

(1922)

**SELECTED JUDGMENT NO. 51 OF 2018**

IN THE CONSTITUTIONAL COURT OF ZAMBIA

Appeal No. 10/2016

AT THE CONSTITUTIONAL REGISTRY

2016/CC/A016

HOLDEN AT LUSAKA

2016/CC/A042

*(Constitutional Jurisdiction)*



IN THE MATTER OF:

ARTICLE 47(2), 51, 54, 72(2)(c) AND  
73(1) OF THE CONSTITUTION OF  
ZAMBIA CHAPTER 1 VOLUME 1 OF THE  
LAWS OF ZAMBIA

AND

IN THE MATTER OF:

SECTION 81, 89, 97(1), 98(c), 99 AND  
100(2) OF THE ELECTORAL PROCESS  
ACT NO. 35 OF 2016

IN THE MATTER OF:  

CODE OF CONDUCT RULES 12,  
15(a)(h)(k)

AND

IN THE MATTER OF:

MUNALI CONSTITUENCY ELECTIONS  
HELD IN ZAMBIA ON THE 11<sup>TH</sup> AUGUST  
2016

BETWEEN:

NKANDU LUO (PROF)

1<sup>ST</sup> APPELLANT

THE ELECTORAL COMMISSION OF ZAMBIA

2<sup>ND</sup> APPELLANT

AND

DOREEN SEFUKE MWAMBA

1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL

2<sup>ND</sup> RESPONDENT

Coram: Sitali, Mulenga, Mulembe, Munalula and Musaluke, JJC

On 20<sup>th</sup> April, 2018 and 16<sup>th</sup> November, 2018

For the 1<sup>st</sup> Appellant:

Mr. B. Mutale, SC, and Ms. M. Mukuka of  
Messrs. Ellis & Company

Mr. E. Silwamba, SC, of Messrs. Eric  
Silwamba, Jalasi and Linyama Legal  
Practitioners

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	Mr. M. Lungu of Messrs. Lungu Simwanza & Company
For the 2 <sup>nd</sup> Appellant:	Mr. R. Mwala and Mr. K. Wishimanga of Messrs. A.M. Wood & Company
For the 1 <sup>st</sup> Respondent:	Dr. H. Mbushi of Messrs. HBM Advocates
	Mr. K. Mweemba of Messrs. Keith Mweemba Advocates
	Mr. G. Phiri of Messrs. PNP Advocates
For the 2 <sup>nd</sup> Respondent:	Ms. T. Nkunika, State Advocate

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## JUDGMENT

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**Mulembe, JC, delivered the Judgment of the Court.**

Cases referred to:

1. Michael Mabenga v Sikota Wina and others (2003) Z.R. 110
2. Brelsford James Gondwe v Catherine Namugala Appeal No. 175 of 2012
3. Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) Z.R. 138
4. Steven Katuka and Law Association of Zambia v The Attorney General and 64 Others, selected Judgment No. 29 of 2016
5. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
6. Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007
7. Mulondwe Muzungu v Elliot Kamondo 2010/EP/001
8. Chizonde v The People (1975) Z.R. 85
9. Mubita Mwangala v Inonge Mutukwa Wina, Appeal No. 80 of 2007
10. Nakbukeera Hussein Hanifa v Kibule Ronald and another (2011) UGHC 64
11. Giles Chomba Yamba Yamba v Kapembwa Simbao, Selected Judgment No.6 of 2018
12. Abiud Kawangu v Elijah Muchima, Appeal No. 8 of 2017

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13. Valsamos Koufou v Anthon Greenberg (1982) Z.R. 30
14. Mlewa v Wightman (1995/1997) Z.R. 171
15. August v Electoral Commission and others [1999] ZACC 3
16. Augustine Kapembwa and another v Attorney General (1981) Z.R. 127
17. Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others Petition No. 1 of 2017
18. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
19. Austin Liato v Sitwala Sitwala, Selected Judgment No. 23 of 2018
20. Saul Zulu v Victoria Kalima (2014) Z.R. 14
21. Chrispin Siingwa v Stanley Kakubo, Appeal No. 7 of 2016
22. Richwell Siamunene v Sialubalo Gift, Selected Judgment No. 58 of 2017
23. Thorp v Holdsworth [1876] 3 Ch D 637
24. British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con. L.R. 1
25. Christopher Lubasi Mundia v Sentor Motors Limited (1982) Z.R. 66
26. London Passenger Transport Board v Moscorp [1942] A.C. 332

Legislation referred to:

1. Electoral Process Act No. 35 of 2016
2. Electoral Process (General) Regulations 2016
3. Constitution of Zambia (Amendment) Act No. 2 of 2016

Other works referred to:

1. Phipson on Evidence, 18<sup>th</sup> edition
2. Concise Oxford English Dictionary, 12<sup>th</sup> Edition, Oxford University Press
3. Pocket Oxford Dictionary & Thesaurus, 2<sup>nd</sup> Edition, Oxford University Press
4. Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 38A, LexisNexis
5. Zambian Civil Procedure: Commentary and Cases, Volume 1, Lexis Nexis

This is an appeal against the Judgment of the High Court which nullified the election of the 1<sup>st</sup> Appellant, Nkandu Luo, who



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to view the video clip in the presence of all the parties and give a ruling stating whether or not the video was the same video viewed during the trial. In his ruling, availed to this Court in Supplementary Record of Appeal filed on 29<sup>th</sup> March, 2018, the learned Judge in the court below confirmed the authenticity of the video. In addition, during this process the video was misplaced within the High Court. The appeal was finally heard on 20<sup>th</sup> April, 2018.

We, therefore, wish to guide the High Court and the local government election tribunals that where a piece of evidence is tendered and viewed during the trial of an election petition, the same should be properly marked and admitted in evidence and placed in the custody of the court or tribunal. This will avoid unnecessary delays as encountered in this case.

We now turn back to this appeal. The background of this appeal is that the 1<sup>st</sup> Appellant and the 1<sup>st</sup> Respondent, Doreen Sefuke Mwamba, stood as candidates for Member of Parliament for Munali Constituency in the 11<sup>th</sup> August, 2016 general elections. The 1<sup>st</sup> Appellant contested the seat on a Patriotic Front Party (PF) ticket. The 1<sup>st</sup> Respondent participated as a



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candidate for the United Party for National Development (UPND). There were six other contestants. Five stood on various political parties' tickets while one was independent. The 1<sup>st</sup> Appellant emerged victorious with 37,935 votes and was declared duly elected Member of Parliament for Munali Constituency. The 1<sup>st</sup> Respondent came in second having polled 24,628 votes. The six other candidates shared the remaining valid votes cast as follows: Mike Mposha, MMD – 11, 122; Antonio M. Mwanza, FDD – 4,651; Sydney P. Kaweme, Independent – 893; Vincent Chaile, RRP – 831; Mutale Mwila, UNIP – 373; Boston G. Chifita, Rainbow – 294.

Aggrieved by the outcome of the election, the 1<sup>st</sup> Respondent filed a petition seeking, among other things, a declaration that the 1<sup>st</sup> Appellant's election as Member of Parliament for Munali Constituency was null and void. In her petition, the 1<sup>st</sup> Respondent alleged that prior to the election, the 1<sup>st</sup> Appellant held herself out as Cabinet Minister and used public resources towards her campaign. Further allegations were that on 8<sup>th</sup> August 2016, the 1<sup>st</sup> Appellant sponsored violent cadres who attacked the 1<sup>st</sup> Respondent's campaign bus in Mtendere and

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that on 11<sup>th</sup> August, 2016 a PF councillor, in PF regalia, campaigned in a polling station in full view of the police and the 2<sup>nd</sup> Appellant's officials. It was also alleged that PF polling agents were allowed to wear PF regalia inside the polling station and that on 11<sup>th</sup> August, 2016 the 1<sup>st</sup> Respondent was refused entry to Vera Chiluba School polling station by the 1<sup>st</sup> Appellant and one Kaizer Zulu, who closed the gate. It was also alleged that the 2<sup>nd</sup> Appellant refused to provide Form GEN12 to the 1<sup>st</sup> Respondent's polling agents, resulting in their inability to submit the correct total of the results she obtained at each polling station.

The 1<sup>st</sup> Respondent claimed that as a consequence of the alleged illegal practices committed by the 1<sup>st</sup> Appellant and her agents and the failure of the 2<sup>nd</sup> Appellant to conduct the election fairly, the majority of voters were prevented from electing their preferred candidate.

The learned trial Judge, in his verdict, pointed out that the provisions of the law in section 97(2)(a) of the Electoral Process Act No. 35 of 2016 (henceforth "the Act") were very clear in providing circumstances under which a parliamentary election may be nullified. The trial Judge reminded himself that the

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burden of proof rested on the petitioner and that the standard of proof required is that allegations raised must be proved to a fairly high degree of convincing clarity, citing **Michael Mabenga v Sikota Wina and others**<sup>1</sup>, **Brelsford James Gondwe v Catherine Namugala**<sup>2</sup> and **Anderson Kambela Mazoka v Levy Patrick Mwanawasa**<sup>3</sup> for authority. In this regard, the learned trial Judge noted that the allegations in the petition were outlined in paragraph 5 under seven sub-heads and proceeded to consider the same seriatim.

In regard to the allegation of the 1<sup>st</sup> Appellant holding herself out as Cabinet Minister, the court below found that it was not in dispute that during the campaign for the Munali seat, the 1<sup>st</sup> Appellant was a Cabinet Minister. That this was only stopped by the decision of this Court in **Steven Katuka and Law Association of Zambia v The Attorney General and 63 others**<sup>4</sup>. The court below found that this part of the allegation in paragraph 5(i) of the petition was proved. And on the alleged abuse of public resources, the court below stated that it was not in dispute that Cabinet Ministers were entitled to a Government motor vehicle, public fuel and public driver, but what was in



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dispute was that the 1<sup>st</sup> Appellant used the said public resources in her campaign. Though the trial Judge acknowledged that the 1<sup>st</sup> Appellant had her personal motor vehicles which she used during her campaign, he stated that he had not seen evidence to show that she truly did not use a Government vehicle as well. The trial Judge was of the view that the lacuna in the 1<sup>st</sup> Appellant's testimony was that he had not seen any Government guideline to preclude a minister from using Government resources during campaign.

The court below noted that the 1<sup>st</sup> Appellant was seen being driven in a Government vehicle with a Zambian flag accompanied by a Toyota Noah branded in PF colours and that PW5 saw the 1<sup>st</sup> Appellant distributing PF campaign materials at a house in Kaunda Square. Although the trial Judge noted that the 1<sup>st</sup> Respondent's witnesses had difficulties in describing the Government vehicle, he was satisfied that they were describing the same motor vehicle and that the allegation was proved. The court below also found that to the extent that the 1<sup>st</sup> Appellant held the office of minister illegally, her salary was paid to her

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illegally and that she used it to the disadvantage of the 1<sup>st</sup> Respondent who did not have access to Government funds.

In regard to the allegation that the 1<sup>st</sup> Appellant sponsored violent cadres who attacked the UPND campaign bus in Mtendere on 8<sup>th</sup> August, 2016, the learned trial Judge held that he had seen no evidence to show or even to suggest that the 1<sup>st</sup> Appellant sponsored cadres to attack the UPND campaign bus. However, as the 1<sup>st</sup> Appellant was not at the scene of the attack, the Court below disagreed with her position that the attackers were not PF cadres and found that the allegation had succeeded.

On the allegation that a PF Councillor was campaigning in a polling station dressed in PF regalia in full view of the police and the 2<sup>nd</sup> Appellant's officials, the court below found that this allegation was not sufficiently supported by evidence and dismissed it. The court below also found no credible evidence to support the allegation of persons wearing PF regalia inside the polling station at Chainda Catholic Church.

In respect of the allegation that the 1<sup>st</sup> Respondent was refused entry to Vera Chiluba School Polling Station, the Court below noted that there were two disputes to this allegation. First,

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that the 1<sup>st</sup> Appellant was in the company of one Kaizer Zulu. Secondly, that the 1<sup>st</sup> Respondent was denied entry. After reviewing the evidence on this aspect, the trial Judge stated that it was immaterial whether or not the 1<sup>st</sup> Appellant was in the company of Kaizer Zulu. That the material fact was, in the view of the learned trial Judge, a demonstration of double standards where the 1<sup>st</sup> Appellant was allowed entry into the polling station and the 1<sup>st</sup> Respondent was denied entry. The court below dismissed the testimony of RW12, the returning officer for Munali Constituency, who testified that it was not possible for the 1<sup>st</sup> Appellant and Kaizer Zulu to close the gate to the polling station. According to the court below, RW12 was untruthful on account that he purported to testify to events which happened in his absence. Thus, the trial court adjudged that the 1<sup>st</sup> Respondent was not allowed to monitor the elections in which she was a participant and found that the allegation was proved.

The allegation against the 2<sup>nd</sup> Appellant was that it refused to provide Form GEN12 to UPND polling agents. That this caused the polling agents not to submit the correct number of votes the 1<sup>st</sup> Respondent obtained at each polling station. The



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court below found that the inadequacy of Form GEN12 affected all participants and found that the failure by the 2<sup>nd</sup> Appellant to avail the GEN 12 forms did not help to build confidence in the Munali Constituency election. That it was a lapse on the part of the 2<sup>nd</sup> Appellant and no one could positively ascertain whether or not the votes cast in favour of the 1<sup>st</sup> Respondent were fully accounted for. Thus, the court below found that the allegation had been proved.

The next allegation was that the 1<sup>st</sup> Respondent managed to provide her polling agents at Kalikiliki Polling Station with GEN12 forms but the presiding officer was stopped from signing the same by PF cadres. The trial court held that for reasons already given in regard to the allegation of refusal to provide Form GEN12, the allegation succeeded.

The learned trial Judge summed up his findings by stating that the elections in Munali Constituency were not contested on level ground. That the 1<sup>st</sup> Appellant abused Government resources in her campaigns and that the campaigns in Munali Constituency were marred by violence, which reached a crescendo on 8<sup>th</sup> August, 2016 and was capable of influencing

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abuse of Government resources and that such abuse materially affected the outcome of the polls in Munali Constituency.

Ground Two

The court below erred in law and fact when it annulled the poll in Munali Constituency based on the attack of a UPND bus in Mtendere on 8<sup>th</sup> August 2016 without evidence linking the appellant or her campaign agent to the said act.

Ground Three

The court below misdirected itself in law and fact when it held that the first respondent was denied entry into Vera Chiluba School Polling Station and such denial materially affected the outcome of the poll in Munali Constituency.

Ground Four

The lower Court erred in law and fact when it held that the non-provision of GEN 12 forms to all the candidates' polling agents materially affected the outcome of the polls.

The 2<sup>nd</sup> Appellant advanced five grounds of appeal as follows:

Ground One

The learned trial Judge misdirected himself in law and in fact when he nullified the Munali Parliamentary seat on the basis of the alleged illegal and unfair practices committed by the Appellant without establishing that the alleged illegal and unfair practices affected the parliamentary election results, contrary to the law.

Ground Two

The learned trial Judge misdirected himself in law and in fact when he held that the 1<sup>st</sup> Respondent had proved her allegations as contained in paragraph 5(v) of the Petition, contrary to the evidence on the record.

Ground Three

The learned trial Judge misdirected himself in law and in fact when he found that paragraph 5(vi) of the Petition had been proved without any evidence to support such finding.

Ground Four

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The learned trial Judge misdirected himself in law and in fact when he held that the 1<sup>st</sup> Respondent's allegation as contained in paragraph 5(vii) of the Petition had been proved, contrary to the law and evidence on the record.

#### Ground Five

The learned trial Judge misdirected himself in law and in fact when he held that the Appellant failed to conduct transparent, free and fair elections contrary to the provisions of the law and evidence on the record.

In the interests of brevity and orderliness, we propose to address some of the 1<sup>st</sup> Appellant's and 2<sup>nd</sup> Appellant's grounds of appeal together. In this regard, we first address the 1<sup>st</sup> Appellant's grounds one and two of the appeal separately. We then proceed to consider the 1<sup>st</sup> Appellant's ground 3 together with the 2<sup>nd</sup> Appellant's ground two. Ground four of the 1<sup>st</sup> Appellant's appeal is considered together with the 2<sup>nd</sup> Appellant's grounds one, three, four and five.

In support of the appeal, the 1<sup>st</sup> Appellant filed detailed and lengthy heads of argument on 25<sup>th</sup> January, 2017. Ground one of the appeal challenges the finding of the court below that the continued stay of the 1<sup>st</sup> Appellant in office created an irrebuttable presumption of abuse of Government resources and that such abuse materially affected the outcome of the election in Munali Constituency. The 1<sup>st</sup> Appellant began by giving a detailed



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outline of the applicable legal principles in election petitions. Calling in aid various case authorities, including **Lewanika v Chiluba**,<sup>5</sup> **Mubika Mubika v Poniso Njeulu**<sup>6</sup> and **Mazoka v Mwanawasa**,<sup>3</sup> the 1<sup>st</sup> Appellant submitted, *inter alia*, that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and that it must be established, with convincing clarity, that the malpractice complained of was widespread and affected the outcome of the election. It was the 1<sup>st</sup> Appellant's position that cogent evidence must support the discharge of the burden of proof under section 97(2) of the Act. It was contended that while the learned trial Judge reminded himself on the burden and standard of proof in election petitions, he did not apply the law accordingly.

Further, that even though the trial Judge reminded himself that the petitioner was not allowed to bring in evidence other than evidence connected to and supporting the pleadings, he still relied on extraneous and irrelevant matters to arrive at some findings. That the trial Judge relied on the use of presumptions in finding that the allegations were proved. The 1<sup>st</sup> Appellant submitted that though the law of evidence in certain instances

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allows presumptions, authorities on the burden and standard of proof in election petitions clearly point to the fact that any matter alleged had to be proved to a high standard of convincing clarity.

The 1<sup>st</sup> Appellant asserted that the finding of the court below that she illegally held herself out as a Cabinet Minister throughout the campaign period was a misapprehension of the holding of this Court in **Steven Katuka**<sup>4</sup> and that the misapprehension informed most parts of the lower court's judgment and tainted its reasoning.

On the allegation that the 1<sup>st</sup> Appellant used her official car in the campaigns, it was the 1<sup>st</sup> Appellant's position that the approach the learned trial Judge adopted in resolving the conflicting evidence given by the 1<sup>st</sup> Appellant on one hand and the 1<sup>st</sup> Respondent on the other, in which different descriptions of the 1<sup>st</sup> Appellant's car were given, shows that he did not apply the correct standard of proof. That the trial Judge's finding that he had not seen any evidence to show that the 1<sup>st</sup> Appellant truly did not use a Government vehicle showed that he placed the burden of proof on the 1<sup>st</sup> Appellant to lead evidence that she did not use a Government vehicle. The 1<sup>st</sup> Appellant contended that

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the finding was a clear misdirection and that the allegation should be found not to have been proved as the 1<sup>st</sup> Respondent had not discharged the burden of proof. It was the 1<sup>st</sup> Appellant's contention that the 1<sup>st</sup> Respondent merely saw her being driven to inspect a Government project, which did not constitute campaigning. It was contended that there were discrepancies in the evidence as to the make of the vehicle and the witnesses could not recall the vehicle registration number. The 1<sup>st</sup> Appellant further asserted that PW5 was a partisan witness with an interest to serve, citing **Mulondwe Muzungu v Eliot Kamondo**<sup>7</sup> and **Chizonde v The People**<sup>8</sup> for support. It was submitted that the court below made no adverse finding against the 1<sup>st</sup> Appellant and, therefore, that there was no basis upon which it could have resolved the dispute in favour of the 1<sup>st</sup> Respondent.

In regard to the alleged use of Government funds, the 1<sup>st</sup> Appellant contended that there was no evidence in support led by the 1<sup>st</sup> Respondent; that the money the 1<sup>st</sup> Appellant used in the campaigns came from her gratuity and well-wishers and that the finding that she had used her salary for campaigns was perverse as there was no evidence to support such a finding. Further,



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that the finding by the court below to the effect that the alleged use of government funds by the 1<sup>st</sup> Appellant affected the 1<sup>st</sup> Respondent who had no access to such funding was a misdirection as the act complained of ought to affect the outcome of the election and not a contestant. The 1<sup>st</sup> Appellant argued that the court below was not entitled to use presumptions or make adverse inferences without specific evidence being led on an allegation.

The 1<sup>st</sup> Appellant submitted, in the alternative, that even if it was proved to the requisite standard that she used a Government vehicle and funds, the court below was still not entitled to nullify the election on this ground because it was not proved that the use of a Government vehicle and funds affected the outcome of the election. It was contended that in terms of section 97(2)(a) of the Act, evidence must be led to prove that the majority of voters were or may have been prevented from electing their preferred candidate, citing **Mubita Mwangala v Inonge Mutukwa Wina**<sup>9</sup> for support. It was the 1<sup>st</sup> Appellant's further contention that the court below relied on the PF's use of the slogan "*boma ni boma*" as proof that she used her ministerial

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position to intimidate her opponents; but that there were no witnesses called to testify that they were intimidated or did not vote for their preferred candidate on account of the slogan.

In ground two, the 1<sup>st</sup> Appellant challenged the lower court's annulment of the election in Munali Constituency based on the attack of the UPND bus in Mtendere on the 8<sup>th</sup> August, 2016 without evidence linking the 1<sup>st</sup> Appellant or her election agent to the said attack. It was submitted that under section 97(2)(a) of the Act, the first test to apply for nullification of an election is proof that either the candidate or her election agent committed the act complained of; that it was a clear departure from section 93(2)(a) of the Electoral Act 2006 which required proof of any malpractice that affected the outcome of the election. The 1<sup>st</sup> Appellant submitted that the court below found that there was no evidence to show, or even to suggest, that she sponsored cadres to attack the UPND bus but it still proceeded to find that the allegation was proved. It was argued that the finding was not only contradictory but perverse and that it was a misdirection to proceed to examine the matter further after the court had found that the 1<sup>st</sup> Appellant was not connected to the attack.

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Citing **Mazoka v Mwanawasa**<sup>3</sup> and **Mabenga v Wina**<sup>1</sup> to support the point, it was submitted that the finding that the 1<sup>st</sup> Appellant had not sufficiently shown what measures she took to control her supporters illustrated the lower court's misapprehension of the burden and standard of proof in an election petition. The 1<sup>st</sup> Appellant argued that the burden to prove that she sponsored the violent cadres lay with the 1<sup>st</sup> Respondent who had made the allegation; that the 1<sup>st</sup> Appellant could not be expected to demonstrate measures taken to "cage" supporters as she had no burden of proof to discharge. We were referred to the case of **Brelsford James Gondwe v Catherine Namugala**<sup>2</sup>, where the Supreme Court said:

"The appellant having failed to prove his case no reasonable court would call upon the respondent to adduce evidence in rebuttal. In any event there was nothing to be rebutted and only courts where injustice is practiced would brave calling the respondent to adduce evidence in rebuttal in these circumstances."

The 1<sup>st</sup> Appellant maintained that the finding of the court below fell outside the ambit of the pleading and the law. And citing **Lewanika v Chiluba**<sup>5</sup> it was further submitted that even if the violent cadres were PF members, a candidate was not responsible for the actions of all their party members. Further, that the finding by the court below that the attack was widely



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reported by the media thereby spreading fear and leading to a low turnout at a UPND rally on 10<sup>th</sup> August, 2016 was not supported by evidence.

The combined submissions on ground three of the 1<sup>st</sup> Appellant's appeal and ground two of the 2<sup>nd</sup> Appellant's appeal were to the effect that the court below misdirected itself in law and fact when it held that the 1<sup>st</sup> Respondent's allegation that she was denied entry into Vera Chiluba polling station was proved and that such denial materially affected the outcome of the election.

The 1<sup>st</sup> Appellant submitted that the objection to the finding of the court below on this aspect was twofold. First, that the court below did not address itself to the pleadings but merely discredited RW12 on the ground that he was untruthful. The 1<sup>st</sup> Appellant contended that there was no evidence to prove the allegation that the 1<sup>st</sup> Appellant, acting with one Kaizer Zulu, closed the gate and prevented the 1<sup>st</sup> Respondent from entering Vera Chiluba polling station to see her polling agents. It was contended that the finding of unfair treatment was irrelevant as it was not pleaded.

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Secondly, it was submitted that under section 97(4) of the Act, it has to be demonstrated, through evidence, that the misfeasance by an electoral officer affected the outcome of the election, which the 1<sup>st</sup> Respondent failed to do. We were referred to pages 60, 61, 62 and 70 of the record of appeal to support the point that the court below failed to consider the 1<sup>st</sup> Appellant's evidence that she had not been allowed into Vera Chiluba polling station, contrary to the 1<sup>st</sup> Respondent's claim. We were also referred to page 881 of the record to show that the 1<sup>st</sup> Appellant never admitted to having been allowed entry into the said polling station and that it was for the 1<sup>st</sup> Respondent (as petitioner) to prove all allegations to a fairly high degree of convincing clarity.

On its part, the 2<sup>nd</sup> Appellant submitted that no evidence was adduced at trial to support the allegation that the 1<sup>st</sup> Appellant and Kaizer Zulu closed the gate and refused the 1<sup>st</sup> Respondent access to her polling agents. It was further submitted that since in cross-examination the 1<sup>st</sup> Respondent conceded that the allegation was not true, the matter should have ended there and the allegation dismissed. The 2<sup>nd</sup> Appellant impugned the finding of the court below that the allegation in the

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pleadings had been proved, arguing that the court below misdirected itself as it is trite that evidence must support the pleadings. It was the 2<sup>nd</sup> Appellant's contention that in arriving at his conclusion, the trial Judge wrongfully accepted and applied the 1<sup>st</sup> Respondent's testimony to the effect that she was locked out of the polling station by a police officer while the 1<sup>st</sup> Appellant was allowed to go in. That the court below erred in its finding that there was a demonstration of double standards, thereby resulting in unfairness on the part of the 2<sup>nd</sup> Appellant's conduct of the elections. It was submitted that at Vera Chiluba polling station, there was an incident where a group of individuals wanted to vote after the close of the poll; that, as testified by RW12, all voters on the queue were instructed to get inside the polling station and the presiding officer closed the gate. That the learned trial Judge's conclusion that RW12 was untruthful had no basis and RW12's testimony ought to have been considered by the court in making its finding.

As indicated earlier, ground four of the 1<sup>st</sup> Appellant's appeal and grounds one, three, four and five raised in the 2<sup>nd</sup> Appellant's appeal are related. Submissions on ground four of the



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1<sup>st</sup> Appellant's appeal were to the effect that the court below erred in law and in fact when it held that the non-provision of Form GEN12 to all the candidates' polling agents materially affected the outcome of the polls. The 1<sup>st</sup> Appellant submitted that the 1<sup>st</sup> Respondent's allegation was that the 2<sup>nd</sup> Appellant refused to provide Form GEN12 to UPND polling agents and, as such, the 1<sup>st</sup> Respondent was unable to ascertain the correct number of votes she received at each polling station. Citing section 49 of the Electoral Process (General) Regulations, it was the 1<sup>st</sup> Appellant's contention that, in the instant case, failure to countersign Form GEN12 could not be the ground or basis to nullify the election if the court below found that each candidate was affected. That there is a high threshold to be surmounted where misfeasance on the part of electoral officers is alleged pursuant to section 97(2)(b) of the Act.

The 2<sup>nd</sup> Appellant, in its third ground of the appeal, contended that the learned trial Judge misdirected himself in law and in fact when he found that the allegation that the 2<sup>nd</sup> Appellant refused to provide Form GEN12 to the 1<sup>st</sup> Respondent's polling agents was proved and also, in ground four, that the

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presiding officer at Kalikiliki polling station was stopped from signing copies of Form GEN12 by PF agents. And in its ground one, the 2<sup>nd</sup> Appellant contended that the trial Judge misdirected himself in law and in fact when he nullified the election in Munali on the basis of the alleged illegal and unfair practices without establishing that the same affected the election results.

The 2<sup>nd</sup> Appellant submitted that Form GEN12 refers to the Announcement of the Result of the Poll and is in fact Form GEN20 in the Electoral Process (General) Regulations and is used at a polling station to indicate the total number of votes obtained by a candidate at the polling station. Further, that as the 1<sup>st</sup> Respondent testified, Form GEN12 is important as it is used to convey information to the totaling centre. And as RW12 testified, the 2<sup>nd</sup> Appellant provides the document to the presiding officer, who must prepare the document and validate it by signing it and then it is made available to polling agents to countersign. The 2<sup>nd</sup> Appellant emphasised that it is copies of authenticated documents that are made available to the polling agents.

It was contended that the crux of the matter was whether or not the 2<sup>nd</sup> Appellant refused to provide Form GEN 12 to the

(1948)

UPND polling agents. It was the 2<sup>nd</sup> Appellant's view that the learned trial Judge glossed over the 2<sup>nd</sup> Appellant's evidence with the result that the full significance of certain aspects of the evidence was not appreciated. It was submitted that the trial Judge ought to have considered the evidence of the 1<sup>st</sup> Respondent and PW5 cautiously. That the 1<sup>st</sup> Respondent was a UPND candidate and PW5 was a UPND polling agent and the trial Judge relied on their evidence without caution as to the self-interest of the witnesses. The case of **Nakbukeera Hussein Hanifa v Kibule Ronald and another**<sup>10</sup> was cited for support.

It was the 2<sup>nd</sup> Appellant's further submission that the trial Judge erred when he accepted and relied on the evidence in collateral matters and that the finding of the court below was based on an unbalanced evaluation of evidence. It was the 2<sup>nd</sup> Appellant's contention that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted her evidence. The 2<sup>nd</sup> Appellant maintained that it did not refuse to provide Form GEN12 to the 1<sup>st</sup> Respondent's polling agents as the form was readily available to polling agents who were present at



(1949)

the polling station after voting, counting and totaling of votes was done.

The 2<sup>nd</sup> Appellant submitted that, faced with two conflicting versions of events, the court below, in its finding, merely relied on the evidence of the 1<sup>st</sup> Respondent's witnesses. That had the trial Judge taken into consideration the evidence of RW12, that winning and losing candidates alike left the polling stations before the GEN12 forms were compiled by the 2<sup>nd</sup> Appellant, he would not have concluded as he did. It was submitted that the non-availability of polling agents at completion of the election process could not possibly be regarded as refusal by the 2<sup>nd</sup> Appellant to provide copies of Form GEN12.

The 2<sup>nd</sup> Appellant maintained that the lower court's finding that the 1<sup>st</sup> Respondent was unable to have the correct total of the results due to failure by the 2<sup>nd</sup> Appellant to provide Form GEN12 was not supported by evidence. It was submitted that the court below did not take into account the 2<sup>nd</sup> Appellant's evidence to the effect that there were alternative sources of information that were provided. It was also submitted that RW12 testified that aside from the provision of Form GEN12 to the

(1950)

polling agents present, the presiding officer announced the results publicly, which gave an opportunity to the parties to hear and record the correct totals. Further, that the "Zero Form", a larger version of Form GEN12 was posted outside the polling station. It was the 2<sup>nd</sup> Appellant's contention that the 1<sup>st</sup> Respondent and her agents had numerous sources provided by the 2<sup>nd</sup> Appellant to obtain the total results received by each candidate at each polling station. The 2<sup>nd</sup> Appellant maintained, therefore, that there was nothing wrong with the presiding officer refusing to sign a document that was provided or prepared by the 1<sup>st</sup> Respondent's agents as the agents could not authenticate the results endorsed thereon.

It was the 2<sup>nd</sup> Appellant's contention that even assuming the allegations of procedural irregularities or non-compliance with the law were true, the acts complained of affected all the candidates. That this was acknowledged by the trial Judge himself when he noted that both winners and the losers did not sign the Form GEN 12. The case of **Mazoka v Mwanawasa**<sup>3</sup> was cited for authority. In addition, the 2<sup>nd</sup> Appellant relied on its submissions filed in the court below appearing at pages 468 to

(1951)

469 of the record of appeal and also adopted the 1<sup>st</sup> Appellant's arguments in so far as they were applicable to the 2<sup>nd</sup> Appellant's appeal. The 2<sup>nd</sup> Appellant submitted that the court below erred in law and in fact when it found that the 2<sup>nd</sup> Appellant failed to conduct transparent, free and fair elections in Munali Constituency and urged us to set aside the lower court's finding.

In oral submissions, Mr. Mutale, SC, submitted that the first three allegations in the petition upon which the election of the 1<sup>st</sup> Appellant was nullified were founded on the interpretation of section 97(2)(a) of the Act. It was State Counsel's position that the lower court's interpretation was seriously misconceived. Citing our decision in **Giles Chomba Yamba Yamba v Kapembwa Simbao**,<sup>11</sup> Mr. Mutale, SC, argued that the petitioner needed to prove the misconduct with crystal clear evidence, and that the majority of the electorate were prevented from electing their preferred candidate.

Mr. Mutale, SC, contended that the 1<sup>st</sup> Respondent failed to discharge her obligation to produce cogent evidence that the 1<sup>st</sup> Appellant did abuse Government resources during her campaign, citing our decision in **Abiud Kawangu v Elijah Muchima**<sup>12</sup> for



**(1952)**

support. State Counsel further submitted that the 1<sup>st</sup> Respondent had failed to adduce evidence that the 1<sup>st</sup> Appellant or any of her agents were involved in attacking the 1<sup>st</sup> Respondent's campaign bus or that the incident was widespread in Munali Constituency. He submitted that the incident was isolated and that the video evidence involving the attack on the campaign bus was irrelevant as it only testified to one incidence of violence in Mtendere ward of the Munali Constituency and did not assist the 1<sup>st</sup> Respondent in confirming that the violence was widespread. Also, that RW10 confirmed at page 948 of the record of appeal that the incident was the only incident of violence that the 2<sup>nd</sup> Appellant heard of in Mtendere ward.

Turning to the allegation that the 1<sup>st</sup> Appellant and Kaizer Zulu closed the gate and denied the 1<sup>st</sup> Respondent entry to Vera Chiluba polling station, it was State Counsel's contention that the lower court's finding was perverse as it was not supported by evidence and that the 1<sup>st</sup> Respondent confirmed in her testimony that it was incorrect as the 1<sup>st</sup> Appellant was not responsible for closing the gate and that Kaizer Zulu was not at the polling

**(1953)**

station. Mr. Mutale, SC, submitted that the finding of the court below should be set aside for being perverse.

On the allegation of failure to provide GEN12 forms, State Counsel submitted that the same were anchored on section 97(2)(b) of the Act. He contended that the 1<sup>st</sup> Respondent failed to adduce any evidence confirming that the failure to provide GEN12 forms by the 2<sup>nd</sup> Appellant affected the results of the entire Munali Constituency. Mr. Mutale SC, added that from a total of 80,727 votes, 37,935 were cast in favour of the 1<sup>st</sup> Appellant while 42,792 was the total cumulative votes cast in favour of the opposing candidates, showing that the majority voted against the 1<sup>st</sup> Appellant. That this went against the allegation that any conduct of the 1<sup>st</sup> Appellant affected the majority from voting for a candidate of their choice.

Mr. Lungu, learned co-counsel for the 1<sup>st</sup> Appellant, added that the court below misdirected itself on the burden and standard of proof in election petitions, as set out in various case authorities. Referring to page 52 of the record of appeal, Mr. Lungu submitted that the learned trial Judge misdirected himself when he appeared to reverse the burden of proof on the allegation

**(1954)**

of use of Government resources, placing the burden of proof on the 1<sup>st</sup> Appellant to show the existence of guidelines concerning use of Government resources in campaigns. It was submitted that it ought to have been the 1<sup>st</sup> Respondent (as petitioner) to adduce evidence on the use of Government resources and that the finding of the court below was liable to reversal.

On the allegation of violence, learned counsel Mr. Lungu submitted that a case falls or stands on its pleadings and that the court below found as a fact that there was no evidence that it was the 1<sup>st</sup> Appellant who sponsored the violent cadres that attacked the UPND campaign bus. That the allegation having not been proved, the court below misdirected itself when it continued to delve into the matter as regards the widespread nature of the violence.

Learned counsel for the 2<sup>nd</sup> Appellant, Mr. Mwala, relied entirely on the 2<sup>nd</sup> Appellant's written heads of argument filed on 23<sup>rd</sup> January, 2017.

In opposing this appeal, the 1<sup>st</sup> Respondent relied on heads of argument filed on 20<sup>th</sup> January, 2017. In regard to ground



(1955)

one, the 1<sup>st</sup> Respondent submitted that by her own admission, the 1<sup>st</sup> Appellant had stated that she was a Government Minister in the Ministry of Gender, holding a constitutional office and, therefore, a public servant. Our attention was drawn to the 1<sup>st</sup> Respondent's submissions in the court below at pages 377 to 378 of the record of appeal and to our judgment in **Steven Katuka**.<sup>4</sup> It was contended that the candidature of the 1<sup>st</sup> Appellant in the 11<sup>th</sup> August, 2016 general election was unlawful as she had failed to comply with the Constitution by failing to vacate her ministerial position before she decided to stand as a candidate in Munali Constituency. That the 1<sup>st</sup> Appellant could not benefit from a contravention of the law, citing **Valsamos Koufou v Anthon Greenberg**<sup>13</sup> for authority.

And quoting extensively from the case of **Mabenga v Wina**<sup>1</sup> for support, it was the 1<sup>st</sup> Respondent's contention that the 1<sup>st</sup> Appellant had admitted to getting an unlawful salary from May to July 2016. Further, that there was abundant evidence on record that the 1<sup>st</sup> Appellant had used a Government vehicle in her campaigns and occupied a Government house, contrary to regulation 15(1)(k) and (l) of the Electoral Code of Conduct. It

**(1956)**

was contended that the learned trial Judge was on firm ground when he found that the 1<sup>st</sup> Appellant used Government resources and that that affected the 1<sup>st</sup> Respondent who had no access to such resources.

In regard to ground two, the 1<sup>st</sup> Respondent began by recounting some of the testimonies on the incident of 8<sup>th</sup> August, 2016 in Mtendere and discounted the 1<sup>st</sup> Appellant's assertion that the UPND had engaged in acts of violence. Referring to the testimony of RW4 and the 1<sup>st</sup> Appellant regarding an alleged act of violence by UPND cadres on 10<sup>th</sup> August, 2016 at RW4's house and in which the 1<sup>st</sup> Appellant's vehicle and another vehicle were allegedly damaged, it was the 1<sup>st</sup> Respondent's contention that the alleged attack by the UPND was a manufactured story. It was submitted that the petition was filed on 26<sup>th</sup> August, 2016 and the report was made on 27<sup>th</sup> September, 2016. Further, that the police report at page 190 of the record of appeal made no reference to the 1<sup>st</sup> Appellant's Toyota Noah vehicle; that in essence no report was made to the police. It was the 1<sup>st</sup> Respondent's position that the foregoing confirmed the evidence of RW10 at page 948 of the record of appeal that no other

(1957)

incidence of violence was reported in Munali Constituency apart from the reported incident of 8<sup>th</sup> August, 2016.

In response to the 1<sup>st</sup> Appellant's assertion that the findings of the court below at page J53 of the judgment, to the effect that the UPND rally at Mahatma Ghandi grounds failed because of fear of an attack by PF cadres, were not supported by any evidence, it was the 1<sup>st</sup> Respondent's contention that the 2<sup>nd</sup> Appellant's own witness, RW10, confirmed that the 2<sup>nd</sup> Appellant learnt of the 8<sup>th</sup> August, 2016 incident through the media. It was submitted that many voters in Munali Constituency saw or heard of the violence that occurred on that day and were prevented from electing a candidate of their choice.

On the 1<sup>st</sup> Appellant's claim that she had no knowledge of the persons who sponsored the violence of 8<sup>th</sup> August, 2016, the 1<sup>st</sup> Respondent referred to the case of **Mlewa v Wightman**<sup>14</sup> where it was held that the question of personal knowledge was irrelevant. It was the 1<sup>st</sup> Respondent's position that the principles of the electoral system and process are well stated in section 3(a), (b), (c) and (d) of the Act, citing the case of **Mulondwe Muzungu v Eliot Kamondo**<sup>7</sup> and the South African case of **August v**



(1958)

**Electoral Commission and others**<sup>15</sup> which, according to the 1<sup>st</sup> Respondent, emphasized the importance of universal adult suffrage and free and fair elections.

On the question of an appellate court interfering with the findings of the trial court, the 1<sup>st</sup> Respondent drew our attention to the case of **Augustine Kapembwa and another v Attorney General**<sup>16</sup> which outlines when an appellate court can interfere with the findings of the trial court.

Learned counsel for the 1<sup>st</sup> Respondent, Mr. Phiri, opened his oral submissions by discounting the 1<sup>st</sup> Appellant's understanding of this Court's holding in **Giles Chomba Yamba Yamba**<sup>11</sup> as it applied to the allegation of abuse of Government resources. Referring to page J75 of that judgment, Mr. Phiri quoted the following excerpt:

"It should be borne in mind that that decision came two days before the elections of 11<sup>th</sup> August, 2016. Its effect, therefore, is post 9<sup>th</sup> August, 2016, and not before."

Mr. Phiri argued that understanding the decision hinged on the word "effect"; that the Court was referring to the order directed to the ministers to pay back salaries and that the 1<sup>st</sup> Respondent failed to see how that could be interpreted to mean

**(1959)**

that the stay of the Ministers in office post dissolution of Parliament was legal. That the order to pay back was a result of the illegality that was perpetrated.

Counsel was brief in his response to ground two of the appeal, arguing that though the 1<sup>st</sup> Appellant was, admittedly, not seen in the video directing the attack on the bus, ground two should fail as the aspect of her election agents had not been specifically addressed. When probed by the Court to show, from the record, evidence linking the 1<sup>st</sup> Appellant or her election agents to the attack, Mr. Phiri conceded that he had not seen any direct evidence of her sponsorship of violence on the record but maintained that the link could only be seen to the extent that the 1<sup>st</sup> Appellant benefited from what happened because the incident had an effect on the election.

In opposing ground three, counsel submitted that the court below was clear in stating that the 1<sup>st</sup> Respondent was denied entry into the polling station and that this was unfair treatment. That as the record showed, this was not rebutted. We were referred to page 61 of the record of appeal where the court below held that there was a demonstration of double standards to the

(1960)

detriment of the 1<sup>st</sup> Respondent who by law had a right to access the polling station.

On ground four, Mr. Phiri submitted that the 1<sup>st</sup> Respondent had evidence of the non-availability of GEN12 forms at 14 polling stations. Counsel argued that the GEN12 form was a primary document for recording results from polling stations in the 2016 elections and that the absence of the form at 14 polling stations would have a material effect on any election. Mr. Phiri referred the Court to a portion of the judgment of the court below at page 65 of the record of appeal where the learned trial Judge lamented the alleged lapses on the part of the 2<sup>nd</sup> Appellant. That the non-availability of Form GEN12 was a finding of fact that was proved.

In regard to the 1<sup>st</sup> Appellant's assertion that the trial Judge had shifted the burden of proof on the allegation of abuse of Government resources, Mr. Phiri referred to the following excerpt of the judgment of the court below at page 52 of the record of appeal:

**"In the contrast, there is evidence from the Petitioner that the 1<sup>st</sup> Respondent was seen driven in a government motor vehicle with a Zambian flag flying during campaigns."**



(1961)

Mr. Phiri contended that there was no proposition advanced from the 1<sup>st</sup> Appellant as to why the finding should be interfered with and we were urged to dismiss the appeal.

In supplementing the arguments, Dr. Mbushi submitted in regard to ground one that evidence from the 1<sup>st</sup> Respondent's witnesses, such as PW5 who allegedly saw the 1<sup>st</sup> Appellant in a Government vehicle with a flag, supported the fact of the 1<sup>st</sup> Appellant's abuse of Government resources. Further, that the 1<sup>st</sup> Appellant, in her own words, informed the court below that she was living in a Government house and was receiving a salary from which she paid her workers, citing the case of **Mabenga v Wina**<sup>1</sup> for support. Dr. Mbushi contended that the 1<sup>st</sup> Appellant did use public resources as the evidence to that effect was not challenged. And in regard to the attack on the UPND campaign bus on 8<sup>th</sup> August, 2016, it was Dr. Mbushi's contention that, as confirmed by RW10, the incident was known throughout the constituency. That violence is illegal no matter the perpetrator and urged this Court to take the issue of violence very seriously.

Learned counsel Mr. Mweemba addressed grounds four, two and one in that order. He opened his submissions by stating

(1962)

that it was not the position of the law that if it could not be proved that a candidate or their agents was involved in an illegality, the election could not be annulled. Mr. Mweemba argued that Zambia was a democracy and that the interpretation of the law must be looked at in the context of democracy and the fundamental principles that govern it. He contended that the Electoral Process Act could not be read in isolation but should be interpreted in the context of Zambia as a constitutional democracy, citing the Kenyan case of **Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others**.<sup>17</sup> Mr. Mweemba argued that one of the fundamental principles of democracy, which also applies to elections, is citizen participation and sovereignty of the people. That people have a right to participate without being intimidated. Counsel also cited government accountability and transparency and the principle of regular, free and fair elections.

Submitting on ground four of the appeal, Mr. Mweemba argued that the law does not provide for quantitative analysis as to whether the election was materially affected or not, hence the use of the word 'may' in section 97 of the Act. Counsel referred

(1963)

us to Articles 8 and 9 of the Constitution on the national values and principles, that section 97 of the Act should be interpreted in light of the same.

Reiterating his point that there was nothing in the Act that suggested that if a candidate was not linked to a malpractice the election could not be annulled, Mr. Mweemba argued that the 8<sup>th</sup> August, 2016 attack on the UPND bus in Mtendere was widely known as it was in both the print and electronic media. That the 2<sup>nd</sup> Appellant was part of the proceedings and if it was found wanting, the election could still be nullified even if the 1<sup>st</sup> Respondent had not proved that the 1<sup>st</sup> Appellant or her agents were liable. Counsel contended that the court has the power to nullify an election if the principles of democracy are breached.

In opposing ground one, Mr. Mweemba contended that the Ministers' stay in office was illegal from the time Parliament was dissolved. That as the record showed, the 1<sup>st</sup> Appellant had conceded to remaining in office after the dissolution of Parliament. Counsel wound up his submissions by urging this Court not to interfere with the judgment of the court below, citing



(1964)

**Wilson Masauso Zulu v Avondale Housing Project Limited<sup>18</sup>** for authority.

The 1<sup>st</sup> Appellant filed heads of argument in reply on 23<sup>rd</sup> February, 2017. In regard to the 1<sup>st</sup> Respondent's assertion that the 1<sup>st</sup> Appellant was not qualified to stand as Member of Parliament for Munali Constituency because she was a constitutional office holder, the 1<sup>st</sup> Appellant cited Article 266 of the Constitution to argue that Ministers and Members of Parliament were excluded from the definition of 'public officer' and 'constitutional office holder'. It was submitted that Article 266 aforesaid puts it beyond doubt that not all persons acting in or holding a public office are public officers for purposes of interpreting the provisions of the Constitution. The 1<sup>st</sup> Appellant argued that the 1<sup>st</sup> Respondent's assertion was misconceived and should be dismissed. Further, it was the 1<sup>st</sup> Appellant's contention that, contrary to the 1<sup>st</sup> Respondent's assertion, there is nowhere in the record, including the portions relied on by the 1<sup>st</sup> Respondent, where the 1<sup>st</sup> Appellant referred to herself as a constitutional officer holder or public servant, thus triggering the provisions of Article 70(2)(b) of the Constitution. That the 1<sup>st</sup>

(1965)

Appellant's evidence was simply that she served as Minister of Gender following the dissolution of Parliament, up to the delivery of the judgment of this Court in **Steven Katuka**.<sup>4</sup> It was further contended that the 1<sup>st</sup> Respondent's proposition on the alleged failure by the 1<sup>st</sup> Appellant to vacate her ministerial position before deciding to contest the Munali seat was not supported by any authority.

On the 1<sup>st</sup> Respondent's comparison of the present case and **Mabenga v Wina**<sup>1</sup> on the question of abuse of Government resources in election campaigns, it was the 1<sup>st</sup> Appellant's contention that the issue was not one of access to public resources but the use of such resources for campaign purposes. That regulation 7(1)(l) and 7(2) relied on in **Mabenga v Wina**<sup>1</sup> was couched in terms similar to regulation 15(1)(k) of the current Electoral Code of Conduct. It was submitted that the 1<sup>st</sup> Respondent had not addressed the use of Government facilities for campaign purposes and, therefore, no parallel could be made between the present case and **Mabenga v Wina**<sup>1</sup>.

In regard to issues arising in ground two, it was the 1<sup>st</sup> Appellant's contention that it was the court below in its judgment

**(1966)**

that found the UPND liable for perpetration of violence. That if the 1<sup>st</sup> Respondent wished to challenge this finding, she ought to have filed a cross-appeal in accordance with the rules of this Court. As the 1<sup>st</sup> Respondent had not done so, it was submitted that arguments concerning that finding ought to be dismissed. In the alternative, the 1<sup>st</sup> Appellant submitted that RW10 did not testify that the UPND did not engage in acts of violence in Munali Constituency. That to the contrary, RW10's evidence was that the 2<sup>nd</sup> Appellant had reached the conclusion that supporters of the PF and the UNPD had been involved in a violent incident on 8<sup>th</sup> August, 2016 in Mtendere. Further, that RW10 did not testify that the PF supporters were the perpetrators and UNPD supporters the victims. That the 2<sup>nd</sup> Appellant admonished both the PF and the UPND.

In regard to the 1<sup>st</sup> Respondent's argument that RW10's evidence confirmed media reports on the 8<sup>th</sup> August, 2016 incident, it was the 1<sup>st</sup> Appellant's position that RW10 did not indicate who received the media report, which media or news outlets and access by the majority of the voters of the said media in Munali constituency. Also, that RW10 did not indicate what



**(1967)**

was reported and how and whether any video or photographs of anything relating to the incident were published or televised. The 1<sup>st</sup> Appellant submitted that it is the duty of a petitioner to adduce evidence to a high degree of convincing clarity that the majority of voters in a constituency were or may have been affected by the misconduct alleged and that, in this case, the 1<sup>st</sup> Respondent had failed to adduce evidence to that effect.

To augment, State Counsel Mutale contended that the judgment of the court below ought to be set aside. He submitted that the 1<sup>st</sup> Respondent did not adduce any evidence of abuse of Government resources and urged the Court to discredit the evidence of PW5. And on the 8<sup>th</sup> August, 2016 attack on the UPND campaign bus, Mr. Mutale, SC., argued that no witness was called to identify the perpetrators of the violence. That even if the perpetrators were identifiable, it would have been pertinent for the court to ascertain whether they were the legitimate election agents of the 1<sup>st</sup> Appellant as defined by the Act.

State Counsel Mr. Silwamba, supplementing, referred this Court to section 97(2)(a)(ii) of the Act, arguing that the law was clear that to nullify an election the malpractice must be

**(1968)**

committed by the candidate or her agents and that the majority must have been prevented from electing a candidate of their choice. Further, that section 97(3) of the Act is clear on the role of an election agent. Our attention was also drawn to the following excerpt of the judgment of the court below at page 63 of the record of appeal:

**"The allegation concerning lack of or the inadequacy of Form Gen12 did not affect the Petitioner alone. Suffice to state that it affected all the participants in that Parliamentary race."**

Mr. Silwamba, SC, submitted that the 1<sup>st</sup> Respondent had not cross-appealed that finding of the court below. He submitted that this Court addressed the issue of Form GEN12 in **Giles Chomba Yamba Yamba**.<sup>11</sup>

Mr. Lungu added that the **Steven Katuka**<sup>4</sup> case distinguished between whether the Ministers' stay in office after dissolution of parliament was void or voidable and did not create an irrebuttable presumption on the abuse of Government resources. He contended that the 1<sup>st</sup> Respondent still had to adduce evidence that Government resources were abused. And on the 8<sup>th</sup> August, 2016 incident of violence, counsel submitted that nullification on the basis of generalized violence was not

(1969)

pleaded in the court below and the 1<sup>st</sup> Respondent was not entitled to go outside the pleadings. And in regard to determining the effect on the majority, Mr. Lungu discounted the 1<sup>st</sup> Respondent's argument that it was not possible to quantify the claim that the majority of voters were precluded from electing their preferred candidate, citing the case of **Mubika Mubika v Poniso Njeulu**<sup>6</sup> for support.

Mr. Mwala, on behalf of the 2<sup>nd</sup> Appellant, submitted that the 2<sup>nd</sup> Appellant called in a witness, RW12, who testified that Form GEN12 was provided at every polling station in excess of 20 copies per election. Mr. Mwala argued that the court below glossed over RW12's evidence and chose to accept the evidence of PW5 who, in his view, was discredited. Drawing our attention to page 65 of the record of appeal, Mr. Mwala submitted that the court below misdirected itself in finding that the failure to countersign a GEN12 form amounted to a failure to provide the document at polling stations, citing section 49(2) of the Electoral Process (General) Regulations and the case of **Mazoka v Mwanawasa**<sup>3</sup> for support.



**(1970)**

We are grateful to the parties for the detailed submissions advanced in this appeal. We have carefully considered the grounds of appeal and the written and oral submissions for and against this appeal. We have also given careful consideration to the judgment of the court below and the evidence on record. From the outset, it is clear to us that this appeal attacks the judgment of the court below on aspects of both law and fact. The key question in this appeal is whether the learned Judge in the court below was on firm ground when he found that all the allegations brought against the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Appellant were proved in accordance with the requirements of the current electoral laws based on which he proceeded to nullify the election of the 1<sup>st</sup> Appellant as Member of Parliament for Munali Constituency in the 11<sup>th</sup> August, 2016 general elections.

This Judgment comes at a time when this Court has had occasion to pronounce itself on key aspects of the new electoral legal regime as espoused by the Act. That notwithstanding, before we proceed to address the grounds of appeal in the instant case, we find it imperative, and in order to put things in context, to

(1971)

restate our position on the current state of the law governing the nullification of elections in Zambia.

Section 97(2) of the Act is central to the judicial resolution of electoral disputes. Section 97(2)(a) is couched in the following terms:

**"97. (2). An 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 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 the 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;"**

As earlier stated, we have, in unequivocal terms, stated our position on the above provisions. In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a), there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his

(1972)

duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election; or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent. Sections 81 to 95 in Part VIII of the Act and also relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the electoral process.

In addition to proving the electoral malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice. Recently in **Austin Liato v Sitwala Sitwala**<sup>19</sup> we said:

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

We reaffirm the above position.



(1974)

"...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, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation..., no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."

We have also expressed agreement with the sentiments expressed in **Brelsford James Gondwe v Catherine Namugala**<sup>2</sup> that:

"The burden of establishing any one of 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 ground(s) must be established to the required standard in election petitions namely a fairly high degree of convincing clarity."

It is the foregoing principles and law that will guide this Court in determining the issues raised in this appeal.

Ground one is to the effect that the learned Judge in the court below erred in law and in fact when he held that the continued stay of the 1<sup>st</sup> Appellant in office as a Cabinet Minister created an irrebuttable presumption of the abuse of Government resources and that such abuse materially affected the outcome of the election in Munali Constituency. The 1<sup>st</sup> Respondent submitted that the court below was on firm ground when it found

**(1975)**

that the 1<sup>st</sup> Appellant had used Government resources during the campaign and that that adversely affected the 1<sup>st</sup> Respondent. That by her own admission, the 1<sup>st</sup> Appellant stated that she was a Minister in the Ministry of Gender and, thus, she had failed to comply with the Constitution when she did not vacate her ministerial position before standing as a candidate in Munali Constituency. Further, that there was abundant evidence on record that the 1<sup>st</sup> Appellant had used a Government vehicle and that she was occupying a Government house, contrary to regulation 15(1)(k) of the Electoral Code of Conduct.

However, under cross-examination as shown at page 604 of the record of appeal, the 1<sup>st</sup> Respondent failed to adduce evidence that the 1<sup>st</sup> Appellant did in fact use her ministerial salary and allowances in the campaign. And as shown at page 633 of the record of appeal, the 1<sup>st</sup> Respondent could not recall the registration number of the Government vehicle she allegedly saw the 1<sup>st</sup> Appellant in and could not state the name of the Government driver allegedly used by the 1<sup>st</sup> Appellant during the campaign.

**(1976)**

It was also the 1<sup>st</sup> Respondent's testimony that the 1<sup>st</sup> Appellant, as Minister, inspected on-going Government projects in the constituency, although, as shown at page 590 of the record of appeal, the 1<sup>st</sup> Respondent conceded that she was aware of some of the developmental projects the 1<sup>st</sup> Appellant initiated since her election as Member of Parliament in 2011. The 1<sup>st</sup> Respondent also testified that she was denied permission by the police to hold meetings while the 1<sup>st</sup> Appellant was allowed to freely have public meetings because she was a Minister.

PW5, Wendy Lwendo Michelo, a polling agent, testified that during the campaign she saw the 1<sup>st</sup> Appellant being driven in a white Government vehicle with a flag on it in Kaunda Square Stage 2 and that a Noah bus in PF colours was following behind. As shown at page 737 of the record of appeal, PW5 described the alleged Government vehicle as "white in colour similar to a Hardbody" but conceded to not having details of the driver. At page 730 of the record of appeal, PW5 stated that the 1<sup>st</sup> Appellant distributed chitenge materials at a house.

In rebuttal, the 1<sup>st</sup> Appellant denied using public resources in her campaign. She argued that the 1<sup>st</sup> Respondent failed to



**(1977)**

adduce cogent evidence that the 1<sup>st</sup> Appellant abused Government resources in the course of her campaign for the Munali parliamentary seat. At page 874 of the record of appeal, the 1<sup>st</sup> Appellant testified that she knew the regulations and rules and did not remember using Government transport, fuel or driver on any day. It was her testimony that her salary was meagre and she raised K100,000 from well-wishers and also used her gratuity from Parliament in the sum of K88,000 to fund her campaign. The 1<sup>st</sup> Appellant testified that she had two personal vehicles, a Toyota Noah and a Toyota Regius, lined up for her campaign and did not use her official Government vehicle, a gray Land Rover Discovery.

RW1, Steven Chanda, the 1<sup>st</sup> Appellant's Campaign Strategist, RW2, Humphrey Tembo, a business man and RW3, Martin Mwanza, in charge of planning, also testified that the 1<sup>st</sup> Appellant did not use Government transport during the campaign as alleged but that she had designated her two personal vehicles to the campaign. RW4, Watson Mtonga, also testified that the 1<sup>st</sup> Appellant did not use a Government vehicle or driver during the campaign. RW1 added that there were other personal vehicles

(1978)

from volunteers used in the 1<sup>st</sup> Appellant's campaign and that RW2 or himself drove the 1<sup>st</sup> Appellant during the campaign.

We have carefully considered the submissions on this ground and the evidence on record. From our perspective, the key question that falls for our consideration is whether, on the totality of the evidence on this aspect, the 1<sup>st</sup> Appellant, in her capacity as Minister, utilized public or Government resources towards her campaign contrary to the provisions of the electoral laws and regulations and that such malpractice affected the majority of the electorate in Munali Constituency as required by section 97(2)(a) of the Act.

Regulation 15(1)(k) of the Electoral Code of Conduct provides as follows:

"15(1) A person shall not –

...

(k) use Governmental or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice President in connection with their respective offices;"

The provision is clear. Use of Government or public resources by any person in the course of a campaign is proscribed except for the President and the Vice President. The allegation against the 1<sup>st</sup> Appellant is essentially that she fell

(1979)

afoul of regulation 15(1)(k) aforesaid in her pursuit of the Munali parliamentary seat.

According to the record, the learned Judge in the court below was of the view that the lacuna in the 1<sup>st</sup> Appellant's testimony was that he had not seen any guideline to preclude a minister from using Government resources during the campaigns. The specific words of the learned trial Judge at page 52 of the record of appeal were as follows:

**"The lacuna in her evidence is that I have not seen any government guideline to preclude a Minister from using government resources such as a government motor vehicle during campaigns. Ministers had government resources at their disposal..."**

The 1<sup>st</sup> Appellant submitted that the court below misdirected itself when it shifted the burden of proof on the allegation that she used a Government vehicle in the campaign; also, that there were discrepancies in the evidence regarding the make of the Government vehicle allegedly used by the 1<sup>st</sup> Appellant. Further, that the trial Judge did not apply the correct standard of proof in election petitions and relied on presumptions in finding that the allegations were proved. The 1<sup>st</sup> Appellant further argued that the court below misapprehended the holding



(1980)

of this Court in **Steven Katuka**<sup>4</sup>, which tainted its reasoning and that it failed to distinguish between void and voidable acts.

We note that at page 48 of the record of appeal, the learned trial Judge reminded himself of the applicable principles on the burden and standard of proof in election petitions. His exact words were:

“I now remind myself that the burden of proof rests on the Petitioner. In an election petition like the one in casu, the standard of proof required though a civil matter is higher than ‘on a balance of probabilities’ in order that the allegations raised must be proved to a fairly high degree of convincing clarity.”

We agree with the learned trial Judge on the correct position of Zambian jurisprudence as far as election petitions are concerned. However, we also note that the 1<sup>st</sup> Appellant argued that in considering the issues in ground one, the learned trial Judge shifted the burden of proof from the 1<sup>st</sup> Respondent, the petitioner in the court below, to the 1<sup>st</sup> Appellant, who was the respondent. Mr. Mutale, SC, for the 1<sup>st</sup> Appellant, drew our attention to this Court’s decision in **Abiud Kawangu v Elijah Muchima**<sup>12</sup> where we said at page J19 to J20:

“We agree with the Respondent’s submission that the burden lay on the Appellant as Petitioner in the court below to prove the allegations made in his petition against the Respondent. This is because the one alleging... carries the burden of proving all the allegations. He must

(1981)

prove the allegations to the required standard with cogent evidence otherwise no judgment will be entered in his favour.”

We reaffirm that position here. In particular, we emphasise that the burden resting squarely on the shoulders of the person alleging is to adduce cogent evidence to prove the allegation, without which judgment will not go in his or her favour. In the instant case, the 1<sup>st</sup> Respondent is the one that brought the allegation against the 1<sup>st</sup> Appellant that she abused Government resources to propel her campaign for the Munali parliamentary seat. Thus, it was incumbent upon the 1<sup>st</sup> Respondent to demonstrate, with convincing clarity by way of cogent evidence, the affirmative of the allegation to the effect that the 1<sup>st</sup> Appellant committed electoral infractions contrary to regulation 15(1)(k) of the Electoral Code of Conduct. We, therefore, find it odd that the trial Judge placed the burden on the 1<sup>st</sup> Appellant to prove that indeed she did not use or abuse Government or public resources in her bid to secure the Munali parliamentary seat. The learned trial Judge clearly misdirected himself despite having reminded himself of the settled position of the law on who bore the burden of proof. At page 52 of the record of appeal, the trial Judge said:

“Ministers had government resources at their disposal. It was left solely to the Ministers themselves whether or not to avail themselves of

**(1982)**

those government resources, of which the 1<sup>st</sup> Respondent denies having used government resources.”

Evidence on the record shows, as the trial Judge acknowledged, that the 1<sup>st</sup> Appellant denied availing herself of Government resources in her campaign. We have not seen any concrete evidence on the record from the 1<sup>st</sup> Respondent to show, with convincing clarity, that the 1<sup>st</sup> Appellant, despite her denials, actually abused Government resources as alleged and, as a consequence, committed a breach of the law prohibiting abuse of Government resources in election campaigns.

Our firm view is that the 1<sup>st</sup> Respondent failed to establish with convincing clarity that the 1<sup>st</sup> Appellant abused Government resources in her campaign, contrary to regulation 15(1)(k) of the Code of Conduct. Further, there was no evidence adduced by the 1<sup>st</sup> Respondent to show how the alleged misconduct affected the majority of the electorate. The 1<sup>st</sup> Respondent's evidence on this allegation clearly failed the test required in section 97(2)(a) of the Act and we, accordingly, reverse the finding of the court below on this aspect.

On the alleged use of a Government vehicle by the 1<sup>st</sup> Appellant during the campaign, evidence on record shows that



(1983)

there were discrepancies on the type of Government vehicle the 1<sup>st</sup> Appellant allegedly used. At page 589 of the record of appeal, the 1<sup>st</sup> Respondent could not say for certain what kind of Government vehicle she saw the 1<sup>st</sup> Appellant in but said it was white in colour and "looked like a Prado VX." PW5, under cross-examination at page 737 of the record of appeal, described it as "white in colour similar to a Hardbody." The 1<sup>st</sup> Appellant herself testified at page 877 of the record that her official vehicle was a gray Land Rover Discovery and her personal-to-holder vehicle was a gold Toyota GX. The learned trial Judge's position, as stated at page 52 of the record of appeal, was as follows:

**"Truly, the 1<sup>st</sup> Respondent had her personal motor vehicles, namely, a Toyota Noah and a Toyota Regius which she used during her campaigns but I have not seen evidence to show that she truly did not use a government motor vehicle as well." (emphasis added)**

Clearly, the learned trial Judge accepted the 1<sup>st</sup> Appellant's evidence and made a finding of fact that she had her personal vehicles which she used in her campaign. What is perplexing to us is that the trial Judge also expected the 1<sup>st</sup> Appellant to demonstrate that she truly did not use a Government vehicle as well. Again, this was a clear reversal of the burden of proof on this aspect and a misdirection on the part of the trial Judge. We

**(1984)**

reiterate our position that the 1<sup>st</sup> Respondent bore the burden of proof and the onus was on her to prove her allegations with convincing clarity. Given the clear discrepancies in her testimony and that of her key witness PW5, as to the type of Government vehicle allegedly used by the 1<sup>st</sup> Appellant and that no evidence was adduced on the identity of the alleged Government driver, we find that the 1<sup>st</sup> Respondent did not discharge that burden. In the absence of clear and convincing evidence on this point, we cannot support the finding of the court below.

Another aspect on this ground is that the 1<sup>st</sup> Appellant used her salary as Cabinet Minister towards the campaign. The 1<sup>st</sup> Respondent, at page 604 under cross-examination could not specifically point to what the 1<sup>st</sup> Appellant used her salary and allowances on during the campaign, insisting only that she knew as a fact that the 1<sup>st</sup> Appellant continued to get her salary despite being adopted as a candidate for Munali constituency; this, she said, was unfair. In rebuttal, the 1<sup>st</sup> Appellant's position was that she used her gratuity from Parliament and funds from well-

(1985)

wishers to finance her campaign; that she used her salary to pay domestic workers and for personal upkeep.

The position of the court below at pages 53 to 54 of the record of appeal was as follows:

"Indeed that was an admission that the salary which she was paid was spent on her campaigns. She was paid that salary as a Minister, the office which she held illegally. To the extent that she held the office of Minister illegally it follows that even the salaries which accrued to her were paid illegally, she was not entitled to that money. Those salaries were government money which she used to fund her campaigns."  
(emphasis added)

It is not in dispute that the 1<sup>st</sup> Appellant held the position of Cabinet Minister during the 2016 election campaign period. However, the flaw in the learned trial Judge's finding is that it was made on a mere assumption that because the 1<sup>st</sup> Appellant was a Cabinet Minister then she must have used her earnings towards the campaign. As we have noted already, the 1<sup>st</sup> Respondent in her testimony could not say how the 1<sup>st</sup> Appellant used her salary, except to maintain that she knew as a fact that the 1<sup>st</sup> Appellant was receiving her salary. We have also not seen any evidence on record to demonstrate that the alleged malpractice prevented or may have prevented the majority of the electorate from electing their preferred candidate.



**(1986)**

Taking into account the evidence before the court below, we find that the requirements of section 97(2)(a) of the Act were not satisfied in regard to the issues raised under this ground. We find that ground one of this appeal has merit. We accordingly reverse the finding of the court below and hold that the 1<sup>st</sup> Respondent did not prove, with convincing clarity, that the 1<sup>st</sup> Appellant abused government or public resources in her campaign as alleged.

In ground two, the 1<sup>st</sup> Appellant contends that the court below erred in law and in fact when it annulled the poll in Munali Constituency based on the attack of a UPND campaign bus in Mtendere on 8<sup>th</sup> August, 2016 without evidence linking the 1<sup>st</sup> Appellant or her election agent to the said act of violence. The 1<sup>st</sup> Respondent's testimony was to the effect that as her campaign entourage approached Mtendere on 8<sup>th</sup> August, 2016, they saw "a group of PF members" running towards their direction and the other vehicles in her procession scampered in all directions. The male cadres on the bus tried to block the PF supporters but were no match for them and the alleged PF members came onto the bus and attacked the 1<sup>st</sup> Respondent and threatened to rape her.

**(1987)**

The 1<sup>st</sup> Respondent testified that she lost consciousness; that when she regained consciousness, she found herself in a taxi surrounded by female residents of the area; that the PF cadres regrouped and came towards the taxi and the taxi driver abandoned her at a house about 100 metres from the scene of the bus attack. The 1<sup>st</sup> Respondent testified that some police officers came on the scene and later she ended up at Levy Mwanawasa Hospital.

PW2, Christopher Hamoonga, testified that on 8<sup>th</sup> August, 2016, before the UPND campaign bus reached Mtendere main market, a group of people he described as clad in PF regalia run towards the bus armed with stones and machetes. That he jumped off the bus and went to observe the incident from a distance and heard the attackers talking about raping the 1<sup>st</sup> Respondent and that they removed UPND campaign materials from the bus. In re-examination, as shown at page 666 of the record, PW2 stated that the distance from the scene of the attack to Mtendere East where the 1<sup>st</sup> Appellant was holding meetings was about three to four kilometres. PW3, Joseph Chilekwa, filmed the attack.

**(1988)**

PW6, Kelvin Pilati Hamwete's testimony was that he was at a bus station waiting for a friend when he witnessed PF youths organizing themselves and giving each other t-shirts. He telephoned the UPND Youth Chairperson who advised him to wait at the station. Shortly afterwards PW6 saw what he described as a "small Canter" from which was playing a UPND party song; that when it reached the market, the PF youths chased the vehicle. Then he was informed that the UPND bus had been attacked and that one person had been killed.

In her testimony, the 1<sup>st</sup> Appellant denied any connection to, or knowledge of the attack on the UPND campaign bus. She asserted that she was in Mtendere East, about five kilometres away, when RW6, Rachel Phiri Nyangu, called her to warn her not to proceed to Mtendere because of the violent incident.

RW1 testified that the 1<sup>st</sup> Appellant did not sponsor the attack on the UPND campaign bus; that the 1<sup>st</sup> Appellant was five kilometres away in Mtendere East at the material time. RW2's evidence was that he was with the 1<sup>st</sup> Appellant in Mtendere East when she received a telephone call on the incident and abandoned her plans to meet marketeers in Mtendere. RW3's



**(1989)**

testimony was to the effect that on 8<sup>th</sup> August, 2016, the 1<sup>st</sup> Appellant planned meetings in Mtendere and Mtendere East. That the 1<sup>st</sup> Appellant was in Mtendere East conducting door-to-door meetings when her team received information about the violent incident in Mtendere and the planned meetings were abandoned.

RW4 also testified that on the material day, he was at Mtendere market waiting for the 1<sup>st</sup> Appellant, who was in Mtendere East conducting door-to-door meetings; that the 1<sup>st</sup> Appellant was scheduled to meet some women at the market to lobby for their support. RW4 stated that he received a telephone call from RW6 informing him about the incident and that she had communicated to the 1<sup>st</sup> Appellant and RW1. That the planned meeting at Mtendere market was then abandoned. RW6 testified that on 8<sup>th</sup> August, 2016 she saw a red double decker bus coming from the direction of Kabulonga. That the bus stopped and three people clad in UPND regalia alighted and started hurling stones at people who were on the road side. She confirmed calling RW1, RW4 and the 1<sup>st</sup> Appellant, who informed

**(1990)**

her that she (the 1<sup>st</sup> Appellant) was in Mtendere East addressing a small meeting.

As the record of appeal shows at page 922, RW10, Crispin Nasilele Akufuna, Public Relations Manager for the 2<sup>nd</sup> Appellant, testified that in July 2016, the 2<sup>nd</sup> Appellant suspended campaigns in Lusaka due to rising levels of intolerance which escalated into violence, including loss of life and damage to property. That the suspension of campaigns was meant to remind political parties of their obligations under the Electoral Code of Conduct. RW10 also testified that the 2<sup>nd</sup> Appellant strongly condemned the violence in Mtendere in a national address, urging both the PF and the UPND to remind their supporters not to engage in violence.

We have viewed the video evidence and given careful consideration to the submissions and the evidence on record on this ground of appeal. As the learned Judge in the court below rightly observed, it is not in dispute that on the afternoon of 8<sup>th</sup> August, 2016, violence erupted in Mtendere in which a UPND campaign bus and its occupants came under attack. What is in dispute is whether or not the 1<sup>st</sup> Appellant perpetrated the violent

(1991)

act against the 1<sup>st</sup> Respondent and, as a consequence, violated the electoral laws and regulations.

In order for us to appreciate the real issue in controversy, we find it necessary to restate the allegation as it appeared in paragraph 5(ii) of the petition as shown at page 73 of the record of appeal and which reads as follows:

**“That on the 8<sup>th</sup> August 2016 on or about 15:00 hours, she sponsored violent cadres in Mtendere and attacked us and destroyed the party campaign bus.”**

The allegation in paragraph 5(ii) of the petition is very specific and unequivocal. In our understanding, the 1<sup>st</sup> Respondent clearly claimed that the 1<sup>st</sup> Appellant sponsored the attack on the UPND campaign bus on 8<sup>th</sup> August, 2016 resulting in its destruction. According to the **Concise Oxford English Dictionary** a sponsor is, *inter alia*, a person taking official responsibility for the actions of another. The **Pocket Oxford Dictionary & Thesaurus** includes the words “backer”, “promoter”, “supporter” and “contributor” as synonyms of the word “sponsor”. In effect, therefore, the allegation of the 1<sup>st</sup> Respondent was that the 1<sup>st</sup> Appellant backed, promoted or contributed to the violent attack on the UPND campaign bus.



(1992)

Regulation 15(1)(a) of the Electoral Code of Conduct states:

“A person shall not –

(a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election;”

Also, section 83(1)(g) of the Act says:

“A person shall not directly or indirectly, by oneself or through any other person –

...

(g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event.”

The foregoing provisions show that the law proscribes violence, intimidation and similar conduct in the electoral process. The Act in section 83(1)(g) also prohibits the unlawful prevention, by any person, of the stated political activities. As we have already noted, it is not in dispute that the UPND campaign bus was attacked in Mtendere on 8<sup>th</sup> August, 2016. The key question, as we see it, is whether or not the violent attack on the UPND campaign bus was directly or indirectly perpetrated by the 1<sup>st</sup> Appellant as alleged by the 1<sup>st</sup> Respondent in her petition in the court below. At page 54 of the record of appeal, the learned trial Judge stated as follows:

“There is no dispute that the UPND campaign bus was attacked in Mtendere on 8<sup>th</sup> August, 2016 at about 15.00 hrs. There are only two disputes. The first dispute is that the attackers of that UPND bus were sponsored by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent vehemently

(1993)

denied sponsoring cadres to attack that UPND campaign bus. I have seen no evidence to show or even to suggest that the 1<sup>st</sup> Respondent sponsored cadres to attack that UPND campaign bus." (emphasis ours)

It is unequivocal from the holding of the learned trial Judge that, though the attack on the UPND campaign bus happened, there was no evidence to link the 1<sup>st</sup> Appellant, or even to suggest her connection or contribution, to the violent incident. We have also carefully searched the record on this aspect and we have not seen evidence connecting the 1<sup>st</sup> Appellant to the incident.

As we noted *supra*, the first requirement in section 97(2)(a) of the Act is for the petitioner in an election petition to prove, with convincing clarity, and on the basis of cogent evidence, that the candidate whose election is disputed engaged in a corrupt or illegal practice or other misconduct in connection with the election. In the instant case, the court below found no evidence connecting the 1<sup>st</sup> Appellant to the attack on the UPND campaign bus. The learned Judge went as far as stating that there was nothing to even suggest that the 1<sup>st</sup> Appellant conducted herself as alleged by the 1<sup>st</sup> Respondent. None of the witnesses, including the 1<sup>st</sup> Respondent herself, proffered evidence directly addressing the allegation as it was framed in the petition. All the

(1994)

testimony was to the effect that violence had erupted in Mtendere on the afternoon of 8<sup>th</sup> August, 2016 in which the UPND campaign bus and its occupants were attacked by alleged PF supporters. At page 49 of the record of appeal, the learned trial Judge reminded himself that the petitioner's evidence must support the pleadings which are in the petition. Citing **Saul Zulu v Victoria Kalima**,<sup>20</sup> the trial Judge said:

"The Petitioner is not allowed to bring in any evidence other than the evidence which is connected to the pleadings and goes to support those pleadings. Put simply, pleadings in an election petition are allegations by the Petitioner against the Respondent(s). What this means is that the Petitioner cannot go at sea, the Petitioner is restricted only to the evidence which is supportive of the allegations outlined in the petition. If the Petitioner or indeed any witness for the Petitioner adduces evidence which does not support the pleadings then that evidence is irrelevant and inadmissible to the extent of its irrelevancy."

And referring to the cases of **Michael Mabenga v Sikota Wina**,<sup>1</sup> **Brelsford James Gondwe v Catherine Namugala**<sup>2</sup> and **Anderson Mazoka v Levy Mwanawasa**,<sup>3</sup> the trial Judge categorically said:

"What this means is that I must look out only for evidence which supports the pleadings in the petition."

We have carefully perused the record and, having viewed the video which was availed to us on the violence in Mtendere on 8<sup>th</sup> August, 2016, we find that there is no evidence supporting the allegation as couched in paragraph 5(ii) of the petition as shown



**(1995)**

at page 73 of the record of appeal, that the 1<sup>st</sup> Appellant sponsored violent cadres to attack the 1<sup>st</sup> Respondent's campaign bus.

The next question that arises is, if the 1<sup>st</sup> Appellant was not personally involved, could she still be culpable indirectly? Under section 97(2)(a)(ii) of the Act, an election can be annulled on account of a corrupt or illegal practice or other misconduct committed in connection with the election "with the knowledge and consent or approval of a candidate or of that of a candidate's agent or polling agent." The 1<sup>st</sup> Appellant testified at pages 879 to 880 of the record of appeal that at the time of the attack on the UPND bus, she was conducting her own activities and did not know of the 1<sup>st</sup> Respondent's programme on the material day; that she just got a warning call from RW6 about what was happening in Mtendere and was advised not to proceed there for her planned campaign activities.

We have perused the record on this aspect and note that the 1<sup>st</sup> Respondent did not adduce any evidence to show that the 1<sup>st</sup> Appellant knew of the attack or that any of her duly appointed election agents were involved or knew or approved of the incident.

(1996)

That there were violent clashes involving political party cadres and supporters during the 2016 campaign period is indisputable. The testimony of RW10 confirmed that there were rising levels of violence in Lusaka leading to the 2<sup>nd</sup> Appellant suspending campaigns in July, 2016. Also, that the 2<sup>nd</sup> Appellant strongly condemned the violence in Mtendere in a national address. At page 922 to 923 of the record of appeal, RW10 said:

**"The Commission also condemned in very strong terms the violence that occurred specifically in Mtendere through a national address and cited both the ruling PF and the UPND to ensure that they as a party or parties followed provisions of the code of conduct and remind their supporters not to engage in violence."**

We wish to say from the outset that we frown upon and condemn all forms of electoral violence. We are of the firm view that elections must be conducted in a peaceful environment and in strict adherence to the Electoral Code of Conduct.

However, for purposes of the instant case, the key issue that falls for our consideration is whether or not the 1<sup>st</sup> Appellant, as a candidate, or through her election agents knew or approved of the violent incident of 8<sup>th</sup> August, 2016 in Mtendere. According to the court below, the 1<sup>st</sup> Appellant had "not sufficiently shown to the court what measures she took in order to cage her

(1997)

supporters and/or agents whose violent conduct had then become a notorious fact...”

As already mentioned, the 1<sup>st</sup> Appellant, whose election was annulled by the court below, was a candidate for the PF party. At page 55 of the record of appeal, the court below said the following:

“The second dispute is that the attackers of that UPND campaign bus were PF cadres. The 1<sup>st</sup> Respondent denied that they were PF cadres. I do not agree with the 1<sup>st</sup> Respondent. I say so because there is evidence that the 1<sup>st</sup> Respondent was not at the scene of the attack....The 1<sup>st</sup> Respondent can, therefore, not know whether those attackers of the UPND campaign bus were PF or not because she was not at the scene of the attack and did not see the attackers for her to positively say they were not PF cadres.”

And at page 67 of the record of appeal, the trial Judge concluded thus:

“There is evidence that the campaigns in Munali Constituency Parliamentary elections were marred with violence. This violence reached a crescendo when on 8<sup>th</sup> August, 2016 the UPND campaign bus was attacked by PF cadres. Apart from saying that she was not at the scene of the attack and that she did not know of the attack, F/Nkandu Luo has not sufficiently shown to the court what measures she took in order to cage her supporters and/or agents whose violent conduct had then become a notorious fact even to the 1<sup>st</sup> Respondent.”  
(emphasis ours)

The 1<sup>st</sup> Appellant contended that the finding by the learned trial Judge was perverse and a misdirection as she could not be expected to demonstrate measures taken to “cage” her supporters



**(1998)**

as she had no burden of proof to discharge and that the finding of the court below fell outside the ambit of the pleading and the law.

We agree with the 1<sup>st</sup> Appellant. From our perspective, it appears that the trial Judge not only reversed the burden of proof on this allegation but apportioned blame onto the 1<sup>st</sup> Appellant for violent acts that PF supporters or cadres generally could have been engaged in during the campaign. As a consequence, the trial Judge held that the allegation was proved.

The law as provided in section 97(2)(a)(ii) of the Act is very clear. In his evaluation of the evidence before him, and having initially determined that the 1<sup>st</sup> Appellant was not personally involved, the learned trial Judge should have carefully considered whether, in the totality of the evidence available to him on this aspect, the 1<sup>st</sup> Appellant, or her duly appointed election agent, was responsible for the attack on the UPND campaign bus within the terms of section 97(2)(a)(ii) of the Act. The trial Judge did not do that. Instead, we note that he held the allegation as proved simply on his finding that there were PF cadres involved and that the 1<sup>st</sup> Appellant did not show what measures she took to control

(1999)

her supporters. This was a gross misdirection on the part of the learned trial Judge. Recently in **Crispin Siingwa v Stanley Kakubo**,<sup>21</sup> we cited with approval, as we have done in our earlier decisions, the holding of the Supreme Court in the case of **Lewanika v Chiluba**<sup>5</sup> wherein it said:

“...a candidate is only answerable for 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 election agent since...an election agent has to be specifically so appointed.” (emphasis added)

Section 2 of the Act defines “election agent” as:

“a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate’s nomination paper.”

Also, regulation 55(1) of the Electoral Process (General) Regulations 2016 reads as follows:

“A candidate shall name an election agent in the nomination paper and, subject to the other provisions of this regulation, the person named shall be the election agent of the candidate for the purpose of that election.”

As we have stated above, in the holding of the court below as reflected at page 67 of the record of appeal, the trial Judge said the 1<sup>st</sup> Appellant needed to show “measures she took” to “cage her supporters and/or agents.” State Counsel Mutale had submitted that no witness was called to identify the perpetrators of the violence and that even if they were identifiable, it was

(2000)

pertinent for the court below to ascertain whether they were the legitimate election agents of the 1<sup>st</sup> Appellant as defined by the Act.

We agree. A careful perusal of the record reveals that the 1<sup>st</sup> Respondent did not adduce a shred of evidence to support the involvement of the 1<sup>st</sup> Appellant's duly appointed election agents in the violent act. Neither was it shown in evidence that the 1<sup>st</sup> Appellant or her election agents knew of the attack on the UPND campaign bus. According to the record, the 1<sup>st</sup> Appellant only became aware of what had transpired when she was informed by telephone.

That cadres or supporters of the PF were implicated in the attack is not enough to attach responsibility to the 1<sup>st</sup> Appellant or her duly appointed election agents and to annul the election on the basis of section 97(2)(a)(ii) of the Act. In **Richwell Siamunene v Sialubalo Gift**<sup>22</sup> we said the following:

"Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election."



(2001)

Our firm view is that, in the circumstances of the instant case, the threshold in section 97(2)(a)(ii) aforesaid was not reached. Considering the gravity of the allegation and taking into account the fact that the occurrence of the attack was not in dispute, the court below should have seriously assessed the evidence before it on this aspect in light of the clear requirements of section 97(2)(a)(ii). The 1<sup>st</sup> Respondent had brought to our attention the holding in **Mlewa v Wightman**<sup>14</sup> as reflected at page 424 of the record of appeal, to the effect that it does not matter who the wrongdoer is. Our firm position is that that argument is not tenable under the current electoral law as espoused in section 97(2) of the Act and we accordingly discount it.

Learned counsel Mr. Phiri, for the 1<sup>st</sup> Respondent, had submitted that though there was nothing on the record to show that the 1<sup>st</sup> Appellant sponsored the attack on the UNPD bus, ground two should still fail as the 1<sup>st</sup> Appellant benefitted from what happened because the incident had an effect on the election. We disagree. The onus was on the 1<sup>st</sup> Respondent, to demonstrate with convincing clarity, in terms of the current electoral law, that the 1<sup>st</sup> Appellant or her election agents were

(2002)

directly or indirectly connected to the alleged violent act. In this regard, our views in **Richwell Siamunene v Sialubalo Gift**<sup>22</sup> were that:

“When section 83 is read with section 97, it is clear that the violence or threat of violence must be perpetrated by the candidate or with the candidate’s knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approved or consented to it; or that his election or polling agent had knowledge and consented to or approved of it.”

We reaffirm that position.

We further find as untenable the argument by learned counsel Mr. Mweemba that the election could still be nullified as long as the 2<sup>nd</sup> Appellant was part of the proceedings even if the 1<sup>st</sup> Respondent had not proved that the 1<sup>st</sup> Appellant or her agents were liable for the attack on the campaign bus as alleged in the petition.

We agree with State Counsel Mutale that the 1<sup>st</sup> Respondent failed to adduce evidence that the 1<sup>st</sup> Appellant or any of her election agents were involved in attacking the 1<sup>st</sup> Respondent’s campaign bus. Further, there was no evidence that the violence was with the 1<sup>st</sup> Appellant’s knowledge, consent or approval or that of her agents. We also find that the learned trial Judge

**(2003)**

veered from the specific allegation as contained in paragraph 5(ii) of the petition to hold that it had been proved, on the basis of which he nullified the election of the 1<sup>st</sup> Appellant. We accordingly reverse the finding of the court below and hold that, on the totality of the evidence on record, the 1<sup>st</sup> Respondent failed to prove the allegation and that the court below did not properly address itself to the correct position of the law on the issues surrounding the allegation. Ground two has merit and it succeeds.

Ground three for the 1<sup>st</sup> Appellant and ground two for the 2<sup>nd</sup> Appellant challenge the holding of the court below that the 1<sup>st</sup> Respondent was denied entry into Vera Chiluba School polling station and that the denial materially affected the outcome of the election in Munali Constituency. The 1<sup>st</sup> Respondent testified that at around 20:20 hours on poll day, she went to Vera Chiluba Polling Station in Mtendere. She stated that the 1<sup>st</sup> Appellant and one Kaizer Zulu were permitted to enter the polling station while the 1<sup>st</sup> Respondent and her delegation were denied entry by a police officer despite introducing herself as a candidate, a situation she characterized as unfair.



(2004)

Under cross-examination, when referred to her allegation under paragraph 5(v) of the petition claiming that the 1<sup>st</sup> Appellant and Kaizer Zulu closed the gate to the polling station and prevented her and her agent from seeing her polling agents, the 1<sup>st</sup> Respondent conceded that the allegation was not correct. It was her testimony that the 1<sup>st</sup> Appellant was not responsible for the gate at Vera Chiluba Polling Station.

The 1<sup>st</sup> Appellant, in rebuttal, contended that the allegation by the 1<sup>st</sup> Respondent was not true and that Kaizer Zulu was not part of her campaign team. She stated that she had to beg the police and the 2<sup>nd</sup> Appellant's officers to allow her to enter the polling station.

RW3 testified that it was not possible to close the gate as alleged by the 1<sup>st</sup> Respondent as it was guarded by the police. RW12, Emmanuel Makulila, the returning officer for Munali Constituency, also testified that it was not possible for the 1<sup>st</sup> Appellant and Kaizer Zulu to close the gate. He stated that the law provided that polling opened and closed at 06:00 hours and 18:00 hours respectively. It was his further testimony that at Vera Chiluba polling station, there was a group of people who

(2005)

wanted to vote after the close of the station; that the presiding officer closed the gate and kept the key himself.

In her submissions, the 1<sup>st</sup> Appellant particularly took issue with the following excerpt in the lower court's judgment at page 61 of the record of appeal:

"The material fact is that there was a demonstration of double standards when one parliamentary candidate, namely, F/Nkandu Luo of the PF was allowed entry into the polling station, yet at almost the same time entry into the same polling station was denied to F/Doreen Sefuke Mwamba of the UPND who was also a parliamentary candidate in the same constituency. This was unfair treatment to the petitioner."

The 1<sup>st</sup> Appellant contended that the court below did not address itself to the pleadings but merely discredited the testimony of RW12 on ground that he was untruthful. That the finding of unfair treatment was irrelevant as it was not pleaded.

The 2<sup>nd</sup> Appellant submitted that as the 1<sup>st</sup> Respondent had admitted in cross-examination that the 1<sup>st</sup> Appellant and one Kaizer Zulu did not lock her out of the polling station, the matter should have ended there. That it was trite law that the evidence must support the pleadings and that the court below wrongfully accepted and applied the 1<sup>st</sup> Respondent's testimony to the effect that she was locked out of the polling station by a police officer

(2006)

while the 1<sup>st</sup> Appellant was allowed to go in. It was the 2<sup>nd</sup> Appellant's contention that the 1<sup>st</sup> Respondent's allegation that the 1<sup>st</sup> Appellant and Kaizer Zulu closed the gate was not truthful and that the trial Judge erred when he found that there was a demonstration of double standards, resulting in unfairness on the part of the 2<sup>nd</sup> Appellant's conduct of the elections.

We have carefully looked at the evidence on the record, the parties' submissions and the holding of the court below on this aspect of the appeal. The key issue, as we see it, is whether the court below was on firm ground to find that the allegation, as framed in paragraph 5(v) of the petition, had been proved.

The 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Appellant, in their respective submissions, have argued that the learned trial Judge went outside the pleading in reaching his decision. At page 60 to 61 of the record of appeal, the court below said:

**"There was no dispute that F/Nkandu Luo who was a Parliamentary Candidate for Munali Constituency went to Vera Chiluba School Polling Station. There are only two (2) disputes. The first dispute is that F/Nkandu Luo was in the company of the said M/Kaizer Zulu. The second dispute is that the Petitioner was denied entry into the polling station. The evidence on this aspect is clear. I have gone through this evidence. I have taken note of the frantic efforts which the Petitioner did in order to be allowed into the polling station. These efforts included self-introduction by the Petitioner that she was an interested party being a Parliamentary Candidate in Munali Constituency. This effort fell on deaf ears. Whether F/Nkandu Luo was in the company of the said M/Kaizer Zulu or not is immaterial. The material fact is that**



(2007)

there was a demonstration of double standards when one Parliamentary Candidate, namely, F/Nkandu Luo of the PF was allowed entry into the polling station, yet at almost the same time entry into the same polling station was denied to F/Doreen Sefuke Mwamba of the UPND who was also a Parliamentary Candidate in the same constituency. This was unfair treatment to the Petitioner." (emphasis added)

The learned trial Judge then proceeded to discount the testimony of RW12 on this aspect, saying that RW12 was not there when the alleged incident happened. At page 62 of the record, the trial Judge concluded as follows:

"I am satisfied that this allegation in the pleading has been proved." (emphasis added)

It is significant to note that the allegation in paragraph 5(v) of the petition, as shown at page 73 of the record of appeal, was very specific and succinct. It reads:

"(v) That on the 11<sup>th</sup> August 2016, at Vera Chiluba School polling station Nkandu Luo and Kaizer Zulu closed the gates and refused me and my agent from seeing our polling agents."

The issue in controversy, as we see it, was that the 1<sup>st</sup> Appellant and Kaizer Zulu blocked the 1<sup>st</sup> Respondent and her agent from entering the named polling station and, as a consequence, prevented her from seeing her polling agents. That there was unfair treatment or a demonstration of double standards was not the nature of the allegation. In **Mazoka v Mwanawasa**,<sup>3</sup> the Supreme Court guided as follows:

(2008)

"The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matter in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by the pleadings and the court has to take them as such."

And in the old English case of **Thorp v Holdsworth**,<sup>23</sup> Jessel MR outlined the function of pleadings as follows:

"The whole object of pleadings is to bring the parties to an issue...to prevent the issue being enlarged, which would prevent either party from knowing...what the real point to be discussed and decided was."

In **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd**,<sup>24</sup> Saville L.J. observed that pleadings:

"...are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing." (emphasis added)

The 2<sup>nd</sup> Appellant submitted that in arriving at his conclusion, the learned trial Judge wrongfully accepted and applied the 1<sup>st</sup> Respondent's testimony to the effect that she was locked out of the polling station by a police officer while the 1<sup>st</sup> Appellant was allowed to go in. In her evidence in chief, the 1<sup>st</sup> Respondent said at page 567 of the record:

"My Lord on polling day about 20:20 hours I went to Vera Chiluba Polling Station in Mtendere. The candidate for the PF Professor Nkandu Luo and the special adviser to the President, Kaizer Zulu were permitted to enter the polling station whilst I who was a candidate was not allowed in."

(2009)

From our perspective, the record shows that the evidence adduced at trial did not address the allegation. The 1<sup>st</sup> Respondent's evidence was at variance with what she pleaded in the petition on this aspect. She did not call any other witness to testify on this issue.

The question then is, what is the effect of this on the appeal? Though only of persuasive value to this Court, we find the case of **Christopher Lubasi Mundia v Sentor Motors Limited**<sup>25</sup> instructive where it was held that where the pleadings are at variance with the evidence adduced in court, the case fails since the case is completely recast without actual amendment of the claim. In that case, Chirwa J, as he then was, cited the case of **London Passenger Transport Board v Moscrop**<sup>26</sup> where Lord Russell of Killowen said:

"I have already stated my difficulty in justifying this implication, but, with it as the basis of their order, the Court of Appeal made a declaration that the representation clause was void. This appears to me to have been a complete re-casting of the respondents' alleged cause of action and the matter was unfortunately carried through without amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact." (emphasis added)



(2010)

We are persuaded. More so because Zambian jurisprudence on election petitions has long required that the petitioner must prove all the allegations with a high degree of convincing clarity, above the balance of probabilities required in ordinary civil matters. There is no evidence on the record that the pleading in paragraph 5(v) of the petition was amended with leave of the court to reflect the issues the 1<sup>st</sup> Respondent brought up in her testimony. We further note that the 1<sup>st</sup> Respondent pointed out what she termed a typographical error only under cross-examination. In cross-examination, the exchange between State Counsel Mutale and the 1<sup>st</sup> Respondent, as shown at pages 605 to 606, was as follows:

**“Q: ...Yes Mrs. Mwamba, in paragraph 5(v) of the petition this is what you said, ‘On 11<sup>th</sup> of August, 2016 at Vera Chiluba School polling station Nkandu Luo and Kaizer Zulu closed the gate and refused me and my agents from seeing our polling agents.’ Would you like to correct that?**

**A: Yes, my Lord. Just one word of correction which must have been a typing error which says that she closed the gate, explaining that she is the one who closed the gate. The policeman closed the gate.**

**Q: So it is not correct to say Professor and Kaizer Zulu closed the gate?**

**A: No, it is not right.**

**Q: And that she was not in charge or responsible for that gate?**

**A: My Lord, the issue in this statement is not the gate the issue has become the gate because of the closing because it is mentioned that Professor Nkandu Luo and Kaizer closed the gates. My Lord the issue**

(2011)

here is the unfairness that even Kaizer Zulu who was not a candidate in Munali....

Q: Mrs. Mwamba, just answer the question I read the paragraph and you have said it is not correct. Professor Luo was not responsible for that gate, do you agree?

A: Yes I agree, my Lord.

Q: Yes that is the position. My Lord, that is all from the 1<sup>st</sup> Respondent. Much obliged.”

We have taken the liberty to reproduce what transpired in the court below for emphasis. We note from the above exchange that in the face of cross-examination, the 1<sup>st</sup> Respondent revised the nature of her allegation from what was specifically pleaded in the petition to matters that were not pleaded under the guise of a typographical error. She clearly conceded that her allegation was not true; in other words, it was a falsehood. This, in our view, called into question the credibility of the 1<sup>st</sup> Respondent, an issue the court below should have interrogated.

The 1<sup>st</sup> Respondent claimed in her testimony that a police officer prevented her access to the polling station. If that were the case, our considered view is that the 1<sup>st</sup> Respondent should have been specific in her petition. We agree with the 1<sup>st</sup> Appellant and the 2<sup>nd</sup> Appellant that the learned trial Judge erred in accepting evidence on matters that were not pleaded. The

learned author of **Zambian Civil Procedure: Commentary and Cases**, volume 1, puts it as follows at page 565:

“Pleadings constitute the spine and sprinkle of a suit on which the fate of the case of a plaintiff or defendant depends. Thus the case of a party is articulated in a pleading and no relief based on any ground not set out in the pleadings can be granted by the court. Parties to a suit are bound by the pleadings. It is the case that has been pleaded that has to be proved and consequently, the decision of the court cannot be based on grounds not set out in the pleadings of the parties.”

What the 1<sup>st</sup> Respondent required to prove in the court below is that the 1<sup>st</sup> Appellant, acting with one Kaizer Zulu, took charge of the gates at Vera Chiluba Polling Station and prevented the 1<sup>st</sup> Respondent from entering the polling station to see her polling agents. That is the burden which the 1<sup>st</sup> Respondent needed to discharge. The 1<sup>st</sup> Respondent failed the test on this aspect as no evidence was adduced to support the allegation as framed in the petition. The net effect is that the threshold required to be established pursuant to section 97(2)(a) of the Act was not reached. We find that no electoral offence was established against the 1<sup>st</sup> Appellant or her election agent in relation to the allegation in paragraph 5(v) of the petition.

We do not agree with the court below that “the allegation in the pleading” had been proved. We, accordingly, find merit in



**(2013)**

ground three of the 1<sup>st</sup> Appellant's appeal and ground two of the 2<sup>nd</sup> Appellant's appeal and they succeed.

Ground four of the 1<sup>st</sup> Appellant's appeal and grounds one three, four and five of the 2<sup>nd</sup> Appellant's appeal impugn the finding of the court below that the non-provision of GEN12 forms to all the candidates' polling agents materially affected the outcome of the election in Munali Constituency and that the 2<sup>nd</sup> Appellant failed to conduct transparent, free and fair elections in Munali Constituency. The 1<sup>st</sup> Respondent's testimony was to the effect that the 2<sup>nd</sup> Appellant did not provide adequate amounts of Form GEN12. That she made photocopies of the same which were then distributed to Chainda, Chakunkula, Mtendere and Kalingalinga wards. Also, that polling agents were using note books that they were given to record results. It was also the 1<sup>st</sup> Respondent's testimony that on 12<sup>th</sup> August, 2016, she went to Kalikiliki polling station where she discovered that there had been a dispute on figures to be written on the GEN12, though it was later resolved after a recount.

PW5 testified that on 12<sup>th</sup> August, 2016, at the Community Hall Munali Ward 33 Masasa, PF cadres stormed the polling

**(2014)**

station, causing confusion, simply because a demand for Form GEN12 had been made. That a police officer managed to calm the situation and asked the PF cadres to leave the polling station. PW5 further testified that the 2<sup>nd</sup> Appellant's officials said they did not give GEN12 forms to polling agents, advising that they (polling agents) write in their note books. That on further insistence, the agents were given the Presidential form which they then photocopied at the market and returned the original.

Under cross-examination, PW5 contradicted the testimony of the 1<sup>st</sup> Respondent in regard to the point at which photocopies of the GEN12 form were given to the UPND polling agents. At page 757 of the record of appeal, PW5 conceded that the 1<sup>st</sup> Respondent testified that all polling agents were given GEN12 forms. When asked to clarify her earlier position that the polling agents were writing in note books and yet she had admitted that the 1<sup>st</sup> Respondent had supplied copies of Form GEN12, PW5 failed to reconcile the two contradictory positions.

The 1<sup>st</sup> Appellant contended that the 1<sup>st</sup> Respondent failed to adduce any evidence confirming that the failure to provide GEN12 forms by the 2<sup>nd</sup> Appellant affected the results in the

**(2015)**

entire constituency. Also, that the failure to sign or countersign GEN12 forms could not form the basis for nullification if each candidate was affected, citing section 49 of the Electoral Process (General) Regulations.

The gist of the 2<sup>nd</sup> Appellant's detailed submissions on this aspect of the appeal was that the issue for determination was the alleged refusal by the 2<sup>nd</sup> Appellant to provide GEN12 forms to the 1<sup>st</sup> Respondent's polling agents and whether, as a result, the 1<sup>st</sup> Respondent was not able to have the correct total of results. It was the 2<sup>nd</sup> Appellant's position that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted the evidence of PW5. Citing regulation 49(2) of the Electoral Process (General) Regulations, it was submitted that the court below misdirected itself in finding that the failure to countersign a Form GEN12 amounted to a failure to provide the document to polling stations. That non-availability of polling agents at completion of the election process could not be regarded as refusal by the 2<sup>nd</sup> Appellant to provide copies of Form GEN12.



(2016)

RW12 testified that it was not true that the 2<sup>nd</sup> Appellant refused to provide Form GEN12 to polling agents. That one of his duties as returning officer was to ensure that all documentation was provided to polling stations and that not less than 20 copies each per election of Form GEN12 was given to presiding officers in all the 47 polling stations.

We have carefully considered the submissions and the evidence on record on these grounds of appeal. In our considered view the key issue that falls for our determination is whether the 2<sup>nd</sup> Appellant fell afoul of section 97(2)(b) of the Act by allegedly abrogating or neglecting its duty to supply adequate numbers of Form GEN12, which dereliction of duty materially affected the election in Munali Constituency. Related to that is the claim that polling agents did not countersign some of the GEN12 forms, affecting the 1<sup>st</sup> Respondent's ability to know the correct results.

It is trite that in terms of Article 229(2)(b) of the Constitution the 2<sup>nd</sup> Appellant has the mandate to conduct elections. And as we observed in **Giles Chomba Yamba Yamba v Kapembwa Simbao**,<sup>11</sup> the 2<sup>nd</sup> Appellant fulfils its functions by

**(2017)**

ensuring that the requirements of the Act are respected and observed in the electoral process. A key requirement in the conduct of elections by the 2<sup>nd</sup> Appellant is the provision of election materials. Pursuant to regulation 4(1)(a) of the Electoral Process (General) Regulations, the 2<sup>nd</sup> Appellant appoints a returning officer for each constituency, district or ward. According to regulation 29(1)(b) of the Regulations aforesaid, the returning officer shall, as part of the preparations for the taking of a poll in a polling station within the returning officer's constituency, district or ward:

**"provide each presiding officer with such number of ballot boxes, ballot papers, official seals, official marks, the voters' roll relating to the polling station and such other things as may be necessary for the taking of the poll;"** (emphasis ours)

RW12 was the returning officer for Munali Constituency in the 11<sup>th</sup> August, 2016 general elections. As we have already noted, in his testimony he confirmed that one of his duties was to ensure that all documentation was provided to the polling stations and that not less than 20 copies each per election of Form GEN12 was given to presiding officers in all the 47 polling stations in Munali Constituency. On the other hand, the 1<sup>st</sup>

(2018)

Respondent's contention is that the 2<sup>nd</sup> Appellant failed to deliver on its duty to supply adequate GEN12 forms.

As we noted in **Giles Chomba Yamba Yamba**,<sup>11</sup> section 97(2)(b) of the Act calls for the annulment of elections in the event that there has been non-compliance with the principles laid down in the Act in as far as the conduct of elections is concerned. Section 97(2)(b) reads:

"97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that- ....;

(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;" (emphasis added)

Thus, a person challenging the election of a candidate on the basis of section 97(2)(b) must demonstrate, with cogent evidence, that there was non-compliance with the provisions of the Act relating to the conduct of an election and that the non-compliance affected the result of the election. We must, however, be quick to point out that not every electoral infraction on the part of the 2<sup>nd</sup> Appellant's officials attracts the ultimate sanction



(2019)

of annulment of an election. Section 97(2)(b) is made subject to section 97(4) of the Act, which is in these terms:

"(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such an act or omission did not affect the result of that election." (emphasis added)

It is clear from the above provision that where there has been substantial compliance with the provisions of the Act, an election cannot be annulled on the basis of section 97(2)(b) of the Act. The learned authors of **Halsbury's Laws of England**, 5<sup>th</sup> Edition, Volume 38A, also state at paragraph 667 that:

**"No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected."**

In the instant case, the learned trial Judge held as follows at page 65 of the record of appeal:

**"There are some Form Gen12 which are partially signed. This confirms the allegation by the Petitioner that there were no Form Gen12 at polling stations. The failure by the Electoral Commission of Zambia to avail Form Gen12 did not help to build confidence in the electoral process in Munali constituency Parliamentary elections. There was a total absence of transparency and it is the Electoral Commission of Zambia who are responsible for the failure to build confidence in the**

(2020)

electoral process ...as well as the total absence of transparency. This was a lapse on the part of the Electoral Commission of Zambia and the result is that no one can positively ascertain whether or not the votes cast in favour of the Petitioner were fully accounted for. In this regard, the Electoral Commission of Zambia has let down the people of Munali constituency and the Petitioner was personally affected." (emphasis ours)

Earlier at page 63 of the record, the trial Judge had found as follows:

"The allegation concerning the lack of or the inadequacy of Form Gen12 did not affect the Petitioner alone. Suffice to state that it affected all the participants in that Parliamentary race."

We find it contradictory on the part of the learned trial Judge that he initially determined that the problem of Form GEN12 affected all participants in the poll only to isolate the 1<sup>st</sup> Respondent as having been personally affected and ultimately finding that the allegation had been proved. It is worth noting that in his holding *supra*, the trial Judge noted that some GEN12 forms were partially signed and that that confirmed the allegation by the 1<sup>st</sup> Respondent that there were no Form Gen12 at polling stations. We are perplexed because at page 63 of the record of appeal, the learned trial Judge made this clear statement:

"I have seen Form Gen12 for each polling station in Munali Constituency."

**(2021)**

From our perspective, the foregoing unequivocal statement was a clear finding of fact by the court below and confirmation that Form GEN12 was available at all the polling stations in Munali Constituency contrary to the 1<sup>st</sup> Respondent's assertion. We do not agree that a finding that some GEN12 forms were partially countersigned equates to non-availability of the document at polling stations. Further, the record of appeal shows at pages 215 to 262 that the 2<sup>nd</sup> Appellant produced in evidence all the GEN12 forms for the 47 polling stations in Munali Constituency, a fact confirmed by the court below as indicated above.

The record of appeal shows that the learned trial Judge addressed the allegation relating to Form GEN12 at pages 62 to 65. We have carefully looked at this portion of the judgment of the court below. Our considered view is that the learned trial Judge did not properly evaluate the evidence on this aspect as against the 1<sup>st</sup> Respondent's allegation that the 2<sup>nd</sup> Appellant failed to supply adequate amounts of the Form GEN12. For instance, we note that the trial Judge never made any reference to the testimony of RW12 who had testified that he issued not



**(2022)**

less than 20 copies of Form GEN12 per election to the presiding officers at all the 47 polling stations and that the evidence was before court. A careful perusal of the record shows that this aspect of RW12's testimony was not challenged in cross-examination.

We hold that the issues surrounding the 1<sup>st</sup> Respondent's allegation that there were inadequate supplies of Form GEN12 in Munali Constituency should have been carefully considered and measured against the threshold in section 97(2)(b) of the Act as read with section 97(4). We have not seen any evidence on record proving with convincing clarity the allegation made by the 1<sup>st</sup> Respondent that the 2<sup>nd</sup> Appellant abrogated its duty pursuant to section 97(2)(b) aforesaid. We, accordingly, reverse the finding of the court below on the ground that it is one which, on a careful assessment and evaluation of the evidence before it, the court below would not have reached.

We now turn to the connected aspect of signing and countersigning Form GEN12. We note that after confirming that he had seen all GEN12 forms for all the 47 polling stations, the learned trial Judge observed that GEN12 forms for 14 polling

(2023)

stations were “not signed at the back”. Further, after naming the 14 polling stations, the trial Judge said at page 64 to 65 of the record of appeal:

“In the wake of the demands by the Petitioner and her agents to comply with the provisions of Form Gen12, I have seen no reason why Form Gen12 for all the above fourteen (14) polling stations were not signed by polling agents....Interesting to note is that it is not only the losers who did not sign Form Gen12 in those polling stations but the winners as well.”

We have had occasion to address the issue of signing and countersigning of Form GEN12 in recent decisions. The provisions of the law on the signing and countersigning of the election results are well stated. Paragraph 5(2) of the Electoral Code of Conduct reads:

“An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid.” (emphasis added)

Also, regulation 49(2) of the Electoral Process (General) Regulations, to which we were referred by the 2<sup>nd</sup> Appellant, provides:

“The presiding officer shall announce how the votes have been cast for each candidate in Form GEN20 set out in the Schedule, and how many have been rejected in the polling station and may require if present, election agents or monitors to countersign the results, except that failure to countersign the election results does not render the results invalid.” (emphasis added)

(2024)

In addressing the importance of Form GEN12 in the electoral process, the learned trial Judge had this to say at page 63 of the record of appeal:

"This issue...is an important matter in the conduct of elections and in the spirit of promoting transparency and building confidence in the electoral system. It is important because Form Gen12 is a document for the Electoral Commission of Zambia which is used in an election at polling stations to record election results both in figures and in words. The design of Form Gen12 shows that polling agents should append their names in full and signature at the back of that Form Gen12. Even if the use of Form Gen12 is not couched in mandatory terms, when a dispute of this magnitude arises, compliance as to the way it is supposed to be filled in becomes a necessity." (emphasis added)

We agree with the learned trial Judge that Form GEN12 plays an important role in our electoral process and that its proper use enhances transparency and confidence in the electoral system. In **Giles Chomba Yamba Yamba**,<sup>11</sup> we said the following when addressing the question of Form GEN12 at page J70:

"We venture to say the ideal situation of course is that all the people required to sign for the election results should sign to enhance transparency in the electoral process."

And in **Lewanika v Chiluba**<sup>5</sup> the Supreme Court put it thus:

"The flaws of all types which we have said were established, of course, did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process."



**(2025)**

We endorse those views. Considering that elections provide a means for the governed to express their will as to who is to govern them, those managing the electoral process must, as far as possible, work on and eliminate any flaws in the process.

The record shows that out of the 47 polling stations in Munali Constituency, GEN12 forms for 14 of those were not signed by any polling agent. According to the court below, this amounted to a total absence of transparency and a lapse on the part of the 2<sup>nd</sup> Appellant as, in the lower court's view, no one could positively ascertain whether or not the votes cast in favour of the 1<sup>st</sup> Respondent were fully accounted for.

The problem we see with the position taken by the court below is that, despite finding that both the losing and winning sides in Munali Constituency did not countersign the Form GEN12 in the named polling stations, the court below isolated the 1<sup>st</sup> Respondent as the candidate whose votes cast in her favour could not be positively accounted for. Our considered view is that this was an unbalanced approach to the issue by the court below. In our view, the non-signing of Form GEN12 for the 14 polling stations affected all the participating candidates. In

(2026)

our recent decisions, we have cited with approval the case of **Mazoka v Mwanawasa**,<sup>3</sup> where the Supreme Court said:

"We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1<sup>st</sup> Respondent."

We remain persuaded by that position.

Most importantly, however, the law, as we have cited it above, clearly stipulates that failure to countersign the election results by election or polling agents does not render the results invalid. The court below found as a fact that all GEN12 forms for all the polling stations in Munali were exhibited in evidence before it. In that regard, we are of the view that, as far as this aspect is concerned, the 2<sup>nd</sup> Appellant conducted the election in Munali Constituency in substantial conformity with the requirements of the law and it should not have been a basis for nullifying the election. Further, we have not seen, from the record, cogent evidence to show how the non-signing of GEN12 forms for the named polling stations affected the overall result in the 2016 Munali parliamentary election. It is our firm view that the election in Munali Constituency was conducted substantially

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in accordance with the provisions of the Act. We find ground four of the 1<sup>st</sup> Appellant's appeal and grounds one, three, four and five of the 2<sup>nd</sup> Appellant's appeal meritorious and they succeed.

All the 1<sup>st</sup> Appellant's grounds of appeal and the 2<sup>nd</sup> Appellant's grounds of appeal have succeeded and, therefore, the entire appeal succeeds. Accordingly, we set aside the decision of the court below to nullify the election and declare that the 1<sup>st</sup> Appellant, Nkandu Luo, was duly elected as Member of Parliament for Munali Constituency.

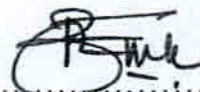
We order that each party bear their own costs of this appeal and in the court below.



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A. M. Sitali  
**Constitutional Court Judge**




.....  
M. S. Mulenga  
**Constitutional Court Judge**



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E. Mulembe  
**Constitutional Court Judge**



.....  
M. M. Munalula  
**Constitutional Court Judge**



.....  
M. Musaluke  
**Constitutional Court Judge**