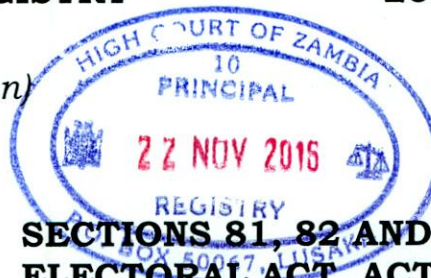


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2016/HP/EP/0049
2016/HP/EP/0062



**IN THE MATTER OF: SECTIONS 81, 82 AND 83 OF THE
ELECTORAL ACT, ACT NO. 35 OF
2016**

AND

**IN THE MATTER OF: MALOLE PARLIAMENTARY
ELECTIONS HELD IN ZAMBIA ON THE
11TH DAY OF AUGUST, 2016**

AND

**IN THE MATTER OF: THE PARLIAMENTARY PETITION
RELATING TO THE PARLIAMENTARY
ELECTIONS HELD ON 11TH AUGUST,
2016**

AND

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE
CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, and VOLUME 1 OF THE
LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 47, 48, 49,
50, 54, 70, 71, 72 & 73 OF THE
CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1, VOLUME 1 OF THE LAWS
OF ZAMBIA**

AND

**IN THE MATTER OF: SECTIONS 15, 29, 37, 38, 51, 52, 55,
58, 59, 60, 66, 68, 69, 70, 71, 72, 75,
77, 81, 83, 86, 87, & 89, 96, 97, 99,
100, 106, 107 & 108 OF THE**

**ELECTORAL ACT (ELECTORAL CODE
OF CONDUCT) NO. 35 OF THE LAWS
OF ZAMBIA**

AND

**IN THE MATTER OF: THE ELECTORAL PROCESS ACT
(ELECTORAL CODE OF CONDUCT) NO.
35 OF THE LAWS OF ZAMBIA**

BETWEEN

EMMANUEL M MUNAILE

1ST PETITIONER

CHILUFYA CHIKONKOLO

2ND PETITIONER

AND

CHRISTOPHER BWALYA YALUMA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

BEFORE THE HONOURABLE MRS JUSTICE M.C. KOMBE

**FOR THE 1ST PETITIONER : MR. M MWANSA- MESSRS
MAMBWE SIWILA &
LISIMBA**

FOR THE 2ND PETITIONER : NO APPEARANCE

**FOR THE 1ST RESPONDENT : MR E KHOSA -MESSRS
NGANGA YALENGA &
ASSOCIATES**

FOR THE 2ND RESPONDENT : NO APPEARANCE

J U D G M E N T

Cases referred to:

- 1. Michael Mabenga v Sikota Wina, Mafo Wallace and George Samulela, (2003) ZR, 220.*

2. *Josephat Mlewa v Eric Wightman*, (1995-1997) Z.R 171(SCZ Judgment No. 15/2003).
3. *Davies Chisopa and Sidney Chisenga*, Appeal Number 179/2012.
4. *Eddie Christopher Musonda v Lawrence Zimba*,
5. *Brelsford James Gondwe v Catherine Namugala*, SCZ Appeal No. 175 of 2012.
6. *Akashambatwa Mbikusita Lewanika v Fredrick T.J Chiluba*, (1998) Z.R 49.
7. *Christopher Kalenga v Annie Munshya and 2 Others*, 2011/HK/EP/03.
8. *Attorney General v Kakoma*, (1975) Z.R 212
9. *Anderson Kambela Mazoka & Two others v Levy Patrick Mwanawasa* (2005) Z.R 138.
10. *Khalid Mohammed v The Attorney General* (1982) Z.R 49.
11. *Wilson Masauso Zulu v Avondale Housing Project* (1982) Z.R. 172.
12. *Mulondwe Muzungu and Elliot Kamondo* 2010/EP/001.
13. *Moore v Lambeth County Court Registrar* (1969) 1W.L.R 141.
14. *Happy Mbewe v The People* (1983) Z.R 59.
15. *Mathilda M. Mutale v Sebiso Mukuka* Appeal No. 45 of 2005 (Unreported).

Legislation referred to:

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016.*
2. *The Electoral Process Act No. 35 of 2016*
3. *The High Court Rules Chapter 27 of the Laws of Zambia.*

This is the 1st Petitioner's petition to contest the results of the elections held on 11th August, 2016 with regard to the Malole Constituency Parliamentary seat.

Before addressing the 1st Petitioner's petition a background of the 1st and 2nd Petitioner's petitions will be given as follows:

On the 29th August, 2016 two separate petitions were filed at the principal registry, against the 1st Respondent Christopher Bwalya Yaluma and the 2nd Respondent, The Electoral Commission of Zambia (ECZ). The petition under Cause No. 2016/HP/EP/0049 was filed by Emmanuel Munaile of Forum For Democracy and Development (FDD) and the petition under Cause No. 2016/HP/EP/0062 was filed by Chilufya Chikonkolo of the United Party For National Development (UPND).

At a scheduling conference held on 9th September, 2016, the two petitions were consolidated as the Petitioners had petitioned the same Respondents. It was ordered that the two petitions would be heard at the same time for the purpose of these proceedings.

At the same conference, Orders for Directions were made and a time table was set out on how the matter would be managed. Trial was scheduled to commence on 3rd October 2016 and end on 11th October, 2016.

One of the orders to be complied with by each petitioner before any further steps could be taken was the payment of Two Thousand Four Hundred Kwacha (K2, 400.00) as security for costs pursuant

to *Section 102 (2) of the Electoral Act No. 35 of 2016* on or before 13th September, 2016.

The 1st Petitioner's petition was heard on the 4th October, 2016 and he closed his case on the 5th October, 2016. Thereafter, the 2nd Petitioner was scheduled to commence her petition on 6th October, 2016. By that date of trial, the 2nd petitioner had not paid the security for costs.

In addition to non-payment of the security for costs, there was no proof of service of the petition on the Respondents, no list and bundle of documents had been prepared by the 2nd Petitioner. Further no appearance had been made by the 2nd Petitioner or their advocates at the scheduling conference held on 9th September and 28th September, 2016 and the date for commencement of the 2nd Petitioner's case on the 6th October, 2016.

Due to the cavalier attitude by the 2nd Petitioner and her counsel in completely failing to adhere to the Order for Directions, the 2nd Petitioners petition was dismissed for want of prosecution on 6th October, 2016 and I proceeded to hear the 1st Respondent's case.

Turning now to the 1st Petitioner's petition, his petition was filed on the 29th August, 2016. The 1st Petitioner stated in his petition that he contested the Malole Constituency Parliamentary seat on the Forum for Democracy and Development (FDD) ticket. The others who contested this seat were Christopher Bwalya Yaluma of the Patriotic Front (PF), the 1st Respondent and Chilufya Chikonkolo of the United Party for National Development (UPND).

The election was conducted by the Electoral Commission of Zambia, the 2nd Respondent. At the end of the election, the Returning Officer Mr Gaston Phiri announced the results of the Parliamentary Election as follows:

- (i) Christopher Bwalya Yaluma 24,879 votes
- (ii) Emmanuel M Munaile 5,319 votes
- (iii) Chilufya Chikonkolo 5,085 votes

With those results the Returning Officer declared the 1st Respondent winner.

However, the 1st Petitioner's contention is that the election of the 1st Respondent as a member of National Assembly for Malole Constituency is void because of the illegal practices committed by the 1st Respondent or his agents which so affected the election result that the same ought to be nullified. The following are the incidences of the said illegal practices;

(a) Between 16th May, 2016 and 11th August, 2016, in the course of his campaigns, the 1st Respondent and his agents did offer and in fact made material donations to complete the works which had stalled since 2011 to the following Primary and Community Schools:-

- (i) Mumba Primary School
- (ii) Mumena Primary School
- (iii) Chifulo Community School
- (iv) Chilaila Community School
- (v) Chipembe Community School
- (vi) Chomba Community School

- (vii) Mutale Mutabukila Community School
- (viii) Pulumwe Community School.

It is alleged that the donations were made in order to lure the electorate to vote for the 1st Respondent.

(b) During the campaign period between 16th May, 2016 and 11th August, 2016, the 1st Respondent and his Campaign team which comprised Mr Simon Mwila who was the Campaign Manager, Mr Charles Mwamba and Mr Bwalya Bwikalo, the PF Malole Constituency Chairperson and others used the following vehicles for his campaigns:-

- (i) A beige Land Cruiser registration number GRZ 320 CJ.
- (ii) A white Nissan Patrol registration number ALD 1932 belonging to the Ministry of Energy and Water Development, Lusaka.
- (iii) A white Toyota Hilux registration number ABZ 7365 belonging to Zambia Electricity Supply Corporation ZESCO Limited Lusaka, which vehicle was given to a Parish Priest, Father Mwamba at St Margaret Catholic Parish in Mungwi. The said Father Mwamba also campaigned on behalf of the 1st Respondent.
- (iv) A green Prado registration number GRZ 168 CL belonging to the Ministry of Mines and Mineral Resources, Lusaka, which vehicle was involved in a Road Traffic accident between the 2nd and 3rd of June, 2016 along Kasama – Isoka road. The driver of the vehicle at the time of the accident was Mr Friday

Mwape, an employee of the Ministry of Mines and Mineral Resources.

The vehicles allegedly used were properties of the Government of the Republic of Zambia and that the use of the same during campaigns is contrary to the *Electoral Code of Conduct of 2016*.

(c) The petitioner's monitors and agents though allowed in the Totalling Center were not shown the Ballot Boxes and neither were they allowed to witness any box being brought into the Totalling Center.

(d) The Presiding Officers were told that the forms were not enough to go round, contrary to the ECZ Regulations. This rendered the results announced not being authentic and questionable.

(e) The 1st Respondent using his position as a Cabinet Minister during the prescribed campaign period graded two major feeder roads in Malole Constituency using government resources and workers. This was in order to entice electorates to vote for the 1st Respondent.

The 1st Petitioner, therefore, contends that by reason of the aforesaid, the 1st Respondent was not validly elected. The 1st Petitioner therefore seeks the following reliefs:

- (i) ***A declaration that the election of the 1st Respondent as a member of National Assembly for Malole Constituency is void;***
- (ii) ***A declaration that the illegal practices committed by the 1st Respondent or his agents respectively so***

affected the election results that the same ought to be nullified.

The 1st Respondent filed into court an answer on 20th September, 2016. In the answer, the 1st Respondent denied the allegations in paragraph 5 of the petition and in particular denied the assertion that he was not validly elected for the following reasons:

- (i) It was not true that between 16th May, 2016 and 11th August, 2016 and in the course of his campaigns, the 1st respondent and his agents offered donations to complete the works which had stalled since 2011 to the following primary and community schools or at all:-
 - a. Mumba Primary School,
 - b. Mumena Primary School,
 - c. Chifulo Primary School,
 - d. Chilaila Primary School,
 - e. Chipembebe Primary School,
 - f. Chomba Community School,
 - g. Mutale Mutabukila Community School, and
 - h. Pulumwe Community School.

The materials referred to were not delivered by the 1st Respondent but were part of the projects under the Constituency Development Fund (CDF) program being undertaken by the local council, the said materials were in fact delivered by the contractor contracted by the council.

- (ii) The 1st Respondent denied that during the campaign period between 16th May and 11th August 2016, he and his campaign team which comprised Mr Simon Mwila

who was his Campaign Manager, Mr Charles Mwamba and Mr Bwalya Bwikalo, the PF Malole Constituency Chairperson and others used the GRZ or public institution vehicles as listed to campaign for the following reasons:

a. Beige Land Cruiser registration number GRZ 320 CJ

The said vehicle was the 1st Respondent's official vehicle at the Ministry of Mines. The 1st Respondent only used the said vehicle once when he was part of the delegation that met the President during the centenary celebration of Catholicism in Mbala and this was prior to the Ruling by the Constitutional Court that Ministers had to vacate office. The 1st respondent denied that he engaged in campaigns using the said vehicle on the said occasions or at all.

b. White Nissan Patrol registration number ALD 1932 as correctly put by the Petitioner belonged to the Ministry of Energy and Water Development, the 1st Respondent's previous Ministry. The 1st Respondent however denied that he used the said vehicle during the campaign period as the said vehicle was not under his jurisdiction. Secondly, the 1st Respondent last used the said vehicle a year before the elections as transport for the reporters that had accompanied him to inspect projects under the Ministry of Energy.

c. The 1st Respondent denied any knowledge of the White Toyota Hilux registration number ABZ 7365

belonging to ZESCO which entity fell under the Ministry of Energy. The 1st Respondent therefore denied any insinuation that he influenced the donation of the said vehicle to Father Mwamba or at all so that he could vote for him.

d. The 1st Respondent denied that the Green Toyota Prado registration number GRZ 168 CL was campaigning for him. The said vehicle had been in Northern Province at that time on official government business at the time of the accident, the driver, Mr Friday Mwape was alone and neither was he found with any officials or campaign materials for the PF.

(iii) Grading of two (2) major feeder roads in Malole Constituency during the campaign period.

The 1st Respondent denied that he used his position as Cabinet Minister during the prescribed campaign period to grade two major feeder roads in the constituency in order to entice the electorate or at all. All road works were undertaken by the Roads Development Agency (RDA) and the Zambia National Service (ZNS) as part of the routine maintenance of feeder and other roads which programs could not be halted on account of an election.

Therefore the 1st Respondent contends that the 1st Petitioner is not entitled to any of the reliefs sought.

The 2nd Respondent, the Electoral Commission of Zambia did not file an Answer to the 1st Petitioner's petition and neither did they

appear for trial. At the trial of the matter on the 4th October, 2016, it was discovered that the 1st Petitioner only managed to serve the 2nd Respondent with his petition on the 30th September, 2016 contrary to the Order for Directions which resulted in insufficient time for the 2nd Respondent to file an Answer. An application for an adjournment to enable the 2nd Respondent file an Answer within 7 days of the commencement of trial was denied on the basis of time which had already ran out for the hearing of the petition.

Further during the trial all allegations against the 2nd Respondent in the 1st Petitioner's petition and its supporting affidavit were expunged from the record.

For purposes of identification the 1st Petitioner and 1st Respondent will remain as they were upon commencement of the trial.

1. THE 1ST PETITIONER'S CASE

The 1st Petitioner called six (6) witnesses.

The first witness, PW1 was the 1st Petitioner himself. His testimony was that he stood in the election as Member of Parliament (MP), together with two other contestants, Honourable Christopher Yaluma and Ms Chilufya Chikonkolo. At the end of the poll the Returning Officer Mr Gaston Phiri declared Honourable Christopher Yaluma as winner with 24,879 votes whilst he had 5,319 votes and Ms Chikonkolo had 5,085 votes. The declaration was made on the 13th August, 2016.

His interest in the petition was that Honourable Christopher Yaluma was not duly elected because he failed to adhere to the

Electoral Code of Conduct No. 35 of 2016 during the campaign period from the 16th May, 2016 to 10th August, 2016 and therefore he broke the law.

It was the 1st Petitioner's testimony that the 1st Respondent used Government vehicles during the campaign period when the *Electoral Code of Conduct* stipulated under *Section 15 (1) (k)* that no person shall use Government transportation or vehicles or any transport facilities except the President and Vice-President in respect to their offices.

The vehicles in question were beige Land Cruiser registration number GRZ 320 CJ, Nissan Patrol white in colour and registration number ALD 1932 belonging to the Ministry of Energy, green Prado registration number GRZ 168 CL belonging to the Ministry of Mines and Mineral Development and a Toyota Hilux white in colour registration number ABZ 7365 belonging to ZESCO.

In relation to the motor vehicle Land Cruiser registration number GRZ 320 CJ, the 1st Petitioner testified that the said vehicle was still being used by the 1st Respondent. He stated that the vehicle was seen in Malole on 30th May, 2016 being the nomination day for Mayors and Council Chairpersons as well as on the day for filing Parliamentary nominations. He went on state that after completing the filing of the nominations he saw the said vehicle parked outside. He further told the court that he knew that the vehicle was the 1st Respondent's ministerial vehicle and he had always been in the possession of it and that he used to see it on several occasions whenever he was in Malole constituency.

The Petitioner identified the vehicle which was parked outside the court room.

Regarding the Nissan Patrol registration number ALD 1932, the 1st Petitioner told the court that the said vehicle was used in most places in Malole Constituency and specifically on the day of nominations and on the 18th July 2016. He stated that the said vehicle was mostly used by Mr Charles Mwamba the Campaign Manager for the 1st Respondent and Mr Bwikalo the Chairperson for Malole Constituency, P.F. The said vehicle was driven by Mr Mwape an employee of the Ministry of Mines and Mineral Development.

The 1st Petitioner went on to say that on the 18th July, 2016, he saw it with his campaign team as they were going towards Mwamba Mulilo village and Mr. Charles Mwamba was seated in front.

Furthermore, the 1st Petitioner told the court that in the evening on 18th July, 2016, they were at a village called Mukuka Mfumu in Malole constituency. The vehicle in question was with Mr. Charles Mwamba and it was being used to announce that his Excellency the President of the Republic of Zambia Mr Edgar Chagwa Lungu was going to have a rally in Mumba village in Malole constituency the following day the 19th July, 2016. He told the court that Mr. Charles Mwamba was telling the people that those who were interested in the rally should stand by the road side the following day at 05:00 hours. He said that Mr. Mwamba drove away because

the children started shouting that *'ibula lilipano'* which means *'the leaf is here'* which is the symbol for FDD.

On the green Prado registration number GRZ 168 CL, the 1st Petitioner told the court that the vehicle was seen at the Council on the day of nominations with members of PF. He said that he only saw this vehicle on the 30th May, 2016 and 31st May, 2016 and that it was involved in an accident on the 20th July and was not seen again after that.

He further told the court that vehicle registration number ABZ 7365, a Toyota Hilux belonging to ZESCO of Lusaka was in the possession of a Catholic Priest Father Mwamba of St Margaret's Parish Church of Mungwi. It was equally involved in the campaigns. He stated that he saw the vehicle at a rally that he was conducting on the 22nd July, 2016.

He said he saw the vehicle again on the 7th August, 2016 at a village called Chewe in Malole. After marrying off a couple at that village, the Parish Priest drove the vehicle to Chikunya. Later on whilst he was on his way to Chikunya for another meeting, the 1st Petitioner saw the Parish Priest heading in the opposite direction with a number of people in the twin cab. He stated that he became suspicious on this particular day and that he wanted to know who owned the vehicle.

After investigating in to the ownership of the Toyota Hilux he discovered that the vehicle belonged to ZESCO Limited a parastatal company. He then informed the Police as a whistle blower after the elections that the Parish Priest was driving a vehicle for ZESCO

during the campaign period but the Police informed him that the right complainant was ZESCO and not him.

He went on to say that the vehicle was still being driven by the Priest. He stated that this conduct was in contravention of *Section 15 (2) of the Electoral Code of Conduct* as Priests were very influential in the areas that they lived and the Priests' conduct influenced the electorate.

It was also the 1st Petitioner's testimony that he raised an issue on the projects that were undertaken during the time of campaign. He told the court that some projects involved completion of community schools such as Chifulo, Chilaila, Chipembele and Mumena among others. He stated that in 2009 when he was a Member of Parliament (MP) for Malole, works had begun in these schools and by the time he left in 2011 there were still some outstanding works like fixing windows frames and panes, door frames, flooring, roofing as well as painting. That the works were only attended to during the time of election campaigns in 2016 and he stated that the act compromised the election process.

He further told the court that when he was in office as MP, they were using Constituency Development Fund (CDF) to help communities meet some challenges that the Central Government could not normally attend to. He told the court that the originator was Hon. Amusaa Mwanamwambwa the former Speaker of the National Assembly. He stated that there was a committee in place that looked into how the money was disbursed and that all MP's were members of the Constituency Development Committee (CDC).

He said the 1st Respondent was a member of the CDC for Malole constituency.

The 1st Petitioner went on to say that for the sake of accountability, the money was disbursed to the local councils in the respective constituencies and that MP's were critical to the disbursement of the CDF. According to the witness, the CDC comprised of two (2) councillors and four other people recommended by the MP.

He also stated that every project to be undertaken in the constituency was proposed by the CDC and then approved by the full council and that it was the responsibility of the council to ensure that the projects were carried out.

The 1st Petitioner went on to say that he started the projects for most of the community schools he had referred to in the petition such as Mumba, Mumena, Chomba, Chifulo, Mutale Mutabukila, Chilaila, Chipembele and Pulumwe Community Schools. And as a matter of government practice, priority was given to on-going projects whether there was a change of government or not because the money came from the same budget.

He told the court that to his surprise, no works on the schools were done in Malole constituency after he left and yet the government had released funds in the years of 2011, 2012 and 2013. In relation to the CDF for the year 2014, the 1st Petitioner told the court that from the information that he received, funds were wrongly deposited into the Malole Constituency Youth Development Fund and it took the Council one year to realise that the money was not in the Malole CDF. It was finally put back in to the right

account on the 5th January, 2016 following a report issued on the 9th January, 2016 by the Council.

The 1st Petitioner testified that his concern was that from January, 2016 the buying of materials was only done when the campaign period had already started. Furthermore, he was surprised that the said monies were also being distributed by Mr Chiluba, the Chairperson of Mungwi District PF Executive Committee in the Malole Constituency, who was now late. The said Mr Chiluba was not a member of the CDC neither was he a Councillor nor a government employee for him to have been involved in a GRZ project. Because of the aforesaid, the 1st Petitioner concluded that the money being used was not CDF and must have come from the Malole MP or PF in order to change the perception of the electorates in Malole Constituency.

He added that the distribution of materials should have been left to government employees like District commissioners or the council so as reduce on the suspicion. He stated that because of this, he raised these issues in his petition that completion of projects that had stalled from 2011 was a deliberate move by the 1st Respondent so that they could change the minds of the voters of Malole when the works were completed at the time of the elections. This was against the Electoral Code of Conduct.

Furthermore, the 1st Petitioner told the court that the involvement of a political cadre swayed the voting pattern in Malole because the projects in question were completed during the campaign period.

The 1st Petitioner also testified that during the campaigns projects at certain schools like Chipembele, Chilaila, Chifulo, Pulumwe and Mumena were completed. Unfortunately for Mutale Mutabukila School, the project was not completed despite materials having been delivered to the school.

In relation to the allegation on the grading of the two feeder roads, the 1st Petitioner testified that during the campaign period from 16th May, 2016 to 10th August, 2016 the road from Kapolyo to Mumba Village in Chambeshi was hurriedly given to ZNS a wing of government to work on. The road in question was abandoned after the elections, meaning that money was not given to the contractor.

He went on to say that the second road starting from Chitanga in Fibwe Ward of Malole Constituency which goes to Chimba to connect to another road which comes from Nseluka and Kayambi was given to a Chinese contractor who was using one grader. As a result men and women of that area were involved in stamping of trees instead of the equipment for construction of roads being used. He stated that he was worried that projects that were supposed to be on-going could be terminated midstream when the elections were over.

With regard to the road to Mumba from Kapolyo, he told the court that only about 3 kilometres had been done the way the road was supposed to be done. He stated that there was nothing to talk about on the road near Kalikeka as well as the road from Chitangu to Chinga as it was only full of heaps of soil and no further works were being done.

He told the court that this was deception to the people who were supposed to benefit from these roads. His conclusion was that the works were started because PF wanted votes for the area MP as they started road works which were not to be. The action by the 1st Respondent was meant to lure the voters to vote for the area MP.

The 1st Petitioner went on to say that it was his experience as former MP from a rural constituency where poverty levels were so high, that any action undertaken to alleviate the suffering of the people would persuade them to support the person who had brought that action.

In view of this, the 1st Petitioner's prayed that the court nullifies the Malole Constituency elections given that the 1st Respondent did not conform to the *Electoral Code of Conduct 2016*. He also prayed for costs.

In cross-examination, the 1st Petitioner confirmed that motor vehicle registration number ABZ 7365 was used by the Priest during the campaign. He further told the court that the offices for the Parish Priest and the offices for the Malole constituency were housed right at the same premises being St Margaret's Catholic Church. He added that the Parish Priest was using vehicle registration number ABZ 7365 during campaign that was before the elections. However, he admitted that he only made a report to the police after the elections.

He further told the court during cross examination that because of the Parish Priest's conduct his official vehicle for the Parish was

parked and that is how he got the vehicle in question. He further told the court that he did not report the use of the vehicle by the Parish Priest to ZESCO or to any other body apart from the police. He explained that he could not report the matter to the Conflict Management Committee because the committee was established to deal with issues involving political players. He denied that he made a report after the elections so that he could build up evidence for the petition.

The 1st Petitioner admitted that he never attended a rally where the Priest was campaigning for the PF or the 1st Respondent. He denied that the 1st Respondent did not have control of the assets that belonged to the Ministry of Energy prior to the dissolution of Parliament.

The 1st Petitioner went on to testify that he saw Mr Mwape who was his former campaign manager driving the Nissan Patrol for the 1st Respondent. He told the court that he was not aware that the 1st Respondent had walked from his party office which was located 50 meters from the Mungwi Polling Station on the day of filing of his nominations.

Responding to a question on the number of campaign vehicles he had, the 1st Petitioner told the court that he had two (2) campaign vehicles and that there were nine (9) people in his campaign team.

The 1st Petitioner told the court that he was aware that the 1st Respondent had more than seven (7) vehicles that constituted his campaign team and out of those two were branded vehicles and one in particular had the registration number ALV 4040. Further

that one of the vehicles which was being used was mounted with a PA system.

The 1st Petitioner also told the court that after filing his nominations in May, he went back to Lusaka and came back for the campaign end of June. The witness further said that he was not aware of the Catholic Centenary celebrations held under Senga Hill Constituency a neighbour to Malole Constituency where the 1st Respondent in his capacity as a government official received President Lungu, who attended those celebrations in the first week of August, 2016.

In relation to the first allegation, the 1st Petitioner told the court that he was a MP for five (5) years and he admitted that at that time the CDF was being given to each constituency. He also admitted that he was aware that the implementation of any specific project in a constituency depended on the approval by the full Council depending on the priority of the project. However, he denied the suggestion put to him by counsel that some projects were not completed according to his expectation because the full council did not regard them as priority projects. He stated that the timing of the projects was wrong.

The 1st Petitioner also told the court that he was not aware that the RDA on behalf of the National Road Fund Agency (NRFA) had entered into a contract dated 21st July, 2015 for the periodic maintenance of 52 kilometres of agriculture feeder roads in Mungwi District in the Northern Province. He was also not aware that the RDA and NRFA had signed a Memorandum of

Understanding (MOU) with the ZNS to take over and be in charge of all rural road projects which roads included the Chitengu to Chimba roads.

The 1st Petitioner confirmed that he was not aware that the 1st Respondent was the Minister for Energy and Mines before the Ministries split and that the vehicle registration number ALD 1932 was one of the vehicles that were given to the 1st Respondent as a utility vehicle before the Ministry was split into two Ministries. He was not also aware that the reason why the vehicle was in the Malole constituency was because the 1st Respondent used it to carry reporters from state institutions and that the last time the 1st Respondent used this particular vehicle was a year before the elections of the 11th August, 2016.

The 1st Petitioner also outlined the procedure for procuring materials approved by the full council. He explained that the procedure was twofold. That depending on the amount involved, the council requested for bids from suppliers. If the amounts were below the threshold, the people in the council would go out and decide on whom to give the tenders.

Concerning vehicle motor registration number GRZ 168 CL, the 1st Petitioner told the court that he was aware that it belonged to the Ministry of Mines where the 1st Respondent was and is still the Minister. That the said vehicle was involved in an accident between the 2nd to the 3rd of June, 2016 as it happened at night. That he was not aware that the vehicle that was involved in an accident had the vehicle motor registration number GRZ 168 CH.

The witness further the court that he was aware of a green Prado being in an accident and that if had made a mistake on the registration number it was on the last letter. He denied that he had mentioned in his evidence in chief that the accident happened on the 20th July, 2016.

The 1st Petitioner also told the court that he did not establish how many out of the thirteen (13) wards he won in Malole as he did not get the individual records from the polling station. Further, that he was not aware that the 1st Respondent had won in 98 polling stations out of a 100.

In re-examination the 1st Respondent explained that since Father Mwamba was driving a vehicle with a private number plate, the rightful authority to complain to was the police as they could take action and not the Conflict Management Committee. He further explained that he did not report the issue of the white Toyota Hilux registration number ABZ 7625 to ZESCO as the Police informed him that there was no complainant.

The 1st Petitioner also told the court in re-examination that it was not in order for the 1st Respondent to have used his ministerial vehicle during the Catholic Church celebrations as it was illegal in the sense that Parliament had been dissolved.

He clarified to the court that the vehicle registration number GRZ 168 CL was involved in an accident on the 1st of June, 2016. He added that the vehicle Land Cruiser GRZ 320 CJ belonged to the Ministry of Mines and Mineral Development and the Minister of

Mines and Development, the 1st Respondent was in possession of that vehicle who was a candidate of Malole Constituency. That it was the vehicle that he had identified during the proceedings and that it was only the 1st Respondent who could drive the said vehicle from Kasama to Lusaka.

The second witness, PW2, was Albert Muma Musonda a peasant farmer from Mukosa village in Malole constituency. His testimony was that during the campaign period for the 11th August, 2016 elections he stood for the position of District Council Secretary. That he had a number of encounters with the 1st Respondent during this period.

The first encounter was on the 16th July, 2016. On that particular day the UPND was holding a public rally at Chimba School in Iyaya Ward, in Malole Constituency. Whilst waiting for senior party officials to come from Kasama, the 1st Respondent passed by on his way to Kayambi in his vehicle a Land Cruiser registration number GRZ 320 CJ. That the 1st Respondent thought the gathering was a PF one and he disembarked from the said vehicle and began to greet the people and distribute PF branded chitenge materials that were in his vehicle. He stated that the people who gathered at Chambal School refused to get the chitenge materials as they were not for PF but UPND and they requested the 1st Respondent to leave.

The second encounter was on the 19th July, 2016 when he was at a layby in Chibawo village along Kasama Isoka road in Malole constituency. PW2 stated that President Lungu had a rally at

Mumba village in Malole constituency and that when leaving the rally, the President did not fly but used a vehicle. He stated that the 1st Respondent who was in his vehicle registration number GRZ 320 CJ was part of the presidential motorcade that drove past the layby where he was. The said motorcade was driving at a slow pace to allow the President wave at the people as a lot of people had gathered to see the President pass by.

He told the court that it was at this point that he had the opportunity to see the 1st Respondent in his vehicle GRZ 320 CJ as he was also waving the people.

The third encounter was on the 22nd July, 2016 when the UPND went to have a rally at Muombo Primary School in Chambeshi area in Malole Constituency and found that the PF was already holding one there. To avoid a conflict the UPND moved to the football pitch and started addressing people there. The PF campaign team noticed that the people had started leaving their rally to go to the UPND one so the PF campaign team followed and parked their vehicles near to where they were and started playing loud music. He said four (4) members of the PF campaign team were clad in PF regalia and were in a white Nissan Patrol registration number ALD 1932. They began to throw PF branded T-shirts and chitenge materials to the crowd in the football pitch so that the crowd could pick them up. After doing this they drove off.

The fourth encounter was between the 28th June, 2016 and the 15th July, 2016. During this period the UPND had a rally in Lubwe in Mungwi Ward, in Malole Constituency. The material day was a

Sunday and in the midst of the rally a white Toyota Hilux passed by and parked approximately between 100 – 130 meters from where the rally was being held. The registration number for the vehicle was ABZ 7365. In this vehicle the occupants started distributing PF branded chitenge materials. PW2 told the court that he made an inquiry regarding the ownership of the vehicle and he was informed that it belonged to a Priest whose name he could not remember but was able to identify facially.

He added that the opposition was not given a fair play by the ruling PF as they were using government materials in their campaign.

In cross-examination PW2 told the court that he stood as District Chairperson on the UPND ticket together with Maureen Mulenga Kaira for FDD and Gift Lwembe for PF. That his campaign team comprised four people these were: Chilufya Chikonkolo, the Parliamentary candidate, Alfred Katongo the Election agent, Emmanuel Mulenga who was the Campaign Manager and himself. That he and his campaign team only had one vehicle. He told the court that they used to hold between 4-6 meetings a day depending on the size of the area. That the PF campaign team was big and they had a lot of resources and motor vehicles.

He further stated that the PF had between 3-4 vehicles that were branded. Amongst the branded vehicles he recalled one of them bearing the registration number ALD 1932. However, the 1st Respondent was not using a branded vehicle.

The witness admitted that although he saw the 1st Respondent in a Government of the Republic of Zambia (GRZ) vehicle bearing

registration number GRZ 320 CJ at Chimba School he did not report the matter to any authority as he was afraid and did not want to cause any trouble. Further he said that at that time Ministers were still in office and according to him he thought it was lawful for the Ministers to be in government vehicles.

PW2 further said that although he was aware of the Conflict Management Committee under the *Electoral Code* he did not report any complaint as it was the responsibility of the Elections Agents and not him as a candidate. He stated that he did not take any photos or videos of what he saw during the campaigns as he had no camera.

He confirmed having seen the Parish Priest with two other people in a vehicle but admitted that he did not know his name or the names of the two people that he was with. When asked whether he was bitter about his loss, the witness denied and told the court that he had accepted the results.

In re-examination PW2 told the court that out of the three vehicles that he had mentioned in his evidence only motor vehicle registration number ALD 1932 was branded. He reiterated his position and stated that the playing field was not fair because a GRZ vehicle was being used in the campaign to the advantage of one political party that party being PF.

He told the court that they were empowered by the Electoral Commission of Zambia to report to the Conflict Management Committee and according to their structures it was the election agent or campaign manager who had the authority to report to the

Conflict Management Committee. He told the court that his election agent was Alfred Katongo whilst his campaign manager was Emmanuel Mulenga. He added that he was not bitter about the election results as he had accepted that being a Zambian there was winning and losing.

PW3 was Ruth Kangwa a business lady from Mungwi Central in Malole constituency. Her testimony was that she was in the campaign team for FDD. She told the court that the campaign period was for three months but she never personally encountered the 1st Respondent or his campaign team. She further stated that she was not aware of the campaign vehicles that the UPND were using. In relation to FDD, she told the court that they had a canter and a small vehicle Mark II.

She went on to tell the court that she was only aware of one vehicle that the PF used during the campaign period. This was a Prado green in colour, registration number GRZ 168 CL. She said she saw the said vehicle at the Council premises at Mungwi District in Malole Constituency on the 30th May, 2016 when there were nominations for Chairpersons. This was between 16:00-17:00 hours.

PW3 told the court that she was puzzled when she saw this vehicle as she knew that the law did not allow the use of GRZ vehicles. She said she had escorted their Chairperson, Maureen Kaira and that she later saw two ladies dressed in PF regalia disembark from the said vehicle which vehicle left shortly thereafter.

PW3 also testified that on the 22nd August, 2016 there was a Complaints Management Committee (CMC) meeting which she attended being a member of the CMC. The meeting was held at Ilamfya Rest House and the meeting was chaired by Father Chrispin Musonda.

She told the court that she inquired whether the rules to be followed had changed because in last election government vehicles were being used. The reason given by the Chief Administrator from Mungwi District Council Mr. Lewis Kwenda was that things were different because the Ministers had remained in office during the campaign period and further that the Republican President had come to visit the area.

In cross-examination, the witness told the court that the campaign period was from 16th May, 2016 and ended on 10th August, 2016 at 18:00 hours. She stated that the Chairpersons were nominated on 30th May, 2016 and MP's on 31st May, 2016.

She admitted that prior to the 31st May, 2016 no one was vying for Parliamentary seats and that on the 30th May, 2016 when she saw the 1st Respondent he had not yet filed his nomination. She told the court that she saw a vehicle registration number GRZ 168 CL with a driver and two ladies but that she did not see the 1st Respondent in the said vehicle. She denied that Mr. Kwenda was part of the PF campaign team and also stated that she did not know whether he was expressing his own opinion or that of the 1st Respondent. She admitted that she was the FDD representative on CMC.

The witness also told the court that she had accepted the results of the elections and that as a member of CMC they had only received one complaint from the PF during the time of the campaign.

In re-examination, she told the court that before the 1st Respondent filed his nominations, he was an aspiring candidate. She went on to tell the court that she was concerned about GRZ 168 CL as it was a government vehicle which was being used during the campaign period.

PW4 was Dominic Kangwa, a farmer from Mwamba Mulilo village. He told the court that on the 18th July, 2016 he and four others by the names of Lloyd, Martin, Clement and Bwalya went to Kasama General Hospital in the company of Police Officers to deposit the body of Justin Mwamba, who had been killed on the 17th July, 2016. The Police Officers told him and the people that he was with that they would go back with them to Mwamba Mulilo village at 13:30 hours where the funeral for the late Justin Mwamba was being held.

Later on Mr. Mwamba Charles called Clement who was in the company of PW4 and informed him that he would go and pick them up. PW4 and his team in turn informed the Police Officers of this development. Mr Mwamba Charles came before 13:30 hours with a driver known as Mwape. They arrived in a Nissan Patrol vehicle registration number ALD 1932 white in colour. The said vehicle was branded with the PF signs and had a picture of the President as well as that of the 1st Respondent. There were also bags in the vehicle.

PW4 further informed the Court that Charles Mwamba was the former campaign manager for Munaile then he later defected to the PF. Mr Mwape on the other hand was a driver for the 1st Respondent. That he would be able to recognise them as he sat with them in the Nissan Patrol.

It was also the evidence of PW4 that on their way back to the funeral house they stopped at Chikumanino market and Charles Mwamba bought 4 x 25 kg bags of mealie meal, 5 litres of cooking oil and a coffin worth K900.00. When they reached Kanyanta village in Malole, Charles Mwamba started announcing to the people using a PA system telling them that if they wanted to attend a rally at Mumba, a truck would be available to ferry people at 5am to Mumba village. The same message was made in Chipalila village in Fube ward, in Chibwao village in Fube ward, in Mukosa village in Fube ward and in Mwamba Mulilo village in Finshe ward.

He told the court that as they approached the funeral house they stopped making the announcement. They all entered the funeral house and mourned. After mourning, Charles Mwamba informed the mourners that he had asked for assistance from the 1st Respondent and he bought a coffin worth K900.00, 4 x 25kg mealie meal and 5 litres cooking oil. He informed the mourners that they were proceeding to Mumba village to inform the people that the President would be addressing a rally in Chambeshi ward in Malole constituency and that after the rally they would return to pick the young men so that they could spend the night in Kasama. Before they left they informed PW4 and his team that no one should get

involved in this funeral and that if they failed as PF then they would notify them.

On the 19th July, 2016 when they came back from the rally around 18:00 hours in the Nissan Patrol white in colour registration number ALD 1932, they informed PW4, Clement, Martin, Bwalya and the father to the deceased to prepare themselves so that they could spend the night in Kasama. They boarded the Nissan Patrol and were driven to Kasama and were taken to the 1st Respondent's residence. The 1st Respondent only arrived at his residence at 21:00 hours and it was decided that PW4 and his team spend the night at PW4's sister in law's place in Katongo village and that they would meet the following day at the mortuary.

On the 20th July, 2016, PW4 and his team went to the mortuary and after the post mortem the body for the deceased was put in a police vehicle whilst the white Nissan Patrol picked up the mourners from Kasama and they all went to Mwamba Mulilo village. This was the last time that PW4 met Charles Mwamba and Mr. Mwape at the burial of Justin Mwamba. It was PW4's testimony that the Nissan Patrol was used during the funeral for Justin Mwamba up until the end.

In cross-examination, the witness said that he knew the late Justin Mwamba very well as he was his friend and that his friend was the PF Information and Publicity Secretary (IPS). He admitted that it was not wrong for the PF to assist a party member during the funeral but that the impression that was coming from the 1st Respondent was to lure the voters.

He also told the court that he was a member of the FDD and was actively involved in the campaigns... He admitted that he saw the PF branded white Nissan Patrol registration number ALD 1932 being used throughout the campaign period and that it had a PA system and it was the one which was being used to make announcements.

He went on to say that he did not see Bwalya Bwikalo at the burial of Justin Mwamba and that the only people he saw are the ones he had mentioned earlier.

In re-examination, he told the court that if FDD rendered assistance during funerals, they didn't publicize.

PW5 was Oswald Bwembya, a peasant farmer from Pwemo village. His brief testimony was that he was aware that works had commenced on the feeder road from Kapolyo to Chambeshi in Malole Constituency between May and June 2016. The said road branched off from the main road being the Kasama Isoka road.

He told the court further that in March 2016, the 1st Respondent went to thank the people for having elected him in 2011 and he promised that he was going to work on the road from Kapolyo to Chambeshi area in the Malole Constituency. By the time the campaigns started on the 16th May, 2016 works had already commenced on this road in Kapolyo although he did not know the exact date when the works started. The works were being carried out by ZNS.

He went on to say that on the 18th July, 2016 announcements were made that on the 19th July, 2016 there would be a rally held in Mumba village at which the President would be in attendance. At the said rally on the 19th July, 2016 promises were made by the key speakers including the President, and the 1st Respondent to the effect that they were going to finish all the works on the roads in question. That contrary to what was promised only a small stretch of 3 kilometres had been done. The entire road was about 150 kilometres.

In cross-examination, the witness admitted that the road in question was in Malole, Mungwi District and that he was aware that the RDA had been contracted to work on feeder roads and that the ZNS was one of the institutions tasked with this work. He was also aware that when the works started the 1st Respondent was the area MP and that he had the right to inspect the roads that were being carried out by the Central government. However, he was not aware that when the 1st Respondent came to their area in March and thanked the people who voted for him, he and other members of the council had approved certain roads to be worked on as part of the annual maintenance plan in conjunction with RDA. The witness further admitted that the works on the roads commenced before the campaign period.

PW6 was Aaron Chanda a farmer from Chipembebe village in Malole constituency. His testimony was that he was the current PTA Chairperson at Chipembebe Community School in Chipembebe village.

He told the court that on the 25th May, 2016 a Canter truck with three people inside that he did not know arrived at the school. They were two men and one woman. One of the men introduced himself as Chiluba from Mungwi. Chiluba inquired as to the whereabouts of the Chairperson of the School and he informed him that he was the one. That the said Chiluba informed him that he had brought materials so that the works on the school building could be completed.

According to the witness, Chiluba explained further that he worked for the District Chairperson for PF in Mungwi District and thereafter he proceeded to direct that the materials be off loaded. The materials that were off loaded included; 50 pockets of cement, 50 iron sheets, an unknown number of glass panes, 3 buckets of paint, 2 tins of varnish, and an unknown quantity of nails. After off-loading the materials Chiluba emphasised that the works should be finished as they had stalled and that they would send someone to roof the school.

PW6 went further to say that sometime in June 2016, a contractor was sent to the school. He introduced himself as the Father to Emma. The said contractor started with the flooring of the structure, and then he plastered it and finally roofed the same. These were the only works that the said contractor did.

In cross-examination, the witness testified that he did not sign for the materials that were delivered by Chiluba but that instead it was one of the teachers who signed for them. He explained that he refused to sign for the materials because the quantities were less

than what they had requested for from the Councillor by the name of Mpange under the PF. The said PF Councillor had informed them that the source of funds for the materials needed to complete construction of the school would come from the CDF for the Mungwi Malole Constituency.

The witness went on to say that the contractor known as bashi Emma or the father to Emma was contracted by Bwalya the building officer from Mungwi. That he first met Bwalya when he came to Mungwi as PTA Chairman in June 2016. He told the court that they had started applying to the Councillor for CDF in 2011 to help with the completion of the works. He admitted that he was aware that the full Council for Mungwi District Council had agreed to give them funds for the school as they had received the materials.

Furthermore, PW6 told the court that he did not know the full names of Chiluba and that he never showed him any Identification Card to confirm that he was the chairperson. He further said he saw the book which they came with and that the teacher endorsed his signature in the same book. After the delivery of the material, he never saw Chiluba again. That although he knew the 1st Respondent he did not see him the day the materials were delivered by Chiluba. He also admitted that he knew that the funds which were used to buy the materials came from CDF.

That was the close of the 1st Petitioner's case.

2. THE 1ST RESPONDENT'S CASE

At the end of the 1st Petitioner's case, the 1st Respondent called seven witnesses.

RW1 was the 1st Respondent himself. He started his testimony by denying all the allegations contained in paragraph 5 of the petition. He told the court that he was a member of the CDF Committee just like any other Councillor representing any of the 13 wards in Malole constituency. That the schools referred to by the 1st Petitioner were funded by the CDF and these projects were not identified by him. He told the court that the projects emanated from the needs arising out of the community from within the Constituency in which they had applied and that they did not go soliciting for the projects.

He went on to say that when the projects were presented by various people within the community they would be tabled by the Councillors in the CDC who in turn would lobby for them to have a share of the funding. He said that it was from this process that the projects would be prioritised, ranked and submitted to the full council which body was tasked with approving the projects. After the approval, what would remain would be implementation or allocation of funds.

The 1st Respondent told the court that he was a councillor in the Constituency by virtue of him being a MP. He explained that the CDF were funds were allocated to the Constituency by the Ministry of Local Government. It was an annual disbursement and the amount was the same across the country. The allocation and

implementation was left in the hands of the local council and it was the local council that would go out to procure services of various contractors to execute the works and this was done in line with the *Procurement Act* as guided by the Zambia Procurement Authority. On these grounds he denied the allegation that he was involved in the delivery of materials or any other services which needed implementation.

In response to the allegation that he had influenced projects to be undertaken in Malole constituency during the full council meeting, the 1st Respondent told the court that as MP one of his mandates was to ensure that services which were needed to improve the living standards of the people of Malole were fulfilled through any active participants in the value chain. That it was illogical and laughable for him as an appointed MP not to influence the projects to be done through the CDC as well as the full Council meeting.

With regard to the allegations over the vehicles, he denied the use of the vehicles as alleged in the petition. The 1st Respondent told the court that the vehicle with the registration number GRZ 320 CJ was his ministerial car and that he had not used the said vehicle on the 30th and the 31st May, 2016. As a matter of fact he flew into Kasama on the 28th May, 2016 ahead of filing his nomination on the 31st May, 2016. He told the court that he was alive to the fact that they were not allowed to use government resources in the campaign and as such he could not use the said vehicle since it was a private party event. To support his assertion that he flew into Kasama the 1st Respondent identified his ticket as exhibited in the Bundle of Documents on page 1.

The 1st Respondent also denied that he used the said government vehicle on 19th July, 2016 the day that the President held a rally in Mumba village. He told the court that he flew in the first helicopter which went to Mumba and did not have the said vehicle with him as it had remained in Lusaka.

He went on to tell the court that due to the loss of his mother-in-law he had to seek permission from the President to travel to Kalomo in Southern province but that he could not leave immediately as the Presidential meeting scheduled in Mumba was already in force. He told the court that he jumped on a private helicopter which was part of the President's entourage to Kasama and later jumped on a Zambia Air force (ZAF) plane into Lusaka. He therefore stated that he could not have been seen by the 1st Petitioner's witness as part of the President's entourage when they were driving in a motorcade.

The 1st Respondent further denied being in the said government vehicle registration number GRZ 320 CJ on the 16th July, 2016 at Chimba School in Iyaya ward whilst campaigning and distributing PF chitenges and materials. He told the court that he was in the company of Mr Simon Mwila in a PF branded Pajero registration number ALV 4040. Upon arrival in Chimba they stopped and started greeting the people at the market and the small shops. That upon the request from the people they distributed a few chitenges and his T-shirts as the consignment though substantial was intended for Makasa Kayambi. He denied that he drove the said government vehicle registration number GRZ 320 CJ at Chimba or

seen with it. He also denied that he had driven the said vehicle in Malole constituency during the campaign period.

In relation to the events that happened in the first week of August, the 1st Respondent testified that on the 6th August, 2016 there was a celebration of 125 years for the Catholic Faith in Zambia at Mambwe and the President was invited as Guest of Honour. A driver by the name of Zilole Zulu was instructed from the Ministry in Lusaka to pick up him from Kasama and be driven to Mbala to receive the President and thereafter go for the Catholic celebrations. He stated that the event that he attended was not a party event but an official one.

The 1st Respondent went on to tell the court that although the letter of instruction given to Zilole Zulu dated 2nd August, 2016 to pick him up bore the reference number MMMD/GRZ 168 CH the actual vehicle that came to pick him up was his ministerial vehicle GRZ 320 CJ. The vehicle bearing registration number GRZ 168 CH however was involved in a traffic accident.

In relation to vehicle registration number ALD 1932 he stated that neither he nor his agents used the same vehicle during the campaign period. He told the court that the said vehicle belonged to the Ministry of Energy and Water Development a Ministry that he had left about a year ago. That during that time he used the said vehicle as a utility vehicle to carry reporters whenever he visited projects for the purpose of monitoring the same. He stated that he did not have any mandate over the said vehicle prior to the

elections and indeed during the campaign period as it was the property of Ministry of Energy and Water Development.

Further, he stated that he last used this particular vehicle before opening of Parliament in August, 2015. After that date the big Ministries were split and as such the Ministry of Mines and Mineral Development and the Ministry of Energy and Water Development were created. That subsequently he was moved to the Ministry of Mines and Mineral Development.

The 1st Respondent further testified with regard to vehicle registration number ABZ 7365, that he had no knowledge of the same and that he had never come into contact with the Parish Priest and had never shared any ideology with him. He told the court that he first heard about the vehicle and the Parish Priest through the petition. Further that the Parish Priest was not a member of his campaign team and that having worked for the Ministry of Energy he had not given him the authority to interfere in a parastatal's day to day operations as he was still an outsider.

With regard to motor vehicle registration number GRZ 168 CL referred to by the 1st Petitioner in his petition, the 1st Respondent told the court that he had no knowledge of that vehicle but had knowledge of a motor vehicle registration number GRZ 168 CH, a Prado green in colour. He stated that at no time was this Prado used for campaigns although it was in the province and that it was being used for official duties by the Ministry of Mines up until the time it was involved in an accident on the 1st June, 2016.

Having denied the use of the vehicles mentioned in the petition, the 1st Respondent informed the Court that he had six (6) vehicles including a tipper truck during the campaign period which he and his team used. He also had six (6) motorbikes that were sent to the Councillors to enable them reach out to the people. Out of the six (6) motor vehicles three (3) were fully branded with PF symbols, the President's face, his running mate and his face. The motor vehicle with registration number ALV 4040 was a Pajero and was fully branded. He told the court that it was the vehicle he was moving around with within the constituency together with the Chairman Bwalya Bwikalo.

The other vehicles that were branded were another Pajero registration number ALP 9703 and an eighteen (18) ton truck registration number RWN 401 GB. The other three (3) vehicles were a Mitsubishi Colt, Nissan Hardbody and a Nissan Trail. The 1st Respondent told the court that the campaign team was also privileged to have well-wishers who offered their vehicles to assist.

Regarding the campaign team, the 1st Respondent stated that they had more than 70 people scattered across the Constituency who were strategically zoned to ensure that they could penetrate each ward adequately with the given resources.

Concerning the last allegation that he used his position as Cabinet Minister to grade feeder roads using the government's resources, he denied the allegation and stated that it was a well-known fact that it was the responsibility of the MP and not the Cabinet Minister to bring development to the constituencies which development

included good roads, good educational and health facilities and water.

The 1st Respondent went on to say that the feeder roads were essential for doing business in their constituency as it was through good feeder roads that they would manage to carry produce to the market and also grow the local economy. He therefore stated that these feeder roads as the 1st Petitioner had alluded to were capital intensive projects and that he could not afford to do such projects using money from CDF. He went on to state that these projects were approved through the same vetting process as that mentioned for the school projects, that is through the council and then funded by the Central government.

In terms of the parastatals that carried out these projects, the 1st Respondent testified that about a year ago the said projects were undertaken by the Rural Road Unit (RRU) under the Ministry of Works and Supply, the Local Government and the RDA would undertake projects for other economic roads. The government decided to infuse the RRU and the task was taken to the ZNS and so currently the ZNS was doing most of the feeder roads across the country and that they were providing a service to the RDA following a MOU that was signed between RDA and ZNS.

He explained in relation to the roads in question that two of them had been ranked for implementation a long time ago and these were the Chitangu, Rosa mission, Sokoni up to Chimba and also about a small road from Nondo in Senga Hill constituency which came to link into that road. He stated that the 1st Petitioner had left

this road in the same state but that it was deteriorating year after year and that he had been pushing for funds as MP since he came into office and that was what the people wanted.

The 1st Respondent denied that the road was worked on because of the elections. He said that the road was advertised in the papers and specifically in the Times of Zambia in January, 2013 and since that time he, the Permanent Secretary for Northern Province, the Provincial Minister and Permanent Secretary in the Ministry of Works and Supply had several meetings to get the road implemented. That it was only until late December last year that movement on the implementation of the said road started and that currently there was a contract awarded by RDA to Springbok Contractors who had moved on site and had been there since February to March, 2016. That it was therefore sad to mislead people as a former legislator that the works had commenced in order to lure voters and that since then, the project had stopped.

He told the court that the contractors had not left and were still working and were camped along the Mbala road.

In relation to the reliefs sought, the 1st Respondent told the court that he had denied all the allegations and that he had substantiated that all the allegations were false. He told the court that the people of Malole saw it fit for him to come back as MP based on the performance in the past five years. He therefore prayed that the petition be quashed as it was full of false allegations.

In cross-examination, the 1st Respondent told the court that the formation of the CDC was guided by guidelines from the Local Government. After nomination the names were sent to Local Government for approval by the full council.

He explained that amongst the selected names there should be a minimum of two (2) Councillors, 1 MP, representation from the Civil Society and the Council staff. The minimum numbers of names to be submitted was six (6). Out of these representatives, the Councillors would have voting powers whereas the NGO representatives would have no voting power as their role was that of an overseer for transparency. However the Council Secretary had no voting power.

He further explained that as of January, 2016 the Mungwi District Council CDC was comprised of the following: Father Chrispin Musonda a Catholic Priest as the Chairperson, Albert Mwansa FDD Councillor, the himself as MP, Mr Chansa the Chiefs representative, the other councillors, the AVAMP representatives, Mr. Wilbroad Chanda, Pastor Beauty Sichangiwa a Reverend and Mr Sandayo.

The 1st Respondent told the court that in January, 2016, the CDC only recommended projects to the full Council and did not approve any projects. However, he did not recall if all the members were present when the projects were recommended. Further, he could not remember the communities that had applied for the projects that were proposed in January, 2016. However, he denied the suggestion that the projects were not approved by the full council.

He added that the district secretary from the council was a witness and that he would testify on that.

He went on to tell the court that the ticket he purchased was proof that he had flown to Kasama and that it was not possible for his vehicle to have been driven to Kasama by any efficient driver as he had travelled on a private party event to file in his nomination. He added that the ZAF plane was a public resource and that his mother-in-law's funeral was a private event.

He told the court that he used the ZAF plane up to Lusaka and thereafter travelled to Kalomo the following day and that he used a private helicopter to fly to Mumba as part of the President's entourage which helicopter he used together with other party officials such as Father Bwalya. He however stated that he did not know who hired the helicopter.

In relation to letter marked as 1(a), the bundle of documents, the 1st Respondent told the court that he was authorised by that letter from the Ministry to use his ministerial vehicle registration number GRZ 320 CJ as the letter stated that he as the Minister of Mines and Minerals was to be picked up in the said vehicle.

The 1st Respondent also told the court that the letter exhibited as 8 (a) dated 25th May, 2016 addressed to Friday Mwape authorised Friday Mwape to use his utility vehicle registration number GRZ 168 CH to travel to Muchinga Province. That in the letter exhibited as 1 (a) the reference referred to vehicle registration number GRZ 168 CH. However, the author of the letter could not stipulate which vehicle he was to use as motor vehicle registration number GRZ

320 CJ was his official vehicle as it was his ministerial car and that no one would use it except him and that if it was not around the vehicle would not move.

The 1st Respondent explained that in the letter exhibited as 1 (a) the vehicle was put in the reference but in the letter exhibited as 8 (a) the vehicle was put in the body of the letter was his utility vehicle set aside in the Ministry and assigned for any other duties specifically to do run errands for the Minister and if there were no pool vehicles it would be picked for use. That in this instance there was no need to instruct his driver Zilole Zulu as he did not drive any other person apart from him and that there was no need to specify which vehicle to use. That even though he was not the author of the letters he had the authority to use motor vehicle registration number GRZ 320 CJ as he was still the Minister of Mines at the time.

He further explained that motor vehicle registration number GRZ 168 CL referred to in the petition was not on their data base as a Ministry but that motor vehicle registration number GRZ 168 CH was the one that fell under their Ministry. That the motor vehicle registration number GRZ 168 CH was on duty in Muchinga and Northern Province. However this vehicle was no longer there as it was involved in an accident on the 1st June, 2016. He went on to say that he did not have the Police Report although the Police visited the scene of the accident. Further, he did not have the accident Board Form and that he didn't know what it was. He further said that he was not the right person to know the whereabouts of the Insurance form and that the driver who was a

witness would be better placed to know its whereabouts. He told the court that the said vehicle after the accident was written off.

In relation to vehicle ALD 1932, the 1st Respondent told the court that he last used it over a year ago and specifically in August two (2) months before the split of the Ministry. That he used it before opening of Parliament that was at the end of September.

Regarding the road projects, the 1st Respondent testified that the roads that required work were advertised in January, 2013 but that he did not have the advertisement for the same. He stated that the advert was placed in the Times of Zambia by the RDA who were responsible for keeping the documentation pertaining to the advert. That following the advert, Springbok responded to it but it took quite long to implement the project. He admitted that that this road project was a very important one to the people in the community and that any works done on the road had a great impact on his political career.

However, he explained that the implementation of the project was needed as soon as the tenders were opened as it was very important to the people of Malole constituency. These projects were funded by the Central Government and all that he could do was to ensure that he pushed for the implementation of the same to the NFRA and also the Ministry of Finance to secure funding for the said projects. He added that he had numerous meetings as far back as 2014 with the Permanent Secretary, Provincial Ministers and the RDA over the said project and that what he had done to push the contractor on site was an achievement because the

people of Malole constituency specifically Chitanga, Chimpa and Nondo, Chilangwa, Rosa Mission, Sokoni, Chimbola up to Chimbe had been expectant.

The 1st Respondent admitted that he had pushed for the project but denied that it was in 2016. He told the court that a project had a start date and a finish date and it was not an off shelf activity that could start any date and finish the following day. That the project period spanned over a long period of time and as he had indicated, these projects were competing for very limited resources in the government coffers and that as he was pushing for this particular project in his constituency his colleagues were equally doing the same thing for their constituencies. He explained that it was not automatic that once one applied for funding that one would receive the funding tomorrow.

The 1st Respondent also testified that as MP he thrived to deliver on the various needs of the people in Malole and that he made promises according to the needs of the people. These promises did not just pertain to the roads but included other projects like water. Therefore, he made promises to the people and he made a wish list. He also managed the process of the projects which was a very long process with different role payers all who worked together to come and achieve a tangible outcome.

He told the court that in this case the role he played as MP was to ensure that the project went through the approval process, the Council, the provincial administration and then the implementers that is RDA. That these projects were competing with other projects

of a similar nature and that he had his role to play through this process but that the aspect concerning the source of funds was outside his realm and responsibility.

He went on to state that the projects that were approved were not restricted to a certain timeframe as when to start and that therefore they could start even during the campaign period. The 1st Respondent explained that was no restriction on CDF projects and Central Government projects as the same could be done even during campaigns and any attempt to prevent it would be derailing the plans which would be costly to the outcome of the project.

The 1st Respondent admitted that it was not only beneficial to him that the projects were implemented but to the people as he would also get jobs for them. He further added that the government would come to a stand-still if projects were to be halted just because it was an election year and such thinking was retrogressive.

In responding to the question when the variation of the 52 kilometer feeder road program was approved by the council, the 1st Respondent told the court that the council applied for a variation of the scope of the project for works on 52 kilometres of the feeder road in Chitangu so as to cater for the people's benefit as it was a key road for maize haulage. However he did not know the specific date when the variation was done but that it was the period from early last year to early this year.

The 1st Respondent admitted that he was part of the meeting that sat on the 9th January, 2016 for this variation process. Further that the CDF funds were disbursed to the Council in totality for the

number of projects to be catered for in the budget. However, he did not have proof of that payment as it was with the Council and that he was not the final authority as he was merely a member. He told the court that the implementation was a collective responsibility and that the council secretary would be better placed to comment on it.

In re-examination the 1st Respondent told the court that the two roads in question being the Chambeshi ring road and 52 kilometres of Chitangu up to Chimba were funded by the Central Government and the supervision of the projects was done by RDA. That the Chambeshi ring road which ran from Kapolyo teeing off from Kasama to Mbesuma road and running through Kalikeka to Bwebe village and through Mumba village to Mulema Sampa and to Chifulo through Mukuka Mfumu and back into the tarmac was being done by ZNS.

The 1st Respondent explained that the raising of the project from the constituency through the normal approval process started even before he came into office. He stated that the tender advertisement inviting bids was done in January 2013 but because of the various hurdles which were met in the process like lack of funding, the projects were delayed. That's why the implementation was done in 2016 when the funding was available.

In relation to Chambeshi ring road, the 1st Respondent explained that the project was initiated a long time ago but because of lack of funds it was not worked on and hence had deteriorated into the state it was now.

In clarifying whether the CDF received in January was disbursed for various projects, the 1st Respondent told the court that the CDF funds that were disbursed for Malole in 2016 were actually funds applied for in 2014 and hence the constituency was yet to receive funds for the years 2015 and 2016. The reason for the delay of the disbursement of the 2014 CDF was because the officer in the Local Government Ministry had put the money in the wrong account which belonged to a Youth Club in Kasama, in Malole. He stated that it was only in December 2015 when the money was traced and hence the late execution of the projects.

When clarifying in what capacity he influenced the CDF process, the 1st Respondent told the court that he influenced the process in his capacity as MP and that this was in relation to the council where the approval was made.

Concerning the letter exhibited as 1 (a), the 1st Respondent explained that it contained an instruction to his personal driver to pick him up from Kasama and hence there was no need to stipulate the vehicle to be driven as that vehicle was allocated to him as a Minister and was driven by his driver Zilole Zulu. With regard to the other driver Friday Mwape they had to be specific which vehicle was to be used as utility vehicles were driven by any driver available.

RW2 was Boniface Mbuzi, the Deputy Permanent Secretary for Northern Province. He testified that he was the provincial Permanent Secretary responsible for general administration in the entire province. He was particularly responsible for human

resource development, human resource management and general administration.

He told the court that Government operations were divided into the following specific institutions: Ministries, Provinces and spending agencies. Each of these institutions prepared an annual budget from which they would procure moveable assets including vehicles and when a person who was entitled to a personal to holder motor vehicle was transferred to another Ministry he or she would not carry the moveable assets such as the motor vehicle and they would not have control of that vehicle. As such he stated that it was not possible for the 1st Respondent to have used motor vehicle registration number ALD 1934 as he had left the Ministry of Energy and Water Development.

In cross-examination, the witness told the court that the moveable and immoveable assets were procured from the budget of a particular Ministry and as such they could not be transferred. That the vehicle in question was purchased by the Ministry of Energy and Water Development, however he did not have any documentary evidence to prove the same.

RW2 admitted that as the District Permanent Secretary, the Ministry of Energy and Water Development did not fall under his portfolio but that he could comment on this portfolio due to the government policy which cut across all government ministries and agencies. That the said policy was found in a circular which stated that government assets for ministries, provinces and spending agencies should belong to those institutions and would never be

transferred to the office holder. However he did not have a copy of the circular.

The witness further told the court that he had been in the civil service for 33 years and hence was able to quote the policies which were always revised. He admitted that he was not able to tell the date when vehicle registration number ALD 1934 was purchased by the Ministry.

RW3 was Simon Mwila a business man of house number 25321 PHI Lusaka. He testified that he was the campaign manager for the 1st Respondent during the campaign period in question. Some of his duties included planning, executing, monitoring and evaluating the campaign process in Malole constituency.

In relation to the allegation that the 1st Respondent used government vehicles in his campaign, RW3 denied the allegation and he told the court that as campaign manager he was in charge of all the vehicles which the 1st Respondent used in the campaign period and that at no time did he see or utilise any government vehicle.

He stated that the vehicles they used in these campaigns were fuelling from one point where they maintained an account and he was the sole controlling officer of that account. If there was a government vehicle used in the campaign this would not have escaped his attention. He further told the court that the system they used in the campaign to deploy the vehicles was very simple to follow.

RW3 testified that they started their campaign on the 4th July, 2016 after a planning meeting they held on the 3rd July, 2016 where the campaign strategy was agreed upon. They were fuelling from a filling station operated by Odro Investments Limited trading as Chitelelwe Puma Service Station in Kasama.

He told the court that a customer statement of the account under the name of the 1st Respondent which showed the dates, motor vehicle, the amount of fuel and amount of money spent as well as the balances starting from the 4th July, 2016 to 30th August, 2016 had been filed. He identified the statement which was part of the documents filed in the 1st Respondent's bundle of documents.

He went on to say that initially his campaign team had begun with seven (7) vehicles namely three (3) branded Pajeros, registration numbers ABM 8218, ALV 4040, ALP 9703 and 4 other vehicles that were not fully branded but had stickers or campaign posters of the PF Presidential candidate Mr Edgar Chagwa Lungu and the Malole PF Parliamentary candidate the 1st Respondent. These vehicles were a black Mitsubishi Colt, registration number BPR 281, a Nissan Hardbody white in colour registration number WRT 484 GP, a grey Nissan X-Trail registration number ALV 5140, and a Hino Truck registration number RWN 401 GP. The truck was fitted with an ultra-modern PA system and modern musical equipment. It was designed in such a manner that they used it as a podium during rallies.

In terms of distribution, the witness told the court that there were three (3) particular individuals of the campaign team who were

given permanent vehicles. These included the Parliamentary candidate who was allocated motor vehicle registration number ALV 4040 the branded Mitsubishi Pajero who was paired with Patrick Mutale, Bwalya Bwikalo the PF Malole Constituency chairperson, Ms Annie Mutale the PF Northern province chairlady and the driver Mwamba Yaluma.

The next vehicle ABM 8218 was allocated to Mr Gift Lwembe the PF candidate for position of Council Chairperson. The said vehicle broke down seven (7) days after commencement of the campaigns and another vehicle was allocated to Mr Lwembe a Nissan X-Trail registration number ALV 5140. The driver of this vehicle was Mr Andrea Malunga.

The motor vehicle allocated to him was a branded Mitsubishi Pajero, registration number ALP 9703. He was the driver of that vehicle and his team members included Mr Charles Mwamba, and Mr Mwamba Kombe. He explained that the reason why the three (3) particular individuals had to be given permanent vehicles was to ensure that they reached out to the entire constituency.

After the breakdown of the Mitsubishi registration number ABM 8218, RW3 told the court that he remained with six (6) motor vehicles which he was to use in thirteen (13) wards that made up the Malole constituency. He therefore came up with a strategy to zone the wards according to proximity and he came up with four zones as follows: Zone 1 comprised of Lubala ward, Mpanda ward and Kabisha ward; Zone 2 comprised of Chanfubu ward, Fibwe ward, and Iyaya ward; Zone 3 comprised of Ngulula ward, Mungwi

Central and Fube wards; Zone 4 comprised of Kalungu ward, Chambeshi ward, Mfinshe ward and Mabula ward. The reason for this zoning was to ensure effective utilisation of the motor vehicles without allowing more than one vehicle in each area at once.

Apart from the motor vehicle, the witness told the court that they also had six (6) motor bikes which he deployed in the wards on a rotational basis. These were mostly used by the PF candidates in the Local Government election to get to places which were hard to reach by motor vehicles. These motor bikes were not permanently used in one ward but that each ward was given an average of one week.

He further explained that at any given time there were three (3) vehicles in three (3) of the four (4) zones and the zone where there was no vehicle either he or the 1st Respondent or the candidate for the position of Council Chairperson would be there. In that way he always ensured that there was a vehicle in each of the four (4) zones at any given time.

RW3 denied that the 1st Respondent was driving motor vehicle registration number GRZ 320 CJ on the 30th May and 31st May 2016 as on the material day he drove the 1st Respondent to Mungwi District Council offices using motor vehicle Izuzu Denver, black in colour registration number ALM 7000. He said he parked this vehicle at the offices of the PF in Mungwi District until the time came for them to escort the PF candidate for the position of Council Chairman to the filing center. He stated that they walked

to the filing center because they wanted to boost the morale of the members and show solidarity to their candidate.

He went on to say that he picked up the 1st Respondent from Kasama airport on the 28th May, 2016 and that he had been in Malole constituency from the 22nd May, 2016.

RW3 also denied that the 1st Respondent used GRZ 320 CJ on 16th July, 2016 at Chimba School in Iyaya ward. He told the court that on a date between 4th July and 10th August 2016 he drove the 1st Respondent to Makasa enroute to Kayambi and when he reached Chimba area they found a reasonable group of people sitting opposite the market place. The motor vehicle they were using was the branded Pajero registration number ALV 4040. Upon seeing the vehicle these people came to the road and wanted to speak to the 1st Respondent. The 1st Respondent asked him to stop the vehicle so that he could come out and he started greeting the people after that he went to the back door of the vehicle and started giving the people PF branded chitenge materials and T-shirts. He explained that the group of people was so large that they could not give everyone who was there because the materials were meant for the meetings at Makasa and Kayambi. So after sometime the 1st Respondent stopped giving out the materials and then they started the car and drove off.

The witness further told the court that he was with the 1st Respondent on this particular day because whenever there were big rallies he and the 1st Respondent drove together for the sake of comparing notes and consolidating messages for the campaign.

RW3 also told the court that it was a false allegation by PW2 that he spotted members of the PF during a rally at Muyombo Primary School in Chambeshi area driving a motor vehicle registration number ALD 1932 which had a PA system that was being used to make announcements. According to the witness the vehicle he used for making announcements during the campaign was a Nissan Hardbody, white in colour bearing registration number WRT 484 GP which had a self-powered public address system at the back.

He testified that on the material day he, Mr Mwamba Kombe and Mr Charles Mwamba went to Muyombo village and held a meeting not a rally outside Muyombo Community School. That Muyombo village was located in the South East of Malole constituency and it was a very small community. It had no Primary school there save for a 1 x 2 classroom block for the community school. That on the said day whilst he was addressing the meeting he saw a vehicle branded in UPND colours approaching where he was playing music from the PA system. This action incensed the people he was addressing as they saw it as a provocation and distraction. Some of the youths wanted to physically confront the UPND team but he had to restrain them. That despite his restraining action all the women who were at the meeting took off their PF chitenge materials and started waving them at the UPND vehicle.

Upon seeing this, the UPND vehicle made a U-turn and drove off to an unknown destination. The vehicle that he was using at this particular time was a branded vehicle registration number ALP 9703. That there was no need to use a PA system to address the

group of people that was gathered at the community school as he was talking to a sizeable crowd and therefore, he simply used a dry voice.

In relation to motor vehicle registration number ALD 1932, the witness told the court that on the 19th July, 2016 Mr Patrick Mutale Bwalya Bwikalo received a message from the PF party members of Mwamba Mulilo village stating that Mr Justin Mwamba of the same village had been found dead in his house. Mr Justin Mwamba was the Publicity Secretary for the PF in that village. So he, Mr Bwikalo, and Mr Charles Mwamba who was a first cousin to the deceased drove to Mwamba Mulilo using a branded Pajero registration number ALP 9703 to go and mourn with the family.

He stated that they arrived at the funeral house and went in and met the elder sister of the late Justin Mwamba who narrated to them the ordeal surrounding the death of Mr Mwamba. She also explained to them the difficulties that the family was going through regarding arrangements for the funeral in particular to do with the food and the purchase of the coffin.

After mourning with the family they drove back to Kasama and mobilized some resources from the party which was used to purchase a coffin from Crystal Funeral services at a cost of K900.00, 5 x 25 kg mealie meal and a 5 litre container of cooking oil. These items were taken back to the funeral house together with the receipt for the coffin. After delivering these items he dropped off Mr Bwikalo at his home. Mr Charles Mwamba remained at the

funeral house from the 18th July, 2016 to the 20th July, 2016 as he was a close relative to the deceased.

On 20th July, 2016 he picked up Mr Bwikalo and his wife and drove to Mwamba Mulilo for the burial of the late. This time he was driving the branded Pajero registration number ALV 4040. Upon arrival at the funeral house he parked the vehicle and shortly thereafter a blue Land Cruiser belonging to the Zambia Police arrived. A group of young men clad in robes for Sacred Heart Makumbi went to the vehicle and picked up the coffin which they took inside the funeral house for prayers. After the prayers the coffin was taken to the burial site on foot and at the grave site the body was laid to rest. Speeches were given and the first one was given by Mr Bwikalo who at that time was representing the PF and his Church, Sacred Heart of the Makumbi of which he was the Provincial Chairperson.

After this a member of the family for the late Justin Mwamba gave a vote of thanks in which he mentioned the assistance that they had received from the PF. After the funeral process was over he drove back to Kasama in the company of Mr Bwikalo, his wife and Mr Charles Mwamba.

He went on to say that there was nothing wrong in the PF rendering assistance at this funeral as the late Justin was a member of the PF who had also held the position of Publicity Secretary. It was prudent for the party since, he had served diligently and wholeheartedly, to contribute to the funeral and to

give him a decent burial. He told the court that this practice happened in all situations even at work or clubs.

RW3 further testified that the money that was contributed did not come from the 1st Respondent and the items that were purchased were delivered 2 days before the burial day and having been the leader of the team that went to deliver the assistance there was no way that he could have allowed the announcement to have been made as it went against the principle of custom and tradition.

RW3 further told the court that on 18th July, 2016 that is the eve of the rally in Mumba he had gone to Mumba village early to oversee the preparations for the rally. On the morning of the 19th July, 2016 a helicopter arrived at Mumba between 09:00-10:00 hours. When the 1st Respondent alighted he greeted him and briefed him on the preparations for the rally. Shortly thereafter two ZAF helicopters landed followed by the Presidential helicopter. A rally was held at Mumba and after the same the President opted to go to Kasama by road. RW3 stated that he heard the 1st Respondent inform the President that the road was quite bad but the President insisted on going.

As the 1st Respondent did not have his own vehicle registration number GRZ 320 CJ or any other he walked back to the helicopter in his company. The 1st Respondent informed the witness that as the President's rallies had finished he needed to go and attend the funeral of his mother-in-law who had passed away in Southern Province. The 1st Respondent asked him to take care of the situation and then boarded the plane and flew off. He said he

remained in Mumba with other members of the campaign team to ensure that the aftermath of the rally was incident free until 19:00 hours. He then drove back to Kasama using the branded Pajero, registration number ALV 4040.

In relation to how prepared he was with the campaign, RW3 told the court that as the Campaign Manager he ensured that the PF was prepared for the campaigns by doing the following:

Firstly, he travelled to Malole Constituency on the 22nd May, 2016 to do a feasibility study and get a clear understanding of not only the socio-political landscape of the area but also to appreciate the geographical and auto topographical situation of the constituency so that when mobilising resources such as motor vehicles, he would know what vehicles could be suitable to be used in the campaign. That was why the vehicles they used were suitable to withstand the terrain.

Secondly, in planning for the campaign he and his campaign team took into account the size of the constituency, the population and approximated registered voters which translated to 9,765 kilometres, 181,300 people and 72,200 registered voters respectively. They also recognised that certain areas such as Chifubu ward had a huge concentration of registered voters and as such they paid particular attention to such areas.

Thirdly, they zoned the constituency into four (4) blocks so as to be systematic as opposed to being haphazard in their campaigns.

Finally he deployed an average of six (6) ward constituency and or district officers in each of the thirteen (13) wards who were monitoring and supervising campaigns personally through door to door outreach exercises. Each of these officials were using bicycles to fulfil the task. At the end of the day when he did an evaluation of the input that he and the 1st Respondent used in this campaign they appreciated the results which gave their Presidential candidate over 30,000 votes as against his closest rival who polled a paltry 4,181. The 1st Respondent polled over 24,000 votes as against his closest rival who got just about 5,000 votes. For the position of Council Chairman the PF candidate got over 26,000 votes as against his closest rival who got just above 4,000 votes. So it was clear that the PF's good harvest was as a result of proper planning, effective execution and equitable resources invested in the campaign.

In contrast however the witness told the court that the 1st Petitioner's campaign strategy employed the use of only one canter and Toyota Mark II. As most of the roads in the Malole constituency could not be accessed by a saloon car this simply meant that the 1st Petitioner only had one vehicle, the canter to traverse an area of 9,765 square kilometres in the number of days that were given for the campaign and it was not possible for the 1st Petitioner to reach all the 100 polling stations which made up Malole constituency. Additionally the 1st Petitioner and his campaign team according to their testimony only comprised of four people as against the PF campaign team which comprised of not less than 81 people.

RW3 further testified that as a person who was overseeing the campaign for the 1st Respondent he prayed that the court would take into account the variation of the campaign systems his team used as the basis for determining the results of the elections as against the unfounded allegations put forward by the 1st Petitioner.

In cross-examination, the witness told the court that he read the petition so that he could get a clear understanding of the allegations made against the 1st Respondent but that he had testified according to what he had witnessed. He admitted that he was in the gallery when the 1st Petitioner was presenting his case.

In relation to the 19th July, 2016 the witness told the court that the 1st Respondent travelled from Kasama to Mumba via the first helicopter that landed at Mumba. The helicopters that were used that day were 5 in number: two (2) of them belonged to ZAF, two (2) were private and unmarked and the last one was the Presidential helicopter. Two (2) of the ZAF helicopters were used during the campaign period.

He further told the court that all the vehicles refuelled from Odro Investment Limited a private entity. The stamp on the customer statement bore a coat of arms and that it was authored by the proprietor of the said company on his request as he was a signatory to the account. That the information on the statement was derived from an account opened by the 1st Respondent on the 4th July, 2016 and closed on the 30th August, 2016 which account was managed by him.

The witness explained that the invoices were kept by the proprietor for purposes of reconciliation but there were no receipts. He also stated that he did not know the Bank where the transfer was from and did not know whether the statement was a system generated document or not. The witness went on to state that to the best of his knowledge VAT was charged for fuel but that the statement did not have a VAT number.

When asked about the movement of the vehicles, RW3 told the court that he drove motor vehicle registration number ALP 9703 on the 18th July, 2016 the day when they went to the funeral house for Justin Mwamba in Mwamba Mulilo village. He said he did not use this vehicle on the 19th July, 2016 and that on the 20th July, 2016 he used motor vehicle registration number ALV 4040 and on the 22nd July, 2016 he used motor vehicle registration number ALP 9703 when he went to Muyombo. He stated that on this particular day he started off from Kasama went through to Chifulo, then to Mumena Sampa where he had a meeting then drove back and branched off on the left side of the road that went to Mumena Sampa from Chifulo and drove through the swamp to Muyombo.

After the meeting in Muyombo he drove back the same way he had come through to Chifulo for another meeting and thereafter to Mukuka Mfumu where he had another meeting. After this meeting he drove back to Kasama. The distances from Kasama to Mwamba Mulilo was between 60-70 kilometres; Mulilo to Malole was 10 kilometres; Malole to Kasama was under 70 kilometres; Kasama to Chifulo was about 75 kilometres; Chifulo to Mumena Sampa about

10 kilometres. However, he was not sure what distance the motor vehicle registration number ALP 9703 could travel.

RW3 further told the court that although the statement that he produced showed that between the 12th July, 2016 to 27th July, 2016 a period of 15 days, reflected that they only refuelled twice which translated to a distance of about 80 kilometres, the consumption level for motor vehicle registration number ALP 9703 was very low as it was a relatively a new vehicle with a diesel propelled engine. Therefore it was possible to use one full tank over this period as what determined the consumption of fuel was distance covered with the state of the vehicle in use and not the length of the period.

Furthermore, the witness explained that although between 18th July 2016 to 22nd July, 2016 he travelled a distance of not less than 300 kilometres; a Pajero normally used 1 litre of fuel per 9 kilometres. Therefore it was possible to use 81 litres of fuel during the period 12th July, 2016 to 27th July, 2016.

In relation to the burial of Justin Mwamba, RW3 told the court that the body was transported in a Zambia Police Land cruiser. He explained that it was in order for the police to have done so because it was a case of homicide and police anticipated trouble.

In re-examination the witness told the court that all the vehicles refuelled from one filling station but that other vehicles from well-wishers and sympathisers of the PF drew fuel from the account for the purpose of the campaigning for the PF in Malole constituency and other areas. RW3 told the court that being the campaign

manager there were times the vehicle was parked because he was either managing the campaign from the campaign centre using an alternative vehicle which was the case during the Presidential rally in Mumba and the burial of Justin Mwamba.

RW3 also explained that when he requested for a printout of all transactions relating to the account for fuel he was told that it could not be given to him just like that because they had to seek authority from the proprietor. He was told to go there after three (3) hours and when he went back he found that hard copies had already been printed and stamped. Therefore he could not say whether it was authored or if the document came from the system.

The witness further told the court that the two (2) ZAF helicopters were in the entourage of the Republican President who also happened to have been the Commander in Chief of Zambian Armed Forces. The witness also stated that he was not in the gallery for the whole period when the 1st Petitioner presented his case that is the time the 1st Petitioner and his witnesses were testifying.

RW3 went on to say that he appeared before the court at the instance of the 1st Respondent as such he needed to know the allegations that were levelled against him otherwise he would have appeared before the Court ignorant about the reasons he was there.

RW4 was Patrick Bwalya Mutale Bwikalo from Malole village in Mungwi district. He testified that he and the 1st Respondent belonged to the same political party and that he was the Chairman for Malole Constituency.

He told the court that on the 19th July, 2016 the 1st Respondent went to Mumba village with a helicopter which was the first helicopter to arrive. He was one of the people who went to receive the 1st Respondent and the others when they landed. One of the helicopters was used by the President. There were five (5) helicopters in total. Two (2) of the helicopters were in military camouflage and the other three (3) were not marked.

He stated that after the rally he saw the 1st Respondent board a private helicopter and it took off. He told the court that he never saw the motor vehicle registration number GRZ 320 CJ.

He further told the court that on the 18th July, 2016 he, Simon Mwila and Charles Mwamba were in Kasama when they received information that one of their colleagues Justin Mwamba was suspected of having been murdered in his house in Mwamba Mulilo village. The three of them resolved that they would go and mourn their beloved colleague in Mwamba Mulilo. When they reached Mwamba Mulilo they entered the house to pay their last respects. The sister to the deceased explained to them how Justin Mwamba met his death. She further explained to them the challenges they had in mourning her brother.

He stated that when he went outside with Simon Mwila, they agreed that they should go back to Kasama to source for funds so that they could render assistance to the bereaved family. Charles Mwamba remained at the funeral house because he was the cousin to the deceased. They arrived in Kasama and managed to source for funds. From the money they raised they agreed to buy a coffin,

5 x 25 kilogrammes of mealie meal and 5 litres cooking oil. They resolved to take the food stuff and receipt for the coffin to the funeral house. After handing over the items they asked to be excused so that they could go and organise the rally for 19th July, 2016 at Mumba village.

The witness further told the court that on the 20th July, 2016 he was picked up from his house together with his wife and they went to the funeral house in Mwamba Mulilo village. After sometime a Police motor vehicle arrived with the body for the late. The body was taken inside the house and prayers were conducted thereafter the body was taken to the burial site.

After the burial, speeches were made by all the relatives. He was called upon to give a speech to represent the political party due to his position in the party and also as a representative of the Church. The witness added that Simon Mwila was using motor vehicle registration number ALV 4040 when he picked him up on the day of the burial.

In cross-examination, the witness told the court that when they purchased the mealie meal and other materials on the 18th July, 2016 they were using motor vehicle registration number ALP 9703. He further stated that on the 19th July, 2016 the President arrived between 09:00-10:00 hours and that he was told that the Police officers took the body of Justin Mwamba to the mortuary using their vehicle. The receipt for the coffin was given to the relatives so that they could go and pick up the coffin themselves.

There was no re-examination.

RW5 was Friday Mwape, a driver under the Ministry of Mines. He testified that he joined the government in 1994. During this period, some of his duties involved deploying workers who went on survey, mapping and explorations. He also mentioned that there were some instances when he would be sent to do work for Ministers using utility vehicles.

In relation to the allegation that he was involved in an accident, the witness told the court that he was not involved in a road traffic accident whilst driving motor vehicle registration number GRZ 168 CL but that he was involved in a road traffic accident on the 1st June, 2016 whilst driving motor vehicle registration number GRZ 168 CH, this was between 04:30-05:30 hours. He only discovered that he was in the hospital and did not know how he found himself in Kasama General Hospital. A Police Officer told him that after being discharged he should report to Mungwi Police Post.

On the 2nd June, 2016 he was discharged and went to stay with his uncle who was based in Kasama. On the 7th June, 2016 he went to Mungwi Police Station in the company of his uncle. After the report the Police Officer informed him that when going to collect the said report he should go with his driver's licence, insurance papers and the white book for the motor vehicle.

Thereafter they returned to Kasama and the Transport Officer from Lusaka came to collect him and took him back to Lusaka. He told the court that he obtained a discharge slip which indicated that he should go to the University Teaching Hospital for review.

He told the court that when the accident occurred he was performing his official duties. The witness identified the document filed into court showing that he was on official duties when the accident occurred. The witness also identified and produced before the court documents showing that he was admitted in Kasama General Hospital and that he went for review at the University Teaching Hospital.

The witness went on to say that after the accident, he filed papers at the accidents board and was told that he should attach a police report. He also told the court that he submitted a statement to his employers. The witness identified and produced before the court the statement that he submitted to his employers which had among other details the registration number of the motor vehicle GRZ 168 CH.

In cross-examination the witness told the court that when a vehicle left the Ministry it was signed for in a Log book. However, he did not sign in the Log book for the vehicle that he used. He admitted that the document from Kasama General Hospital and from the University Teaching Hospital did not bear a stamp. He also admitted that his statement did not refer to the Ministry of Mines.

The witness further told the court that the accident happened on the 1st June, 2016 and that he was supposed to report the accident within 24 hours to his employer. He stated that he was given leave from the 2nd June, 2016 to the 12th June, 2016. His statement was dated 20th July, 2016 because that was when he reported for work after he had recovered. He told the court that he wrote the

statement on the 13th July, 2016 and admitted that it was not written within 24 hours.

RW5 also stated that according to government regulations the government vehicles were to be parked at 20:00 hours and were to be driven in the morning from 05:00 hours. However, he denied that he had breached the regulations as the accident happened between 04:30 hours to 05:30 hours and was driving within the stipulated time.

The witness further explained that he had carried allowances for the Geological Surveyors who were mapping and exploring and that the money was given to the Supervisor. However, they did not sign for it. He further told the court that did not obtain a Police Report and that the vehicle was a write off. He denied that he was in court during the proceedings and that he was the one who had been identified.

In re-examination the witness told the court that he was in court and that he got confused when he denied that he was not in court. He further told the court that reporting within 24 hours meant that the superiors had to be informed about the accident.

The sixth witness RW6 was Fred Moonga, the Council Secretary at Mungwi District Council. He told the court that some of his duties as Council Secretary included planning, organising, controlling and coordinating council activities.

He told the court that before the new Constitution the 1st Respondent used to sit in the full Council but that did not sit there anymore.

The witness denied that that the 1st Respondent made donations to complete works and projects to some government and community schools in Mungwi District which projects were funded from Malole CDF. The witness told the court that the utilisation of the CDF was vested in Mungwi District Council and not the MP. That out of the projects listed in paragraph 5 (1) only two were not approved. The said two were Chilaila and Mutale Mutabukila Community School.

RW6 told the court that when the projects were approved, they advertised to would be suppliers and the advert ran for 30 days in the month of March. Thereafter the bids for suppliers were evaluated and the tender committee sat to award the suppliers. When the suppliers were awarded they took the materials to the site and the works commenced. These projects were tied to the 2014 CDF allocation.

He explained to the court that the projects were only undertaken in 2016 because the Ministry of Finance which disbursed the funds sent the funds to the wrong account called Malole Youth Development Fund. He stated that when he joined Mungwi District Council in September, 2015, he made a follow up of the allocation of the CDF for Malole Constituency in Lusaka and he was informed that the funds had been disbursed. Upon inquiry at the Zambia National Commercial (ZANACO) Kasama Branch, they were informed that the money was not in the CDF account for Malole. He returned to Mungwi with an assurance that the Ministry of Finance would trace the money.

He went on to say that in January 2016, he made another follow up and this time he went to see the Permanent Secretary who after several inquiries was informed by the Bank in Kasama that the money was in the account for the Malole Youth Development Fund. The Council wrote to the Bank on the 5th January, 2016 requesting the Bank to reverse the transaction and put the money in the right account. The witness identified and produced the letter before court.

The witness further testified that after the money was deposited in the right account the matter was reported to the ordinary Council. After the ordinary council acknowledged the matter the Councillors were made to look at the applications received from the Communities so that they could prioritise the projects. The projects were then scrutinised by the sub-planning committee of the district development coordinating committee. This was in line with the CDF guidelines of 1996. The sub-planning committee came up with a Bill of Quantities for the projects and they submitted their report to the District Development Coordinating Committee which committee in turn submitted their report to the Special Council. It was the Special Council that had to be convened as it was the body that was supposed to make a decision on the implementation of the approved projects.

He added that it was only after this process that the projects were advertised as explained earlier. In the month of May, 2016 suppliers started the delivery of materials to the sites. The witness identified and produced the minutes of the District Council meeting. He was unable to produce the minutes of the Special

Council as at the time the documents were being prepared the officer tasked to look for minutes could not locate them and he was out of station in Ndola attending a meeting.

The witness testified further that the materials were delivered by the contractors to the schools where the projects had been approved. The witness identified and produced the delivery notes.

In cross-examination, the witness told the court that there were rules and guidelines that governed the CDF committee and that as Council Secretary he was fully abreast of these rules. According to the rules the constitution of the CDC in terms of number and position included, an area MP, two (2) Councillors, a Chiefs representative, faith based organisations about a minimum of two (2), Director of Works and Planning from the Council, Non-Governmental Organisation's (NGO) about a minimum of two (2).

The witness testified that on the 30th March, 2016 the CDC had a meeting which comprised of 6 members as per the Minutes. That the Minutes did not make mention of those members that were absent. He told the court that the Council employees were members of the CDF and they were eligible to vote. He stated that before the CDF was distributed to respective projects the disbursement had to be approved. However the witness admitted that he had only produced before the court one delivery note for Chilaila School and that he had not produced the approvals for the other projects and a copy of the advert calling for suppliers.

PW6 further told the court that the CDF was very important to the Mungwi District Council. He stated that he was only able to make a

follow up of the disbursement of the 2014 CDF fund in October 2015 as he reported for work as the Council Secretary for Mungwi in September, 2015 and that he could only speak about his time in office and not prior to that.

He further testified that although the funds were transferred in January, 2016 the projects could only be mobilized in May to June 2016 because of the procurement procedures and approvals of the Council. He added that although all the materials were delivered between the 16th May and 10th August 2016 the CDF had nothing to do with elections as what was delivered was a project cycle.

In re- examination, the witness told the court that he had not submitted the documents for approval because at the time the bundle of documents was being prepared, he was out of office in Ndola.

The seventh witness RW7 was Simon Shimwando, a Civil Engineer by profession who worked under RDA as the Regional Manager. His testimony was that the mandate of the RDA was to plan, procure and carry out construction works of public roads and bridges on behalf of the Central Government. Therefore as Regional Manager, part of his duties included supervising road construction works and bridge works throughout the province.

In terms of the nature of the works, the witness told the court that RDA on behalf of the Central Government worked on new public roads and bridges. RDA also carried out periodic and routine maintenance works on existing public roads and bridges. In carrying out its mandate the RDA worked with a lot of stake

holders such as the Councils who were the road local authorities within the districts. The said Councils had a right to apply for variation orders in Road works.

In relation to Contract No RDA/CE/005/014 the contractor that was contracted to carry out rehabilitation works on approximately 52 kilometres of Mungwi agricultural feeder roads was Springbok (Z) Limited and the funding on this project came from the Central Government through the National Road Fund Agency (NFRA).

He further testified that apart from this contract the RDA, ZNS and NFRA signed a MOU in 2015 to carry out rehabilitation works of approximately 9,430 kilometres of Agricultural feeder roads throughout Zambia. The Northern Province had been allocated a total of 943 kilometres of agricultural feeder roads under this MOU. These projects had commenced and works were on going on site in various districts of Northern Province. The witness identified and produced Contract No RDA/CE/005/014 and the MOU.

The witness testified further that the nature of the funding for the projects that RDA undertook on behalf of Central Government was capital funding. He told the court that these were huge contracts with huge contract sums through the NRFA.

In relation to the allegation by the 1st Petitioner that the 1st Respondent used his cabinet position during the campaign period and graded two major feeder roads using government resources, the witness denied that allegation. He told the court that the contracts that RDA undertook were for public use including the 1st Petitioner himself and were not for political campaigns as alleged.

He went on to state that it was not feasible for the 1st Respondent to influence road projects undertaken by the RDA as the RDA fell under the Ministry of Works and Supply and not the Ministry of Mines.

The witness added that as the Regional Manager for Northern Province he only received instructions from the RDA Chief Executive Officer (CEO) pertaining to all roads and bridge works in the Province. No other person could give instructions to the RDA regional office without the knowledge of the CEO. The witness further told the court that Parliament played a role in the approval of the road projects undertaken by RDA as it ratified the budgets for the annual work plans before works were undertaken. He stated that the two road projects mentioned in the petition were purely government programmes and not as alleged in the election petition.

In cross-examination, the witness denied that the MP or Minister influenced road works. He told the court that when RDA wanted to carry out certain works in a particular district, the Councils were the ones that gave RDA the list of priority roads in their districts.

He further told the court that he received a request from Mungwi Constituency in February, 2016 through the Council Secretary and that he was aware that the 1st Respondent was part of the meeting held on 20th January, 2016. However, he still maintained that the 1st Respondent did not play a role in the RDA contracts.

He explained that a Possession of Site was a document given to the Contractor after the Contract had been signed so that the Contractor could start mobilisation of equipment, personnel and

establishing of the road site camp. It also instructed the Contractor to commence the works. Conditions were attached in granting Possession of Site such as the Contractor having to show proof of the list of qualified personnel and list of construction equipment.

He stated that the condition attached to the Possession of Site given to Springbok (Z) Limited was to give a Performance Guarantee. He told the court that the said Performance Guarantee was not before Court as the original was given to the CEO of RDA at Lusaka. Further that the Possession of Site given to ZNS as per MOU signed between ZNS and RDA also had as part of its conditions that ZNS should submit a Performance Guarantee. Similarly this Performance Guarantee was not before the Court. In spite of this he told the court that Springbok (Z) Limited had authority to be on site.

In re-examination the witness told the court that the 1st Respondent was a member of the full Council and he had a role to play in these Council meetings as MP for Malole Constituency.

That was the case for the 1st Respondent.

3. SUBMISSIONS

The parties filed written submissions which I have considered.

On behalf of the 1st Petitioner, learned counsel Mr. M. Mwansa submitted that the petition was commenced pursuant to *Sections 96 (1), 97 (2) of the Electoral Process Act and Section 15 (1) of the Code of Conduct a Schedule to the Act.*

Counsel split his arguments into three subheadings based on the allegations made by the 1st Petitioner in his petition. These are:

1. Submissions on the Purported Use of the 2014 Mungwi District Council Constituency Development Fund.

Regarding this allegation, Mr. Mwansa submitted that it was not in dispute that material goods in the form of building materials were delivered to certain schools in the Mungwi District during the campaign period of 16th May, 2016 to 10th August, 2016. The recipients of these goods, the suppliers and the delivery dates were admitted by the 1st Respondent, the representative of the Mungwi District Council and further exhibited and collectively numbered as page 7 in the 1st Respondent's bundle of documents as follows:

School	Supplier	Delivery date
Mumba Primary School	Crown Suppliers	10/06/2016
Mumena Primary School	Hardkaso General Suppliers	24/05/2016
Chifulo Community School	Nkolela General Dealers	21/05/2016
Chilaila Community School	Eustanga Enterprises	30/06/2016
Chomba Community School	Katoli General Dealers	23/05/2016
Pulumwe Community School	Crown Suppliers	18/05/2016

Counsel submitted further that as the testimony on the record showed, the Constituency Development Fund Committee consisted of a minimum of nine (9) members which included the Minister of the Constituency in question, two (2) Councillors, a Chief's representative, representatives from a Non-Governmental Organisation and a representative of the Church.

He further submitted that upon adoption of projects for funding the Constituency Development Fund Committee presented these projects to the Full Council for approval and upon approval the Council would invite bids for the supply of materials for the Projects. Counsel went on to include observations that he had made from Exhibit 3 of the Bundle of Documents to support his submission as follows:

- (i) Exhibit 3 were minutes of the Constituency Fund Development Committee held on 9th January, 2016 in the Council Chamber of the Mungwi District Council;
- (ii) Only 6 members of the CDF Committee attended the meeting, including the 1st Respondent as opposed to the requisite nine (9);
- (iii) No explanation was given as to why 3 members did not attend the meeting;
- (iv) No reference was made as what the requisite quorum of the CDF Committee was;
- (v) The meeting adopted projects for funding, which included the projects outlined above;
- (vi) There was no Full Council approval for the funding of the projects; and
- (vii) There was no proof of funding of the projects.

In view of the foregoing, Mr. Mwansa submitted that there were only two options available;

- (a) Firstly that the payments were or would be made by the 1st Respondent which was tantamount to corrupt practice, illegal practice or misconduct as outlined in *Section 97 (2)* of the Act.
- (b) Secondly that the payments were or would be made by the Mungwi District Council in respect of projects which were proposed by the Constituency Development Fund Committee on the 9th January, 2016 (which the 1st Respondent attended being the most senior ranking official), but did not obtain the requisite approval of the Full Council of the Mungwi Development Council which again was tantamount to corrupt practice, illegal practice or misconduct as outlined in *Section 97 (2)* of the Act.

To buttress his arguments, Mr. Mwansa cited the case of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samuele⁽¹⁾** case where the appellant was alleged to have used the Constituency Development Fund for the purposes of campaigning in the Parliamentary Election and the Court held that:

‘...the activities of the appellant was so improper that they had eroded the electoral process and induced the electorate to vote for a candidate of their choice...’

Mr. Mwansa also cited the case of **Josephat Mlewa v. Eric Wightman⁽²⁾** where the Supreme Court had occasion to interpret *Section 93 (2) (a)* of the repealed *Electoral Act*, which provided:

‘...The election of a candidate as a Member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon trial of an election petition, that is to say-

(a) That by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency from whom they were preferred...'

He submitted that the Supreme Court stated in that case that an election could be declared void once there was;

'Wrongdoing of a scale or type which had adversely affected an election regardless of who the wrongdoer is'

It was counsel's submission that the said Section 93 (2) (a) was similar to Section 97 (2) (a) of the current Electoral Act, No. 35 of 2016.

2. Submissions on the use of Government Resources during the Campaign Period.

It was Mr. Mwansa's submissions that the 1st Petitioner had endeavoured to show on the balance of probabilities that government resources had been used when the 1st Respondent was campaigning for his re-election as Member of Parliament for Malole Constituency. Counsel submitted that the 1st Petitioner reiterated his allegation that the resources which were used were the Office of the President, motor vehicles registration number GRZ 120 CL and ALD 1932 which conduct learned counsel submitted was captured under Section 15 of the Code.

3. Submissions on the Grading of Feeder Roads in Mungwi District

Mr. Mwansa submitted that the Petitioner had endeavoured to show on the balance of probabilities that the 1st Respondent had used his position as Cabinet Minister to influence the grading of feeder roads in Mungwi District. That it was apparent through testimonies on the record that the feeder roads in Mungwi District were actively worked on during the Campaign period and were part of the President of the Republic of Zambia's campaign message and promise when he attended a rally in Mumba. In addition to this counsel submitted that 1st Respondent had failed to provide a satisfactory explanation as to whether Springbok Zambia Limited and the Zambia National Service had met the pre-conditions for them to be granted site possession.

After submitting on the allegations made against the 1st Respondent, Mr. Mwansa addressed the issue of the complaints to the Conflict Management Committee by stating that *Section 12* of the *Electoral Code of Conduct* provided for the procedure on complaints and in particular *Section 12 (2)* provided that complaints arising during election campaigns and elections may be made to a conflict management committee.

He submitted that in accordance with *Section 12 (3)* complaints may be referred to Zambia Police Service, Anti-Corruption or any other appropriate law enforcement agency. However, it was counsel's submission that the law did not make it mandatory for a complaint to be submitted to the Conflict Management Committee. Neither did the non-submission of the Complaint nullify it.

Mr. Mwansa counsel concluded this point by submitting that the non-referral of the malpractices or illegalities by the 1st Petitioner or his witnesses to the Conflict Management of Committee did not discredit the petition herein.

On the Discharge of the Burden of Proof, Mr. Mwansa submitted that the 1st Petitioner had fully provided an evidential basis for the allegations raised in his petition. Counsel drew the courts attention to the case of **Davies Chisopa and Sidney Chisenga** ⁽³⁾, where the Supreme Court held at page J21 as follows:

'It is not the number of witnesses that proves an allegation but the substance of the witnesses...'

Mr. Mwansa also referred the court with regard to the demeanour of 1st Respondent's witnesses to the case of **Eddie Christopher Musonda v. Lawrence Zimba** ⁽⁴⁾ which was quoted with approval in the case of **Davies Chisopa** case wherein the Acting Chief Justice Lombe Chibesakunda (as she was then) stated that:

'Nevertheless, we are alive to the principle that he who asserts must prove his assertion. Also it is a well-established that the learned trial Judge, as trier of facts, has the advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind we cannot upset his findings...'

Counsel for the 1st Petitioner concluded this point by stating that margin or difference in terms of electoral results between the 1st Petitioner and the 1st Respondent was testimony to how the illegal

practices by the 1st Respondent and his agents affected the election results.

Mr. Mwansa concluded his submissions by stating that the 1st Petitioner had shown the court that the 1st Respondent had breached *Section 15 (1) of the Code* and *Section 97 (2) of the Act*. He therefore prayed reliefs as contained in the petition.

On behalf of the 1st Respondent, learned counsel Mr J. Khosa, responded to the 1st Petitioner's submissions.

Mr. Khosa commenced his submissions by stating that it was trite law that in any matter before the courts of law, he who alleged must prove what he alleges. To buttress this argument counsel cited the case of **Brelford James Gondwe v. Catherine Namugala**⁽⁵⁾ where the court held,

'the burden of establishing of 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.'

On the burden of proof and standard to be achieved in election petitions, Mr. Khosa cited two authorities; **Akashambatwa Mbikusita Lewanika v. Fredrick T.J Chiluba**⁽⁶⁾ and the **Michael Mabenga** case. On these authorities Mr. Khosa submitted that the higher standard had been held to be higher than a balance of probabilities but less than the standard in criminal matters. It was counsel's submission that it was for this court to determine

whether the 1st Petitioner had discharged his burden of proof to the required standard.

On the issue of credibility and demeanour of witnesses, Mr. Khosa urged this court to take note that it was inevitable that the witnesses for both parties would be partisan cadres with an interest to serve. That in evaluating the witnesses that were brought before the court the 1st Petitioner's witnesses were mostly partisan cadres with posts both in the UPND and FDD as opposed to the 1st Respondent's witnesses who were mostly non-partisan.

To buttress this submission Mr. Khosa urged the court to adopt and be persuaded by the reasoning of Kaoma J. in the case of **Christopher Kalenga vs. Annie Munshya and 2 others**⁽⁷⁾ where the court said,

"In an election petition, just like in an election itself, each party is set out to win. Therefore, the court must cautiously and carefully evaluate all the evidence adduced by the parties. To this effect evidence of partisans must be viewed with great care and caution, scrutiny and circumspection.....it would be difficult indeed for a court to believe that supporters of one candidate behaved in a saintly manner, while those of other candidates were all servants of the devil.....in an election contest of this nature, witnesses most of them motivated by the desire to score victory against their opponents will deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain."

It was Mr. Khosa's submissions that notwithstanding the case cited above, the 1st Petitioner's witnesses were not truthful or consistent.

To exemplify this counsel recounted that PW2 told the court that the motor vehicle with the PA system was vehicle registration number ALD 1932 but later changed in cross examination that it was a Nissan Hardbody white in colour bearing registration number WRT 484 GP which vehicle had a self-powered public address system at the back.

Mr. Khosa also recounted that when PW1 was called upon to give the exact date of the alleged accident involving motor vehicle registration number GRZ 168 CL he gave three different dates. On those illustrations, counsel urged the court to make an adverse finding against the said two witnesses.

Counsel also pointed out that the testimonies of the 1st Respondent, PW2 and PW3 were at variance in terms of the colour of motor vehicle registration number ALD 1932 and if the same had been branded. PW2 stated that it was not branded whereas PW3 stated the opposite.

On this score Mr. Mwansa urged the court to find in favour of the 1st Respondent in line with established principles of law when such conflict arises.

On the use of government resources and bribery, learned counsel submitted that the 1st Respondent had demonstrated to the court on all the allegations that he knew what was happening and that he did not at any one time use government vehicles in his campaign, that he did not use government resources to donate to the community in his constituency to lure votes as alleged in the petition and that he did not influence the works of the Central

Government to influence the maintenance of feeder roads in Mungwi District.

Mr. Khosa submitted that the 1st Petitioner's witnesses had failed to prove to the court on a high degree of probability all the allegations as contained in the petition. To buttress this position counsel cited the case of **Josephat Mlewa vs. Eric Wightman.**

Counsel went on to state that it was clearly shown from the evidence that the 1st Petitioner gave conflicting evidence with regard to the allegations of use of government resources. Counsel referred the court to the case of **Attorney General vs. Kakoma** ⁽⁸⁾ where the court held;

'A court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence.'

On that score Mr. Khosa urged the court to make findings of fact against the 1st Petitioner based on the court's observance of the demeanour of the 1st Petitioner's witnesses exhibited during their time on the stand. It was counsel's considered view that the 1st Petitioner had failed to prove to the required standard the grounds against the 1st Respondent as contained in his Petition.

In conclusion, Mr. Khosa urged the court to throw out the petition and not grant the 1st Petitioner any of the reliefs sought as the allegations were not proved to the accepted standard as he had not shown that the elections were influenced by some illegal factors.

Counsel stated further that the 1st Petitioner had failed to provide before the court cogent evidence to have the election of the 1st Respondent nullified on the alleged allegations which were not proved. Consequently it was the 1st Respondent's prayer that the court upholds the election of the 1st Respondent to the office of Member of Parliament for Malole Constituency with costs to the 1st Respondent.

4. LAW AND FINDINGS

The High Court is clothed with the jurisdiction to hear and determine election petitions by virtue of Article 73 (1) and (2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016. This Article provides that:

'73 (1) A person may file an election petition with the High Court to challenge the election of a Member of Parliament.

(2) An election petition shall be heard within ninety days of the filing of the petition.'

Furthermore, Section 96 (1) of the Electoral Process Act No. 35 of 2016 ('the Act') also empowers the High Court to hear matters pertaining to election petitions. The section states that:

"A question which may arise as to whether-

(a) a person has been validly appointed or nominated as a Member of Parliament;

(b) the seat of an elected or nominated Member of Parliament, mayor, council chairperson or councillor, has become vacant, other than a question arising from

the election of a candidate as a Member of the Parliament; or

(c) a petition may be heard and determined by the High Court or tribunal upon application made by-

- (i) any person to whom the question relates; or*
- (ii) the Attorney General;*

may be determined by the High Court or a tribunal, as the case maybe.'

Section 97 (2) (a) provides for instances where an election of a candidate may be declared void. It provides that:

'(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 proved to the satisfaction of the High Court or a tribunal as the case may be that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-

- (i) by a candidate; or*
- (ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and*

The majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred.

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

provision and that such non-compliance affected the result of the election; or

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

It is clear from Section 97 (2) (a) that the grounds on which an election petition is based should be proved to the satisfaction of the court. Therefore, the applicable standard of proof in election petitions has been held to be higher than the balance of probability but less than the standard of proof in criminal cases which is beyond all reasonable doubt. Thus in the case of ***Akashambatwa Mbikusita Lewanika and three others*** the Supreme Court held that:

‘Parliamentary election petitions are required to be proven to a standard higher than on a mere balance of probability.’

This was echoed in the case of ***Anderson Kambela Mazoka & Two others v Levy Patrick Mwanawasa*** ⁽⁹⁾ when the Supreme Court held *inter alia* that:

‘As regards burden of proof the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.’

In relation to the burden of proof, it is trite law that he who alleges must prove. In the case of ***Khalid Mohamed v The Attorney General*** ⁽¹⁰⁾ Ngulube DCJ (as he then was) held that:

‘An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and

if he fails to do so the mere failure of the opponents defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiffs case has collapsed of its inanition or for some reason or the other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed.'

Words to much the same effect were used by the same Judge in the case of **Wilson Masauso Zulu v. Avondale Housing Project** ⁽¹¹⁾ when he stated that where a plaintiff makes any allegation, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case.

In commencing this action under the Act, the 1st Petitioner has relied on Section 97 (2) (a) and on Section 15 (1) (i) and (k) of the Electoral Code of Conduct which is a schedule to the Act. The relevant portion of the section reads as follows:

15(1) A person shall not-

(i) Abuse or attempt to abuse a position of power, privilege or influence, including parental, patriarchal or traditional authority for political purposes including any offer of a reward or for the issuance of a threat;

(k) Use Government or parastatal transportation or facilities for campaign purposes except that this paragraph shall not apply to the President and Vice President in connection with their respective offices.'

The burden of proof therefore entirely rests on the 1st Petitioner to prove the allegations set out in the petition based on the above

accord full weight and credibility to the evidence of RW3, as he was in present in court during the proceedings.

By way of background, the efficacy of excluding witnesses from the courtroom until they are called to testify is a long established and well- recognised measure designed at discouraging fabrication, inaccuracy and collusion so as to increase the likelihood that the testimony of the witness will be candid.

Under our Rules, this measure is provided for under Order V of the High Court Rules Chapter 27 of the Laws of Zambia. It provides that:

1. On the application of either party, or on its own motion, the Court may order witnesses on both sides to be kept out of court; but this rule does not extend to the parties themselves or to their professional representatives, although intended to be called as witnesses.

It is clear from this provision that on an application of either party or on the court's own motion, a witness may be ordered to be kept out of the courtroom.

However, the power of the court to exclude a witness from the court is discretionary as the Order V is not couched in mandatory terms. Thus, in the case of Moore v Lambeth County Court Registrar⁽¹³⁾ the Court of Appeal rejected a submission that in the county court natural justice was violated by the witnesses being allowed to remain in court. It was held that:

'No rule of law requires that in a trial the witnesses to be called by one side must all remain out of court until

their turn to give testimony arises. It was purely a matter within the discretion of the court.'

In giving the principal judgment Edmund Davies J. stated that:

'If the court rules that witnesses should be out of court and a witness nevertheless remains inside while the trial judge may well express his grave displeasure over such disobedience, he has no right to refuse to hear the evidence of such a witness.'

In our own jurisdiction, Sakala J.(as he then was) in the case of ***Happy Mbewe v The People***⁽¹⁴⁾ adopted the same approach taken in the ***Moore v Lambeth*** case but added that:

'where a situation arises in which a witness to be examined heard the evidence of the other witnesses, his evidence is still admissible but the court in considering in evidence at the end of the trial will have to determine as to what weight to attach to that evidence.'

From the record, it is clear that no application was made by either party to exclude the witnesses from the courtroom. The court only made an order after it was brought to its attention that PW5 was present in court during the testimony of the other witnesses. Therefore, I find that there was no disobedience of any Order of the court by PW, RW3 and RW5. In this regard therefore their evidence will not be discounted but an assessment of the probative value or weight to be attached to the evidence will be made.

Furthermore I wish to add that at the close of the 1st Petitioner's case, the allegation against the Electoral Commission of Zambia as contained under paragraph 5 (iii) and (iv) remained unproven.

Therefore I shall deal with the allegations against the 1st Respondent.

1. MATERIAL DONATIONS MADE TO COMPLETE WORKS AT SCHOOLS.

The first allegation by the 1st Petitioner against the 1st Respondent contained under paragraph 5 (i) of the petition is that between 16th May, 2016 and 11th August 2016, in the course of his campaigns the 1st Respondent and his agents made material donations to complete the works which had stalled since 2011 to the following primary and community schools:

- (1)Mumba Primary School
- (2)Mumena Primary School
- (3)Chifulo Community School
- (4)Chilaila Community School
- (5)Chipembe Community School
- (6)Chomba Community School
- (7)Mutale Mutabukila Community School
- (8)Pulumwe Community School.

The 1st Petitioner alleged that the donations were made by the 1st Respondent to lure the electorate to vote for him.

The witnesses who led evidence to prove this allegation were the 1st Petitioner himself and PW6, Aaron Chanda, the PTA Chairperson at Chipembe Community School.

According to the 1st Petitioner, the basis for this allegation was that government had released CDF in the year 2011, 2012 and 2013

but no works were attended to at the schools in Malole constituency.

Further, that even after the 2014 CDF which was wrongly deposited in the Malole Constituency Youth Development Fund was finally put back in the right account on 5th January, 2016, works at the schools in question only commenced during the election period. According to the 1st Petitioner, this act by the 1st Respondent compromised the election process as it was a deliberate move to change the minds of the voters.

It was also the 1st Petitioner's evidence that monies were being distributed by Mr. Chiluba, the Chairperson of Mungwi District PF Executive Committee in Malole constituency. He added that the said Mr. Chiluba was neither a councillor nor a council employee for him to have been involved in a government project. Based on this, the 1st Petitioner concluded that the money used was not part of the CDF and must have come from the Malole Member of Parliament or the Patriotic Front (PF).

The evidence from PW6 was that Mr. Chiluba the Chairman of the Mungwi PF Executive Committee who was in the company of one other man and one woman delivered materials to Chimpebele Community School on 25th May, 2016 and emphasised that the works which had stalled should be completed.

In rebuttal, the 1st Respondent denied that he delivered the materials mentioned but stated that the same were part of the projects undertaken by the council using CDF. He also denied that

the materials were delivered by Mr. Chiluba but that they were delivered by a contractor contracted by the council.

The 1st Respondent's witness who also addressed this allegation was RW5, the Council Secretary at Mungwi District Council. He denied that the 1st Respondent made donations to complete works and projects to some government schools and community schools in Mungwi District. His evidence was that the projects were funded from the Malole CDF and were tied to the 2014 CDF allocation.

He further explained that the projects were only undertaken in 2016 as the Ministry of Finance which disbursed the funds sent the funds to the wrong account called Malole Youth Development Fund and that the funds were only disbursed in the right account in January, 2016.

I have carefully considered the evidence adduced to support the allegation and the evidence in rebuttal.

I should state from the outset that going by the dates on the delivery notes which were produced in the 1st Respondent's bundle of documents, the deliveries to the schools in question were made between 18th May, 2016 and 26th June, 2016. This period fell within the campaign period which commenced on 16th May, 2016 and ended on 10th August, 2016. I therefore find as a fact that the deliveries to the schools mentioned were made within the campaign period.

However, in order to succeed, the 1st Petitioner has to prove that the materials delivered to the schools were donated by the 1st

Respondent and his election agent or polling agent with his knowledge and consent or approval.

Although the 1st Petitioner testified with much vigour that Mr. Chiluba was involved in the delivery of materials to the schools in question, there is no evidence that the 1st Petitioner personally witnessed the delivery of the materials to the schools by Mr. Chiluba. His evidence I must say falls in the realm of hearsay and it is not admissible.

Therefore the 1st Petitioner's allegation hinges on the testimony of PW6, Mr Aaron Chanda, the P.T.A Chairperson for Chipembebe Community School. In terms of the category of witnesses in which he fell, I considered him to be an independent witness as there was no evidence that he belonged to any political party.

However, he is the only witness who testified that Mr. Chiluba delivered the materials on 25th May, 2016 to Chimpebele Community School and that he told them to immediately commence the works which had stalled. The question I ask myself is this: Is this evidence sufficient to meet the standard of proof required in election petitions?

In answering this question, I am guided by the provisions of Section 97 (2) of the Act which I referred to above which specifically provides that an election of a candidate as Member of Parliament can only be avoided if it is proved to the satisfaction of the court that such a candidate or that candidate's election agent or polling agent committed the corrupt practice, illegal practice or other misconduct in connection with the election.

I am also guided by the judicial precedents cited above that the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.

Since the standard set is high, I am not satisfied that the evidence of PW6 has met the standard of proof to a fairly high degree of convincing clarity that Mr. Chiluba delivered the materials to Chimpebele Community School. I say so for the following reasons:

- (1) If indeed Mr. Chiluba delivered the materials as alleged, his full particulars should have been adduced in evidence so that his true identity could have been ascertained. As the evidence stands, PW6 was not able to give the court the full names of Mr. Chiluba.
- (2) For the 1st Respondent to be liable for the acts done by his alleged agents, it must be proved that the act was done with his knowledge and consent or approval. According to section 2 of the Act, an election agent means:

'A person appointed as an agent of a candidate for the purpose of an election who is specified in the candidate's nomination paper.'

It is abundantly clear from the record that no evidence was led to show that Mr. Chiluba delivered the goods as a registered agent of the 1st Respondent and that this was done with his knowledge and consent or approval considering that PW6 told the court that the 1st Respondent was not there when the materials were delivered. In a case of this nature, it was not sufficient for this 1st Petitioner to have merely stated

that a political cadre who was not a councillor or government employee was involved in the delivery of materials.

(3) PW6's evidence was that he refused to sign for the materials delivered by Mr. Chiluba because they were not according to the quantity that they had requested for. For this reason, the teacher at the school signed for materials in a book. The teacher whose full particulars were not disclosed was not called as a witness and the book was not produced in evidence as proof that the materials were delivered by Mr. Chiluba. This would have provided satisfactory proof on who actually delivered the materials to Chipembe Community School.

(4) The allegation by the 1st Petitioner relates to eight (8) schools in Malole Constituency but the evidence adduced by PW6 was only in relation to Chipembe Community School. There was no evidence that was led by the 1st Petitioner or any of his witnesses that the materials delivered to the other schools were also delivered by the 1st Respondent or his agents. This court cannot be invited to make a general inference that Mr. Chiluba was also involved in all the deliveries of the materials to the other schools based on the evidence of PW6 since there is no reliable and clinching evidence so proved from which such an inference can be made.

(5) There was no evidence that was adduced by the 1st Petitioner that because of the material donations allegedly made by the 1st Respondent and his agents the voting pattern in the wards or areas where the schools are located was swayed. What is

on record is the 1st Petitioner's own assessment which is not supported by any evidence.

On the other hand, the 1st Respondent denied that the materials were delivered by Mr. Chiluba but that they were delivered by the contractor contracted by the council.

His evidence was supported by RW6, who testified in his capacity as the Council Secretary at Mungwi District Council. I therefore regard him as an independent witness. He told the court that the materials were delivered to the schools in question by the contractors and delivery notes were issued to that effect. He produced the delivery notes not only for Chipembe Community School but also for the other schools mentioned in the petition.

The delivery note for Chipembe Community School which the 1st Petitioner in his submissions surprisingly did not make reference to shows that it was prepared on the 24th May, 2016, by Moddy Sichalwe, and that the materials delivered by Pamela Mulenga were received by Francis Mulenga. Mr. Chiluba's name was not on this document.

In the light of the evidence adduced in rebuttal, and for the reasons I have given above, I am not satisfied that Mr. Chiluba who allegedly was the PF Executive Chairman in Malole delivered the materials to the schools mentioned in the petition and that he did that as an agent of the 1st Respondent. I therefore I find that the materials were delivered by the contractors contracted by Mungwi District Council and not Mr. Chiluba.

Before I proceed to consider the next allegation, it is evident from the submissions made by counsel for the 1st Petitioner that proof of this allegation took another dimension. Counsel made observations on Exhibit 3 in the 1st Respondent's bundle of documents which were the minutes of the CDC held on 9th January, 2016.

He submitted that no explanation was given why only six (6) members instead of the nine (9) members attended the meeting, no reference was made to the requisite quorum of the CDC, there was no full council approval for the funding and there was no proof of funding of the projects. In view of foregoing, he submitted that there were two options that were available.

The first option was that the payments were or would have been made by the 1st Respondent or secondly that the payments were or would have been paid for by Mungwi District Council without the approval of the full council meeting. That these acts were tantamount to corrupt practice, illegal practice or misconduct as outlined in Section 97 (2) of the Act.

From the outset, I wish to state that in making the above inferences the 1st Petitioner has shifted the burden of proof to the 1st Respondent and that his failure to adduce certain evidence means that he breached the provisions of Section 97 (2) of the Act.

As I have mentioned, the 1st Petitioner bears the burden of proof as he is the one alleging. The case of ***Khalid Mohammed v The Attorney General*** is quite instructive on this point. Therefore I entirely approve of and desire to adopt as my own the language of DCJ Ngulube which I referred to above to the effect that the 1st

Petitioner must prove his case and that he is not entitled to judgment even if the 1st Respondent's defence collapses .

What this means is that before inviting the court to make the inferences referred to in the submissions, it was incumbent upon the 1st Petitioner to adduce evidence that the meeting of 9th January, 2016 did not meet the required quorum according to the laid down guidelines and also that no full council meeting was held to approve the projects mentioned in paragraph 5(i) of the petition.

However, from the 1st Petitioner's testimony, it is clear that the emphasis was not on the issues that were canvassed in the submissions but on the involvement of a political cadre in the distribution of materials to the schools and also the timing of the works to complete the schools. It is surprising that these issues were not even canvassed in the submissions.

Therefore, in as much as the minutes of the full council meeting would have supported the evidence of the 1st Respondent and RW6, I find the explanation by RW6 to be plausible and his evidence credible for the following reasons:

- (i) He told the court that a request was made by the Mungwi District Council for a Special Council Meeting to be held to approve the projects. A letter dated 15th February, 2016 was produced in the 1st Respondent's bundle of documents showing that a request was made by Mungwi District Council to the Provincial Local Government Officer to hold a Special Council Meeting on 18th February, 2016 to

allocate the 2014 CDF which was received on 15th January, 2016 amounting to K 1,400, 000.00.

- (ii) A letter dated 17th February, 2016 from the Provincial Local Government Officer authorising a Special Council Meeting to be held on 18th February, 2016 was produced in the bundle of documents.
- (iii) RW6 also explained to the court that the projects were funded using CDF for 2014 which had delayed because it had been deposited in a wrong account. To support this, he produced a letter written by the Mungwi District Council to the Bank Manager for Zambia National Commercial Bank (ZANACO) requesting the bank to transfer the funds from the Malole Youth Development Fund account to the Malole Constituency Development Fund Account so that the council could implement the intended purpose of the funds.
- (iv) RW6 explained that the works on the schools in question could only be mobilised in May to June 2016 due to the elaborate procurement procedures and approvals of the council and that commencement of the works were not meant to coincide with the campaign period as what was delivered was a project cycle.
- (v) I examined the demeanour, of RW6. He did not strike me as a witness who came to court to fabricate a story. He was fixed and consistent when giving his testimony both in examination in chief and cross examination and he was gracious enough to concede on certain issues. The evidence

he adduced and the explanation he gave was therefore not discredited during cross-examination.

In view of the foregoing, this case can be distinguished from the **Michael Mabenga** case which counsel for the 1st Petitioner cited. In that case the court found that there was overwhelming evidence to show that the appellant in the matter actively participated in ensuring that the CDF funds were drawn by the Fund Chairman and MMD Constituency Chairman and used at the time to benefit the appellant.

In the present case, there was no evidence adduced to the effect that the 1st Respondent or his registered agents were actively involved in the administration of the CDF. From the letters that have been produced, it is clear to me and I find that the source of funding was the CDF and that it was the Mungwi District Council which was actively pursuing the implementation of the projects and the process was transparent.

Therefore in the light of the other evidence adduced by the 1st Respondent and his witness RW6 and the explanation proffered why there were delays in implementing the projects which I consider to be plausible, I find that it cannot logically be inferred that the payments for the projects were made by the 1st Respondent or that the projects were paid for by the Mungwi CDC without the approval of the full council in the absence of cogent evidence to the contrary.

I hasten to mention that as the court, I have to be watchful and avoid the danger of allowing suspicion to take the place of legal proof.

For the reasons that I have highlighted above I find that the 1st Petitioner has failed to prove this allegation to a fairly high degree of convincing clarity that the 1st Respondent and his agents made material donations to the schools and that this was intended to lure the voters to vote for him. This allegation therefore fails.

2. USE OF GOVERNMENT VEHICLES DURING THE CAMPAIGN PERIOD

The second allegation as indicated in paragraph 5 (ii) of the petition is that during the campaign period between 16th May, 2016 and 11th August, 2016 the 1st Respondent and his campaign team which comprised Simon Mwila as the campaign manager, Charles Mwamba and Bwalya Bwikalo as the PF Malole Constituency Chairperson and others used four vehicles that were properties of the Government of the Republic of Zambia. The said vehicles were:

1. A beige Land Cruiser registration number GRZ 320 CJ.
2. A white Nissan Patrol registration number ALD 1932 belonging to the Ministry of Energy and Water Development, Lusaka.
3. A white Toyota Hilux registration number ABZ 7365 belonging to ZESCO.
4. A green Prado registration number GRZ 168 CL belonging to the Ministry of Mines and Mineral Resources which

vehicle was involved in a Road Traffic accident between the 2nd and 3rd June, 2016.

The 1st Petitioner, placed reliance on Section 15 (1) (k) of the Electoral Code of Conduct.

In addressing this allegation, I will consider the evidence adduced in relation to each vehicle and then proceed to make findings.

(i) Beige Land Cruiser registration number GRZ 320 CJ

The evidence on this allegation was from the 1st Petitioner and PW2. The 1st Petitioner's evidence was that he saw this vehicle parked at the nomination center on 30th May, 2016, the day of nominations for Mayors and Council Chairperson as well as on 31st May, 2016, the day for filing Parliamentary nominations. He also stated that the vehicle was always in the possession of the 1st Respondent throughout the campaign period in Malole Constituency.

The gist of PW2's evidence is that he saw the 1st Respondent using this vehicle on two occasions. The first time was on 16th July, 2016 when the UPND was holding a rally at Chimba School in Iyaya ward. The second time was on 19th July, 2016 when the 1st Respondent's vehicle was part of the Presidential motorcade that drove past where he was standing.

The 1st Respondent denied being in the said government vehicle on the 16th July, 2016 at Chimba School in Iyaya ward. Rather he stated that he was in the company of Mr Simon Mwila in a PF

branded Pajero registration number ALV 4040. He also denied the use of the said vehicle on the day that the President held a rally in Mumba village on the 19th July, 2016 contrary to PW2's allegation. He stated that on the said date the 1st Respondent flew into Mumba via a helicopter in the entourage of the President and did not have the said vehicle with him.

The 1st Respondent maintained that he never drove the GRZ vehicle throughout the campaign except for the one day on the 6th August, 2016 when there was a celebration of 125 years for the Catholic Faith in Zambia at Mambwe and the President was invited as Guest of Honour. His ministerial vehicle registration number GRZ 320 CJ was driven by a driver Zilole Zulu under instruction from the Ministry in Lusaka to pick him up from Kasama and take him to Mbala to receive the President.

The witness who supported the 1st Respondent's evidence was RW3, Simon Mwila, the campaign manager. He denied that GRZ 320 CJ was used by the 1st Respondent on the 30th and 31st May, 2016. He stated that on the material days he drove the 1st Respondent to Mungwi District Council offices using motor vehicle Izuzu Denver black in colour registration number ALM 7000.

Furthermore, he told the court that they walked to the filing centre when escorting the PF candidate for the position of Council Chairman to file his nomination papers.

The witness also denied that the 1st Respondent used GRZ 320 CJ when he went to Makasa between 4th July and 10th August, 2016. He told the court that he drove the 1st Respondent to Makasa

enroute to Kayambi using was a branded Pajero registration number ALV 4040.

RW3 also told the court that on the 19th July, 2016 the day of the rally at Mumba where the President was in attendance the 1st Respondent arrived in Mumba via a helicopter and not his ministerial vehicle.

The other witness who gave evidence to support the 1st Respondent was RW4, Bwalya Bwikalo. He testified that on the 19th July, 2016 the 1st Respondent arrived in Mumba via a helicopter. That he did not see motor vehicle registration number GRZ 320 CJ.

(ii) A white Nissan Patrol registration number ALD 1932 belonging to the Ministry of Energy and Water Development, Lusaka.

The 1st Petitioner's evidence in support of this allegation concerning motor vehicle registration number ALD 1932 was that it was used in most places in Malole Constituency and specifically on the 30th May, 2016 the day of nominations. It was also used on the 18th July, 2016 to announce that his Excellency the President of the Republic of Zambia Mr Edgar Chagwa Lungu was going to have a rally in Mumba the following day on the 19th July, 2016 a village in Malole Constituency. The said vehicle was driven by Mr Mwape an employee of the Ministry of Mines and Mineral Development.

The other witness who addressed the allegation on this vehicle was PW2. He told the court that on 22nd July, 2016, he saw the motor vehicle registration number ALD 1932 a white Nissan Patrol that

was branded in PF colours and symbols after a rally that was held at Muyombo Primary School in Malole.

PW4 also testified in relation to this vehicle. His evidence was that he saw the said vehicle on 18th July, 2016 driven by Mr. Charles Mwamba during the funeral of Mr. Justin Mwamba and throughout the campaign period.

The 1st Respondent denied that he or his agents used the said vehicle during the campaign period. In rebutting this allegation, he told the court that the said vehicle belonged to the Ministry of Energy and Water Development a Ministry and that he last used this particular vehicle before opening of Parliament in August, 2015.

To support this evidence, the 1st Respondent called RW2, the Provincial Permanent Secretary responsible for administration in the entire province. The gist of his testimony was that it was not possible for the 1st Respondent to have used motor vehicle ALD 1932 as he had left the Ministry of Energy and Water Development.

RW3 also testified that it was a false allegation by PW2 that he spotted members of the PF during a rally at Muyombo Primary School in Chambeshi area driving a motor vehicle registration number ALD 1932 which had a PA system that was being used to make announcements. He told the court that the vehicle that the PF campaign team was using to make announcements was a Nissan Hardbody white in colour bearing registration number WRT 484 GP.

RW3 further told the court that on the 19th July, 2016 at the funeral of the late Justin Mwamba he, Mr Bwikalo and Mr Charles Mwamba drove to Mwamba Mulilo using a branded Pajero registration number ALP 9703. On the 20th July, 2016 he picked up Mr Bwikalo and his wife and drove to Mwamba Mulilo for the burial using the branded Pajero registration number ALV 4040.

(iii) White Toyota Hilux registration number ABZ 7365 belonging to ZESCO.

The 1st Petitioner's evidence was that he saw this vehicle on 22nd July, 2016 which belonged to ZESCO being driven by the Father Mwamba the Parish Priest at St Margaret's Catholic Church at a rally that he was conducting. He stated that he also saw the vehicle on the 7th August, 2016 at a village called Chewe in Malole where meetings were held.

PW2 also testified that he saw motor vehicle registration number ABZ 7365 a Toyota Hilux white in colour between the 28th June, 2016 and the 15th July, 2016 at a rally in Lubwe in Mungwi Ward in Malole Constituency. The said vehicle passed by and parked approximately between 100-130 metres from where the rally was being held. The occupants of the vehicle started distributing PF branded chitenge materials. When he inquired as to ownership of the vehicle and he was informed that it belonged to a Priest whose name he could not remember but was able to identify him facially.

The 1st Respondent denied any knowledge of motor vehicle registration number ABZ 7365 and that he had never come into

contact with the Parish Priest and only first heard about him through the 1st Petitioner.

(iv) A green Prado registration number GRZ 168 CL belonging to the Ministry of Mines and Mineral Resources which vehicle was involved in a Road Traffic accident between the 2nd and 3rd June, 2016.

The evidence of the 1st Petitioner and his witness PW3 was that a green Prado registration number GRZ 168 CL was seen by the two witnesses at the Council on the day of nominations with members of the PF on the 30th May, 2016 and the 31st May, 2016.

In response to the evidence adduced, the 1st Respondent denied any knowledge of a vehicle bearing registration number GRZ 168 CL. He told the court that he was only aware of a vehicle bearing the registration number GRZ 168 CH a Prado green in colour and that this vehicle was not used in campaigns as it was in the province on national duties up until the time it was involved in an accident on the 1st June, 2016 and was written off.

RW5 also testified that he was involved in a road traffic accident on the 1st June, 2016 using motor vehicle registration number, GRZ 168 CH and not GRZ 168 CL as alleged by the 1st Petitioner. He denied having ever driven a motor vehicle bearing the registration number GRZ 168 CL.

It is clear from the foregoing that the 1st Respondent denied that the motor vehicles contained in paragraph 5 (ii) were used in the campaigns. Proof of these allegations therefore will not only depend on the evidence adduced to support or rebut the allegations, but

also on assessing the credibility of the 1st Petitioners witnesses as against the 1st Respondents witnesses in order to determine the weight to attach to the evidence adduced. In doing so, I will be making findings on the allegations made on each of the vehicles.

In relation to GRZ 320 CJ, the 1st Petitioner testified that the said vehicle was in Malole constituency throughout the campaign period and to be specific that he saw it on 30th May, and 31st May, 2016 on the day of nominations for Council Chairpersons and Parliamentary candidates.

Although PW3, Ruth Kangwa of the FDD was at the council offices on 30th May, 2016 at the same time the time that the 1st Petitioner was there, she did not see this particular vehicle. Therefore there is no other witness who saw that this vehicle was in Malole constituency on 30th and 31st May, 2016 apart from the 1st Petitioner.

PW2 supported the evidence of the 1st Petitioner only to the extent that the vehicle was in Malole constituency during the campaign period. To be specific he stated that he saw it on 16th July, 2016 and 19th July, 2016. There is evidence on record that PW2 belongs to UPND and therefore he is partisan. His evidence therefore fell within the category of those who may have an interest to serve since the UPND Parliamentary candidate equally lost the elections. Therefore it requires something more than a belief in the truth based simply on his demeanour and plausibility of the evidence.

As the court I had the opportunity to see the vehicle as it was identified by the 1st Petitioner during the trial. In terms of

identification, it is not a vehicle that one could fail to identify if it was seen anywhere. However, apart from the word of these witnesses against that of the 1st Respondent and his witnesses what other evidence was adduced to support this allegation?

It is very clear from the evidence of the 1st Petitioner that he filed this petition because the 1st Respondent breached the Electoral Code of Conduct. PW2 also told the court that the playing field was not fair as the PF used government resources during the campaign period.

It is surprising that notwithstanding the concerns that the 1st Petitioner and PW2 may have had over the use of this vehicle allegedly during the campaign period, no report was made to the relevant authorities as provided for under Sections 12 (1) and (2) of the Schedule to the Electoral Process Act. This section provides that:

12. (1) The following persons may lodge a complaint to the Commission in relation to an election:

(a) a voter or candidate in a constituency where a breach of this Code has been committed; or

(b) from a political party participating in an election.

12. (2) Complaints arising during election campaigns and elections may be made to an election officer or to a conflict management committee at the place where the conduct complained against occurred.

This provision is concise in its presentation that any voter, candidate or member of a political party may lodge a complaint to the Electoral Commission of Zambia in relation to an election and

further that complaints arising during election campaigns and elections may be made to an election officer or to a conflict management committee at the place where the conduct complained against occurred.

Counsel for the 1st Petitioner argued that non-referral of the malpractices or illegalities by the 1st Petitioner and his witnesses to the CMC did not discredit his petition as the law does not make it mandatory.

That is not disputed because Section 12 (2) is not couched in mandatory terms. However, in a case of this nature where the standard of proof is high, a complaint or report made contemporaneously with the conduct complained of would have corroborated the 1st Petitioner and PW2's evidence in a material particular that the 1st Respondent was using the said vehicle and that the concern which was raised after the elections was not a mere fabrication. There was no evidence adduced that such a report was made.

On the other hand, the 1st Respondent denied that the said vehicle was in the constituency throughout the campaign period. He however, admitted that the only time this vehicle was in the constituency was during the period of the Catholic Faith Celebrations in August, 2016.

His evidence was supported by RW3, Simon Mwila and RW4, Bwalya Bwikalo.

However, in terms of categorisation, RW3 and RW4 were members of the 1st Respondent's campaign team and are therefore partisan and may have their own interests in the outcome of this matter. Their evidence like that of PW2 is to be treated with caution and therefore requires something more than a belief in the truth based simply on their demeanour and plausibility of the evidence.

I have however noted that the 1st Respondent did not just make a bare denial that he did not use his GRZ 320 CJ during the campaign period. He also adduced documentary proof of an electronic-ticket indicating that he was supposed to travel by air from Lusaka to Kasama on 28th May, 2016 on Proflight. In the absence of any evidence to the contrary that he used other means of travel on that day, I have no reason to doubt that he travelled by air two (2) days ahead of filing of the nominations. I therefore find that the 1st Respondent travelled to Kasama by air on 28th May, 2016.

Furthermore, the 1st Respondent produced a letter dated 2nd August, 2016 from the Permanent Secretary Ministry of Mines and Mineral Development showing that the driver from the Ministry was tasked to pick up the 1st Respondent from Kasama and take him to Mbala to receive His Excellency the President who was the guest of honour at the 125 years Catholic Faith Celebrations.

This documentary proof is very significant as it provides supporting evidence against which the testimony of the 1st Respondent and his witnesses can be checked. I say so because if the 1st Respondent was using GRZ 320 CJ which was his official vehicle during the

campaign period as alleged by the 1st Petitioner, there was no need for the Permanent Secretary in the Ministry of Mines and Minerals Development to have sent a driver from Lusaka to take him for the Catholic Church Celebrations in Mbala.

In the absence of any supporting evidence from the 1st Petitioner to substantiate the this allegation, I am inclined to accept the evidence of the 1st Respondent and that the vehicle was only in the constituency during the time of the Catholic Church celebrations and this was on official duty and so I find.

In view of the foregoing reasons, I find that the 1st Petitioner has failed to prove this allegation to a fairly high degree of convincing clarity that the 1st Respondent used vehicle registration number GRZ 320 CJ during the campaign period.

The next vehicle is a white Nissan Patrol registration number ALD 1932 which vehicle belonged to the Ministry of Energy and Water Development, Lusaka.

In this instance the evidence relied on was from the 1st Petitioner, PW2 and PW3.

They all gave evidence of this vehicle being used at various fora and on different dates by members of the 1st Respondent's campaign team including at a funeral. In terms of description of the vehicle, their evidence was consistent in that they all stated that it was a white Nissan Patrol registration number ALD 1932 and that it was branded with the portrait of the President and his running mate.

However, in terms of categorisation, PW2 is a member of UPND and therefore, he may have his own interest to serve.

Similarly PW4, Dominic Kangwa is the Information and Publicity Secretary for FDD and was involved in the campaigns. In fact he did not inspire me as a credible witness as he was evasive during cross examination. His evidence therefore has to be treated with caution as he may have an interest in the outcome of this matter.

In rebutting this allegation, the 1st Respondent and his witnesses RW3 and RW4 denied that the vehicle was used on the dates alleged. However, the 1st Respondent's witnesses may have their own interest to serve as they also belong to the PF party and were part of the 1st Respondent's campaign team.

In view of the categorisation of the 1st Petitioner and his witnesses other supporting evidence should have been adduced apart from oral testimony that the 1st Respondent's agents used the vehicle in question during the campaign period.

On the other hand, there is documentary evidence of a customer statement for the 1st Respondent for the period 4th July, 2016 to 30th August, 2016 prepared by Odro Investment Limited showing the vehicles that they were re-fuelling at Chintelelwe Puma Service Station. The motor vehicle registration number ALD 1932 does not appear on that statement. I have accepted the contents of this document as there is no evidence to show that it is not an authentic document.

In addition, there is evidence of RW2 the Deputy Permanent Secretary for Northern Province who I consider to be an independent witness. Although he was not from the Ministry of Energy and Water Development, he supported the 1st Respondent's evidence by giving the general government policy on movable assets like motor vehicles that once a Minister was transferred to another Ministry, he or she would not carry the movable assets such as a motor vehicle as they would not have control of that vehicle. As a result of this, he stated that it was impossible for the 1st Respondent to have used the vehicle in question as he had left the Ministry of Energy and Water Development.

I have accepted this evidence as there is no evidence to the contrary that was adduced by the 1st Petitioner that the 1st Respondent still had control of the vehicle even after he left that Ministry. In this regard, I find that the 1st Respondent did not have control of the vehicle registration number ALD 1932 as he had left the Ministry of Energy and Water Development.

As I have mentioned the 1st Petitioner has to prove with convincing clarity that the vehicle in question was being used during the campaign period in the manner and instances alleged.

Therefore if 1st Petitioner or any of the witnesses were equipped with the knowledge that the 1st Respondent was using government vehicle, they should have taken the prudent step of lodging a complaint with the relevant authorities as outlined in *Section 12* of the *Electoral Code of Conduct*. This complaint would have supported their evidence.

In the absence of any supporting evidence, and in view of the evidence adduced by the 1st Respondent, I find that the 1st Petitioner has failed to prove with a fairly degree of convincing clarity that the motor vehicle registration number ALD a government vehicle was used during the campaign period. The allegation there fails.

The next vehicle is the white Toyota Hilux registration number ABZ 7365 belonging to ZESCO. The witnesses who testified on this vehicle were the 1st Petitioner and PW2.

The 1st Petitioner alleged that he saw this vehicle on 22nd July, 2016 and 7th August, 2016 in the possession of a Catholic Priest, Father Mwamba of St Margaret's Parish Church of Mungwi who was involved in the campaigns on behalf of the 1st Respondent. PW2 also addressed this allegation that he saw the said vehicle between 28th June, 2016 and 15th July, 2016.

Although the 1st Petitioner stated that he established that the vehicle belonged to ZESCO, there is no proof that the said vehicle actually belongs to ZESCO which is a parastatal.

Further he stated that he made a report to the police and that he was told that he could not make a report as he was not the complainant, however, there was no evidence that this report was actually made to the police.

In addition, it is not clear why the 1st Petitioner decided to make a report after the elections even after establishing at the time of the campaigns that the vehicle allegedly belonged to ZESCO. It is

equally not clear why the 1st Petitioner did not make a report to ZESCO, the purported owners of the vehicle for them to take up the matter with the police. This casts a doubt in my mind whether ZESCO owns such a vehicle and that it was used in the manner alleged by the 1st Petitioner.

Coming to the testimony of PW2 whose evidence I have to treat with caution, he only gave the description of the vehicle as a Toyota Hilux registration number ABZ 7365 and stated that on the day they had a rally in Lubwe in Mungwi ward he saw this vehicle and the occupants started distributing chitenge materials for PF.

However, he was only told that the vehicle belonged to the priest but the identity of this priest is unknown.

Furthermore, there was no evidence that was adduced to show that the Priest was an election agent for the 1st Respondent and that he was using the vehicle for campaigns with the knowledge and consent or approval of the 1st Respondent.

Furthermore there is no evidence that since Priests are considered to be influential in the rural setting, the alleged misconduct by the Priest influenced the electorate to vote in a certain way.

In view of the foregoing, I am not satisfied that the 1st Petitioner has proved this allegation to a fairly high degree of convincing clarity that the 1st Respondent or his agent used this vehicle during the campaigns. The allegation therefore fails.

The last vehicle was the green Prado registration number GRZ 168 CL belonging to the Ministry of Mines and Mineral Resources.

The evidence in support of this allegation was through the 1st Petitioner and PW3, Ruth Kangwa a member of the campaign team for FDD. This witness being partisan may have an interest to serve and therefore there is need for other supporting evidence.

The gist of her evidence supporting the 1st Petitioner is that she saw the vehicle in question on 30th May, 2016 on the day of nominations and that two (2) ladies who were in PF regalia disembarked and the vehicle left. However, no other evidence was adduced that this vehicle was seen on any other day by either the 1st Petitioner or PW3 and that it was actually used by the 1st Respondent during the campaign period.

As a matter of fact, PW3 admitted that she never met the 1st Respondent or his campaign team during the campaign period.

Furthermore, PW3 told the court that she was puzzled when she saw this vehicle on the date in question as she knew that Government vehicles were not supposed to be used during the campaign period. However, that notwithstanding, she did not make a report to the Conflict Management Committee over this concern even though she was a member of the CMC.

As mentioned earlier, it would have been prudent if a complaint was made to the CMC at the time the 1st Petitioner or PW3 saw this vehicle. However, PW3 told the court that she raised a concern during the CMC meeting which was held after the elections. No evidence in form of minutes was adduced by this witness or the 1st Petitioner that such a meeting took place and the concern she referred to was raised.

On the other hand the 1st Respondent denied any knowledge of this particular vehicle registration number GRZ 168 CL. He stated that the vehicle he knew about which was in Malole constituency was GRZ 168 CH and not GRZ 168 CL and that it was involved in an accident on 1st June 2016.

The 1st Respondent's witness who addressed this allegation is RW5, Friday Mwape. Although this witness is employed as a driver in the Ministry of Mines and Mineral Development, and may not have an interest to serve in this matter, I must state that he did not strike me as a forthright witness when giving his evidence as he was inconsistent. During cross examination he denied that he was not identified by PW4 and then later changed in re-examination. Therefore, his evidence cannot stand on its own it has to be supported by other evidence.

Apart, from the oral testimony of RW5, the 1st Respondent produced a letter from the Permanent Secretary dated 25th May, 2016 instructing RW5 to travel to Muchinga and Northern Provinces to take allowances to the team of officials of the Ministry of Mines and Minerals Development who were involved in mapping/exploration in the two provinces. The said letter specifically stated that the utility vehicle to be used for the exercise was a green Prado Land Cruiser Registration Number GRZ 168 CH. In the absence of any other evidence to the contrary, I have no reason to doubt the authenticity of this letter and I find that Mr Friday Mwape was on official duties when he was involved in an accident on 1st June, 2016 whilst driving motor vehicle registration number GRZ 168 CH and not GRZ 168 CL.

Going by the said letter, the motor vehicle which was in Northern Province from 25th May, 2016 up to 1st June, 2016 when it was involved in an accident was GRZ 168 CH. The question I ask is this: Is this the same vehicle that the 1st Petitioner and PW4 saw on 30th May at the council offices?

In terms of description, both witnesses stated that they saw GRZ 168 CL but the 1st Respondent, RW3 and RW5 denied that they used the said vehicle on the date in question. Therefore, there is conflicting evidence in the identity of the vehicle in question as far as the registration number of the vehicle is concerned.

In this regard, there was need for the 1st Petitioner to have adduced other supporting evidence to prove that actually the motor vehicle the 1st Respondent knew about was the one he saw on the nomination day.

Even assuming that the motor vehicle that was seen on the nomination day was GRZ 168 CH the one the 1st Respondent and RW5 knew about, there is no evidence that was adduced to show that it was used by RW5 with the knowledge and consent or approval of the 1st Respondent. RW4 was categorical in her evidence as she told the court that she never met the 1st Respondent and his campaign team during the campaign period.

According to PW4, she stated that she saw the vehicle on the day of nominations and PF supporters disembarked from it and that after that it left. There is no evidence that was adduced to show that as a result of the use of this vehicle on that particular day, the 1st

Petitioner was disadvantaged and the majority of the voters were prevented from voting for their preferred candidate.

For the reasons I have highlighted above, it is not very clear to me that the vehicle that was seen by the 1st Petitioner and PW4 was GRZ 168 CH belonging to the Ministry of Mines and Mineral Development. Therefore in the light of the evidence adduced by the 1st Respondent, I find that the 1st Petitioner has not proved that the motor vehicle registration number GRZ 168 CH belonging to the Ministry of Mines was used during the campaign period by the 1st Respondent or his agents with a fairly high degree of clarity. This allegation therefore fails.

On the totality of the evidence adduced on this allegation of the use of Government Resources by the 1st Respondent and his agents, I am not satisfied that the 1st Petitioner has proved this allegation to the required standard of fairly high degree of convincing clarity that the 1st Respondent and his agents used these vehicles during the campaign period.

In this day of advanced technology where pictures can be taken even on phones, no pictures were adduced in evidence that could have been of use to the Court in determining the weight to be attached to the 1st Petitioner's evidence and that of his respective witnesses.

In the absence of any supporting evidence and considering that the 1st Respondent has disproved the allegations, I find that the 1st Petitioner has not proved this allegation and it therefore fails.

3. GRADING OF TWO MAJOR ROADS IN MALOLE

The third allegation contained in paragraph 5 (iv) of the petition is that the 1st Respondent used his position as a Cabinet Minister during the prescribed campaign period and graded two major feeder roads in Malole Constituency using government resources and workers in order to entice electorates to vote for the 1st Respondent.

This allegation was addressed by two witnesses the 1st Petitioner and PW5 Oswald Bwembya. According to the 1st Petitioner, he stated that during the campaign period from the 16th May, 2016 to 10th August, 2016 the road from Kapolyo to Mumba village in Chambeshi ward was hurriedly given to Zambia National Service a wing of government, to work on. The road in question was abandoned after the elections which meant that money was not given to the contractor.

The second road starting from Chitanga in Fibwe Ward of Malole Constituency which goes to Chimba to connect to another road which comes from Nsekula and Kayambi was given to a Chinese contractor who was using on grader. As a result men and women of that area were involved in the stamping of trees instead of using the standard equipment for the construction of the road.

It was the 1st Petitioner's evidence that it was apparent that the PF wanted votes for the area MP because they started road works which were not meant to be. According to the 1st Petitioner, this action by the 1st Respondent was therefore meant to lure voters in Malole constituency in the Fibwe and Chambeshi to vote for him.

The gist of the evidence from PW5 was that sometime in March, 2016, the 1st Respondent went to Chambeshi ward in Malole constituency and thanked all the people who had voted for him in the 2011 elections and he promised them that he was going to work on the road from Kapolyo up to where it goes round Chambeshi.

It was also his evidence that before the campaign activities started Zambia National Service started working on the roads. Further that the 1st Respondent and the Republican President at a rally held on 19th July, 2016, promised the people that works on the said would be completed. However, the promise had not been fulfilled

The 1st Respondent denied the allegation. His evidence was that it was the responsibility of the MP not the Cabinet Minister to bring development to the Constituencies which development included good roads, good educational and health facilities and water. He explained that the feeder roads were essential for doing business in their constituency.

In relation to the roads in question, he further explained that two of them had been ranked for implementation a long time ago and these were the Chitanga, Rosa Mission, Sokoni up to Chimba and a small road from Nondo in Senga Hill constituency which came to link into that road. He stated that he had been pushing for funds as MP since he came into office and that was what the people wanted. He therefore denied that the road was rehabilitated because of the elections.

The 1st Respondent added that the said road was advertised in the papers and specifically in the Times of Zambia in January, 2013 and since that time he, the Permanent Secretary for Northern Province, the Provincial Minister and Permanent Secretary in the Ministry of Works and Supply had several meetings to get this road implemented.

That it was only until late December last year that movement on the implementation of the said road started and that currently there was a contract awarded by RDA to Springbok Contractors who had moved on site and had been there since February to March, 2016. He added that the contractors had not left and were still working and were camped along the Mbala road.

He further told the court that the projects that were approved were not restricted to a certain timeframe as when to start and that therefore they could start even during the campaign period. He explained that the government would come to a stand-still if projects were to be halted just because it was an election year and such thinking was retrogressive.

To support the 1st Respondent's evidence, RW7, the Regional Engineer for Northern Province also testified to the effect that Springbok (Z) Limited had been contracted to carry out rehabilitation works on approximately 52 Kilometers of Mungwi agriculture feeder roads and that the funding on this project came from the Central Government through National Roads Fund Agency (NFRA).

He also testified that apart from this contract the RDA, ZNS and NFRA signed a MOU in 2015 to carry out rehabilitation works of approximately 9,430 kilometres of Agricultural feeder roads throughout Zambia. The Northern Province was allocated a total of 943 kilometres of agricultural feeder roads under this MOU. These projects had commenced and works were on going on site in various districts of Northern Province. The witness identified and produced Contract No. RDA/CE/005/014 and the MOU.

The witness testified further that the nature of the funding for the projects that RDA undertook on behalf of Central Government was capital funding. That these were huge contracts with huge contract sums through the NRFA. He explained that the contracts that RDA undertook were for public use including the 1st Petitioner himself and were not for political campaigns as alleged by the 1st Petitioner.

He added that it was not feasible for the 1st Respondent to influence road projects undertaken by the RDA as the RDA fell under the Ministry of Works and Supply and not the Ministry of Mines. Further as the Regional Manager for Northern Province he only received instructions from the RDA Chief Executive Officer (CEO) pertaining to all roads and bridge works in the Province. No other person could give instructions to the RDA regional office without the knowledge of the CEO. He therefore stated that the two road projects mentioned in the Petition were purely government programmes and not as alleged in the election petition

I have carefully analysed the evidence adduced in support of this allegation and the evidence in rebuttal. From the 1st Respondents

evidence, it is not in dispute that rehabilitation works were being carried out on the Agricultural feeder roads in Mungwi District. What the 1st Respondent disputes is that he used his position as Cabinet Minister to grade the two feeder roads during the campaign period with a view of luring voters to vote for him.

RW7 testified in his capacity as the Regional Roads Engineer from RDA. He therefore fell in the category of an independent witness. Having examined his demeanour, I have no reason therefore to doubt his evidence because it was supported by documentary evidence. From the contract that he produced, it is evident that an agreement was entered into on 3rd December, 2015 between RDA and Springbok Limited for the Periodic Maintenance of approximately 52 Kilometers of Agricultural Feeder Roads in Mungwi District.

Further, he adduced evidence that a MOU was entered into by RDA, National Road Fund Agency (NFRA) and ZNS in September, 2015 appointing ZNS as local Road Authority for the purposes of carrying out road rehabilitation and maintenance works on at least 9,430km of Primary Feeder Roads. This evidence was not discredited in cross examination.

On the other hand, the 1st Petitioner's evidence is supported by PW5. I have noted that PW5 was present in court during the proceedings. However, I examined his demeanour and to me he was a credible witness and there is no reason for me to doubt his evidence that on 19th July, the 1st Respondent promised the people at a rally that road works would be completed.

What I have to determine however, is whether the 1st Petitioner's evidence and that of PW5 is sufficient enough to meet the standard of proof.

From the evidence adduced by the 1st Petitioner, it has not been proved to the required standard that the rehabilitation works on the roads in question were initiated by the 1st Respondent using his position as Cabinet Minister to lure voters to vote for him. This is because there is evidence on record that the works were part of government programme and were commenced before the campaign period and this was confirmed by PW5 in cross examination.

Furthermore, the 1st Petitioner alleged that the road works had been abandoned after the elections. Apart this testimony, no other evidence was adduced to show what the current state of the road is.

In the absence of any other evidence adduced by the 1st Petitioner, I find that the explanation given by the 1st Respondent and the evidence adduced by RW7 is credible and in line with the observation made by the Supreme Court in the case of **Akashambatwa M. Lewanika** case when it stated that:

'While acknowledging the fact that government projects do have some influence on some affected voters, these do not amount to illegal activities because government projects should not come to a standstill during the time of elections as that was not in the public interest.'

This position was further confirmed in the **Mathilda M. Mutale v Sebio Mukuka** ⁽¹⁵⁾ case where the Supreme Court dealt with the

issue of whether the distribution of relief maize and fertilizer a month before the election amounted to corrupt practice. The Supreme Court held that:

'Government projects do not constitute corrupt or illegal activities even though the scale and timing might have certainly benefitted the party in power and its candidates.'

Therefore in the light of the evidence adduced in rebuttal and guided by the authorities referred to above, I am satisfied and I find that the grading of the two feeder roads in Malole Constituency was part of the Government projects which commenced before the election campaigns started and that the works could not be halted because of the 11th August, 2016 elections.

I wish to add that although the 1st Petitioner testified that due to poverty levels in rural constituencies the people would support anyone who would alleviate their suffering, there is no evidence that was led to show how the grading of the two (2) feeder roads in Fibwe and Chambeshi wards affected the voting pattern in these wards. The statement by the 1st Petitioner was not supported by any cogent evidence and therefore it is highly speculative.

I therefore find that the 1st Petitioner has failed prove to a fairly high degree of convincing clarity that the 1st Respondent used his position as Cabinet Minister during the prescribed campaign period to grade two feeder roads in Malole constituency using government resources and workers in order to entice electorates to vote for him. This allegation fails and it is dismissed.

On the totality of the evidence adduced by the 1st Petitioner before me and in view of my findings on all the three (3) allegations made against the 1st Respondent, I find that the 1st Petitioner has failed to prove the allegations to the required standard and that the majority of the voters in Malole constituency were prevented from voting for their preferred candidate.

From the glaring differences in the election results, it is evident that the 1st Respondent was the choice of the majority people in Malole constituency and therefore the choice of the people of that constituency must be upheld.

I therefore declare that the 1st Respondent **CHRISTOPHER BWALYA YALUMA** was validly elected as Member of Parliament for Malole Constituency. The petition is accordingly dismissed.

Although costs follow the event, I order that each party shall bear their own costs of this petition.

Leave to appeal is granted.

Delivered at Lusaka this 22nd Day of November, 2016.



M. C. KOMBE
JUDGE