IN THE CONSTITUTIONAL COURT **APPEAL NO.5/2017**
AT THE CONSTITUTIONAL COURT REGISTRY **2016/CC/A43**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF: **ARTICLE 73(1) OF THE CONSTITUTION OF ZAMBIA, ACT NO.2 OF 2016**

IN THE MATTER OF: **SECTION 96 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

IN THE MATTER OF: **LUENA PARLIAMENTARY CONSTITUENCY ELECTION HELD IN ZAMBIA ON THE 11TH OF AUGUST, 2016**

BETWEEN:

CHANGANO KAKOMA CHARLES **APPELLANT**

AND

KUNDOTI MULONDA **RESPONDENT**

CORUM: Chibomba, PC, Mulenga, Mulembe, Mulonda, Munalula JJC on 1st August, 2017 and 22nd March, 2018

For the Appellant : Mrs D. Findlay of D. Findlay and Associates

For the Respondent : Mrs N. Mutti of Lukona Chambers

J U D G M E N T

Mulenga, JC delivered the Judgment of the court

Cases referred to:

1. **Mulondwe Muzungu v Elliot Kamondo 2010/EP/001(unreported)**

2. Kufuka Kufuka v Ndalamei Mundia SCZ Appeal No. 80/2012
3. Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114/2007
4. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.
5. Garret v Nicholson (1999) 21 WAR 226
6. Rosemary Chibwe v Austin Chibwe (2001) Z.R. 8
7. Manal Investments Limited v Lamise Investments Limited (2001) Z.R. 24
8. Hu He Rong v Charity Oparaocha SCZ Appeal Number 111 of 2000
9. Leonard Banda v Dora Siliya SCZ Appeal No. 95 of 2012
10. Attorney General and Others v Kaboivon (1995) 2 L.R.C. 757
11. Justin Chansa v Lusaka City Council (2007) Z.R. 256
12. Mushemi Mushemi v The People (1982) Z.R. 71 (SC)
13. Philip Mhango v Dorothy Ngulube and others (1983) Z.R. 61 (SC)
14. Levison Mumba v Peter William Mazyambe Daka SCZ Appeal No. 38 of 2003
15. Josephat Mlewa v Eric Wightman (1995/97) Z.R. 171
16. Mark Cletus Mushili v Mary Mildred Zambezi and Electoral Commission of Zambia SCZ Judgment No. 46 of 2008
17. Robert Chisuke v Richard Timber Simbula and Attorney General SCZ Appeal No. 223 of 2012.
18. Akashambatwa Mbikusita Lewanika and Others v Frederick Titus Jacob Chiluba (1998) Z.R. 84
19. Adeyeye v Simeon Oduoye (2010) LPELR.CA/EPT/NA/67/08
20. Zesco v Bonaventure Chikoti SCZ Appeal No. 25 of 2010
21. GDC Hauliers (Z) Limited v Trans Carriers Limited SCZ Judgment No. 7 of 2001
22. Chief Chanje v Paul Zulu SCZ Appeal No 73 of 2010

Legislation Referred to:

1. The Electoral Process Act Number 35 of 2016

Works Referred to:

1. Black's Law Dictionary, 6th edition by Bryan Garner
2. The Halsbury's Laws of England, Volume 15 (Fourth Edition Re-issue)

This is an Appeal against the decision of the High Court in an election petition brought at the instance of the Appellant following his loss in the general elections held on 11th August, 2016. The Appellant contested for the Luena Parliamentary Constituency seat under the ticket of the Patriotic Front Party (PF) against three (3) other candidates who included the Respondent from the United Party for National Development (UPND). The Respondent emerged as winner polling 7,898 votes while the Appellant polled 2,181 votes. The candidate from Alliance for Democracy and Development Party (ADD) and an independent candidate got 4,869 and 208 votes, respectively.

During the trial, the Appellant testified as PW1 and called eight (8) witnesses while the Respondent gave evidence as RW1 and also called eight (8) witnesses. After considering the evidence and the submissions made by the parties, the learned trial Judge stated that under section 97 of the **Electoral Process Act No. 35 of 2016** (to be subsequently referred to as the **Electoral Process Act)** the courts are empowered to nullify the elections where the offences set out under section 81 are proved by the petitioner to the required standard.

The trial Judge stated that the Appellant had to prove two things as regards the alleged corrupt practices; firstly, that the malpractice took place, be it in the form of giving out money, salt, soap, chitenge, clothes or mealie meal as alleged by the Appellant and his witnesses; and on the other hand, that the act was done by the Respondent either directly or with his knowledge and consent or approval or that of the Respondent's agents. Secondly, that as a result of the proved malpractice, the majority of the electorate were or might have been prevented from electing a candidate of their choice.

The learned trial Judge adopted the categorisation of witnesses enunciated in **Mulondwe Muzungu v Elliot Kamondo**[1] that:

1. **Witnesses who are supporters of the petitioner or the respondent; these may have their own interest to serve as they are partisan,**
2. **Witnesses who are independent, who are non- partisan, and**
3. **Witnesses, who are supporters of the candidate, but give evidence which is not supportive of their candidate; if they are truthful their testimony could be more cogent.**

The learned trial Judge then observed that the Appellant's evidence was mainly hearsay and the witnesses called, with the exception of PW6, were PF supporters holding high positions in the wards or were actively involved in the election. That all the

witnesses were thus partisan with their own interest to serve. The trial Court went on to find that in the absence of any other independent or supporting evidence, the Appellant had failed to discharge the burden of proof required by the law. Further, that the allegations of corrupt or illegal practices or misconduct had equally not been proved.

In respect of the allegation pertaining to the intimidation and the harassment of voters and PF members, the trial Judge stated that there was no evidence that the said issues, which should have been dealt with by the Electoral Commission of Zambia (ECZ), were reported to the Electoral Commission of Zambia. In addition that the Electoral Commission of Zambia was not party to the election petition proceedings for them to be answerable for the actions. Furthermore, that there was no evidence of undue influence exerted on any of the voters to vote or not to vote for any candidate or political party.

Relying on **Kufuka Kufuka v Ndalamei Mundia[2]** and **Mubika Mubika v Poniso Njeulu[3],** the trial Judge stated that the will of the people of Luena Constituency was expressed by the majority votes secured by the Respondent as the winning candidate. The trial Court thus declared the Respondent as duly elected Member of

Parliament for Luena Constituency and accordingly dismissed the petition.

Dissatisfied with the Judgment, the Appellant appeals on the following grounds:

1. **The Judge in the court below erred in law and in fact in failing to adjudicate on the following issues as alleged by the Appellant-**

   a. **The Appellant's allegation that the Respondent had issued false statements to the people that the Appellant had without proper reason or excuse burned his uncle's house;**

   b. **The Appellant's allegation that the Respondent's agents committed bribery and corruption, but instead the Court below only concentrated on and dealt with the issue of bribery and corruption relating to the Respondent directly;**

   c. **The Appellant's allegation that the UPND and the Respondent had gone around and distributed a letter marked as exhibit "CKC1" defaming the Litunga and the Government by accusing them of conniving to grab land from the people of Western Province and thus affecting the voters.**

2. **That the Judge in the Court below erred in law and in fact when she held that all of the Appellant's witnesses were partisan with their own interest with the exception of only PW6 when in fact it was not only PW6 but both PW5 and PW6 who were independent and non partisan, therefore that the Court below ought to have considered their evidence and attached more weight to their testimony.**

3. **That the Court below erred in law and in fact when she preferred the testimony of the Respondent's witnesses who were partisan with interest to serve in preference to the Appellant's witnesses, particularly in preferring the testimony of RW8 and RW2 over the testimony of PW4 and PW7 and therefore misdirected herself into an erroneous conclusion.**

4. **That the Court below erred in law and in fact when she concluded, with regard to the evidence of PW9, that the Appellant would have benefitted had he sued the ECZ when the Court below ought to have taken this evidence of PW9 as proof of the allegation of misconduct on the part of the Respondent by his agent.**

5. **That the Court below erred in law and in fact in holding that the Appellant had failed to discharge the evidential burden of proof in respect of the allegations of corruption when in fact the testimony of PW2, PW3, PW7 and PW8 proves the fact of direct evidence that the Respondent bribed the voters.**

6. **That the Court below erred in law and in fact in holding that there was no evidence of intimidation and that if so the evidence ought to have been linked directly to the Respondent, moreover erred in interpreting the words "foolish" uttered by the Respondent's campaign team did not constitute a threat of whatever nature to induce a person to vote or refrain from voting, without due regard to the effect of the words on the particular crowd they were uttered to.**

7. **That the Court below erred in law and in fact in holding that majority of votes secured by the winning candidate the Respondent, expressed the will of the people of the Luena Constituency, without regard to the factors that influenced the winning candidate attaining majority votes particularly with regard to the allegations as adduced by the evidence of the Appellant.**

The Appellant filed heads of argument in which it was argued with respect to ground one that the Court below failed to pronounce itself on the three (3) allegations that were set forth by the Appellant concerning the burning of his uncle's house; bribery and corruption by the Respondent's agents; and circulating a defamatory letter against the Litunga and the Government in which it was stated that they were conniving to grab land from the people of Western Province.

With respect to the first allegation, the Appellant submitted that according to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[4] the Court below had the duty to adjudicate on every issue and all matters raised before it. That it equally had the duty to adequately state the reasons for a decision and a failure to do so constitutes an error of law. Citing **Garret v Nicholson**[5], it was argued that the Court below failed to address the allegations and did not give a reason as to why they were unsuccessful.

The Appellant contended that on the authority of **Rosemary Chibwe v Austin Chibwe**[6], **Manal Investments Limited v Lamise Investments Limited**[7] and **Hu He Rong v Charity Oparaocha**[8], a court's failure to give reasons for its decisions was a valid ground of appeal which would warrant the setting aside of a decision.

It was further argued that the allegation of whether or not the Respondent made the alleged false defamatory statement against the Appellant was a crucial issue that ought to have been addressed by the Court below, more so that rule 15 (1) (c) of the **Electoral Process Code of Conduct** proscribes such acts. Regard was equally had to the Supreme Court decision in **Leonard Banda**

v Dora Siliya[9] and the Tanzanian case of the **Attorney General and Others v Kaboivon**[10] on the aspect of the negative effect of defamatory or inflammatory statements on a candidate.

As to the second allegation, it was contended that the Court below only addressed itself on the issue of whether there was direct evidence that the Respondent bribed any voters despite the provisions under section 97 (2) (a) (ii) of the **Electoral Process Act** which proscribed corrupt practices by other persons with the candidate's knowledge and consent or approval or that of his election agent or polling agent. Therefore, that the Court below failed to address itself on the issue given that there was evidence from PW4, PW5 and PW6 that the alleged act was committed by the Respondent's councillor who was distributing second hand clothes.

Pertaining to the third allegation, it was advanced that the Court below equally did not pronounce itself on this allegation. Relying on the case of **Justin Chansa v Lusaka City Council**[11], it was submitted that this Court can interfere with the trial Court's findings of fact on the basis that the Court below failed to disclose reasons for ignoring the evidence before it, coupled with and

amplified by the fact that the stated issue of distribution of the defamatory letter was also never addressed and adjudicated upon.

The Appellant then argued grounds two and three together by submitting that the Court below wrongly disregarded the evidence of PW4 and PW5 as partisan without stating the reasons why. Further, that PW5 was non-partisan as stated on page 226 of the record of appeal. It was also submitted that the Court below ought to have given more weight to the testimony of PW6 in his capacity as monitor, which confirmed the testimonies of PW4 and PW5 on the allegation of distributing second hand clothes. That PW6, as a monitor, fell within the category of witnesses to whom much weight should have been attached as stated in the case of **Mulondwe Muzungu v Elliot Kamondo**[1]. That this was more so seeing as the testimonies of PW4, PW5 and PW6 contradicted that of RW8 and hence the Court below erred in law in preferring the testimony of RW8 without stating reasons. It was added that even the testimony of RW8 that PW4 was a PF chairlady was not corroborated or supported by independent evidence and yet it was accepted by the trial Court. And that RW8 did not deny that there was a meeting between PW4, PW5 and RW7.

Reference was also made to the cases of **Mushemi Mushemi v The People**[12] and **Philip Mhango v Dorothy Ngulube and Others**[13] on the principles of credibility of witnesses. It was advanced that the error on the part of the trial Court in the manner it dealt with the evidence of the Appellant's witnesses warranted interference with its findings of fact.

Regarding ground five, the Appellant argued that the Court below determined the question of credibility merely on the basis of an interest to serve instead of other factors. And that the testimonies of PW1, PW2, PW3, PW7 and PW8 which provided direct evidence that the Respondent bribed voters, were disregarded without stating the reasons. Therefore, that based on the evidence adduced and from the unsatisfactory reasons given by the Court below for both disbelieving the Appellant's witnesses and believing the Respondent's witnesses, it could not have taken proper advantage of having seen and heard the witnesses. The instance was highlighted where the Court below preferred the testimony of RW2 over that of PW7 and that this was despite RW2 stating on pages 380, 384 and 385 of the record of appeal that he had a purpose, to lie to the Appellant.

It was submitted that the entire evidence adduced by the Appellant ought to be considered as it had established the allegations of corrupt and illegal practices to the requisite standard in election petitions and in line with the cases of **Levison Mumba v Peter William Mazyambe Daka**[14], **Josephat Mlewa v Eric Wightman**[15] and **Mark Cletus Mushili v Mary Mildred Zambezi and Electoral Commission of Zambia**[16] the only conclusion ought to be that the majority of voters in the constituency were prevented from electing the candidate whom they preferred.

Arguments on ground six related to the allegations of intimidation. It was advanced that the Court below misdirected itself in requiring that there be evidence to directly link the Respondent to the acts of intimidation contrary to section 97 of the **Electoral Process Act**, the case of **Josephat Mlewa v Eric Wightman**[15] and rule 4 (2) of the **Electoral Process Code of Conduct** which recognise acts done with a candidate's knowledge and consent or approval.

The Appellant also invited us to determine whether or not the utterance of the word "foolish' constituted a threat as per

Josephat Mlewa v Eric Wightman[15] and paragraph 15 of the **Halsbury's Laws of England,** 4th Edition Reissue Volume 15.

Ground seven questioned the holding of the Court below that the majority of votes secured by the winning candidate expressed the will of the people of Luena Constituency. It was submitted that the activities of the Respondent eroded the electoral process and induced the electorate to vote for him and thus prevented people of Luena constituency from expressing their free will.

The Appellant urged us to note the distinction between 'constituency', 'district' and 'ward' stated in section 97 of the **Electoral Process Act** and advanced that it is not the people of the entire constituency that ought to have been affected but that it was sufficient for the Appellant to have proved that the voters in a ward were prevented from electing their preferred candidate in that ward.

We were thus urged to uphold the Appeal.

In augmenting the heads of argument, learned counsel for the Appellant, Mrs. Findlay, submitted on ground one, that the public nature of an election petition cannot be underscored and that the voters in the constituency concerned follow the court

proceedings and ultimately expect to hear the court addressing the allegations contained in the petition. In that regard, that whether the trial Court disagrees or agrees with the Appellant's allegations, each and every allegation ought to have been addressed in the interest of all concerned or interested people and not just the Appellant and Respondent.

Mrs. Findlay then referred to the case of **Robert Chiseke v Richard Timber Simbula and Attorney General**[17] where the Supreme Court pronounced itself on the public nature of an election petition and how it affects the public at large and the people of the constituency. She submitted that it was thus imperative that this appeal was brought and it was therefore not frivolous in any way. And that this should be taken into account as regards the issue of costs should this Court not uphold the appeal. As regards ground four which was not argued, counsel submitted that the same was abandoned.

The Respondent filed the heads of argument in opposition and submitted on ground one that the Court below adjudicated on all allegations made by the Appellant in his petition. The Respondent referred to the relevant portions of the Judgment where the lower Court analysed the evidence pertaining to the

allegations. It was then argued that the Appellant did not tender any evidence to support his allegation that RW7 was an agent of the Respondent but only wanted the lower Court to make an inference that he was an agent.

On grounds two and three, the Respondent argued that the Court below gave reasons why the Respondent's witnesses were believed in preference to those of the Appellant in accordance with the holding in **Mushemi Mushemi v The People**[12]. In particular, that the Appellant's witnesses, PW2 and PW3, were partisan being PF officials as well as husband and wife. As regards the testimony of PW6, the Respondent submitted that there was not much weight that could be attached to evidence that did not exist since PW6 confirmed that his evidence was based on what he was told by PW4 and PW5 and therefore the Court's findings could not be faulted because they were supported by evidence on record.

On ground five, the Respondent submitted that the trial Judge was on firm ground when she disregarded the testimonies of PW2, PW3, PW7 and PW8 as these witnesses were discredited during cross examination and the trial Judge rightly found them unreliable partisan witnesses with their own interest to serve. It was argued that the Court below took into consideration the

totality of the evidence of the witnesses on record in determining the question of credibility and had an opportunity of seeing and hearing all the witnesses.

It was the Respondent's further submission that the evidence of the Appellant, PW2, PW3, PW7 and PW8 fell far short of the high standard of proof in an election petition as set out in the case of **Akashambatwa Mbikusita Lewanika and Others v Frederick Titus Jacob Chiluba**[18] in which the Supreme Court held that in election petitions, the standard of proof is higher than a mere balance of probability though less than beyond reasonable doubt. The Respondent added that the Appellant had not demonstrated how the alleged corrupt and illegal practices affected the result of the election.

With respect to ground six, the Respondent submitted that the Appellant failed to call evidence to support his allegations that acts of intimidation, showing of symbols and Mr Masiye wearing an attire of the colour that was on the ballot paper unduly influenced the voters. That the Appellant failed to establish to the required standard, the general allegations he made against the Respondent in his petition. And that as a result there was

insufficient evidence from which the lower Court was to draw inferences.

It was submitted on ground seven that the Appellant had failed to produce cogent and credible evidence to meet the requirements of section 97 (2) (a) of the **Electoral Process Act**. The Respondent argued that there was need to furnish a quantitative analysis as stated in the Nigerian case of **Adeyeye v Simeon Oduoye**[19] when it came to determining the effect or impact that the malpractice had on the electorate or the overall result.

The Respondent posited that the Appellant's argument on section 97 of the **Electoral Process Act** was out of context in that the reference to constituency was in respect to members of parliament, district in respect of mayors and council chairpersons while ward was in respect of councillors. Further, that the record indicated that in the wards where the alleged malpractices occurred, the Respondent did not win the poll. Thus, that there was no evidence that the majority of voters were prevented from voting for their preferred candidate. In sum, it was submitted that the Court below was on firm ground in relying on **Mubika Mubika v Poniso Njeulu**[3] that there should have been evidence that the

majority of the electorate were or might have been prevented from electing a candidate of their choice.

The Respondent thus urged us to dismiss the appeal with costs for being frivolous and vexatious.

Learned counsel for the Respondent, Mrs. Mutti, augumented the Respondent's heads of argument and submitted with respect to ground one, that it was for the Appellant to adduce evidence to prove the allegations in the petition to the required standard. Counsel argued that the trial Judge endeavoured to address all the allegations by evaluating the evidence adduced by both parties and arrived at the conclusion. That after considering the totality of the evidence and the law, the trial Judge reached an unavoidable conclusion that the Appellant had failed to prove the allegations. That the Judgment shows that the trial Court addressed the issues of public interest in its Judgment and could not therefore be faulted. Counsel added that even if this Court was of the view that the trial Court did not address some allegations, what was cardinal is section 97 (2) (a) of the **Electoral Process Act** which requires that the majority of the electorate should have been prevented from electing a candidate of their choice and there was no conclusive evidence to prove this aspect.

Mrs. Mutti concluded that the appeal had no merit and should be dismissed with costs.

We have carefully considered the grounds of appeal, the Judgment of the trial Court and the arguments advanced by both parties.

On ground one, the issue for determination is whether the Court below failed to pronounce itself on the three allegations of bribery and corruption, the false statement against the Appellant and the distribution of a defamatory letter.

The first allegation was that the Respondent had issued false statements on 15th July, 2016 that the Appellant had burnt his uncle's house. The contention is that the trial Court did not adjudicate on this allegation. We have perused the record and note that the trial Judge briefly outlined the evidence of PW2 and PW3 and the other witnesses of the Appellant at pages J76 to J78 of the Judgment. The trial Judge concluded that, based on the fact that the Appellant's witnesses were partisan with their own interest to serve and in the absence of other supporting evidence, the Appellant had not discharged the high standard of proof. The learned trial Judge thus did not make specific findings on this

allegation but dismissed it solely based on the fact that PW2 and PW3 were partisan.

The Court below needed to fully adjudicate on this contentious allegation and to evaluate the evidence of PW2 and PW3 and also in relation to the Respondent's evidence.

In particular, the evidence of PW2 and PW3 was that the meeting took place on 15th July, 2016 while the Respondent, RW4 and RW6 (the Appellant's cousin) stated that it was on 21st July, 2016. RW6 added that his father's house got burnt on 18th July, 2016 and thus, the fact could not have been known on 15th July, 2016 as alleged. RW6 also acknowledged getting a call from the Appellant but stated that the Appellant accused RW6, and not the Respondent, of making the false statement. RW6 stated that he denied that any such statement was made and asked the Appellant to bring the informants. He further denied having apologised to the Appellant.

The dictates of section 97(2) of the **Electoral Process Act** required proof of both the uttering of the false and defamatory statement by the Respondent or with his knowledge and consent or approval and that the majority of voters were or might have

been prevented from electing their preferred candidate. We wish to stress that defamatory falsehoods against a candidate are undesirable as they impugn the free and fair conduct of elections. Specifically, rule 15 (1) (c) of the **Electoral Process Code of Conduct** proscribes publishing of false, defamatory or inflammatory allegations concerning any person or political party in connection with an election. However, this allegation was not proved to the required standard against the Respondent.

Perusal of the record of appeal supports the conclusion that the subject allegation was not proved to the required standard as the evidence of PW2 and PW3 as witnesses with a possible interest to serve required corroboration or something more to meet the high standard of proof.

We hence cannot fault the trial Judge's conclusion that the Appellant had failed to prove the allegation to the high standard of convincing clarity.

As regards the allegation of corruption and bribery, the evidence that was tendered by PW4 and PW5, as eye witnesses, was that RW7, the UPND Councillor candidate, distributed second hand clothes which he stated as coming from the Respondent.

PW6 also testified that he heard about the incident which he investigated and retrieved some of the clothes. The Appellant's contention is that the Court below should have made a finding that RW7 committed the bribery and corruption as the Respondent's agent. The learned trial Judge did not address the issue of whether RW7 was proved to be the Respondent's agent. However we note that at page J80 of the Judgment, the trial Judge observed as follows:

> **"The Petitioner had to prove two limbs; that the malpractice took place, be it in the form of giving out money, salt, soap, chitenge, clothes or mealie meal as alleged by the Petitioner and his witnesses, on one hand, that the criminal act was done by the Respondent either directly or with his knowledge and consent or approval or that of the Respondent's agent. In respect of the allegation of corruption the Petitioner has failed to discharge his evidential burden."**

This analysis clearly covers the alleged acts of the Respondent's agents as the Court below was alive to the fact that the alleged acts could be perpetrated either directly by the Respondent or by another with his knowledge and consent or approval or that of his agents. Nevertheless, it was desirable for the Court below to specifically state that it concluded that RW7 was not proved to be the agent of the Respondent.

The record nonetheless shows that the Appellant did not prove to the required standard that RW7 was an agent of the

Respondent. The mere fact that he was a UPND councillor candidate did not make him the Respondent's agent. It was also not proved to the required standard that RW7 was distributing the second hand clothes with the Respondent's knowledge and consent or approval.

Lastly on this ground, the Appellant takes issue with the failure of the Court to pronounce itself on the allegation that the Respondent had distributed a letter accusing the Litunga and the Government of conniving to grab land from the people of Western Province. The Appellant testified that the Respondent had distributed a letter alleging that the Litunga had connived with the Government to sell land. The said letter was produced before Court and marked "CKC1". The Judgment of the Court below indeed does not make a categorical finding on this allegation. It therefore falls on us to consider it.

We have carefully assessed the evidence on the issue. Only the Appellant testified on this issue that the said letter was littered in Limulunga on 9th and 10th August, 2016. It is apparent that the Appellant did little to link the letter to the Respondent and there is nothing in the evidence suggesting that either the Respondent or his agents authored or distributed the said letter

or that the letter was distributed with the Respondent's knowledge and consent or approval.

We note that while the trial Court did not specifically address the allegation to do with the distribution of a defamatory letter, we are of the view this was addressed generally in the Judgment after evaluating the witness evidence and stating that as partisan witnesses, the Appellant and his witnesses required corroboration, the absence of which meant that the allegations were not proved.

It follows that ground one has only succeeded to a minor extent in that there were no specific findings of fact on two of the three allegations. However, this does not change the ultimate finding that the Appellant did not prove the allegations to the required standard.

Before we leave ground one, we wish to point out that the Court below should have addressed the allegations set out under ground one in a more specific manner rather than making general umbrella findings. Findings of fact on contentious issues ought to be stated with clarity and precision for the easy comprehension of the parties concerned and other interested

parties. This would in turn avoid unnecessary appeals and encourage finality in litigation.

Grounds two and three challenge the trial Court's finding on the credibility of the Appellant's witnesses. **Black's Law Dictionary** defines credibility in this manner:

> **"worthiness of belief; that quality in a witness which renders his evidence worthy of belief..."**

The determination of the question of credibility of witnesses is akin to findings of fact and therefore the limitations that an appellate court faces in interfering with the findings of fact of the trial court are equally applicable. This is owing to the fact that an appellate court does not have the benefit of observing the witnesses and their demeanour first hand. The Supreme Court was faced with an appeal anchored on the trial court's findings on credibility of witnesses in the case of **Zesco v Bonaventure Chikoti**[20] and it opined as follows:

> **"The Court below had the benefit of seeing and hearing the witnesses as they testified and of observing their demeanor. We do not have the same benefit. We echoed this in *Attorney General v Achiume*, where we went further to state that we would not reverse findings of fact unless the findings were, on a proper view of the evidence, no trial Court acting correctly can reasonably make. This applies to findings made by the trial Court which are based on credibility of witnesses."**

In **GDC Hauliers (Z) Limited v Trans Carriers Limited**[21], the Supreme Court stated that:

> **"Findings of credibility are not to be interfered with lightly by an appellate Court which did not see and hear the witnesses first hand."**

We endorse this position. With this limitation in mind, we have closely examined the evidence that was before the trial Judge and her reasons for so finding. Of note is the partisan aspect as well as the implausibility of the testimonies of some of the Appellant's witnesses whose evidence was challenged by the Respondent's witnesses who included some PF members. The trial Judge in her Judgment at pages J77 to J78 outlines the gist of the evidence of all the Appellant's witnesses.

In particular, on ground two, the Appellant invited us to consider the credibility of PW5 whose testimony was that she was non partisan. It is the Appellant's contention that the lower Court disregarded PW5's testimony without reason. The two issues for determination therefore are whether PW5 was proved to be a partisan witness and whether the Court below ought to have attached more weight to the testimonies of PW5 and PW6.

As regards the first issue of whether PW5 was proved to be partisan, we note that the trial Judge's finding relating to PW5 as

stated at page J76 of the Judgment was that all of the Appellant's witnesses were partisan except PW6. However, there is nothing on record to show that PW5 was partisan and hence the contrary finding by the trial Court was not supported by the evidence on record. This was a misdirection by the trial Court.

Despite this misdirection, a perusal of the Judgment of the Court below reveals that it doubted the credibility of PW5. The trial Judge gave an analysis of PW5 in the following manner at page J77:

> **"PW5 testified that she was non-partisan and a recipient of the second hand clothes which were allegedly distributed by PW4. However, in cross examination, a doubt was cast upon my mind when she vouched for PW4 as not campaigning for UPND when she was distributing the second hand clothes on behalf of UPND."**

It was within the trial Judge's purview to determine the issue of credibility of witnesses. We are persuaded by the reasoning of the Supreme Court in the case of **Chief Chanje v Paul Zulu**[22] where it stated thus:

> **"We cannot fault the learned Judge for so finding as he was perfectly entitled to decide whom to believe as he had the opportunity to observe the witnesses and to form the impression that he did. We repeat here what we have stated time and again and that is that the appellate Court will not reverse findings of fact made by the trial Court unless the appellate Court is satisfied that the findings in question were either perverse or made in the absence of any evidence or upon a misapprehension of facts or that they were findings which on a proper view of the evidence, no**

trial Court acting correctly can reasonably make... Further, perusal of the Judgment has shown that the learned Judge did analyse the evidence that was before him before he came to the conclusion that the Respondent and his witnesses were more credible than the appellant and gave reasons for finding thus."

The further contention by the Appellant is that since PW5 and PW6 were non partisan witnesses, the trial Court should have attached more weight to their testimony.

We wish to state that the mere fact that a witness is not partisan does not mean that such a witness is credible. The issue of credibility is broad and includes the demeanour and the perception on truthfulness of the witness and consistency of one's testimony.

In this instant case, the learned trial Judge doubted PW5 on the basis that she vouched for PW4 as not campaigning for UPND when distributing second hand clothes on behalf of UPND. The reason for not believing PW6 as stated at page J78 of the Judgment was that "*his investigations results are not convincing as the conclusions were all based on evidence that is already before this Court*". This shows that the Court below did not find the corroboration by PW5 and PW6 to be sufficient since it did not find their evidence convincing.

It follows that the trial Judge found that it was not sufficiently proved that the second hand clothes were from the Respondent or that they were distributed with the Respondent's knowledge and consent or approval. We must state that even if it was proved that the second hand clothes were from the Respondent, this would have still fallen short of the second limb of section 97 (2) (a) of the **Electoral Process Act** requiring proof of the majority of the electorate being affected. The record shows that there was no clear evidence of how many people were present at the said meeting, which was in one ward out of the several wards in the constituency, as well as how many people benefitted from the second hand clothes. This allegation was therefore not proved against the Respondent.

Ground two has thus only partially succeeded with respect to the status of PW5 but the success does not change the fact that the trial Judge was on firm ground in finding that the allegation involving second hand clothes was not proved to the required standard against the Respondent.

Ground three impugns the lower Court's preference of the Respondent's witnesses' testimonies over that of the Appellant's witnesses. The testimonies of RW2 and RW8 were pointed out as

the basis upon which the lower Court disregarded the evidence of PW4 and PW7. We have closely examined the evidence that was before the trial Judge and we see nothing pointing to her decision on the credibility of witnesses being perverse as she gave reasons for so finding. The trial Judge had this to say about the two witnesses on pages J77 to J78 of the Judgment:

> **"PW4 was the one who attested to the Respondent's giving out of salaula, she was a PF supporter. I have my doubts in believing her evidence, because as pointed out by RW8, who was the branch chairman and campaign manager for the Councillor for Mabili ward, it would not make sense to use a chair lady under PF to distribute campaign material...PW7 was also a PF member, vice Chairman for Limulunga ward. He is the one who testified to being given a K250.00 by the Respondent, in order for him to de campaign the PF. However, his evidence collapsed when his witness, RW2 testified in favour of the Respondent that the story was actually made up to pacify the Petitioner on his losing the election..."**

In election petitions, the burden of proof lies on a petitioner and where the trial court finds his evidence unconvincing or where his evidence does not prove the allegation to the required high standard, it matters not the evidence proffered by the other party, the case will fail. This apparently, was the case in the Appellant's petition. The trial Court's Judgment reveals that the basis for not taking the evidence of PW4 and PW7 was not only that the testimonies of RW2 and RW8 challenged the same and thereby raised doubt, but also the fact that PW4 and PW7, as

witnesses with a possible interest to serve required corroboration to enable the Appellant discharge the requisite standard of proof in an election petition. Ground three accordingly fails.

Ground four was abandoned by the Appellant.

In ground five, the Appellant challenges the finding of the lower Court on allegations of corruption. The Appellant anchors his arguments, which are akin to those under grounds two and three, on the testimonies of PW2, PW3, PW7 and PW8. In particular, that the credibility was determined merely on the basis of interest to serve instead of other factors when there was direct evidence of bribery or corruption and that the trial Judge gave unsatisfactory reasons for believing the Respondent's witnesses instead. The gist of the Respondent's response was that the evidence of the said witnesses fell short of the high standard of proof.

The issue to be resolved is whether the evidence of the Appellant and that of PW2, PW3, PW7 and PW8 proved the allegations of corruption to the required standard. We have thus considered in detail the evidence tendered by these witnesses.

The Appellant in the petition alleged that the Respondent distributed salt, soap and sugar on 10th August, 2016 and that one Imenda also gave out money on 10th August. The evidence of the Appellant on these allegations was purely hearsay as he was recounting what he was told and did not personally witness the distribution of the items or money.

The testimony of PW2 and PW3, as wife and husband and PF officials, was that the distribution of items by the Respondent took place on 15th July, 2016. The Respondent and his witnesses, namely, RW4 and RW6 disputed the allegation and stated that the meeting was held on 21st July, 2016 and that there was no distribution of items by the Respondent. The contending versions and the absence of corroboration of the Appellant's witnesses' version showed that the allegation was not proved.

PW7 testified that on 10th August, 2016 the Respondent asked him to leave the PF and campaign for and join UPND and promised to give him K250.00 which he gave him on 11th August, 2016. RW2, the PF secretary who testified as witness for the Respondent, countered this evidence and stated that PW7 concocted the story and had asked RW2 to confirm it to the Appellant. The record of appeal at pages 380, 384 and 385 also

shows that RW2 consistently stated that he was not in agreement with PW7's plan to lie contrary to the Appellant's argument that RW2 had a purpose to lie. In light of this evidence by RW2, the allegation by PW7 could not be taken as proved in the absence of corroboration to tip the scale.

As regards PW8, he stated that he was on his way home from voting with Lyamba when the Respondent met them and gave K100.00 to Lyamba. Further, that the Respondent gave money to a lot of people and told them to vote for UPND. This evidence clearly lacked specifics in terms of the people who were allegedly given money and told to vote for UPND or that the money given to Lyamba was for bribery or corruption. It would have assisted the Appellant if the said Lyamba was called to testify as well as the others.

The record of appeal thus shows that apart from the fact that the Appellant's evidence was hearsay, the above evidence of PW2, PW3, PW7 and PW8 did not prove the alleged corruption to the requisite standard of proof of a high degree of convincing clarity, that is, a standard higher than the balance of probability. As already stated above, the burden of proof in election petitions lies on the petitioner and in this case, the Appellant who clearly did

not discharge it. The Appellant's witnesses fell in the category of witnesses with their own interest to serve and thus required corroboration or independent evidence to meet the high standard of proof. The Court below was thus on firm ground when it found that the Appellant's evidence had not proved the alleged corruption on the part of the Respondent.

We wish to reiterate that it was within the trial Judge's purview to make a determination of the witnesses' credibility and as an appellate Court, we see nothing in the evidence justifying an interference with the trial Judge's finding. In addition, it is our firm view that even where a witness, who falls in the category of a witness with a possible interest to serve, is found to be credible, such a witness would still require corroboration or something more for an allegation to be said to have been proved to the required high standard of proof in election petitions. Ground five fails.

Ground six is an amalgamation of a number of issues, it challenges the findings of the trial Judge that there was no evidence of intimidation; that the evidence of intimidation ought to have been linked directly to the Respondent; and further, that

the lower Court erred in its interpretation of the word "foolish" as not constituting a threat.

The issue for determination is whether the Appellant tendered satisfactory evidence regarding intimidation. The allegation of intimidation concerned firstly, the alleged actions of a police officer against the Appellant's polling agent or monitor; secondly, the action of the Assistant Polling Officer at Singongo polling station; thirdly, that one Mr. Masiye, as the Respondent's party chairperson, was dressed in 'an attire that was on the ballot paper'; and fourthly, that a female UPND member, whilst on the queue to vote, said that anyone who would vote for PF was foolish.

We have perused the evidence which was proffered before the Court below on the allegation of intimidation. The evidence was tendered by the Appellant and did not meet the requisite standard of proof. And as regards the first three allegations, the trial Judge further found that they related to the Electoral Commission of Zambia and that the Appellant never reported them to the Electoral Commission of Zambia and did not also join the Electoral Commission of Zambia to the petition to enable it answer to the allegations.

Section 97(2) (a) of the **Electoral Process Act** is instructive as regards the requirement for the intimidating or threatening utterances to either be linked directly to the Respondent or, when uttered by third parties, it should be shown to have been done with the knowledge and consent or approval of the Respondent or his election or polling agents. This position of the law was outlined by the Court below. In addition, the record reveals that the Appellant's evidence before the lower Court did not prove any knowledge and consent or approval on the part of the Respondent or his agents.

The trial Judge was thus on firm ground in finding both that there was no satisfactory evidence of intimidation and that there was no intimidation directly linked to the Respondent. It is also apparent that there was no evidence of intimidation indirectly linked to the Respondent.

Addressing the fourth issue of the word "foolish" being deemed as a threat, we are guided by the learned authors of **Halsbury's laws of England,** in paragraph 15 at page 429 who state as follows;

"In order to constitute undue influence a threat must be serious and intended to influence the voter, but it must appear that the

threat should be judged by its effect on the person threatened and not by the intention of the person using the threat."

We are of the view that the word "foolish" cannot by any stretch of imagination be taken as a threat to have an effect on another in the manner envisaged by the law. The evidence which was given by the Appellant only showed that he was disturbed when an unnamed UPND supporter uttered the words. The Appellant did not also prove that the word "foolish" was uttered by the Respondent's campaign team as was alleged in the petition. The Court below was thus on firm ground in holding as it did since this allegation was not tied to the Respondent as required by section 97 (2)(a) of the **Electoral Process Act**. This ground fails.

Ground seven attacks the conclusion of the lower Court's Judgment to the effect that the will of the people of Luena Constituency was expressed by the majority votes secured by the winning candidate. It was argued that the lower Court did not take into account the factors that influenced the winning of the candidate.

What falls to be determined is whether the Appellant proved the factors to support his assertion that the majority of the voters

were or might have been prevented from electing a candidate of their choice.

It can be gleaned from the arguments that the factors referred to were the allegations which, as we have stated above, the Appellant failed to prove to the requisite standard. That being the case, the Court below rightly took the election results of Luena Constituency as reflecting the wishes of the majority of the electorate.

The Appellant also took issue with the trial Judge's statement that the majority votes secured by the winning candidate expressed the will of the people in the constituency. We note that this statement was made in the light of the trial Judge's finding that the Appellant had not proved his allegations to the required standard. We thus wish to clarify that the mere fact that one secures the majority votes in an election does not always mean that the same reflects the will of the people. This is the reason why an election can be successfully challenged where it is proved that the majority of the voters were or might have been influenced not to vote for a candidate of their choice. In such cases, even if the offending candidate got the majority of the votes,

an election could still be nullified as not reflecting the will of the people.

We further wish to address the argument advanced by the Appellant that the reference to majority of voters was not limited to the constituency but extended to any ward as well.

Section 97(1) and (2) of the **Electoral Process Act** provides as follows:

> **(1)An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.**
>
> **(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 that constituency, district or ward whom they preferred; (emphasis ours)**

Section 97 of the **Electoral Process Act** caters for election petitions pertaining to Members of Parliament, Mayors or Council Chairpersons and Councillors. Therefore the applicability of the word majority of voters in a stated location depends on the election being petitioned. In the case at hand, concerning a

parliamentary election, the majority of voters that had to be considered are those of the constituency who are the deciding voice of a constituency. Therefore, the Appellant's argument that proof of the majority of voters in one ward in the constituency which had several wards was enough to nullify a parliamentary election lacks merit. This ground fails.

On the whole, this appeal fails and is hereby dismissed.

Considering the fact that the Appellant has partially succeeded in grounds one and two, we order that each party should bear its own costs.

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H. CHIBOMBA
PRESIDENT
CONSTITUTIONAL COURT

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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