

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

2016/HP/EP/0043

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

AND

IN THE MATTERS OF : SECTION 97(1); 97(2) (a) (i&ii) OF THE ELECTORAL
PROCESS ACT No. 35 OF 2016

AND

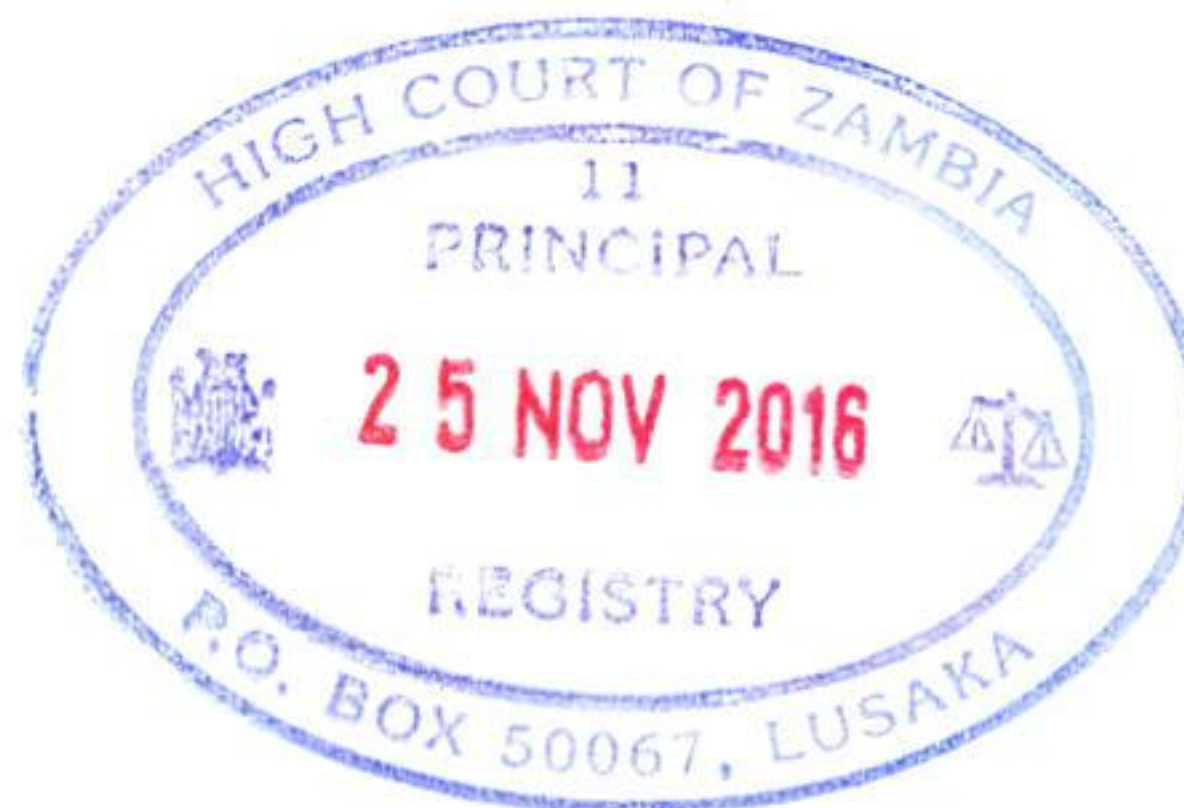
IN THE MATTER OF : A PETITION FOR THE KAPIRI MPOSHI
PARLIAMENTARY ELECTION HELD ON 11TH AUGUST, 2016

BETWEEN:

CHRISPIN SIINGWA

AND

STANLEY KAKUBO



PETITIONER

RESPONDENT

**BEFORE HONOURABLE LADY JUSTICE M. CHANDA THIS 25TH DAY OF
NOVEMBER, 2016**

APPEARANCES

FOR THE PETITIONER : MR N. YALENGA OF NGANGA YALENGA &
ASSOCIATES

FOR THE RESPONDENT : MR P. CHUNGU APPEARING WITH MS
CHIRAMBO OF RANCHHOD CHUNGU
ADVOCATES

JUDGMENT

LEGISLATION REFERRED TO:

1. SECTION 103 OF THE ELECTORAL PROCESS
2. ELECTORAL ACT, NO. 35 OF 2016
3. THE ELECTORAL PROCESS (GENERAL) REGULATIONS, 2016

AUTHORITIES REFFERED TO:

1. ANDERSON MAZOKA V LEVY PATRICK MWANAWASA (2005) ZR 138
2. JERE V DVR/SGT SHAMAYUWA AND ANOTHER (1978) ZR47
3. LUSAKA V CHEELO (1979) ZR 99.

4. MLEWA V WIGHTMAN (1995-97) ZR 17
5. AKASHAMBATWA MBIKUSITA LEWANIKA AND OTHERS V FREDRICK JACOB TITUS CHILUBA (1998) ZR 79
6. CHRISTOPHER KALENGA V ANNIE MUNSHYA AND 2 OTHERS 2011/HK/EP/03
7. JOHN CHISATU AND FAUSTINA LOMBE V ATTORNEY GENERAL (1981) ZR 35
8. ASKAN DAS BATRA V THE ATTORNEY GENERAL (1993-1994) ZR 41
9. THE PEOPLE V MUVUMA KAMBANJA SITUNA (1982) ZR 118
10. MATEO MWAMBA V ANTHONY KAUNDA KASOLO APPEAL NO 27 (2003)
11. MISHECK MUTELO V EILEEN MBUYWANA IMBWAE SCZ APPEAL NO. 113 (2012)

On 29th August, 2016 **Chrispin Siingwa**, the petitioner herein, filed a petition in the principal registry challenging the election of **Stanley Kakubo** as Kapiri Mposhi member of parliament.

The petitioner alleged that the campaign by the respondent was characterised by widespread acts of undue influence, bribery, voter treating, voter intimidation, violence and all manner of illegal electoral practices contrary to the *Electoral Process Act No. 35 of 2016* and the *Election Code of Conduct*. The petitioner further asserted that as a consequence of the illegal practices committed by the respondent and his agents, the majority of the voters were prevented from electing the candidate of their choice in the Constituency. The reliefs sought by the petitioner were as follows:-

- i. A declaration that the election of the respondent as a Member of Parliament for Kapiri Mposhi Constituency was null and void *ab initio*.
- ii. A declaration that the electoral malpractices committed by the respondent and his agent materially affected the election and that the same ought to be nullified;
- iii. An order that the costs occasioned by this petition be borne by the respondent ; and

- iv. Any other relief that the Court may deem just and fair.

The petition was supported by an affidavit.

In rebuttal to the petition the respondent, Stanley Kakubo, filed his Answer on 26th September, 2016 wherein he contended that his declaration as duly elected candidate for the Kapiri Mposhi Parliamentary seat on 13th August, 2016 was lawful and valid. The respondent refuted that his campaign for the election was characterised by undue influence, bribery, voter treating, voter intimidation, violence or indeed any malpractices as alleged. He urged the Court to dismiss the petitioner's claims and to confirm the respondent's election as Member of Parliament for the Kapiri Mposhi Constituency. The Answer was supported by an affidavit sworn by the respondent.

During the course of the proceedings the Court granted the petitioner's application for leave to withdraw the petition against the Electoral Commission of Zambia pursuant to *Section 103 of the Electoral Process Act*. Consequently, the portions relating to the Electoral Commission of Zambia in the petition, were *ex punged* from the record.

Hearing of the matter commenced on 3rd October, 2016. The petitioner called 14 witnesses while the respondent called 3 witnesses.

Chrispin Siingwa was the first witness hereinafter referred to as “**PW1**”. PW1’s affidavit evidence augmented by his *viva voce* testimony in Court was as follows:

That he was a candidate in the Kapiri Mposhi Constituency Parliamentary elections held on 11th August, 2016 having been adopted as such by the Patriotic Front party hereinafter referred to as PF.

The other candidates in that parliamentary election included, **Stanley Kakubo** of the United Party for National Development (UPND), **Dorothy M. Mambwe** of the Movement for Multiparty Democracy (MMD), **Dube P. Tembo** of the Forum for Democracy and Development (FDD), and **Fredrick Manyanina** of the United People’s Party (UPP)

That the results for the said parliamentary election were declared by the returning officer one **Jimmy Musweu**.

	Name of Candidate	Party	No. of votes received
i.	Stanley Kakubo	UPND	22, 388
ii.	Chrispin Siingwa	PF	20, 798
iii.	Dorothy M. Mambwe	MMD	1, 772
iv.	Dube P. Tembo	FDD	457
v.	Fredrick Manyanina	UPP	168

PW1 further averred that contrary to the said declaration by the returning officer, the respondent was not validly elected because of the widespread malpractices perpetrated by him and the UPND

contrary to the provisions of the Electoral Process Act. PW1 categorised the particulars of the electoral malpractices as corruption, undue influence and intimidation.

ELECTORAL CORRUPTION AND BRIBERY

PW1 testified that throughout the campaign period the respondent engaged in systematic bribery and corruption of the voters.

One instance was in Kashitu ward where the respondent and two other UPND officials namely Mr and Mrs Lundale together with the local government election candidate, Mr Francis Nkhoma, were dishing out cash to the electorate right up to the polling day. The witness stated that the aforementioned persons were seen giving out K100 and K500 notes to voters at Mobe Polling Station and asking them to vote for the UPND. He further testified that the said Mr Nkhoma also paid the village headwoman by the name of Mrs Patricia Mulimbika.

According to PW1 at Kabwale, Munga and Mubofwe wards the UPND's Chabakale Bernadette who was standing as Councillor, was also seen giving out money to voters and requesting them to vote for all the UPND candidates including the respondent.

PW1 asserted that the local Red Cross Society coordinator, one Mr Chiyoye was a UPND sympathiser and used the auspices of the Red Cross as a cover to hand out money to voters. Another Non-Governmental Organisation called National Empowerment Fund was also giving out money to voters in the sum of K200 and

promising them K10,000.00 in the event that the respondent emerged victorious.

PW1 further stated that the respondent during the campaign period gave out footballs and bicycles labelled "**sponsored by Kakubo, vote UPND and HH**" particularly in Katotola village in Mpunde area, Kakwesa ward and Kakwelesa.

At Palamedes Basic School polling station, a Mr Sameman Hakalumbwe, the UPND District Youth Chairman, was on polling day seen giving out money randomly and asking people to vote for all UPND candidates. The matter was reported to the local police who undertook to investigate.

At Mpunde polling station, the UPND's local government candidate, Bernadette Chayi, was seen distributing money to voters urging them to vote for all UPND candidates.

It was PW1's testimony that on the eve of the election, the respondent and a Mr Obby Kabasa delivered beer to a tavern owned and operated by a Mr Sikaaza near to the polling station at Nansenga with instructions that it must be given free of charge to all the people during the night. This was after closure of campaign period and the matter was reported to the local police for further action.

He also testified that the respondent ferried voters to Chisamba polling station in UPND branded vehicles and dropped them within the 100 meters restricted area. According to the witness the

voters were rowdy and brandished the UPND symbol contrary to the Code of Conduct proscribing electioneering within 100 meters of the polling station.

The same thing was observed at Kampumba and Ilungu polling stations in Kampumba ward where the UPND gave out money and conducted open campaign 50 meters within the precincts of the polling station.

PW1 asserted that between the 17th and 31st of July, 2016, the respondent held a campaign rally at Kakwelesa in Kakalo area in Shipangula village and gave out huge sums of money to the women folk and asked them to vote for the UPND. A fight thereafter ensued amongst the women as they scrambled for the money.

At Kapiri Secondary School polling station, the respondent in the company of Mr Sameman Hakalumbwe, Mr. Kabasa Obby, Mrs Kabasa and a Mr Lunda were giving out money at the gate to voters and asking them to vote for UPND and when the matter was reported to the person in charge of the station, one Mpanza she merely chased the culprits instead of ordering their arrest.

At Imansa polling station, the UPND's local government candidate Muka Patel was seen dishing out money in various sums in K100 notes as well as UPND campaign materials in the form of chitenges.

The witness stated that the same acts were observed at Matilyo polling station being perpetrated by the respondent.

UNDUE INFLUENCE AND INTIMIDATION

PW1 narrated that the campaign conducted by the respondent and the UPND was characterised by violence and intimidation of the voters.

The village headwoman Patricia Mulimbika of Mobe area was given money by Mr. Francis Nkhoma and Mrs. Lundale of UPND and as a result thereof, she became hostile to all non UPND supporters in her village. She started intimidating her subjects with repercussions of not voting for the UPND candidates.

The witness informed the Court that there were widespread acts of violence against persons known to be PF supporters in the Constituency which was declared a forbidden area for the PF. In Kabwale Ward, the Central Province Youth Chairperson, one Alice Boka was severely beaten and threatened with a gun by relatives of the local government candidate a Mr. Magumbo. The matter was reported to the police and the perpetrators arrested and charged.

PW1 further explained that on polling day, UPND supporters attacked PF supporters. He stated that the worst case happened at Likumbi polling station in Mubofwe ward where the UPND held a meeting within a 50 meters radius of the polling station. PW1 stated that when confronted to move away from the restricted

zone, the UPND members assaulted the PF supporters and other innocent bystanders thereby intimidating would be PF voters.

The UPND and the respondent embarked on a campaign of character assassination of the PF and the petitioner by informing people at the rallies that;

The PF was intending to introduce gay rights in the bill of rights via the referendum and those that would vote yes in the referendum would be allowing PF to legalise same sex marriages contrary to the Zambian traditions and culture. The petitioner stated that this issue greatly repulsed the voters who were mainly from villages and found such suggestions to be an abomination and expressed their anger in the poor referendum results.

The respondent also falsely stated that the petitioner was a serial adulterer and womaniser who had been caught committing adultery with one of his campaign staff. The said falsehoods were on 8th August, 2016 reported by the Zambia Watchdog, an online publication that openly sympathised with the UPND.

The petitioner complained that as a consequence of the aforesaid alleged illegal practices committed by the respondent and his agents, the majority of the voters in the constituency were prevented from electing a candidate of their choice.

In cross examination, PW1 told the Court that Kapiri Mposhi had 16 wards and a total of 93 polling stations. When asked how

many of the 93 polling stations were affected by the grievances as presented before Court, he replied that they were about 8.

When asked if he had witnessed any of the alleged malpractices he put forward in Court, he answered in the negative. He further clarified that he was merely told by his informers. With regards to the Lundales, the witness told the Court that PW2 only alerted him to the fact that the duo were generally distributing cash to voters and urged them to vote for the UPND. PW1 further refuted the assertion that PW2 informed him that the Lundales were acting on behalf of the respondent.

With regards to the happenings at Mpunde polling station and the allegation that Bernadette Chayi had been distributing money on the 11th August, 2016 the witness testified that this information was brought to his attention by Tebulo Mumba one week after the elections.

The witness however explained that he was not aware if Mumba, who was also vying for the position of councillor, had filed any formal complaint with the presiding officer to that effect.

On the allegations touching on Mr Chiyoye, PW1 responded in cross examination that he was told about the distribution of cash to some of the women at Matilyo compound by Mr Simon Musonda, the local PF councillor. It was his evidence that Mr Musonda learnt about the incident when he found the women arguing at the house of Edna Mutale.

The witness clarified that he did not know Edna (PW7) on a personal note but he just knew her as a PF cadre.

In further cross examination, PW1 testified that on 11th August, 2016 Sameman Hakalumbwe performed acts of bribery by dishing out money within the precincts of Palemedes Basic School polling station.

When asked whether Sameman was acting on behalf of the respondent, he replied that according to Mr Godfrey Kangwa, Sameman did not say directly that he was acting on behalf of the respondent but that he was campaigning for all the UPND candidates in general.

In relation to the happenings at Nansenga, PW1 explained in cross examination that he was informed that the respondent and Bernadette Chayi delivered beer to a local bar for distribution to the voters though he did not know how many crates were delivered. When the witness was however referred to paragraph (g) of his petition, he noted that what he had indicated therein was that the respondent and Obby Kabasa took the beer to the said bar.

As for the events at Kakwelesa, PW1 told the Court, that a Mr Kamanga had told him of the rally. He further stated that he did not know whether Mr Kamanga was present at the said rally. He also went on to state that theafore said information was related to him before the election but that he did not relay the complaint with ECZ because he was busy with his campaigns.

In further cross examination PW1 informed the Court that he was unable to determine whether the individuals that engaged in malpractices on behalf of the respondent were registered agents with the ECZ.

He clarified that PW2, who was a candidate for the position of councillor, informed him about Monica Mwansa's illegal practices of threatening to evict her subjects from Kashitu ward who did not vote for UPND.

The witness also testified that the Magumbo family of Kabwale ward were sympathetic to the UPND and in fact one of them was contesting for the position of councillor. He however conceded that at the time that Alice Boka had been assaulted, the respondent was not present. When asked if their action of assaulting Alice Boka was in favour of the respondent, he responded that the act was favourable to the UPND generally.

In respect of the publication by the *Zambian Watchdog*, PW1 replied that he attributed the same to the respondent as the site had merely reproduced what the respondent had been saying about him at the rallies.

When pressed as to whether it was the respondent who said that he was caught by his wife committing adultery with a PF cadre at a lodge, PW1 answered in the negative.

With regard to the issue of legalising gay marriages, PW1 explained when cross examined that the respondent had associated him in the minds of the voters, who were mostly from the rural areas, that he in fact supported gay marriages hence his support for the referendum. The net effect of this, he argued was to make him lose popularity as the people considered gay relationships a taboo.

PW2 was **Pathias Kapu** a businessman from Kashitu ward. He told the Court that he had taken part in the last election as a PF candidate for councillor for Kashitu ward which election he won.

He told the Court that after the election, he had embarked on a post-mortem program as the results particularly for Mobe polling station had not been as expected. PW2 narrated that he called his polling agent by the name of Growford Katandala who had told him that there were several factors that contributed to the loss namely the threats from the village headwoman in Momboshi village by the name of Monica Mwansa and that some people had been giving out money to the voters.

The witness testified that Growford informed him that the headwoman was campaigning for the UPND and threatened to expel anyone who did not support the UPND from her village and to repossess their fields.

PW2 also explained before Court the events that happened at Kennedy bar concerning his elder brother Thomas Katandala. According to PW2, Growford had narrated to him how Thomas had

been involved in an altercation with a Mr and Mrs Lundale at Kennedy's bar in Mobe area. He informed the Court that the genesis of the fight was the non-payment by the Lundales of the money that they had agreed to pay Thomas for services rendered on polling day.

PW2 further testified that, Growford had told him that the Lundales had given his brother K500 to distribute to the voters and promised to be rewarded after completion of the assignment. Thomas was only paid K60 after execution of his work.

In cross examination, he confirmed that his evidence was merely hearsay as he had not been present at the time that the said fight took place. He also told the Court that the reason he had called Growford was because he wanted to conduct a post-mortem of the results particularly in Mobe where his votes were very low.

PW3 was **Thomas Katandala** from Lusenga village in Kashitu ward. He told the Court that on election day, he went to vote very early in the morning and when he reached the cordoned off area at the polling station, Mr and Mrs Lundale asked him whom he was going to vote for. According to the witness he responded that his vote was secret but they prevailed on him to vote for all the UPND candidates and gave him a K100. PW3 stated that he was asked to go back and see Mr and Mrs Lundale after casting his vote.

PW3 asserted that he was requested to distribute K20 notes amounting to K500 to voters who accepted to vote for UPND candidates and was promised to be paid a sum of K500. When all

was done as agreed, he was only paid K60 and assured to be paid the balance the following Saturday as they had not yet received the money.

The witness further asserted that when the Lundales were later confronted over the payment of the remaining balance at Kennedy's bar, instead of addressing the issue they fobbed him off by telling him that the elections had passed and urged him to move on. PW3 informed the Court that this resulted in a heated argument between him and the Lundales which was witnessed by his brother and other people. Mr Lundale was the UPND branch secretary whereas his wife was the chairlady of the branch.

In cross examination, he was asked if he was aware that what he had engaged in was illegal and he replied in the affirmative. He told the Court that at the time that he was given money by the Lundales there were no other people present. He confirmed that he distributed K20 notes to 25 people but that he did not know their names.

When asked about the positions that were up for grabs in the election, PW3 replied that it was for the President, MP, Mayor, Councillor and the referendum. When asked if he knew all the candidates that were standing in the area, he said he did not know.

The witness told the Court that the Lundales had not suggested to him the names of the people to vote for but merely impressed on him to vote for the UPND candidates. When asked if he knew

Dube Tembo, Frederick Manyanina, Dorothy Mambwe and Stanley Kakubo, he only identified the Petitioner and said it was because he had gone to his area to campaign.

PW4 was **Growford Katandala** of Momboshi village in Kashitu ward. He told the Court that he belonged to the PF and during the last election he had been a polling agent on behalf of the PF stationed at Mobe.

He told the Court that the headwoman of Momboshi village, Monica Mwansa, had issued threats against the local villagers that those that were not going to vote for UPND would be chased from the village. It was also his testimony that the same lady was campaigning on Election Day at Mobe polling station.

PW4 also confirmed having witnessed the fracas that ensued between his brother (PW3) and the Ludales at Kennedy's bar.

After separating the feuding parties, his brother had narrated to him the cause of the fight as I have already outlined above.

In cross examination, he confirmed that he had never been given an Identity Card to operate as a Polling Agent and that even though he knew that the activities by the headwoman were illegal practises, he did not report to the presiding officer of the polling station.

PW5 was **Brian Masapi** of Munjibi village in Mobe area who indicated that he was also at Kennedy's bar, when PW3 had a

confrontation with the Ludales. His testimony was basically a rehash of the evidence of PW3.

In cross examination, he told the Court that he learnt of the details of the agreement between PW3 and the Lundales after they had engaged in a quarrel.

When asked whether there had been a mention of Stanley Kakubo in the fight, the witness replied that the name had not been mentioned and he also did not know the said Kakubo. PW5 testified that during the argument PW3 stated that he had been retained to lure voters to vote for H.H.

PW6 was **Justina Bwalya Nondo** a marketeer of Soweto compound within Kapiri Mposhi. She testified that on 10th August, 2016, her friend Edna Mutale had visited her home and they arranged to go and vote early the next morning so that they could later attend to their business supplies to take to Kasumbalesa.

It was PW6's testimony that after Edna left, she returned in a short while and informed her that she had come across some people who wanted to carry out programmes for women's empowerment. The witness stated that Edna was asked to mobilise some women and facilitate for a meeting at her residence around 14:00 hours. She went on to narrate that she attended the meeting which was initially addressed by a Mr Chiyoye.

PW6 testified that Mr Chiyoye was later joined by the respondent and Mr Kabasa. According to the witness, the duo solicited for votes and promised that if they emerged victorious they would give them empowerment loans of K10,000 each. She stated that all the attendees were given K200 each and the meeting dispersed. The meeting was attended by more than 20 women. PW6 stated that on 15th August, 2016 the women congregated at Edna's house to demand for the payment of K10,000 as promised. The witness further explained that in the course of agitating for their payment PW12, Mr Simon Musonda made an inquiry of what the problem was. PW12 was accorded an explanation of the whole issue at hand and he accordingly advised that the women had been duped.

In cross examination PW6 testified that she carried her NRC to the meeting but not her voter's card. She also told the Court that there had been no register of the people present. When asked which of the men present she had known before the date in question, she replied that she knew Mr Kakubo and Mr Kabasa.

When asked why she had remained when the story changed from empowerment to bribes, she replied that even if she knew that bribes were illegal, she however decided to remain as she needed the money due to her poverty.

She also told the Court that even though the men had asked if the women had voter's cards, they had never demanded to see them.

When asked when they were to be paid the K10,000, she replied that they were promised payment on 15th August, 2016 and that

on that day the women went to Edna's house in the afternoon. It was her testimony that when no money was produced by Edna, there was a heated argument as the women thought that Edna had concealed the money.

When challenged to identify any of the men that she claimed was at the women empowerment meeting, she identified the respondent. She stated that the meeting lasted for over an hour.

PW7 was **Edna Mutale** of Matilyo compound. Her evidence in chief was similar to that of PW6. She however went on to explain how Mr Chiyoye met and engaged her on the issue of women's empowerment. PW7 informed the Court how she later met Mr Chiyoye at the container in Matilyo compound so that they could proceed to her house to address the women.

She also explained that she knew Mr Chiyoye as the local Red Cross coordinator who had previously carried out empowerment programs and thus believed what he was telling her. When asked if he had said that the Red Cross was carrying out the empowerment program, she had replied that he had not said that.

In cross examination, she denied being a member of the PF but admitted knowing Simon Kabala Musonda as her church mate.

The witness initially stated that she knew where to find Mr Chiyoye but when pressed further she conceded that she did not know where to locate him. She replied that she thought it was alright to sell her vote because she was promised money in

exchange for it. When asked who gave them the K200 each, she clarified that it was Mr Kakubo. Mr Kabasa had only encouraged the women with promises of more to come.

In further cross examination PW7 stated that all the women had voter's cards because Mr Choyoye insisted that they needed to be voters.

She also informed the Court that she did not know all the women who attended the meeting but pointed out that she knew where they resided.

PW8 was **Alice Boka** of Lukanda plots in Kapiri Mposhi. She told the Court that she was the Provincial Youth Secretary for the PF. Her testimony was essentially that on 17th June, 2016 she had gone to Kabwale ward with fellow PF members to put up party posters. PW8 testified that while she was on the go, some members of the Magumbo family attacked and severely beat her. She stated that her assailants warned her that Kabwele was a forbidden area for PF. The witness also stated that the matter was reported to the police and was eventually taken to the Subordinate Court. She concluded her evidence by stating that the matter against the Magumbo brothers was not conclusively prosecuted because she applied for the case to be withdrawn.

In cross examination PW8 indicated that she withdrew the matter against Cornwell and Arnold Magumbo because they pleaded with her and showed remorse. When asked if the respondent also went to apologise for the assault, PW8 answered that he did not. She

also denied the assertion that she was paid some money to withdraw the case from Court.

PW9 was **Friday Mwape** of Lyambe village in Mpunde ward in Kapiri Mposhi. He testified that on 10th August, 2016 around 19:00 hours he went to buy talk time at the shops where he met the UPND vice chairman Mr Augustine Mwansa. PW9 narrated that he was told by the vice chairman that the respondent together with a Mrs Chabakale were being expected later that night and he was requested to wait for them.

According to PW9 the duo arrived at 23:00 hours and he was given K100 and urged to vote for all the UPND candidates. The witness informed the Court that the respondent told him that the petitioner was Namwanga by tribe, was not a resident of Kapiri Mposhi and did not have a wife.

PW10 was **Beauty Mukonchi** the Headwoman of Chipungu village, Kakwelesa area in Kapiri Mposhi. She narrated that in July, 2016 she attended a UPND meeting in Kakolo area where a Mr. Malembeka introduced to the crowd the respondent and one Most Shanangombe who was contesting the position of councillor in the ward. PW10 testified that Malembeka extolled the UPND and its candidates as the only ones who could look after the people well. She also testified that the speaker advised them against voting for the PF candidates as doing so would spell doom for the villagers.

The witness further explained that when the respondent addressed them he regurgitated what Mr Malembeka had said and added

that if he became their Member of Parliament, he would introduce various projects aimed at empowering women. He also accused the petitioner of being a philanderer with no fixed abode who would not be a good representative of the villagers.

PW10 explained that when the meeting ended a small group of women went to bid the respondent and his entourage farewell as was customary in the area. According to her, the respondent gave them one thousand kwacha (K1000) which she received on behalf of the others. She said the respondent asked them to use the money to hire other women to vote for him.

She also told the Court that in addition to the money, she was given campaign posters and two balls to give to the youths and the local women. She further informed the Court that the area Headman was equally given seventy kwacha (K70) to buy beer for the people who had attended the meeting.

The witness however stated that as they were discussing how the money could be shared amongst the women, she was pushed from behind resulting in the money falling on the ground. She stated that the people present scrambled for the money and there upon a fight ensued. She then scampered for safety and hid in one of the fields.

In cross-examination, she explained that when the meeting finished, the group followed the respondent to bid him farewell and it was at that point that she was nominated to be the recipient of the money. She said the respondent told her that the money

given was meant to assist in the campaigns and he promised to give them more money after he was elected. She added that PW11 was also asked to assist the respondent in the campaigns and was given one hundred kwacha (K100). She said the respondent did not indicate the date he would go back but promised that there would be development and the welfare of the people would improve if they voted for him.

PW11 was **Peter Munkuli** a peasant farmer of Shipangula village in Kakwelesa area Kapiri Mposhi whose evidence was very similar to that of PW10. In addition to the version of PW10's testimony, he told the Court that the fight that erupted when the money was knocked out of the hands of PW10 was so fierce that they sought the intervention of Mr Kamanga and the neighbourhood watch to restrain the combatants.

PW11 disclosed that the respondent did not know him but nonetheless gave him K100 so that he could campaign for him. He concluded his evidence by informing the Court that he ended up pocketing the money he had received from the respondent.

The witness was not subjected to any cross examination.

PW12 was **Simon Musonda**, a member of the PF and a Councillor in Kapiri Mposhi Central. His evidence before Court was that on 15th August, 2015 he left his house between 16:00 hours to 17:00 hours to go to the barbershop. The witness stated that enroute to the barbershop he encountered a group of women that were

engaged in a heated exchange at PW7's house. PW12 essentially rehashed the events as already stated by PW6 and PW7.

In cross examination the witness stated that upon noticing the scuffle he entered PW7's yard and made inquiries. He further stated that although he was able to see all the other women gathered at PW7's house, he recognised none of them.

PW13 was **Patrick Mulenga Chola** of Riverside in Kapiri Mposhi. His testimony before Court was that he was stationed at Kapiri Primary School as polling agent for the PF in the last elections. He stated that on election day he went out of the polling station to take a breather when he got wind of information that someone from the UPND was distributing money to the voters at the gate. PW13 testified that he immediately alerted their campaign manager, Mr Kangwa on phone, and requested him to rush to the polling station. According to the witness, he thereafter went in search of the person who was giving out money and eventually effected a citizen's arrest. PW13 indicated that when the police officer on duty was called on to arrest the offender she instead released him and he drove away in his vehicle. He told the Court that Sameman, who was the District Chairman of the UPND, was the person he caught distributing K50 notes to the voters and urging them to vote for all their candidates.

In cross examination, the witness confirmed that the incident happened at Kapiri Primary School and that he had only seen one person giving out money who he reported to Mrs Mpanza the police officer. PW13 denied having seen or apprehended Obby

Kabasa, Mrs Kabasa or Mr Lundale. He however stated that he heard Sameman telling voters to elect all the UPND candidates. He also denied having seen the respondent anywhere near Kapiri Primary School.

PW14 was **Alex Chabusali** of Lunyambwe village in Chief Chipepo's area. He informed the Court that on 10th August, 2016 around 22:00 hours he saw the respondent arriving in a vehicle accompanied by Mrs Chabakale and another person. The witness narrated that the trio offloaded crates of Castle and Mosi beer which they said were meant for would-be voters for the UPND.

PW14 averred that the crates of beer were received by Kennedy Chuka, Chris and Gerald. He stated that the following morning he went to vote and he found Chris, Gerald and Kennedy who gave him a K50 and urged him to vote for all the UPND candidates. The witness stated that after voting he went back to Nansenga School to request for his share of the beer but he was told it had run out as he had arrived late.

In cross-examination he said the respondent and the occupants in the vehicle only spoke to Chris, Kennedy and Gerald. He said the respondent did not speak to him and it was the three men who told him what the beer brought was for. He said he was not sure how much money the three men were given but they told him they had received two thousand kwacha (K2000). He said he was not given any money that night but was given fifty kwacha (K50) the following morning and requested to vote for all UPND candidates. He said two bottles of beer were kept for him when he went the

following day. When asked if he had actually seen beer being distributed to any people, the witness's response was that he had not.

This marked the close of the petitioner's case.

The respondent called three witnesses hereinafter referred to as RW1, RW2 and RW3, to rebut the petitioner's allegations.

RW1 was the respondent himself, **Stanely Kasongo Kakubo** of Chalala Lusaka. In his evidence in chief, RW1 entirely relied on his answer and affidavit evidence on record wherein he averred as follows:-

That he acknowledged that the petitioner was a PF candidate in the parliamentary election for the Kapiri Mposhi Constituency which was held on 11 August, 2016. He was similarly such a candidate and sponsored by the UPND.

He stated that he was declared the duly elected candidate for the Kapiri Mposhi parliamentary seat by the Returning Officer, Jimmy Musweu, on 13th August, 2016.

RW1 averred that his declaration as duly elected candidate was lawful and valid. He denied that his campaign for the election was characterised by undue influence, bribery, voter treating, voter intimidation and violence as alleged.

He also denied engaging in any systematic bribery and corruption of any voters.

RW1 stated that the persons referred to as Mr and Mrs Lundale were not known to him nor to the said Francis Nkhoma and neither had he met them before. He denied that he was ever engaged in the "dishing out" of cash as alleged with Mr Francis Nkhoma. He averred that Mr Francis Nkhoma was the candidate for Kashitu ward within Kapiri Mposhi Constituency and lost his bid to be elected as Councillor.

He further stated that Mr Francis Nkhoma was not gainfully employed or engaged in any money generating commercial activity to be able to have monies to distribute as alleged. The witness averred that if he did distribute any such monies he did so without his participation or knowledge. He said the allegation of payment that was made to the headwoman, Mrs Patricia Mulimbika was not known and sanctioned by him.

RW1 denied having participated in the distribution of money to any voters. He also stated that the said Chabakale Bernadette was a candidate for Mpunde Ward and not Kabwale, Munga or Mubofwe wards and would not ordinarily be campaigning in Mpunde ward as alleged.

He refuted knowing the person referred to as "Mr Chiyoye". He asserted that he had never met with the said individual nor communicated with him. RW1 stated that he had no connections with the National Empowerment Fund and was unaware that

there was any money given to voters. He denied having distributed any monies in collusion with Mr Chiyoye or the National Empowerment Fund.

He indicated that the only goods that were distributed by the UPND were in February 2016 before the campaign period commenced. RW1 averred that the contributions were in form of bicycles for logistical support during the impending elections. He stated that at the time the bicycles were distributed he was not yet adopted to contest the Kapiri Mposhi parliamentary seat.

It was RW1's assertion that the said Sameman Hakalumbwe was the accredited agent for the UPND based at the Civic Centre. He was stationed there throughout the period of the elections, including on the polling day, and did not depart from the station. He also asserted that the said Sameman Hakalumbwe was never summoned or accosted by the police in relation to any police report or complaint. RW1 stated that no official complaint was lodged with the returning officer indicating that the petitioner's election agent objected to any behaviour of any person on the polling day.

RW1 further averred that if Sameman Hakalumbwe did in fact conduct himself as alleged, then he did so on his own and without the respondent's knowledge or authority.

He denied knowing one Bernadette Chayi and stated that the UPND did not have a candidate by that name contesting the Local Government elections in Kapiri Mposhi constituency.

He stated that he never knew anyone by the name of Mr. Sikaaza. He was not involved with Obby Kabasa in the delivery of any beer to a tavern as alleged and that if any person, or indeed Obby Kabasa did in fact engage in such distribution then he did so on his own and without the respondent's knowledge or permission. He was also not aware of any police complaint made against him in relation to the said incident.

RW1 indicated that he only had one vehicle that he used throughout the campaign period and denied ferrying voters to the alleged polling station. He also disassociated himself from the individuals that were alleged to be involved in the illegal conduct.

He denied distributing any monies at a campaign rally in Kakwelesa at Kakalo area in Shipangula village.

RW1 went on to indicate that the allegations in relation to distribution of funds and campaign materials at Imansa and Matilyo polling stations did not involve him but a named person being Muka Patel. He averred that if Muka Patel, did in fact act as alleged, he acted on his own and without his knowledge or permission.

He denied his campaign being characterised by violence and intimidation of voters and stated as follows:-

RW1 refuted knowing or communicating with the person referred to as Mrs Lundale. The allegation that headwoman Patricia

Mulimbika was given money by Francis Nkhoma and Mrs Lundale was denied and that if any such transaction transpired as alleged, RW1 was unaware of it and all the actors did not have his permission to conduct themselves in that manner or participate in the transactions.

He also refuted participating in any violence as alleged and that the incidents which the petitioner referred to were not perpetrated by him. He averred that he had no power to restrain the actions of the alleged perpetrators of the violence.

He said he did not at any time, attribute any disparaging remarks to the petitioner nor particularly the issue of gay rights as alleged. He did not similarly make any insinuations of adultery in relation to the petitioner as alleged. He averred that it was in fact the petitioner who made a deriding reference to his marital status and indicated that he was not fit to be a Member of Parliament.

He was not aware of the sympathies that the "Zambian Watchdog" may have had with the UPND and that he had no control of the editorial content of the publication. He was unaware of the publication that the petitioner alleged.

There was no official complaint or objection from either the petitioners or his polling agent relating to the incident at Kabwale polling station or indeed the police.

He stated that the incident of the alleged irregular vote cast by Brian Simata was one that neither the petitioner nor his agent raised at the time of the poll.

He wound up his testimony by stating that, the alleged discrepancies by the petitioner would not have had the effect of changing the result of the election. Considering that he had won by a difference of 1, 590 votes more than the petitioner.

During cross-examination, the respondent stated that it was the UPND policy for all candidates to campaign for the party candidates and there was written authorisation to specific individuals to campaign. He stated that he did not visit all the wards in his constituency at the same time but the other UPND members continued to campaign. He denied knowing Mr and Mrs Lundale and stated that they were not his agents and the illegal acts they were accused of doing were done without his consent. He agreed that one needed resources to campaign although the resources did not necessarily have to be monetary. He explained that Mr Francis Nkoma depended on contributions from local villages to a large extent when he participated in the election.

When asked if he knew the people who gave Thomas Katandala money to distribute, he said he did not. He further explained that he knew that 41 people campaigned for UPND in Mobe but could not recall their names at that moment.

When the witness was asked how Justina Bwalya (PW6) and Edna Mutale (PW7) were able to identify him in Court, his response was

that it was easy for any person to identify him as he was a public figure.

The witness agreed to knowing Mr Kabasa the council chairman for UPND who had contested the previous elections on the UPND ticket.

In relation to the incident that occurred on 10th August, 2016 at PW1's house, RW1 responded that on the material date he was attending a funeral at RW3's farm.

In further cross examination he admitted that his testimony placed him in a different location and agreed that he needed to call Mr Mudenda (RW3) to confirm his *alibi*. He told the Court that his evidence concerning Mr Mudenda was not an afterthought. The witness went on to explain that there was no need for him to mention Mr Mudenda in his answer because the allegation in the petition only touched on Mr Chiyoye and the empowerment fund. He clarified that he introduced Mr Mudenda to his counsel the previous day but that at the time his counsel was preparing the answer, he did not know Mr Mudenda.

He stated that at the time of drafting his answer, he did not instruct his lawyer to respond to the allegation pertaining to Bernadette Chayi because he was not aware that she was also known as Bernadette Chabakale.

RW1 stated that he heard the testimony of Beauty Mukonchi (PW10) but still disputed having addressed any rally as was narrated by her.

He stated that the Electoral Commission of Zambia voter's register for Kapiri Mposhi was availed to the district chairperson two days before the Election Day. He confirmed that he looked at the Kapiri Mposhi register of voters as he was interested in knowing the total number of registered voters. He said the name Bernadette Chayi was recorded in the last row.

In further cross examination RW1 said he cast his vote at Kapiri School and afterwards he proceeded to the Parallel Voter Tabulation office at Chimsoro Lodge. He also said he knew Sameman Hakalumbwe who was a UPND agent and RW1's accredited agent. RW1 testified that Sameman was under his instruction to lead the team that was at the totalling centre in Kapiri Mposhi and was in constant touch with Sameman coordinating the results he received at the totalling centre with the Parallel Voter Tabulation.

He conceded that since voting took place from 06:00hours in the morning to 18:00hours in the evening, the totalling centre only received results after 18:00hours. He stated that he had reason to believe that Sameman was at the totalling centre because he was in constant touch with him via the cell phone.

In re-examination, RW1 was referred to paragraph (b) and (f) of the petition and, he clarified that Bernadette Chabakale was

mentioned under Munga and Mubofwe wards while a Bernadette Chayi was mentioned concerning acts at Mpunde polling station hence the mix up in her identity.

The second respondent's witness was **Chrisential Phiri (RW2)**, the campaign programme officer for UPND in Kapiri Mposhi District who basically confirmed that he was with the respondent on 10th August, 2016 attending the funeral at RW3's farm.

In cross-examination, RW2 testified that the people who claimed that they were with the respondent on 10th August, 2016 were not truthful as he was with him the whole day. When asked how far RW3's farm was from Kapiri and what area it was in, he responded that the farm was about 27-28 kilometres from Kapiri and that it was situated in Kashitu area. He also explained that the respondent's farm was located not more than 10 Kilometres from RW3's farm.

He further stated that the UPND had no campaign activities on 10th August, 2016 and their only task was to make phone calls to ensure that the agents were at the polling stations.

There was no re-examination

RW3 was **Joshua Mudenda**, the District Coordinator for UPND. He told the court that on 10th August, 2016 around 14:00hours, RW1 paid him a visit at his home to console him on the loss of his son. He confirmed that he was with RW1 and RW2 until after 16:00hours when they left.

In cross-examination, RW3 informed the court that his son passed on between 7th and 8th June, 2016. He denied being responsible for drawing up elections programmes and stated that RW2 was in charge of that.

Having considered the evidence, I now turn to deal first with the preliminary issue regarding the *alibi* raised by the respondent in connection with the events of the 10th August, 2016. Counsel for the petitioner, Mr Yalenga, contended in his submissions that the respondent raised a defence in his testimony that was at variance with his answer. The defence was objected to by the petitioner but this Court ruled that the respondent could not be fettered in the manner he wished to conduct his defence. It was Mr Yalenga's assertion that the respondent conveniently raised an *alibi* to the effect that he had been paying his respects to Mr Mudenda in Kashitu area from 13:00 hours to 19:00 hours on that day and could not possibly have been in Matilyo compound as alleged by PW6, PW7 and PW11. Counsel further referred the Court to the case of **Anderson Mazoka v Levy Patrick Mwanawasa**¹ where the Supreme Court had this to say:-

“The function of pleadings, is to give a fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the Court has to take them as such.”

Counsel also alerted the Court to the case of **Jere v DVR/SGT Shamayuwa and another**² where it was held that:-

“It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to Court to prove and to avoid taking his opponent by surprise. If he does not do that, the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not previously raised it and will not be allowed to rely on it; or it may give him leave to amend by raising itself and protect the other party by letting the other case stand down.”

Mr Yalenga vehemently argued that in the instant case, the petitioner objected immediately the respondent raised the *alibi* as a defence. Counsel opined that this Court was precluded from considering the evidence of the *alibi* raised by the respondent in view of the foregoing reasons.

Going by the details of the alleged malpractices or anomalies in the various wards and polling stations as outlined in the petition, the evidence of the respondent in relation to the *alibi* raised is mostly in connection with paragraph C at page 3 of the petitioner’s pleadings. Paragraph C is reproduced hereunder for ease of reference.

“The local Red Cross Society coordinator, one Mr. Chiyoye was and is a UPND sympathiser and used the auspices of the Red Cross as a cover to hand out money to voters. Another Non-Governmental Organisation called National Empowerment Fund was also giving out money to voters in the sum of K200 and promising K10, 000.00 in the event that the respondent emerged victorious.”

Much as I marvel at Mr Yalenga's ingenious submissions on this point, I must expressly state here that the petitioner simply set out general statements or allegations without any specifics. In view of the failure by the petitioner to indicate the date of 10th August, 2016 in paragraph C of the pleadings, his insistence that the *alibi* raised ought to have been specifically pleaded in the respondent's answer is not only impracticable but also misconceived. This is so because the date of 10th August, 2016 was only alluded to during the course of trial by PW6 and PW7. It is therefore my affirmation that the principle espoused in the authorities cited by Mr Yalenga is good law, but the position I take is that on the facts of this case, they cannot aid the petitioner in any way.

I now turn to consider the specific allegations which the petitioner is relying on to impugn the election of the respondent herein. The election petition before me is predicated on *Sections 97(1) and 97(2) (a) (i) and (ii) of the Electoral Process Act, No. 35 of 2016*. Leaving out what is not necessary *Section 97 of the Electoral Process Act* reads:-

"97 (1).....

(2) *The election of a candidate as a Member of Parliamentshall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court 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*

- (iii) *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."*

It is apparent that *Section 97(2)* sets out three clear grounds upon which any election of a candidate to the National Assembly can be nullified if it is independently established to the satisfaction of the Court (see the case of **Lusaka v Cheelo**³).

According to the *Lusaka case*, nullification can be ordered even when an agent is the one who is held blameworthy personally and not the candidate. It is incumbent in *Section 97(2) of the Electoral Process Act* upon the petitioner to establish to the satisfaction of the Court that corrupt practices or irregular practices were committed in the elections by an agent of a candidate or polling agent. It is also noteworthy to point out that the petitioner must establish that the electoral offence was committed with the knowledge or consent or approval of the candidate.

I also take note of the decision of the Supreme Court in the case of **Mlewa v Wightman**⁴ which was cited by counsel for the petitioner in his submissions. The approach of the Supreme Court in the *Mlewa case* was that even one instance of a corrupt practice or illegal act is sufficient to nullify an election. It must however be emphasised that in the case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**⁵ it was held that the corrupt practice or illegal act is required to be proven to a standard higher than on a mere balance of probability. This

now brings me to determine the petitioner's main grievances namely, corruption and bribery as well as undue influence and intimidation.

In his petition at paragraph **4(i)** and **(ii)**, the petitioner sets out what he alleges as illegal electoral practices by the respondent. As almost every one of the allegations contained in paragraph **4(i)** and **(ii)** result in a direct conflict of the evidence between the petitioner and the respondent and their respective witnesses, the issue of credibility is crucial to the decision of this case. The witnesses have to be subjected to strict scrutiny of their integrities.

On the issue of credibility learned counsel for the petitioner, Mr Yalenga, urged this Court to adopt and be persuaded by the reasoning of Justice Kaoma in the case of **Christopher Kalenga v Annie Munshya and 2 others**⁶ where the Court said as follows:-

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

On the other hand learned counsel for the respondent, Mr Chungu, submitted that it is the duty of this Court to evaluate the evidence on record in terms of credibility and demeanour. To buttress his proposition, Mr Chungu drew the attention of this Court to some authorities which included **John Chisata and Faustina Lombe v Attorney General**⁷, **Askan Das Batra v the Attorney General**⁸. Mr Chungu further cited the case of **Simasiku Namakando v Eileen Imbwae**⁹ where the High Court elucidated the need to be cautious in the treatment of evidence of witnesses who may harbour an interest. Mr Chungu implored this Court to bear the fact of the allegences of these witnesses and in that regard treat their evidence with extra caution.

I have given my careful consideration to these illuminating submissions from counsel representing both parties. I will now set out to determine the corrupt practices in the manner they were pleaded in the petition.

1. CORRUPTION AND BRIBERY

The evidence on corruption and bribery came from a fairly large number of witnesses and involved various wards as well as polling stations as follows:-

I. Kashitu ward

The evidence on the electoral malpractices touching on Kashitu ward came from PW2, PW3, PW4 and PW5. After an evaluation of the evidence of these witnesses, the impression I have so far is that the alleged perpetrators of the corrupt practices were Mr

and Mrs Lundale. According to the evidence of PW3 he was given K500.00 in denominations of K20.00 notes on polling day by Mr and Mrs Lundale to distribute to voters so that they could vote for UPND. The witnesses denied knowing the respondent. The question that occupies my mind is whether the Lundales were election or polling agents of the respondent pursuant to *Regulation 55 of the Electoral (General) Regulations Statutory Instrument No. 63 of 2016*. *Regulation 55(1)* is couched in the following terms:-

“55 (1) A candidate shall name his election agent in his nomination paper and, subject to the other provisions of this regulation, such a person shall be the election agent of that candidate for the purpose of that election”.

A close examination of Regulation 55 reveals that not everyone in one's political party can be considered as a candidate's election agent, since an election agent has to be specifically so appointed. Accordingly, I find no cogent evidence to show that the Lundales were appointed agents of the respondent for the purposes of the previous election. I am also satisfied that in line with *Section 97 (2) (a) (ii)* the respondent is only answerable for those irregularities and malpractices which are done by his election agent or with his consent. This allegation is dismissed as the petitioner has not established that the respondent was privy to the malpractice at Kashitu.

II. Mpunde Polling Station, Kabwale, Munga and Mubofwe wards

There was evidence from the petitioner that Bernadette Chabakale Chayi who was standing as Councillor on the UPND ticket was seen giving out money to voters and requesting them to vote for all the UPND candidates. The respondent had denied the knowledge of Bernadette's activities. According to the petitioner this information was conveyed to him by Tebulo Mumba who was also contesting for the position of Councillor under the PF ticket. After evaluating the evidence of the petitioner it is clear to me that his testimony on this score is purely hearsay as Tebulo Mumba was not called to attest to the said conversations about the alleged incidents.

I agree with Mr Chungu's submission that it is indeed a settled legal position that the testimony of a witness must be a recollection of events that the witness perceived and not a recount of the conversations told to him about those events. I also wish to associate myself with what Ngulube, DCJ as he then was, stated in the case of the **The People v Muvuma Kambanja Situna**¹⁰ that:-

“Evidence of a statement made to a witness by a person who is not himself called is hearsay and inadmissible.”

I adopt this statement as my own and disregard the petitioner's testimony as hearsay.

III. Matilyo Compound

As to the happenings in this compound, both PW6 and PW7 testified that on 10th August, 2016 they received K200.00 each

directly from the respondent who was in the company of Obby Kabasa. According to the witnesses the duo who were introduced to them by Mr Chiyoye, the local red cross coordinator, solicited for votes and promised to give them empowerment loans of K10,000.00 each if they won the elections. In cross examination the evidence of PW7 who mobilised the other 30 women for the meeting in question was at variance with the testimony of PW6. Whereas PW7 stated that all the women who attended the meeting had voter's cards because Mr Chiyoye insisted that they needed to be voters, PW6 indicated that she only carried her National Registration Card (NRC) and that none of them were required to produce their voter's cards.

I find it very strange that PW7 who claimed to have mobilised the other women for the meeting was unable to give further and better particulars of the said women but was able to recall with ease the names of the respondent and Obby Kabasa whom she was meeting for the first time. It is also surprising that this witness did not know any other candidates in the previous parliamentary election but for the respondent. Further PW7 vehemently denied being a PF party cadre contrary to the petitioner's evidence that she was a known PF supporter. It is equally amazing that PW6 and PW7 conceded that notwithstanding the illegal nature of the activities they had engaged in they decided to tag along because they were poverty stricken. It is clear to me that the two witnesses were mostly motivated by the desire to gain monetary benefit and lacked

integrity, as such it is highly likely that they would deliberately resort to peddling falsehoods.

With these observations I have come to the conclusion that PW6 and PW7 are not witnesses of truth upon whose evidence any reliance can be placed, in the absence of independent corroboration. I have also considered the evidence of PW12 whose loyalty to the petitioner was so obvious to such an extent that I cannot accept him as a wholly impartial and reliable witness. It follows that for an allegation of a corrupt nature to succeed, the petitioner must adduce evidence establishing the issue raised to a fairly high degree of convincing clarity. The counter evidence of the respondent and his witnesses was that on 10th August, 2016 they had visited RW3 to console him following the death of his son. The respondent denied being at Matilyo compound on the date in question. I find the version of events as narrated by the respondent and his witnesses to be probably true compared to that of the petitioner's witnesses. I so hold that this allegation has not been proved beyond the balance of probabilities by the petitioner.

IV. Palamedes Basic School

The petitioner also complained of the bribery that was perpetuated by Sameman Hakalumbwe at this school. According to the petitioner, Godfrey Kangwa informed him that Sameman Hakalumbwe the local UPND district youth chairman was seen on polling day campaigning for the UPND and dishing out money to voters within the precincts of the polling station.

It must be noted that no witnesses were called to testify to this allegation during trial. I equally find the petitioner's testimony to be hearsay and inadmissible as proof of the allegation made.

V. Kakwelesa

The evidence on the complaints relating to Kakwelesa came from PW10 and PW11. PW10 attested to the incidents at a meeting in July, 2016 which was addressed by the respondent among other people. She testified that in addition to the K1000 she received on behalf of the other women, she was also given campaign posters and two balls to distribute to the youths and the local women. In cross examination the witness clarified that the money she was given was indeed to assist in the campaigns and the respondent promised to give them more money upon being elected. PW11 testified to the same allegations as PW10. The witness categorically stated that the K100 he received from the respondent was meant to help with the campaigns.

After a close analysis of the evidence of the two witnesses I have come to the conclusion that they were witnesses of truth as they gave evidence in a straightforward and perfectly frank manner. Their evidence was not controverted by the respondent. Although the witnesses expressly indicated that the money they received from the respondent was meant to help in the campaigns, I am still of the opinion that the promise to give them more money after the election was meant to induce them to vote for the respondent. This I must say is contrary to the

provisions of *Section 81 (1) (c) of the Electoral Process Act. Section 81 (1) (c)* in part reads as follows:-

“81 (1) A person shall not, either directly or indirectly by oneself or with any other person corruptly:-

(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”

It is therefore clear that the promise by the respondent to give more money after the election to PW10 and the few women that went to bid him farewell after the Kakwelesa meeting was meant to induce them to procure the return of the respondent as a candidate, bringing his actions within *Section 81 (1) (c)*. I must however stress that although the promise which was made may have subjected the respondent to penalties under the Act, it does not in my opinion provide a basis upon which this election can be nullified. It is apparent that the said promise to induce the voters was not wide spread as it was only restricted to a small group of women in Kakolo area. In my considered view it had no significant bearing on the result of the whole Kapiri Mposhi constituency.

VI. Chisamba Polling Station

The Petitioner alleged that he was informed by Obed Shike the PF candidate for the position of councillor that the respondent and Mr Kabasa had instructed some people to ferry voters to Chishimba polling station in UPND branded vehicles. No

witness was called to substantiate this allegation, as such it is equally disregarded as hearsay evidence.

VII. Kapiri Secondary School Polling Station

The petitioner alleged that at this polling station the respondent in the company of Mr Sameman Hakalumbwe, Mr Kabasa Obby, Mrs Kabasa and Mr Lunda were seen at the gate giving out money to voters. However the petitioner's witness PW13 only informed the Court that he apprehended Sameman at Kapiri primary school distributing fifty kwacha (K50) notes to induce voters to elect all UPND candidates. PW13 refuted seeing the respondent, Obby Kabasa, Mrs Kabasa or Mr Lundale at the polling station in question. Firstly it is my observation that the evidence adduced by the petitioner and PW13 is at great variance, secondly the allegation herein is cast in broad terms. There is for instance no detail as to how many people actually received the fifty kwacha notes. But most importantly the crucial feature of this complaint is that, the petitioner has not established in keeping with *Section 97(2) of the Electoral Act*, that the alleged corrupt practice by Sameman Hakalumbwe was committed with the knowledge or consent or approval of the respondent. This allegation cannot therefore succeed.

VIII. Imansa Polling Station

According to the petitioner, he was told by Bizwell Muchima that Muka Patel who stood for the position of councillor under the UPND ticket was seen distributing UPND party regalia to

voters on the 11th August, 2016. As previously indicated for this allegation to stand the petitioner ought to adduce evidence to show that Muka Patel was the respondent's appointed election agent in line with *Regulations 55 of the Electoral Process (General) Regulation Statutory Instrument No. 63 of 2016*. No such evidence has been adduced to show this. In the absence of direct evidence to that effect, nothing less than an unavoidable inference would to my mind justify the conclusion that the respondent had been guilty of a corrupt practice.

2. UNDUE INFLUENCE AND INTIMIDATION

The thrust of the petitioner's testimony under undue influence was that there were severe acts of violence and intimidation perpetrated by the UPND in Mobe area, Kabwale and Mubofwe wards. The evidence on violence and intimidation came from the petitioner, PW2, PW4 and PW8. According to the petitioner he was informed by PW2 that Monica Mwansa the village headwoman threatened her subjects in Kashitu ward under Mobe with eviction if they voted for the PF. PW2 who emerged victorious in the election for councillorship under Kashitu ward confirmed that the threats by the headwoman contributed to the loss of his party. PW4 equally informed the Court that the headwoman of Momboshi village threatened to eject those subjects who would not vote for the UPND. PW8 also recounted how she was brutally attacked at Kabwale ward by the Magumbo family who belonged to the UPND.

The offence of undue influence is provided for under *Section 83 of the Electoral Process Act*. It is at the same time a criminal offence under *Section 124* in relation to an election, which if allowed to take root during political campaigns, is capable of swaying the electorate away from a candidate of their choice. It follows that if a person is to be found guilty of undue influence it must be proved that by one or the other specified means in the Act he impeded or prevented a voter from casting their vote freely.

For any person to be guilty of undue influence under *Section 83 (1) of the Electoral Process Act* it would be necessary to prove to a fairly high degree of convincing clarity that the acts of violence and intimidation had in fact hindered or prevented the free exercise of the franchise by a voter at the time they cast their vote.

In the matter before me there is no proof by way of direct evidence to confirm that some voters in Mobe area were in fact influenced by the alleged threats by the headwoman at the time of casting their votes. Further, I equally find no evidence to suggest that PW8 a renowned PF supporter was dissuaded by the violence exhibited by the Magumbo brothers from exercising her vote freely in the privacy of the polling booth on election day.

I must affirm that to offend against *Section 83 (1)* there must not only be threats or violence or restraint upon any other

person but that the said acts must be shown to have impeded or prevented the free exercise of the right to vote of the elector.

I have carefully examined the evidence of the witnesses in connection with the alleged undue influence and intimidation. Thus it is my finding that the said witnesses have failed to satisfy me that some voters in the affected wards were indeed hindered to exercise their franchise within the meaning of *Section 83 (1)*. This now leads me to consider the petitioner's final grievance of character assassination.

Two witnesses were called to testify about the alleged character assassination. Counsel for the petitioner contended in his submission that the false statement that the petitioner was a womaniser and of no fixed abode greatly affected his candidature as Member of Parliament for Kapiri. It was further canvassed by Mr Yalenga that the effect of false statements in campaigns was discussed at length by the Supreme Court in the case of **Mateo Mwamba v Anthony Kaunda Kasolo**¹¹ and cited with approval in the case of **Misheck Mutelo v Eileen Mbuywana Imbwae**¹². In the latter case the Supreme Court held as follows at J40:

"In this appeal before us, false statements were made by the appellant that the respondent was a thief as she had stolen money to sink boreholes. The letter written by the respondent in which as an incumbent MP she had requested for money to sink boreholes was floated as evidence that the money had been stolen. This was carefully planned and neatly executed to stigmatise the respondent,

similar to the false statement in *Mwaba v Kasolo*, that the PF had been dissolved and Mr. Sata was to be Vice President in MMD, Members of Parliament are elected to spur development and not to stall it, by stealing money intended to spur that development. No reasonable voter, it be an elite or illiterate, would vote for a candidate who deprives such a voter water, which is essential through stealing money intended to provide such a commodity.

In the instant case, both the petitioner and the respondent testified to this Court that the majority of the Kapiri Mposhi constituency is comprised in rural areas. Counsel for the petitioner urged this Court to take judicial notice of the fact that the rural communities place a higher premium on sexual morality and reference to the petitioner as one who was likely to commit adultery with most of the married women in the constituency greatly stigmatised him.

In response Mr Chungu submitted that only two witnesses spoke about the alleged character assassination and no other. According to him that was not a widespread occurrence. Mr Chungu went on to submit that the words that were ascribed to the respondent were in any event not statements that would amount to misconduct as alleged. The words, which his client denied, did not refer to the petitioner's state of health or that he was deceased or had withdrawn from the contest for the election as member of parliament as stipulated in *Section 84 of the Electoral Process Act*. He contended that the statement of the respondent could only amount to an illegal practice if that statement related to the matters specified in *Section 84*.

I have carefully considered the submission in support of the allegation on character assassination from counsel for both parties. It is my observation that specific illegal practices in connection with publishing false statements relating to candidates in an election are covered under *Section 84 (1) of the Electoral Process Act*. *Section 84* provides as follows:-

“(1) *A person shall not, before or during an election, publish a false statement of the illness, death or withdrawal from election of a candidate at that election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not believing it to be true.*

(2) *A person who, contravenes subsection (1) commits an illegal practice, unless that person had reasonable grounds for believing, and did believe, the statement to be true.”*

A close examination of *Section 84(1)* reveals that the only publications that are proscribed as illegal practices are those statements relating to illness, death or withdraw from the election of a candidate. It will be seen that *Section 84 (1)* does not make reference to publication of false statement in relation to sexual immorality. There is no such provision in *Section 84 (1)*. In view of that I am of the opinion that it would be going against the spirit of the law to extend it so as to cover false statements of sexual immorality. As I see it, the allegation does not therefore amount to one of an illegal practice of publishing a false statement under the *Electoral Process Act*. It does in my view amount to an allegation of a tort of defamation of character thus this allegation cannot succeed.

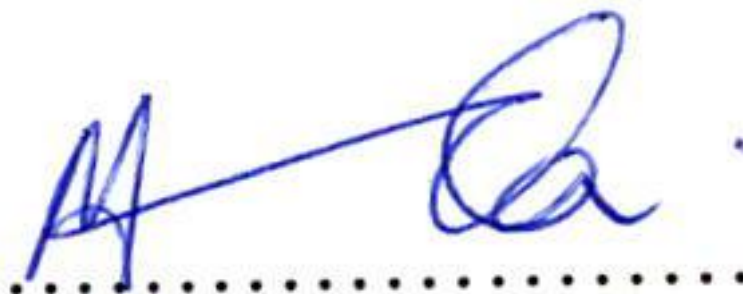
With regard to the petitioner's grievance on how the respondent had associated him in the minds of voters, that his support for the referendum implied that he supported gay marriages, the petitioner's contention was that the net effect of the alleged conduct by the respondent was to make him lose popularity as the people considered gay relationships a taboo. Flowing from this, I am compelled to state that I find no connection between the referendum results and the outcome of the petitioner's election results. I say so because if the alleged introduction of gay rights by way of the referendum repulsed voters in most parts of the constituency all the PF sponsored candidates should have lost the elections in Kapiri which was not the case. The record will clearly show that PW2 who stood on the PF ticket won the election of councillor for Kashitu ward. I consequently find this allegation to be misconceived and based on assumptions. I must also mention here that the petitioner or his informers took no reasonable steps or means to report to the commission of the alleged irregularities and breaches pursuant to the provisions of the *Electoral Process Code of Conduct*. This by implication is a clear suggestion of the satisfaction by the petitioner and his supporters with the way the campaign process was carried out generally. It is therefore my firm belief that the alleged complaints are an afterthought, prompted by the petitioner's loss.

In conclusion I wish to state that the petitioner lost the election by a margin of 1,590 votes. The alleged falsehoods or campaign irregularities took place at one meeting in Kakolo area. I must reiterate that in accordance with the earlier cited *Section 97 (2) (a)*

(i) and (ii) of the Electoral Process Act it is not enough for the petitioner to prove that an illegal practice or other misconduct was committed by the respondent in connection with the election. It must also be shown that the effect of that misconduct was to prevent the majority of the voters from electing a person of their choice. In the present case the petitioner has not established that the majority of voters in Kapiri Mposhi constituency were prevented from voting for their preferred candidate. Thus, it cannot be said that this election was so flawed that the defects seriously affected the result which no longer can reasonably be said to represent the true and free choice of the majority of voters. This petition therefore fails and is dismissed. I declare that Stanley Kakubo was duly elected member of parliament for Kapiri Mposhi constituency. Notwithstanding the dismissal of this petition, I am inclined to order that costs shall be in the cause. This is because I am of the considered view that for our democracy to thrive, challenges to parliamentary elections should not be unnecessarily inhibited by the condemnation in costs.

Leave to appeal is hereby granted.

Dated at Lusaka this 25TH day of NOVEMBER, 2016



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M. CHANDA
JUDGE