IN THE CONSTITUTIONAL COURT OF ZAMBIA **APPEAL NO. 12 OF 2017**
AT THE CONSTITUTIONAL REGISTRY **2016/CC/A038**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF:	**A PARLIAMENTARY ELECTION PETITION RELATING TO THE PARLIAMENTARY ELECTIONS HELD THE 11th AUGUST, 2016**
AND	
***IN THE* MATTER OF:**	**THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**ARTICLE 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50, 54, 70, 71, 72 AND 73 OF THE CONSTITUTION OF ZAMBIA ACT CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60, 66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87, AND 89 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**
AND	
IN THE MATTER OF:	**SECTION 96, 97, 98, 99, 100, 106, 107 AND 108 OF THE ELECTORAL PROCESS [ELECTORAL CODE OF CONDUCT] ACT NO. 35 OF 2016**
IN THE MATTER OF:	**THE ELECTORAL CODE OF CONDUCT 2016**

BETWEEN:

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
24 SEP 2018
REGISTRY 2
P O BOX 50067, LUSAKA

ROBERT CHISEKE TAUNDI **APPELLANT**

AND

MWENE NALUWA **RESPONDENT**

For the Appellant: Messrs Makebi Zulu & Advocates, No Appearance

For the Respondent: Ms. F. M. Zaloumis of Mesdames Dove Chambers and Ms. L. Mushota of Mesdames Mushota & Associates

Coram: **Mulenga, Mulembe, Mulonda, Munalula and Musaluke JJC.**

On 16th January, 2018 and 24th September, 2018

JUDGMENT

Mulonda, JC, *delivered the Judgment of the Court*

Cases referred to:

1. **Subramaniam v Public Prosecutor [1956] 1 W.L.R 965**
2. **Mutambo and Five Others v The People (1965) Z.R. 15**
3. **Mbinga Nyambe v The People SCZ No. 5 of 2011**
4. **Simasiku Kalumina v Lungwangwa Geoffrey Lungwangwa and the Electoral Commission of Zambia 2006/HP/EP/007**
5. **Simasiku Namakando v Eileen Imbwae 2006/HP/EP/002**
6. **Shamwana and 7 others v The People (1985) Z.R. 41**
7. **Mubika Mubika v Poniso Njeulu SCZ No. 114 of 2007**
8. **Davey v Garret (1877) D 167**
9. **Abdul Ebrahim Dudhia and others (trading as Musa Dudhia & Co., a law firm) v Sanmukh Ramnla Patel and First Alliance Bank (Z) Limited SJ No. 12 of 2016**
10. **Christopher Kalenga v Annie Mushya and 2 others 2011/HK/EP/03**
11. **Mulombwe Muzungu v Elliot Kamando 2010/EP/001**
12. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172**
13. **Times Newspaper Zambia Limited v Kapwepwe (1973) Z.R. 292**
14. **Raila Amolo Odinga, Stephen Kalonzo Musyoka and Independent Electoral v Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission and H.E. Uhuru Muigai Kenyatta, Election Petition No. 1 of 2017**
15. **Steven Masumba v Elliot Kamondo, Selected Judgment No. 53 of 2017**

16. **Mubita Mwangala v Inonge Mutukwa Wina, Appeal No. 80 of 2007**
17. **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79**
18. **Mbololwa Subulwa v Kaliye Mandandi, Selected Judgment No. 25 of 2018**
19. **Austin Liato v Sitwala Sitwala, CCZ Selected Judgment No. 23 of 2018**

Legislation referred to:

1. **Electoral Process Act No. 35 of 2016**
2. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
3. **The Constitutional Court Rules S.I. No. 37 of 2016**

Other Works referred to:

1. **Phipson on Evidence, 17th Edition Sweet and Maxwell, 2010**
2. **Halsbury's Laws of England 4th Edition, Volume 15**
3. **Bryan A. Garner, Black's Law Dictionary 4th Edition Minnesota: West Publishing Co. 1968**
4. **Sidney Lovell Phipson, Phipson on Evidence 17th Edition London: Sweet and Maxwell, 2010**
5. **Snell's Principles of Equity 28th Edition**
6. **Supreme Court Rules of England 1999 Edition (White Book)**

The appellant, Robert Chiseke Taundi, who was the petitioner in the court below, appeals against the High Court Judgment delivered on 24th November, 2016 which dismissed his petition and declined to nullify the election of the respondent, Mwene Naluwa, as Member of Parliament for Mangango Constituency in Kaoma District of the Western Province of the Republic of Zambia.

The background of this matter is that both the appellant and the respondent were Parliamentary candidates during the 11th August, 2016 elections for Mangango Constituency together with two other candidates. The respondent was declared as the duly elected Member of Parliament for Mangango Constituency after polling a total of 7, 922 votes on the United Party for National Development (UPND) ticket. The appellant on the other hand, stood on the Patriotic Front (PF) ticket and polled a total of 3, 522 votes. The rest of the votes went to the Forum for Democracy and Development (FDD) candidate who polled 700 votes and the Rainbow Party candidate who polled 359 votes.

Dissatisfied with the result of the election, the appellant filed a petition in the High Court in which he sought the nullification of the election of the respondent on grounds of alleged corrupt and illegal practices contrary to the Electoral Process Act No. 35 of 2016 (hereinafter called the 'Act'), and more particularly, that the respondent was involved in acts of bribery, undue influence, violence, intimidation and publishing of false statements against the appellant. It was alleged in the Petition that the majority of voters

were prevented from electing their preferred candidate as a result of the respondent's malpractices.

In opposing the allegations in the Petition, the respondent disputed all the allegations made against him and stated that he never engaged in any of the alleged illegal practices. The respondent prayed that the Petition be dismissed as it lacked merit.

At trial, the learned trial judge heard evidence from both parties. In support of the petition, the appellant testified as PW1 and called nine (9) other witnesses while the respondent testified as RW1 and called ten (10) other witnesses. Detailed submissions were also filed by both parties. The learned trial judge concluded that the allegations in the Petition could be summarized into three categories, namely;

1. **Corruption and bribery;**
2. **Violence and intimidation, and;**
3. **Defamatory remarks and character assassination.**

According to the learned trial judge, the evidence of the appellant was hearsay and inadmissible as he merely testified to what he had been told by witnesses after the election. The learned trial judge went on to dismiss the allegations of bribery on the basis that the

appellant's witnesses lacked credibility and gave uncorroborated evidence. The allegations of corruption, defamation, violence and intimidation were also dismissed on the basis that they had not been proved to the required standard.

The learned trial judge found that all the allegations against the respondent had not been proved and that the appellant failed to show that the voters were prevented from voting for their preferred candidate. She went on to declare the respondent as the duly elected Member of Parliament for Mangango Constituency.

The appellant being dissatisfied with the Judgment, appealed to this Court advancing five grounds of appeal. They read as follows:

> **Ground One**
>
> **The learned Judge erred in law and fact when she held that the petitioner's testimony was hearsay.**
>
> **Ground Two**
>
> **The learned Judge erred in law and in fact when she held that the authenticity of the purported program in the respondent's bundle of documents was not questioned as the record will show.**
>
> **Ground Three**
>
> **The learned Judge erred in law and fact when she held that the violence perpetrated against the petitioner's witnesses particularly PW7 did not affect the outcome of the elections in the absence of evidence linking the respondent and or his agents to the alleged acts of violence or if at all the violence was politically motivated.**

Ground Four

The learned Judge erred in law and fact when she held that there was no evidence adduced to show that the voting pattern had changed in that area even though witnesses testified that they did vote for the respondent after the bribe.

Ground Five

The learned Judge erred in law and fact when she gave credence to RW1 and RW5's testimony when their testimony was contradictory and inconsistent in material particulars as to the campaign materials they had.

Under ground five, we note that the appellant included a further ground whose inclusion was objected to by counsel for the respondent. It read as follows:

> **"Further in relation to this ground the trial Judge erred in law and in fact when she gave credence to most of the respondent's witnesses even though they were all members of the same party."**

Counsel for the respondent objected to the inclusion of the additional ground of appeal and argued that the same was contrary to the provisions of Order 11 Rule 9 (3) of the Constitutional Court Rules which proscribe the inclusion of grounds other than those set out in the memorandum of appeal without leave of court. It was submitted that the addition was made without leave of court and therefore ought to be expunged from the record.

Order 11 Rule 9 (3) of the Constitutional Court Rules was cited which provides that:

> **"The appellant shall not thereafter without the leave of court, put forward any grounds of objection other than those set out in the memorandum of appeal, but the court in deciding the appeal shall not be confined to the grounds put forward by the appellant." (Emphasis ours)**

We fully agree with the respondent's objection and we therefore expunge it from the record together with its attendant arguments in support on that particular aspect. We will proceed to consider the arguments relating only to ground five as shown in the memorandum of appeal.

When this appeal was called for hearing, the learned counsel, Mrs Lilian Mushota informed the Court that she had been approached by the appellant to say that his counsel, Mr. Jonas Zimba was indisposed and that it was agreed by the parties that both parties would rely on their heads of argument. It was on that basis that the Court went on to reserve the matter for judgment.

In arguing ground one of this appeal, counsel referred to the law relating to hearsay evidence as elaborated in the case of **Subramaniam v Public Prosecutor**[1] cited in the case of **Mutambo v**

The People[2], wherein it was held that evidence is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement, but is not hearsay and is admissible when it is given to prove the fact that it was made.

We were then referred to the learned authors of **Phipson on Evidence, 17th Edition** at paragraph 28-02 on page 856 where it states that:

> **"The word (hearsay) implies that a witness is prevented from reporting a communication heard outside the courtroom but this is not the case. Hearsay is not defined by the nature of the evidence (an out of court statement) but by the use to which it is put. To be excluded as hearsay the out of court statement, must be relied upon to prove the matter stated."**

Counsel submitted that the appellant's evidence ceased to be hearsay when the witnesses who themselves witnessed the particular malpractices gave testimony of the events before the lower court.

Counsel proceeded to argue ground two of the appeal where it was submitted that the learned trial judge erred when she held that the authenticity of the purported programme in the respondent's bundle of documents was not questioned as shown by the record. The

thrust of the submission was that the respondent admitted during cross examination, to not having strictly followed his campaign schedule due to certain events. It was submitted that the authentication referred to was in relation to the correctness and genuineness of the schedules as they appeared on the respondent's campaign schedule.

In arguing ground three, it was submitted that the violence attributed to this matter could be equated to a form of duress which could affect the result of an election. Counsel submitted that according to the **Black's Law Dictionary**, **4th Edition**, duress is defined as the unlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done and is contrary to his will.

It was further submitted that the net effect of such violence was the contravention of section 83 of the Act which prohibits the use of threats, force or violence. To this end, the case of **Mbinga Nyambe v The People**[3] was cited in which it was held that where a conclusion is based purely on inference, that inference may be drawn if it is the only reasonable inference on the evidence. It was therefore argued

that an inference could be drawn that the violence did affect the outcome of the election.

Counsel proceeded to argue ground four by reproducing the provisions of section 81 (1) and (2) of the Act which prohibit any acts of bribery or corruption before, during or after an election. It was contended that the voting pattern did actually change as evidenced by the respondent's own admission that he only won the election after contesting on the UPND ticket as compared to the previous election when he contested on a different political party ticket. Further, it was submitted that the appellant led evidence of the alleged bribery together with other witnesses in the court below. In concluding this submission, we were referred to **Halsbury's Laws of England 4th Edition** at page 534 which states that due proof of a single act of bribery by or with knowledge and consent or approval of the candidate or by the candidate's agents, was sufficient to invalidate an election.

In arguing ground five, it was submitted that the learned trial Judge erred in law and fact when she gave credence to RW1 and RW5's testimony when their testimony was contradictory and inconsistent

in material particulars as to the campaign materials they had. It was argued that the trial judge further erred in law and fact when she gave credence to the evidence of most of the respondent's witnesses even though they were all members of the same party. It was submitted that the evidence of the respondent and the majority of his witnesses, who were all members of the UPND, should have been treated with caution as they all had a motive to secure victory against the appellant. In support of this submission, the case of **Simasiku Kalumina v Geoffrey Lungwangwa and the Electoral Commission of Zambia**[4] was cited in which it was held at page J19 as follows:

> **"At the end of the petitioner and respondent's cases, it became apparent that it is a question of credibility. There is need to put the credibility of witnesses in three categories.**
>
> **(i) Witnesses who are party members of the petitioners' and respondents' parties.**
>
> **(ii) Witnesses engaged by the Electoral Commission of Zambia which is supposed to be neutral as a conductor of the electoral process.**
>
> **(iii) Monitors and police officers who unlike the Electoral Commission of Zambia are not party to these proceedings.**
>
> **The whole petition turns out of the credibility of witnesses as you have most petitioners' witnesses giving evidence to support allegations contained in the petition, while witnesses for the respondent dispute those allegations. As I said on the petition of Simasiku Namakando and Ireen Imbwae, the witnesses have to be subjected to strict scrutiny of their integrities."**

Further, the case of **Simasiku Namakando v Eileen Imbwae**[5] was cited where the court addressed the need to be cautious in the treatment of evidence of witnesses who might harbour an interest. Counsel prayed that this appeal succeeds.

In opposing this Appeal, the learned counsel for the respondent, Mrs. Zaloumis and Mrs. Mushota relied on the respondent's heads of argument and additional heads of argument filed.

In responding to ground one of the appeal, Ms. Zaloumis submitted that the learned trial judge was on firm ground when she held that the testimony of the appellant was hearsay. It was contended that hearsay was not determined by the nature of the evidence but by the purpose for which the evidence was tendered. It was submitted that evidence of an out of court statement was hearsay and inadmissible when the object of the evidence was to establish the truth contained in the statement.

Further, that the same evidence was not hearsay and admissible if it was proposed to establish the fact that the statement was made as aptly elucidated in the cases of **Mutambo and 5 Others v The People**[2] and **Shamwana and 7 others v The People**[6]**.**

From the above authorities, it was pointed out that the appellant testified in the court below about the respondent sponsoring a football tournament in Samukenya area, giving money in the sum of K300.00 in exchange for votes and that one Bertha, an agent of the respondent, gave money and bought alcohol at a UPND gathering and yet the appellant was not present at those events. As a result, it was submitted, the said evidence tendered by the appellant was hearsay as it was given based on the truth of the allegations contained in the statement and not that the statement was made and that therefore, the trial judge was on firm ground in her holding.

In the additional heads of argument, counsel referred us to various portions of the record of appeal which contained the said testimony. The gist of counsel's submission was that the testimony was given to show that the statements the appellant heard were the truth, and not merely to show that the statements were made, therefore it was hearsay and inadmissible. It was prayed that this Court should uphold the lower court's decision as it could not be faulted based on the assumption that the majority of voters were prevented from electing a candidate of their choice resulting from hearsay evidence.

In advancing arguments in opposition to ground two, Ms. Zaloumis contended that the learned trial judge was on firm ground when she held that the authenticity of the campaign program in the respondent's bundle of documents was not questioned. It was submitted that according to the record, counsel for the appellant did not question the authenticity of the campaign program that was produced in evidence by the respondent during cross examination.

It was contended that the allegation by the appellant that the respondent admitted to not following his campaign schedule during cross examination was not true. It was argued that in fact, the respondent stood his ground and insisted that he followed his campaign schedule in conducting his campaigns; therefore, the trial judge was on firm ground in her holding on this point.

Ms. Mushota concurred with the above submission and reiterated that there was nowhere in the record that showed that the respondent during cross examination stated that certain events prohibited him from strictly following his campaign schedule. It was argued that the appellant never doubted the authenticity of the program and therefore there was no substance in this ground as it

did not offend the Constitution of Zambia or the Act and the Rules. It was prayed that this ground be dismissed.

In responding to ground three of this appeal, Ms. Zaloumis submitted that this ground was couched in a very misleading manner as it suggested that there was some violence perpetrated against PW7. It was argued that the contrary was held by the learned trial judge in her judgment where she stated that:

> **"In the absence of any supporting evidence, of assault, I am not particularly satisfied that the witness was assaulted during politically motivated violence."**

It was submitted that based on the above holding, the trial judge went further to state that even assuming that there was violence perpetrated against PW7, it could not affect the outcome of the election in the absence of evidence linking the respondent and or his agents to the alleged acts of violence. Counsel quoted the provisions of section 83 (1) (a) of the Act which addresses electoral violence together with section 97 (2) (a) (i) and (ii) of the Act which provides for instances when an election of a Member of Parliament would be void.

It was submitted that the acts of violence against the appellant's witness, PW7, could only stand if the respondent was linked to the violence directly or indirectly, evidence for which there was none. It was argued that the appellant failed to prove that the misconduct complained of prevented the majority of voters from electing a candidate of their choice as even PW7 confirmed that he voted for the candidate of his choice.

In response to the argument by the appellant that violence could be equated to a form of duress, it was submitted that the argument lacked merit and was not supported by any authority or evidence adduced during trial. It was therefore submitted that the learned trial judge was on firm ground in her holding.

Ms. Mushota adopted the above submissions and added that the appellant missed the point completely. It was submitted that the evidence on record revealed that the person who allegedly beat PW7 was never found. It was added that the trial judge was on firm ground to doubt that there was any politically motivated violence as PW7's testimony lacked credence and was not corroborated or supported by any medical report.

It was argued that a perusal of the record of appeal showed that PW7 was aware that his vote was secret and that there would be no way that his perceived assailants would have known whom he voted for. Further, that PW7 conceded that the respondent was more popular and better known than the PF candidate. It was submitted that this ground was unproven and should fail as there was no evidence of violence by the respondent or his agents that affected the outcome of the election.

In response to ground four, Ms. Zaloumis contended that indeed there was no evidence adduced to show that the voting pattern changed in the area even though PW5 and PW6 testified that they were influenced to vote in the manner they did because of the alleged money they received. It was submitted that the trial judge rejected the evidence of the said witnesses as it was marred by contradictions and made a finding that there was no bribe given by the respondent to the said witnesses. It was argued that even if evidence did exist to show that PW5 and PW6 were influenced to vote as they did due to a bribe, the appellant could not succeed in his argument because according to section 97 (2) (a) (i) (ii) of the Act,

to nullify an election, the majority of voters ought to have been prevented from electing a candidate whom they preferred. It was submitted that the evidence of two witnesses PW5 and PW6 who claimed they were influenced by a bribe did not prove that the voting patterns in the Constituency had changed. To support this position, counsel cited the case of **Mubika Mubika v Poniso Njeulu**[7] where the Supreme Court held that statistics of registered voters who attended rallies should have been given to assist the trial court on the extent of influence in the constituency when considering widespread vilification of a candidate in an election.

In response to the allegation that the respondent had previously stood on other political party tickets and lost, showing that the voting pattern had changed in the area, counsel argued that the claim lacked merit because those other political parties were not strong in the area as compared to the UPND whose candidates dominated the 2011 elections in Western Province.

It was further submitted that the passage cited by the appellant from **Halsbury's Laws of England 4th Edition** on proof of a single act of bribery being sufficient to nullify an election, could not apply

in this matter as we have the Electoral Process Act which regulates the matter in question. It was pointed out that the Electoral Process Act was enacted to iron out the creases in the electoral process and prevent unreasonable allegations from rendering an election void. It was therefore submitted that the Court below was on firm ground in its holding in ground four.

In addition to the above submissions, Ms. Mushota contended that the ground was cast in general terms and referred to change of voting patterns without clarity as to the issues contained in the Petition. Further, that the evidence of the witnesses fell within the purview of hearsay assertions. With regard to the issue of generality, counsel cited the cases of **Davey v Garret**[8] and **Abdul Ebrahim Dudhia and others (trading as Musa Dudhia & Co., a law firm) v Sanmukh Ramnla Patel and First Alliance Bank (Z) Limited**[9] and submitted that it was common knowledge that people voted for a candidate based either on political affiliation or on leadership qualities, or both.

We were referred to various testimonies in the record of appeal as counsel argued that PW3 had probably voted for the UPND because

he was a member of the party and not because he was given the sum of K20.00. It was contended that PW3 and PW4 gave contradictory evidence in the court below. It was therefore submitted that because of the generality of this ground on the voting pattern and the fact that the anomaly was not specified, this ground ought to be dismissed as the Court below was on firm ground.

In response to ground five, Ms. Zaloumis submitted that there was no contradiction whatsoever in the testimonies of RW1 and RW5 with regard to the campaign materials they possessed. It was pointed out that RW1 testified as to the campaign materials that he possessed as a parliamentary candidate for Mangango Constituency and not as someone contesting at local government level while RW5 testified as to campaign materials that she possessed as a person who stood as a councilor in Mushwala Ward and not as a Parliamentary candidate.

It was argued that it was absurd for the appellant to expect a person contesting at parliamentary level to have the same campaign material as someone contesting at local government level. That RW5 testified that if RW1 had chitenge materials, then perhaps he gave it

to other wards and not the ward where she contested. It was submitted that the trial judge saw it fit to consider the credibility of the witnesses in order to assess the weight to attach to their testimony. The trial judge based her decision on the case of **Christopher Kalenga v Annie Mushya and 2 others**[10] where the Court stated as follows:-

> **"In an election petition, just like in an election itself each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection...it would be difficult indeed for a court to believe that supporters of one candidate behaved in a saintly manner, while those of other candidates were all servants of the devil.....in an election contest of this nature, witnesses most of them motivated by their desire to score victory against their opponents will deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain."**

That the Court below further relied on and adopted the sequence followed by Musonda J. in the case of **Mulombwe Muzungu v Elliot Kamando**[11] in which witnesses were categorized in an election petition as they could be partisan with an interest to serve. Counsel submitted that the trial judge properly directed herself in dealing with the testimonies of witnesses in this matter as she attached more weight to the testimony of independent witnesses as opposed to partisan witnesses in line with the above cited authorities. It was

lastly contended that based on the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[12], the finding of the trial Judge was neither perverse nor made in the absence of any relevant evidence or misapprehension of facts to warrant a reversal by the appellate court. Further, that the appellant did not give details of the conflict in RW1 and RW5's testimony or that of most of the respondent's witnesses. It was therefore prayed that this Court uphold the Judgment of the court below and dismiss the appeal for lack of merit with costs.

In reply, counsel for the appellant submitted that the appellant's evidence was not hearsay. To support this position, he restated the holding in the case of **Subramaniam v Public Prosecutor**[1] and further cited the case of **Times Newspaper Zambia Ltd v. Kapwepwe**[13] where it was stated *obiter dicta* that:

> **"Words spoken by third parties may well be hearsay in so far as it is sought to use them to establish the truth of what was said, but they can hardly be excluded as hearsay when it is sought only to show that they were spoken..."**

It was therefore submitted that the essence of hearsay evidence was that the statement complained of was made in the absence of the accused person. It was counsel's view that what one witness said to

another, in the absence of the accused, was equally hearsay evidence if it was given in court to prove not the fact that the statement was made, but the truth of what the witness said.

With regard to ground two of the appeal which related to the authenticity of the respondent's campaign schedules, it was submitted that a perusal of the record of appeal would reveal that the correctness and genuineness of the schedules was questioned. Counsel quoted from **Black's Law Dictionary, 8th Edition** at page 142 which defines authentication as follows:

> **"Broadly, the act of proving that something (as a document) is true or genuine, especially so that it may be admitted as evidence."**

In relation to ground three, it was contended that the elections were not free and fair as they were characterized by violence contrary to the provisions of section 83 of the Act. To support this submission, reliance was placed on the Kenyan case of **Raila Amolo Odinga, Stephen Kalonzo Musyoka and Independent Electoral v Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission and H.E. Uhuru Muigai Kenyatta**[14] where it was held as follows:

"As to whether the irregularities and illegalities affected the integrity of the election, the court was satisfied that they did and thereby impugning the integrity of the entire presidential election."

In reply to ground four, it was contended that the elections were not free and fair due to the acts of bribery which were contrary to the provisions of section 81 of the Act. Reliance was also made on the **Raila Odinga**[14] case. In emphasizing the point on bribery, counsel relied on his earlier quotation from **Halsbury's Laws of England, 4th Edition** at page 534 which states that proof of a single act of bribery by a candidate or his agent with his knowledge was sufficient to invalidate an election.

As regards ground five of the appeal, counsel proceeded to argue that the respondent's witnesses, RW1 and RW5, should not have been given any credibility as their fabricated stories revealed discrepancies. Further, it was reiterated that the learned trial judge erred in law and fact when she gave credence to most of the respondent's witnesses who were purely motivated by the desire to secure victory against their opponents. Counsel restated the holdings in the cases of **Simasiku Kalumiana v Geoffery Lungwangwa and The Electoral Commission of Zambia**[4] and

Simasiku Namakando v Ireen Imbwae[5] which addressed the issues of credibility of witnesses and the treatment of evidence in election petitions.

In conclusion, it was submitted that the respondent's witnesses ought not to have been given any credibility. It was prayed that the appeal succeeds.

We have considered the Judgment of the lower court, the heads of argument from both parties and the evidence on record. It is our considered view that the main issue in this appeal is whether the trial judge was on firm ground when she upheld the election of the respondent as Member of Parliament for Mangango Constituency in the face of allegations of corrupt and illegal practices.

It is imperative to reiterate our position as stated in numerous cases regarding the threshold for nullifying an election of a Member of Parliament where a corrupt practice, illegal practice or other misconduct has been alleged in an election petition.

Section 97 (2) (a) of the Act provides as follows:

> **"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-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in the constituency, district or ward whom they preferred;"

The above provision requires a petitioner to prove to the satisfaction of the court that the corrupt practice, illegal practice or other misconduct was committed by a candidate personally or with his knowledge and consent or approval or that of his election or polling agent in order to nullify the election. It further requires that where the impugned act is proved, the petitioner must further prove that as a result of the electoral malpractice or misconduct, the majority of voters in the constituency, district or ward were or may have been prevented from voting for their preferred candidate.

In interpreting the provisions of section 97 (2)(a) of the Act, we stated in the case of **Steven Masumba v Elliot Kamondo**[15] that:

"The requirement in the current law for nullifying an election of a member of parliament is that a petitioner must not only prove that the respondent has committed a corrupt or illegal act or other

misconduct or that the illegal act or misconduct complained of was committed by the respondent's election agent or polling agent or with the respondent's knowledge, consent or approval but that he/she must also prove that as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred."

Section 97 (2) requires that where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of his election agent or polling agent, the petitioner must demonstrate that as a result of the above proscribed acts, the majority of voters in that constituency, district or ward were or may have been prevented from electing their preferred candidate. This requires the proscribed act to be widespread so as to prevent or potentially prevent the majority of the voters from electing the candidate they prefer.

In this regard, the Supreme Court in the case of **Mubika Mubika v Poniso Njeulu**[7] stated as follows:

"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was

widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate."

Further, in the case of **Mubita Mwangala v Inonge Mutukwa Wina[16],** the Supreme Court held that:

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

In order to successfully challenge the election of a Member of Parliament on grounds of corrupt or illegal practice or other misconduct, a petitioner must go further to prove that the majority of voters were prevented from electing their preferred candidate as a result of the corrupt or illegal practice or other misconduct.

In addition to the above requirements under section 97 (2) (a) of the Act, a petitioner ought to prove to a fairly high degree of convincing clarity all the allegations made against the candidate or his election or polling agent. To this end, we have cited with approval in numerous cases the holding in the case of **Lewanika v Chiluba[17]** where it was stated as follows:

> **"As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that parliamentary election petitions have generally long been required to be proved to a standard higher than on a mere balance of probability. It follows therefore, that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation..., no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."**

Before proceeding to consider the appeal before us, we would like to emphasize the essence of section 97 (2) (a) that we highlighted in our recent decision in the case of **Mbololwa Subulwa v Kaliye Mandandi**[18] where we stated as follows:

> **"The spirit of section 97 (2) (a) is to ensure that elections are held in a free, fair and legal manner. This is in order to uphold as well as advance constitutional democratic tenets that provide and enable voters to elect a candidate of their own choice."**

We reiterate the above statement here and we adopt the above principles in determining this appeal.

What we consider as falling for our determination in this matter are the following issues, namely; whether or not the appellant's testimony in the court below amounted to hearsay; whether or not the authenticity of the respondent's campaign schedule was questioned; whether or not the alleged acts of bribery and violence were sufficient to affect the outcome of the election or to change the

voting pattern in the constituency; and whether or not the testimonies of RW1 and RW5 were contradictory and inconsistent.

Grounds one, two and five challenge the findings of the trial Judge on issues relating to the evidence tendered before her at trial in the court below. Thus, for clarity's sake we shall first consider these grounds of appeal individually before we proceed to consider grounds three and four.

In ground one, the appellant challenges the trial Judge's finding that his testimony was hearsay evidence and therefore inadmissible. In this regard, the appellant referred us to the opinion of the Privy Council in the case of **Subramaniam v Public Prosecutor**[1] where it was stated as follow:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay, it is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made." (Emphasis ours)**

He argued that similarly, in the matter at hand, the appellant tendered evidence that he was told of the malpractices by witnesses who then came and testified to these events before the court below.

It was therefore the appellant's argument that the evidence tendered was not hearsay as the testimony moved from being hearsay to admissible evidence at the time the witnesses who themselves witnessed what the appellant said were called to testify and did so.

In response to ground one, counsel for the respondent supported the finding of the trial Judge and submitted that the evidence tendered by the appellant in the court below did amount to hearsay as it was given based on the truth of the allegations contained in the statement relating to events that transpired in the absence of the appellant. That the said evidence was not given to establish the fact that the statement had been made, therefore, the trial Judge was on firm ground in holding that it amounted to hearsay and was therefore inadmissible. The record shows that the learned trial Judge found that the appellant did not witness any of the alleged electoral malpractices but merely testified to what he had been told by other witnesses after the elections.

It is our considered view, having reviewed the evidence of PW1 on record, that the same does not fall within the meaning of the exception as enunciated in the **Subramaniam**[1] case cited above. It is

clear from the record that the testimony given by the appellant in the court below was tendered for its content value and not for purposes of establishing that the witness testimony were made. We therefore see no reason for faulting the trial Judge's finding and accordingly dismiss the ground for lack of merit.

In ground two, it was submitted that the respondent admitted during cross examination, to not having strictly followed his campaign schedule due to certain events, therefore, the trial Judge erred when she held that the correctness and genuineness of the said schedule was not questioned during trial.

In response, counsel for the respondent submitted that a perusal of the record would show that the appellant did not question the respondent about the authenticity of his campaign schedule and that the respondent did not state that certain events prohibited him from strictly following his campaign schedule. It was further argued that in fact, the respondent stood his ground and insisted that he followed his campaign schedule in conducting his campaigns, therefore, the trial Judge was on firm ground in her holding on this point.

We have reviewed the record and the relevant evidence on the authenticity, correctness and genuineness of the respondent's campaign schedule. Our view is that the appellant brought out three issues to question the authenticity of the schedule, that is, the two visits to Chibweka village and the aborted attendance at the Kalumeyoyo meeting on 24th July, 2016. The record reveals that the two instances are well explained in that the respondent testified that his second visit to Chibweka was not for purposes of campaigning but that he went back to Chibweka to visit the sick village Headman Chibweka who had a swollen body. This evidence was corroborated by RW8 who testified that the respondent visited the sick village Headman Chibweka on that particular date and whose testimony went uncontroverted.

On the issue of the respondent's non-attendance at the meeting in Kalumeyoyo on 24th July, 2016 the record shows that this was due to the fact that the respondent had to rush one of his officials whom he was moving with by the name of Shipununa to the hospital as he fell ill. The trial judge noted that this evidence went uncontroverted when the respondent produced documentary proof of the campaign

program and the authenticity of the document was not questioned in any way during cross examination. The record further shows, as argued by counsel for the respondent, that the respondent denied ever going against his campaign schedule. We are, therefore, of the considered view that the trial judge cannot be faulted for finding that the correctness and genuineness of the schedule was not brought into question. The second ground is dismissed for lack of merit.

In arguing ground five, counsel for the appellant contended that the learned trial judge erred in law and fact when she gave credence to the testimony of RW1 and RW5 which was contradictory and inconsistent in material particulars as to the campaign materials that they had. It was argued that the two witnesses should have been treated with caution as they had a motive to secure victory against the appellant.

It was submitted in opposition that there was no contradiction in the testimony of RW1 and RW5 with regard to the campaign materials that they possessed. It was pointed out that RW1 testified as to the campaign materials that he possessed as a parliamentary candidate

for Mangango Constituency and not as someone contesting at local government level while RW5 testified as to campaign materials that she possessed as a person who stood as a councilor in Mushwala Ward and not as a Parliamentary candidate. It was argued that the trial judge rightly considered the credibility of the two witnesses in assessing the weight to attach to their evidence and she therefore properly directed herself when she attached more weight to the testimonies of independent witnesses as opposed to partisan ones.

We have perused the record to establish whether the trial judge was on firm ground in her finding. She listened to the witnesses, observed their demeanor and rendered her decision after considering their testimony. We therefore agree with the trial judge that the testimony of RW5 in so far as bribery was concerned was more credible than that of PW4 who alleged that he was bribed. Ground five is dismissed.

In arguing ground three, the gist of the appellant's argument was that the acts of violence perpetrated against PW7 were enough to affect the outcome of the election. It was submitted that violence could be equated to a form of duress and that the acts of violence

were a contravention of the provisions of section 83 (1) of the Act, which in turn resulted in an election that was not free and fair. To support their position, counsel cited the case of **Raila Odinga and 2 others v Boundaries Commission and 3 others**[14] where the Kenyan court was satisfied that irregularities and illegalities affected the integrity of the election.

In response, counsel for the respondent submitted that ground three was couched in a misleading manner as it suggested that there was some violence perpetrated against PW7 when the same was not proved in the court below. It was submitted that the record would show that PW7 was never assaulted. It was further submitted that assuming there was some violence against PW7; it could not affect the outcome of the election in the absence of evidence linking the respondent and or his agents to the alleged acts of violence. It was submitted that no evidence was led to show that the misconduct complained of prevented the majority of voters from voting for their preferred candidate, as even PW7 testified that he voted for the candidate of his choice.

In arriving at her decision, the trial judge observed that there was no evidence adduced to show that PW7 was actually assaulted by people who he alleged were UPND cadres and that there was no supporting evidence in form of a medical report and police report to aid the testimony of PW7. The trial Judge was therefore not satisfied that the said witness was assaulted during politically motivated violence.

We have considered the submissions, the finding of the trial Judge and the evidence on record. What falls for our determination is whether or not there was violence against PW7 and if the result of the election was therefore affected by the alleged act. Section 83 (1) (a) of the Act is couched in the following terms:

> **"83. (1) A person shall not directly or indirectly, by oneself or through any other person –**
>
> **(a) make use of or threaten to make use of any force, violence or restraint upon any other person."**

We earlier stated that section 97 (2) (a) of the Act requires that a petitioner ought to prove to a high degree of convincing clarity the allegations against a candidate and must show that the corrupt practice, illegal practice or other misconduct was committed by a

candidate or with his knowledge and consent or approval, or that of his election or polling agent.

The record shows that PW7 was the only eye witness who testified that on 5th August, 2016 he was assaulted by a person called Chinengu who hit him with an iron bar on top of his eye as he was passing by a group of persons who were chanting 'forward, forward'. He testified that he reported the incident to the police who issued him with a medical report which he took to a hospital in Mangango where he received treatment. The record shows that the respondent denied having any knowledge of the incident. The record also shows that PW7 did not produce any medical or police report to support his allegation.

From the record, we are satisfied that indeed, there was no evidence to show that there was any politically motivated violence against PW7. We agree with the trial judge that there is no evidence on record to show that the respondent was directly or indirectly by himself or through his agents involved in the violence as provided for under section 83 (1) (a) of the Act. Further, there is nothing on record to show that the electorate were or may have been prevented

from voting for a candidate of their choice as a result of the alleged single incident of violence which is not linked to the respondent in any way by the evidence. We therefore find no basis to fault the finding of the trial Judge that PW7 was not assaulted during politically motivated violence. We find no merit in ground three and we therefore, dismiss it.

Under ground four, it was the appellant's contention that the election was not free and fair because of the acts of bribery that characterized the polls. That the trial judge erred when she held that there was no evidence adduced to show that the voting pattern had changed in that area even though witnesses testified that they did vote for the respondent after the bribe. It was argued that the voting pattern in the area had changed as supported by the respondent's testimony that he had previously lost the election when he stood on another political party's ticket, but won this time around when he stood on the UPND ticket. It was submitted that the acts of bribery were contrary to the provisions of section 81 of the Act.

In response, the gist of the respondent's argument was that ground four was cast in general terms and referred to change in voting

patterns without specificity. On the issue of generality, counsel relied on the case of **Davey v Garret**[8]**.** It was submitted that it was common knowledge that people voted for a candidate either based on political affiliation or on leadership qualities, or both. It was further submitted that despite PW5 and PW6 testifying that they were influenced to vote in the manner they did because of the alleged money they received, the trial judge rejected their evidence as it was marred by contradictions. It was counsel's contention that the evidence of PW5 and PW6 did not prove that the voting pattern had changed in the constituency.

In relation to the allegation that the respondent had lost the election previously when he stood on another political party ticket which showed that the voting pattern had changed in that area, it was argued that the respondent lost at the time because the other political parties he had stood on were not strong in Western Province as compared to the UPND, whose candidates had won the elections since 2011.

The trial judge held that there was no evidence adduced that RW5 was acting with the knowledge and consent or approval of the

respondent when she allegedly gave out money to PW4. She further dismissed the allegation that the respondent gave out money to a group of women and men at Litolokelo, and that he gave out a K100.00 to a group of youths on the same day as the allegation had not been proved to a fairly high degree of convincing clarity. The trial judge had this to say on record:

> **"However, the testimony from PW5 and PW6 was inconsistent on a material point and therefore their evidence was discredited on who actually kept the K50 after the respondent allegedly gave it to them. PW5 told the court that he kept the K50 and gave it to someone to keep it for him when he went to drink beer. On the other hand, PW6 was categorical and stated she got the money and later gave her sister to keep it for her and that she only got the money after voting."**

The trial judge added that the inconsistency in their evidence cast a doubt in her mind as to whether the respondent actually gave them any money and she therefore found that the two witnesses were not truthful that the respondent gave them money to go and vote for him.

We have considered the arguments on this ground, the finding of the trial judge and the evidence on record. What we consider as falling for our determination is whether the alleged acts of bribery did

change the voting pattern in Mangango Constituency. Section 81 (1) (c) of the Act reads as follows:

> **"81 (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 endeavor to procure the return of any candidate at any election or the vote of any voter at any election;"**

It is clear from the above that section 81 creates the offence of bribery and it proscribes the making of a gift, loan, offer, promise, procurement or agreement for purposes of inducing a person in order to gain a benefit in the electoral process. We have perused the record and we are not satisfied that the appellant had proved to the high standard of convincing clarity that PW5 and PW6 were bribed by the respondent or his election or polling agents. This is more so in light of the trial judge's finding that the two witnesses were not truthful. In relation to the allegation that the voting pattern in the area had changed as a result of the said bribes, we restate our earlier position that section 97 (2)(a) of the Act has a majority threshold that ought to be satisfied. In our recent decision in the

case of **Austin Liato v Sitwala Sitwala**[19]**,** we affirmed the majority requirement when we stated as follows:

> **"...it is not sufficient for a petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice."**

Similarly, the Supreme Court pronounced itself on an allegation affecting the majority of voters in the **Mubika Mubika**[7] case. It was stated that:

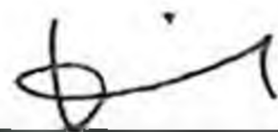
> **"The evidence, therefore does not indicate widespread vilification of the respondent, neither does it indicate that the majority of the registered voters were influenced by the respondent. In this type of allegation, statistics of registered voters who attended rallies should have been given to assist the trial court on the extent of influence in the constituency."**

We affirm the finding of the trial judge on this ground as the record reveals that no evidence was led to show that the voting pattern had changed in Mangango as a result of the alleged acts of bribery. We have already stated and reaffirm that the law on election petitions requires that where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of his

election agent or polling agent, the petitioner must demonstrate that as a result of the above proscribed acts, the majority of voters in that constituency, district or ward were or may have been prevented from electing their preferred candidate. This requires the proscribed act to be widespread so as to prevent or potentially prevent the majority of the voters from electing the candidate they prefer. In this regard, we find that ground four of the appeal fails and we therefore dismiss it.

In view of the above, we find that all the grounds of appeal lack merit and therefore fail. The appeal is dismissed in toto.

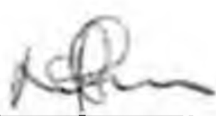
We order that each party bears their own costs.



M.S. Mulenga
Judge
Constitutional Court

E. Mulembe
Judge
Constitutional Court

P. Mulonda
Judge
Constitutional Court



M.M. Munalula
Judge
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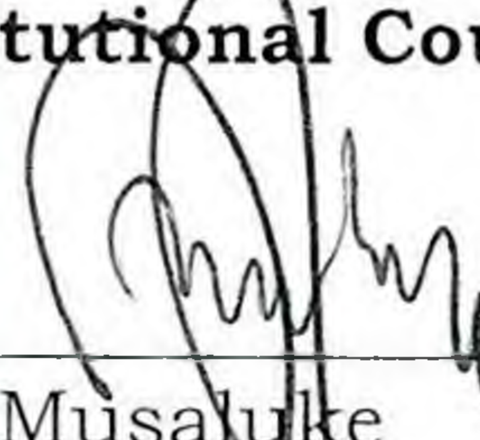

M. Musaluke
Judge
Constitutional Court