SELECTED JUDGMENT NO. 2 OF 2018

IN THE CONSTITUTIONAL COURT FOR ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 16/2017
HP/EP/0025/2016

IN THE MATTER OF: **ARTICLES 47 (2), 68 (1), (2a) & 73 (3)**

IN THE MATTER OF: **ALLEGED CONTRAVENTION OF ARTICLES 45 (2a), (C) & (d), 47 (2) & 68 (1) & (2a)**

BETWEEN

CHRISTABEL NGIMBU **APPELLANT**

AND

PRISCA CHISENGO KUCHEKA **1ST RESPONDENT**

ELECTORAL COMMISSION OF ZAMBIA **2ND RESPONDENT**

Coram: Chibomba, PC, Mulenga, Mulembe, Mulonda and Munalula, JJC.

On 12th July, 2017 and on 24th January, 2018.

For the Appellant: Mr. A. D. M. Mumba of AD Mwansa Mumba & Associates.

For the 1st Respondent: Mr. K. Mweemba, of Keith Mweemba Advocates and Mr. G. Phiri of PNP Advocates.

For the 2nd Respondent: Ms. M. M. Mulenga, In-House Counsel, Electoral Commission of Zambia.

JUDGMENT

Chibomba, PC, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Million Juma (1984) Z.R.1.**
2. **Buhari v Obasanjo (2005) CLR 7K.**
3. **Michael Mabenga v Sikota Wina, Wallace Mafo and George Samulela (2003) Z.R. 43.**
4. **Morgan and Others v Simpson and Another [1974] 3 All E.R. 722.**

5. **Akashambatwa Mbikusita Lewanika and Others v Fredrick Chiluba (1999) 1 LRC 138.**
6. **Anderson Kambela Mazoka and two Others v Levy Patrick Mwanawasa and two Others (2005) Z.R. 138.**
7. **Webster Chipili v David Nyirenda SCZ Appeal Judgement No. 35 of 2003.**
8. **Wiheim Roman Buchman v Attorney General, SC Judgment No. 14 of 1994.**
9. **Loongo v Shepande (1984) Z.R. 71.**
10. **Phiri v Phiri (1979) Z.R. 126.**
11. **Woodward v Sarsons [1874-80] All E.R. Rep 262.**
12. **Attorney General v Kakoma (1975) Z.R. 212.**
13. **Steven Masumba v Elliot Kamondo- Selected Judgment No. 53 of 2017.**
14. **Kehar Singh and others v State (Delhi Admn.) -1988 SCR Supl. (2) 24.**
15. **Michael Chilufya Sata v Rupiah Bwezani Banda and two others- SCZ/8/EP/01/2008.**

Legislation referred to:

1. **Electoral Process Act No. 35 of 2016.**
2. **Constitutional Court Rules, 2016 (CCR).**
3. **Electoral Process (General) Regulations, 2016.**
4. **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.**
5. **Acts of Parliament Act, Chapter 3 of the Laws of Zambia.**

Works referred to:

1. **Halsbury's Laws of England, 4th Edition, Volume 15 (4).**
2. **Black's Law Dictionary, 10th Edition, by Bryan Garner.**

The Appellant who was the Petitioner in the Court below appeals against the Judgment of the High Court which dismissed her petition against the 1st and 2nd Respondents on account of want of merit.

The facts leading to this appeal are that the Appellant, who stood on the Patriotic Front (PF) ticket, and the 1st Respondent, who stood on the United Party for National Development (UPND) ticket together with two other candidates were parliamentary candidates for Zambezi West

Constituency in North-Western Province of the Republic of Zambia at the elections that were held on 11th August, 2016. The 2nd Respondent was responsible for the conduct of the said elections and was petitioned in that capacity.

The 1st Respondent, having polled 3,951 votes as against the Appellant's 3,752 votes was declared as the duly elected Member of Parliament (MP) for Zambezi West Constituency. Dissatisfied with the said declaration, the Appellant petitioned the High Court to nullify the election of the 1st Respondent. The Petition was filed pursuant to Article 73 (1) of the Constitution as read together with Section 98 (c) and Section 97 (1) (2) (b) and (c) of the **Electoral Process Act No. 35 of 2016** (**the Act**). The grounds upon which the nullification was sought are as follows:-

1. **That the Presiding Officers on 13th August, 2016 in all the polling stations in the Constituency brought ballot papers for the Referendum, Presidential, Parliamentary and Mayoral elections combined in the same ballot boxes. That this was contrary to Section 66 (1) (c) of the Act.**

2. **That some of the ballot boxes that were brought to the totalling centre were open and unsealed resulting in the Assistant Returning Officer to castigate the Presiding Officer and the 2nd Respondent's officials and this was contrary to Section 66 (b) of the Act.**

3. **That the results forms were not signed by the 2nd Respondent's officials, Presiding Officers and the Polling Agents from contesting political parties and others when they were brought from the various polling stations to the totalling centre and that**

some of the results were on unofficial election forms, such as mere plain papers. And that this was contrary to Section 71 (1) (b) of the Act.

4. **That the Assistant Returning Officer Mr. Gilges Musumali in fact, castigated the Presiding Officers and Electoral Commission of Zambia (ECZ) Officials in the presence of stakeholders for bringing unsigned results forms and using unsealed ballot boxes from polling stations.**

5. **That at the totalling centre, the Returning Officer had to ask the stakeholders from contesting political parties to sign the results forms that were not signed at the polling stations so as to authenticate them, but that these stakeholders were not present at the polling station where the results were coming from.**

6. **That some voting materials were brought in private handbags and luggage by some ECZ officials from various polling stations instead of packing in authorised ECZ packaging materials.**

7. **That the Presiding Officers from Sakayi, Nyachikayi, Kangulunga and Muyemba polling stations brought data that was incomplete and that they had to do some corrections to the results at the totalling centre.**

8. **That on 11th August, 2016 Muyembe Polling Station opened at 10.00 hours and closed at 22.00 hours and that after the closing of the voting, the Presiding Officer told the stakeholders to take a break because he was hungry and ordered them to leave the polling station. And that counting did not start immediately after the voting finished and that was contrary to the Act as the Appellant's agents were not present at the time the ballot boxes were opened for the commencement of the counting process. And that this resulted into the Respondent being declared winner of the Zambezi West Parliamentary Constituency. And that this was contrary to Section 67 (2) of the Act.**

The 1st and 2nd Respondents disputed the allegations against them in their respective Answers and the matter proceeded to trial and the respective parties called witnesses. After considering and analysing the evidence, the learned trial Judge found that eight issues had been

raised for determination. He then proceeded to deal with each issue raised.

As regards the first allegation of combining in the same ballot boxes, ballot papers for the referendum, presidential, parliamentary and mayoral elections, the learned trial Judge considered the Appellant's evidence together with that of her witnesses. He found that although the ballot papers mentioned above were combined in the same ballot boxes, the combining of these ballots was not proscribed or disallowed by Section 66 of the **Act**. He thus agreed with the submission by Counsel for the 2nd Respondent that the Appellant had laboured under a wrong assumption that the ballot papers referred to in Section 66 are used and marked ballots that had been allotted to each candidate when the section refers to sealing in separate boxes, unused and spoilt ballot papers. He, therefore, dismissed this allegation on account of want of merit.

As regards the second allegation that some of the ballot boxes were open and unsealed when they were brought to the totalling centre thereby prompting the assistant returning officer to castigate the presiding officers and the 2nd Respondent's officials, the learned trial Judge referred to the evidence of the Appellant and her witnesses. He stated that the Appellant had missed the point that some of the ballot

boxes that were brought to the totalling centre were empty and thus, the onus was on the Appellant to prove that the ballot boxes that were brought open or unsealed were those that were required by the law to be sealed but that none of the witnesses alluded to this.

As regards the third allegation that some of the results forms were not signed by the 2nd Respondent's officials, presiding officers and polling agents from contesting parties and that in some cases, unofficial forms such as plain papers were used to record the results, the trial Judge identified from the evidence of the Appellant, that this was in reference to Kangulunga and Sakayi polling stations. He, however, found that the results forms that were produced by the 2nd Respondent were signed. He thus dismissed this allegation on ground that the Appellant had not produced any of the alleged unsigned documents or their copies nor did she call any of her polling agents from those polling stations to support the allegation in question.

In respect of the fourth allegation that the assistant returning officer castigated the presiding officers and ECZ Officials for bringing unsigned results forms and for using unsealed ballot boxes, the learned Judge found that the Appellant had not adduced any evidence to show that there were unsigned results forms or unsealed ballot boxes.

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As regards the fifth allegation that the returning officer asked stakeholders to sign the results forms at the totalling centre as they had not been signed at the polling stations when they were brought, the learned Judge referred to the evidence of PW3 whose testimony was that he was asked to sign the GEN 12 forms at the totalling centre so as to authenticate them. The learned Judge did not however, accept this evidence on ground that PW3 had neither produced any documents as proof that he signed them at the totalling centre nor did he pinpoint the signature of any stakeholder who was not at the polling station but signed the GEN 12 forms or any document at the totalling centre. He, thus, concluded that this allegation was a mere assertion which had not been proved. The trial Judge also considered the evidence of PW2 that he signed GEN 14 and ECZ 19 forms at the totalling centre. He found that GEN 14 could only be signed at the totalling centre and not at the polling station and that since the Appellant did not call any witnesses to show that they signed the GEN 12 at the totalling centre, and not at the polling station, this allegation had not been proved.

As regards the sixth allegation that some of the voting materials were brought in private handbags and luggage by ECZ officials instead of packing them in authorised ECZ packaging materials, the trial Judge found that this allegation had not been proved on ground that the

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Appellant did not particularise or name the alleged materials that were carried in handbags. And that the Appellant did not also show how carrying of the GEN 12 forms in handbags to the totalling centre could have influenced or affected the results of the poll as the counting had already been done and the results announced at the polling stations.

As regards the seventh allegation that Presiding Officers from Sakayi, Nyachikayi, Kangulunga and Muyembe polling stations brought incomplete data and that corrections had to be made at the totalling centre, the learned Judge found that the Appellant did not prove these allegations to the required standard as none of her polling agents who were at the polling stations were called to prove the allegation of incomplete data.

As regards the eighth allegation that on 11th August, 2016 Muyembe Polling Station opened at 10.00 hours and closed at 22.00 hours and that the Presiding Officer, did not immediately begin the counting of the votes cast as he instead ordered everybody to leave the polling station so that he could take a break and eat and that as a result of this conduct, when counting started, the Appellant's agents were not present and that when they later came back, they found that the ballot boxes had been opened for the commencement of counting resulting in the 1st Respondent being declared winner; the trial Judge considered the

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Appellant's evidence that her Polling Agent, Mr. Manjimela, told her about this. The trial Judge found that since Mr. Manjimela was not called to testify so as to confirm what he told the Appellant, the Appellant's evidence in that respect was not corroborated. He also found that it was not mandatory under Section 67 (2) of the **Act**, that counting of votes must commence immediately the polling station closes as what commences immediately are the procedures under Section 67. And that reading Section 67 (2) in the manner suggested by the Appellant would lead to absurdity and result in a conflict with Section 66 of the **Act** which requires a presiding officer to first complete the ballot paper account form and the sealing of voting materials before counting commences.

In conclusion, the learned trial Judge stated that although he agreed that there were some wrongs committed by the 2nd Respondent's officials, such as making alterations on GEN 12 forms without signing for the alterations, the parliamentary election for Zambezi West Constituency was substantially conducted in accordance with the provisions of the **Act** in that the wrongs committed did not affect the result of the election. He, accordingly, dismissed the petition.

Dissatisfied with the refusal by the learned trial Judge to nullify the 1st Respondent's election in question, the Appellant has appealed

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advancing three grounds of appeal in the Memorandum of Appeal as follows: -

> **"1. The learned Judge in the court below erred and misdirected himself in law and fact when he found that the wrongs committed by the 2nd Respondent's officials such as making alterations on GEN 12 Forms without signing against the alterations did not affect the result of the election when the same alterations gravely affected the electoral process and system of administering the Zambezi West Constituency Parliamentary Election for 11th August, 2016.**
>
> **2. The learned Judge in the court below erred and misdirected himself in law and fact when he accepted and relied on the fundamentally questionable Form GEN 12 and Form GEN 14 filed and produced by the 2nd Respondent in dismissing the Appellant's Petition.**
>
> **3. The court below erred and misdirected itself in law and fact when it failed to order a verification and recount of the ballot of the 11th August, 2016 for Zambezi West Constituency Election as prayed by the Appellant in her viva voce evidence considering the grave irregularities observed and admitted by the Court."**

In support of this Appeal, the learned Counsel for the Appellant, Mr. Mumba, relied on the arguments in the Appellant's heads of argument. Grounds 1 and 2 were argued together.

The sum total of the Appellant's arguments in support of the two grounds of appeal is that there was dereliction of duty in the conduct of the elections in question on the part of the 2nd Respondent as can be deduced from the evidence of PW1, PW2, PW3, PW4 and PW5 which showed that the counting of ballots did not commence immediately after the polling station closed. And that this was contrary to Section 67 (2) of

the **Act** which provides that counting of ballots must commence immediately the polling closes. Further that this provision is cast in mandatory terms as the term "shall" is used. As such, there was a likelihood that the votes were tampered with. To press this point, Counsel cited a number of authorities including the case of **Attorney General v Million Juma**[1].

As regards the allegation of combining ballot papers for different categories of elections in one ballot box, Counsel referred to the evidence of RW6 and RW8 which was that this was done because the vehicle that was used could not accommodate all the ballot boxes. It was submitted that the above acts contravened Section 71 (4) of the **Act** as the provision has no exceptions as to when the provisions can be circumvented.

In support of the allegation that results for various polling stations were brought to the totalling centre on mere plain papers and not on official ECZ forms and that some of the results forms used were not signed by ECZ officials and stakeholders, it was submitted that the 2nd Respondent breached Section 71 (1) of the **Act**. To illustrate this point, Counsel referred to the form GEN 12 in the 2nd Respondent's bundle of documents. He submitted that this document was not filled in and

completed at the polling station after announcing of the results but at the totalling centre. And that the said form did not have any record of some of the contesting parties in the election in question.

As regards the allegation that some of the result forms on record had alterations which were not countersigned and thereby, resulting into their authenticity being doubtful, Counsel argued that some of these documents are incomplete and therefore, not credible as they do not contain complete data.

As regards the finding by the learned Judge that although there were some wrongs committed by the 2nd Respondent, he was convinced that the election was conducted substantially in accordance with the provisions of the **Act** as the wrongs in question did not affect the election result, Counsel submitted that the unsigned for alterations on form GEN 12 for Muyembe, Kangulunga and Nyachikayi polling stations vitiated the election. As such, the election was not conducted substantially in conformity with the law as provided by Sections 98, 67, 71, and 97 of the **Act** and that the breaches in question went to the root of the conduct of the election in question and therefore negatively affected the election result.

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It was submitted that the Appellant's allegations against the 2nd Respondent were also fortified by the report she made to the District Electoral Officer on the breaches complained about as these were confirmed to have taken place by two Assistant Returning Officers. As authority, Counsel cited the case of **Buhari v Obasanjo**[2] where the Supreme Court of Nigeria stated that the burden is on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result and that there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election.

In concluding his submissions under grounds 1 and 2, Counsel submitted that the Appellant did prove to the standard set in election petitions that the Parliamentary election for the Constituency in question was not conducted in accordance with the provisions of the **Act**. To press this point, Counsel cited the case of **Michael Mabenga v Sikota Wina & Others**[3] in which the Supreme Court discussed the question of the standard of proof in election matters.

The totality of the Appellant's arguments in support of ground 3 was that the court below was wrong to decline, without giving reasons, to order a verification and recount of the votes cast which the Appellant

had prayed for in her *viva-voce* evidence. Counsel submitted that this is more so because the GEN 12 and GEN 14 forms which the 2nd Respondent produced were questionable. Counsel argued that a recount is not required to be pleaded as an application for a recount made during the hearing of the petition suffices.

In concluding his arguments under ground 3, Counsel urged us to order a recount of the poll and to uphold this appeal.

In opposing this appeal, the learned Counsel for the 1st Respondent, Mr. Mweemba and Mr. Phiri also relied on the arguments advanced in the 1st Respondent's Heads of Argument filed. Grounds 1 and 2 of appeal were responded to together. Counsel began by first addressing the issue of the burden and standard of proof applicable in election petitions and cited a number of decided cases from Zambia and from other countries such as the case of **Buhari v Obasanjo**[2]; and **Morgan and Others v Simpson and Another**[4].

Counsel submitted that the standard of proof elucidated in the above cited cases has been adopted in our laws and hence, Section 97 (2) of the **Act** is couched in the manner it is and requires a high standard of proof for imputing election malpractices. According to Counsel, the standard applicable goes beyond a mere balance of probability but falls

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slightly below proof beyond reasonable doubt. To press this point, Counsel referred us to the cases of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Chiluba[5]; Michael Mabenga v Sikota Wina and two Others[3]; Anderson Kambela Mazoka and two Others v Levy Patrick Mwanawasa and two Others[6]** and **Webster Chipili v David Nyirenda[7]**.

In responding to the Appellant's arguments in support of grounds 1 and 2 Counsel addressed each allegation in the said grounds. In response to the Appellant's claim that counting of ballots at Muyembe polling station did not commence immediately after the close of the poll, Counsel contended that it was common cause at trial that a break was taken but, however, that PW3's testimony that the break lasted for one and half hours was not corroborated by any other witness. That on the other hand, RW5, who was the Presiding Officer at that polling station testified that after voting closed, he together with the police officer, the two agents from UPND and the two agents from PF sealed the ballot boxes and that a short break of 30 minutes was taken to allow for the change of the room from voting layout to vote counting and that this break was also used by the officials and the agents to take refreshments inside the polling station in full view of the agents and Davy Samututu an

election observer who joined them. And that RW5's further evidence was that after refreshments, the counting commenced until completion the following morning. It was argued that this evidence was corroborated by the evidence of RW2 as to what transpired after the close of the polling and that food was taken inside the polling station after ballot boxes had been sealed.

In response to the Appellant's argument that had counting began immediately after the voting closed, then counting could not have continued up to 05.00 hours the following morning as only 551 voters cast their votes at that polling station and, hence, the only inference to be drawn is that counting began at 01.30 hours as asserted by PW3; Counsel submitted that this reasoning is not supported by the evidence on record as the evidence of RW5 was that there were other ballots that had to be counted including the presidential, mayoral, councillor and the referendum ballots.

In response to the Appellant's contention that since counting of ballots did not commence immediately the voting closed, the 1st Respondent's election must be invalidated, Counsel submitted that if this reasoning is followed, it would mean that election officers, agents, observers, police officers and everyone else involved in the management of elections on polling day should not eat or take health

breaks or engage in any other activity other than immediately counting the ballots. And that the rooms should not be re-arranged but counting must start immediately. Hence, if the Appellant's proposition was a stipulation of the law, then it would be absurd in most situations as the word "**immediately**", used in Section 67 (2) of the **Act** cannot be taken literally as a clear reading of this provision illuminates what is supposed to commence immediately after the voting closes, namely, the procedures set out in Sections 66 and 67 relating to the counting of votes and not the actual counting of votes including the completion of a ballot paper account form and sealing of all classes of ballot boxes. Counsel contended that reading Section 67 (2) in the manner suggested by the Appellant would also be in conflict with Section 66 of the **Act** which requires the presiding officer to complete the ballot paper account form and sealing of voting materials after the close of the polls before the start of the counting.

In response to arguments on the combination of ballots for all categories of elections in the same ballot boxes, Counsel began by quoting Section 71 of the **Act** which according to Counsel, stipulates what a presiding officer must do after announcing the results at a polling station. He argued that the act of combining ballots for all categories of the elections in one ballot box was not a contravention of the provision

of Section 71 as that Section provides that the presiding officer shall announce the results at the polling station and then proceed to complete the form showing, inter alia, the number of ballots supplied to the polling station and the results at the polling station and that the last procedure under Section 71 (4) (a) of the **Act** is the sealing in separate ballot boxes, rejected ballot papers; spoilt ballot papers and unused ballot papers. Counsel pointed out that while the above exercise is being done, all the parties involved in an election would have already known the results and would have signed the results forms authenticating the results. Hence, the 1st Respondent's argument that mixing of spoiled, rejected or unused ballot papers would not have any effect on the results at all.

Counsel further argued that Section 66 (1) (c) complements Section 71 (4) (a) as it specifically particularises what ought to be sealed in separate ballot boxes at the close of the polling. And that both Sections 66 and 71 of the **Act** do not refer to sealing of used or marked ballot papers that have been allocated to each of the candidates. Therefore, the apprehension by the Appellant on this score is misplaced.

In response to the allegation that the results for various polling stations were brought to the totalling centre without the result forms

being completed and signed by the ECZ officials and the stakeholders and that some of the results were not on official ECZ forms as mere plain papers were used, Counsel contended that this contention has no basis as no evidence was adduced by the Appellant to prove this claim.

As regards the contention that some of the results forms had alterations which were not counter-signed by the Presiding Officer; Counsel argued that the Appellant did not lead any evidence to show that the ECZ officials, presiding officers, as well as polling agents did not sign the results forms or that some of the results forms contained incomplete data or were endorsed on plain papers or unofficial elections forms.

In response to the argument that not all the polling agents' signatures appeared on the GEN 12 form for Chikota Polling Station, Counsel submitted that the evidence on record from the Presiding Officer at that polling station was that after opening the polling station, there were only two polling agents who had valid accreditation letters and that these were from UPND and that they witnessed the counting of the ballots and signed the GEN 12 form for the parliamentary election results. It was therefore Counsel's contention that the Appellant did not

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demonstrate how these alterations affected the results declared or prejudiced her.

It was Counsel's further submission that ECZ 19 form shows that the results declared at the various polling stations are in consonance with those entered on this form. And that this form was signed by the representatives of the Appellant thereby signifying that the results endorsed on it were vetted and as such, authentic. Counsel submitted that the lapses by the 2nd Respondent also affected the 1st Respondent but that these were not sufficient to invalidate the election as they did not affect the result at all. To fortify this position Counsel cited a number of authorities including the case of **Anderson Mazoka and 2 Others v Levy Patrick Mwanawasa**[6]; and **Paragraph 670 of Halsbury's Laws of England, 4th Edition, Volume 15 (4).**

It was contended that the above authorities apply to the case in *casu* in that while the organization of the election in question was not exactly flawless, the results were credible and that no cogent evidence was produced to show that the results of the elections are not what they were. Therefore, the Appellant has not impeached the results as the only contention is that some 'insignificant' alterations which did not change the results were done but were not counter-signed for and that counting

at Chikota Polling Station did not commence immediately after close of polling. Hence, grounds 1 and 2 of this appeal must fail.

In opposing ground 3 which attacks the learned Judge for failure to order a verification and recount of the ballots, Counsel for the 1st Respondent began by submitting that the Appellant did not cite any authorities to support this ground of appeal contrary to **Order XI Rule 9 (10) of the Constitutional Court Rules Act, 2016, the CCR**, which provides *inter alia* that the heads of argument shall clearly set out the main heads of the appellant's arguments together with the authorities to be cited in support of each head of argument. According to Counsel, the above provision is mandatory and that on this ground alone, ground 3 should be dismissed.

Counsel also submitted that the Appellant did not plead a recount of votes in her pleadings. Hence since this issue did not arise in the court below, it should not be raised and argued on appeal in this Court. In support of the above submission, Counsel cited the case of **Anderson Mazoka and two others v Levy Patrick Mwanawasa**[6] which illustrates the function of pleadings and the case of **Wiheim Roman Buchman v Attorney General**[8], in which the Supreme Court took the

position that a matter which was not raised in the court below cannot be raised as a ground of appeal.

Counsel contended that the argument that there were mistakes in the tabulation of results or that the GEN 12 forms were questionable as regards the results contained therein could have been addressed before the hearing of the Petition as Section 76 of the **Act** empowers the **ECZ** to correct mistakes committed by an elections officer in the tabulation of results. However, that since the Appellant did not approach the 2nd Respondent to do so, she cannot now be seen to want to cure this by demanding a recount which was not asked for in her Petition in the court below. And that Ground 3 should also be dismissed. Hence, this Appeal should be dismissed with costs as it is unmeritorious, frivolous, vexatious, mischievous and lacking substance and merit.

The learned Counsel for the 2nd Respondent, Ms. Mulenga, also relied on the 2nd Respondent's Heads of Argument filed. In response to the allegation that Section 67 (2) of the **Act** was contravened, Counsel submitted that the break that was taken by elections officers at Muyembe Polling Station so that they could have refreshments was not an irregularity, breach or contravention of Section 67 (2) of the Act. Counsel argued that Regulation 45 (2) of the **Electoral Process (General) Regulations, 2016** allows election officers to take breaks

after the close of the voting. And that although the words *"immediately after the polling station is closed for voting"* used in Section 67 (2) are not ambiguous, they should not, in the context of elections, be interpreted using their literal meaning as doing so would mean that elections officials must work non-stop from the start of voting until the announcement of election results without taking time off for health breaks or refreshments. This, according to Counsel, would be unreasonable and therefore, the purposive rule should be applied in interpreting the meaning of these words so that elections officers can have some short breaks during the election day. To press this point further, Counsel cited and relied on Regulation 45 (2) of the **Electoral Process (General) Regulations, 2016** which provides for reasonable time to be taken for refreshments during counting of votes.

As regards the inference by the Appellant that the election results were tampered with during the time that the break was taken, Counsel submitted that this assertion was not substantiated as no evidence was adduced to support this claim.

In response to the Appellant's argument that the mixing of ballot papers for different categories of elections in the same boxes contravened Section 71 (4) of the **Act**, it was submitted that while it was conceded that this act is undesirable, the Appellant did not show how

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this negatively impacted only on her as a candidate and how this should necessitate a declaration that the election was null and void as the ballot papers for different categories of elections were later separated. Hence, this anomaly was corrected as agreed by all stakeholders.

As regards the claim that the Forms GEN 12 were filled in at the totalling centre as opposed to so doing at the polling stations, it was submitted that no evidence was led to support this allegation.

In response to the alleged alterations to the Forms GEN 12 for Nyachikayi, Kangulunga, Muyembe and Chikota polling stations, it was argued that for Nyachikayi and Muyembe, the alterations were to the number of votes cast and not the results while for Kangulunga, although the alterations were to the votes cast and the results, the corrected results were for the 1st Respondent and a third party and not for the Appellant and that this was done to match the results as reflected in figures and in words; that for Chikota, the alteration was on the date on the Form GEN 12 and not the results. It was further argued that the Appellant did not adduce evidence to show how the above alterations were inconsistent with the results polled in the affected polling stations.

It was further submitted that the law is settled that even where there are flaws in the system of administering elections, what matters is

conformity to the law and practice governing elections as was stated in **Lewanika v Chiluba**[5] case.

In response to the Appellant's arguments on Ground 2 of the appeal, Counsel for the 2nd Respondent submitted that the court below was on firm ground when it accepted the Forms GEN 12 and GEN 14 produced by the 2nd Respondent as these are the documents that are used at law to reflect the results of an election. Counsel referred us to Section 71(1) of the **Act** and argued that the forms in question reflect the actual results for the different polling stations and that the Appellant did not contest these results. And that she did not also produce any Form GEN 12 in the court below to assist the court to make a determination regarding the election results. And that in relation to the overall results, the Forms GEN 14 and GEN 19 on record were signed by PW2 who was the Appellant's polling agent thereby signifying the correctness of the election results.

In response to the Appellant's arguments under Ground 3, Counsel for the 2nd Respondent submitted that the court below did not err when it did not order a verification and recount of the ballots as under Regulation 53 (3) and (4) of the Electoral Process (General) Regulations, the verification exercise is conducted by the 2nd

Respondent and not by the court. Therefore, that the learned trial Judge cannot be faulted for not ordering verification of the results as this relief does not exist at law. Further, that although a recount may not be pleaded, a viva- voce application for a recount during the hearing of the petition does not suffice as an order for a recount is made subject to the hearing of an interlocutory application which is made by the petitioner. That in the current case, no such application was made by the Appellant. Therefore, Counsel argued, the learned Judge was on firm ground when he did not order a recount of the votes. In further pursuing this point, Counsel cited and quoted from the following authorities which guided on when the relief of a recount is available:-

1. **Loongo v Shepande**[9]
2. **Phiri v Phiri**[10]
3. **Halsbury's Laws of England, Volume 15, 4th Edition, Paragraph 940** where the above principle is set out.

In concluding her submissions, Counsel for the 2nd Respondent urged us to dismiss this appeal with costs for want of merit.

We have seriously considered this appeal together with the Grounds of Appeal raised, the arguments in the respective Heads of Argument and the authorities cited therein. We have also considered the

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Judgment by the learned Judge in the court below. The major question raised in this appeal is whether the Parliamentary election for Zambezi West Constituency that was held on 11th August, 2016 was not conducted in conformity with Sections 67 (2), 71(1) and (4), 97 and 98 of the **Act** so as to warrant the nullification of the election results.

The Appellant's major contention in support of her position that the election was not conducted in conformity with the electoral law is that the Parliamentary election in question was marred by procedural irregularities which vitiated the election. On the other hand, the 1st and 2nd Respondents' counter- position was that although there could have been some flaws in the conduct of the election, these did not meet the threshold for nullifying an election on the basis of the alleged non-conformity with the **Act**.

We wish to state from the outset that it is settled that where a party alleges non-conformity with the electoral law in election petitions, such a party must not only prove that there was non-compliance with the law and that such non-compliance did affect the result of the election. The Supreme Court took this position in **Webster Chipili v David Nyirenda**[7]. The Supreme Court in Nigeria also took a similar position in **Buhari v Obasanjo**[2] and put it thus:-

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"The burden is on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result ...there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election."

The Court in England as far back as 1875 took that same position in **Woodward v Sarsons**[11] and emphasized the position of the law as regards what should be established where non-compliance with the electoral law is alleged. This illustrates that the position of the law in this respect has been settled since the eighteen hundreds that the court will only invalidate an election on account of irregularities in the conduct of an election if it is satisfied that the non-compliance with the electoral law was so great that it rendered the conduct of the election invalid and that the non-compliance must also have been so great as to satisfy the court that it did affect the result of the election.

The principles enshrined in the above cited cases though not binding on this Court, mirror and echo the requirement of our **Act** and in particular, Section 97(2) (b) of the **Act** which sets the threshold for nullifying an election of a Member of Parliament where non-compliance with the electoral law in the conduct of an election is alleged as was the case in the current case. Section 97(2) (b) of the **Act, 2016** provides as follows:-

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

In determining this appeal, we shall therefore, be guided by the above principles and provisions of the **Act**.

For convenience and to avoid repetition, we shall consider grounds one and two of this appeal together as they are interrelated. We also take it that it is for this very reason that the Appellant argued them together.

The core of the Appellant's arguments in support of grounds 1 and 2 is that the parliamentary election for the constituency in question was not conducted substantially in conformity with the provisions of the **Act**. In sum, the 'breaches' alleged to have been committed by the 2nd Respondent in the conduct of the election are:-

1. That Section 67(2) of the **Act** was breached as counting of the ballots at Muyembe polling station did not commence immediately after the polling station closed. Hence, there was a likelihood that votes were tampered with;
2. That Section 71 (4) of the **Act** was not complied with as the 2nd Respondent's officers combined ballot papers for different categories of elections in the same ballot boxes;

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3. That contrary to Section 71(1) of the **Act,** the 2nd Respondent's officers took results from various polling stations to the totaling center on mere plain papers and not on official ECZ forms and that in some cases, ECZ officials and stakeholders completed and signed some of the results forms at the totaling center when this should have been done at polling stations and that in some cases, the data on some of the forms was incomplete and thereby casting doubt on the credibility of the results; and

4. That alterations were made to Forms GEN 12 for Nyachikayi, Kangulunga, Muyembe and Chikota polling stations without countersigning them and thereby casting doubt on the authenticity of these forms.

As regards the alleged breach of Section 67(2) of the **Act** and the argument by the Appellant that the counting of votes at Muyembe polling station did not begin immediately the polling station closed for voting; the allegation that the Presiding Officer for that polling station took one and half hours break to eat and told everyone to leave; the claim that counting of votes started in the absence of the Appellant's polling agents and the assertion that there was therefore a likelihood that the votes were tampered with; the Appellant pointed to her own evidence and that of her witnesses, PW2, PW3, PW4 and PW5, as proof of the alleged breaches.

On the other hand, the sum total of the 1st and 2nd Respondents' arguments in response was to confirm that a break was, indeed, taken, and that this was to re-arrange the room from voting layout to counting layout and also to do the procedures prescribed under Sections 66 and 67 of the **Act** which must first be done before counting of votes can begin including the completion of a ballot paper account form and

sealing of all classes of ballot boxes. It was argued that it was only after this was done that the 2nd Respondent's officers took refreshments in the presence of all the stakeholders. Further, that the alleged tampering with the results during the break is not supported by any evidence on record. And that taking a break is not an irregularity or breach of the **Act** as Regulation 45 (2) of the **Electoral Process (General) Regulations, 2016**, allows elections officers to take a break for refreshments. That in the current case, the break taken lasted 30 minutes and not one and a half hours as alleged by the Appellant.

We have anxiously considered the above submissions. The question raised is whether there was breach of Section 67 (2) of the **Act** which requires a presiding officer to ensure that the procedures set out in Part VI of the **Act** relating to the counting of votes commences immediately the polling station is closed for voting and to continue the counting of votes until completion.

As regards the duration of the break taken, the learned Judge did not accept the Appellant's evidence that the break lasted one and a half hours on ground that the Appellant's evidence was not confirmed by a Mr. Manjimela who was the Appellant's polling agent at the polling station in question and from whom the Appellant said she learnt about

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what had transpired. The learned Judge accepted the evidence of the 2nd Respondent's witnesses that a 30 minutes break was taken to re-arrange the room and to conduct the procedures stipulated in Sections 66 and 67 of the **Act** as well as for election officials and other stakeholders to eat. The trial Judge dismissed the Appellant's claim on ground that she did not prove the allegation to the required standard.

We have considered the above arguments and finding by the learned trial Judge. We have combed through the evidence on record. Our firm view is that the question whether the break taken lasted 30 minutes or one and a half hours is a question of fact to be determined on credibility. In **Attorney General v** Kakoma,[12] the Supreme Court guided that the trial court is entitled to make findings of fact where the parties advance directly conflicting stories and that the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence. In the current case, we adopt the position taken by the Supreme Court in the above cited case as the principle pronounced therein applies to the case in *casu*. We repeat here that the learned trial Judge was entitled to find as he did as he had the opportunity to see and hear the witnesses who testified on this issue and to accept the version of the evidence of the witness (es) that appeared more credible and plausible. Further, since Manjimela was not called as a witness to

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confirm what the Appellant claimed he told her, her evidence in this regard was also caught up in the realm of hearsay and could therefore not be relied upon as proof that the break taken lasted for one and half hours. In **Steven Masumba v Elliot Kamondo**,[13] we adopted the definition of the term 'hearsay' by the learned authors of **Black's Law Dictionary, 10th edition,** by **Bryan Garner** who put it thus:

> **"Hearsay-Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence."**

We do not intend to depart from the above definition in the current case.

As regards the Appellant's assertion that the reason why the counting of votes at Muyembe polling station went on up to the following morning was because the break lasted one and half hours, our firm view is that the learned trial Judge cannot be faulted for rejecting this assertion as clearly, the Appellant's claim in this respect ignores the fact that this was a general election that did not only involve the Parliamentary vote counting but also the Presidential, Local Government and Referendum votes. It is therefore, a more plausible and reasonable explanation of why the counting of votes at the polling station in question

could have gone on up to the following morning and not because of the one and half hours break allegedly taken by the 2nd Respondent's officials to eat.

We further agree with the 1st and 2nd Respondents' submissions that when Parliament enacted Section 67 of the **Act**, it did not have in mind the position taken by the Appellant that elections officers would work non-stop without taking a health break or refreshments. Regulation 45(2) of the **Electoral Process (General) Regulations, 2016** is also explicit as regards breaks that can be taken and is couched in the following manner:-

> **"The counting of the votes shall, so far as circumstances permit, proceed continuously until the count is completed, allowing only for reasonable time for refreshments."**

Coming back to the question whether there was breach of Section 67(2) of the **Act** as the counting of the votes did not start immediately the polling closed, to ably determine this issue, it is imperative that we quote this provision here. Section 67 (2) provides as follows:-

> **"(2) A presiding officer shall ensure that the procedures set out in this Part relating to the counting of votes commences immediately after the polling station is closed for voting and continue the counting of votes until completion."(emphasis ours)**

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It is our considered view that Section 67(2) mandates a presiding officer to ensure that the procedures stipulated in Part VI of the Act relating to vote counting commences immediately after the polling station closes for voting and continues until it is completed. The question therefore is- what are these procedures that a presiding officer must comply with that are stipulated in Part VI of the Act? Clearly, it is not just the actual physical counting of votes. Thus, Section 67(2) should not be read in isolation but must be read together with other provisions in Part VI of the **Act** so as to give meaning to what a presiding officer must immediately do after the close of the poll. Of particular relevance in Part VI, in addition to Section 67(2), is Section 66 (1) which is couched in the following manner:-

> **"66. (1) A presiding officer shall, at the close of a polling station, in the presence of an accredited observer, monitor or election agent**
>
> **(a) Complete a ballot paper account form reflecting the number of-**
>
> **(i) Ballot boxes entrusted to that presiding officer;**
> **(ii) Used ballot boxes;**
> **(iii) Unused ballot boxes;**
> **(iv) Ballot papers entrusted to that presiding officer;**
> **(v) Issued ballot papers;**
> **(vi) Unissued ballot papers; and**
> **(vii) Cancelled ballot papers;**
>
> **(b) Seal each unused ballot box entrusted to that presiding officer; and**
>
> **(c) Seal in separate ballot boxes**

(i) the certified segment of the Register of voters for that polling district;
(ii) the unused ballot papers entrusted to that presiding officer;
(iii) the spoilt ballot papers and
(iv) the written record of any objections concerning voting."

In view of the above provision, the proposition that it is the counting of votes that must immediately commence after the poll closes is flawed as Section 67 cannot be interpreted to mean that it is the actual counting of the votes that must begin immediately the poll closes as what a presiding officer is mandated to ensure commences immediately the poll closes are the procedures relating to counting of the votes as stipulated in Part VI of the **Act**. Further, our firm view is that the act of counting of votes is part of the procedures which a presiding officer must comply with and not that this is what he should begin with. Infact, when Section 67(2) is read together with Section 66(1), it will be seen that Section 67(2) provides that the procedure for counting of the ballots shall begin immediately the polling station closes for voting and that the counting must continue until completed. Thus, the procedures prescribed in Section 66 (1) must first be undertaken before the actual counting of ballots can begin. These include the following:-

(i) Completion of a ballot paper account form reflecting the number of ballot boxes entrusted to that presiding officer; the used ballot boxes; unused ballot boxes; ballot papers entrusted to that presiding officer;

issued ballot papers unissued ballot papers; and cancelled ballot papers.

(ii) Sealing of each unused ballot box entrusted to that presiding officer; and

(iii) Sealing in separate ballot boxes the certified segment of the register of voters for the polling district involved; the unused ballot papers entrusted to that presiding officer; the spoilt ballot papers; and the written record of any objections concerning voting.

We therefore agree that interpreting Section 67(2) in the manner suggested by the Appellant would result in an absurd meaning being given to the provision and that this would be in conflict with Section 66 which prescribes pre- counting procedures which must be complied with by a presiding officer before the counting of votes can start. Further, it is apparent that the Appellant must have read Section 67(2) of the **Act** in isolation from the other provisions of Part VI of the **Act**. Doing so is flawed as this is contrary to the settled principles of statutory interpretation which guide that in interpreting statutory provisions, the statute must be read as a whole and no single provision must be isolated from the others.

We are fortified in our holding by the decision in **Kehar Singh and others v State (Delhi Admn.)**[14] where, in discussing what constitutes 'ascertaining the provisions of a statute', the supreme court in India put it thus:-

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> **"If the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature a rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. ... We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute."**

The principle pronounced in the above cited case applies to interpretation of Acts of Parliament in Zambia and this is that in interpreting a provision of a statute, no single provision of the statute should be segregated from the others and that all provisions bearing on a particular subject must be considered and taken into account so as to give effect to the greater purpose of the instrument. To this end, Section 10 of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia** and Section 3(2) of the **Acts of Parliament Act, Chapter 3 of the Laws of Zambia are, respectively, couched in the following manner:-**

> **"10 When a written law is divided into parts, titles or other subdivisions, the fact and particulars of such divisions and subdivisions shall, with or without express mention thereof in such written law, be taken notice of in all courts and for all purposes whatsoever."**
>
> **"3(2) The words of enactment shall be taken to extend to all sections of the Act and to any Schedules, tables and other provisions contained therein."**

Therefore, the learned trial Judge cannot be faulted for finding that the alleged breach of Section 67(2) of the **Act** by the 2nd Respondent

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was not proved to the requisite standard.

As regards the allegation that there was breach of Section 71 (4) of the **Act** which requires a presiding officer to, after announcing the results at the polling station, complete a form reflecting the number of ballot papers supplied to the polling station; the results at the polling station; the number of rejected ballot papers; the number of spoilt ballot papers and the number of unused ballot papers and to seal in separate ballot boxes, each of the above mentioned items and to also include a written record of any objection and to deliver the completed form and the sealed ballot boxes to the returning officer; the Appellant's contention was that the 2nd Respondent's officers breached this Section as ballot papers for different categories of the elections were combined together in the same ballot boxes when the Section requires that these be sealed in different ballot boxes before taking them to the totalling centre.

The kernel of the 1st and 2nd Respondents' arguments in response was that no such breach occurred as what is prohibited to be combined by Sections 71 (4) (a) and 66 (1) (c) are the rejected, spoilt and the unused ballot papers and not marked ballot papers allocated to each candidate. The 2nd Respondent went further to contend that although the act of mixing ballot papers for different categories of elections in the

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same box is undesirable, nonetheless, the Appellant did not demonstrate how this negatively affected only her and not the other candidates so that this could be a basis for nullifying the election and that in fact, the anomaly was later rectified by agreement of all interested parties.

We have considered the above arguments. In determining this issue, the trial Judge found that the Appellant's evidence and that of all her witnesses who were at the totalling centre was that the ballot papers for the different categories of elections, namely, Presidential, Parliamentary, Mayoral and Councillorship were brought from different polling stations to the totalling centre combined in the same ballot boxes and that this was confirmed by the evidence of the 2nd Respondent's own witness, RW10, who was the Returning Officer for the Constituency in question. The learned Judge, nevertheless, found that this anomaly was not sufficient to nullify the election because it was not proscribed by Section 66 of the **Act** as the Section refers to the sealing in separate boxes, unused and spoilt ballot papers and not used or marked ballot papers allocated to the respective candidates.

We have considered the above submissions. As conceded by the 2nd Respondent, it is correct that the mixing of ballot papers for different categories of elections in the same ballot boxes is indeed undesirable.

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However, the question that follows is whether this amounted to a breach of Section 71(1) of the **Act** and whether it should be a ground for nullifying the election in question. We totally agree with the learned trial Judge that in the circumstances of this case, the mixing of ballot papers for different categories of elections by the 2nd Respondent's officers is not sufficient ground for nullifying the election because, as submitted by Counsel for the 2nd Respondent, this was done after the votes had been counted, announced and entered in the requisite results forms at the polling stations and before they were transported to the totalling centre. Further, since this anomaly was rectified by agreement of all interested parties, it cannot on its own be held to be sufficient ground for nullifying the election in question. This is more so in the light of the evidence by the 2nd Respondent's witnesses, RW6 and RW8, as the Presiding Officers for Sakayi and Kangulunga polling stations, respectively, who told the court below that the ballot papers for the different categories of elections that were combined in the same ballot boxes were sealed in separate envelopes. And that it was these envelopes that were combined together with other election materials in the same ballot boxes for the purpose of transporting them from the concerned polling stations to the totalling centre.

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Further and as rightly pointed out by the learned trial Judge, what Section 71(1) of the **Act** proscribes is the mixing of rejected, spoilt and unused ballot papers as these are required to be sealed in separate ballot boxes. We are also not satisfied that the Appellant did demonstrate in the court below how the anomaly complained of affected the outcome of the election or the election result for the Constituency in question.

For the reasons stated above, we find no merit in the Appellant's second argument that the mixing of envelopes containing ballot papers for different categories of elections by the 2nd Respondent's officers is ground enough for nullifying the 1st Respondent's election as the alleged flaw did not meet the threshold for nullifying an election on ground of non- conformity with the electoral law. We are fortified in so holding by the decisions in the cases of **Webster Chipili v David Nyirenda**[7]; **Buhari v Obasanjo**[2] and **Woodward v Sarsons**[11] cited above. We repeat here the principle in these cases which, in sum, is that where in an election petition non-compliance with the electoral law is alleged, the burden is on the petitioner to prove not only that non-compliance has taken place but also that the non-compliance has affected the result.

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The third allegation under grounds 1 and 2 is the alleged breach of Section 71(1) of the **Act** by the 2nd Respondent's officers who were alleged to have committed the following acts:-

(a) Using mere plain papers to take results from various polling stations to the totalling centre;

(b) Completing and signing of some of the results at the totalling centre when this ought to have been done at the polling station; and

(c) Having incomplete data on some of the forms which resulted into casting doubt on the credibility of the results.

The total sum of the 1st and 2nd Respondent's arguments in response was that the above allegations were not proved as they were not supported by any evidence on record.

The trial Judge considered the above issues and identified the affected polling stations as Kangulunga and Nyachikayi. He, however, dismissed all the above assertions on ground that the allegations were not supported by evidence as the Appellant did not produce copies of the 'unsigned' documents and the 'unofficial forms' used as what was on record were the results forms for the affected polling stations that the 2nd Respondent produced. And that the Appellant did not call any of her polling agents in the affected polling stations to testify to confirm the above claims.

We have considered the above arguments and the finding by the trial Judge. As regards the first claim that some of the election results

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were taken to the totalling centre on mere plain papers and not on official ECZ forms, we totally agree with the learned Judge that this claim was not supported by the evidence and therefore, it cannot succeed before us. This is so because it is settled that the burden of proof lies on the one who alleges or asserts a fact. The Supreme Court affirmed the law as regards the burden of proof in a plethora of cases including the **Mazoka v Mwanawasa**[6] case which is still good law and put it thus:-

> **"where a Plaintiff ... makes any allegation, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case."**

In the current case, we have combed through the record and we have found no tangible evidence to support the Appellant's claim in this regard. Therefore, the learned trial Judge was on firm ground when he dismissed this claim as it was a mere allegation which was not proved. This also applies to the allegation that the election result forms were completed and signed at the totalling centre instead of being completed and signed at the polling stations where they came from and equally applies to the claim that some of the result forms had incomplete data which according to the Appellant, cast doubt on the credibility of the results in question. These allegations were not supported by evidence on record. As such, the trial Judge cannot be faulted for dismissing the

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claims as mere assertions. We reiterate that the onus was on the Appellant to prove these allegations to the requisite standard of convincing clarity. Therefore, the alleged breach of Section 71(1) of the **Act** cannot be sustained at law as it was not proved.

As regards the fourth allegation that the 2nd Respondent's officers made alterations to the GEN12 Forms for various polling stations that were also not signed for and the contention that the unsigned for alterations on form GEN12 for Muyembe, Kangulunga, Nyachikayi and Chikota polling stations vitiated the election and the argument that the trial Judge should have as such held that the election was not conducted substantially in conformity with the law; the crux of the 1st and 2nd Respondents' combined arguments in response was that the Appellant did not demonstrate how the alleged alterations affected the election results or prejudiced her and that she did not adduce any evidence to show how the alleged alterations were inconsistent with the election results in the affected polling stations. They pointed out that the evidence on record shows that for Nyachikayi and Muyembe polling stations, the alterations were to the number of votes cast and not the results; for Kangulunga polling station, the correction was done to match the results in figures and in words and related only to the 1st Respondent's results and those of a third party and not the Appellant's;

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and that for Chikota polling station, the alteration was to the date on the GEN12 Form and not the results. They argued that these alterations were insignificant and did not change or affect the election results or provide sufficient ground to invalidate the election.

We have considered the above arguments. In the Judgment appealed against, although the learned Judge agreed that there were alterations made to some of the GEN12 Forms that were not signed for, he, nonetheless, went on to find that the alterations did not affect the result of the election. We also note that both the 1st and 2nd Respondents have conceded in their submissions that alterations were, indeed, made to the GEN 12 Forms for Nyachikayi, Muyembe, Kangulunga and Chikota polling stations. In fact, the 2nd Respondent's own witnesses, RW5, RW8 and RW9 who were respectively Presiding Officers for Muyembe, Kangulunga and Chikota polling stations, admitted that alterations to the GEN12 Forms were done and that these were not countersigned while RW10 who was the Returning Officer, also admitted under cross-examination, that alterations were made to the GEN12 Forms and that these were not signed for.

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We agree with the Appellant that the act of making alterations to the GEN12 Forms that were not signed for was indeed an irregularity which could cast doubt on the authenticity of the affected results.

However, our firm view is that this alone cannot be sufficient ground upon which an election can be nullified as there is a further requirement that the petitioner must also prove that the said irregularity or flaw did affect the election result and that the election was not substantially conducted in accordance with the electoral law.

In determining this issue, we did also consider the nature of the alterations that were effected and not signed for vis-a-viz the entire election and the result. According to the evidence, the alteration to the GEN 12 Form for Muyembe polling stations was to the number of votes cast; while for Kangulunga polling station, the alteration was done to match the results in figures and in words and related only to the 1st Respondent's results and those of a third party; and for Chikota polling station, the alteration was to the date on the GEN 12 Form.

The trial Judge did consider the above issues. His view was that the alterations complained of were not sufficient ground for nullifying the election in question. We totally agree with the findings by the learned

trial Judge as the alterations that were made cannot be held to be sufficient ground or reason to vitiate the election because the Appellant's evidence did not prove that the alterations were so significant that they affected the election or the election result. We reiterate the position of the law as illustrated above that the onus was on the Appellant to prove not only that the alterations complained of were made but to also demonstrate how these alterations affected the results or outcome of the election in order for this to be a basis for nullifying the election. It is not sufficient to merely allege that the results could have been tampered with. More is needed to be done to show or prove the impact on the election or election results or that the results were not the actual results.

For the reasons given above, we find that the fourth allegation under grounds 1 and 2 was not proved to the required standard.

Grounds 1 and 2 are thus dismissed as they have no merit.

As regards ground 3 which criticises the learned Judge for declining to order a verification and recount of the votes, the main argument in support of this ground was that the court below ought to have ordered verification and a recount of the votes cast as the Appellant had prayed for this relief in her viva-voce evidence as the **GEN**

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12 and GEN 14 Forms that were produced by the 2nd Respondent were questionable. And that a recount need not be pleaded as it can be made during the hearing of a petition.

The thrust of the 1st Respondent's response to ground 3 was that the Appellant's contention is not supported by any authority and is thus contrary to Order XI Rule 9(10) of the **CCR**. And that the issue raised was neither pleaded in her pleadings nor raised in the court below.

Further, that the Appellant ought to have raised the issue with the Electoral Commission of Zambia under Section 76 of the **Act** which empowers the Electoral Commission of Zambia to correct mistakes committed by electoral officers in the tabulation of results. Hence this ground should be dismissed.

The thrust of the 2nd Respondent's response to ground 3 was that the court below was on firm ground when it did not order verification and recount of ballots as it is the 2nd Respondent and not the court that is empowered to conduct a verification under Regulation 53 (3) and (4) of the **Electoral Process (General) Regulations, 2016.** And that a viva-voce application for a recount during the hearing of a petition does not

suffice as an interlocutory application has to be made before such an order can be made.

We have considered the submissions by Counsel for the respective parties. Perusal of the record has shown that indeed, the Appellant did not formally apply for a recount of the votes in the court below. The applicable procedure for a vote recount is settled. Only where a Petitioner files a formal interlocutory application can the court order a vote re-count.

We are fortified in our holding by the position taken by the Supreme Court in the case of **Michael Chilufya Sata v Rupiah Bwezani Banda and two others**[15] in which the Court put it thus:-

> **"an order for a recount is interlocutory, made only on the basis of cogent evidence justifying the making of such an order.**

We hasten to state that although the above cited case is not binding on this Court, it is nonetheless persuasive as it discussed sound and well settled principles of the law on the procedure for obtaining an order for a recount. We do not therefore intend to depart from the position as stated in the above cited case. It follows that in order for the High Court to order a recount of votes, a petitioner must make an interlocutory application. In the current case, the Appellant did not make

any interlocutory application for a recount of the votes as she only made this request in answer to a question, put to her under examination in chief as to what she wanted the court to do for her. She cannot therefore be said to have made an interlocutory application in the court below. Hence, the Appellant's prayer for an order for a vote recount is misplaced and irregular. As such, the learned trial Judge cannot be faulted for not ordering a recount. In view of the position we have taken above, the rest of the arguments fall away.

As regards the issue whether or not the learned trial Judge should have ordered verification of the votes cast, our short response is that this argument is misconceived and flawed at law as under Section 76 of the **Act**, it is the ECZ and not the High Court which is empowered to conduct votes verification. Section 76 provides as follows:-

> **"The Commission may correct a mistake committed by an electoral officer in the tabulation of results within seven days after the declaration of the results."**

This can also be deduced from the provisions of Regulation 53 of the **Electoral Process (General) Regulations, 2016** which provides for verification of ballot papers by the returning officer. Therefore, the learned trial Judge cannot be faulted for not ordering a verification of the votes.

All in all, we find no merit in ground 3. We dismiss it.

All the three grounds of appeal having failed, the sum total is that this appeal has failed on account of want of merit. The same is dismissed.

Since this case raised important constitutional issues, we order that each party shall bear their own costs.

.....
H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

.....
M. S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....
E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....
P. Mulonda
CONSTITUTIONAL COURT JUDGE

.....
M. M. Munalula
CONSTITUTIONAL COURT JUDGE