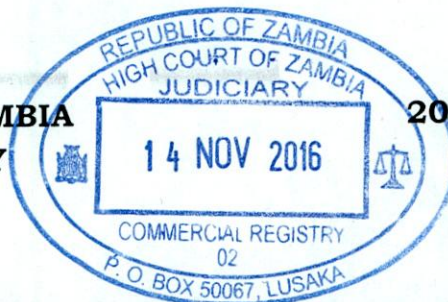


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**



2016/ HP/EP/0026

**IN THE MATTER OF A PARLIAMENTARY ELECTION PETITION FOR
MUFUMBWE CONSTITUENCY NUMBER 13 SITUATE IN THE MUFUMBWE
DISTRICT NUMBER 006 OF THE NORTH WESTERN PROVINCE OF THE
REPUBLIC OF ZAMBIA HELD ON THE 11TH OF AUGUST, 2016**

**IN THE MATTER OF : Article 73(1) of the Constitution of Zambia
(Amendment) Act No. 2 of 2016**

**IN THE MATTER OF : Section 83 of the Electoral Process Act No.
35 of 2016**

**IN THE MATTER OF : The Electoral Petition Rules Statutory
Instrument No. 426 of 1968 (As amended)**

BETWEEN:

STEVEN MASUMBA

PETITIONER

AND

ELLIOT KAMONDO

RESPONDENT

*Before the Honourable Mr. Justice W. S. Mweemba in Open Court on this 14th
day of November, 2016.*

*For the Petitioner : Mr. Kelvin F. Bwalya – Messrs KBF and
Partners.*

*For the Respondent : Mr. Milner Katolo – Messrs Milner and Paul Legal
Practitioners.*

J U D G M E N T

CASES REFERRED TO:

1. *LEWANIKA AND OTHERS V CHILUBA* (1998) Z.R. 49.
2. *MABENGA V WINA AND OTHERS* (2003) ZR 110.
3. *MAZOKA AND OTHERS MWANAWASA AND OTHERS* (2005) Z.R. 138.
4. *RAILA ODINGA AND OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND OTHERS - SUPREME COURT OF KENYA ELECTION PETITION NO. 5 OF 2013.*
5. *SHRI KIRPAL SINGH V SHRI V. V. GIRI* (1971) (2) SCR 197.
6. *NABUKEERA HUSSEIN HANIFA V KIBULE RONALD AND ANOTHER* (2011) UGHC 72.
7. *MC ILVENNA V VIEBIG* (2012) BCSC 218.
8. *TSHISHONGA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER* (2007) 281 LJ 195.
9. *PETER LIFUNGA MACHILIKA V THE PEOPLE* (1978) ZR 44.
10. *THE PEOPLE V CHISATA* (1969) ZR 176.
11. *KENOSI V THE STATE* (1993) BLR 329.
12. *SUBRAMANIAN V PUBLIC PROSECUTOR* 1956 I WLR.

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *ARTICLE 73(1) OF THE CONSTITUTION ACT NO. 2 OF 2016.*
2. *ELECTORAL PROCESS ACT, NO. 35 OF 2016.*
3. *ELECTORAL (CODE OF CONDUCT) REGULATIONS, 2016.*

FACTS

The undisputed facts may be shortly stated. The Petitioner Steven Masumba and the Respondent Elliot Kamondo were candidates during the presidential and Parliamentary Elections held throughout Zambia on 11th August, 2016. They and 3 other candidates competed for election as Member of Parliament for Mufumbwe Constituency in the North- Western Province of the Republic of Zambia. The Petitioner was sponsored by his party the Patriotic Front (PF) and the Respondent was sponsored by his party the United Party for National Development (UPND).

Following the elections the Respondent was declared as the winner of the seat and the duly elected Member of Parliament for Mufumbwe Constituency. The Petitioner polled 2,687 votes while the Respondent polled 8,012 votes. There were three other contestants in the race who have not petitioned. The

difference in the votes between the Petitioner and the Respondent was 5,325 votes.

For completeness of record, the results that were announced for each candidate by ECZ which are under contestation were as follows:

Name	Party	Votes Scored
Kamondo Elliot	UPND	8,012
Mbalau Davies	Independent	5,438
Kyakilika Watson	Independent	3,084
Masumba Steven	PF	2,687
Kayombo Lapsos	FDD	202

PLEADINGS

The Petitioner issued his petition on 26th August, 2016 through Messrs KBF and Partners of Lusaka and it was supported by an affidavit of verification. The petition is brought under Article 73(1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, Section 83 of the Electoral Process Act No. 35 of 2016 and the Electoral Petition Rules Statutory Instrument No. 426 of 1968 (As amended).

The Petitioner has made a number of allegations in the petition under paragraph 3. It is alleged in paragraph 3 that the campaigns in the said elections were characterized by Defamation or inflammatory allegations contrary to Section 15 (1) (c) of the Code of Conduct, intimidation and violence contrary to Section 15 (1) (a) of the Code of Conduct and undue influence contrary to the provisions of Section 83 of the Electoral Process Act No. 35 of 2016 respectively that resulted in voters to vote for the United Party for National Development (UPND).

He prays that he should be granted the following reliefs and declarations. (1) That the election was void. (2) That the Respondent was not duly elected. (3) Such other declarations and orders that this Court may deem fit (4) costs of and incidental to this petition.

The Respondent filed his answer on 22nd September, 2016. In brief he stated that neither he, his agents nor servants defamed the Petitioner and or brought his name into ridicule, that UPND members did not institute violence at every place the two major political parties met. He has denied every allegation in the petition and has given his reasons in paragraphs 7 to 15 of his answer.

PETITIONER'S EVIDENCE

The Petitioner testified and called fifteen other witnesses. I shall briefly review the evidence. The Petitioner (**PW1**) testified that he was the former Member of Parliament for Mufumbwe constituency who also participated in the previous general election.

He also testified that what prompted him to bring this petition were the surrounding circumstances of the campaign in Mufumbwe. Moreover that during this period it was public knowledge that the Patriotic Front (Hereinafter called PF) party he represented supported the Referendum.

In addition that the participants in the election were from three major political parties namely the United Party for National Development (UPND), the Forum for Democracy and Development (FDD), and the Patriotic Front (PF) and two other independent candidates who were also coming from the UPND but had not been adopted on their party ticket. It was also his evidence that in his campaign message he would talk about the Referendum but would receive

negative feedback through the comments of his colleagues in the other political parties.

PW1 went on to state that on several occasions he would hear the vehicle for the UPND play their songs and with the use of megaphones campaign to the people on various issues including the Referendum on which he specifically heard Clement Machayi the campaign manager for the Respondent telling the people that if they voted for the Referendum then they would be giving way to gay rights in the Constitution.

He told the Court that he complained about this issue and informed the Conflicts Resolution Committee at district level who assured him that it would be discussed. Further, that **PW1** actually heard the Respondent on one occasion whilst addressing people at Chizela market inform them that if they voted for the Petitioner and generally for the PF they would be giving way to gay rights.

He went on to tell this Court that the distance from Mufumbwe to Solwezi was roughly 240km and that the majority of the people there were peasant farmers who believed in marriage as it was part of their culture. Further that this was the reason why he found it difficult to educate the local people to a point where they would understand that the message being relayed by the Respondent was not true as the damage had already been done.

On the issue of how he was defamed, **PW1** stated that it arose when the Respondent began going round telling the electorate that he was a criminal since he had once been incarcerated when according to him when a person receives a Presidential pardon he gains clean standing in the society. Moreover that he was also defamed on the issue where the Vice President visited Mufumbwe area in January, 2016 and in her tour of duty learnt that there were two schools which had blown off roofs and she instructed her office to

secure a K77, 000 for the Munyambala School and K55, 000.00 for Shukwe West Community School in Bulobe.

The Petitioner also commented on the report that was in the Plaintiffs Bundle of Documents (PBD) at page 1 to 6. It was his evidence that it related to the issues of the schools and that the process of allocation of monies to the said schools took long due to government bureaucracy. According to the Petitioner, this also became an issue in the campaigns as the Respondent made it part of his campaign message and he alleged that this money had been given to **PW1** who had misused it. So he also reported this matter to the Conflicts Resolution Committee and the District Commissioner was also informed as this message also discredited ex- Chief Munyambala who stays in the locality of Munyambala School which is named after him.

Further that from that time, the ex- Chief had been working under pressure because his subjects were questioning his integrity and due to this he summoned the District Commissioner, Sekeseke Masela who went to address a gathering in his chieftdom just to clarify the issue although the damage had already been done.

According to **PW1** the environment in Mufumbwe became quite hostile for him as his integrity had been questioned and that there was a lot of intimidation and violent activities that he had never experienced before in its history and that the same violence was the reason why the Respondents seat was nullified in 2010. Further that this time around **PW1** simply made reports to the Police on the violence as several people were involved and he made reference to the medical report of Lasson Kandela one of the victims of the said violence.

It was also his evidence that his campaign agents were living in fear because whenever UPND supporters saw anybody associated to PF they would attack them and unfortunately some of these activities would happen right in the presence of the Respondent. He also mentioned an example of Marshal

Mingochi a Presiding Officer at Kangombe Polling Station that was attacked and beaten.

Yet another example from **PW1** was that while campaigning in Miluji, he would receive complaints about threats of subjects by Indunas who would tell them that that if they voted for the PF and the Petitioner specifically then they would be evicted from the customary land and he would report these complaints to the relevant authorities.

PW1 said that he made an official complaint to his Royal Highness Chief Mushima Mubambe who immediately instructed his secretary Endeni Sinfukwe to warn the Indunas in the Village Land Committee. According to **PW1**, all this made the campaign so stressful, difficult and tedious. Moreover that the violence happened throughout from the start of the campaigns to the end even after people had voted.

As a matter of fact, that even as late as 23:00 hours on the day prior to the election there was violence and that on the actual election day it was witnessed when presiding officers were being beaten. Further that the campaigns became so difficult to a point where campaign agents were scared to campaign alongside **PW1** due to the hostile environment.

All in all **PW1** stated that the campaigns were not fair enough and that they were coming from a background where the Respondent lost the election to him in 2011 and he petitioned. Although in 2010 when the Respondent won his seat was nullified because of violence.

When shown the photos of him and the Respondent (**RW1**) he stated that these were captured at a traditional ceremony under Chief Chizela where due to the violent activities prevailing in Mufumbwe the Royal Establishment suggested that the candidates should come together to show the people that they were

able to interact and denounce violence. Despite these attempts however, the violence still continued. Further that he did not donate a K 1 000, bicycles and branded mealie-meal to anyone as the only thing he gave out were campaign Chitenge materials for PF branded Edgar Chagwa Lungu. Moreover that his political agents never left Kaminzekenzeke Polling Station voluntarily.

Lastly it was his fervent prayer that this election is nullified and the Respondent be barred from participating in future elections.

In cross examination **PW1** told the Court that he had only petitioned the Respondent although the elections were conducted by the Electoral Commission of Zambia and it was their officials who declared him winner. Moreover, that in the entire petition he had not challenged this declaration. When asked about the police report of Sydney Wotela in the Petitioners Bundle of Documents at pages 25 to 27 it was his evidence that he never gave any instructions to have a person abducted and brought before him. He also added that according to the report there had been violence perpetrated by the PF. On the issue of the police report on page 15 of the Petitioners Bundle of Documents he stated that the alleged perpetrators of the violence were the Independent and PF cadres who clashed and there was no mention of the UPND. He said that the PF supporters did not scheme violence in order to eventually have the Respondent's seat nullified.

He also confirmed that in his testimony he had not mentioned a point when he saw the Respondent instigate violence. Regarding the Ntongo celebration day he stated that both he and the Respondent stood up to address the people and to denounce violence. Moreover that during his tenure as Member of Parliament he did not recall if there were incidents of fighting ever reported in the constituency as it was the responsibility of the police to report to relevant channels.

He then stated that even during an election period the normal day-to-day life of the people of the constituency continued and that on one occasion his campaign team and that of the Respondent met during the campaign period and that they accidentally met and shared a greeting cordially.

He stated that on his way to Kabanda to campaign he found the Respondent at Kamikambi where he was having a meeting. He (**PW1**) stopped and called the Respondent and the two even shook hands by the roadside after the Respondent left the rally he was addressing and went to meet him in the company of three others but that his entourage consisted of two cars and the other was carrying youths. According to **PW1** the rally of the Respondent did not react against him in any way as there was a peaceful atmosphere.

Further that page 7 of the Petitioners Bundle of Documents which showed the medical report stated that Lasson Kandela suffered a fractured leg after a Road Traffic Accident and not due to violence. On the same document PW1 stated that there was a date stamp at the bottom from Mufumbwe district hospital which had a date of 20th September, 2016 with no other date visible and he thought this could have been the date when the victim was attended to at the hospital.

Further that although he had talked about the Referendum he could not confirm that copies were circulated in Mufumbwe by the Government of Zambia or in newspapers. Moreover that he had no evidence to show that the Respondents were saying that gay rights were contained in the Referendum even in form of a recording as this would have made it easier for the police to believe what he had heard. He however confirmed that even people without a Voters card and only a Green National Registration Card were entitled to vote in the Referendum. Moreover that the people of Mufumbwe were capable of making their own independent decisions on who to vote for and that even in this election they did so.

He also stated that according to the statistics on the record of proceedings from the totaling center he polled 2687 votes whilst the Respondent polled 8012 with a difference of over 5000 votes so in the general ranking he emerged fourth. He then added in agreement that this was a reflection of their independent thinking.

On the issue of defamation he testified that it was done all around the constituency. He then identified polling stations such as Nyansonso where the Respondent got 53 votes and he got 98, Kikonge where the Respondent got 24 and PW1 got 44, Kawama East where the Respondent scored 13 and PW1 got 73, Shukwe ward where the Respondent got 8 while PW1 got 36 votes. In Bulobe the Respondent scored 121 whilst he got 145. In Kawama west, the Respondent got 18 and PW1 got 58. He further stated that despite the alleged defamation the people in these areas still decided to vote for him.

He went on to talk about Kamipando where the Respondent polled 52 whilst PW1 got 72, Musonweji where Respondent got 14 votes whilst he got 41. Listed on number 35 was Kabipupu where the Respondent got 53 votes whilst PW1 got 106 votes. Number 36 is called Kanyundo where Respondent got 40 and PW1 45. Further that under paragraph 5 of his petition he alleged that there was a disruption of his rally at Kamanzovu where the Respondents scored 129 and PW1 19, the one that got the highest score of 135 was an independent candidate. Moreover that this pattern of different candidates winning more votes than others was normal in an election and that what was displayed by that record of proceedings was the norm.

He further went on to state that he spent over 3 months in prison and was unable to visit his constituency during that time, but the people there knew about his incarceration because he communicated to them. Thus if anyone had said PW1 had been arrested and convicted they would be speaking the truth.

Moreover that after his pardon he went round the constituency to tell them of this fact even before the campaign period. Thus he took the information around himself and anyone talking about it would just be repeating what he had said.

He also added that the people of Mufumbwe wanted him to take development there and that the area of Miluji would get flooded during the rainy season and people would cross over using canoes. It was also his evidence that he was unaware of any promises to put a bridge there. Further that the Vice President promised civil servants to rehabilitate Bulobe school and not at a rally although he did not know if this had been done. As of 11th August, 2016 the iron sheets had not been put up. He however did not agree that this disadvantaged the PF in the elections.

In addition he stated that when election results were declared he did not call the Respondent to congratulate him but clearly added that he could not be bitter towards him as he was actually his in-law. Lastly he told the Court that although he made reports to the District Conflict Management Committee he had no proof that he did so before Court.

In Reexamination PW1 told the Court that the independence of the voters was highly compromised due to the campaign message that the Respondent was disseminating to the people who were made to believe that he was a criminal, had stolen cash and the iron sheets and that gay rights would be introduced, intimidation and violence were the order of the day.

Further that he had mentioned that the Respondent and his team were not only holding rallies but would also use a vehicle mounted with a P.A system to make announcements to the electorate of Mufumbwe. Further that he could not make any audio recording because he had no smart phone at the time when he heard these things and that the motor vehicle with the P.A system would be far.

He also clarified that the results running from page 3 where he had beaten the Respondent appeared normal but the overall results were not normal in the sense that people were deceived by prevailing circumstances without which results would not have been the way they came out.

On the issue of violence where he was referred to pages 25 to 27 in the Petitioners Bundle of Documents there, Sydney Wotela is someone he knew as a UPND cadre who worked at the bus station and was amazed at the allegation that he wanted this person deceased as he was not a violent person and did not send any people to do anything neither did he say these words.

Further that Tom Kayombo, Willie Mutale, and Lint George were youths he had worked with as his campaign agents and they were all assaulted and that their peace making during the Ntongo traditional ceremony on 5th June was meant to deter the prevailing violence in Mufumbwe though it never even ended despite these efforts.

PW2 was Chief Inspector **Steven Kateule** the Officer in Charge of Mufumbwe Police Station. He told the Court that he received a subpoena duces tecum on 30th September, 2016 where he was ordered to produce 5 Occurrence Books from his police station before Court. These were then admitted as part of his evidence as P1 to P5 respectively. P1 covered the period 23rd March to 11th June, 2016 P2 covered the period from 11th June to 3rd July, 2016, P3 covered the period 3rd July to 28th July, 2016. P4 covered the period 28th July to 23rd August, 2016. P5 was from the period 23rd August to 3rd September, 2016.

It was his evidence that during the period of the elections he had 22 Police Officers under his command and that the nature of Reports generally received during this time were violent in nature and some were actually unreported due

to the vastness of the area or because they had been referred to the conflict Management Committee as well as the Political Liaison Committee.

According to him, all the political parties involved in the election campaigns were making reports of the violence in the area and the atmosphere was not calm as there was tension amongst the members of the public which was caused by the violence. That about 8 Officers investigated these offences, 2 were guarding ZESCO installations, 2 were guarding Airtel Stations, 2 were stationed at the Mines, 1 at the Bank, and 4 were manning the Inquiries Office.

Further that the Police were failing to contain the violence that was prevailing and that p1 showed the first violence that occurred on 30th May, 2016, the second on 13th June, 2016 the next on 22nd July, thereafter on 29th July, and on 30th July where there were two reports of violence, then on 1st and 2nd August there were 4 incidences, the next one occurred on 4th August, and thereafter on 11th and 12th August, 2016.

He also testified that he had assigned each of these cases to a police officer who would come and explain the details that occurred. Some of these officers were Martin Solochi, **Felix Mpasela (PW9)**, **Kamwengo Psalms (PW5)**, **Kayula Kalumbeta (PW8)**, **Sichande Chanza (PW6)** and **Paul Makina (PW7)**. There was also the Conflict Management Committee which composed of political parties, security wings such as the police and DEC as well as NGOs.

He went on to state that during the election period the general topic that was discussed was that of violence with an aim to promote peace. According to **PW2** the police worked fairly and would conclude some cases and fail to conclude others. Further that the common cases reported were assaults, threats and malicious damage. A specific example he outlined was the threatening of electoral staff from Electoral Commission of Zambia (ECZ) when the UPND president announced during a rally on 7th August, 2016 that some officers from

ECZ wanted to rig elections so people should be alert and should actually be removed from the process of conducting elections.

Moreover that whenever they received a complaint they would report it to the Conflict Management Committee where it was decided that a public apology should be made by the parties involved. Further that during the rally, the Respondent was at the platform with his President Hakainde Hichilema and the public took what they were told seriously and the electoral officers were victimized slowly whilst the Respondent did nothing.

Two other examples he narrated occurred at Kalambo and Kaminzenze ward. At Kalambo Polling Station, on 11th August, 2016 around 23hours a vehicle belonging to Mr. Kamondo and his wife went there and the occupants harassed the Assistant Presiding Officer Marshal Mingochi claiming they had information that he was about to rig the elections.

PW2 went on to state that another incident happened on 12th August, 2016 at Kaminzenzeke Polling Station, where the Assistant Presiding Officer delayed to announce the election results, tension developed and the crowd came and forced itself into the polling station. The crowd aimed to damage the Ballot Boxes but these were protected by the Police Officers so it instead focused its attention onto the presiding officer claiming that he was rigging elections, so he ran into the bush and with the help of a satellite phone he called **PW2** for help.

Further that the electoral mood was not good and despite the pictures of the **Petitioner (PW1)** and the Respondent together these did not reflect the true picture as they were just trying to show that if the leaders could be together then the people should not fight. In short they were preventing violence.

Regarding the issue of the traffic accident he stated that Inspector Rodgers Shambala attended to it and not him. Further that Roy Ifwa the driver of the

car that was involved in the road traffic accident admitted the charge. Moreover that the report on page 15 of the Petitioners Bundle of Documents shows that the person that was injured was Tom Kayombo George Linti and Willy Mutale and Job Miti and that Inspector Mpasela Felix received these reports.

Thereafter that pages 25 to 27 of the same Bundle showed that the complainant therein was Sidney Wotela and the officer that dealt with him was Constable Kamwengo Psalms. He told the Court that he knew Sidney Wotela very well as a member of UPND and that he was currently in police custody in Kabompo for the offences of assault and attempted arson after he assaulted a PF cadre and attempted to burn down the Mufumbwe bus station whilst acting with about 7 others. Moreover that he did not receive any report saying that Hon. Masumba wanted Sydney Wotela to die.

He also made it clear that there were no reports in the OB books which showed that monies meant for Munyambala School had been stolen. Lastly it was his evidence that from his viewpoint as a police officer there was too much violence.

In **Cross Examination PW2** told the Court that he received a report of the assault of Sydney Wotela dated 16th June, 2016 and never refuted this earlier. Moreover that he had gone to have the warn and caution statement of Sydney Wotela at Manyinga recorded by D/Constable P. Kamwengo and that he was merely briefed about it on the same date they went there. That whilst it was being recorded he was outside repairing a vehicle and afterwards despite his interest in the matter he did not read the statement. Further that it was not correct that he had not taken any further action on the report of attempted murder and that he had never summoned Hon. Masumba to question him on the contents of this report.

It was also his evidence that the statement that was issued by the UPND President was a serious issue and it was reported to the police by the mentioned electoral officers although no such report could be found in the Occurrence Books he had as it had been referred to the Conflict Management Committee.

Further that the proceedings of this Committee were actually written down in minute form and although **PW2** did not have them with him it was not because the agenda was not discussed during the committee meeting and he had no evidence before Court. He also added that he had been Officer In Charge at Mufumbwe Police station for two years now and from the time he went there to about April, 2016 they had been recording assaults in the community and cases of affray.

Further that even without elections there was violence in Mufumbwe and he never distinguished ordinary violence from election violence in his evidence in chief as not all of it could be attributed to elections and he could not say that the PF and UPND cadres clashed in a bout of violence. Moreover, that the OB books had records of individuals from each party causing violence on each other. According to the report on page 24 PF cadres were violent whilst Page 15 showed that Independent candidate's supporters and PF cadres clashed. Further that at no point did he call **PW1** to ask him questions about the reports of violence from the PF supporters. Further that in all his evidence he had not mentioned the Respondent getting involved in violence. He also added that he did not compile any statistics to show the levels of violence during this time but it would still not be difficult for this Court to understand the levels of violence during this time. Lastly, he admitted having failed to control violence in Mufumbwe.

In **re- examination PW2** told the Court that all the political parties and Independent candidates and their supporters that participated in the 2016

election to the exclusion of FDD were violent. Further that the ECZ staff that were threatened by the UPND supporters were Hector Chikunji, Mwanza, Mrs. Bwalya and Dorcas Shipilo. That he read the Police report made to him as the officer in charge of Sydney Wotela about three days after the conclusion of investigations in the matter.

PW3 was **Shambala Rodgers** a Police Inspector from Mufumbwe. He told the Court that during the election period he was working from Mufumbwe District and that the documents he had been shown in Court were a police report he had written and a medical report he issued to the victim Lasson Kandela after a Road Traffic Accident involving two motor vehicles one of which was driven by Roy Ifwa.

It was also his evidence that during the course of his investigations, he went to the accident scene where he found that Roy Ifwa was driving a Toyota Hilux Reg No. AAV 1211 along Zambezi Solwezi Road from the East to West direction while carrying UPND cadres and stickers all over and he failed to maintain his lane and went to hit into an oncoming motor vehicle a Toyota land cruiser unregistered which was carrying PF Cadres where one passenger Lasson Kandela sustained a fractured right leg and general body pains. He testified that the accident happened on 4th August, 2016 at about 19.25 hours.

He then established that the Toyota Hilux belonged to Clement Machayi the UPND campaign manager for the Respondent whilst the Toyota Land Cruiser belonged to the Petitioner of PF. Thereafter he issued the receipt for K300 and then charged and detained the driver for UPND for Dangerous driving and under warn and caution statement in Kaonde, he gave a free and voluntary reply admitting the charge. After paying the admission of guilt fee he was released.

According to his investigations, he concluded that negligence was the cause of the accident and he issued the medical report on 11th September, 2016 although the accident occurred on 4th of August, 2016. He explained that after the accident the victim was taken out of Mufumbwe to Kasempa for medication and he only came back on 10th September, 2016.

Moreover that the stamp at the bottom was from Mufumbwe District Hospital and doctor Shawa attended to the victim who sustained a fractured right leg. That although he did not speak to this Doctor, he could confirm that the accident happened during the campaign period and the driver was not prosecuted because he admitted the offence. **PW3** then produced the sketch plan of the accident and it was admitted into evidence as P6.

In **Cross Examination PW3** told the Court that during any election period accidents do happen and each was unique and not politically inclined. According to him there was pure negligence in this accident. Further that he had not even brought the statement where Roy Ifwa admitted the offence but the receipt showed that he admitted it although it was unclear because it was a copy. Further that the witnesses who were his fellow officers could confirm this.

He also stated that the purpose of the Medical Report was to know the extent of the injury and to ensure that a victim is attended to at the hospital. However that he issued a medical report form when the victim had already been attended to at Mukinge General Hospital in this matter and that when Lasson went to the Police Station on 11th September he was limping and had a Plaster Kandela of Paris and did not even talk about what the hospital in Mukinge had done.

Further, that the Medical Report was issued just for record purposes. That as a Traffic Officer he knew that when a vehicle is involved in an accident there

was supposed to be a report of an Examiner on status of the vehicle. There are no Examiners Reports, in the absence of which the road worthiness of both vehicles could not be known hence it was not clear if the Land Cruiser had poor lighting and so it would not be concluded that the accident was political.

He confirmed that P6 was a description of an accident between two motor vehicles and that if the victim had told this court that the vehicles did not collide but just hit him he would say that since the vehicle of UPND had damages on the right side so it meant that it hit into another motor vehicle although it was possible that it had hit one person then hit another vehicle according to what he found on the scene.

Further that what he had initially recorded as the vehicle make on the copy of the receipt was a Toyota Hilux whilst on the original it was recorded as Nissan. The makes changed right after the accident when he spoke to the driver and he told him it was a Toyota Hilux. 11 days later he came and changed his mind and said it was a Nissan. The Nissan was not written at a different time from the carbon copy so the expectation is that the two will have the same information recorded. Further that he saw the vehicle personally and noticed that it had stickers but did not determine its make. According to him, he could not distinguish between the makes of the two cars since they had stickers and that the age of the driver on the original receipt was 28 whilst on the copy it was 26 although he did not know if these ages recorded related to one person.

Moreover that when he reached the scene he did not find the vehicles as he only found particles shown by letter B on the sketch plan which showed that they had been present. Both drivers said they were moving, one driver said they were both moving and the other that only one was moving. On the sketch, the particles were glass and small metals. Further that it was difficult for him to determine how much the victim was injured or whether he was in or outside the vehicle although in the course of his investigations he should have spoken

had to talk to Lasson Kandela before drawing a sketch plan but since the victim had been taken out of the district he did not manage to do so. He then stated that the information relayed there even without talking to him was complete.

In **reexamination PW3** told the Court that the person who admitted guilt and paid the money on the receipt was Roy Ifwa who had not come back to refute this. **PW3** then stated that someone changed the age on the receipt and that it was written by Constable Mwale and witnessed by Constable Tembo and he did not write anything there and that the Toyota Land Cruiser had no number plate.

PW4 was **Lasson Kandela** a peasant farmer from Mufumbwe. He told the Court that after attending a rally at Kamabuta on 4th August he went back to Mufumbwe district in a motor vehicle and when they arrived at Kalambo the driver offloaded female party officials and parked by the road side. According to Lasson, when the ladies disembarked he was looking at them whilst standing at the driver's door of the same vehicle and when he looked to the east he saw a vehicle coming and when it was about 25m from where he stood the driver flashed his lights.

All he could recall was that his friends then screamed at him and said 'run away from there the vehicle is coming to kill you' but by this time it was already nearby. From there he had no idea how he would save himself and he was hit and fell to the ground.

When he gained consciousness he noticed that his thigh was bending on the other side and he felt some blood in his nose. From there he saw the vehicle that had bumped into him stopped then it reversed and he also heard a voice say 'he is not dead can you reverse so that you finish him off.'

Further that when his friends heard this they picked stones and attempted to throw them at the vehicle and the driver left. He was later taken to the Police Station where a statement was recorded and then to Mufumbwe Hospital. He also stated that he knew Mukinge Mission hospital because he was taken there around 02hours after the accident.

Moreover that his bones had been brought back into position because of the metal that had been inserted inside his thigh and the driver of the vehicle that bashed him was Roy Ifwa whom he got to know after the accident when they went back to the police station from Mukinge. He also made it clear that he was a member of the PF and that he recalled that one of the two motor vehicles had PF stickers whilst the other one had red ones and that the motor vehicle with red UPND stickers was for Clement Machayi the campaign manager for the UPND.

Lastly he told the Court that in the moment of the accident, what crossed his mind was that a UPND vehicle was coming to hit him and that his next review would be on 5th October at Mukinge Mission Hospital.

In **Cross Examination PW4** testified that the vehicles did not hit into each other and that he did not tell the police that fact and that what was in the statement on page 16 of the Petitioner Bundle of Documents was incorrect as he had outlined what he saw transpire that day. According to him the vehicle he saw was a white Toyota Hilux whilst on their vehicle he recalled that the wheels on the left side lay in the furrow with the tyres on the right side on the gravel at the edge of the tarmac. He then stood at the driver's door which was in the path where bicycles usually pass and suddenly the driver of the Land Cruiser came and bumped into him as there was a small gap in between the two vehicles where he had been standing.

That although the accident happened on 4th August and elections were still far this date did not reflect in the Plaintiffs Bundle of Documents but he specifically recalled that he was taken to the police station and to the hospital on the same date. Moreover, that he had no paper to show that he went to Mufumbwe General Hospital on 4th August and he had no Medical Report for that date from Mufumbwe. That was the day when he was almost killed but the Medical Report only showed the date in September.

In **Re-examination** the witness maintained that the accident happened on 4th August, 2016 and that it was the duty of the police at Mufumbwe Police Station, Traffic Department to issue Medical Report and it was issued to him when he returned from Mukinge by Dr Shawa from Mufumbwe General Hospital. He also confirmed that the accident happened around 19hours and that the road had a cycle track but there were no cyclists moving at the time.

PW5 was Constable **Kamwengo Psalms** a police officer in Mufumbwe. His evidence before Court was that he recorded the statement on pages 25 to 27 in the Petitioners Bundle of Document on the 19th of June, 2016 from Loloma Mission Hospital in Manyinga after Sydney Wotela reported that he had been assaulted by suspected PF cadres. That on their way back he briefed the Officer In Charge (OIC) about it and he also confirmed that he recorded the allegation that the Petitioner wanted Sydney killed and that when he was assaulted he was bundled and taken to the Petitioner.

That he informed the OIC who urged him to investigate the case and later submit a report to him after which he assigned the docket to Constable Sichande who conducted the investigations since he had a good number of other cases to attend to.

It was also his evidence that whilst in Mufumbwe he dealt with reports concerning violence among the political parties and some of the cases he

personally investigated included the one of 10th August, 2016 where whilst on duty at Mufumbwe Police Station at around 23.30hrs he received a phone call from members of the public who informed him that Mingoichi Marshal a Presiding Officer at Kangombe Polling Station in Kalambo Ward was attacked by suspected UPND cadres.

Acting on this he informed the OIC (Chief Inspector Kateule- PW2) and with other officers they quickly went to Kalambo Ward and upon arrival they found UPND cadres scattered right there as some were wearing UPND labeled t-shirts. A further check revealed that the perpetrators of that violence had already left and the only thing they did was to disperse the cadres they found there who included the UPND chairperson Luckson Ndonyo. All polling staff were left in fear and the Presiding Officer had locked himself inside one of the rooms after being attacked.

Thereafter, he and other officers went to Mufumbwe and found UPND cadres lead by Mrs. Kamondo were moving from one polling station to another checking for the ballot papers. Further investigations revealed that they were using a maroon Spacio motor vehicle which belonged to the Respondent and there was also an unregistered Toyota Nissan. He and 3 other officers a reserve officer called Kayombo and a senior police officer called Mwendabai Mwendabai, the OIC- all went to Mufumbwe and found the Respondents motor vehicle parked just next to First Inns at his shop.

He went on to tell the Court that the Respondent was found there and the two vehicles that passed the polling station were found right there refueling around 01hours. Mr. Mwendabai called the Respondent and cautioned him to refrain from attacking Presiding Officers. It was at the same time that Fred Kambowa was apprehended in connection with the violence that had occurred at Kangombe Polling Station. The officers then placed him in a police vehicle and upon seeing that the Respondent commanded the cadres to remove him from

the police motor vehicle and said that we would not take him anywhere. Fred was then removed from the police vehicle by force as the cadres outnumbered the police and although he was armed he did not use the fire arm for fear of igniting fire from the cadres.

When the situation worsened, they left and no arrests were made in that matter. Fred was taken out of our custody and we proceeded to the police station. This was on the eve of the election and his senior officers reported the matter to the Conflict Management Committee. His comment on the report was that it was a reflection of what happened.

Another case he investigated was on 12th August when whilst at the totaling center he received a phone call from Mr. Chikanya who stated that they had been attacked by UPND cadres at Kaminzekenzeke Polling Station and since he was in the team patrol, he informed the OIC who later advised that they rush to the scene and when they arrived, that is **PW5, Mr. Mwendabai, Constable Tembo** and the **Reserve Officer Samupi** they found people at the scene surrounding the polling station and when they approached them they ran away whilst shouting forward forward. This was about 180 Kms from Mufumbwe.

Mr. Mwendabai (the Snr superintendent) entered the Polling Station and did not find the Presiding Officer (Chikanya) who ran away because he was the target. Further investigations revealed that the reason for attacking presiding officers was connected to the allegation that all presiding officers had been paid to rig elections from the UPND party President who said so on the 27th of July, 2016 whilst conducting a rally in Mufumbwe. Some ECZ officers were also mentioned including Mr. Chikunji and PW5 was there making patrols along the road at this time.

Mr. Mwendabai entered the polling station and asked for the Presiding officer and the Assistant Presiding Officer told him that he had run away after being

attacked by the UPND cadres. Shortly thereafter, Mr. Chikanya came and when asked where he was coming from he said he said that he had run into the bush to avoid being beaten by the UPND cadres. That he had actually called whilst in the bush using a satellite phone and he spoke to the senior officer and explained what happened. Thereafter **PW5** and his team picked the polling staff and materials to take them to the totaling center.

Moreover that before and during the election period the level of violence increased and it even affected the campaigns because people would fear to attend rallies to avoid being beaten. According to PW5, the violence was not just within the township but even in other areas besides the Mufumbwe boma. He also agreed knowing a person called Davies Mbalau but not Judith Chitenge. That he knew Mr. Mbaulu because at some point there had been a report lodged that his vehicle was damaged and the screens shattered. This matter was investigated by Constable Kalumbeta.

It was also his testimony that there were reports generally from other political parties on malicious damage, assaults and bad language and that they failed to control violence up to the Election Day as it was too high.

In **Cross Examination** PW5 told the Court that he did not know how many wards or polling stations were in Mufumbwe although he visited all the places in the constituency. Further that he did not know the number of registered voters nor how many people voted in the constituency and that since he was not in all the places on polling day he was unable to tell the rate of voter turnout.

He also said he could not assess if violence had an impact on the voter turnout. Further that he knew the places called Lalafuta, Kalengwa, Kikonge, Kashima East, Kashima West, Jivundu Polling Station, Kamayembe and Lubilo

in Mufumbwe and that he had not talked of any incidence or report of violence in those places.

He went on to state that he still wanted this Court to believe that violence was widespread and that he wrote a report on Kamayembe in the Occurrence Book although he could not find it. That he also knew Wishimanga but could not tell if the Occurrence Book had an entry on violence there although it served the purpose of recording all incidents reported to the Police. Regarding the report he made of Sydney Wotela he saw him whilst in hospital admitted and believed his report which he had been assigned to get by the OIC who was not under a duty to read it.

Further that he gave it to Constable Sichande his rank mate who had the duty to read through it and that Constable Tembo was the only driver at Mufumbwe Police Station but it was the OIC who drove them to Manyinga to record the statement after he made the decision for them to travel. Moreover that Sydney Wotela was injured and because a statement was required to open a docket they had to travel there to get it. That a docket had been opened but he did not know if a statement had been taken from the Petitioner and he did not open the docket but he saw it.

He further stated that they arrested Sydney Wotela for the alleged attempted arson and that they did not turn a blind eye to his allegations against Mr. Masumba because he is a big fish in Mufumbwe. That he received a phone call from members of the public about Marshal Mingochi. There were so many calls that came in and there was no Medical Report by the police to confirm the assault of Marshal Mingochi. That when they arrived at Kalambo they found the perpetrators had left so the ones they found were not. That he was on record as having apprehended Fred Kambowa and that the distance from the shop to the place they found him was about 7kms.

He also stated that he had not received a report that Fred Kambowa was arrested for assaulting Marshal Mingochi and when they arrived at the camp they did not find the Respondent sleeping, as he was just there behind the shop with his followers. That it was not correct for Civilians to tell them not to make an arrest and that he had a firearm, but did not know what his friends carried and that they did not have other gadgets that should be used for crowd control. It was also his evidence that when he went to the shop and camp for the Respondent he found people there carrying out their business peacefully (refueling vehicles inclusive) and they did not introduce violence in their camp despite following them there.

According to **PW5** they were conducting general patrols and did not just visit the camp of the Respondent and that he had no report from the Conflict Management Committee. That he went through the report relating to Kaminzekenzeke Polling Station and I agree with what was outlined therein as at the time it was made, the unofficial results of Kaminzekenzeke were known by the electorates through their agents but there was a delay in announcing of the official results. Further that the groups were not identified in the report as there were 5 parliamentary candidates in the election and each had his own group.

Moreover that on the actual polling day he was tasked to be a security officer at Shimbandanga where the total number of ballot papers was 455 and there was no violence there. Thus violence was not widespread and that they arrived at 04.30hrs at Shimbandanga and the queue was not long due to low population and 455 was a good turnout. That he could confirm that the report on page 11 of the Petitioners Bundle of Documents did not talk about UPND in any way and the cadres mentioned therein were from PF on whose ticket the Petitioner stood.

After receiving this report the OIC (**PW2**) assigned Constable Kalumbeta to take it over and PW5 did not go and see the Petitioner. A statement was recorded from Mr. Mbalau (independent candidate) at the Police Station. The police command Mr. Mwendabai warned and cautioned the Petitioner although **PW5** was not there when this was done. That Page 13 of the Petitioners Bundle of Documents showed that PF cadres are involved there and that page 14 talking about Kakilufya Polling Station also mentioned PF cadres. That Page 15 par 1 showed that the clash was between PF and Independent cadres which showed that that PF was involved in violence and a good number of reports were still undergoing further investigations and before they are concluded they could not establish that they had failed to do their job as police.

That there was no further cautioning to the Respondent after this incident and he feared a reaction from the crowd after Freddy was removed from the car and as the police they had the power to issue a call out for him to report to the police station but it was not issued. That although the report on Page 19 of PBD referred to them, there was no evidence to show that the Toyota IST belonged to Mrs. Kamondo nor that the Maroon Spacio belonged to the Respondent.

PW5 further confirmed that the Respondents shop was a public place where anyone could go and that there were UPND cadres present there since they were dressed in T-shirts labeled HH and when the Respondent was cautioned, some came behind him murmuring and they were not entitled to murmur even if they had followed them to their own place. As a matter of fact that they were not entitled to protect themselves after being followed.

That page 1 of the Respondents Bundle of Documents recorded that 20,199 votes were cast which is a big number of people in Mufumbwe who went out to vote. Besides the police other organizations monitored the elections such as

JEVIC who he saw at the polling station and there was no report from them regarding violence.

In **Re-examination PW5** told the Court that he and other police officers went to the camp of Respondent to maintain a peaceful environment and that Fred was commonly called Zacks and upon arrival even the vehicles that were mentioned by members of the public were found there.

He further stated that the Report on page 11 of the PBD was investigated by Constable Kalumbeta who was a witness in this matter and in relation to the issue of the police having been weak, the clarification of **PW5** was that they did not go to the camp for violence and that is why when they arrived the Respondent was cautioned by the Senior Officer and even when Fred was apprehended, the cadres picked him from their vehicle and the police didn't retaliate or discharge any ammunition.

According to **PW5**, Fred was picked because if they had reacted they would have ignited fire and they didn't fail to control them due to weakness as they were just outnumbered by the cadres.

PW6 was Constable **Sichande Chaanza** from Mufumbwe Police Station. He testified that during the election period he was working from the enquiries office at Mufumbwe Police Station. Further that he knew Sydney Wotela and that he recalled the statement he made on pages 25 to 27 of the PBD and that his evidence on this was that on 13th of June, 2016 he reported on duty in shift number 2 which runs from 08hours to 16hours and during that time, he received a report of assault where Sydney Wotela of Mufumbwe complained that he was assaulted by PF cadres on 13th June, 2016 around 17hours and he sustained swollen eyes, a painful left leg and other general body pains.

Acting on this **PW6** opened a docket of assault and issued the Complainant with a Medical Report. This brought tension at the police station as there was as a mob wearing UPND regalia present. He also stated that his comments on the Medical Report were that it was issued by Constable Kalumbeta to Sydney Wotela because even if he was alone on duty there were different reactions from the crowd which would grab the Occurrence Book from him whenever he wanted to record the statement. As a result he was forced to call the OIC who sent 3 officers that came and assisted him to control the crowd.

When these officers arrived they managed to retrieve the Occurrence Book as well as the medical report form and it was eventually issued to the complainant who was then ferried to Mufumbwe District Hospital by a police vehicle. Since no statement was recorded from him, a follow up was made the next day however when we reached the hospital we were informed that Sydney Wotela's mother had picked him and taken him to Loloma District Hospital in Manyinga district thus it was difficult for us to begin investigating the matter.

Thereafter on 19th of June, 2016 Chief Inspector Kateule, Inspector Mpasela and Detective Constable Kamwengo went there and recorded a statement from Sydney Wotela. Since he was the dealing officer, Detective Constable Kamwengo handed it over to him and he went through it and based his investigations on it. That in view of the allegations of the victim being taken to the Petitioner, his comment was that he decided to go and check from the notifications book that was showing where each candidate would be campaigning from at a particular moment in order to determine where the Petitioner was at the time of the said allegation. That this book clearly showed that the Petitioner and his entourage were in Kalengwa proceeding to Kabipupu on 12th of June and to confirm it all he called officer, Constable Makina who had gone there for operations and he confirmed that the Petitioner was right there and had not returned to Mufumbwe.

Further that the distance from Mufumbwe to Kabipupu is about 82kms and that Sydney Wotela claimed he had been beaten by PF cadres who he would identify when given chance to see them so PW6 expected him to go to the police station so that he could go and identify them in order for them to be apprehended.

According to his investigations, on 13th June, 2016 the Petitioner was in Kabipupu and he was sure due to the notification from PF and the confirmation by Constable Makina. He also stated that the distance from Kalengwa to Mufumbwe is 42kms whilst that from Mufumbwe to Kabipupu is about 82kms.

He also explained that Constable Makina told him that when the Petitioner and his team reached Kalengwa on a Sunday morning they attended a church service there on 12th June, 2016 and on the 13th he was told that the Petitioner had a meeting and he proceeded to Kabipupu. That he did not know the time he got back to Mufumbwe but the date he did so was surely on 13th of June. Makina also told him that he saw the Petitioner and his crew between 18 and 19 hours in Kalengwa on 13th of June, 2016.

It was also his Evidence in Chief that during the election period the particular shift he would be in would determine what he would be doing as there were 3 shifts. That they would generally carry out investigations as there were so many incidences occurring despite the few officers in Mufumbwe. He also confirmed that the crime levels increased and cases such as assault and theft were prevalent.

According to **PW6**, the general mood relating to the campaigns was that of receiving complaints of clashing political parties and since there were a lot of things happening the officers would move up and down around the district.

Examples of some of his encounters include the one where Independent candidate Kiakilika was stoned and they rushed there. The circumstances according to his complaint were that it happened whilst on his way to Miluji using the shortcut of Kalengwa road but he failed to specify the political party that had stoned him as it was late.

That his comment on the claim that the police failed to control violence is that it was true because officers were working in fear and would receive threats from all political parties. This affected their work and a clear example was where whilst Constable Makina was on duty a bottle was smashed on the front desk at enquiries and another one was where Constable Kalumbeta was assigned to guard the chopper that had brought ECZ officials and he was attacked from there.

In **Cross Examination PW6** told the Court that the distance from Mufumbwe to Kabipupu is 86kms and that from Mufumbwe to Chizela is 4kms. That Sydney Wotela failed to come to identify the people that allegedly beat him up and that he read the statement on page 25 which showed the names of Sam, Kanyembo and George who he had made an effort to summon as after he was discharged from hospital what was expected was for him to go to the police station as this was the procedure.

That he did not call the Petitioner to ask if he knew these three individuals and that he could not remember the number of Constable Makina. According to his statement, Sydney Wotela was at Mufumbwe Bus Station and that the statement does not give a specific time when he was beaten neither does it state when he was taken to the Petitioner. The only certain thing is that it happened on 13th June, 2016 and that is the date the Petitioner returned to Mufumbwe.

It was also his evidence that since he had confirmed that the Petitioner returned to Mufumbwe on that date, **PW6** was obliged to call him to ask about the incident but he had not done so to date. Thus he executed his duty. First since Sydney Wotela never went to the police station he followed him to Mufumbwe Main Bus station where he worked and he clearly stated that PF cadres beat him up.

Further that although the Petitioner was specifically mentioned in the statement he was not in a position to go after him as he was not specifically stationed at the office because of moving up and down due following up on the incidences happening at the time. That as police officers they do issue call outs to summon people to the police station and although he could have done so he did not issue one to the Petitioner. He also recalled that A PF cadre called Francis was arrested during the election period for misconduct at Mufumbwe Main Bus Station.

That he also recalled saying that there were few officers at Mufumbwe and when this happens police are able to call for reinforcement however in this case this was not done. Moreover that he was registered to vote in Mufumbwe and he did so from Kiamwena Polling Station and he voted incident free there. In his report however, he did not mention any incidence of violence and neither did he receive any such report related to Kiamwena nor Chilemba, Kiamakwabo, Kamipingo, Shungulu and Shongwa and Kabanga.

Further that he still believed that violence was widespread even in places like Mufumbwe township though there was no report to that effect and he had information that the Petitioner was in Kabipupu but did not receive any report from him that he failed to campaign nor that his vehicle was stoned. That he spoke of violence in Kalengwa when the Independent was going to Miluji although he did not know who attacked him.

In **Re-examination PW6** told the Court that a polling station is a place where people vote from in an election. That Pages 25 to 27 of the PBD shows that the person who took the statement was getting it from Wotela Sydney. That he was at the enquiries desk and according to the statement at the time he mentioned that he was at the bus station was not true because he recalled that he appeared at the police station around 17hrs and that a mob had followed him so before he could receive a report or issue a medical report the Occurrence Book was grabbed from him by the mob and that was why he was questioning the claim that he was at the bus station around 19hours.

PW7 was Constable **Paul Makina** of Mufumbwe Police Station. It was his evidence in chief that between May to June, 2016 he was working from Kalengwa mine and from July to August, 2016 he went back to work from the police station at Mufumbwe. Then on 12th June he got a call from Constable Sichande who wanted to confirm if the Petitioner was in Kalengwa and Kabipupu and he agreed and added that he had actually spent a night in Kalengwa and proceeded to Kabipupu. The next time he saw the Petitioner's vehicle passing was on 13th June around 19hours going back to Mufumbwe.

In **Cross Examination PW7** testified that he had been assigned by the OIC to monitor all the political violence in the district. From May to June, 2016 he never sent any written report to the OIC in Mufumbwe. On 13th June, 2016 around 19hours he saw the petitioner because the vehicle stopped at the market and he was the one who was driving it. That he was monitoring at the market around 19hours, and saw the petitioner greet people freely and without any incident although he did not have an opportunity to speak to the Petitioner.

There was no reexamination.

PW8 was Constable **Kayula Kalumbeta** from Mufumbwe Police station. He told the Court that during the election period of May to August, 2016, he was working from Mufumbwe and some of his duties were to ensure that law and order were maintained. That he recalled that on 30th July, 2016 he was assigned two dockets of malicious damage of property. In the first one, Paul Kanembo reported on behalf of independent candidate Davies Mbalau that his vehicle, a Toyota Noah registration number ACX 400 was maliciously damaged by unidentified suspected PF cadres.

In the second docket Judith Chitengi reported that her house had been maliciously damaged by suspected cadres of independent candidate Davies Mbalau. He stated that he perused through them and began investigating by going for a scene visit in the company of other officers. In the first docket he reached the scene and found two windows had been shattered and also found stones and bottles that were alleged to have been used in the act. Further investigations revealed that the assailants were using an unregistered Land Cruiser.

In the second matter when he arrived at the scene, he discovered that a door and its frame were maliciously damaged and he found bricks and stones on top of the house that were used to conduct the act. Investigations further revealed that the assailants who maliciously damaged the door were acting in revenge because the report he received was that as they were damaging her house she could hear their voices outside saying "your fellow PF cadres attacked us".

No arrests were made in both matters as no one was identified. When referred to the page 11 of the Petitioners Bundle of Documents, **PW8** confirmed that the issues he spoke about are found in this document. In addition that generally in the campaign period there were a lot of violent cases that occurred. The cases involved were assaults, malicious damage to properties and threatening

violence. Most of the cases being received were not ordinary as they involved violence which extended from the political players to the Police Officers.

He also testified that on 13th June, 2016 between 18 and 19 hours Constable Sichande who was on duty at Mufumbwe Police station phoned him and informed me that he was being harassed by UPND cadres whilst on duty at the police station and when he rushed there with colleagues and he found him being grabbed about and that the Occurrence Book had been taken from him. When they talked to these people, it was discovered that they had come to make a report of Assault Occasioning Actual Bodily Harm in which one male Sydney Wotela was assaulted.

That as a matter of fact, he even issued the Medical Report form after sometime since he needed to calm the people down between 18 and 19hours. According to him Wotela would not have been at the Bus Station at that time and after this he called the OIC and informed him on the matter. The OIC instructed them to take Sydney Wotela to the hospital and in his investigations he established that Sidney was assaulted between 16 and 17hours.

When referred to page 15 of the Petitioners Bundle of Document he stated that he did he did not know Tony, Kayombo, George, Willy or Linti the names mentioned there. That he knew the place called Kaminzekenzeke but did not carry out investigations there. That generally considering the strength of Mufumbwe police station, they only had a few officers so in most cases they would use professionalism but the violence continued. Moreover, that whilst an officer would be handling one issue he would receive another call from another area that another person had been beaten up.

When shown exhibit P2 which covered the period June to July, 2016 he referred to a report that was received on Monday 16th of June, 2016 at 19:54hours because we they had quite a struggle with the cadres and it took quite

some time for them to convince them to let the officer do his work and allow everything else to continue later. Before he and Constable Njekwa arrived the Occurrence Book was in the control of the officer on duty but when they arrived they found that cadres had grabbed it from the officer on duty and it was from then onwards that their diplomacy started at the police station.

In **Cross Examination PW8** told the Court that it would be incorrect to state that the Medical Report was only issued after the report was recorded in the Occurrence Book. But that is what happened here as the Medical Report was not issued after he was taken to hospital. He could not confirm that he had been assaulted. What he wrote on the Medical Report was swollen left and right cheeks and general body pains. That he also wrote "Assaulted by unknown people" because these people were not mentioned. However, when the Officer read out the entry made at 19:54 in the Occurrence Book before Court it showed that the left and right eyes of the victim were swollen.

He further stated that it was a serious breach for cadres to come and grab the Occurrence Book but there that there was no record of this breach in the Occurrence Book. According to the witness, such an incident occurred and that he did not know when the campaign period was but he could determine the incidences that occurred between June and July, 2016. In addition that the only two reports he had investigated were the ones he had already outlined above.

Moreover that he lived in Mufumbwe and stayed there during the whole period and was operating from ZESCO. That It was the duty of the OIC to compile reports. That the statement from Sydney Wotela showed 19.45 hours and that this is the same as what appeared in the Occurrence Book. That the victim had no influence on the time that was recorded.

In **Re-examination, PW8** stated that when recording in the Occurrence Book the officer got the information from Sydney Wotela who also issued the statement recorded on page 25 of the PBD and that an officer records the time when he makes the report and does not backdate the time.

PW9 was Inspector **Felix Mpasela** of Mufumbwe Police station. His evidence in chief was that on 22nd July, 2016 he reported on duty at Mufumbwe police station and whilst on duty he got a report from Kennedy Muyanga who reported that on the same date around 18hours whilst addressing a lawfully convened meeting the Petitioners meeting was disrupted by UPND cadres and among them was headman Sasaki of Kamanzovu Area. He further stated that chaos erupted as UPND cadres started showing their symbols as the Petitioner was giving a speech. Acting on this he in the company of other Police Officers booked out to Kamayembe area where they found that people had already left but stones could be seen along the road and others on top of shops. They went back to Mufumbwe police station and continued with investigations and he received information from reliable sources that headman Sasaki and others who could be identified were in the forefront of showing the UPND symbol.

Further that they then went back to Kamanzovu area where **PW9** cautioned the said headman who denied having been present but reliable sources reported to the contrary. He did not arrest the headman but just went back to Mufumbwe. On the 2nd of August, 2016 whilst on duty at Mufumbwe Police Station he received a call from the members of the public stating that the Independent candidate for Council Chairman Bruce Kanema was attacked by PF cadres who were driving a Land Cruiser as he was addressing a meeting. Acting on this, he and other police officers booked out to the area and they found that 3 PF members Willie Mutale, George Linti and Tom Kayombo had been assaulted and were just lying in the Land Cruiser.

They also saw supporters of male independent Mbalau standing along the road with stones and sticks whilst shouting that it was better for them to fight. After investigations it was discovered that a fight erupted when the PF wanted to have a rally when others were already there. This situation was calmed down by the OIC and people encouraged to go and report the matter at Mufumbwe Police station. Lastly he told the Court that there was violence during the election period and as police they were unable to cope with this situation.

In **Cross Examination PW9** told the Court that as the police they were involved in regulating who would hold a rally where and at what time and that the issue of violence regarding the independent Mbalau and the PF cadres did not occur because of issuing two permits at once.

He further stated that the OIC is the one that was regulating this but due to the mentality of violence of the people involved it still erupted. The group of Independent Mbalau were already on the venue and it was PF that wanted to hold the rally there after finding their friends there. The OIC should have carried out investigations but did not moreover that **PW9** actually performed his work.

When referred to page 29 of the PBD PW9 stated that no follow up was done because investigations were still underway but it was not only after their conclusion that what transpired would be determined. The general mood he commented on in examination in chief was that of the general constituency and that there was violence almost everywhere. That in fact he had a report of violence in Kashima East where there was a disruption of the meeting. In Matushi, there was no report of violence, in Kikonge there was a complaint during nomination of a Councilor who tried to bring confusion. This was not recorded it was only on phone.

As for Musonweji there was no report received, whilst in Lalafuta one was arrested in connection with the election offences of forging a certificate and not violence. That he was assigned to go and monitor security and elections in Kakilufya and he never filed any report of an incident there as there were long queues there and half of the number of people voted though he had no statistics.

Moreover that violent cases were compiled in the statistics but he did not know the number. Further that there are 22 officers at Mufumbwe and 8 which is a big number had come to testify on behalf of the Petitioner. That as police they had no interest in this matter but that whenever they move from the station they were paid allowances and even in this case he was not sure if I will be paid.

In **Re-examination PW9** told the Court that there were too many cases in the Occurrence Book to have statistics. Violence was coming from all political parties and from all areas of the vast district.

PW10 was **Endeni Simfukwe** a farmer and the secretary of the Mubambe Royal Establishment of Chief Mushima in Mufumbwe. It was his evidence that during the election period he was in Mushima and during that time a complaint from the headmen and land committee had been received of intimidation of people in Miluji area who were being told that if they did not vote for PF they would withdraw land from them they would be chased out of the chieftdom thus a notice was written by the royal establishment to the senior headman in Miluji area to stop the intimidation and not to take part in active politics.

PW10 told the Court that he wrote the letter because chiefs don't participate in active politics. No follow up was made it was just a notice that they should not partake in campaigns. The complaint was brought by council candidate Herald

Jerome that if people voted for PF and if they voted for the Referendum they would have their land withdrawn from them. The headmen had been telling this to people in Miluji.

Further that if people voted for the referendum they would be allowing gay marriages so as a Chieftdom they got worried and advised that people should not get involved in active politics. Apart from the letter nothing else was done. That they received reports on violence though they were not witnessed as the teams that were there were being chased from places where they were camping.

In **Cross Examination PW10** stated that his own letter did not say anything about the referendum and it did not say that a report was received from Mr. Herald Jerome. The letter did not even state who was causing intimidation and that his evidence just talked about the PF and no one was removed from their land in Miluji. That someone went to the palace to report that he had been beaten on a date unknown.

Moreover, that there were the Chief's Retainers called Kapaso and he was a registered voter who voted peacefully at his polling station. Further that what he had stated was what transpired during the election campaign period and political parties held rallies in chief Mushima's area and he could also confirm that he had not told this Court that a fight was reported at one of these rallies.

In **Re- Examination PW10** testified that reports of violence are taken to the police.

PW11 was **Brian Solochi** of Mufumbwe and in this case he worked at Miluji as a PF cadre. He testified that when they arrived in Miluji as PF cadres, they decided to go and speak to people on the second day and they found a UPND meeting at Miluji Central whilst wearing their PF regalia so they decided not to go to their meeting place.

But stood at a distance listening and fear was instilled in them because of the message being spread by the Respondent in the meeting when he told his listeners that "the person (PW1) coming to cheat you is a thief and a criminal and if you vote for him then you would have just wasted your vote."

He also stated that Headman Kyunsu of the same area stood to make a speech and he stated that "in this village we have given you the directive from Mr. Kamondo we don't want anybody who will support PF or the Petitioner as whoever does so will be chased from this village".

Whilst in fear they decided to leave the place as people present were also filled with fear. The chief of that area was Chief Mubambe. After some time the one who stood as the Council Chairman Herald Jerome found them in this area and when they explained the challenges they had been having he decided to go and see the Chief.

Moreover that he did not know what transpired when they went to see the Chief. Regarding the issue of the Referendum, there was widespread circulation of information in the urban area on television and radio whilst that was not the case in Mufumbwe. The only exposure they had to this information was through vehicles mounted with mega phones moving up and down.

Whilst in Miluji he saw the vehicle of the Respondent and people were being told that if they voted for the Referendum then they would be allowing gay rights. Due to this their campaign became very difficult. The people even started shunning their meetings whenever we would invite them as the perception in villages on marriage is very important. It was his evidence that he heard this information in the area where he was and he found the same message in Mufumbwe. Lastly he stated that he was saying what he saw and heard and was not just siding with the Petitioner.

In **Cross Examination PW11** told the Court that he campaigned for the Petitioner in the last election and that he wanted him to win and when he did not win he could not believe it and to date he had not. The only way I would believe it is if the election was nullified and that is why I had come to give his evidence before Court.

Moreover that the Miluji rally took place on a date he could not recall and it is not true that he could not put a date to it because it never happened. That he spoke Kaonde and a bit of English and this meeting was in English and the interpreters would translate to Lozi as it was the local dialect thus if people came and claimed that what he was saying was not true he would tell them that they were lying.

Moreover that the place where the meeting was held was in an open area at the football pitch and they stood about 100 meters from the said place and he could clearly see the crowd. The people at the rally were not able to see him as he was behind some shops and alone at this time. He confirmed that the meeting was held sometime in the afternoon and not between 18 and 19 hours.

Lastly he stated that he had gone for campaigns in Miluji but did not go around the whole place and had made statements on things he had seen not heard and they were in Miluji from 13th July to 10th August. Violence existed and vehicles were damaged.

In **Re-examination PW11** testified that, the violence he mentioned arose out of a directive that if you support PF we will chase you out of this village.

PW12 was **Robson Siakondo** a farmer of Mufumbwe who lived at Chief Chizela's palace. He told the Court that during the campaign period he was based in Miluji where he had gone to campaign and he decided to remain at the camp on one of those days whilst the person he had gone with went to a

meeting at Miluji that had been addressed by the Respondent and when he returned he told him about it.

He stated that the Respondent had told the people that if they voted for the Referendum then they would be allowing gay marriages. Further that the Petitioner was a thief, a criminal and would soon be taken back to prison. After **PW11** told him this the two of them were filled with fear and could not even start fieldwork.

He further stated that 4 days before the election the Respondent chaired another meeting and on that day he was present and listened to his message when he started telling the people that they should not forget what they had been told on the Referendum and should vote wisely. Another thing he observed was that the Headman Kyunsu and Kandendu whilst at the same meeting told the electorate that if they did not vote wisely they would be chased from this village. The Respondent then suggested that people should sit in groups of 100 and each group was given K100. There were 3 groups.

That this information disturbed the environment in the area as people were disturbed since the Petitioner was popular in this area and **PW12** even failed to go and do his fieldwork. He also stated that the Respondent polled 513 votes in Miluji whilst the Petitioner polled 93 votes. In Kabanga the Respondent polled 175 whilst the Petitioner polled 30 votes. In Shimpandanga the Respondent polled 254 and the Petitioner polled 28 votes. In Kamipingo the Respondent polled 143 whilst the Petitioner polled 10 votes.

In **Cross Examination PW12** averred that he had problems going out to campaign in the field and that the Petitioner was popular because he was the MP of the area, further that he had been moving around with the Petitioner dishing out some items several times and each time they got back safely. The people they were meeting were receiving them well except at times certain

people would speak words to them. He stated that they would distribute t-shirts and different types of Chitenge materials.

However he stated that he was not sure if some aspiring Councilors also wanted bicycles and that his explanation in Court was on all that he know pertaining to the elections and it was not true that wherever they went no one threw stones at them although he recall having stated in examination in chief that wherever they went they returned peacefully. Further that they had been out for campaigns for a number of days in Miluji where they had their own camp.

PW12 also confirmed that at no time were they attacked by anyone at the time they stayed in Miluji and that since he was not moving about he was unable to tell whether the people there needed a bridge. That movements were there and when he heard that there was a rally he stood there listening in the that they were failing to go in the field to campaign as they feared the local village headmen and the people who knew that they were PF cadres.

These people as well as two headmen were present in the meeting addressed by the Respondent and that he went to this meeting of people he feared and freely attended it and nothing was done to him because he was a PF cadre. According to him he was in fear and that he was not part of the group of 100 people I mentioned and that he left immediately after the meeting so he did not actually see this giving of K100s but only heard it being said that they would be given after they grouped themselves as directed. The meeting was in the evening.

In **Re-examination PW12** stated that he noticed the popularity of the Petitioner when he moved around with him before they went to Miluji and that he was filled with fear at the meeting because the headman saw him. That he saw the Respondent 4 days prior to the election in the evening at Miluji where he had been for a month and only left on 10th August.

PW13 was **Masela Sekeseke Chinyama** the District Commissioner for Mufumbwe. She testified that she was in Mufumbwe district during the campaign period and during that time she observed that there were a lot of violent activities from the day of the nominations when she heard noises from the nomination center which was the council offices area and when she enquired what was going on from the Officer in Charge police she was told that the candidates were fighting and had been picked and put in police custody. She told the Court that as DC she superintended over all government and non-government organizations and traditional affairs and the community as a whole. Due to this she received complaints from the many stakeholders in the elections as well as from the police whose Office in Charge was the Chair for the District Joint Operations Committee (Government Security Board) who told her that they had recorded many incidences of violence and that the security situation in the district was not good.

That upon further enquiry the Officer in Charge told her that the complainants in those violent incidences were spread from the major political parties of UPND, PF and FDD that he had been in contact with the district leaders of the PF and UPND to urge them to control their cadres but it was to no avail as violent activities continued.

She also added that the Council Secretary also reported that there were a number of violence related complaints brought to his committee which was the Conflict Resolution Committee created specifically to deal with complaints during the election. That she also received phone calls from parliamentary candidates and their agents complaining about their cadres being beaten by other groups of cadres from different parties. Most of the complaints came in from PF, UPND and FDD. Traditional leaders in the district such as the Royal Establishment of his Royal Highness Chief Chizela, Ex Chief Munyambala as

well as Chief Mubambe Mushima called her on separate occasions to go and explain why violence had escalated in the district during the campaign period.

She further testified that she also got complaints from the Chairman of Mufumbwe market who stated that there were violent activities occurring in the market and that his life was even threatened. As a matter of fact that she could also hear cadres shout and threaten to harm and beat her up during the campaigns. In fact a lot of people that went to see her during that time were going to complain because they felt threatened or were beaten.

Due to this she would call the Officer in Charge of Police and urge him to intensify patrols in the district and also to patrol around her house especially during the night as she feared being harmed but despite this the violence continued even towards the few days before and after the elections. She also noticed that there were a lot of misunderstandings on the voting amongst the residents of Mufumbwe district especially on the Referendum. That the complaints she received from different stakeholders expressed fear that the government was up to no good by wishing to introduce homosexuality in the country among other vices if the candidates under PF were voted for and if the Referendum was successful.

It was also her evidence that she received a delegation from the Ministry of Justice about 2 weeks before the elections and it was agreed that a stakeholders meeting be convened and during this meeting the members of the District Development Committee were present as the delegation explained the issue of the new constitution which would be enacted if people voted yes in the Referendum. They made their presentation and participants asked questions where they were not clear and the main question was whether there would be homosexuality introduced if the Referendum was successful.

According to **PW13**, the facilitators labored to answer the question and they did so in the negative. That the participants complained that they had been convinced otherwise and that the majority of the residents were also convinced of this. They also bemoaned the fact that it was too late and there were no resources availed to stakeholders to enable them explain the issue at hand and clarify it to the residents of the district. Many of the participants concluded that the nation would lose out as they feared that the vote would be a no due to the misconception that had characterized the referendum during the run up to the elections.

She also went on to state that Ex-Chief Munyambala and his people called her to clarify on whether the school whose roof had been blown off had received funding as the belief going round was that the funds had been misappropriated by the Chief and the Petitioner who had been the area MP. It was alleged that the Petitioner had also stolen the money from other schools which had experienced similar disasters as the Chairperson for the District Disaster Management PW13 was required to clarify this. According to the Chief these allegations were being made by the UPND and the Respondent in the public arena and he felt offended.

Thus as the Chairperson of this Committee she assured the Chief that she would investigate the matter to determine if the funds had been released by government and what had happened to them. So the next morning she spoke to Mr. Kabaso the Chairman of the Disaster Management in the province and she enquired from him if he was aware that funds had been released for the rehabilitation of the schools whose roofs were blown off. According to him, no monies had been released for that purpose. PW13 also phoned Mr. Kangwa the National Coordinator for Disaster Management in Zambia and made a similar enquiry and when she followed up he confirmed that there was no record showing that monies were released for that purpose and he told her that it was malicious for people to claim that monies were released and misappropriated

by the Chief and MP because the latter had been enquiring on progress of funding for the schools.

After this she phoned the Chief and explained what she found out on the schools. Regarding the campaigns she stated that these were characterized by lots of name calling, false accusations and a lot of violence. Fear also gripped the residents of Mufumbwe as they feared that they would be chased from Mufumbwe if voting was not done in the right pattern, some feared being harmed physically to the point that others would seek shelter in her house.

Moreover that she knew Dorcas Shipilo as a secretary at the City Council of Mufumbwe and that during the elections she was one of the officers carrying out election duties. That this lady went to complain to her with other officials from the ECZ who were working from the council as they felt threatened and that their lives were in danger because residents of Mufumbwe district were made to believe that she and other Council workers that were working for ECZ would rig the elections to disadvantage the UPND. She told the Court that Ms. Shipilo explained to PW13 that she lived in fear more so that she was a single mother who was keeping her elderly parents and that her house was in a community where a lot of people and neighbors threatened her with death.

Moreover that this threat arose on the day that the president of UPND had a mammoth rally in the district attended by a lot of people, and announced she would rig the elections and therefore should be gotten rid of. That **PW13** was over whelmed with such reports as some other women had gone to seek shelter in her house and protection from the police since their houses were surrounded by UPND cadres so she asked Ms. Shipilo to ask her relatives to stay with her because they had insufficient security personnel to match the requests for protection being made. Lastly, **PW13** stated that the elections were not free and fair as people lived in fear of being harmed physically or displaced.

In **Cross Examination PW13** told the court that she was appointed DC in 2011 but reappointed in February, 2016 and that she did not have the specific number of registered voters but it was over 30,000 in Mufumbwe though she did not vote from there. Moreover that over 50% of the voters turned out to vote and that this was not a good turnout in an election as 70 to 80% would have been good. She also added that most of those more than 50% who turned up were living in fear.

It was also her evidence that the campaign period started on the date of the nomination in June and not following the dissolution of parliament. That there were 16 Wards in Mufumbwe and though she did not specifically mention it, Kabipupu ward had reports of violence as she spoke in general terms and gave an example but there were many others. That as the DC she was interested in putting in place remedial measures and needed to identify the most troubled spots in the district.

Thus she identified the market and the station as the troubled spots in Mufumbwe and that she mentioned an incident in Chief Mushima in Mubambe area where the Chief mentioned that there was widespread violence on his Chiefdom but that she did not attempt to ask the Chief for specific instances of that alleged violence and she didn't say that she verified the reports coming from there.

That regarding the team from the Ministry of Justice which came to explain on the Referendum it was not wrong for people to ask questions as she also did so and that they had a Department of the Ministry of Information in Mufumbwe but did not use it to disseminate the correct information of the Referendum from the Ministry of Justice due to lack of information and time. That she began hearing on the Referendum from February, 2016 when she assumed office.

As DC she told the Court that she was the head of the district and had been so for six months and during that time she did not verify the reports she was receiving on the Referendum. That she took steps to clarify on the issues of the Referendum such as calling the Permanent Secretary of North Western Province who said people would come to clarify on the issue and she also asked for a copy of the Bill of Rights and familiarized herself with it but it never came till 2 weeks prior to the election. She also agreed that it was the duty of government and other stakeholders to enlighten citizens on the Bill of Rights.

According to her everyone was misled even the church mother body and that the voting in the Referendum included even non registered voters. Further that it could be right that the roofs of the schools were blown off in 2013 and that she did not attend the meeting where the Vice President made arrangements to have the school roofs repaired although she was aware about her announcement that monies would be sent to this school but not anything that happened prior to the time she resumed office as this visit was before the day she resumed office.

She confirmed that the community was in order to demand why the school wasn't repaired and that she was aware about the need of a bridge in Minoweji ward as the stakeholders had been constantly questioning why it had not been made there but that they have not told her that they were unhappy about it due to the MP since they would complain to her as the government representative.

She also stated that Miss Dorcas Shipilo lived in Mufumbwe and during the election period she continued with her work and was not attacked. That she received complaints that the Respondent had alleged that the Petitioner had stolen funds but never called him to verify as she only verified the information with her superiors. She further confirmed that no one had been misplaced in Mufumbwe, nor land grabbed from them.

Further that the District Joint Operations Committee reported to her and she did not sit in its meetings. That the police reported that all election related complaints were being channeled to the Conflict Management Committee and that she would say the same information if the PF won. That during the campaign period she met the Petitioner frequently, Independent Kyakilika once in a while, and Kayombo Lapson very frequently because he was her neighbor. That she and the Petitioner were preparing to jointly meet the Vice President who would visit the province. That the Petitioner would come and report to her on the alleged violent activities against the PF cadres and she would also go and speak to him on the reports of violence perpetuated by the PF cadres. It was reported to her that PF cadres were involved in violence and that she met the Respondent on very few occasions and that they would meet in a public place where she would be safe because Mr. Machayi his campaign manager constantly threatened violence to her and she heard him say he was going to kill her. This threat to life was very serious and she told the Officer in Charge who assured her of regular patrol on her residence.

She also stated that she reported this to the OIC and in relation to the Ntongo Ceremony the Petitioner and the Respondent urged the people to stop the violence as it had escalated to very high proportions. That it was her in the background of the photo smiling as she was very happy with the step taken by the 2 gentlemen. However that violence continued even in higher proportions after this. Statistics were verbally mentioned to her by the OIC of police on the degrees of violence.

There was no **Re-examination of PW13** by Mr. Bwalya.

PW14 was Dorcas Mwambaabantu Shipilo a stenographer at Mufumbwe District Council and in relation to this case she was an Assistant Returning Officer IT in Mufumbwe constituency. She told the Court that she and four

other people worked in relation to the elections, and these were the District Returning Officer Mr. Mwansa Mfula, the Returning Officer Mr. Hector Chikunji. The Assistant Returning Officer Tracy Bwalya and the Assistant Returning Officer, Samuel Mwanza.

That their duties were to facilitate the running of the election, to shortlist the poll staff and to deploy them in their stations and to receive results from polling stations. Further that on one occasion whilst shortlisting the UPND President Hakainde Hichilema held a rally in Mufumbwe at Freedom Square near their offices on about 27th July, 2016 and it was at that time that she and all other electoral officers heard their names mentioned during the rally by HH. It was stated that the 4 of them would rig elections so HH instructed some of his people to get rid of them as they were incapable of running elections.

That after this they received a letter from the UPND saying that the Council Secretary should ensure that the 4 of them were removed from running the elections. That this letter was received on 4th August but it was written in July and it scared them so much especially the part that mentioned that their lives were in danger. This letter was written by Clement Machayi. That she was very scared and sought clarity from the District Electoral Officer who also informed the Local Service Commissioners her employers and the Electro Commission of Zambia.

That she informed the Officer In Charge of Police who took note and provided security for her but she was still scared especially that they had to sometimes work from morning to 23hours, and she had to look after her 5 children and aged parents. That it was very difficult for her to move from one point to another and to date it was still difficult for her to do so as she still have the authors of that letter. That after making reports she was informed that this matter should go to the Conflict Management Committee and this meeting was held on 4th August and she was in attendance. She also submitted as part of her evidence P7 a letter from the UPND.

PW14 told the Court that during the meeting the Officer In Charge of Mufumbe Police was asked to provide security at the work place and the homes, which he did. That the UPND were asked to provide proper evidence but they said that evidence would only be provided if the matter went to Court. That the UPND have failed to make an apology through the Media as demanded but Mr. Clement Machai apologized during the Conflict Management Committee Meeting.

PW14 further stated that because of the public pronouncement at a rally she and her colleagues could not move freely with most of the people saying that it could be better for them to run elections elsewhere than in Mufumbwe. Because of this the other three officers requested for transfers and they were transferred immediately. The Returning Officer Mr. Chikunji is in Chitambo, the Assistant Returning Officer Mr. Samuel Mwanza is in Itezh-tezhi while Associate Returning Officer Tracy Bwalya is in Kapiri Mposhi.

In **Cross Examination PW14** confirmed that indeed there were 5 officers who made up the group of returning officers and that she did not mention a Mr. Oliver Usheya who was from the Ministry of Education and only joined them after being recruited as a poll staff. Moreover, that the Rally was held on 27th July, 2016 whilst the letter was written on 28th July, 2016. That as at that date Mr. Usheya had not yet been recruited but according to the letter he participated in the election process and was recruited as part of the poll staff during the time they were shortlisted. Further that she did not know the number of registered voters in Mufumbwe but she was the one that was compiling and tabulating this information.

Further that she also compiled the percentage voter turnout of Mufumbwe but did not want to mislead the Court on the figures and that she prepared the document on page 1 of the PBD and there were 20199 votes cast which was

not a small number and that it was not true that a lot of people turned out to vote in Mufumbwe where she was a registered voter and voted from Kiamwina Primary School which was about 5 minutes walk from her home where she was taken in an Electoral Commission of Zambia vehicle and she found long queues of people, polling agents and monitors ready. She also confirmed that what she told the Court in Examination in chief was all she knew about Mufumbwe and when she arrived at the polling station she did not hear anyone shouting that she was an electoral agent. She said that when leaving her house she had already decided who she was going to vote for on what position. That she had lived in Mufumbwe for 10 years.

She also told the Court that the date of the stamp was 3rd July, 2016 and the letter was written on 28th July because the date stamp was not changed before it was placed onto the document and that the other date stamp on this letter was changed by hand as the date stamp in the registry was not okay. She further stated that if the first council date stamp was a mistake it could have easily been changed by hand but it was not.

Further that an Original Letterhead did not look like the way it appeared on the said letter from UPND and that the Mufumbwe Council letterheads were printed in color and this letter was not a total fabrication. Mr. Machayi said he had written the letter during the meeting and she confirmed that she did not say that from the 27th of July to date, her house was attacked by anyone and neither did cadres go to her office to make noise.

She also stated that she was a Christian who attended the New Apostolic Church and that she would attend church at times during which times she would walk to church the distance which was about 7 to 10 minute walk and she had not been threatened at any of these times and yet the church membership composed of people from different political parties.

That after voting she went to work at the totaling center where UPND and all the parties were represented there and there was no violence. She confirmed having told the Court all that transpired but that she experienced a violent attack at the totaling center but did not report it to the police. That the UPND was a stake holder in the just ended election and as such they had the right to raise any concerns about the elections as they did in the said letter.

Moreover that what would trigger Mufumbwe to be plunged into chaos was the mismanagement of elections but this did not happen in Mufumbwe. That she did not know if Mufumbwe was plunged into chaos and if it were there she would have noted it and it was incorrect to assume that since there was no violence there was no danger to the officers. She lastly confirmed that she was not moving with a body guard to church.

In **Re- examination PW14** stated that the letter was not a fabrication and her understanding of the last paragraph was that it was a threat to the officers that were running the elections. The threat was there even when she was going to church as during the election period they would not move about anyhow but would concentrate on the elections. Oliver Musheya had applied for the position of a poll staff and he was hired by the group and that she was the one with the responsibility to submit results to the National Totaling Center together with the Assistant Returning Officer technical support whose name was Brown Mwale. Lastly that the percentage turn out of the election petition was something she could not say unless if she looked at the papers and that she did not know the number or registered voters in Mufumbwe as she did not have the information.

PW15 was Tom Kayombo a Peasant farmer of Mufumbwe. He stated that during the election period he was in Mufumbwe and that he belonged to the Patriotic Front. It was his evidence that during the said period of time on 2nd August he went to Kamayembe to organize a meeting to be chaired by the

Petitioner. Further that as they were organizing people to come to the meeting he suddenly saw a group of people who went to him and asked what they had gone to do there and he explained the purpose. That before he finished explaining he was hit with a handle of a hoe on the head and fell to the ground and could not even remember having been taken to hospital. This meeting was being organized from Kamayembe at school.

That they were about 10 in number and the people that came to ask them were from the vicinity of Kamayembe and did not identify themselves and the person who hit him was behind and due to this he could not determine who it was. He stated that he sustained a scar on the head and he could not hear properly in both ears and had a Medical Report to this effect and that he and George Linti were injured and only those that had minor injuries ran away.

He went on to state that the police found a lot of people who later ran away when they arrived and that he knew an officer by the name of Kalumbeta (PW8) as well as Chief Inspector Kateule (PW2). The police were waiting for him to be healed so that they could continue with the matter. However that he was able to continue with the campaign as he was passionate about it and that he stayed in hospital for about 4 days.

In **Cross Examination PW15** averred that he was a registered voter in Mufumbwe who even voted from Kangombe Polling Station and that he was injured as shown by the Medical Report which he took to the police and assumed they had brought it before Court. He further stated that the scar was not an old one as he sustained it during the campaign period and that he could convince the Court that he took back the Medical Report to the police. He also confirmed having told the Court all that he knew and that only he and George Linti were injured badly and that he knew Willie Mutale. His testimony was that cadres for Independent candidate Mbalau are the people who attached them.

PW16 was George Linti of Mufumbwe. He testified that during the last election he was in Mufumbwe and that he supported the PF party and was before Court to state that he was beaten up by the UPND when they went for a meeting at Kamayembe School in the company of 9 others.

That when they arrived at the school and even before they began the meeting they were beaten up by people wearing UPND regalia with a hoe handle and sustained an injury on the forehead next to his left eye. Further that he knew an officer of Mufumbwe called Kalumbeta (PW8) but not Chief Inspector Kateule (PW2). According to him, it was the UPND that beat him up due to the UPND regalia they wore. Moreover that he did not know how many candidates stood but that some independent candidates stood.

In **Cross Examination PW16** told the Court that he was with Tom Kayombo when he was assaulted and they both saw those that attacked them. Further that the Independent Candidates together with UPND were combined although in his earlier statement he said that only UPND cadres attacked him. Moreover, that his injuries were treated at the hospital although he did not have the Medical Report before Court as it was with the police and he was aware that the police came and gave evidence before Court but that they did not bring him to Court from Mufumbwe. He also added that the Medical Report was grabbed away from him by the police and he maintained that it existed. During this incident only two of them were injured. Moreover that he did not know any person known as Willie Mutale and that he did not vote in the last election as he had an injury in his left eye.

There was no Re examination

This marked the close of the Petitioner's case.

RESPONDENTS EVIDENCE

The Respondent has also testified and called eight other witnesses. I shall again endeavor to summarize their evidence.

The Respondent's evidence is that he is the current Member of Parliament for Mufumbwe Constituency from 13th August, 2016. On the referendum he stated that the allegation that he and other independent candidates had told a lie about the referendum was false as his campaigns were issue based and having been an MP of that constituency in the period May, 2010 to August, 2011 he noted that the people of Mufumbwe were in desperate need of a bank, a boarding secondary school, health facilities and shortages of classroom blocks among other things.

Moreover that he managed to bring a bank and a secondary boarding school in the district which even stalled after he left. Thus as already indicated his campaigns were based on these issues as he wanted to continue these things. That he never talked about the Referendum in the mentioned wards but concentrated on the 10 point plan for UPND that explained to the electorates how the UPND intended to address the many challenges being experienced by the people of Zambia, particularly in Mufumbwe. That issues were being explained according to the challenge a polling station or ward was facing and that he had no role in the campaign message being disseminated by the independent parties.

He also stated that he did not have any role in the campaign message of the Independent Candidates nor have any relationship with them and that he never heard Webby Iputu state in this Court that he heard him talking about gay rights. Ben Mufuka was not called as a witness in this Court and neither did he hear Malachi Tedious say he heard him talk about gay rights in this campaign. That he did not hear Kalundu Peter and Justin Kamponge testify

that they heard him talk about gay rights. As a matter of fact the two Independent Candidates were not called as witnesses in this Court.

His comment on the allegation that his motor vehicle mounted with a Public Address system was going round telling people that if they voted for the Referendum then gay rights would be introduced in the Constitution was not true as they had a program whereby they were not campaigning using a microphone as whilst travelling they would play two songs. The first one basically lobbied for votes of the position of MP and the other asked where the driver HH was where they would lobby for votes for the position of president.

That at no time when they played these songs did they defame any candidate and he was perplexed that he was accused as having alleged that Petitioner stole and misappropriated the funds for the rehabilitation of the two schools. That the Petitioner was his friend and on several occasions they consulted each other and a good example was when they attended Ntongo Traditional Ceremony where jokingly he told him if he knew that they were the two giants of Mufumbwe and he jokingly responded that he had been an MP and his time was over and this was now his time. Whilst there they also agreed that they would show leadership by denouncing violence, name calling, etc.

That during the ceremony they and all the other candidates were given chance to talk to an audience of more than 3000 people who had gathered to denounce violence and among all, the two of them took a photograph and that was how cordial and peaceful they were to each other. That the photo exhibited on page 8 of the RBD is a photo he said he took with the Petitioner. That bringing them together was an initiative that came from the DC of Kasempa district Mr. Sansakuwa who saw him sitting next to the Petitioner and appreciated that and suggested that they stand up so that others could see from afar that the politicians related very well.

So the two of them were told to mention to the audience that they would not condone any violence and also present in the photo were the DC for Mufumbwe and the FDD candidate who admired their pose and relationship. His comment on the accident concerning Roy Ifwa was that it was an accident involving 2 motor vehicles and as said earlier the Petitioner and he were related as his wife was the sister to the Petitioner and the older brother to his wife Davies Mutelo supports the Petitioner and was his agent. If he were bitter and violent the first thing he could have done was to divorce his wife. Further that since he had related very well with the Petitioner during the campaigns at Kamikambi Polling Station in Mushima Ward, the Petitioner found him addressing a meeting with his vehicle loaded with supporters. In fact there were 2 vehicles whilst his rally was going on at Kamikambi he came hugged, greeted the Respondent and wished him well.

Further that none of the cadres from either side clashed and that they actually started exchanging food and that's how they related. After this the Petitioner and **RW1** agreed that if he found him in a given area he would give him chance to finish his rally so that as soon as he left he would also address the same people as no one owned them and they did so in that area.

He also stated that he had no idea on the allegation that on 27th June, 2016 PF rally at Kamanzovu was violently disturbed by UPND cadres who were throwing stones and police officer Felix Mpasela said matters were not concluded. According to him the Petitioner was the one that was at liberty to campaign from anywhere because at some point he should have addressed a meeting at Kaminzekezeke after he got back from Miluji ward which was 180 kms from there and when he arrived they were told that the Vice President would have a meeting in the same area and the Office of the President told them to go to other wards besides that one and they met PF members there although it was at night and they reasoned with them and moved out of that area and went to

Musonweji and returned two days later in the same ward to continue their meetings.

Thus in totality, the Petitioner was highly favoured. Page 29 of the PBD showed information that was not true because he did not know the names mentioned therein of Headman Sasaki, Donald Ndumba and Katulushi Evans and that the report did not mention him or state if he were present.

Moreover that allegation number 7 was fabricated because on the material day he had gone to Mushima Mubambe area and returned to Mufumbwe around 21 to 22 hours and since he had moved a long distance after a series of meetings he got back very tired and just slept. That he was later woken up and was told that the police wanted to see him and without hesitation, he went to see them. The police officers stood in front of his business and he saw the OIC for Mufumbwe and his superior whose name he could not remember who told him that they had received a report that members from political parties were going round harassing the election officers.

They told him to caution his people not to ever involve themselves in such a vice. In response, he assured them that as long as it came to his knowledge he would tell his cadres to refrain from such actions. Whilst talking to the OIC the police officers saw his brother in law Zakeyo Kambowa who owned a bottle store in front of his business house and said that he had been named as having harassed the officer and they said he was lucky since he had not been found at the scene as he would have been arrested. After speaking to them, the police officers left.

He told the Court that this was a peaceful moment and he saluted them for the initiative taken and the superior among the police officers said they went to him because he was a stakeholder in this election and patrols were being made to ensure that peace prevailed. On the issue of the allegation that he organized

could not declare the winner due to this and while waiting patiently, knowing that he had won after considering the number of registered voters in that polling station and peacefully waiting, the returning officer told him that they needed to go there urgently.

According to **RW1** the results of Kaminzekezeke were known to them at the time because the counting had been completed and their agents communicated to them via the satellite phone and the agent that rang him to inform him told him that the PF agent started walking out of the polling station when they saw the selection of ballot papers as he was informed that his tray was increasing whilst the one for the Petitioner had few ballot papers. After the Returning Officer had finished counting the ballot papers for the presidential, parliamentary, council chairman and councilors and the referendum he took time to declare the winner so his agents had already known the results. The election results and what he had read were saying the same thing.

Moreover that the claim that the Presiding Officer was attacked and had to run into the bush to make a call from his satellite phone could have only been proved by the said Presiding Officer and not third parties. He further stated that he was declared as MP on the 13th of August, 2016 as shown on page 1 of the PBD. That for the first time in Mufumbwe the voter turnout of almost 63% was higher than the less than 55% from previous elections he had participated in as shown by statistics from ECZ.

Thus any claims that people did not vote for their preferred candidate due to violence would not be correct as the voter turn- out in the parliamentary election was even higher than in the presidential election. He also stated that the Petitioner had distributed bicycles during the campaign period in Miluji ward to lure the electorate to vote for him and that since this was a breach of the Electoral Code of Conduct he should be barred from participating in elections and from voting for 5 years.

He then stated that he was duly elected as an MP for Mufumbwe constituency and that this Petition should be thrown out with costs and the fact that the ECZ were not party to these proceedings entailed that he was duly elected and they did a good job. He also refuted the claim by the police that he stopped them from arresting Fred Kambowa in totality because at no point did they go back to him nor give him a call out to go to police to answer such an allegation.

In **Cross Examination RW1** told the Court that he had seen PF branded mealie meal in sacks being distributed but had not brought any empty sack as a sample and did not know the number that was distributed. Further that the bicycles were distributed and Sililo received one between 5th and 10th July and that he did not have a picture of this handover.

Moreover that a Mr. Mukumbuta the PTA chairman told him he witnessed the handover of these bicycles. He also stated that there were 31,964 registered voters and 20, 199 total votes cast with a difference of 11,763. That his comment on those results and the claim that threats affected them was that in the history of Zambia and elsewhere, not everyone voted and that he did not only want his supporters to vote but according to him since Mufumbwe performed better than the presidential then it was better. He also stated that he had heard of the term rape of the mind and that if someone was intimidated and threatened they would make an incorrect decision.

He went on to state that some of the things that happened in Mufumbwe were that 6 candidates initially applied stand on the UPND ticket and that out of these he was picked and only one Mbalau Davies decided to go independent as Kiakilika did not apply from UPND and that he did not know that he was supporting any presidential candidate and that he attended the rally on 27th of July and was introduced as a candidate. He also reaffirmed that he never

spoke about the Referendum during his campaign as he only spoke of the 10 point plan and himself.

Further that he did not know the results of the Referendum and he would not be surprised to know that there were more spoiled votes on the Referendum than the actual votes for referendum in Mufumbwe. Moreover that he heard the DC say that the main point of the meeting with people from Ministry of Justice was on the Referendum and that the letter in the notice to produce was from chief Mushima who was in his constituency and the secretary produced it. That he did not threaten anyone to a point where the letter was written and that it was dated 6th August, 2016 and that he visited this area but did not know the headmen in the area as he only knew the Chief.

He also added that Kyunsu was not a headman and that when a campaign is marred with violence, intimidation and threats, character assassination, lies and falsehoods it would not be free and fair and that the campaigns were not marred with this last statement. **RW1** also stated that it was not true that he was spreading violence and that during his campaigns he had motor vehicles mounted with speakers and that it was possible for a person to record the message being spread whilst a car was moving.

He further stated that the relationship between him and the Petitioner was cordial and the pictures from the Ntongo Traditional Ceremony were taken on 26th of June, 2016 and according to him violence was denounced in the presence of other candidates because people would differ during elections and a message had to be sent to the people that this should not be tolerated.

He went on to state that it was not true that the DCs of Kasempa and Mufumbwe and the Chief were worried about the high levels of violence hence the organization of the meeting. According to RW1 there was no violence because people were not fighting and that he heard officers say that there were

cases of violence but not that they increased and that there was violence from all parties. He also clarified that it was not his position that it was okay for violence to increase in the campaign period and that he was not a violent person but he commanded cadres.

Moreover that when political leaders met they did not fight and that when the cadres met without their leaders to restrain them there was no likelihood of violence. That page 7 of the Petitioners Bundle of Documents was a Medical Report of Lasson Kandela that did not come to his attention and that the OIC did not address him on violence and neither did any other Police Officer. When referred to pages 19 and 20 of the PBD which was a police report that Marshall Mingochi a presiding officer was beaten, **RW1** stated that he was unaware of this and did not know the motor vehicles mentioned in the letter as he no longer owned a spacio and had a Toyota corolla and not a Toyota IST. In addition that his wife had owned a Maroon Spacio that had since been sold sometime in May, 2016.

He also stated that Mr. Mwendabai did not caution him but went to tell him that he had received reports that political parties and their cadres were going through the polling stations to tell the electoral officers not to rig the elections and that he should talk to his people not to get involved in such a vice to which he obliged and that there were about 5 people present but they were not using the two cars and that the police found his people refueling.

According to **RW1** he had no grudge against Mr. Mwendabai, the reserve officer, Chief Inspector Kateule nor inspector Kalumbeta who was armed so there was no reason for the police to say falsehoods against him. When referred to page 15 of the PBD **RW1** stated that the casualties there were as a result of the violence and when shown the police report of Sidney Wotela **RW1** stated that he knew this man but he did not belong to the UPND he also added that it was true that there were cases of assault in the Occurrence Books he also

added that violence was there in some cases although it was too general. Moreover that he was unaware of the attack on Marshal Mingochi the Presiding Officer. He also admitted that p7 was written by Clement Machayi the campaign manager for UPND on 28th July and that he was present during the UPND rally on 27th July, 2016 but did not hear the UPND president say that the electoral officers would rig the elections but that his party made demands that the officers mentioned in the letter should not participate in elections. He also added that the electoral officers were not threatened in the letter and that the public had pointed out their names.

RW1 told the Court that he knows **PW2 (Chief Inspector Kateule)** and that he did not speak to him on the levels of violence. Further that it was the opinion of **PW2** that all the parties were involved in violence and that he did not agree that there was a lot of violence by the party cadres from all parties and more so that after the rally by HH the violence increased.

That he did not agree that there was too much violence that they had to guard some of the electoral officers and he heard the Chief Inspector say that he belonged to the Conflict Management Committee and the general topic was that of violence in all political parties but he was unaware of that and that the representative from UPND on that committee included Mr. Luckson Ndonyo who he could recall and that he did not report back to him on what they discussed on violence.

RW1 suspected that there was a problem between the CIO and he as the reports coming from police and their dates had disparities. Psalms (PW5) said he investigated a matter where Marshal Mingochi was beaten up but **RW1** did not believe that report. The same officer stated that Independent Davies Mbalau was stoned and that suggested violence and the issue of going to rescue an election officer because he had been attacked 180 kms away was not violence according to him.

Moreover that he had a problem with **PW9** but not on a personal level and he heard the officer tell the Court that at a rally being addressed by the Petitioner at Kamanzovu, UPND cadres disturbed this meeting and headman Sasaki was involved. According to him it was reported as violence and so was the attack of Bruce Kanema.

He further stated that there was no air of violent mentality despite PW9 saying this was the position before Court and that the violence was not widespread in Mufumbwe and he did not know Officer **Kalumbeta (PW8)** and they had never differed personally who said that there was violence in his reports and that these reports together with that of PW6 and PW8 who worked together at a police station stated that UPND cadres went and grabbed the Occurrence Book from PW6 till he called for backup from other officers and that the Medical Report Form shows that Sidney Wotela had been beaten up and this was violence according to the report.

That as for the incident at the police station **RW1** stated that he could not say that it was violence since he was not there when it happened and that he would only believe violence once he saw it happen. Regarding the rally **RW1** stated that when his party President addressed it and announced the names of the electoral officers he was seated next to him and even introduced him as the UPND candidate. Thereafter he told the Council chairman that he should go to the Council and make a formal complaint for the mentioned names to be removed from the poll staff because they were partisan. That then he told them to guard the votes and turn out in large numbers to vote.

That during the rally the President did not give an order that the electoral staff should be removed and that this did not incite violence. He also added that he had heard the evidence of **PW13, 14** and **15** and that **PW13** the District Commissioner of Mufumbwe had been a member of the UPND and campaigned

... and that he was unaware that two candidates that stood for Council chairmanship had fought and were in custody.

He further stated that he knew Roy Ifwa who was a cadre who was employed as a driver of Clement Machayi's car and he was unaware that this man hit a

It was also his evidence that the violence testified about before Court was not true and according to him as a disabled person who could not run he had been meeting with officials from the PF, FDD and independent candidates. Thus if there had been a fight he would have been the first to be killed and the vehicle he was driving damaged. He also stated that he did not know a person known as Sydney Wotela.

Further that he voted in the last election from Wishimanga Primary School and that he visited a number of polling stations on the Election Day in order to assess what was going on. That he passed through Kabipupu, Musonweji, Kalengwa, Shukwe, Kikonge and Chizela and he had a breakdown near the Petitioner's house. He then asked for another vehicle and left the one he had been driving right there and using a Toyota Corolla he went to Kamabuta and then Wishimanga.

That there were 4 queues and he spent about 4 hours there and voted peacefully. Thereafter he went to Munyambala, Kashima West then back to the spot where his car had broken down around 18hours. Further that the broken down vehicle was still intact and the vehicle was pushed to BELGA. He also testified that he managed to pass though all those places because they were near each other. According to **RW3** the election was free and fair.

He also testified that there was a time when the Vice - President visited Mufumbwe and they were in Kaminzekezeke and around 19:00 hrs. They were met by PF cadres who told them that the VP would be in Kaminzekezeke and since they were there and also near their camp they were ordered to leave and go to another place. So they left and went to Kamikambi where they met the police who told them that it was not far enough from where the VP would be so they proceeded to Musonweji.

The next day they began their meetings from Musonweji then Shungulu, thereafter they held another meeting at Kabanda where they were informed that the Petitioner would have a meeting there so they left and went to Kambi Kambi and a good number of people attended their meeting. That before their meeting ended the Petitioner arrived in 2 vehicles and **RW3** escorted the Petitioner to the Respondent and the two shared a greeting. UPND and PF cadres were happy.

In **Cross Examination**, **RW3** said that there was no fighting in the ward. Regarding the affray on 30th May 2016 at Mufumbwe Civic Center it was his evidence that when it happened he was in Mufumbwe but he had not been told about this fight. Further that he had heard about the alleged attempted arson but did not know Sydney Wotela.

Further that the violence in Mufumbwe never occurred and that he was unaware that the District Commissioner of Mufumbwe had to be guarded by police due to violence. Moreover that he knew Ms. Dorcas Shipilo and was unaware that she had been intimidated and that he did not attend the UPND Presidents rally because he was in Miluji.

According to him he was not aware that 4 election officers were under constant intimidation after HH's visit and that the witnesses who told the Court that there was violence were lying and that he did not attend any meeting where headmen addressed a UPND rally in Miluji. That he did not speak about this letter from Chief Mushima Mubambe because he had seen it for the first time in Court and it was signed by a Mr. Endeni Simfukwe who he did not know.

Moreover that he was unaware that Jerome Herod had taken a complaint to the Chief and that he was unaware if headmen said what was alleged. Further that he knew Clement Machayi the Campaign Manager for the Respondent and

that to harass and intimidate people is not good and that what he did not know what he meant by the words he wrote in the letter.

In **Re-examination PW3** told the Court that he knew everything that was happening in the constituency and violence pertaining to elections and up to Election Day, did not happen and that is why he as coordinator never saw or received it.

RW4 was **Fred Mukelebai** a farmer of Miluji in Mufumbwe. He told the Court that during the campaign period he was in Miluji and that in relation to this matter he had contested as a Ward Councilor on the UPND. It was his evidence that the campaigns went well and they had good interaction with all political parties as they would all help each other whenever a challenge arose since they were working together in the same arena and he stated that in his area there was a PF camp that was close to his village and just about less than a kilometer away.

That he enjoyed the interaction they had with PF and other political parties and an example of their interaction was how he interacted with the team that went to Miluji for PF since his MP visited him once in his ward and he would get fuel from PF people and they likewise. He also enjoyed the interaction he had with the Petitioner and never got any bad comment from him. The specific person that would help him with fuel was Robby Siakondo from PF.

It is not true that there was name calling and intimidation during the campaigns as during their rallies there was no mention of UPND saying that once the Referendum was given a yes vote then gay rights would be introduced. Regarding the allegation of the Petitioner that there was violence in Miluji it was his evidence that the elections were free of violence.

That on election day at Miluji where he was a candidate he was allowed to cast his vote and on his way back he met the Petitioner and greeted him and that he went back in the evening to wait for the counting of the votes and he left the polling station after counting and nothing went wrong there.

In **Cross Examination RW4** told the Court that he told the Respondent that he was getting fuel from Mr. Siakondo of PF. That it was true that **PW11** and **PW12** attended a rally where of the UPND which took place around early August but he did not tell the Court that he attended it because he was not asked anything concerning it. That Headman Kyunsu was the Chitumbamfumu and he fell under His Royal Highness Chief Mushima.

He also added that the Respondent had a Pajero vehicle mounted with speakers going round the ward making announcements but that he was not in this car daily and throughout the campaign period so he could not say if gay rights and the Referendum were discussed.

Further that the police would know about the level of violence in Mufumbwe constituency and that he did not know that most election officials were attacked during the campaign period and that the police were also threatened and intimidated by UPND cadres. Moreover that he did not know that a Mr. Sidney Wotela was assaulted or know a Mr. Clement Machayi. The Respondent had a campaign manager who he did not know and that he had never been to Kitwe.

When shown the letter he said it came from His Royal Highness Chief Mushima who heads Miluji and that it was addressed to the headman and was a warning on intimidation and threats leading to violence. Further that he knew Herald Jerome as he contested as Council Chairperson on the PF ticket and that he only knew bits from his ward and not everything that was going on in Mufumbwe.

In **Re-examination RW4** told the Court that there was no intimidation or violence in the ward during the campaigns. The reason why I said there were no announcements pertaining to gay rights being introduced by PF via the Referendum because the vehicle rarely visited his ward due to the distance as from Mufumbwe to Miluji the distance is about 467kms so the vehicle just came to his ward three or four times and it would pick him and go playing the music and he would have meetings in other polling stations.

RW5 was **Mukumbuta Albert Kongwa** a senior church Minister and PF supporter of Miluji in Mufumbwe. That due to his age and profession he was bound to tell the truth as he was a legal settler of Miluji ward. According to him Kandendu and Bagley went and settled at Miluji after him which meant that they respected him as a senior resident and none of them would have tried to grab his land. Therefore this allegation of threatening to grab land was not true.

Further that he had seen many of such letters written by the secretary when none of them have been signed by the Chief himself thus he believes he had been impersonating the Chief. There have been other letters and he recalled a land issue where the two Chitumbamfumu Kyunsu and Kandendu gave out land to interested parties. In fact they sell it and in one instance they gave out prohibited forestry land and when **RW5** and others advised them against doing so they argued that they had powers from the Chief so they travelled to Chief Mushima to ask for the degazetting of the said land. Two days later they returned with a similar letter that indicated that land was de gazetted and this has been an issue. That he doubted all this while because to his knowledge land is never de gazetted by the Chief and that he was not threatened to leave his land if he didn't vote for PF.

He also testified that Miluji was peaceful during the campaigns to a point where people from all parties were interacting, no body fought, was beaten up or insulted and people walked about even at night. Moreover that the Petitioner hired a motor bike from the UPND Youth Chairperson (Simbala) to travel from Miluji to Shimpandanga. Thus if there were terrible differences he would not have agreed to hire out his motor bike to him and that he did not hear any announcements being given that gay rights would be introduced through the referendum.

Moreover that one day he went out to look after his herd of cattle around 18.30 hours and on his way back his children informed him that the Respondent had been at the school grounds and had addressed a short meeting which was sparsely attended because a message had reached them that he would come but he did not arrive on time and people went back home and that there was no other meeting by the Respondent in Miluji.

Regarding the distribution of bicycles **RW5** recalled that two weeks before the polling day, the Petitioner went to Miluji and conducted a party officials meeting which he attended and party officials began to complain of the distances they had to cover in order to campaigns and the Petitioner accepted to bring them bicycles on a certain date.

However, due to logistical problems the bicycles were only delivered on another day and a list was prepared for the recipients of the bicycles and his name was included since he was a staunch supporter of PF and whilst out for another meeting for 3 or 4 days the bicycles were delivered and when he returned he found a bicycle at his home and he even bought the missing spares and upon his return he went to Gift Siyoto's village to complain why he had been given such a bicycle and he told him that he was fortunate to have even received one because many people including those not listed went to scramble for them and

that they had not even been assembled so they required assembly and in this process certain parts went missing.

The other names on the list were Gift Siyoto, Sililo Mukosiku and Mutangu Mukumbuta (his son), Mutangu Lunda, Pelekelo Mwitumwa and the Chitumbamfuma himself and many others. His comment on Page 10 of the RBD was that it was a photograph of himself with the said bicycle and he tendered it as part of his evidence as p8. Further that the general mood of the campaigns and the turn out at the polling station in Miluji was much bigger than in previous elections and bicycles were not delivered two weeks before elections.

That it was difficult to convince people to vote for PF as they wanted change and that in 2012 the Petitioner resigned from MMD to join PF. He told the Court that the Vice president at the time went to Miluji moving from Kabanga to Shimpandanga and finally went to Miluji where he promised a number of things such as a bridge crossing Lalafuta river to Miluji, a network tower, an extension to the rural health post and a secondary school. People voted for the PF hoping that they would fulfill these promises as a ruling party and the Petitioner won.

These projects remain unfulfilled and in conclusion he wished to say that elections were peaceful and that the Petitioner only lost because people needed change.

In **Cross-examination RW5** stated that before 2012 he belonged to UPND and he still had friends there. That Headman Kandendu and Kyunsu belonged to the Village Lands Committee whose duties were to give out land on behalf of the Chief and they had power over the subjects in matters of land.

He also added that there was a rally that the Respondent addressed but he did not attend it so he did not hear him nor Headman Kyunsu speak there. That he knew Endani Simfukwe and did not know the circumstances under which he wrote the letter and that he knew Herald Jerome who was the PF candidate for the constituency chairmanship. Further that **Robinson Siakondo (PW12)** and **Brian Solochi (PW11)** were PF cadres from PF.

He also stated that he was not aware of the circumstances under which the Chief instructed him to write a letter and had no proof that it was not written by **PW10** and he did not know that the PF had a policy to deliver bicycles between 25th February and 20th April, 2016 and that the distribution of bicycles did not reach Mufumbwe in March and they were not seen then.

It was his evidence that he received no report on violence and did not witness it and that if threats are present then elections would not be free and fair and that he was unaware that election officers had been threatened to be removed. That he knew that Clement Machayi was campaign manager for UPND and was and was unaware that three of these officers have been transferred away from Mufumbwe. Neither was he aware that Ms. Dorcas Shipilo had to seek police protection. That people report affrays and threats to police who would be better placed to tell the Court on the nature and level of violence.

In **Re- examination RW5** told the Court that he was offended about the accusation of being told that he was a traitor because even the Petitioner knew him better as a true supporter of PF and that the last time he interpreted for the Respondent was 2006 and he (the Respondent) did not contest in 2011 and in this election he interpreted for the Petitioner.

Moreover that he was among the first in the queue of Mr. Masumbas most trusted party members and it was not true that he was not given a bicycle and went away complaining. That the truth he knew was that there were no threats

and intimidation and elections were free and fair. According to him the bicycles were initially promised two weeks before the elections and that he did not make any reports on threats and intimidation in relation to land to the Petitioner as he only phoned him to inform him that Forest Reserve land was being given out without official allocation.

RW6 was **Ndonyo Luckson** of Mufumbwe who in relation to this election was a Coordinator and district chairman for the UPND. He told the court that during the period of the campaigns for the just ended elections he was in Mufumbwe Constituency whilst Mr. Kayona Jacob was the Constituency Coordinator. When referred to the report of Mr. Felix Mpasela on page 19 to 20 of the Petitioner's Bundle of Documents he agreed that the description that he was the UPND Chairperson was correct. That it was alleged that the report was received on 11th August 2016 between 23:40 and 08 hours and according to him at that time he was at the totaling Centre and that he did not know what was happening at Kangombe Polling Station on that date or at that time because he was busy seeing the results after people had already voted.

That when it came to campaigns he visited all the 16 wards in the constituency and that he was able to confirm that there were no elections beatings, break ins and other offences being committed during this time. That the message being spread to the electorates in Mufumbwe with regard to the Referendum was being done by the ECZ and not all political parties and it was not true that the UPND were going round in a motor vehicle mounted with speakers announcing that "if people voted for the Referendum, they would be voting for the introduction of Gay rights." That their campaigns were to convince the electorates to vote for their candidates.

Moreover that at no time did they go around the Constituency calling the Petitioner a thief or frustrating the campaign rallies for the PF. On the violence increasing during the campaign period it was his evidence that there was no

violence and the atmosphere that he found in all the wards that he visited during the campaigns periods and the election was calm and that he knew a Sydney Wotela as a call boy at the station and would sell them us bus tickets. That the report of Sidney having been beaten up was not attached to the UPND and that he attended the Rally held in Mufumbwe by the UPND President HH and that he instructed the Council Chairman to put a formal complaint against the officers who were mentioned and that he told his supporters to go and vote in numbers and to guard or protect their votes as apparently he had information that the PF wanted to steal their votes using the officers.

That exhibit P7 had his phone numbers which are 0966562364, 0979562364 and 0954068064 and that it came from his office as it is. That the original letter head looks had a red emblem and all the letters are supposed to be in color even the details The United Party for National Development, the Chairman were supposed to be in color. According to him any document not meeting these specifications would not be an original. Regarding the date stamps on the letter he stated that there were contradicting dates there as the letter was written on 28th July but it was certified on 3rd July.

On the allegation of the threatening paragraph **RW6** stated that there was no seriousness in it as it was just a reminder and that there was no mismanagement of elections in Mufumbwe and that he had known **PW14** for more than 15 years as she was his sister in the New Apostolic Church where he was her shepherd and that when he was councilor for Mufumbwe for 2 terms as councilor for Mufumbwe.

He also stated that he knew she stayed in Maikulile compound and that she was not living in fear and that to get to her home, work place and the church she passes through the business Centre and the station. He also confirmed that **PW14** would attend Church services and would walk home.

Further that her home was a place where the women and sister's fellowship in the church would meet with him as the coordinator and **PW14** as the secretary who was responsible to communicate the programs they had and each time they would consult to find out how far they had gone in their preparations and that was during the election period. That during the times he went to her home he did not find any policemen guarding it and he was sure because **PW14's** home was like his and he stayed near it. According to **RW6** the elections were free and fair and all the political parties that participated had an equal platform to campaign and the electorates made a choice to vote for the Respondent and the atmosphere was okay as they were mingling with the PF cadres and had no misunderstandings.

According to **RW6** the 11,000 people from the registered voters that did not vote was not a big number because some were on transfer, others were dead and some were sick.

In **Cross Examination RW6** told the Court that the distance from Kashima East to the Boma was 45 kilometers and that the village where he stayed was not in the Mufumbwe Boma but in Kashima East and he maintained before Court that he attended the New Apostolic Church with **PW14**. He also stated that **PW14** was like a Godchild to him as he was her shepherd and that according to the way he knew her she was not a crook or a liar but he did not trust her at this point only in church.

He also added that he visited **PW14** during the campaign period to discuss her state of mind and that she herself would be better placed to talk about it and that he knew Chief Inspector Kateule and the District Commissioner for Mufumbwe but that he did not recall when he spoke to her about her feelings and that he was unaware that the only time she spoke of him in her testimony

was when she said that he was a member of the Conflicts Management Committee.

When shown the Occurrence Books particularly on 10th of August, 2016 **RW6** stated that the officers left at around 23.50hrs and only returned on 11th August early in the morning but that the entry was made at 02:00 hours and the officers proceeded to Kalambo and that the name Marshall Mingochi was indicated to show the person the report related to. RW6 was then referred to some instances of violence beginning with the police report on page 8 of the PBD where the police indicated that there was an affray at the civic center and Elijah Munyompe candidate for the United Party for National Development standing in Mufumbwe as Counsel Chairman was involved in a small scuffle in public with aspiring independent candidate Bruce Kanema and he said it was violence.

He was also shown the Medical Report on page 7 and he admitted that when the police issue a Medical Report to someone it means there are injuries and on page 11 of the PBD he read that a Noah belonging to male Davis Mbalau on the 29th of July, 2016 was maliciously damaged but stated that he would not know if this was violence and he also stated that it was not his position before Court that if violence occurred somewhere but it did not involve the UPND then there was no violence. On the issue of the Rally addressed by President Hakainde Hichilema on 27th July, 2016 he admitted that the President issued an instruction that the officers whose names he was reading to the crowd should be removed and that p7 was authored by Clement Machayi the campaign manager for UPND and that he wrote it a day after the rally.

He also added that he was unaware that **PW14** according to the evidence that she gave was not free in Mufumbwe and lived in fear to date. He said that she attended church every Sunday during the campaign period. Moreover that since he had stated that the stamps on the letter were contradictory so it did

not carry serious threats and that he did not think it was just human error. Moreover that he participated in elections in 2011 and the election of the Respondent was nullified in 2010 whilst **RW6** was one of the people that were arrested and detained for that violence. That it was not his position that the police managed the violence during the campaign period and he confirmed that when there are threats during an election it would not be free and fair.

In **Re-examination RW6** told the Court that there were no threats and intimidation in the last elections of Mufumbwe and that he doubted the evidence of PW2 because he sat with him in the Conflict Management Committee where all the electoral conflicts are tabled and that they did not receive any violent report referred to the police as a party (UPND). Moreover that he knew that Dorcas Shipilo was walking freely in Mufumbwe, and thereafter came to tell the Court lies. Regarding page 19 of the PBD and the OB book, his comment was that the time suggested that Officer Mpasela wrote it on 11th August, 2016 at 23: 40 hours.

On document 8 on Mr. Munyompe he stated that there was no mention of the UPND in it and the reason why the fight erupted was also not elaborated but that it happened in May, 2016 but the report was written on 27th September, 2016. That the medical report stated that the reason for the injuries was an accident and that on the issue of where he lived he stated that he used to be in Kashima which is his village but he is now currently in the township and that he voted on 11th August and went to the Totaling Center at Civic Center on 12th August, 2016 awaiting the results and that he only left it the next day around 22 to 23 hours after the announcement of the winner. Thus from about 18:00 hours on the 11th of August until about 12:00 hours on the 12th of August he was at the Civic Center.

RW7 was **Ndongo Kelvin** a peasant farmer of Kashima East Ward in Mufumbwe. He stated that from about May to 11th August, 2016 he was in

Kashima East Ward and that he knew Kamazovu Polling Station which is in Kashima East Ward and that it had been alleged that on 27th July, 2016 UPND cadres disrupted a meeting being held by the PF. According to him on 27th July, 2016 around 17hours the Petitioner and his entourage held a meeting where so many people gathered and he was in attendance and did not recall anyone having thrown stones.

During the meeting **PW1** asked why his relatives the Lundas hated him and that on several times when he stood in an election they did not vote for him and he told them that even if they did not vote, he had already gone through. That two elderly men Mr. Musumali Mr. Laban also stood and asked him why he had gone to the area if he knew they would not vote for him and the meeting ended at night. Further that page 29 of the PBD documents mentioned that there was a fight between the UPND and the PF in a report that was written by Felix Mpasela and he said that the disruption took place on 22nd of July, 2016.

However that the events were not falling into place because the Petitioner's Bundle of Pleadings stated that the meeting took place on 27th July, 2016 whilst page 29 of the PBD showed that the meeting took place on 22nd July, 2016. That the sequence of events outlined was the same however and in his view the evidence that came from the police was false and was even written before the meeting at Kamanzovu took place. Further that the meeting of 22nd July, 2016 did not even take place and all the campaigns were conducted in a peaceful manner and the document at page 4 of the RBD showed that the number of people that voted was 342. He also added that there were 400 registered voters in Kamanzovu and he knew because he had been a Councilor for 5 years and it was part of his duties to know this.

According to the document only 58 people did not cast their vote, hence the voter turnout was very good and if someone asserted that people never voted because there was violence, threats and intimidation he would say it was false.

Moreover, that their friends who were supporting PF realized that they never had supporters and they opted to campaign with their councilor leaving out their President and MP and that this was clear from the evidence at Kamanzovu Polling Station where the Petitioner got 19 votes, the Councilor Tedious Malachi PF got 140 which he knew because he was the campaign manager at the ward.

In **Cross Examination RW7** told the Court that Felix Mpasela said the rally took place on 22nd July whilst the record showed the date when it occurred as 27th but that this did not mean that he was able to pre determine what would occur on 27th July and that he too makes mistakes, it was human and the officer probably made one. Moreover the claim that he did not attend the rally at Kamazovu because their president HH was holding a meeting at the BOMA was untrue because **RW7** did not attend it. Further that whilst their President was at the boma holding a rally they made another one at Kamanzovu on the same date.

There was no re-examination.

RW8 was **Fred Kambowa** a peasant farmer from Mufumbwe district. His comment on the statement he read from the report on pages 19 and 20 of the PBD was that he did not do anything wrong and that it was on 11th August at around 23 hours when the Officer in Charge at Mufumbwe police station and 2 other officers he did not know found him selling beer at his at his bottle store.

That they informed him that they had received reports of noise at the Respondents residence and at the bottle store and that was why they had gone there to check and when they did so they told him that it was all clear and they were leaving. He also testified that he knew Officer **Felix Mpasela (PW9)** and the CIO as he lived in the same neighborhood with the latter although on that particular incident of the visit Officer Felix Mpasela was not amongst the officers.

Moreover that there was a certain day when Mr. Felix Mpasela summoned him to his office and asked him if he was the one selling stories to the Office of the President as he had heard that these officers went to his shop daily so he spent a while with him and told him that he was going to tell Mr. Matonge who was an Office of the President officer and Mr. Mpasela retorted and told him that that since he started fighting with officers in the security wings he should not complain about what would happen to him and that was why he was surprised that this officer who was not present during the incident when the officers visited him could come and testify as such in Court. He also added that he had lived in Mufumbwe for 20 years and it was not true that during the campaign period the violence increased and was not manageable. Lastly he stated that on that particular night he was not put into a motor vehicle where the Respondent removed him by force from police custody.

In **Cross - Examination RW8** told the Court that the CIO was his neighbor and that Felix Mpasela could not speak about this event because he is the one who threatened him and he admitted that another officer was on duty in Mufumbwe somewhere around 23:00 hours so it is he and the Officer in Charge who booked out to go to him and not Mr. Mpasela. Moreover that he was unaware that that the officers were acting on the report after some fracas at the polling station and they were chasing two motor vehicles, one was white car and the other maroon and the two ended up at their camp where Mr. Kamondo was. Moreover that he did not know that it was after they missed him at the polling station that they followed him because they had now received information naming him and they followed him and that he did not know about the two vehicles.

That he could not recall anything on the events that transpired in the early hours of 11th August, 2016 and he refuted having been with Mr. Kamondo and the police officers around 01hours in his yard. He maintained that he was not

present. When shown the Occurrence Book on the 10th of August, 2016 **RW7** read the time indicated in the report there and that the date indicated was 13th of August, 2016 at 02hours. He also added that at no point did the officers attempt to put him into a car.

In **Re-examination RW8** told the court that his name had not been mentioned in the occurrence book and it did not even state that he was arrested, put in a motor vehicle then taken out by cadres. Further that the report at page 19 was dated 11th of August, 2016, and **Chief Inspector Kateule** the Officer In Charge Mufumbwe Police Station and two officers found him at his bottle store on 11th August around 23:00 hours my Lord.

RW9 was **Roy Ifwa** an unemployed resident of Mufumbwe. He testified that on 4th August, 2016 around 19hrs he moved from the Boma to Kalambo whilst driving a Nissan Registration No. AAV 1211 and that on his way before he reached a corner he saw some vehicle lights approaching in the front of his vehicle and as the two vehicles were about to bypass there was a bit of a collision and he couldn't stop there since it was night time and only stopped at Kamabuta where he phoned the people at him who picked him up with the police.

Further that he never saw a person but only saw the vehicle with which he collided and he proceeded to go and stop where he was going. Page 9 of the RBD showed the vehicle he was driving and it showed some marks on the vehicle and that the side mirror had come out. That if it was disputed he would tell the court that this was the said vehicle he was driving and he had to park it at the police station.

Moreover that **Lasson Kandela (PW4)** alleged that he said he would reverse and finish him off, but he did no such thing and did not even know that a person had fallen and that according to the sketch plan the place indicating BB

was higher than the other side. Further that although Lasson Kandela claimed that he stopped by the roadside, it was not true because there is no pavement and one side was higher than the other.

That the person who was coming from the opposite direction did not follow the lane he came in and the point of impact was actually where there it was indicating BBB on the sketch plan. In addition that although the dotted lines shown as DDDD were referred to as skid marks where the vehicle stopped on the sketch plan he did not stop on this point.

He also stated that the document at page 18 in the PBD showed that he was charged for dangerous driving and later paid for admission of guilt because he collided with another motor vehicle. Moreover that the make of the vehicle he was alleged to have been with was a Toyota Hilux, when he did not drive one. Further that the owners of the one he was driving were the North Western Sewerage and that the accident that happened was not a fight as it just happened. He also clarified his age as being 38 and not the 26 that was indicated by the police report on page 16 of the PBD.

In **Cross Examination RW9** told the Court that he had not apologized to the person that was injured and that he went to ask the Traffic Officer and he told him he did not know him and had not made an effort to help or pay his medical bills. That he had not seen AAV 1211 on the photo on page 9 and that the vehicle there had no UPND stickers.

According to him the point of impact was on the white line.

There was no Re-Examination.

This was the close of the Respondents case.

SUBMISSIONS

Both Counsel for the Petitioner and Counsel for the Respondent filed written submissions into Court which I have considered together with the evidence on record.

THE LAW

Section 97 (2) of the Electoral Process Act No. 35 of 2016 deals with the grounds upon which the election of a Member of Parliament shall be void if proved to the satisfaction of the trial court. It states that:

“The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

- (a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—***
 - (i) by a candidate; or***
 - (ii) with the knowledge and consent or approval of a candidate or of that candidate’s election agent or polling agent; and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;***
 - (b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or***
 - (c) the candidate was at the time of the election a person not qualified or a person disqualified for election.***
- (3) Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election***

petition, and the High Court or a tribunal further finds that such candidate has proved that—

- (a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;*
- (b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and*
- (c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;*

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

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

The above provision essentially shows that the grounds for nullification of a petition are found under Section 97 (2) (a) and (b) of the Act. The current position is that a malpractice must be such that it is capable of influencing the outcome in an election in that the majority of voters either in a constituency as it is in this case, district or ward will be prevented from voting for a candidate of their choice.

Regulation 15 (1) (a) and (c) of the Electoral Code of Conduct of 2016 states that:

“A person shall not—

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

(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election;”

The law on Undue Influence comes from Section 83 (1) (a) and (b) of the Electoral Process Act No. 35 of 2016. It states that:

“83. (1) A person shall not directly or indirectly, by oneself or through any other person—

(a) make use of or threaten to make use of any force, violence or restraint upon any other person;”

The Law on obstructing an election officer is found in Section 94 (1) (a) and (b) of the same act. It states that:

“A person shall not—

(a) willfully delay or obstruct an officer in the carrying out of that officer’s duties and powers under this Act; or

(b) assault an officer in the lawful exercise of that officer’s duties and power under this Act.”

Burden and Standard of proof

It is trite law that the burden of proof in an election petition lies with the petitioner. In **LEWANIKA AND OTHERS V CHILUBA (1)** the Supreme Court stated that “parliamentary election petitions are required to be proven to a

standard higher than a mere balance of probabilities". In **MABENGA V WINA AND OTHERS (2)** the Supreme Court said that:

"an election petition is like any other civil claim that depends on the pleadings and that the burden of proof is on the challenger to that election to prove "to a standard higher than on a mere balance of probability; issues raised are required to be established to a fairly high degree of convincing clarity".

Further in **MAZOKA AND OTHERS V MWANAWASA AND OTHERS (3)** the Supreme Court stated:

"...that for the petitioners to succeed..., it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of voters."

The same principle has been followed in other commonwealth jurisdictions such as Kenya where the Supreme Court of Kenya in **RAILA ODINGA AND OTHERS V INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION AND OTHERS (4)** states thus at page 75:

"But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof

should in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question”.

In the Indian presidential election case of **SHRI KIRPAL SINGH V SHRI V. V. GIRI (5)** the Supreme Court of India stated that:

“There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence which leaves no scope for doubt as to whether they have done so. Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the Court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice”.

In my view the standard of proof is generally higher than the ordinary balance of probabilities because the subject matter of the petition is of critical importance to the welfare of the people and their democratic governance. The duty is therefore on the petitioner to bring cogent evidence before court to prove his allegations on the required standard of proof. Moreover, the allegations made in the petition once proved must substantially affect the election results otherwise the election ought not to be declared void.

A Petitioner has a duty to adduce credible or cogent evidence to prove his allegations on the requisite standard of proof; and that the evidence must be free from contradictions and truthful, so as to convince a reasonable tribunal

to give judgment in the party's favour. On both principle and on authority, I am convinced that the allegations made in the Petition if proved must affect the results of the election in a substantial manner. Without a bearing on the result, the election cannot be avoided.

In the Ugandan case of **NABUKEERA HUSSEIN HANIFA V KIBULE RONALD AND ANOTHER (6)** it was said that:

"In an election Petition, just like in the 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 was also stated that:

"....it would be difficult indeed for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil; further that; "in election contests of this nature, witnesses most of them motivated by the desire to score victory against their opponents deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain "and that "... the evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source".

I cannot agree more with these observations.

My understanding of the law is that in an election Petition the Electoral Body in our case the Electoral Commission of Zambia must be a Respondent. No explanation was given to the Court by the Petitioner why the Electoral

Commission of Zambia which conducted the election which he was challenging was not joined to the action.

THE ISSUES

From the pleadings and evidence it seems that six main questions arise for decision:

1. Whether the Respondent and his polling agents told the electorates that gay rights would be introduced into the Constitution through the Referendum if it received a yes vote from them.
2. Whether the Respondent and his agents published false statements and assassinated the character of the Petitioner by spreading a message that he was a criminal, thief and convict.
3. Whether there was widespread violence, intimidation and threats in the constituency of Mufumbwe that the majority of voters failed to elect the candidate they preferred.
4. Whether there was undue influence from the Indunas during the campaign period to sway the electorate from voting for the Petitioner.
5. Whether the election officers who worked for the ECZ were barred from performing their duties in the elections.
6. Whether there were any corrupt or illegal practices which would be sufficient ground to nullify the election.

I will deal with each issue separately in the light of the evidence adduced before Court:

1. THE REFERENDUM

The Petitioner (**PW1**) came before this Court and alleged that the UPND told the electorates that gay rights were to be included in the Bill of Rights via the Referendum. Evidence from **PW1** was that he had heard Clement Machayi whilst in a motor vehicle of the UPND that was mounted with a Public Address System going round campaigning and making announcements that the voters should not vote yes in the Referendum as doing so would entail the introduction of gay rights in the Constitution. He also stated that he heard the Respondent address people at Chizela market where he spread the same message.

Evidence on the Referendum also emerges from **PW10 (Endani Simfukwe)** who stated that a person called Herald Jerome complained to the Chief that people in Miluji were being told by the headmen that if they voted for the PF and voted for the Referendum they would have their land withdrawn from them and that they would be allowing gay marriages.

The evidence by **PW10** is clearly hearsay and therefore unreliable and inadmissible.

There is the evidence of **PW11 (Brian Solochi)** that whilst in Miluji he saw the vehicle of the Respondent and people were being told that if they voted for the Referendum then they would be allowing gay rights. The testimony of **PW11** was that a UPND rally or meeting was held on the second day after he (**PW11**) and **PW12** arrived in Miluji to campaign for the Petitioner and the PF but in Cross Examination he said that the rally took place on a date he could not recall, leaves a lot to be desired. Still during Cross Examination **PW11** stated that he and **PW12** were in Miluji from 13th July to 10th August, 2016. It follows that if the UPND rally which he says he listened to while hiding behind a shop took place as alleged by **PW11**, it was held on 14th July, 2016.

I find that no UPND rally or meeting was held in Miluji on 14th July, 2016 as all evidence on the record shows that the rally held and addressed by the Respondent in Miluji was in early August, 2016.

Brian Solochi's demeanour when he was testifying and the kind of evidence he gave shows that it is highly doubtful he was telling the truth and I treat his evidence as such. During his evidence in Chief he was testifying as though he was with someone else when he was listening to the Respondent and Headman Kyunsu address the UPND rally. At page 256 of the record of proceedings he testified thus:

"When we had reached at Miluji as PF cadres... the second day... We thought of going to speak to the people according to the job that we had followed. We had found at Miluji Central there was a meeting for UPND. We were putting on the PF regalia and we thought of not reaching the meeting place of our friends. We stood at a distance listening my Lord. My Lord having listened to the words that were spoken they brought fear in us and during the time of our campaign we were filled with fear".

But in cross examination PW11 said that he was alone when he was listening to the UPND rally from behind a shop on the second day after they arrived in Miluji. That PW12 remained at the PF camp.

PW11 was also not certain about what time the UPND rally or meeting took place. In cross examination he firstly said that it was in the afternoon and then that it was in the evening. Later still he stated that it was in the afternoon.

There is also the evidence of **PW12 (Robson Siakonda)** that 4 days before the election the Respondent addressed another meeting at Miluji and he heard the Respondent tell the people not to forget what they had been told on the

Referendum and that they should vote wisely. In cross examination **PW12** testified that he attended the meeting addressed by the Respondent in spite of the fact that it was a meeting of UPND supporters who knew him and whom he feared. In his evidence in chief **PW12** told the Court that both he and **PW11** were filled with fear and could not even start field work. I do not therefore see how he could attend a UPND rally at which people he feared were in attendance.

The Respondent on the other hand stated in his evidence that the allegation that he and other independent candidates had told a lie about the Referendum was false as his campaigns were issue based. He refuted having mentioned the referendum in his campaigns and that as a matter of fact even when he paid a courtesy call on chief Mushima he did not raise any concerns on the same and neither did he do so in the letter brought to Court by **PW10 (Endani Simfukwe)**.

RW2 (John Mbangu Kalyata) an aspiring candidate as Councilor for the PF also stated that he did not hear what the UPND were saying apart from the Electoral Commission of Zambia who were sensitizing residents in the community and that he never heard the UPND say anything about gay rights and the Referendum because he was busy with campaigns. **RW4 (Fred Mukelebai)** who contested as a ward Councilor on the UPND ticket told this Court that in the campaigns there was no mention of the UPND saying that if the Referendum was given a yes vote then gay rights would be introduced and that since Miluji was far away from Mufumbwe boma the campaign vehicle rarely visited his ward due to the distance of about 467kms so the vehicle just came to his ward three or four times and it would pick him and go round playing the music and not talk about the Referendum.

I note that the Petitioner raised the issue of the Referendum but he did not prove it to the required standard that indeed the Respondent and his UPND

I have also noted that the letter produced in court by **PW10** did not make mention of the Referendum as an issue that the Chief was concerned about and **RW1** also confirmed this in his evidence when he said that the Chief did not even make mention of this when he paid a courtesy call on him.

Mr Bwalya submitted that the Petitioner's evidence was duly corroborated by **PW11** who explained that on the Referendum question the Respondent and his campaign manager Clement Machai were going around the constituency in their campaign motor vehicle announcing that the Petitioner and the PF were advocating for gay rights. I do not accept this submission because **PW11** never made reference to Clement Machai in his testimony. M Bwalya also submitted that the evidence of **PW11** and **PW13** fully corroborated the Petitioner's evidence. I do not accept this submission as I do not consider that the evidence of **PW11** is credible for the reasons given above while the evidence of **PW13** is hearsay again for reasons to given below.

Mr Katolo submitted that the evidence of **RW1,RW2,RW3,RW4,RW5** and **RW6** was not shaken in cross examination and neither were the witnesses discredited in cross examination. I agree with this submission and confirm that I have no reason to doubt the evidence of the Respondent's witnesses to the extent that they stated that the Respondent and UPND campaign team did not talk about the Referendum because it was a government programme.

I also agree with the submissions of Counsel for the Respondent that indeed all the witnesses called by the Petitioner except for **PW11** testified that they voted freely and for a candidate of their choice and were not prevented in any way by this issue and that the Petitioner also conceded in cross examination that the people of Mufumbwe were capable of exercising their own independent decision to vote for a candidate of their choice.

Moreover I also note that the Petitioner failed to bring to Court witnesses who were named in allegation number 1 (ii) at page 3 of the Petition who would

testify that they heard the UPND candidate Elliot Kamondo speak on gay rights in the whole of Mufumbwe constituency. The two Independent candidates, Webby Iputu, Ben Mufuka, Malichi Fedious, Kalindu Peter and Justice Kamonge were to testify on behalf of the Petitioner. None of these individuals were called to testify. Malichi Fedious, Peter Kalundu and Davies Mbalau were listed as Petitioner's witnesses on the List of Witnesses filed into Court on 3rd October, 2016. No explanation was given to the Court on why these individuals were not called as witnesses. If the two Independent candidates had been called as witnesses they would have been more credible as they had no interest to serve since they were independent candidates.

The Respondent contends that deliberate failure by the Petitioner to call witnesses that were mentioned in the Petition and listed as witnesses on the Petitioner's List of Witnesses should move the Court to draw adverse inference against the Petitioner. Mr Katolo drew my attention to the case of **MC ILVENNA V VIEBIG (7)** where Sigurdson J stated as follows regarding the drawing of an adverse inference for failure to call witness:

“ In particular the judge should consider whether there is a legitimate explanation for failing to call witness, the witness is within the exclusive control of the party or is equally available to both parties the witness has key evidence to provide or is the best person to provide the evidence in question. In a case before a jury, the trial judge should charge the jury that it is appropriate to infer that a failure to call material evidence uniquely available to a party was an indication that such evidence would have been unfavourable to that party”.

As no explanation was given to the Court by the Petitioner on why the said individuals were not brought to testify and particularly the 2 Independent candidates Davies Mbalau and Watson Kyakilika who I consider to be the best

persons to provide the evidence in question, I hereby draw the adverse inference that if the named individuals were called as witnesses for the Petitioner they would have stated that, the Respondent did not make any statement of gay rights in relation to the Referendum.

Another case cited by the Respondent's Counsel on adverse inference is the South African Case of **TSHISHONGA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER (10)** where it was held that;

“ But an adverse inference must be drawn if a party fails to testify or Place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him and even damage his case.”

This case to is on point.

In my judgment there was no evidence to substantiate the allegations in particulars 1(i) and 1(ii) of page 3 of the Petition that during the campaign period the Respondent and two (2) Independent candidates namely Davies Mbalau and Watson Kyakilika used lies against the Referendum in the entire Constituency and that the Respondent and the said Independent candidates told the electorates that the rights which were to be included in the Bill of Rights via the Referendum contained gay rights and as such the PF was not to be voted for. The Petitioner has not proved these allegations to a fairly higher degree of convincing clarity. These allegations fail.

2. PUBLICATION OF FALSE STATEMENTS AND ASSASSINATION OF THE PETITIONER'S CHARACTER BY THE RESPONDENT /DEFAMATION OF THE PETITIONER

The evidence on this allegation comes first from the Petitioner who told the Court that the Respondent's campaign message was to the effect that the Petitioner was a thief despite the Presidential pardon of his conviction and that he misappropriated funds that were meant for the roofing of the Shukwe and Munyambala Primary Schools in Mufumbwe. **PW1** also told the Court that the independence of the voters was highly compromised due to the campaign message that the Respondent was disseminating to the people who were made to believe that he was a criminal, had stolen cash and the iron sheets. **PW11 (Brian Solochi)** a PF cadre also told this Court that he had heard the Respondent tell the electorates during a rally that "the person (PW1) coming to cheat you is a thief and a criminal and if you vote for him then you would have just wasted your vote". As already indicated I doubt if **PW11** told the Court the truth. **PW12 (Robson Siakondo)** also stated that he was told by **PW11** that 2 days after they arrived in Miluji the Respondent during a meeting said that the Petitioner was a thief, a criminal and would soon be taken back to prison. **PW13 (Masela Sekeseke Chinyama)** testified that she was informed by Ex – Chief Munyambala and his people that the Respondent had held public meetings in his area where he alleged that the Petitioner and the Chief had misappropriated funds received from the Government for rehabilitating the roof of Munyambala Primary School. Further that the Petitioner had also stolen the money for rehabilitating other schools which experienced similar disasters.

The evidence by **PW13** is clearly hearsay and therefore unreliable and inadmissible.

The Respondent in rebuttal stated that neither himself, his agents nor servants defamed the Petitioner and or brought his name into ridicule. He also added

that at no time when they played their campaign songs did they defame any candidate and that he was perplexed that he was accused as having alleged that the Petitioner stole and misappropriated the funds for the rehabilitation of the two schools. **PW3 Jacob Kayona** told the Court that he was the one who used to drive the UPND campaign vehicle that was mounted with loud speakers and that he went to all the sixteen wards of Mufumbwe Constituency. He stated that they were not using the information about the Petitioners incarceration to tell the people that he was a thief. He said that the Petitioners incarceration was announced through the radio. **PW3** also testified that after his release from Prison the Petitioner went to Mufumbwe and went round telling the people that he had been vindicated from his problems. The Petitioner organized a ceremony which **RW3** attended. **RW6** who was **Ndonyo Luckson** the Coordinator and district chairman for the UPND stated that at no time did they go around the Constituency calling the Petitioner a thief.

Counsel for the Petitioner submitted that the Respondent was spreading falsehoods to benefit himself knowing the reaction of the community and that he gave no proper defence to them.

Counsel for the Respondent submitted that at no time in their evidence before Court did any of the police officers assert that the Petitioner laid a complaint that the Respondent had committed a criminal offence by breaching the provisions of the Code of Conduct by allegedly calling the Petitioner a thief and neither did he file a similar complaint before the Conflict Management Committee.

I agree with the submissions by Mr. Katolo that the allegations that the Respondent's campaign message was to the effect that the Petitioner was a thief despite the Presidential pardon against his conviction and further that the Petitioner stole money meant for rehabilitating Munyambala School and Bulobe Primary School is anchored on the alleged breach of the provisions of Section

15 (1) (c) of the Code of Conduct of the Electoral Process Act No. 35 of 2016 which provides as follows:

“15. (1) A person shall not –

...

(c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election:...”.

In terms of the provisions of Section 15 (2) of the Code of Conduct, any breach of the provisions of Section 15 (1) is not a basis for avoiding an election but the penalty is provided as follows:

“15 (2) A person who contravenes subparagraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both”.

As Section 15 (2) of the Code of Conduct makes it a Criminal Offence to breach the provisions of Section 15 (1) of the Code of Conduct, the Petitioner is required to prove the allegation to the Criminal standard of proof, namely proof beyond reasonable doubt.

I have carefully considered the Petitioner’s evidence and the evidence of his witnesses on the allegation of publication of false statements and the assassination of the Petitioner’s character by the Respondent. It is clear from the evidence of the Petitioner himself and that of the Police Officers namely; **PW2 Chief Inspector Steven Kateule, PW3 Inspector Rodgers Shambala, PW5 Constable Psalms Kamwengo, PW6 Constable Chaanza Sichande, PW7 Constable Paul Makina, PW8 Constable Kayula Kalumbeta and PW9 Inspector Felix Mpasela** that none of them testified that the Petitioner laid a complaint to the Police that the Respondent had committed a Criminal Offence

by breaching the provisions of the Code of Conduct by allegedly calling the Petitioner a thief. No Occurrence Book record or entry was laid before the Court in this regard. Further the Petitioner never testified to the effect that he had filed a complaint with the District Conflict Management Committee that he was being called a thief by the Respondent.

I am surprised that the Petitioner raised this allegation because the Petitioner admitted under Cross Examination that when he was released from prison following the Presidential pardon, he went to Mufumbwe Constituency and went round the Wards informing the electorates that he had been released from prison. He admitted that he is the one who informed the electorates in Mufumbwe about his incarceration. The Petitioner agreed that anyone who talked about him being a thief would merely be repeating what he himself told the people of Mufumbwe.

I accept the submission by Mr. Katolo that the Petitioner failed to bring to Court sufficient evidence to prove that the Respondent and his agents called him a thief. He did not also bring any evidence to show how many electorates, if any, were prevented from voting for him on account of being called a thief. **RW5 (Mukumbuta Albert Kongwa)** testified to the Court that the PF government had made many promises of construction of a Bridge over Lalafuta river, erection of communication towers, extension of the rural health Centre and construction of a Secondary School in Miluji and when the electorates realized that these promises were not fulfilled they decided to vote for the Opposition. Mr. Katolo submitted that the evidence from RW5 is more cogent and forms a clear explanation of why the Petitioner lost the election.

I find the evidence of RW5 to be more credible and cogent as he is a PF supporter and not likely to have fabricated lies against the Petitioner. I have been urged to take judicial notice of how the people of North Western Province voted for the Opposition UPND in all the Constituencies of the Province and

that Mufumbwe is no exception. I take the view that although it is not a disputable fact that the whole of North Western Province's Parliamentary elections were won by UPND candidates this Court must determine on the evidence before it and applying the applicable law whether the election in Mufumbwe was free and fair.

I find that there was no evidence to substantiate the allegation in particular 1 (iii) page 3 of the Petition that during the campaign period the Respondent's campaign message was that the Petitioner was a thief despite the Presidential pardon against his conviction and that the Petitioner stole money meant to roof Munyambala Primary School and rehabilitate Bulobe Primary School. The Petitioner has not established this allegation to a fairly high degree of clarity. The allegation fails.

3. VIOLENCE THREATS AND INTIMIDATION OF THE ELECTORATE

The evidence on this allegation similarly first comes from the Petitioner who told the Court that the environment in Mufumbwe became quite hostile as there was a lot of intimidation and violent activities that he had never experienced before in its history. Further that the violence happened throughout from the start of the campaigns to the end and even after people had voted.

PW2 Chief Inspector Stephen Kateule told the Court that According to him, all the political parties involved were making reports of the violence and that from his standpoint as a police officer there was too much violence during the campaign period.

The Police, **PW2, PW3, PW5, PW6, PW7, PW8** and **PW9** were also called as witnesses to come and testify on the levels of violence in Mufumbwe during the campaign period. **PW13** the District Commissioner also gave her evidence on this issue of high levels of violence that were reported to her.

The Petitioner in his Petition at page 4 Item 1 (iv) alleges that the accident that happened on 4th August, 2016 along the M8 road around 19:00hours is an example of the violence that allegedly characterized the campaign period. The Petitioner called two witnesses namely **Inspector Rodgers Shambala PW3** and **Larson Kandela PW4** to support his claims. The version of how the accident happened as told by **PW3** is at variance with the version as told by **PW4**. **PW3** testified that there was a collision between the PF vehicle (unregistered Toyota Land Cruiser) and the UPND Toyota Hilux Registration No. AAV1211. The version as told by **PW4** was that there was no collision between the two vehicles but that the UPND vehicle driven by one Roy Ifwa hit **PW4** as he was standing by the stationery vehicle. The pleadings indicate that there was a collision between the UPND vehicle and the PF vehicle.

For the Respondent **John Mbangu Kalyata RW2** who was a passenger in the PF vehicle testified that the accident occurred between two vehicles while both vehicles were in motion. He further testified that **PW4 Larson Kandela** was standing outside the vehicle holding on to it while it was in motion because there was no space in the vehicle to accommodate everybody inside. **Roy Ifwa RW9** who was driving the UPND vehicle testified that the accident occurred on a curve along the M8 road and that the driver of the PF vehicle cut in on the curve causing the two vehicles to have an almost head on collision but they just scratched each other. **RW9** strongly denied **PW4's** version of the accident as he denied ever hitting a pedestrian on the day of the accident.

I am unable to believe the evidence of **PW4** because of his demeanour when he was testifying and the kind of evidence he gave. Had he been standing by the stationery vehicle there would not have been any scratching of the vehicles and the vehicle particles or debris found on the accident scene by **PW3** would not have been there.

The evidence stating that there was a collision or scratching between the two vehicles is corroborated by the testimony of **RW9** who exhibited a photograph of the UPND vehicle which had scratch marks and whose outside mirror came out. Further I find the testimony of **RW2** to be more credible and cogent as he is a PF supporter who is unlikely to make fabricated lies against the Petitioner. **RW2** stated that the PF vehicle did not stop at the spot of the accident to drop some ladies because it was a place where there were no people and secondly everyone in the vehicle was going directly to Mufumbwe BOMA.

Mr. Katolo submitted on behalf of the Respondent that what happened on 4th August, 2016 is a pure case of a Road Traffic Accident and not a case of political violence. He pointed out that infact **PW3** clearly admitted in cross examination that the incident was a pure accident caused by negligence. That the Medical Report issued to **PW4** belatedly clearly shows that the case was reported as a case of Road Traffic Accident and was resolved through **PW9** paying an admission of guilty fee of K300 as shown by the document appearing at page 9 of the Petitioner's Bundle of Documents.

I agree with the submissions by Mr. Katolo that what happened on 4th August, 2016 on the M8 road is a pure case of a Road Traffic Accident and not a case of Political violence.

The fifth witness who gave evidence on violence, threats and intimidation was **Constable Psalms Kamwengo (PW5)**. He recorded the statement at page 25 – 27 of the Petitioner's Bundle of Documents which shows the involvement of PF cadres in violent attacks. **Chief Inspector Kateule (PW2)** as Officer In Charge of Mufumbwe Police instructed **PW5** to investigate the allegation by one Sydney Witola that he had been assaulted by suspected PF cadres on 13th June, 2016 around 19.45 hours whilst at Mufumbwe Bus stop . Rather than investigate the case **PW5** assigned the dockets to Constable Chanza Sichande.

PW6 Constable Chaanza Sichande testified that whilst on duty on the Mufumbwe Police Inquiries on 13th June, 2016 he received a report of assault from Sydney Wotela around 17;00 hours and he sustained swollen eyes, a painful left leg and other general body pains. Acting on this **PW6** opened a Docket of assault and issued the complainant with a Medical Report. **PW6** also stated that there was tension at the police Station because of the presence of a mob of people wearing UPND regalia. **PW6** called the Officer In Charge who sent 3 officers who went to the station and assisted him to control the crowd. The officers are **Constable Kayula Kalumbeta (PW8)**, **Constable Psalms Kamwengo (PW5)** and a reserve police officer Njekwa.

PW6 told the Court that although the statement recorded from Sydney Wotela mentioned the PF cadres who assaulted him as Kanyembo, Gowe and Sam these individuals were not summoned. It was further his testimony that although Sydney Wotela was taken to the Petitioner after being beaten the Petitioner was never called or contacted to ask if he knew the three individuals. Further that although the Petitioner was specifically mentioned in the Statement **PW6** was not in a position to go after him and no call out was ever sent to the Petitioner.

In **Cross Examination PW6** said that he also recalled that a PF cadre called Francis was arrested during the election period for misconduct at Mufumbwe Main Bus Station.

In Re-examination **PW6** testified that Sydney Wotela could not have been at Mufumbwe Bus stop at 19:00hours as indicated in the Statement Recorded by **Constable P. Kamwengo (PW5)** because he appeared at the Police Station around 17:00hours and that a mob had followed him and so before he could receive a report or issue a Medical Report the Occurrence Book was grabbed from him by the mob and that is why he was questioning the claim that Sydney Wotela was at the Bus station around 19:00hours.

To say the least **Constable Chaanza Sichande's** demeanour was wanting. I observed that he was not telling the truth. He testified that on 13th June, 2016 he reported on duty in shift No. 2 which runs from 08;00 hours to 16;00 hours. However, a perusal of the Occurrence Book shows that on Monday 13th June, 2016 **PW6 Constable Sichande** reported on duty at 15;30 hours and was in shift No. 3. He took over from Sergeant Moonga and the Handing Over Certificate was entered in the Occurrence Book at 15:40 hours by the two officers. **PW6** worked until 23:50 hours when he handed over to Constable Ronald Mwamba.

Further the Occurrence Book shows that at 17:02 hours **PW6** attended to Male Gettis Kangombe of Kashima West who reported that he had been unlawfully wounded by his wife Violet Kabemba. This is entry No. 2129 in the OB. At 17;17 hours **PW6** attended to Male Bornface Mulindwa of Maikulile Compound who reported that he had been assaulted by his wife Inonge Mulindwa at about 16:00 hours. This was entry No. 2132.

The OB shows that **Constable Sichande** attended to Male Sydney Wotela aged 28 years of Roads Compound who reported that he had been assaulted by unknown people who he can identity. It also shows that the victim sustained a swollen left and right eye and other general pains. That this occurred on 13th June, 2016 at 19:00 hours at Mufumbwe Main Bus Station. This entry was made by **PW6** at 19:54 hours and is entry No. 2134. Sydney Wotela left the Inquiries Office for medical treatment at 20:00 hours.

Clearly **PW6** was telling the Court lies when he testified that Sydney Wotela could not have been at Mufumbwe Bus stop at 19:00 hours because he appeared at the Police Station at 17:00 hours.

Regarding the assault of Sydney Wotela, Constable **Kayula Kalumbeta (PW8)** testified that in his investigations he established that Sydney Wotela was assaulted between 16:00 and 17:00 hours. In the face of what is recorded in the Occurrence Book as shown above I come to the inescapable conclusion that **PW8** was also telling lies to the Court.

In Cross – Examination **PW8** said that a Medical Report can be issued to a victim of an assault even before an entry is made in the Occurrence Book. It was his testimony that this is what happened with Sydney Wotela who was issued a Medical Report between 18:00 and 19:00 hours. I have examined 68 reports of assaults entered in the Occurrence Book between 30 May 2016 and 25 August, 2016 and it is clear that the Police only issue a Medical Report after an entry relating to the complaint is made in the OB. Again **PW8** did not tell the Court the truth.

PW8 issued the Medical Report to Sydney Wotela but in cross examination he was evasive when asked to indicate the injuries sustained by the victim. He said that the victim had swollen cheeks when in fact it was swollen eyes and this fact is recorded in the OB and the Statement at page 25 to 27 of the Petitioners Bundle of Documents.

In view of the foregoing I doubt the evidence of **PW6** and **PW8**.

It seems to me that **PW6** and **PW8** testified that Sydney Wotela was assaulted earlier than 19:00 hours in order to distance the Petitioner who is mentioned in the Victims Recorded Statement from the incident. **Constable Paul Makina (PW7)** testified that on 12th June, 2016 he received a call from **PW6** asking for confirmation if the Petitioner was in Kabipupu and Kalengwa to which he confirmed that the Petitioner spent a night in Kalengwa and proceeded to Kabipupu. That on 13th June, 2016 around 19:00 hours he saw the Petitioners vehicle passing going back to Mufumbwe. In Cross Examination **PW7** changed

his testimony and said that he did not only see the vehicle but saw the Petitioner driving the vehicle. When asked what his interest was in knowing when Hon. Masumba went to Kabipupu and when he went back to Kalengwa **PW7** told the Court that he was assigned by the Officer In Charge (**PW2**) to monitor all the political movements due to the increase in violence in the district. In his evidence in Chief **PW7** said that his interest in the Petitioner was because of a telephone call from **PW6** on 12th June, 2016.

The Record shows that the Police did not Record a Statement from Sydney Wotela regarding his complaint that he had been assaulted by suspected PF cadres until 19th June, 2016. OB Entry number 2134 made at 19:54 hours on 13th June, 2016 does not mention the PF cadres involved nor the fact that the Petitioner was allegedly implicated. It follows that the testimony of **PW6** and **PW7** regarding the whereabouts of the Petitioner on 12th and 13th June, 2016 is all fabricated. **Constable Sichande** and **Constable Makina** told lies – they made up these lies to distance the Petitioner from what Sydney Wotela alleged happened to him on 13th June, 2016.

Although the police failed and neglected to properly investigate the matter of the violence against Sydney Wotela, I find that the Patriotic Front Party (PF) was involved in the violence against the said Sydney Wotela.

Constable Kayula Kalumbeta (PW8) also gave evidence on Violence. He testified that on 30th July, 2016 he was assigned 2 Dockets of Malicious Damage to Property. The first one relates to a report by Paul Kanyemba on behalf of Davies Mbalawu who was an independent Parliamentary candidate in Mufumbwe. It was alleged that his Toyota Noah vehicle Registration No. ACX 400 was maliciously damaged by unidentified PF cadres. Investigations revealed that 2 passengers windows were damaged and that stones and bottled were used. The assailants were using an unregistered Land Cruiser and the incident happened at Kalende Turn Off area on 29th July, 2016. By his Report

dated 1st August, 2016 at page 11 of the Petitioner's Bundle of Documents **RW8** states that he continues with investigations by following up the said Land Cruiser although no one was able to identify any of the suspects.

The second Docket relates to a report by Judith Chitenge that she was attacked by Mr Davies Mbalau's cadres at her house near Kalende Junction. **RW8's** report states that the door to Ms Chitenge's house was damaged by Mrs. Sazoza. That this was an act of revenge for damage caused by PF cadres to Mr. Mbalau's vehicle. The report states that no arrests were made and this is despite the fact that the individuals who damaged Ms. Chitenge's door are named in the OB.

The evidence of **RW8** relating to these 2 Dockets shows that the Patriotic Front Party (PF) was yet again involved in political violence.

Inspector Felix Mpasela (PW9) also testified on violence. He told the Court that on 22nd July, 2016 at about 17:00 hours the Petitioners campaign meeting at Kamanzovu Primary School was disrupted by UPND cadres who included Headman Sasaki of Kamanzovu area. The Report at page 29 of the Petitioners Bundle of Documents is dated 26th July, 2016. The Report states that at the scene the police discovered stones along the road and others on top of the shops. The Report indicates that **PW9** was informed by Kennedy Muyanga a member of PF at 22:00 hours.

However, the Occurrence Book Reference No. 2669 entered at 19:56 hours states that Kennedy Muyanga reported that the meeting was stopped because people attending it started making noise because they were drunk and they started throwing stones. There is no mention of UPND members showing their symbols.

The matter does not end here. At particular 1 (v) page 4 of the Petition the Petitioner alleged that on 27th July, 2016 at about 17:00 hours UPND cadres violently disrupted a rally held by the Petitioner at Kamanzovu. The Petitioner stated that a report of the incident was made to the Police and that Inspector Mpasela Felix investigated the matter.

As indicated above the evidence of **Inspector Mpasela Felix (PW9)** was to the effect that the meeting addressed by the Petitioner which was disrupted by UPND cadres was held on 22nd July, 2016 in **PW9's** Report dated 26th July, 2016.

Mr. Katolo submitted that taking into account the variation in dates on the date of the alleged meeting – the issue of the disruption of the meeting is a mere fabrication that never happened. He points out that the Petitioner did not even bring any witness who allegedly attended the said Rally. That on the other hand the Respondent called **RW7 Kelvin Ndonga** who testified that on 27th July, 2016 around 17:00 hours he attended a Rally held by the Petitioner at Kamanzovu. He testified that the Petitioner complained on why Lundas did not like voting for him at Kamanzovu. The witness stated that the meeting ended peacefully because it was becoming dark and there was no one who disrupted the meeting neither was there anyone who threw stones at the meeting. **RW7** stated very clearly that **PW9 Felix Mpaseli** lied when he said that the meeting addressed by the Petitioner at Kamanzovu was disrupted by UPND cadres. He stated that the evidence that came from the Police was false evidence.

Mr. Katolo contended that the Petitioner colluded with the Police to fabricate evidence of violence when there was infact no violence. The Court was urged to treat Inspector Felix Mpasela as a lying witness whose evidence must affect the probative value of all the evidence given by the Petitioner's witnesses. For this

contention the case of **PETER LIFUNGA MACHILIKA V THE PEOPLE (9)** was cited. In that case it was held inter – alia that:

“Once a complainant has been shown to be untruthful in very material respects such as the use of violence, her evidence can carry very little weight, since her evidence of rape can not be separated from these allegations of violence”.

Further in the case of **THE PEOPLE V CHISATA (10)** it was held that:

“The other eye witness Samson Banda gave evidence reasonably well. He was the only witness of the three who gave any appearance of credibility. Had this evidence stood alone it might well have had weight. The evidence must however be taken as a whole. All three witnesses are friends. One has been shown to be lying and another to be probably lying”.

I agree with Mr. Katolo’s submission that **PW9** having lied in his Report that a rally held on 22nd July, 2016 and addressed by the Petitioner was disrupted by UPND cadres when no such meeting has been pleaded by the Petitioner the evidence of **PW9** must be held to be false and a fabrication, and I so find and hold.

I have already found and held that the evidence of **Constable Chaanza Sichande PW6, Constable Kayula Kalumbeta PW8 and Constable Paul Makina PW7** is false and a fabrication and as such on the principles enunciated in the cases of **PETER LIFUNGA MACHILIKA V THE PEOPLE (9)** and **THE PEOPLE V CHISATA (10)** the evidence of these 4 lying witnesses from the Police must affect the evidence of all the Petitioners witnesses.

The allegation that UPND cadres violently disrupted a rally organised by the Petitioner at Kamanzovu on 27th July, 2016 fails and is dismissed as the same has not been proved and is premised on fabrication of evidence.

Endani Simfunkwe (PW10) the Secretary to the Mushima Mubambe Royal Establishment also gave evidence on violence. He testified that the Palace received reports of violence within the Chiefdom but that these were not witnessed. **PW10's** evidence is clearly hearsay and therefore unreliable and inadmissible.

The District Commissioner for **Mufumbwe, Masela Sekeseke Chinyama (PW13)** also gave evidence on violence. She testified that during the campaign period there were a lot of violent activities from the day of the nominations. She said that she received complaints from many stakeholders in the elections as well as the Police whose Officer In Charge (**PW2**) was the Chairman for the District Joint Operations Committee. That **PW2** had told her that they had recorded many incidences of violence and that the security situation in the district was not good.

She further testified that **PW2** told her that the complainants in those violent incidences were spread from the major political parties of PF, UPND and Forum for Democracy and Development (FDD). That she had been in contact with the district leaders of PF and UPND to urge them to control their cadres but it was to no avail as violent activities continued. It was also her testimony that the Council Secretary also reported that there were a number of violence related complaints brought to his committee, namely the District Conflict Resolution Committee. That Parliamentary Candidates and their agents also called her to complain about their cadres being beaten by other groups of cadres. She said that traditional leaders in the district also asked her to explain why violence had escalated in the district.

PW13 further testified that the chairman of the Mufumbwe market also told her about Violent activities occurring in the market. She said that she heard cadres shout and threaten to harm and beat her up.

I have carefully considered **PW13's** evidence on violence and while she appeared a candid and truthful witness most of her evidence is clearly hearsay and therefore unreliable and inadmissible.

As regards the allegation that Clement Machayi the UPND Campaign Manager threatened violence to her, I find that she never made a formal complaint to the Police and as such no Docket was opened.

No minutes of the District Conflict Management Committee were filed into Court and as such there is no evidence before me relating to matters dealt with by that committee.

Dorcas Mwambabantu Shipilo (PW14) also gave evidence on intimidation or violence. She testified that following the pronouncement by the UPND President at a Rally held on 27th July, 2016 that 4 named Election Officers were going to rig the election she was scared. That the receipt of a letter from the UPND dated 28th July, 2016 scared her even more particularly the portion which said that their lives were in danger. I found **PW14** to be a very evasive witness who refused to voluntarily answer questions relating to matters that she dealt with as Assistant Returning Office 1T.

From the evidence of **PW14** and **RW6** I find that the letter from the UPND dated 28th July, 2016 reflected the pronouncement made by the UPND President Hakainde Hichilema at the Rally held in Mufumbwe on 27th July, 2016. The letter by Mr. Machai does not say that the named Election Officers were to be removed from Mufumbwe. The letter demanded that the named Officers be removed from handling the 11th August, 2016 General Elections

because they were suspected of working with the PF to manipulate the election results in favour of the PF. Paragraph 3 of the letter reads as follows:

“The United Party for National Development being a major stakeholder in this election demands the express removal of the above mentioned names from handling the 11th August, 2016 General Election. We further demand that the above mentioned Officers be replaced with non – partisan individuals who will deliver a credible election which will reflect the will of the people of Mufumbwe”.

The penultimate paragraph of the letter did not in my view put the lives of the Election Officers in danger. It clearly states that any attempt to mismanage the election by the officers would not only plunge Mufumbwe District into chaos but also endanger the lives of the Officers from the general public. It is common cause that Mufumbwe District was not plunged into chaos nor any of the Election Officers named in the letter harmed because the election was not mismanaged.

PW14 testified that because of the pronouncement at a public rally by the UPND President she and her colleagues could not move freely in Mufumbwe and the other three officers requested for transfers and they were transferred immediately. Other than her testimony no documentary evidence was filed into Court as proof of the reasons for the transfers. Although **PW14** testified that she was living in fear she testified that she was able to walk to and from church during and after the campaign period. **PW14** was not assaulted or harmed by any one and she voted on 11th August, 2011 without any incident at all. No one threatened her.

Mr. Bwalya has submitted that **PW14** is awaiting re-deployment. My observation is that **PW14** did not say anything about being transferred out of Mufumbwe in her testimony.

The next witness to give evidence about violence was **PW15 Tom Kayombo**. He testified that on 2nd August, 2016 he went to Kamayembe to organize a meeting which was to be addressed by the Petitioner. The meeting was to be held at Kamayembe School but he was hit by a hoe handle and sustained a head injury. **PW15** says that only he and **PW16 George Linti** were injured. He contradicts the Police Report dated 4th August, 2016 written by **PW9** that 3 PF cadres were injured. **PW15** testified that it is cadres for Independent Parliamentary candidate Davies Mbalau who attacked them.

George Linti PW16 however, testified that he and **PW15** were attacked by UPND cadres and not cadres for Davies Mbalau. **PW16** also stated that only he and **PW15** were attacked. They dispute that one Willy Mutale was also attacked as alleged by **Inspector Felix Mpasela (PW9)**

PW9 did not file Medical Reports issued to **PW15** and **PW16** which he said were issued. **PW9** testified that after investigations he discovered that the whole fight erupted when the PF members wanted to have a Rally whilst others had already taken up the place. In Cross Examination **Inspector Mpasela** said that he did not know who was supposed to have a Rally at Kamayembe when he had already testified that the group for Davies Mbalau were allowed by **PW2** to have their Rally there.

It is clear that it is again the PF members who caused the violence at Kamayembe.

Counsel for the Petitioner stated that apart from the Petitioner, **PW2 the Officer In Charge** and all his police officers that appeared before Court were all in agreement that the constituency had recorded increased numbers of violence

during the campaign period. Further that **PW14** an officer of the ECZ in the past election lived under intimidation and fear for her life. That **PW11**, **PW12**, **PW15** and **PW16** all referred to the campaigns of the Petitioner being threatened or indeed having experienced violence from the Respondent and his supporters.

Counsel for the Respondent in rebuttal stated that although **PW9** claimed that a rally of the Petitioner had been disrupted at Kamazovu on 22nd July, 2016 the Petitioner did not ever mention having held a rally there that was disrupted by UPND supporters. Moreover that the variation in the dates of the said meeting by **PW9** from the date shown in the Petition also indicates that this story was a mere fabrication. In addition that **RW7** told the Court that he attended a rally of the Petitioner at Kamazovu on 27th July, 2016 and that the meeting ended peacefully as it was becoming dark and there was no disruption of the said meeting.

PW7 a police officer despite having been assigned by the OIC to monitor all the political violence in the Mufumbwe district whilst stationed at Kalengwa confirmed that he did not send any report of violence to the officer in charge the whole time he was there from May to June, 2016 during the campaign period.

I have analyzed the evidence of **PW9** and have found that he told the Court that he received information from reliable sources that Headman Sasaki was identified in the forefront showing the UPND symbol. I find this to be hearsay evidence which should have been corroborated by this same reliable source before Court but such a witness was not summoned.

PW9 also told the Court that whilst investigating the alleged assault of PF cadres Tom Kayombo, George Linti and Willy Mutale he saw Independent candidate Mbalau's supporters standing along the road with stones and sticks

whilst shouting and he also said that his investigations revealed that the fight erupted when the PF wanted to hold a rally at a venue when others were already there. Again this is evidence from a police officer which shows that even the PF were also instigating violence and supports the evidence of **PW2** that reports of violence from every political party existed in the campaign period.

I also took note of the exhibits P1 to P5 which are Occurrence Books of the Police Service that covered the campaign period in Mufumbwe. Having gone through them thoroughly with a view to assess whether the politically motivated violence increased during the campaign period I have found that there were reports of violence in Mufumbwe especially to do with domestic assaults, malicious damage, threatening violence and conduct likely to cause a breach of peace. There was no significant increase in the violence during this time. Between 30th May 2016 and 25th August, 2016 there were 68 incidents of Assault Occasioning Actual Bodily Harm recorded in the Occurrence Books. Of these only 8 were identified by the Police as being politically motivated and testified about in these proceedings. 33 incidents relate to domestic assaults i.e. the perpetrators and the victim being persons who live in the same abode. During the same period there were 7 incidents of Malicious Damage to Property but only 2 were testified about by the Police. I placed much reliance on the Occurrence Books as these were written by random police men as and when an incident happened. Moreover it was clear especially from P5 which showed reports of violence after 11th August, 2016 that the violence continued even after the elections.

I have therefore come to the conclusion that the evidence found in these exhibits was even more credible than the oral evidence adduced in Court by the Police Officers who mostly brought hearsay evidence before Court. I have also noted that the examples of the violence used by the Police in Court were not all instigated by the Respondent and his party supporters, for instance the

accident where a male Larson Kandela sustained a fracture was presented to be politically motivated by the Petitioner however evidence clearly showed that it was just a normal road traffic accident.

Mr. Bwalya submitted that the Respondent and his Campaign Manager Clement Machai and their supporters were in a combat mood throughout the campaign, which resulted in violence. I do not agree with this submission because proven evidence on the Record of cases brought before this Court most of which are in the Petitioners Bundle of Documents show that it is in fact the PF and its cadres which was involved in the majority of violence incidents reported and not the UPND.

There is no doubt that there was some political violence in some parts of Mufumbwe during the campaign period. Political violence was however, not as widespread as alleged by the Petitioner and his witnesses. There is nothing to show that electoral violence was only instigated or perpetrated by the UPND. To the contrary it was the PF that were involved in most incidents of violence testified about in these proceedings as shown at pages 11, 15, 21, 24 and 25 – 27 of the Petitioners Bundle of Documents, which show the involvement of PF cadres in violent attacks. The Report at pages 25 -27 puts the Petitioner at the center of the violence against Sydney Wotela.

I accept Mr. Katolo's submission that to nullify the Respondents election based on the wrong doing of the Petitioner and his party cadres would be a violation of the policy of common law that no one shall be allowed to profit by his own wrong as demonstrated by the latin Maxim "**nullus commondum capere protest de injuria sua propria**".

Most importantly however, the electoral violence or political violence in Mufumbwe constituency, is not shown to have adversely affected the Petitioner to the exclusion of the other candidates. The conclusion that the Court has

Kandendu and Baglay Londo and that none of them tried to grab his land and neither did he make any reports on threats and intimidation in relation to land to the Petitioner. That he only phoned the Petitioner to inform him that Forest Reserve land was being given out without official allocation. However, this was long before the campaign period.

Counsel for the Petitioner submitted that the headmen of the Chief were involved in issuing threats and intimidation to the electorate by telling them that land would be grabbed from anyone that voted for the PF and that the Royal Chief Mushima Mubambe had to sound a warning in this regard through **PW10** his secretary. Thus this disadvantaged the Petitioner who could not campaign effectively as the voters who were in a village had a serious fear of losing their land.

Whilst Counsel for the Respondent submitted that the letter from the Chief did not mention the issue of alleged threats to grab land belonging to PF cadres if they did not vote for the UPND and that it did not even mention the names of the people that were allegedly threatened with eviction from the land.

In my view of all the witnesses on this point I find the evidence of **RW5** to be more credible and cogent and I attach a lot of weight to it. This is because apart from maintaining that he was a PF supporter he clarified the issue of the nature of his report to PW1 which was to inform him as area MP that Forest Reserve land was being given out without official allocation. **RW5** denied having told the Petitioner that the electorate were being threatened with eviction if they voted for the PF.

The Court notes that P6 does not in any way mention the issue of alleged threat to grab land belonging to PF supporters if they did not vote for the UPND. Further the said P6 does not even mention any names of people that were allegedly threatened with eviction from the land. The said letter does not

even mention any specific incident of intimidation or violence. **PW10's** evidence was that, the report of intimidation was brought by one Herold Jerome. The said Herold Jerome should have been called as a witness to confirm whether indeed he was the one who gave such a report to the Royal Establishment.

I agree with Mr. Katolo's submission that Herold Jerome as a person who was mentioned by **PW10 Endani Simfukwe** and **PW13 Sekeseke Masela Chinyama** as the person who had personal knowledge of the allegations surrounding the alleged threats of eviction from the land ought to have been called as a witness to substantiate the allegation. Mr. Katolo has urged the Court to draw an adverse inference against the Petitioner for failure to call Herold Jerome. The Court hereby draws the adverse inference that had the said Herold Jerome testified in this case facts unfavourable to the Petitioner could have come to light.

In my Judgment there was no evidence to substantiate the allegation at particular 2(i) page 5 of the Petition that on or about the 1st August, 2016 some Indunas by the name of Chairman Kandendu and Baglay Londo from Miluji ward went around threatening the PF members that if they did not vote for the UPND candidates, then their land would be grabbed from them. The Petitioner has not established this allegation to a fairly high degree of clarity. This allegation also fails.

5. OBSTRUCTION/BARRING OF ELECTION OFFICERS

Evidence on this allegation came from **PW2 (Chief Inspector Steven Kateule)** and other Police Officers. **PW2** stated that on 11th August, 2016 around 23:00 hours a vehicle that belonged to the Respondent and his wife carried occupants that harassed the Assistant Presiding Officer Marshal Mingochi claiming they had information that he was about to rig the elections.

PW5 (Psalms Kamwengo) also stated that on 10th August, 2016 whilst on duty at Mufumbwe Police station at around 23:30 hours he received a phone call from members of the public who informed him that Mingochi Marshal a Presiding Officer at Kangombe Polling Station in Kalambo ward was attacked by suspected UPND cadres. He testified that upon arrival at the Polling Station they found UPND cadres but discovered that the perpetrators of the violence had already left and they dispersed the rest of the cadres they found there. Moreover, that around 01:00 hours on 11th August, 2016 they arrived at the Respondents shop where the 2 vehicles said to have been at Kang'ombe Polling Station were found and that the Police then apprehended Fred Kambowa in connection with the violence at Kang'ombe Polling Station and when they put him in a Police vehicle he was forcibly removed by UPND cadres.

There is also evidence in form of a Police Report written by **PW9** which is at pages 19 and 20 of the Plaintiffs Bundle of Documents who states that on 11th August, 2016 whilst in Shift 1 which runs from 23:40 hours to 08:00 hours he received a call from Marshal Mingochi a Presiding Officer at Kangombe Polling Station in Kalambo Ward stating that he was attacked and beaten by a mob of people belonging to UPND. That he in the company of other Police Officers went to Kalambo area where they found that the cadres were within the barricaded area and the perpetrators of the crime had already left the place.

There are inconsistencies in the evidence of the Police Officers. **PW5** testified that he received the call about an attack on Marshal Mingochi from members of the public on 10th August, 2016 while **PW9** says that he received a call from Marshal Mingochi on 11th August, 2016. The alleged attack could not possibly have taken place on 2 different dates or nights. **PW5** testified that the Police Officers who went to Kalambo ward and then to the Respondents shop were four namely himself (**PW5**), **PW2**, **Mr Mwendabai Mwendabai** and a Reserve Officer called **Kayombo**. In his Report **PW9** stated that he, **PW2** and other Officers went to Kalambo area. **PW9** is not mentioned by **PW5** as one of the

officers who went to Kalambo area. This is a clear example of inconsistency in the evidence of the Police Officers who ought to bring reliable evidence to Court.

The matter does not end there. **PW5** testified in cross examination that they did not have other gadgets that should be used for crowd control when they went to Kangombe Polling Station and then the Respondents shop. The Occurrence Book Entry No. 2908 entered at 23:50 hours on 10th August, 2016 shows that **PW2** booked out to Kalambo with motor vehicle ZP 2078 having withdrawn one AK47 Rifle and 7 rounds of Ammo plus one Riot Gun and three irritants. **PW5's** testimony that they did not have other gadgets for crowd control is therefore false.

These inconsistencies in the evidence of **PW5** and **PW9** as well as the lie told by **PW5** make me doubt the evidence of these Police Officers. Police Officers are generally independent and non – partisan and they are expected to bring reliable evidence before the Court. In this instance however, I cannot rely on the evidence of **PW5** and **PW9** with regard to this allegation as it lacks credibility.

Evidence in rebuttal from the Respondent was that the attack of Marshal Mingochi did not happen as described by the Police who could have had a grudge against him and that he was unaware of any attack on the said person. I agree with the Respondent's Counsel who stated that the failure to call Marshal Mingochi as a witness should raise doubts as to whether the alleged incident happened at all since there was no medical report to show that he was truly assaulted as alleged.

Counsel cited the case of **KENOSI V THE STATE (11)** where it was stated that:

“The issue of material witnesses arose when there were two contending versions which could only be settled one way or the other by the testimony of the person not called. In the absence of such a situation, the general principle was that a case was not decided by counting heads.”

Mr. Katolo submitted that the issue of calling a material witness arises where there are two contending positions regarding an incident as in the case where the alleged incident is mentioned to have happened on two different dates and two different times. Further that there is denial by the Respondent and his witnesses that the said event never happened.

I agree with the position of the law in the cited case of **KENOSI V THE STATE (11)** and Mr. Katolo’s submissions.

RW8 Fred Kambowa who was alleged to have been involved in the beating of the said Marshal Mingochi vehemently denied ever moving out of his place where he runs a bottle store. I note that the Report at page 19 of the Petitioners Bundle of Documents clearly states in paragraph 2 that the Police found the cadres at Kalambo Ward within the barricade but the perpetrators had already left. The identity of the perpetrators is not given in the report but it cannot be the UPND cadres that were allegedly found at the Polling Station.

I also note that under cross examination **PW5** stated that there was no medical report that had been filed to prove that Marshal Mingochi had sustained injuries after being attacked by suspected UPND cadres. Moreover, I find it surprising that the Petitioner failed to bring the said Marshal Mingochi before Court to give his evidence as he would have been the best person to speak on whether or not he was barred from doing his work as an Election Officer of the Election Commission of Zambia.

There is an allegation that the Returning Officer at Kaminzenzeke Polling Station was harassed and assaulted by UPND cadres. The only evidence on this violence at Kaminzenzeke came from Police Officers and in particular **PW2** and he relied on the Report appearing at page 37 in the Petitioners' Bundle of Documents. The report was prepared by one Constable Gift Chifita who was listed as a witness for the Petitioner but was not called as a witness. Even the Presiding officer whose name is Albert Chikanya according to the said report was not called as a witness. Clearly there was no better person placed to explain what allegedly transpired at Kaminzenzeke than the person who was allegedly harassed.

Mr. Katolo submitted that the incident described at page 37 of the Petitioner's Bundle of Documents never happened because if it did the Petitioner would have called the victim to testify as he did **PW4**, **PW16** and **PW17** who purported to have been victims of assault. I accept Mr. Katolo's submission as well as his contention that the alleged incident at Kaminzenzeke which allegedly took place when the voting was already over did not in any way affect the results of the poll and as such should not stand as a basis for the avoidance of the Mufumbwe constituency election for a Member of Parliament.

Another aspect of barring election officers arose from the allegations of **PW14**, who told this Court that her life was threatened and she was living in danger because of the sentiments of Hakainde Hichilema during a rally in Mufumbwe held on 27th July, 2016. That he announced to the people in attendance that 4 named electoral officers in Mufumbwe should be removed and that a letter was written by the UPND campaign manager the next day which was expressing these demands and also threatened their lives.

Evidence on the record shows that although **PW14** testified that she was living in fear from 27th July, 2016 her life continued fairly normally. She continued to go for work, attended church and was able to execute her duties as Assistant

Returning Officer IT without being attacked by anyone. **PW14** voted peacefully and continues to work and live in Mufumbwe without being harassed or attacked by anyone. I therefore find that neither **PW14** nor any other Election Officer were obstructed from performing their duties in the 2016 election.

The Petitioner and his witnesses did not lead any evidence to show that the majority of voters in Mufumbwe were prevented from voting for a candidate of their choice on account of the alleged assault of Presiding Officer Marshal Mingochi. For these reasons I find that the Petitioner has not proved this allegation of the barring and obstruction of election officers to the requisite standard of proof and therefore fails.

6. CORRUPT/ ILLEGAL PRACTICES.

Although not pleaded evidence in this regard first emerged from the testimony of **PW12 Robson Siakondo** a PF supporter. He told the Court that during a UPND rally in Miluji he heard the Respondent suggest that people should sit in groups of 100 and each group would be given K100. There were 3 groups. In cross examination he told the Court that he was not part of the group of 100 people he mentioned and that he left immediately after the meeting so he did not actually see this giving of K100s but only heard it being said that they would be given after they grouped themselves as directed.

The Electoral Process Act No. 35 of 2016 defines a corrupt practice to be

“Any conduct which is declared to be a corrupt practice in accordance with section eighty one;”

Section 81 states that:

“81. (1) a person shall not, either directly or indirectly, by oneself or with any other person corruptly—

(a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;

(b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;

(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

..."

The above Section expressly states that no person shall give money to a voter to induce or refrain them from voting in a particular manner. **PW12** clearly stated that he did not actually see the Respondent hand over this money to the voters. This evidence was not corroborated and in my view as the evidence was denied and controverted by the Respondent the Court does not stand persuaded that the allegation is true or reliable. A mere or sketchy and generalized allegation is not sufficient to prove a serious criminal act.

I have also found that the evidence of **PW2, PW9, PW10** and that of **PW13** unreliable as it lacked credibility on the issues before Court. However, had the Petitioner called the Independent candidates as indicated in the Petition, Herold Jerome, Marshal Mingochi and all the people that were said to have made reports to the Police, **PW10** and **PW13** to testify in support of their

evidence, there could have been some corroboration which would have made their evidence cogent.

In the circumstances their evidence may be considered to be hearsay because it referred to out of Court statements made by people that were not called as witnesses yet their statements were being presented in Court as the truth. In the case of **SUBRAMANIAN V PUBLIC PROSECUTOR (11)** the Privy Council stated that:

“Evidence of a statement made to a witness by a person who is not a witness and who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement.”

Under Section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 an election of a candidate as a Member of Parliament, shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court that a corrupt practice, illegal practice or other misconduct has been committed in connection with the election by a candidate; or 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.

The Respondent has not been proved to have committed any illegal practice or corrupt practice or any other electoral misconduct. No single agent duly appointed by the Respondent was shown to have committed any illegal practice or corrupt practice or any other electoral misconduct. No single witness testified before Court that she or he was prevented from voting for the candidate she or he preferred. Each witness stated that she or he voted freely at the Polling Station to which they registered. Even **PW14 Dorcas**

Mwambanabantu Shipilo who testified that she was living in fear testified in Court that she voted on 11th August, 2016 without any hindrance at all.

I have come to the inescapable conclusion that the Petitioner has failed to prove to the requisite standard any of the allegations in the Petition. Therefore, I find no ground on which to declare the election of the Respondent as Member of Parliament for Mufumbwe constituency as null and void. In effect, therefore, in my judgment this petition should be dismissed. On the whole, I declare that the Respondent was duly elected as Member of Parliament for Mufumbwe constituency. Accordingly I dismiss the Petition with costs to the Respondent to be taxed if not agreed.

The Respondent in his Answer to the Petition alleged that during the campaign period the Petitioner distributed bicycles in different wards to lure electorates to vote for the Petitioner and his Party the PF. That the Petitioner through these acts is rendered ineligible as a candidate as he breached the rules of the electoral process. The Respondent prayed that the Petitioner should be disqualified from being a candidate in any election for not complying with the provisions of the Constitution and the Electoral Process At.

The Respondent testified that the Petitioner distributed bicycles during the campaign period in Miluji ward to lure the electorate to vote for him and that since this was a breach of the Electorate Code of Conduct he should be barred from participating in elections and from voting for 5 years. In cross examination the Respondent said that the bicycles were distributed between 5th and 10th July, and that one Sililo received one bicycle.

The evidence by the Respondent is clearly hearsay and therefore unreliable and inadmissible.

RW5 (Mukumbuta Albert Kongwa) who is a PF supporter testified that two weeks before the Polling day, the Petitioner went to Miluji and conducted a party officials meeting which he (**PW5**) attended. He said that party officials complained about the distances that they had to cover in order to campaign and the Petitioner agreed to give them bicycles on an agreed and stated date. He told the Court that due to logistical problems the bicycles were not delivered on the agreed date but on another date.

That a list of recipients of the bicycles was prepared and his name was included since he was a staunch supporter of PF. **RW5** said that the bicycles were delivered and distributed to the listed recipients at Mr. Gift Siyoto's village where the assembling was also done. That although he was not present at the time the bicycles were distributed he found his bicycle when he returned to his home and he even bought the missing spares.

Further and Better Particulars relating to paragraph 12 of the Respondents Answer were filed into Court on 10th October, 2016. It is stated therein that between 28th July, 2016 and 5th August, 2016 in Miluji Ward the Petitioner engaged in an illegal practice of bribery and vote buying by promising and actually distributing Humber bicycles one each to 14 PF members listed therein for the purpose of influencing the listed persons and their families to vote for the Petitioner. The listed persons include **RW5**, Kitumbafumo Kyunsu Muponde Kimbamanga, Gift Siyoto, Sililo Mukosiku and Lutangu Mukumbuta. **RW5's** comment on page 10 of the Respondents Bundle of Documents was that it was a photograph of himself and his Humber bicycle. The bicycle was introduced in evidence.

It is not disputed that the Petitioner had given out 14 Humber bicycles to PF members. What is in issue is whether the bicycles were used to induce voters to vote for the Petitioner.

The allegation of bribery and vote buying is a serious criminal offence directed at the Petitioner. Cogent evidence is needed to attain the high standard of beyond reasonable doubt. An essential aspect of the kind of offence being alleged is that the persons being given the bicycles must be asked to vote for the Petitioner. **RW5** testified that PF party officials complained about distances they had to cover in order to campaign and the Petitioner agreed to give them bicycles.

I find that the bicycles were given to the Petitioner's campaign team in order to enable them effectively campaign in Miluji Ward. In the absence of evidence that the bicycles were given to the named 14 PF members in order to influence them and their families to vote for the Petitioner, I find the allegation of bribery and vote buying directed at the Petitioner has not been proved and it fails.

Leave to appeal is granted.

Delivered in Open Court at Lusaka this 14th day of November, 2016.



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WILLIAM S. MWEEMBA
JUDGE