It is our view that the court after trial of election petitions must be categorical on the finding on allegations; whether or not they have been proved in respect of both limbs as regards the candidate or agent or were done with their knowledge and consent or approval and on the majority of the electorate being affected.

That notwithstanding, there is no definitive indication on record that the 1st Respondent was at the locations where the donations were made or that his election or polling agents committed the said acts. The onus on the Appellant, as petitioner in the court below, was to establish with convincing clarity that the 1st Respondent was responsible, directly or indirectly, for the corrupt or illegal acts, and that as a result, the majority of the electorate were or may have been prevented from voting for a candidate they preferred. The court below found that this standard of proof was not satisfied. We find no basis upon which to fault the learned trial Judge. The Appellant has not

shown either on the evidence on record or in his submissions that the alleged corrupt or illegal acts were proved as against the 1st Respondent or that the majority of the electorate were influenced. And though decided on the repealed Electoral Act of 2006, we are persuaded by the Supreme Court in **Mubita Mwangala v Inonge Mutukwa Wina**[14] when it stated:

> **"In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct it must be shown that a majority of the voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred...It is clear to us that the corrupt practice or illegal practice or indeed any misconduct must affect the majority of the voters in a constituency. In other words, the corrupt practice or illegal practice must be widespread in the constituency so as to affect the majority voters..."**

Also, the claim by the Appellant that the malpractice can be by "any person" is simply not tenable. The law in section 97(2)(a) of the Electoral Process Act is very clear. The malpractice in issue must be directly or indirectly connected to the candidate or his duly appointed agents by way of cogent evidence.

In regard to the road and electricity projects, the trial Judge found as a fact that the projects were government undertakings when she said the following at page J57:

> **"I am also of the considered view that the ZESCO and Road construction projects cannot be considered to be corrupt or illegal**

practices as these were developmental programmes undertaken by the government of the day...."

We note from the record that, though the 1st Respondent was aware about the developmental activities, both RW3 and RW5 confirmed that the 1st Respondent was not involved with the said projects. The learned trial Judge, who had the benefit of listening to and observing the witnesses, found their testimonies credible and exonerated the 1st Respondent by finding that the projects were in fact the initiative of the RDA and ZESCO, respectively. There is no evidence on record that the 1st Respondent was directly or indirectly privy to the conception, planning and execution of the RDA and ZESCO projects. In that regard, we must affirm the finding that the road rehabilitation and the electrification projects were Government developmental projects. We find no basis upon which to overturn the lower court's findings. We further find that the court below properly applied the standard of proof required by the law.

On the whole, in regard to grounds four, six and seven, we find that the court below considered the evidence before it and we cannot fault its conclusions that there was no sufficient evidence to satisfy all the elements in section 97(2)(a) of the Electoral

Process Act. We find no merit in grounds four, six and seven and dismiss them accordingly.

In regard to ground eight, the Appellant alleges that the trial court committed a miscarriage of justice when it found that the non-signing of Form GEN12 was "neither here nor there". That the learned trial Judge did not recognise the importance of Form GEN12.

PW10, Jonas Mazimba, the UPND Senga Hill Constituency Chairperson, testified that he was engaged as a monitor for the UPND and that when polling closed on Election Day, he embarked on visitations to polling stations in the Constituency. According to his testimony, he visited Chomba, Nondo, Mwiluzi and Mwenje polling stations and discovered that his agents did not have copies of Form GEN12. That upon inquiry, the Presiding Officer at Chomba polling station informed him that he only had one copy. PW10 conceded that he visited only five out of 56 polling stations and that he did not know what was prevailing at the rest of the polling stations. The 2nd Respondent's witnesses testified that the ECZ had provided sufficient GEN12 forms; that the form is used to announce election results and is supposed to

be signed by representatives and agents of candidates and political parties. RW6, Wina Mwanamonga, Manager-Elections at ECZ testified that he did not receive any complaints in regard to the conduct of elections.

The court below reached the following conclusion in its judgment at page J58:

> **"...the allegations against the 2nd Respondent have not been proved to the required standard which is higher than that of a balance of probabilities....The allegation that the Form G12 was not signed by the presiding officers or polling agents or was not even given to them, is neither here nor there as the 2nd Respondent in its defence categorically stated through its witnesses that where the G12 form was missing, the zero form was used to display the results at polling stations in the Constituency. In any event the evidence of PW10 was weak as he conceded that he only visited 5 polling stations out of 56 and may therefore not have known what was going on at the other polling stations that he did not visit. PW1 and PW10 further conceded the fact that even though they were aware of the complaints procedure, they did not file a complaint to that effect."**

It is the above opinion of the court below that aggrieved the Appellant and formed the basis of ground eight of this appeal.

On the basis of the Appellant's submissions, there are two limbs to this ground. Firstly, there is the allegation that Form GEN12 was not availed; that the 2nd Respondent had failed or neglected to provide the same. Secondly, that the presiding officers had not signed the form following the declaration of results.

In regard to the first limb, earlier in this judgment we observed that the function of conducting elections is assigned to the Electoral Commission of Zambia (ECZ), the 2nd Respondent in the instant case, pursuant to Article 229(2)(b) of the Constitution of Zambia. In addition, the Electoral Process Act, in its various provisions, outlines principles guiding how elections in this country are to be conducted and managed. We note that section 58 of the Electoral Process Act requires the ECZ to supply voting materials necessary for the election at a polling station. PW10's evidence was that he did not find any Form GEN12 at the polling stations he visited and that his agents did not have any. This was countered by the 2nd Respondent's witnesses who testified that the ECZ had provided sufficient copies of Form GEN12. As indicated above in the excerpt of the judgment of the court below, the learned trial Judge found PW10's testimony as weak. By his own admission, he had visited only five of the 56 polling stations in the Constituency and conceded that he did not know what the situation was like in the rest of the polling stations.

We have reviewed the evidence on record and considered the parties submissions on this aspect. We hold that the learned

trial Judge was on firm ground when she found that the allegation in regard to the non-supply of the GEN12 form had not been proved to the required standard. As we have already stated above, section 97(2)(b) of the Electoral Process Act requires that non-compliance with the provisions of the Act which, in our view, according to section 58 referred to above includes the duty to supply election materials, should affect the result in order to warrant nullification of the election by the court. Other than the allegations against the 2nd Respondent in relation to the five named polling stations PW10 visited, there was no evidence advanced in that regard for the rest of the constituency. Therefore, it cannot be definitively ascertained that the problem of the GEN12 form identified by PW10 was so widespread as to impute a dereliction of duty on the part of the 2nd Respondent in connection with the election in Senga Hill or that the results were affected as contemplated in section 97(2)(b). In its submissions, the 2nd Respondent had referred us to the case of **Mazoka and Others v Mwanawasa and Others**[9], where the Supreme Court said:

"We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st Respondent."

We endorse that view. In the circumstances of the instant case, the allegation was that the 2nd Respondent failed or neglected to provide the GEN12 form. The only problem is that PW10, the Appellant's key witness on this aspect of the appeal testified only in regard to a few polling stations, five out of 56 in Senga Hill Constituency. That dereliction of duty on the part of the 2nd Respondent, if any, with regard to a few polling stations based on the evidence proffered, cannot be relied upon as an indicator of the situation in the rest of the constituency. The Appellant should have advanced cogent evidence to that effect. Also, borrowing from the opinion of the Supreme Court in **Mazoka and Others v Mwanawasa and Others**[9], there is no evidence on record to show that the lack of GEN12 form affected the result. In the premises, we have no basis upon which to disagree with the findings of the learned trial Judge that the evidence of PW10 was insufficient to prove this allegation.

In regard to the second limb, the Appellant's complaint is that the learned trial Judge misdirected herself when she held that the non-signing of the GEN 12 form by election or polling agents was "neither here nor there". In his submissions, the Appellant referred this Court to his submissions in the court below, stating that the same were relied on for purposes of this appeal. We have taken the liberty to review the record on this point. We note that it was argued that it should not be accepted that the 2nd Respondent should not secure the names and signatures of the polling agents, monitors and observers under the guise or claim that the agents, monitors and observers were not available due to frustration or excitement. That the 2nd Respondent should account for non-authentification of the GEN 12 forms.

We find it prudent to refer to the relevant provisions of the law. Regulation 5(2) of the Code of Conduct reads:

> **"An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid." (emphasis added)**

The record shows that the learned trial Judge offered her opinion on Regulation 5(2) at pages J44 to J45 saying:

"In one breath the section makes it mandatory for election agents or polling agents to countersign the election results duly announced or declared by a presiding officer or returning officer as the case may be. In another breath it provides in mandatory terms also that the failure to countersign the Gen 12 form by agents or polling agents cannot render the results invalid."

Whether or not Regulation 5(2) contradicts itself is not the real issue in the instant case. What is before us is the consequence of election and polling agents not signing the GEN12 form and the effect of that on the election results. RW7, Returning Officer for Senga Hill, testified to the effect that failure to countersign the GEN12 form by election or polling agents does not render the results of an election invalid. In reference to the words we have put emphasis on in Regulation 5(2) above, it is clear that if, for some reason, an election or polling agent does not append their signature to the GEN12 form, the provision states that there will be no effect on the results. We venture to say the ideal situation of course is that all the people required to sign for the election results should sign to enhance transparency in the electoral process.

In the circumstances of this case, the Appellant, through PW10, offered evidence in respect to only five polling stations.

The learned authors of **Halsbury's Laws of England**[2], 5th Edition, Volume 38A, state at paragraph 667 as follows:

> **"No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected."**

In the instance case, no cogent evidence is available on record to the effect that the lapse affected the result of the election. The court below also found as fact that neither the Appellant nor PW10 filed a complaint on the lack of election materials, despite being aware of the complaints mechanisms available.

This ground of appeal is unmeritorious, fails and is accordingly dismissed.

In regard to grounds nine and ten, which were also argued together, the gist of the Appellant's submission was that the 1st Respondent held himself out as a Minister throughout the campaign period and that government projects were linked to

him (the 1st Respondent) to the disadvantage of the Appellant who was not as privileged. That the 1st Respondent's conduct in that regard fell afoul of section 97(2)(a) of the Electoral Process Act and Regulation 15(1)(i) of the Code of Conduct. Further, that the 1st Respondent was seen driving a Government vehicle, a white Toyota Hilux, to a funeral, contrary to Regulation 15(1)(k) of the Code, as testified by PW2, evidence which the learned trial Judge discarded. We were referred to our decision in **Katuka and Another v The Attorney General and Others**[7] to support the argument that the 1st Respondent occupied office as Cabinet Minister illegally during the campaign period.

The 1st Respondent denied abuse of his position of Minister or use of a government vehicle and resources. RW6, Isaac Mucheleng'anga, who served as the 1st Respondent's official driver, testified that he knew nothing about a Government owned white Toyota Hilux allegedly driven by the 1st Respondent, contrary to the testimony of PW2. RW6 said the utility vehicle allocated to the 1st Respondent, a Mitsubishi Pajero, was left parked at the Ministry of Transport and Communications and was never used by the 1st Respondent in the campaigns.

The learned trial Judge held that the 1st Respondent had defended himself against the allegations. She further held that the issue of the illegal stay in office was for the determination of the Constitutional Court. This prompted the Appellant to contend that the learned trial Judge had washed her hands off determining the issue.

Regulation 15(1)(i) and (k) of the Code of Conduct provide that a person shall not:

> **"(i) abuse or attempt to abuse a position of power, privilege or influence, including parental, patriarchal or traditional authority for political purposes including any offer of a reward or for the issuance of a threat;**
>
> ...
>
> **(k) use Government or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice President in connection with their respective offices;"**

The above regulations are unequivocal. Taking advantage of a position of influence or power or use of Government transportation or facilities for political or campaign purposes are illegal acts in the electoral process. The Appellant's contention is that the 1st Respondent violated the said regulations in his campaign, which the 1st Respondent denied.

As the judgment in the court below shows, the learned trial Judge found that there was insufficient evidence that the 1st Respondent had abused his ministerial position or government transport to facilitate his campaign.

We have reviewed the evidence on record. We find nothing that would compel us to disagree with the learned trial Judge's findings. The Appellant himself testified that he did not personally see the 1st Respondent driving a Government vehicle. PW2 mentioned the type of vehicle he allegedly saw the 1st Respondent in, which type was discounted by the evidence of RW6, the 1st Respondent's driver, who testified that he knew nothing about a white Toyota Hilux. Further, the alleged sighting by PW2 of the 1st Respondent using a Government vehicle to a funeral is the only incident on the record. In other words, our considered opinion is that there is nothing in the Appellant's submissions or in evidence proffered in his favour that demonstrates that there was conduct on the part of the 1st Respondent consistent with the prohibitions in Regulations 15(1)(i) and (k) of the Code of Conduct and, as a consequence, that such conduct fell within the ambit of section 97(2)(a) of the

Electoral Process Act. We affirm the lower Court's findings that this aspect was not proved to the required standard of proof.

Turning to the Appellant's reliance on our decision in **Katuka and Another v The Attorney General and Others**[7], that the 1st Respondent was in office as Cabinet Minister illegally, our views are brief. It should be borne in mind that that decision came two days before the elections of 11th August, 2016. Its effect, therefore, is post 9th August, 2016, and not before. We note that the Appellant argued further that the 1st Respondent had a duty, under Article 2 of the Constitution, to resist, *inter alia*, the illegal abrogation of the Constitution. A perusal of the Petition before the lower Court shows that this aspect was not pleaded. We see no basis upon which we should address it.

Grounds nine and ten fail for lack of merit and are dismissed.

We now turn to grounds eleven to fourteen. According to the Appellant, the grounds comprise a summary based on the ultimate decision of the court below. Essentially, the Appellant claims the learned trial Judge ignored the evidence before her without saying why, rendering her judgment a nullity.

We find these grounds of the appeal curious especially that they were not supported by any substantive arguments. They amount to an unnecessary repetition of what is in the previous grounds. Considering we have already indicated during our consideration of grounds one to ten of this appeal that the learned trial judge was on firm ground in her findings on both law and fact and that she did not misdirect herself, these grounds are dismissed for being devoid of merit.

All the grounds of this appeal have failed. We find no merit in this appeal and accordingly dismiss it.

Each party shall bear their own costs.

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A. M. Sitali
Constitutional Court Judge

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M. S. Mulenga
Constitutional Court Judge

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E. Mulembe
Constitutional Court Judge

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P. Mulonda
Constitutional Court Judge

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M. M. Munalula
Constitutional Court Judge