IN THE CONSTITUTIONAL COURT OF ZAMBIA **2016/CC/A048**
HOLDEN AT LUSAKA **APPEAL NO. 13/2017**

(Constitutional Jurisdiction)

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

AND

IN THE MATTER OF: **SECTION 98 (c) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

AND

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

BETWEEN:

JONATHAN KAPAIPI **APPELLANT**

AND

NEWTON SAMAKAYI **RESPONDENT**

Coram: **Sitali, Mulenga, Mulembe, Mulonda and Munalula, JJC on 13th July, 2017 and 29th January, 2018**

For the Appellant: **Mr. K. Kombe of Andrew and Partners**

For the Respondent: **Mr. P.G. Katupisha of Milner & Paul Legal Practitioners**

J U D G M E N T

Sitali, JC, delivered the judgment of the Court.

Cases cited:

1. **Philip Mhango v Dorothy Ngulube and Others (1983) Z.R. 61.**
2. **Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138.**
3. **Sithole v The State Lotteries Board (1975) Z.R. 106.**
4. **Mlewa v Wightman (1995/1997) Z.R. 106.**
5. **Annard Chibuye v Zambia Airways Corporation Limited (1985) Z.R. 4.**
6. **Hollington v F. Hewthorn and Company Limited [1943] 2 All E.R. 35.**
7. **Mubita Mwangala v Inonge Mutukwa Wina SCZ Appeal No. 80 of 2007.**
8. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007.**
9. **Akashambatwa Mbikusita Lewanika, Evaristo Hicuunga Kambalala, Dean Namulya Mung'omba, Sebastian Saizu Zulu and Jennifer Mwaba Phiri v. Frederick Titus Jacob Chiluba (1998) Z.R. 49.**
10. **Brelsford James Gondwe v Catherine Namugala SCZ Appeal No. 129 of 2012.**
11. **Attorney-General v Kakoma (1975) Z.R. 212.**

Legislation referred to:

1. **The Electoral Process Act No. 35 of 2016, section 97 (2) (a) and (4).**

This is an appeal against a judgment of the High Court by which the Court dismissed the appellant Jonathan Kapaipi's petition and declared that the respondent, Newton Samakayi, was duly elected as Member of Parliament for Mwinilunga Constituency.

The appellant and the respondent were candidates in the parliamentary election for the Mwinilunga Constituency held on 11th August, 2016. The appellant was the candidate for the Patriotic Front (PF) Party while the respondent was the candidate for the United Party for National Development (UPND). The respondent

obtained 32,645 votes in the election while the appellant obtained 2,900 votes. Thus, the respondent was declared as the duly elected Member of Parliament for the Mwinilunga Constituency.

The appellant petitioned the High Court and alleged that the respondent was not validly elected because, during his campaign, the respondent engaged in illegal practices of publishing false statements against the appellant and his party and spreading hate speech against Mr. Lungu, the PF presidential candidate. The appellant's allegations, in a nutshell, were that the hate speech was to the effect that Mr. Lungu and the appellant had imported 250 ritual killers called matumbula into Mwinilunga Constituency to kill people in the area and that six PF youths who were in Mwinilunga Constituency to assist with PF campaigns were matumbulas who were armed with machetes and guns; that the respondent through one Mr. Mbimbi of the New Covenant Church published hate speech to the Christian community; that as a result of the hate speech an aspiring PF councillor in Ntambu ward in Mwinilunga Constituency was accused of killing a person and people in the area subsequently burned three village kitchens and a house belonging

to PF members; that the respondent and or his agents intimidated PF supporters and pulled down the appellant's campaign posters.

That on nomination day, the respondent sent his supporters to disrupt the appellant's nomination and they assaulted the appellant's supporters; that at Kanyihampa polling station the respondent's cadres assaulted and stopped three PF polling agents from performing their duties as polling agents.

The appellant further alleged that Mr. Andrew Kanyabu, who had applied to stand as a councillor under the UPND was recruited as a polling assistant while Mr. Jonathan Chiyezhi who had posters of the respondent on his motor vehicle was recruited as a presiding officer at Kabanda polling station; that on 10th August, 2016, the respondent and or his agents removed two polling assistants, whom they suspected of being PF sympathisers, from the group of polling assistants who were being deployed to various polling stations while Kennedy Katong'i who spread hate speech about Mr. Edgar Lungu was presiding officer at Mulumbi polling station. Lastly, the appellant alleged that the respondent and or his agents continued to campaign after the official close of campaigns at 18.00 hours on

10th August, 2016; and that the respondent's cadres were campaigning on the queues while voting was taking place on polling day, 11th August, 2016. The appellant alleged that as a consequence of the illegal practices outlined above, the majority of the voters in the constituency were prevented from voting for their preferred candidate.

The appellant thus sought the following reliefs in his petition:

i) **That it may be determined and declared that the said NEWTON SAMAKAYI was not duly elected Member of Parliament for Mwinilunga Constituency.**

ii) **That it may be determined and declared that the said election was void and therefore a nullity.**

iii) **That the Petitioner may have further or other relief as may be just.**

iv) **That costs occasioned by this petition be borne by the Respondent.**

The respondent filed an Answer in which he denied being involved in any corrupt or illegal practices prior to the elections as alleged by the appellant. He specifically denied preaching hate speech against the PF Party presidential candidate Mr. Edgar

Lungu and the PF members, either personally or through his agents. He denied that the people who burnt the three houses in Ntambu ward were his agents.

The respondent further denied intimidating PF supporters and pulling down PF posters or that he instructed his supporters or agents to disrupt the appellant's nominations or to physically assault the appellant's supporters.

He asserted that allegations to do with the conduct of elections were for the Electoral Commission of Zambia to respond to. Lastly he denied campaigning after the official close of campaigns and asserted that he was legally elected as Member of Parliament for Mwinilunga Constituency.

At the trial of the petition, the appellant testified in support of his petition and called 14 other witnesses. In rebuttal, the respondent testified in his defence and called 16 other witnesses.

The Electoral Commission of Zambia which was made a party to the petition as 2nd respondent, was subsequently removed from the proceedings by consent of the parties through a consent order dated 3rd October, 2016.

The learned trial Judge analysed the evidence adduced by the parties and found that the appellant had failed to prove all the allegations to the required standard except for one allegation. The allegation which was found to have been proved was the allegation about the presiding officer Katong'i communicating a clearly partisan message intended to sway the recipient to vote in a particular manner. The learned trial Judge, however, observed that there was evidence that the recipient of the message did not forward it to any other person and that he voted for his preferred candidate. For that reason, the learned trial Judge held that she was not satisfied that the non-compliance affected the result of the election in a substantial manner. The learned trial Judge, therefore, declared that the respondent was duly elected as Member of Parliament for Mwinilunga Constituency and accordingly dismissed the petition.

Dissatisfied with the decision of the lower Court, the appellant appealed to this Court advancing five grounds of appeal.

The first ground of appeal was that the learned trial Judge erred in law and fact when she held that there was no evidence that

the respondent accused PF members or the appellant of the ritual killing of Pethias Katanga to influence the vote in his favour.

The second ground of appeal was that the learned trial Judge erred in law and fact when she held that there was no cogent evidence adduced by the appellant to rebut the respondent's evidence that the respondent did not spread hate speech against the appellant after the Nyaunda ceremony and that there was no evidence that in the instances where the term "matumbula" was used by local people and UPND cadres, its use was so widespread that it covered the whole Mwinilunga Constituency and the majority of voters were or may have been prevented from electing their preferred candidate.

The third ground of appeal was that the learned trial Judge erred in law and fact when she held that there was no evidence which proved that the assaults on PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or that of his election agents or polling agents.

The fourth ground of appeal was that the learned trial Judge erred in law and fact when she held that Katong'i's action in sending the SMS clearly proved his partisan inclination and

contravened the Electoral Process Act No. 35 of 2016 (hereinafter referred to as the Act) but that the contravention did not compromise the election which was conducted as to be substantially in accordance with the provisions of the Act and that Katong'i's act did not affect the result of the election.

The fifth ground of appeal was that the learned trial Judge erred in law and fact when she held that the allegations by the appellant that the respondent and or his agents were campaigning after close of campaigns were general and lacked specificity.

Both the appellant and the respondent filed written heads of argument.

In the appellant's heads of argument Mr. Kombe argued grounds one and two together. Regarding the first ground of appeal, counsel submitted that the appellant strongly contended that there was sufficient evidence adduced during trial to show that the respondent and or his agents linked the death of Pethias Katanga to the appellant and alleged that the appellant and or his agents had killed Pethias Katanga because the appellant and his agents were called "matumbulas", a derogatory term used to describe ritual killers. Counsel submitted that the appellant's evidence on record

shows that the use of the derogatory and offensive term "matumbula" against the appellant and other PF members was all over Mwinilunga Constituency and that this greatly affected their campaigns before the elections and ultimately, the results of the election.

It was submitted that the evidence of the appellant and PW6 Binwell Nkala was that because of the matumbula tag, when Pethias Katanga died in Ntambu Chiefdom, UPND cadres alleged that the PF had killed him. That as a result of that accusation three kitchens which belonged to PW6, his brother Collins who stood on the PF ticket as a councillor and a third person were burned.

Counsel submitted that it was a fact that the kitchens were burnt by known people after the death of the deceased and that the trial Judge erred when she found that there was insufficient evidence on this point and believed that the kitchens were burnt mysteriously. Counsel contended that this implied that the learned trial Judge believed in witchcraft.

On ground two, counsel submitted that the appellant laid sufficient evidence before the trial Court to prove that the respondent spread hate speech that the appellant and the PF were

matumbulas after the Nyaunda ceremony. He submitted that the learned trial Judge fell into gross error when she stated that the appellant needed to adduce evidence to rebut the respondent's evidence when the appellant had already given his evidence. It was contended that it was not for the appellant to adduce evidence to rebut what the respondent said in examination in chief but for the trial Court to make a finding on the evidence of the appellant and that of the respondent.

Counsel submitted that the appellant had testified that on 23rd July, 2016, after a Nyaunda ceremony in Chief Sailunga's Chiefdom to which he and other PF members were invited, and at which the respondent was also present, the respondent and his agents started a story that the appellant had brought 250 "matumbulas" into Mwinilunga Constituency to kill people. That the term "matumbula" was all over the place to the extent that Chief Ntambu told all the village headmen to stop calling the appellant "matumbula" as they were tarnishing the Chief's image. It was contended that according to the appellant, once a person is tagged as "matumbula" in his language, he risks not only the votes but also his life and cited an

incident were two taxi drivers were killed after they were called matumbula.

It was submitted that, in rebuttal, the respondent merely stated that he never referred to the appellant as a "matumbula" because it was late when he left the Nyaunda ceremony and that there was no network in the area at that time.

Counsel contended that the tagging of the appellant as a "matumbula" affected his election because no one wants to associate with a person alleged to be a "matumbula" in a rural area. That the appellant was perceived as a threat to the community due to the tag of "matumbula" which was placed on him and other PF members and which was all over the Constituency.

Mr. Kombe submitted that there was cogent evidence on record for the election to be nullified. He contended that the learned trial Judge did not properly view the evidence before her and therefore misdirected herself when she held that the appellant's evidence should have rebutted the respondent's evidence. That it was not the duty of the appellant to rebut the respondent's evidence but vice versa. Counsel contended that the learned trial Judge's findings of fact were made in the absence of relevant evidence and

upon a misapprehension of facts and were findings which, upon a proper view of the evidence, no trial court acting correctly could reasonably make.

Counsel cited the case of **Philip Mhango v Dorothy Ngulube and Others**[1] in support of his submission that an appellate court can reverse the findings of fact made by a trial Judge if it is 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.

On ground three, Counsel submitted that the learned trial Judge erred in law and in fact when she held that there was no evidence which proved that the assaults on PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or that of his election agent or polling agent. He argued that the appellant testified that on nomination day, the respondent and UPND supporters attacked him and his supporters until they were rescued by the police and taken to the police station for safety. That some of his supporters including Susan Maladi

(PW4), Womba Maladi and Jameson Kapita were injured in the incident and were issued with medical reports.

Counsel further submitted that PW4, Susan Maladi, testified that she and her sister Womba Maladi were assaulted by two UPND cadres Anton and Shafi on nominations day. This was after they were chased from the Council office where she and other PF supporters had accompanied the appellant to file his nomination papers. That according to PW4, the respondent was seen in a motor vehicle whose doors were open as the UPND cadres shouted "muchikasa" meaning on the hand. That PW4 sustained injuries and said that she was still unwell and failed to vote for the appellant on polling day, hence the loss.

He submitted that regarding the issue of violence, PW3 also testified that he was assaulted by UPND cadres who included John Kapeso and Robert on polling day at Kanyihampa polling station where he was stationed as a PF agent, for reporting two UPND agents, Mr. Franco and Mr. Kachiza to the police for campaigning at the polling station. He sustained injuries and was issued with a medical report by police.

Counsel contended that going by this evidence, the trial Court should have found that the acts of violence were committed with the knowledge and approval or consent of the respondent as he was present when UPND cadres assaulted PF cadres on nomination day and that he did nothing to restrain the UPND cadres from assaulting innocent female PF cadres.

He submitted that PW4 ably corroborated the evidence of the appellant in the Court below that the violence on nomination day occurred in full view of the respondent. That the highlighted acts of violence show that the respondent and his agents were involved in these illegal practices and other misconduct.

Counsel went on to submit that the reference in section 97 (2) (a) of the Act to the majority of voters in a constituency being prevented from electing a candidate of their choice does not entail that the appellant should have rounded up all the witnesses from the 75 polling stations in the constituency to prove that a corrupt or illegal practice or other misconduct was so widespread as to affect the outcome of the election. He further submitted that section 97 (2) of the Act provides for instances where a Court can draw necessary inferences from the evidence on record to conclude, for

instance, whether or not the majority of the voters were, or could have been, affected by the violence perpetrated by the respondent's party so as to affect the outcome of the election.

Counsel submitted that the evidence adduced by the appellant and his witnesses established or proved the allegations in the petition to a fairly high degree of convincing clarity which is the standard to which allegations in an election petition must be proved as was held in **Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others**[2]. Counsel argued that the trial Judge did not make an adverse finding of fact against the appellant and his witnesses when she stated that she believed the respondent's witnesses. That it was shown in the Court below that the respondent's witnesses contradicted each other and that they gave inconsistent statements in examination in chief and in cross examination. Counsel contended that the evidence of the respondent's witnesses was mostly impeached in cross-examination and that the learned author Steven Lubet in his book entitled **Modern Trial Advocacy** at page 137 states that the impeachment of the testimony of a witness is intended to discredit the witness as a reliable source of information.

Thus, Counsel urged us to substitute our opinion for that of the trial Court and find that the respondent and or his agents had knowledge and consented to or approved of the assault of PW3, PW4, PW5 and PW8, as according to Counsel, the evidence on record reveals that they were present when these witnesses were assaulted. Counsel cited the case of **Sithole v The State Lotteries Board**[3] to support his submission that where an appellate court is in as good a position as the trial court to draw inferences, it is at liberty to substitute its own opinion for any opinion which the trial court might have expressed.

Regarding ground four, Counsel contended that the learned trial Judge erred in law and fact when she held that Katong'i's action in sending the SMS clearly proved his partisan inclination and contravened the Act but went on to find that the contravention did not compromise the election which was conducted as to be substantially in accordance with the provisions of the Act and that Katong'i's act did not affect the result of the election.

Counsel cited section 89 (1) (j) of the Act and submitted that it is clear from the evidence on record that there was serious non-compliance with the provisions of the Act as it related to the

conduct of elections. That the evidence of PW2, Mulenga Chishimba, had shown that UPND cadres forcibly removed him and other election officers whom they perceived to be politically inclined to the PF from the group of election officers and that this evidence was not disputed. He contended that the conduct of the UPND cadres highly compromised the credibility of the elections in Mwinilunga Constituency.

After citing the provisions of section 97 (2) of the Act, counsel submitted that the conduct of the UPND cadres was so grave in nature that it adversely affected or may have adversely affected the outcome of the election. He cited the case of **Mlewa v Wightman**[4] in which it was stated that an election can be nullified if there was wrong doing of the type and scale which satisfies the Court that it had adversely affected or may have affected the election. It was submitted that it was evident from the evidence of PW2 that the elections in Mwinilunga Constituency were not conducted within the principles laid down in the Act and that it was shown in evidence that the respondent was aware of these illegalities and did nothing to prevent them from being committed.

Counsel further submitted that there was evidence on record which revealed that Katong'i's partisan inclination and participation in the elections as a polling assistant compromised the elections substantially. He contended that the appellant in the Court below had testified that he found a lot of anomalies in Parliamentary results in Indalu and Lukokwa polling stations, which are in remote rural areas where there is a lot of illiteracy, and yet both polling stations recorded zero rejected votes. It was submitted that at Ntambu polling station out of two streams, the PF presidential candidate recorded zero votes and yet the PF councillor and his family live in that area. That the appellant testified that out of 75 polling stations, he won at Inkenyaule polling station where he polled more than 500 votes while the respondent only had 07 votes and that this polling station had a problem with declaring the winner and that there was unwillingness to take the results from the polling station to the totaling centre. It was submitted that all these anomalies arose because of the way presiding officers were chosen as they were only screened by UPND cadres. Further, that it is on record that campaigns were conducted on the election day in direct contravention of the Electoral Code of Conduct and the

Act. It was submitted that this was a clear indication that election officers were highly compromised as seen from the acts of Kennedy Katong'i an election agent who was very partisan.

Under ground five, it was submitted that the trial Judge did not consider the evidence on record when she held that the allegation by the appellant that the respondent and or his agents were campaigning after close of campaigns was general and lacked specificity. Counsel contended that the evidence of the appellant and his witnesses regarding that allegation was specific to the extent of identifying the individuals who were campaigning on election day. That the trial Judge totally disregarded that evidence when she held that the allegations by the appellant were general and lacked specificity. Counsel again cited the case of **Philip Mhango v Dorothy Ngulube and Others**[1] and contended, in conclusion, that the findings of fact made by the trial Judge should be reversed as there was ample evidence on record based on which, if properly viewed, the trial Judge acting correctly would have made reasonable conclusions.

In augmenting the arguments on grounds one, two and three, Mr. Kombe submitted that there were pertinent issues in the

interpretation of section 97 (2) (a) of the Act which the learned trial Judge did not take into account when she dismissed the petition. He contended that the trial Judge took a narrow and restrictive interpretation of section 97 (2) (a) with regard to the majority of voters in a constituency being prevented from electing a candidate of their choice. He submitted that the trial Judge did not take into account the evidence led by the appellant (as petitioner) and his witnesses.

Mr. Kombe submitted that grounds one, two and three relate to the hate speech propagated by the respondent and his agents and violent activities which are illegal practices and misconduct under the Electoral Process Act. That the record of appeal will show that evidence was led to show the extent of these illegal practices and misconduct by the respondent and his agents. That for instance, the trial Judge ruled that there was no evidence which proved that there was hate speech and violent activities carried out with the knowledge and consent or approval of the respondent and yet there was strong evidence led by the appellant and by PW2, PW3, PW5 and PW8 regarding violence. Counsel submitted that regarding the hate speech, RW3 had announced in church that the

appellant and his agents were matumbulas. That in spite of all that evidence on record, the learned trial Judge ruled that there was no evidence to prove the allegations.

Counsel contended that the learned trial Judge did not address her mind to whether the witnesses who testified represented a constituency, district or ward. That bearing in mind that election petitions are time bound, most witnesses were from one ward called Kanyihampa ward and that if the evidence of those witnesses was considered by the trial Judge, she would have arrived at the decision that the witnesses did represent the majority of voters in that particular ward. Counsel submitted that by inference, the illegal activities which the witnesses from Kanyihampa ward testified about were common and wide spread. Mr. Kombe submitted that it would be impossible to call all the residents of a particular ward to testify in order to prove that the majority of voters were or may have been prevented from voting for their preferred candidate. Counsel invited us to substitute our opinion for that expressed by the learned trial Judge, as according to counsel, we are in as good a position as the learned trial Judge was

to draw inferences from the evidence on record. He cited **Sithole v The State Lotteries Board**[3] as authority for his proposition.

Counsel submitted that it was the appellant's position that the majority of voters in the constituency were, or may have been prevented from voting for a candidate of their choice, due to the alleged illegal practices that occurred in the one ward, namely Kanyihampa ward. Counsel therefore urged us to uphold the appeal and reverse the learned trial Judge's decision.

In opposing the appeal, Mr. Katupisha, Counsel for the Respondent relied on the Respondent's written heads of argument which he augmented with brief oral submissions.

In opposing grounds one and two, Counsel submitted that there was no witness who testified before the lower Court that he or she saw or heard the respondent or his election agents accuse PF members or the appellant of the ritual killing of Pethias Katanga to influence the vote in his favour. It was submitted that according to the evidence of PW6 the death of Pethias Katanga was not related to ritual killing which was why PW6 took the matter to the traditional court at the chief's palace because witchcraft was suspected. That PW6 told the Court that what caused the death of Pethias Katanga,

according to the nurse, was beer which he took on an empty stomach. Counsel submitted that that cannot be said to be ritual killing.

He further submitted that the evidence of RW10, was that people in the village accused members of the deceased's family of putting medicines on the grave of the deceased so that the dead person could burn the shelters in the village. It was contended that going by that evidence, it could not be said that the respondent and or his agents accused PF members and the appellant of being ritual killers. Counsel submitted that ritual killing takes a different form in that a person is physically murdered with the motive of removing special body parts. That in this case, Pethias Katanga was not physically murdered by anybody and therefore ritual killing was not in issue. Counsel submitted that the appellant's allegation that the respondent accused him of being a ritual killer was a figment of his imagination calculated to sway the trial Court's decision in his favour.

Counsel contended that in order for the appellant to have succeeded in his petition, he ought to have brought a witness who personally heard the respondent accuse PF members or the

appellant himself of being "matumbula" or a witness who personally heard either of his two election agents accuse PF members or the appellant of being ritual killers. It was submitted that the Act specifically provides that in order for an election to be nullified, a corrupt practice, illegal practice or other misconduct has to be committed in connection with the election by a candidate or with the knowledge and consent or approval of the candidate or that of the candidate's election agent or polling agent. That the appellant further needed to prove that because of the illegal act committed by the candidate or with the candidate's knowledge and consent or approval or that of his election or polling agent, the majority of voters in the constituency were, or may, have been prevented from electing their preferred candidate.

Counsel submitted that the standard provided for under section 97 (2) of the Act is very high and that, in the present case, there was no evidence on record to show that the respondent had knowledge of the alleged illegal practice or that he consented to it. That there was equally no evidence to show that the respondent's election agents or his polling agents committed such an illegal act.

Counsel submitted that the trial Judge was therefore on firm ground to hold as she did and that ground one must, therefore, fail.

With regard to ground two, it was submitted that no witness testified to the effect that the respondent spread hate speech against the appellant after the Nyaunda ceremony and that it is on record that after the ceremony, the respondent remained behind in an area where there was no network to communicate with people in the Boma. That the respondent testified in chief and maintained in his cross examination that he remained behind after the ceremony.

Counsel therefore submitted that the trial Court cannot be faulted in its finding that there was no cogent evidence to prove that the respondent spread hate speech against the appellant after the Nyaunda ceremony because, in cross examination, the respondent's evidence remained unshaken. Counsel submitted that the appellant failed to prove the allegation to the required standard and that the trial Judge was on firm ground to dismiss it. He urged that ground two should, therefore, also fail.

In opposing ground three, Counsel submitted that the learned trial Judge was on firm ground in holding that there was no evidence which proved that the assaults on PW3, PW4, PW5 and

PW8 were carried out with the knowledge and consent or approval of the respondent or that of his election or polling agents.

That the respondent told the Court that on the nomination day, 30th May, 2016, it was his team that was attacked by PF cadres as they were coming from Kabwiku going to his campaign centre through the Boma on the only road leading to the campaign centre.

He submitted that it was, therefore, not true that the respondent and his team attacked the appellant and his cadres but that, on the contrary, it was the appellant and his cadres that attacked the respondent's team, especially the women who were pulled out of the motor vehicles and one person who was pushed off his motor cycle. That Susan Maladi (PW4), Womba Maladi and Jameson Kapita were not assaulted by the respondent's team as members of his team were in motor vehicles and proceeded to the campaign centre after the police intervened.

It was submitted that the trial Court cannot be faulted in its finding that there was no evidence to prove that the respondent's agents assaulted PF cadres as the people who were mentioned by PW3, PW4, PW5 and PW8 as their assailants were not the

respondent's agents and were not allowed to do what they did, if at all they did anything of that sort. It was submitted that PW4 took the case to Court but the alleged UPND cadres were acquitted. Counsel argued that the appellant cannot rely on the result of the criminal trial to prove his case as the law clearly states that the result of a criminal trial cannot be referred to as proof of a fact which must be established in a civil case. To that effect, counsel cited the case of **Annard Chibuye v Zambia Airways Corporation Limited**[5] and the English case of **Hollington v F. Hewthorn and Company Limited**[6] in support of the submission that the criminal proceedings in the subordinate court which were relied upon by the appellant and PW4 and others were not relevant to the election petition proceedings in the lower Court and could not be relied upon in those proceedings.

Regarding the allegation that UPND cadres assaulted Teddy Kachiza (PW3), a PF agent on polling day, it was submitted that the evidence of PW3 was in fact not the correct position of what transpired, and that John Kapeso and Robert who were alleged to have beaten PW3 were not the respondent's polling agents and that they were not allowed to assault PW3, as it was alleged they did.

Counsel submitted that on polling day no one is allowed to wear party regalia and that it was therefore difficult for anyone to identify party cadres.

It was submitted that RW6 Francis Ilenda denied beating PW3 and that he told the Court in cross examination that he did not know that Mr. Kachiza was assaulted or that he reported the matter to the police.

Counsel further submitted that RW9 Kachiza Kabwita, whom the appellant alleged had beaten PW3 Teddy Kachiza at Kanyihampa polling station, told the Court that he left Kanyihampa polling station at 07.00 hours and went to Kanyama to take food to polling agents and that he was in Kanyama until 04.00 hours on 12th August, 2016. Counsel contended that it was therefore not possible that RW9 was present at Kanyihampa polling station at the time he is alleged to have assaulted PW3.

It was contended that if PW3 was assaulted, it was not with the respondent's knowledge and consent or approval or that of his election or polling agents. That the assault of PW3 therefore, could not be the basis upon which the respondent's election could be nullified.

With regard to the alleged assaults on nomination day, Counsel submitted that the acts of violence were not committed with the knowledge and consent or approval of the respondent, as alleged by the appellant, as the respondent's witnesses had testified that it was they that were in fact attacked by PF cadres on their way to their campaign centre, as they were unaware, at that time, that the PF candidate was filing his nomination papers.

Counsel referred us to the nomination time table at page 217 of the record of appeal which, he submitted, shows that the PF candidate was the first candidate scheduled to file his nomination papers from 09.00 hours to 09.50 hours. Counsel contended that at the time the UPND campaign team left Kabwiku to proceed to their campaign centre and found the road blocked, it was well after the respondent had filed his nomination papers between12.00 and12.50 hours. It was submitted that the respondent's team did not expect the appellant and his team to be at the Civic Centre as according to the time table, the PF candidate had already filed his nomination papers prior to that time.

Mr. Katupisha further submitted that section 97 (2) (a) of the Act has set a very high standard of proof in election petitions and

that, in terms of that section, the trial Court cannot be called upon to draw inferences from the evidence adduced by a party as submitted by Counsel for the appellant. He argued that a petitioner in an election petition has to prove, on a standard higher than a mere balance of probabilities, that a candidate, whose election is challenged, committed a corrupt or illegal practice or other misconduct or that the corrupt or illegal act in issue was committed with the knowledge and consent or approval of the candidate or that of the candidate's election agent or polling agent. He submitted that a perusal of the appellant's petition reveals that the appellant made general allegations against the respondent and or his agents without specifying whether it was the respondent or a particular election or polling agent of the respondent who committed a specified corrupt or illegal practice or other misconduct. Counsel submitted that the appellant ought to have precisely stated that the respondent or his named agent committed the corrupt or illegal practice or other misconduct to enable the respondent to respond precisely to every allegation.

It was contended that although Mwinilunga Constituency is a vast rural constituency, the appellant only adduced evidence of

alleged violence in Kawiku ward to prove that the majority of voters in the 19 wards of the constituency were prevented from electing the candidate whom they preferred.

Counsel contended that whereas the appellant submitted that section 97 (2) of the Act provides for instances where the Court can draw necessary inferences from the evidence on record to conclude whether or not the majority of the voters could have been affected by the violence from the respondent's party, the law provides that the corrupt practice or illegal practice or misconduct must be widespread in the Constituency so as to affect the majority of the voters. Further, that the law provides that the Court must be satisfied about the scale or type of wrong doing. That this Court cannot do this by drawing inferences.

The case of **Mubita Mwangala v Inonge Mutukwa Wina**[7] was cited in support of this submission in which the Supreme Court held that:

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

constituency. In other words, the corrupt practice or illegal practice or misconduct must be widespread in the constituency so as to affect the majority of voters.

...We did indicate in the case of Mlewa v Wightman[4] that the Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the majority of voters in the constituency not to vote for their preferred candidate."

It was contended that the appellant's evidence generally failed to satisfy the standard of proof set in the case of **Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others**[2] which is to a fairly high degree of convincing clarity and that it also failed to meet the standard set out in section 97 (2) (a) of the Act. That the case of **Sithole v The State Lotteries Board**[3] cited by the appellant does not apply. Counsel urged that ground three should therefore fail.

In opposing ground four counsel submitted, after citing section 97 (4) of the Act, that the issue of Katong'i's SMS arose out of the evidence of PW13, Peter Banda, who said after he received the message from Katong'i, he kept it to himself and that he voted for his party. That in the circumstances, that act alone did not affect the outcome of the election.

Counsel proceeded to submit that Kennedy Katong'i's act of sending the SMS on a date in June, 2016, before he was appointed as an election officer, could not be the basis to declare an election

void as he was not an election officer performing official duties in connection with the elections held on 11th August, 2016 and that the act did not relate to the conduct of elections.

It was submitted that the learned trial Judge was on firm ground when she held that Katong'i's action in sending the SMS clearly proved his partisan inclination and contravened the Act but that the contravention did not compromise the election which was conducted as to be substantially in accordance with the provisions of the Act, and that Katong'i's act did not affect the result of the election.

It was further submitted that the respondent's election could not be nullified based on the conduct of UPND cadres but that it could only be nullified based on a proven corrupt or illegal practice or other misconduct committed by the respondent personally as a candidate in relation to the election or with his knowledge and consent or approval or that of his election agent or polling agent. That section 97 (2) (a) of the Act has prevented casting the net wide.

Counsel contended that since the appellant had removed the Electoral Commission of Zambia as a party to the petition by consent of the parties, the appellant could not bring an allegation

relating to the conduct of elections by Electoral Commission officers against the respondent, as the respondent did not employ election officers.

It was submitted that based on the case of **Mlewa v Wightman**[4], the evidence adduced before the lower Court by the appellant was insufficient to warrant the nullification of the election as the said wrong doing by Katong'i could not be said to be of a type and scale which satisfied the lower Court that the act had adversely affected or may have affected the election, when the text message was only shared between two people in a constituency that has 75 polling stations. Counsel urged that ground four must accordingly fail.

Lastly, in opposing ground five, it was submitted that the learned trial Judge was on firm ground in holding that the allegations by the appellant that the respondent and or his agents were campaigning after the close of campaigns were general and lacked specificity. That the appellant as a petitioner knew or ought to have known that up until the close of the campaign period, the respondent had only two election agents. That in order to prove this allegation, the appellant needed to adduce specific evidence as

to whether it was the respondent or his agents who were campaigning after the close of the campaign period instead of merely saying the respondent and or his agents were campaigning after the close of the campaign period. It was contended that the appellant generalised because he did not know who allegedly continued to campaign after the close of the campaign period. That the appellant in his pleading cast the net wide in the hope of catching either the respondent or his agents.

It was further argued that the appellant did not adduce any evidence to establish how the respondent and his agents were campaigning after the close of the campaign period and so the allegation remained speculative. Counsel urged for that reason that ground five must fail.

Counsel submitted, in conclusion, that the appellant failed to prove his allegations against the respondent to the required standard as provided by section 97 (2) of the Act. He therefore prayed that this appeal be dismissed with costs.

We have considered the grounds of appeal, the heads of argument and the authorities cited therein and the judgment of the lower Court.

Before we consider the grounds of appeal, we wish to examine the law regarding the circumstances in which an election of a candidate as a Member of Parliament, among others, may be declared void. Section 97 (2) (a) and (b) of the Electoral Process Act No. 35 of 2016 (which we shall refer to as the Act) on which the petition was based provides as follows:

> **"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor 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."**

The provisions of section 97 (2) (a) of the Act are clear and unambiguous. An election of a candidate cannot be nullified unless the person challenging the election of the candidate proves to the

satisfaction of the Court that the candidate in question personally committed a corrupt practice, an illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or other misconduct was committed by another person with that candidate's knowledge and consent or approval or with the knowledge and consent or approval of the candidate's election agent or polling agent.

A further requirement of section 97 (2) (a) is that where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of his election agent or polling agent, the petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred.

Thus, it is not sufficient for a petitioner to only prove that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and

therefore prevented or may have prevented the majority of the voters from electing a candidate of their choice.

To that effect, the Supreme Court in the case of **Mubika Mubika v Poniso Njeulu**[8] stated that:

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

Further, in **Mubita Mwangala v Inonge Mutukwa Wina**[7] the Supreme Court said:

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

In the earlier case of **Josephat Mlewa v. Eric Wightman**[4] the Supreme Court held that:

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

The above authorities, which are persuasive, demonstrate the import of the majority provision under section 97 (2) (a) of the Act. We duly endorse them.

Under section 97 (2) (b) of the Act, the election of a candidate may be declared void if it is proved to the satisfaction of the Court that the provisions of the Act were not complied with in the conduct of an election and that as a result of the non-compliance, the results of the elections were affected. Where it is demonstrated that despite the non-compliance with the provisions of the Act, the election was conducted as to be substantially in accordance with the provisions of the Act and further, that the act or omission complained of did not affect the result of the election, the election will not be declared void.

In this case, the appellant's election petition was premised on section 97 (2) (a) of the Act. Thus, the appellant was obliged to prove not only the commission of the corrupt or illegal practices or other misconduct by the respondent or with his knowledge and consent or approval or that of his election or polling agent, but also that the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

We also wish to restate that in an election petition, just as in any other civil matter, the burden of proof is on the petitioner to establish the electoral offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. A consideration of Zambian jurisprudence reveals that the evidence adduced in support of allegations made in an election petition must establish the issues raised to a fairly high degree of convincing clarity. In the persuasive authority of **Lewanika and Others v Chiluba**[9] the Supreme Court said this regarding the standard of proof:

> **"As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.... It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."**

In **Brelsford James Gondwe v Catherine Namugala**[10] the Supreme Court said:

> **"The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity:"**

Thus in the present case, the evidence adduced by the appellant in the Court below needed to have established the issues

raised in the petition to a fairly high degree of convincing clarity and to have demonstrated that the proven electoral offences were so widespread that the majority of voters were or may have been prevented from electing the candidate whom they preferred.

It is with these principles in mind that we shall consider the respective grounds of appeal.

Grounds one and two relate to the allegation in the petition that the respondent and or his agents preached hate speech against the PF presidential candidate Mr. Lungu and the appellant to the effect that they had imported 250 ritual killers called matumbula into Mwinilunga Constituency to kill people in the area. That as a result of the hate speech, an aspiring PF councillor in Ntambu ward was accused of killing Pethias Katanga and people in the area burned three village kitchens and one house belonging to PF members as a result of the accusation.

The evidence on the death of Pethias Katanga in Ntambu ward was adduced by PW6 Binwell Nkala and RW10 Jessy Kambungu. PW6 essentially testified that when Pethias Katanga died on 30th July, 2016, mourners from the UPND alleged that PF members had killed him as he could not have died from drinking beer.

Subsequently, PW6's kitchen and the kitchen of his brother, a PF member and that of another man were burned. A brother of the deceased told PW6 that his kitchen was burnt because PW6 was one of the ritual killers who killed the deceased.

PW6 testified that the police visited the scene of the burnt hut and after they left, people said if the police had picked anyone from the area, PF supporters, especially the Nkala family, would have been taught a lesson. PW6 said because of the death of Pethias Katanga, and the resulting threats, they stopped campaigning and wearing PF regalia.

In cross examination, PW6 said he and his brother Collins Nkala sued Chris Ngolofwana in the traditional Court because he accused them of witchcraft.

On the other hand, RW10 testified that on 27th July, 2016 her nephew Pethias Katanga died. A week later the shelters of Binwell Nkala (PW6), his brother Collins Nkala and Mr. Kauta were burnt in the night. RW10 stated that people in the village accused the family of the deceased of putting charms on his grave so that the dead person could burn shelters in the village. She denied that the family

placed charms on the grave of the deceased and said that the shelters and houses burnt mysteriously.

The learned trial Judge analysed the evidence and stated that although the appellant alleged that due to the hate speech, an aspiring PF councillor in Ntambu ward in Mwinilunga Constituency was accused of killing the deceased, which accusation led people in the area to burn three village kitchens and a house, she was of the view that the death of Pethias Katanga had nothing to do with the spreading of hate speech. The trial Judge believed the evidence of RW10 who said the death of her nephew was not linked to ritual killing but was linked to witchcraft and that the community, including RW10, believed that it was the deceased who mysteriously burnt the kitchens and houses of people who caused his death.

We have considered the evidence on record regarding this issue. We note that whereas the appellant challenges the trial Judge's finding that there was no evidence that the respondent accused PF members or the petitioner of the ritual killing of Pethias Katanga to influence the vote in his favour, an examination of the evidence adduced by PW6 reveals that this witness did not say that the respondent or either of his election agents accused the

appellant or PF members of the ritual killing of Pethias Katanga. Instead, PW6 clearly said that it was his family, the Nkala family, who were accused of the ritual killing of Pethias Katanga. He further said he and his brother Collins Nkala sued Chris Ngolofwena in the traditional Court because he accused them of witchcraft. RW10 confirmed that she and other people in the village believed the death of Pethias Katanga was due to witchcraft.

A careful consideration of the evidence on record also reveals that there was no evidence whatsoever that the death of Pethias Katanga was linked to the appellant and PF supporters by the respondent and his agents as alleged by the appellant or that the burning of the village kitchen, the house and the motor bike was caused by the hate speech allegedly propagated by the respondent and his agents.

The appellant did not adduce any evidence to show that the incidences of arson which occurred in Ntambu ward were as a result of hate speech.

We cannot fault the learned trial Judge when she accepted the evidence of RW10 as she had observed the witnesses and clearly resolved the conflicting evidence adduced by the parties based on

the credibility of the witnesses. It is settled law that a trial 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 as held in the case of **Attorney-General v Kakoma**[11].

Going by the evidence on record, the trial Judge was on firm ground when she found no evidence that the respondent accused PF members or the appellant of the ritual killing of Pethias Katanga to influence the vote in his favour. We too have found no such evidence on the record of appeal. Ground one therefore fails and is dismissed.

Under ground two, the appellant attacks the learned trial Judge's finding that there was no cogent evidence adduced by the appellant to rebut the respondent's evidence that he did not spread the story that the appellant and his agents were matumbula after the Nyaunda ceremony. And the further finding that there was no evidence that in instances when the term matumbula was used by local people and UPND cadres, its use was so widespread as to cover the whole Mwinilunga Constituency so that the majority of

voters were or may have been prevented from electing their preferred candidate.

In support of this allegation, the appellant testified that after the Nyaunda ceremony which was held on 23rd July, 2016 in Senior Chief Sailung'a's Chiefdom, the respondent and his agents spread a story that PF had brought 250 ritual killers called matumbula to kill the people of Mwinilunga. The appellant stated that the respondent and his agents announced this on the radio and on a public address system. That the respondent's agent, Francis Imenda, continuously made the announcement from 08.00 hours to 18.00 hours every day at the old market and further that Derrick Chiyanyi drove around with Tolopo, who was commonly known as Chamwenini, in the respondent's car and announced that the appellant was a matumbula. According to the appellant, other people continued with the propanda until voting day.

In rebuttal, the respondent denied that he originated the story alleging that the appellant had brought 250 ritual killers into Mwinilunga Constituency and that the appellant and other PF members were matumbula.

He stated that after the Nyaunda ceremony he remained in Chief Sailung'a's area which had no cellular phone network for him to have originated the story. He said that if Derrick Chiyangi and Tolopo made announcements about the appellant being a matumbula, as the appellant alleged, he was not privy to the said announcements as the two men were not his agents.

RW6, Frank Silver Ilenda, alias Franco, who was alleged to have announced on a public address system at the market that the appellant was a matumbula, denied making such an announcement and said he only occasionally played UPND campaign songs on his music system.

Further RW3, Wilson Mbimbi denied publishing hate speech to the church and said his role as a preacher was to preach peace and unity. That due to the happenings in the Boma, he asked the congregation to pray for peace. RW3 said although he announced regarding the arrest of the six strange men in town, he reassured the congregants not to worry as the police had intervened. RW3 stated that at the time he made the announcement, the church was praying for peace during campaigns and also during and after the elections.

In evaluating the evidence on this issue, the learned trial Judge considered the definition of election agent and polling agent as provided in section 2 of the Act. The learned Judge observed that the legal position was that an agent had to be specifically appointed by the candidate as held in the case of **Akashambatwa Mbikusita Lewanika, Evaristo Hicuunga Kambalala, Dean Namulya Mung'omba, Sebastian Saizu Zulu and Jennifer Mwaba Phiri v Frederick Titus Jacob Chiluba**[9]. That the respondent's testimony that he had appointed two election agents, namely William Mukang'ala (RW17) and Aaron Kakwimba was corroborated by the evidence of RW17.

The trial Judge found that there was no evidence that the respondent and or his agents used the term matumbula to refer to the appellant and his agents. The learned trial Judge further found that there was also no evidence that in instances when the term was used by local people and UPND cadres, its use was so widespread that it covered the whole Mwinilunga Constituency and that the majority of voters were or may have been prevented from electing their preferred candidate.

The trial Judge further found that while the appellant contended that there was evidence on record adduced by the appellant to the effect that the use of the offensive term matumbula placed on him and other PF members was all over the Constituency, which situation negatively affected his campaign before the elections and ultimately the results of the election, the appellant did not highlight that evidence.

Based on the evidence on the record of appeal, we agree with the learned trial Judge that the appellant's allegations regarding the preaching of hate speech were not proved to the required standard.

In view of the requirement that a petitioner must prove the allegations in the petition to a fairly high degree of convincing clarity, we agree with the learned trial Judge that in this case, not only did the appellant fail to adduce any evidence to prove that the respondent and his agents referred to him and his agents and supporters as matumbula, the appellant did not adduce any evidence to show that the use of the term matumbula was so widespread in the Constituency to the extent that the majority of the voters were or may have been prevented from electing their preferred candidate.

Ground two therefore has no merit and is dismissed.

Under ground three, the appellant challenges the learned trial Judge's finding that there was no evidence which proved that the assault of PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or of his election or polling agents. The appellant argued that the respondent was present when UPND cadres assaulted PF supporters on nomination day and he did nothing to restrain them from doing so until the PF supporters were rescued by the police who took them to the police station.

The evidence regarding the issue of violence was adduced by PW3, PW4, PW5 and PW8. PW3 Teddy Kachiza stated that he was the appellant's agent and that on polling day he was assaulted by UPND cadres at Kanyihampa polling station in Mulumbi ward because he warned a Mr. Franco and a Mr. Kachiza to stop campaigning by flashing the UPND symbol.

PW3, however, conceded in cross examination that voters at Kanyihampa polling station did not wear party regalia and so there was no way he could identify the party to which the men, whom he alleged assaulted him, belonged.

PW4 Susan Maladi testified that on nomination day, 30th May, 2016, she accompanied the appellant to the Council office to file his nomination papers. That she was subsequently assaulted and undressed by Anton and Shafi, whom she said were UPND cadres. The two men were charged and prosecuted for the assault but were acquitted although they admitted the charge after they sought her forgiveness. PW4 said she failed to vote on 11th August, 2016 as she was embarrassed after she was assaulted and undressed.

PW5, Fides Mutinta Chimba, also testified that she was assaulted by UPND cadres on polling day, 11th August, 2016, while she was at Kanyihampa polling station as a PF polling Agent. PW5 stated that she recognized her assailants as UPND cadres because of the regalia they wore. PW5 stated that she and other PF members were rescued by the police who took them to the police station for their safety. PW5 further stated that on the way to the police station, UPND cadres, who included Katong'i, Franco and John, threw stones at them.

PW8 Griffin Mulongesha testified that on 2nd August, 2016 he attended a PF meeting. After the meeting he and other people escorted their councillor to some shops. After the councillor left, a

person who appeared mad started beating PF members who wore PF party regalia with a stick. PW8 said he was hit on the nose with the stick and started bleeding. He further said he was also hit on the left hand by two UPND cadres namely Kasongo Kazhila and Stevenson Kazhila and he sustained injuries.

PW8 alleged that he did not vote on 11th August, 2016 as his face was still swollen after the act of violence. In cross examination, PW8 conceded that the person who appeared mad and assaulted people with a stick did not wear any party's regalia. He further conceded that it was that person who assaulted him.

Each of the four witnesses named specific individuals whom they said were UPND cadres as the persons who assaulted them. None of these four witnesses testified that the respondent or either of his appointed election agents were present when the alleged assault took place or that the assault was perpetrated with the knowledge and consent or approval of the respondent or that of his appointed election or polling agent.

It is trite that a candidate is responsible for the illegal or corrupt practices or other misconduct which he personally engages in or which are committed with his knowledge and consent or

approval or that of his election agent. Not everyone in a candidate's political party is his election agent in terms of the law as an election agent has to be specifically appointed. This was clearly stated by the Supreme Court in the case of **Lewanika and Others v Chiluba**[9]. In that case the Supreme Court observed thus:

> **"We are mindful of the provisions of the Electoral Act that a candidate is only answerable to those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's political agent since under regulation 67, an election agent has to be specifically so appointed."**

We endorse this sound principle of law. In the present case, we have examined the evidence on the record as given by PW3, PW4, PW5 and PW8. It is to the effect that the assailants of the named witnesses were alleged UPND cadres. In the circumstances, we are of the considered view that the learned trial Judge was on firm ground when she held that there was no evidence that the assaults on PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or of his election agents. We say so because according to the evidence, the respondent had appointed two election agents and neither of them was placed at the scene of the assault of any of the four witnesses who testified for the appellant regarding the allegation of violence.

Although PW4 said she saw the respondent in a motor vehicle on nomination day, she clearly stated that she and her sister Womba were assaulted by the two people she named at Kanyihampa primary school were they had taken refuge. From PW4's evidence neither the respondent nor his election agents were present in that place.

Further, the evidence on record is to the effect that all the alleged scenes of violence occurred only in one ward, namely Kanyihampa ward. The undisputed evidence is that Mwinilunga Constituency has 19 wards. Clearly in the circumstances, it cannot be said that the alleged acts of violence, even if they had been proven to the required standard, which they were not, could be said to have been so widespread as to have prevented the voters in the Constituency from electing their preferred candidate.

Given that allegations in an election petition must be proven to a fairly high degree of convincing clarity, we agree with the learned trial Judge that the evidence adduced by the appellant in relation to the alleged violence did not satisfy the stipulated standard. Ground three therefore fails on that basis.

Ground four relates to the allegation that Mr. Andrew Kanyabu who had applied for candidature as councillor under the UPND was recruited as a polling assistant and that Mr. Jonathan Chiyezhi who had posters of the respondent on his vehicle was recruited as presiding officer at Kabanda polling station.

The trial Court observed that the respondent denied that Andrew Kanyabu or Jonathan Chiyezhi were his agents and that he further denied giving his posters to Mr. Chiyezhi. The lower Court further noted that the respondent's evidence was that Jonathan Chiyezhi was not a presiding officer but a presiding assistant in charge of the referendum. That the respondent also said he did not employ the two officials as they were employed by the Electoral Commission of Zambia and that he had no control over who the Commission employed.

The learned trial Judge found that Andrew Kanyabu and Jonathan Chiyezhi were indeed employed by the Electoral Commission of Zambia and not the respondent and that the respondent could therefore not be blamed for the Commission's choice of polling assistants and presiding officers. The trial Court noted that the party which should have been answerable for the

appointment of the officers was the Electoral Commission of Zambia which was removed from the proceedings by consent of the parties. The Court ultimately observed that there was no breach of the electoral law by the ECZ through its appointments.

The trial Court further held that the allegation that the respondent and his agents removed the appellant's agents and supporters from the group of polling assistants but kept the suspected UPND presiding officer was not proved.

Regarding the issue of Kennedy Katong'i distributing hate speech in the form of an SMS, the trial Court found that there was evidence that the SMS was sent to Peter Banda (PW13) as alleged and was confirmed by Isaac Musadabwe Banda (PW15) as having been sent by Katong'i. That the message was clearly partisan but that PW13 said he did not forward it to anyone else and that it remained between Katong'i and himself. That PW13 said despite receiving the SMS, he still voted for his party, the PF.

The trial Court observed that PW13's evidence clearly showed that the message had no bearing on the outcome of the election as the recipient still voted for the candidate of his preference. The Court further observed that there was no evidence to prove that the

respondent was privy to or authorized Katong'i to communicate the message to Peter Banda (PW13). The Court thus found that although by sending the SMS, Katong'i's action proved his partisan inclination and contravened the provisions of the Electoral Process Act, she was of the view that the contravention did not compromise the election, which the trial Court found was conducted as to be substantially in accordance with the provisions of section 97 (4) of the Act. Thus, the learned trial Judge concluded that Katong'i's act did not affect the result of the election.

We have examined the evidence relating to the fourth ground of appeal. We entirely agree with the learned trial Judge that the appellant's evidence in support of the allegations relating to this ground did not satisfy the standard of proof for election petitions. As the trial Court rightly observed, and we agree with it, the conduct of elections vests in the Electoral Commission of Zambia as per Article 229 of the Constitution. Thus, if there were any shortcomings in the appointment of election officers, in this case, the right party to have responded to any allegation in that regard was the ECZ. As the ECZ was indeed removed from the proceedings

by consent of the parties, those allegations could not subsequently be directed at the respondent.

Further, and as the trial Judge again rightly observed, there is no evidence that Katong'i's act of sending the SMS to PW13 had any effect on the result of the election. This is particularly so as PW13 Peter Banda admitted that although he received the SMS from Katong'i, he was not influenced by it and he still voted for his preferred candidate. That being the case, we cannot fault the trial Judge for holding that the allegations relating to ground four were not proved. We therefore find no basis to upset the trial Court's findings in that regard, as Mr. Kombe invited us to do. Ground four clearly has no merit and we dismiss it.

Turning to ground five, the appellant submitted that the learned trial Judge erred in law and fact when she held that the allegation by the appellant that the respondent and or his agents were campaigning after the close of the campaigns were general and lacked specificity. The appellant in this regard alleged that the respondent and or his agents continued to campaign after the official close of campaigns at 18.00 hours on 10th August, 2016 and that the respondent's cadres were allowed to campaign even on the

polling day, 11th August, 2016. He gave the example of RW4 as one person who was campaigning on polling day. It was the appellant's position that RW4's case was not an isolated case. The appellant in his heads of argument contended that the trial Judge did not consider the appellant's evidence and that of his witnesses which was specific and by which specific individuals were identified as campaigning on election day.

We have carefully considered the evidence on record relating to the specific allegation that the respondent and his agents continued to campaign after the close of the campaign period. In his evidence, the appellant said Bishop Musesa, who testified as RW4, was one person who was campaigning after the close of the official campaign period.

We note that the specific allegation leveled against the respondent in the petition was that the respondent and his agents continued to campaign after the close of campaigns at 18.00 hours on 10th August, 2016. The appellant did not call any witness to testify that he or she saw the respondent personally or either of his election agents campaigning after 18.00 hours on 10th August, 2016.

According to the evidence on record, RW4, Bishop Musesa, was not the respondent's agent and neither was Pephious Kandela who was also alleged to have been campaigning after the close of the official campaign period.

The trial Judge, in agreement with Mr. Katupisha, observed that the appellant did not state in his petition whether the respondent was personally campaigning or whether it was his election agents who were campaigning and if so, which specific agents were campaigning, in what place and at what time.

Given the lack of evidence on the record of appeal to support the allegation in issue, we cannot fault the trial Judge's finding that the allegation that the respondent and or his agents were campaigning after the official campaign period closed, lacked specificity and were general. The trial Judge was on firm ground in arriving at that conclusion. Ground five thus lacks merit and is dismissed.

As all the grounds of appeal have failed, the appeal has no merit and we accordingly dismiss it. We uphold the lower Court's

decision to declare the respondent, Newton Samakayi, as duly elected Member of Parliament for Mwinilunga Constituency.

Each party will bear their own costs of this appeal.

.....

A.M. Sitali,
CONSTITUTIONAL COURT JUDGE

.....

M.S. Mulenga,
CONSTITUTIONAL COURT JUDGE

.....

E. Mulembe,
CONSTITUTIONAL COURT JUDGE

.....

P. Mulonda,
CONSTITUTIONAL COURT JUDGE

.....

M.M. Munalula,
CONSTITUTIONAL COURT JUDGE