IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

APPEAL NO. 15/2016
2016/CC/A022

IN THE MATTER OF: **ARTICLE 73(1) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA**

AND

IN THE MATTER OF: **SECTION 97 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

AND

IN THE MATTER OF: **THE ELECTORAL CODE OF CONDUCT, 2016**

AND

IN THE MATTER OF: **SIKONGO PARLIAMENTARY CONSTITUENCY ELECTIONS HELD ON 11TH AUGUST, 2016**

BETWEEN:

KUFUKA KUFUKA **APPELLANT**

AND

MUNDIA NDALAMEI **RESPONDENT**

CORAM: **Chibomba, PC, Sitali, Mulenga, Mulonda and Munalula, JJC on 21st June, 2017 and 29th January, 2018**

For the Appellant: **Ms. N. Yalenga and Mr Khosa, Messrs Nganga Yalenga and Associates.**

For the Respondent: **Ms. M. Mushipe, Mesdames Mushipe and Associates, Mr. N. Inambao, Messrs ICN Legal Practitioners**

J U D G M E N T

Mulenga, JC, delivered the Judgment of the court.

Cases cited:

1. **Nabukeerra Hussein Hanifa v Kibule Ronald and another (2011) UGHC 72**
2. **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49**
3. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samulele (2003) Z.R. 110 (SC).**
4. **Reuben Mtolo v Lameck Mangani SCZ Judgment No. 2 of 2013**
5. **Josephat Mlewa v Eric Wightman (1995 – 1997) Z.R. 171 (SC)**
6. **Attorney General v Kakoma (1975) Z.R. 212 (SC)**
7. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114/2007**
8. **Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138 (SC)**
9. **Nkhata and Others v The Attorney General (1966) Z.R.124**
10. **Masauso Wilson Zulu v Avondale Housing Project Ltd (1982) Z.R. 172**
11. **Makumbi v Greytown Breweries Limited and Others SCZ Appeal number 32 of 2012**
12. **Brelsford James Gondwe v Catherine Namugala, SCZ Appeal number 129 of 2012**

Legislation cited:

1. **The Electoral Process Act Number 35 of 2016**

Other Materials Cited:

1. **Halsbury's Laws of England, 4th Edition, Volume 15**

This is an appeal by the Appellant against the High Court decision dismissing his election petition challenging the declaration of the Respondent as the duly elected member of Parliament for Sikongo constituency during the 11th August, 2016 general elections.

The Appellant was sponsored by the Patriotic Front (PF) and polled 5,167 votes while the Respondent was sponsored by the United Party for National Development (UPND) and polled 7,740 votes. The Appellant in his election petition alleged that the Respondent and his agents had engaged in acts of intimidation, violence, vote buying and

corruption. It was further alleged that the said illegal practices so affected the result as to warrant the nullification of the election.

At the trial of the election petition, the Appellant testified as PW6 and called fifteen (15) other witnesses in support of his case. The Respondent also testified as RW8 and called fourteen (14) other witnesses. The learned trial Judge considered the adduced evidence and pleadings and noted that the standard of proof required in election petitions was higher than a mere balance of probabilities and that the issues raised were therefore required to be established to a high degree of convincing clarity. After noting that most of the witnesses were partisan, the learned trial Judge cited the Ugandan case of **Nabukeerra Hussein Hanifa v Kibule Ronald and another**[1] wherein it was stated that the court needs to cautiously evaluate the evidence of all parties due to the fact that each party sets out to win an election and therefore, the supporters of one candidate cannot all behave in a saintly manner while those of the other candidate all behave in an unsaintly manner. Hence, the trial Judge stated that the authenticity of the Appellant's evidence required corroboration from neutral and independent sources.

The learned trial Judge identified nine (9) issues or allegations for consideration. These were then evaluated in light of the evidence

and the relevant law following which the learned trial Judge found that all the allegations were not proved to the required standard.

In particular, on the first allegation of distribution of money, salt and bags of mealie meal during the campaign period, the learned trial Judge considered PW1 (the Chairperson of the Social Cash Transfer Committee under the Ministry of Community Development, commonly known as CWAC) and PW2 to be witnesses with a possible interest to serve as they testified that they were bribed and that they reported the incident to other people including CWAC members. The lower Court noted that the people they allegedly informed of the alleged bribes were not called as witnesses. The lower Court observed that doubt was raised as RW14 who was the deputy chairperson of CWAC testified that he was not informed about the bribery incident. The lower Court added that no one who received the salt was called to testify and that the testimony of PW1 and PW2 lacked independent evidence or corroboration. Further, that RW13, the uncle to PW1, testified that he was with PW1 on the material evening of 9th August, 2016 when PW1 was allegedly bribed by the Respondent and that no vehicle went to their village. This evidence was held to support the evidence of the Respondent and his witnesses that he was not in

PW1's village on the material night and therefore did not bribe PW1 and PW2.

The trial court also held that the second allegation was not proved because no evidence was adduced to show that the Respondent and his agents gave gifts during voting day as an inducement to voters.

The third allegation that the Respondent visited a Dorcas rally on or about 4th July, 2016 and donated K1,000.00 and a bag of mealie meal was found not to have been proved. On this aspect, the lower Court considered the evidence of PW4 and PW5 who admitted in cross examination that they did not see the Respondent at the Dorcas rally but that the person who handed over the money to the pastor said it was from Mr. Hakainde Hichilema. The concerned pastor, who was RW1, stated that the K1,000.00 was handed over to him by Mr. Chipman who also informed him that it was from Mr. Hakainde Hichilema. Further, that the church also received 30 bags of mealie meal from the Patriotic Front in August, 2016. The lower Court found that RW1's explanation that the money was from Mr. Hichilema was reasonable and that the donation was a philanthropic activity that was not prohibited during the election campaign period.

The fourth allegation, that headman Nesha of Nesha village went to Wakunja Village around 19th July, 2016 and said he did not want any PF member in the village and ordered them to leave, was found not to have been proved in the absence of evidence to show that the threats were made with the Respondent's knowledge and consent or approval. This was after considering the evidence of the Appellant, PW8, PW9, RW2 and the Respondent. The trial Judge also noted that no one was called to testify that they were threatened or chased or that their fields were confiscated. Further, that PW8 who was the nephew to the headman and who alleged that he was ordered to leave the village for supporting the PF still lived in the village even after the elections. It was added that headman Nesha was not the Respondent's agent.

Similarly, the fifth allegation that headman Sitenge of Sambangula village, as UPND vice chairperson for the area, announced on 25th and 28th July, 2016 that all those supporting the Appellant would be chased from the village and have their fields confiscated, was found not to have been substantiated. This was after considering the evidence of PW11, PW12 and RW3 (headman Sitenge). The trial Court stated that the Appellant failed to call independent witnesses to testify to that effect or to testify that any person received

a pen and was compelled to vote for the UPND. Further, that PW12 who stated that his cattle were chased from the village acknowledged that this occurred in October, 2016 two months after the elections.

The trial Judge further held that the sixth allegation that headman Ndelwa closed the communal tap and declared that supporters of the PF would not be allowed to draw water and would be sent back to their homes in other villages had not been proved. The trial Judge found that the communal tap was closed every evening to protect it from abuse. The trial Judge also accepted the evidence of PW10 and RW12 (headman Ndelwa) that supporters of the PF were not restricted access to the communal tap and that RW12's statement that Inspector Mwangala of Sikongo Police went to investigate the said allegation. The trial Judge thus found that the allegation was not proved.

On the seventh allegation that the Respondent burnt down houses belonging to perceived PF supporters and committed many other atrocities, the lower Court found that no witness testified on the burning of houses and that the evidence of PW16, the Officer in Charge at Sikongo Police Station, was hearsay because the owner of the house that was allegedly burnt was not called to testify nor was anyone called who witnessed the burning. Regarding the issue of the

PF supporters being beaten by UPND supporters, the lower Court held that it was not persuaded that the assault actually occurred in the absence of medical reports and evidence that the two alleged suspects were agents of the Respondent or that they acted with the Respondent's knowledge and consent or approval. Further, that the fact of the entries made in the occurrence book was not evidence that the crime was committed.

The trial Judge also found that witnesses were not called to support the eighth allegation that headman Mbambo confiscated his wife's national registration card to prevent her from voting or that other women were beaten and told not to vote for the Appellant.

The ninth allegation was that on voting day, some polling agents perceived to be for the Appellant had their property damaged and some of it taken away. The learned trial Judge considered the evidence of PW15, PW16, RW6 and RW7 and found that the evidence of PW15 differed from that of PW16, the Officer in Charge of Sikongo Police Station, on the aspect that PW15 also lost K1,100.00. It was further held that there was no evidence to show that the people who broke into PW15's house were agents of the Respondent. The case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**[2] was relied upon for the holding that not everyone in one's

political party was one's agent. The lower Court further held that none of the four incidences had been shown to have been committed by the Respondent's agents. The lower Court added that there was also evidence by RW6 and RW7 that on 29th June, 2016 the Appellant gave K2,000.00 to induna Lwandama for him to share with others.

The learned trial Judge proceeded to state at page J49 of the Judgment lines 25 to 35 that:

> **"After analyzing and evaluating the evidence in its totality, I must deal with the issue of the standard of proof. In an election petition, the standard of proof is higher than the ordinary standard of proof in civil matters so the Court subjects the evidence before it to the required standard. From the foregoing and considering the evidence before this Court where the Petitioner relied on what he was told and failed to substantiate the allegations, considering the inconsistencies and contradictions I am not satisfied that the Petitioner has established or proved the allegations to the required standard."**

The trial Judge further stated that none of the illegal practices or election offences were committed by or with the knowledge, consent or approval of the Respondent or his agents. Thus, the Appellant had failed to prove the allegations to the requisite standard of high degree of convincing clarity. Further, that the actions complained of did not affect the whole or substantial part of the constituency. Hence, the learned trial Judge dismissed the petition with costs to the Respondent.

The Appellant being dissatisfied with the Judgment of the lower Court lodged this appeal. He has raised six grounds of appeal as follows:

(i) **The learned trial Judge erred in law and fact when she failed to reconcile the conflicting statements given by the Respondent and his witnesses concerning his whereabouts on the 9th of August, 2016 and resolve the said conflicting statements in favour of the Appellant.**

(ii) **The learned trial Judge erred in law and fact when she held that the donation of ZMW 1,000.00 by Mr. Hakainde Hichilema to the Dorcas Mothers of the Seventh day Adventists Church when he held a rally in Sikongo was a philanthropic act and was therefore not petitionable.**

(iii) **The learned trial Judge erred in law and fact when she held that the defects in the election complained of were not deep rooted and did not affect the whole constituency for her to nullify the election.**

(iv) **The trial Judge erred in law and fact when she held that recording of an incidence in the occurrence Book did not constitute evidence of the alleged incidence having occurred.**

(v) **The learned trial Judge erred in law and fact when she condemned the Appellant to pay costs in a Constitutional matter despite the long standing custom of the Supreme Court to order that each party bears their own costs.**

(vi) **The learned trial Judge erred in law and fact when she failed to give an analysis of why she believed the witnesses of the Respondent and disbelieved those of the Appellant despite numerous instances of contradictions in the evidence of the Respondent's witnesses.**

The Appellant filed heads of argument in support of the appeal. On ground one, it was argued that the Appellant called witnesses to prove the acts of bribery and corruption by the Respondent. That PW1, PW2, PW3, PW4 and PW5 particularly gave evidence establishing the circumstances when the Respondent and Sitali Sitali at Luombe village offered K150.00 and K50.00 to PW1 and PW2, respectively.

Further, that PW1 and PW2 said that they were then urged to vote for the Respondent and all his other party candidates and they did so.

The case of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samulele**[3] was cited on the effect of a proved fact of an act of bribery or corruption when it was held *inter alia* that:

> **"Satisfactory proof of any one act of corrupt or illegal practice or misconduct in an election is sufficient to nullify an election."**

It was also argued that the testimonies of the Respondent and RW10 were in direct conflict with each other. The Respondent stated that he was called by RW10 to meet him at Liyeliye Lodge while RW10 said the opposite that he did not make any prior arrangements to meet with the Respondent even though the Respondent went looking for him at the lodge. That this was a direct indication of an attempt to create an alibi for the Respondent who was on this particular night at PW1's house where he engaged in corrupt activities.

Further, that RW11's testimony did not tally with that of the Respondent when he testified that on 8th August, 2016 he was at Lulang'uni where there was no network. It was clearly not possible for RW11 to have communicated with the Respondent through the phone as claimed. This was therefore another attempt to create an alibi for the Respondent which flies in the face of logic. It was submitted that

the above facts inevitably left the trial court with only one logical conclusion that the Respondent on 9th August, 2016 was at the house of PW1 around 23:00 hours but the trial Judge held otherwise and failed to reconcile the conflicting evidence. This warranted that the trial Judge should have resolved the conflicting evidence on the whereabouts of the Respondent in favour of the Appellant in line with well established principles of law. The Appellant urged this Court to overturn the trial Judge's finding.

The case of **Reuben Mtolo v Lameck Mangani**[4] was cited with regard to electoral malpractice and corruption, in which the Supreme Court held that:

> **"Where acts or an act of bribery is established, an election will be nullified, notwithstanding that the bribery has no widespread effect on the electorate... We do not accept the argument that one or two proven acts of corruption or illegal practice attributable to a candidate, to nullify an election, it must be shown that it prevented or may have prevented the majority of voters in a constituency, from electing the candidate of whom they preferred."**

That the Supreme Court further enunciated with regard to acts of bribery or corruption and the effect on the result of an election in the case of **Josephat Mlewa v Eric Wightman**[5] when it held that:

> **"The question of personal knowledge is quite irrelevant and inapplicable under paragraph (a) where it does not matter who the wrong doer is, and the scheme of the law appears designed to protect the electorate and the system itself by providing for nullification whenever there is wrong doing which the Court feels satisfied, perhaps because of the scale or type of wrong doing, probably adversely affected the election ....."**

The Appellant contends that even if the Respondent did not have personal knowledge of each and every particular case of bribery and corruption of the electorate by members of his party, he should have known of such acts by virtue of them being members of the same party and falling under his supervision and thus the election must be nullified on account of such proven acts.

It was added that the record showed that the Respondent gave conflicting evidence with regard to the incidences of corrupt practices and bribery by members or agents of his party. We were urged to follow and apply the principles enunciated in the case of **Attorney General v Kakoma**[6], that:

> **"A Court is entitled to make findings of fact where the parties advance directly conflicting stories and the Court must make those findings on the evidence before it having seen and heard the witnesses giving the evidence"**

With respect to ground two, the Appellant based his submissions on the case of **Reuben Mtolo Phiri v Lameck Mangani**[4] as regards what constitutes an act of electoral malpractice as opposed to philanthropic works. It was argued that in the instant case, the presidential candidate for the Respondent's party made a donation of K1,000.00 at a church for the first time when he was in the constituency holding a political rally at a nearby place. That this was done knowing fully well that the Dorcas Mothers gathering was well attended by members

from across the constituency and the donation was made to influence the election, which donation the Respondent benefited from. The Appellant contended that this brought the said donation within the ambit of being petitionable.

Regarding ground three on the holding that the defects were not deep rooted, the Appellant submitted that any electoral malpractice or defect in an election is capable of rendering such an election null and void if shown that it had an effect on the outcome of the election.

With respect to ground four challenging the holding that the Occurrence Book did not constitute evidence of the alleged offence, the Appellant submitted that records kept by the police for purposes of recording incidences reported by the public constitute evidence upon which the trial court can and was mandated to rely especially if such evidence was brought by an officer with the proper and necessary knowledge of the incidences reported in the Occurrence Book.

Ground five was on the order to pay costs and the Appellant submitted that matters which touch on a citizen's basic human rights should not be fettered by the fear of being lumped with costs if a litigant tries to pursue his rights by means of a court action. Further,

that a plethora of Supreme Court authorities were instructive with regard to costs in electoral matters.

On ground six relating to analysis of contradictory witness evidence, the Appellant argued that the trial court did not address its mind to factors such as bribery and corruption which influenced the elections as demonstrated.

It was finally submitted that the Appellant had proved the various incidences of electoral corrupt practices, bribery and violence perpetrated by members of the Respondent's UPND party over which the Respondent had control through the various party structures and that the said individuals did so in furtherance of the Respondent's interest and of his party at large. It was the Appellant's prayer that this Court overturns the lower Court's Judgment and nullifies the election of the Respondent as Member of Parliament for Sikongo Constituency with costs to the Appellant.

At the hearing of the appeal, learned counsel for the Appellant, Mr Yalenga augmented the heads of argument by submitting on grounds one and two.

On ground one, he submitted that the trial Judge erred in not considering the evidence of PW3 which corroborated the evidence of

PW1 and PW2 on the aspect of the Respondent being in Lwahumba village on the night of 9th August, 2016. Further, that the trial Judge wrongly relied on the evidence of RW13 who was not even with the Respondent at the material time of the alleged illegal practice. RW13 stated that he was in fact at his kraal and therefore was not with PW1 on the night in issue.

It was advanced that the trial Court misapprehended the facts when it came to a conclusion that PW1 had not informed the members of the Social Cash Transfer Committee (CWAC) that the Respondent had given him money for him to solicit and entice CWAC beneficiaries to vote for the Respondent on the basis of the testimony of RW14 who was not present when PW1 was given the money. Further, that PW1 did not state that he had told the committee that he had been given money by the Respondent. Therefore, the lower Court misapprehended the facts when it disbelieved PW1 on the basis of the evidence of RW14.

Mr. Yalenga added that **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samulele**[3] was still good law under the current Electoral Process Act as section 97(2) (a) is substantially the same as the provision in the repealed Electoral Act of 2006 on the requirement for the act to be widespread. However, that proof of one

act is sufficient to nullify an election so as to safeguard the integrity of the election.

With respect to ground two, counsel submitted that the donation of K1,000.00 made by the UPND presidential aspirant transcended a charitable or philanthropic activity because it was coupled with a request for votes and was therefore a bribe. Counsel maintained that it was impossible to disassociate the Respondent from the gift which was given by the President of his party. When prodded by the Court, Mr. Yalenga stated that the Appellant did not dispute the trial Judge's finding that his allegation on the donation as pleaded in the petition was not proved but that the appellant's contention was regarding the effect of the donation on the Respondent's election.

Mr. Yalenga concluded that this Court should uphold the Appeal and hold that there was satisfactory proof of corrupt practices on the part of the Respondent.

The Respondent also filed heads of argument in opposition. In response to ground one, it was argued that there were no conflicting statements by the Respondent and his witnesses concerning his whereabouts on 9th August, 2016 but that the testimonies of PW1 and PW2 were unsubstantiated as they were adequately rebutted at the trial. The Respondent extensively referred to the record of proceedings

and submitted that he was not in Sikongo on 9th August, 2016. He instead spent a night at Lulang'unyi Primary School with the Council Chairman (Sitali Sitali).

Further, that his testimony and that of RW10 were not in direct conflict. He acknowledged that his testimony was that he called RW10 to meet at Liyeliye Lodge, while RW10 said the opposite, that he did not make prior arrangements to meet with the Respondent although the Respondent went looking for RW10 at the lodge. And that this inconsistency did not change the position that the two were in Kalabo on the material day. It was argued that the record of proceedings is clear that apart from the issue of not making prior arrangement to meet, the two witnesses' account agrees on a number of issues. The overwhelming evidence was that the two actually met at around 22:00 hours at Liyeliye Lodge. And most importantly, the purpose of the Respondent's trip to Mongu was confirmed by RW10 and that at around 23:00 hours he was in fact in Mongu at Kobil Filling Station refuelling. Therefore, that it was practically impossible for the Respondent to have been at PW1's house at 23:00 hours as alleged.

It was further surmised that the Respondent's testimony was also not in direct conflict with that of RW11 that on 8th August, 2016 he was at Lulangu'unyi where there was no network. It was therefore,

not possible for RW11 to have communicated with the Respondent through the phone. The record also showed that the Respondent was in Lulang'unyi on 9th August, 2016 and not 8th August as alleged by the Appellant. Further, RW11 confirmed that he was informed of the Respondent's coming at 21:00 hours and the two met at Kobil Filling Station between 23:00 and 24:00 hours. RW11 also denied that the Respondent was in Lwahumba in Sikongo at 23:00 hours. Therefore, that the issue of being in Lulang'unyi on 8th August, 2016 where there was no network to enable the two to communicate was a misinterpretation of the evidence on record on the part of the Appellant. Accordingly, the lower Court was on *terra firma* when it found the Respondent's alibi to be justifiable.

It was submitted that although the holding in the case of **Michael Mabenga v Sikota Wina and Others**[3] was that satisfactory proof of any one corrupt or illegal practice was sufficient to nullify an election, **Halsbury's Laws of England, 4th Edition, Volume 15** states at paragraph 789 that:

> **"... clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive."**

Therefore, that in the absence of satisfactory proof of any one corrupt or illegal practice or misconduct, the election cannot be nullified.

Further, that when the standard of proof is applied, it is clear that the Appellant did not prove the allegation of corruption and bribery to the required standard of a fairly high degree of convincing clarity.

With regard to ground two, it was submitted that the donation of K1,000.00 to the Seventh Day Adventist Dorcas Mothers by Mr. Hakainde Hichilema was not petitionable as it was a genuine charitable gift to the church and was a mere public philanthropic act and had completely nothing to do with influencing voters as evidenced by the testimonies from the pastor who also confirmed receipt of donations from several people including 80 bags of maize from the Patriotic Front (PF).

Halsbury's Laws of England, 4th Edition Re-issue Volume 15, at paragraph 689, was cited as stating that:

> **"The distribution of genuine charitable gifts to voters has always been allowed. If a gift is charitable, it will not become bribery because of the use made out of the gift, it is not possible any subsequent act to make that which was legal at the time illegal and criminal."**

The case of **Lewanika and Others v Chiluba**[2] was also cited as holding that:

> **"...public philanthropical activity during election is not prohibited."**

It was surmised that ground two lacked merit and should fail.

In response to ground three, it was submitted that the defects in the election, if any, were not deep rooted and did not affect the whole constituency to warrant the nullification of an election. That the case of **Mubika Mubika v Poniso Njeulu**[7] was instructive when it stated that:

> **"The provision for declaring an election of a member of Parliament void is only if whatever activity is complained of, it is proved satisfactorily that as a result of the wrongful conduct, the majority of voters in a constituency were, or, might have been prevented from electing a candidate of their choice. It is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate."**

The case of **Josephat Mlewa v Eric Wightman**[5] was also relied on as indicating that:

> **"The court must be satisfied about the scale or type of wrongdoing. By scale, it is meant wide spread as to influence the majority of voters in the constituency not to vote for their preferred candidate."**

However, that in the case in *casu*, the Appellant's evidence fell far below the requisite standard of proof in an election petition.

As regards ground four, the Respondent argued that recording an incident in the Occurrence Book did not on its own constitute evidence of the alleged incident having occurred. That it only amounted to evidence that an alleged incident could have occurred and thorough investigations were required to actually prove the incident.

In response to ground five, the Respondent argued that costs were at the discretion of the court and that the discretion was exercised fairly as the Respondent was dragged to court on frivolous grounds.

Lastly, with respect to ground six, it was submitted that the learned trial Judge gave an analysis of the witnesses from both parties and tested the authenticity of the evidence especially for the Respondent who brought neutral and independent sources such as the Pastor from the Seventh Day Adventist Church and other congregants who were not inclined to any political party in the strict sense. That this was in line with the Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and another**[1] which stated that:

> **"The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source."**

The Respondent also filed submissions expanding on his skeleton arguments. We have however not outlined the submissions as they are on similar lines.

The learned counsel for the Respondent, Ms. Mushipe and Mr. Inambao, augumented the heads of argument and submitted in sum that the lower Court did not misapprehend RW13's evidence. The evidence of RW13, with respect to the Respondent's whereabouts, was that no motor vehicle came to the village on the material night. Reliance was placed on page 500 of the record of appeal which shows that the distance between PW1's house and RW13's house was 8 meters. That the case of **Michael Mabenga v Sikota Wina and Others**[3] did not apply to the appeal at hand because the Appellant had failed to prove the allegations of bribery. It was argued in response to ground two that the donation was philanthropic and not petitionable. Counsel thus prayed that the appeal be dismissed.

In reply, Mr. Yalenga reiterated his earlier submissions. He added that the testimony of RW13 that PW1 was an agent for the PF party and therefore, a witness with an interest to serve, was an afterthought as PW1 was never cross examined on this aspect.

We have carefully considered the grounds of appeal, the Judgment of the lower Court, the record of appeal, heads of argument

filed on behalf of the respective parties as well as the oral submissions by counsel for the parties.

Before we delve into and address the grounds of appeal, we wish to observe from the outset that before arriving at a decision to nullify an election, the trial court must bear in mind the standard of proof required in election petitions. The case of **Michael Mabenga v Sikota Wina and Others**[3] clearly outlines the standard of proof as follows:

> **"proof of an election petition, although a civil matter is higher than balance of probability, but less than beyond all reasonable doubt"**

In the case of **Mazoka and Others v Mwanawasa and Others** [8] it was added that:

> **"As regards the burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."**

These principles have not changed and we endorse them. This higher standard of proof requires that in determining an election petition, the trial court needs to carefully and diligently assess the evidence presented by the parties at the petition hearing.

For a parliamentary election to be voided, the Appellant, as the petitioner, needed to prove any of the three (3) grounds set out in section 97(2) of the Electoral Process Act No. 35 of 2016 (which we shall refer to as the **Act**). Section 97 (2) of the **Act** 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:

(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;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

(c) The candidate was at the time of the election a person not qualified or a person disqualified for election.

The Appellant's election petition hinged on the ground in section 97(2)(a) of the **Act** on corrupt or illegal practices and misconduct on the part of the Respondent or his agents or with his knowledge and consent or approval. Part VIII (sections 81 to 95) of the **Act** outlines what constitutes an illegal practice or corrupt practice as well as misconduct.

Having thus stated, we now address the grounds of appeal. As we see it, five out of the six grounds impugn the findings of fact of the trial Court. It will be prudent for us to reiterate and endorse the accepted principles enunciated in **Nkhata and Others v The Attorney General**[9] where the Court of Appeal held as follows:

A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:
(a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or
(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or
(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

In **Masauso Wilson Zulu v Avondale Housing Project Ltd**[10], the Supreme Court put it in this manner,

"Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."

Ground one alleges a failure on the part of the trial Court to reconcile conflicting statements given by the Respondent and his witnesses concerning his whereabouts on 9th August, 2016. This particular evidence of the Respondent and his witnesses was advanced to rebut the evidence given by PW1 and PW2 which was to the effect that the Respondent had gone to PW1's home on the night of 9th August, 2016 and gave him money for purposes of securing votes in the elections. The ground further alleges a conflict between the testimony of the Respondent (RW8) and that of RW11 in relation to the

Respondent's claim that an area known as Lulang'uni lacked mobile network.

Where there are conflicting versions with regard to an issue, there is generally need for the party alleging to call the material witnesses to testify in order to assist him discharge his burden of proof. The burden of proof cannot be shifted to the opposing party to prove the falsity of an allegation. The burden of proof is thus always on the petitioner to prove his case and he cannot succeed merely because the respondent has not put forward a defence or that the defence put forward has failed.

A scrutiny of the subject testimonies reveal that they agree on the material particular that the Respondent went to Kalabo and then Mongu on the night of 9th August, 2016. The record however shows that there were contradictions on a number of aspects surrounding the alibi. In particular, the Respondent stated that he got a message around 1800 hours to go and fuel in Mongu and he left and arrived in Kalabo at 2200 hours where he met RW10 and in Mongu at 2300 hours or midnight where he fueled in the early hours of 10th August. The Respondent stated that RW10 had called him around 2200 hours before meeting him. RW10 denied that he called the Respondent but stated that he met the Respondent between 2100 and 2200 hours

after being informed of his presence by another person. RW11 stated that he was phoned by the Respondent around 2100 hours that he was going to Mongu to fuel after he had informed the Respondent on 8th August of the fuelling program. And that the Respondent arrived between 2300 and 2400 hours. RW9 stated that the Respondent, who had earlier left Sikongo with Sitali Sitali and another person for campaigns, arrived back alone at Sikongo at around 1000 hours. Upon arrival, the Respondent told RW9 that he was going to Mongu but only left at around 1900 hours. Sitali Sitali and the other person returned at 2000 hours and then proceeded to the Respondent's home.

The lower Court in its finding relied on the evidence of RW11, RW13 and RW14 who attested to the Respondent's whereabouts on the particular date. The lower Court also found that PW1 and PW2 were witnesses with a possible interest to serve and as such, their evidence required corroboration but which corroboration was absent. The trial Judge concluded that the allegation was not proved with convincing clarity.

The question however is whether the Appellant had proved to the required standard that the Respondent gave PW1 K200.00 cash and a bag of mealie meal. The trial Judge found that the allegation was not

proved as PW1 and PW2 admitted to being bribed and therefore needed corroboration. The record of appeal shows that the testimony of these two witnesses was corroborated by PW3 who stated that he was the one who showed the Respondent the house of PW1 and identified PW1 to the Respondent. This evidence was not addressed. However, the trial Judge in further discounting the evidence of PW1 and PW2, accepted the evidence of RW13 that he did not hear the sound of any vehicle from his house which was eight (8) meters away from PW1's house. We note, however, that this evidence of RW13 neither supported the Respondent's case nor negated the Appellant's case because he admitted that at the material time in the night he was not at his house but at the kraal outside the village. Therefore, the fact that RW13 did not hear the sound of the vehicle did not discredit the evidence of PW1, PW2 and PW3. In addition, the evidence of PW14 that as vice chairman of CWAC, he was not told about the bribe by PW1 as alleged, could not on its own discredit the evidence of the event having taken place. It instead negated the issue of the bribery having been published to all the CWAC members by PW1 for purposes of securing votes for the Respondent.

This gives basis for us to disturb the trial Judge's finding on this issue in line with the principles set out in **Nkhata and Others v The**

Attorney General[9]. The first ground accordingly partially succeeds on the fact that PW3 corroborated the evidence of PW1 and PW2 on the allegation that the Respondent went to the house of PW1 at which he took a bag of mealie meal and K200.00. We, however, find that the trial Judge was on firm ground in holding that this allegation was not proved to the required standard as the Appellant failed to show that the corrupt or illegal practice affected or may have affected the majority of the electorate in the constituency. There is no evidence of this allegation of bribery being widespread or affecting any other person other than PW1 and PW2. The testimony of RW14 supports this finding.

The Appellant has argued that on the basis of **Josephat Mlewa v Eric Wightman[5]**, the proof of one act of bribery should result in the nullification of the election. This argument is flawed and has no basis in light of the provisions of section 97 (2) (a) of the **Act** which provide that the corrupt or illegal practice or other misconduct upon which an election can be nullified or voided has been restricted to two instances, namely, where the same has been committed by either the candidate or by another person with the candidate's knowledge and consent or approval or that of his election agent or polling agents. The issue of a candidate committing an act or misconduct needs no

elaboration. In terms of another person having committed an act or misconduct, it is no longer enough that someone, even from the candidate's party, committed a corrupt or illegal practice or misconduct, it must be shown that the act in issue was committed with the knowledge and consent or approval of the candidate or his election agent or polling agent.

Once the first aspect of committing a corrupt practice, illegal practice or misconduct by a candidate or another person with the candidate's knowledge and consent or approval or that of his agent is shown with convincing clarity, the further requirement is that it should also be shown that the majority of voters were or may have been prevented from electing a candidate of their choice. It is only when these two aspects are fully satisfied that an allegation can be taken as proved so long as the required standard of proof is met.

We wish to stress that proof of one corrupt or illegal practice or misconduct by the candidate is generally enough to nullify an election only if that one act is also proved to have been so widespread or that it affected or may have affected the majority of the electorate. It is to this extent only, that the case of **Josephat Mlewa v Eric Wightman**[5] is distinguishable from the current provisions of section 97 (2) (a) of the **Act**.

On the whole ground one fails.

The second ground challenges the finding of the lower Court that the donation of K1,000.00 by Mr. Hakainde Hichilema to the Dorcas Mothers of the Seventh Day Adventist Church in Sikongo was a philanthropic act. The Judgment shows that when deciding on this issue, the trial Judge entirely relied on RW1's testimony which she accepted as reasonable over the evidence of the Appellant's witnesses. We note that the trial Judge was faced with two conflicting versions and decided to accept that of the Respondent's witness, RW1, being the pastor who was handed the money. In the case of **Makumbi v Greytown Breweries Limited and Others**[11], the Supreme Court observed that where witnesses advance directly conflicting stories, the trial Court is better placed to make a finding than the appellate Court. Further, in **Brelsford James Gondwe v Catherine Namugala**[12], the Supreme Court refrained from tampering with the finding of the lower Court that the money that an election candidate had advanced to some churches during the campaign period were offerings instead of donations on the grounds that it did not have the opportunity that the trial Court had. We agree with these sound principles. In addition, we hasten to note that even if we were to oblige the Appellant and reverse the findings of fact of the trial Judge on this aspect, it would still fall

short of the requirements of section 97(2)(a) of the **Act** in that it was not proved that the donation was made by the Respondent or with his knowledge and consent or approval and that it also affected the majority of the voters.

The Appellant's allegation was that it was the Respondent who visited the Church or Dorcas Mothers rally and donated the K1,000.00 and a 25kg bag of mealie meal. The Appellant's evidence did little to convincingly prove that it was the Respondent who gave the subject money to the Church. While PW4 said she saw the Respondent give the pastor money, the other witness (PW5) stated that she did not see the Respondent at the time the money was handed over to RW1 (the pastor) who also testified that the money was given to him by a Mr. Chipman. The Respondent's evidence was that he was neither aware nor present when the money was allegedly donated. And at the hearing of the appeal, the Appellant's counsel conceded that the trial Judge's finding that the Appellant did not prove his allegation against the Respondent was not disputed.

However, that the Appellant's contention was that the donation was petitionable because it was donated by the Respondent's party president and the Respondent benefitted from it. The dictates of section 97 (2) (a) of the **Act** as set out above require that the candidate

or his election agent must have been aware of the corrupt or illegal practice and must have approved of it. There is nothing on the record to indicate this position. No evidence was led to show that the Respondent had knowledge and consented to the money being given to the Church. There was equally no evidence to show that Mr. Hakainde Hichilema was the Respondent's election agent or had acted with the Respondent's knowledge and consent or approval so that his conduct could be imputed to the Respondent. The issue therefore of the Respondent benefitting from the donation had no bearing on the election petition brought against him under section 97 (2) (a) of the **Act**. This is because of the deliberate shift from the previous position under the Electoral Act of 2006 of punishing a candidate for acts of third parties be they from his political party or not. That said, this ground equally fails for lack of merit.

Ground three challenged the finding of the lower Court that the defects in the election were not deep rooted in that they did not affect the whole constituency. Section 97 (2) (a) of the **Act** requires that whatever corrupt or illegal practice or misconduct is complained of, it must have prevented or may have prevented the majority of voters from electing their preferred candidate. In **Mubika Mubika v Poniso Njeulu**[7], the Supreme Court put it thus:

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

We have perused the evidence which was before the lower Court and find that the lower Court was on firm ground in finding as it did seeing that there is no evidence on record to prove that the alleged defects were widespread to the scale envisaged by the law. This ground fails.

The fourth ground impugned the lower Court's holding that a recording of an allegation in an Occurrence Book did not amount to it being proved. It is trite that when a complaint is lodged with the police by a complainant, it is not taken as an established fact but an allegation which requires investigation and proof. The lower Court stated that the mere fact that there was a record of the allegation in the Occurrence Book did not prove that it happened but that what it proved was that a complaint to that effect was lodged. It was for the Appellant to prove to a high degree of convincing clarity that the incident actually happened and that it was done with the Respondent's knowledge and consent or approval or that of his agents. There is nothing in the evidence on record to suggest this. The Appellant could have proved this by calling the person concerned who

reported the complaint to the police to testify to the incident and the Respondent's involvement. This ground also fails.

The sixth ground of appeal is that the trial Judge failed to state why she believed the witnesses of the Respondent despite their numerous contradictions and disbelieved those of the Appellant. The argument on this ground was general and related to the allegations of bribery and corruption which have been covered under grounds one to three of the appeal. This ground is thus general and the trial Judge's findings regarding the Appellant's and Respondent's witnesses have already been canvassed under the respective grounds above. The trial Judge properly evaluated the evidence of witnesses and where she did not believe a particular witness, the reason was stated. This ground equally fails.

Lastly, with respect to the fifth ground of appeal, the Act has a detailed provision on the issue of costs. Section 109 of the **Act** provides in part as follows:

> **"(1)Subject to the provisions of this section, costs, charges and expenses of, and incidental to, the presentation and trial of an election petition shall be borne in such manner and in such proportions as the High Court or a tribunal may order and in particular, any costs which in the opinion of the High Court or a tribunal have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.**
>
> **(5) Where, on the trial of an election petition, any person appears to the High Court or a tribunal to have been guilty of any corrupt practice or illegal practice**

relating to the election which is the subject of the election petition, the High Court or a tribunal may, after giving that person an opportunity of making a statement to show cause why the order should not be made, order the whole or a portion of the costs of, or incidental to, the trial of the election petition to be paid by that person to such person or persons as the High Court or a tribunal may determine."

Costs may be ordered against an unsuccessful party or one found to have committed a corrupt or illegal practice or any party to the proceedings and in such proportions as the trial court deems fit. This is a departure from the practice of costs generally following the event. Subsection (1) refers to costs being ordered against a party found to have been vexatious in conduct or found to have advanced frivolous allegations and objections during trial. The trial court may order such a party to pay costs despite the outcome of the petition. Subsections (2) (a) and (b) stipulate that costs may be ordered against the State or a particular erring election officer where a petition succeeds. Under subsection (5), costs can be ordered against any person found guilty of an illegal practice or corrupt practice in respect of the election being petitioned.

From the way the provision is couched, award of costs is still at the discretion of the trial court but we hasten to state that there is need for the trial court to make a finding on the aspect of the parties' conduct when the petition was being tried. We note that the trial Judge in this instance made no finding on this aspect. The mere fact

that one failed to prove his allegations to the required standard in an election petition does not mean that the petition was frivolous and vexatious. There must be an objective finding on this aspect.

In light of what has been stated above, particularly with respect to ground one, this is an appropriate case to order that each party should bear its own costs both of this appeal and of the petition in the High Court. For avoidance of doubt, the award of costs to the Respondent in the court below is hereby set aside.

Apart from the minor success in grounds one and five, this appeal fails and is hereby dismissed.

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H. CHIBOMBA
PRESIDENT
CONSTITUTIONAL COURT

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A.M. SITALI
CONSTITUTIONAL COURT JUDGE

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M.S. MULENGA
CONSTITUTIONAL COURT JUDGE

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P. MULONDA
CONSTITUTIONAL COURT JUDGE

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M.M. MUNALULA
CONSTITUTIONAL COURT JUDGE