

**IN THE HIGH COURT FOR ZAMBIA**

**2016/HP/EP/27**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**IN THE MATTER OF: A PARLIAMENTARY ELECTION PETITION FOR ITEZHITZHI CONSTITUENCY NUMBER 5 SITUATE IN THE ITEZHITZHI DISTRICT NUMBER 004 OF THE CENTRAL PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11<sup>TH</sup> AUGUST, 2016**

**AND**

**IN THE MATTER OF: ARTICLE 73 (1) OF THE CONSTITUTION OF ZAMBIA (Amendment) ACT No. 2 OF 2016**

**AND**

**IN THE MATTER OF: SECTION 83 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

**AND**

**IN THE MATTER OF: SECTION 89 (1) (e) OF THE ELECTORAL ACT NO. 35 OF 2016**

**AND**

**IN THE MATTER OF: SECTION 15 (15) (1) (a) (b) (c) OF THE CODE OF CONDUCT OF THE ELECTORAL ACT NO. 35 OF 2016**

**AND**

**IN THE MATTER OF: THE ELECTORAL PETITION RULES STATUTORY INSTRUMENT NO. 426 OF 1968 (As amended)**

**B E T W E E N**

GREYFORD MONDE (MALE)

**PETITIONER**

**AND**

HERBERT SHABULA

**RESPONDENT**

**BEFORE THE HON. MRS. JUSTICE P. K. YANGAILO IN OPEN COURT ON 24<sup>TH</sup> DAY OF NOVEMBER, 2016**

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For the Petitioner: Mr. L. E. Eyaa & Mr. J. Tembo - Messrs KBF & Partners  
For the Defendant: Ms. M. Mushipe - Mesdames Mushipe & Associates

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## J U D G M E N T

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### **CASE AUTHORITIES REFERRED TO:**

1. *Pankaj Parmer (T/A Mugodi Drillers and Building) Vs. Albidon Zambia Limited - 2011/HP/0257*
2. *Saul Zulu Vs. Victoria Kalima - SCZ Judgement No. 2 of 2014*
3. *Alex Cadman Luhila Vs. Batuke Imenda - 2002/HP/EP/0017*
4. *Batuke Imenda V Alex Cadman Luhila - SCZ App No 5 Of 2003*
5. *Eileen Mbuyana Imbwae Vs. Misheck Mutelo, Electoral Commission of Zambia and The Attorney General - 2011/HP/EP/0004*
6. *Brigadier General Kenneth Kankinza And Others Vs. Sara Sayifwanda and Another - 2011/HP/EP/54) [2012]*
7. *Josephat Mlewa Vs Eric Wightman - (1995-97) ZR 171*
8. *Brelsford James Gondwe Vs. Catherin Namugala - SCZ App No. 175 of 2012*
9. *Mubita Mwangala Vs. Inonge Mutukwa Wina - Appeal No. 80 of 2007*
10. *Lewanika and Others Vs. Chiluba - (1998) ZR 79*
11. *Kamanga Vs. The Attorney General and Another - [2008] ZMSC 20*
12. *Michael Mabenga Vs. Sikota Wina and Others - (2003) ZR 110*
13. *Mubika Mubika Vs. Poniso Njeulu - SCZ Appeal No. 114/2007*
14. *Kafuka Kafuka Vs. Ndalamei Mundia - Appeal No. 80/2012*
15. *Suburumaniam Public Prosecutor - (1956) 1 WLR 965*
16. *Green Nikutisha and Another Vs. The People - (1979) ZR 261*
17. *Matilda Macarias Mutale Vs. Sabio Mukuka & ECZ - SCZ App. No. 45 of 2013*
18. *Christopher Kalonge Vs. Annie Munshya - 2011/HK/EP/03*
19. *Mazoka & Others Vs. Mwanawasa & Others - (2005) ZR 138*

### **LEGISLATION AND OTHER WORKS:**

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The Electoral Process Act No. 35 of 2016*
3. *Edward J. Imkwinkelreid's Evidentiary Foundations, 4<sup>th</sup> Edition, Lexis Law Publishing, Charlottesville, Virginia, 1998*

This is an Election Petition filed by the Petitioner herein namely Greyford Monde, on 26<sup>th</sup> August, 2016 against the Respondent namely Herbert Shabula. According to the Election Petition, the Petitioner was a candidate under the Patriotic Front (PF) ticket in the Itezhitezhi Constituency Number 5 Parliamentary Elections held



on 11<sup>th</sup> August, 2016. Alongside the Petitioner were the Respondent of the United Party National Development (UPND), Ireen Shilupizhi of the Forum for Democracy and Development (FDD) and Sheck Chifuwe of the Rainbow Party. The Returning Officer declared the Respondent as being duly elected Member of Parliament for Itezhitezhi Constituency Number 5 after declaring the results as follows: -

<b>Herbert Shabula (UPND)</b>	-	<b>21,018 votes</b>
<b>Greyford Monde (PF)</b>	-	<b>2,727 votes</b>
<b>Sheck Chifuwe (Rainbow)</b>	-	<b>1,756 votes</b>
<b>Ireen Shilupizhi (FDD)</b>	-	<b>180 votes</b>
<b><i>Total votes cast</i></b>	-	<b><i>26,238 votes</i></b>

The said election was conducted by the Electoral Commission of Zambia (ECZ) as established pursuant to the provisions of **Article 229 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016.**

The Petitioner, in his Petition, alleged that the said elections were characterized by undue influence contrary to the provisions of **Section 83 of the Electoral Process Act No. 35 of 2016** and other election offences contrary to **Section 89 (1) (e) of the Electoral Process Act No. 35 of 2016** and **Section 15 (1) (a) (b) and (c)** of the attendant Code of Conduct resulting in the electorates voting for the UPND. Further, that owing to the alleged undue influence created by threats of the electorates' lives and interference with the



independence of voters, the electorates were compelled to vote for the UPND candidate.

The Petitioner, in a nutshell, laid down the alleged particulars of contraventions of the **Electoral Process Act No. 35 of 2016** and its attendant **Code of Conduct**. The particulars in relation to **Section 15 (1) (a) (b) and (c)** of the code of conduct, in a nutshell, were as follows: -

1. That on 14<sup>th</sup> June, 2016 Royd Muzundu, a PF Ward Chairman, was picked by UPND party members along the way in Lubwe Ward, with guns and by threats. He was dragged to a UPND meeting where he was forced to resign in the presence of the Respondent and Gift Chilombo Luyako, a UPND aspiring Council Chairman candidate. Further, that the matter was reported to the police.
2. That on 10<sup>th</sup> August, 2016 UPND members, namely; the Respondent, Gift Chilombo Luyako, a Mr. Sitengu the Campaign Manager and Mr. Godfrey Beene the Deputy Campaign Manager had a radio interview at Itezhitezhi Radio where they alleged that the PF were distributing mealie meal and that they had pre-marked ballot papers. Further, that during the said interview Gift Chilombo Luyako instructed UPND members to beat PF members and do whatever they wanted to them. In addition, that during the campaign period the UPND's campaign message was to the effect that the





Petitioner was a thief who had stolen money allocated for the purchase of a grader and water driller thereby denting the Petitioner's image in the eyes of the electorate as evidenced by the Petitioner's low scores in Mbila, Shambala, Luyanda and Masemu.

The particulars, in relation to contravention of **Section 15 (1) (a)** of the **Electoral Code of Conduct, Sections 83 and 89 (1) (e)** of **The Electoral Process Act No. 35 of 2016**, in summary, were put as follows: -

1. That on 11<sup>th</sup> August, 2016 the Respondent caused violence at Mbila Basic School resulting in the attack on Jacob Mubambo, a PF Monitor, and intimidation of voters. Further, that the Respondent's driver called Orient Makunde hacked a PF member by the name of Muhila Muloba who is currently undergoing treatment at University Teaching Hospital (UTH). In addition, that as a result of the violence several people including; Mwiya Mwiya, Boyd Lufunda, O'Brian Monde, Penjani Kaluba, Kunda Christopher and Muhila Muloba were also injured. Further, that PF Polling Agents at Mbila Basic School namely; Hartwell Haweza, Lawrence Chibulamukwa, Gift Mashole and Fides Sibanda ran away from the Polling Station by escaping through a window to save their lives and several PF supporters also left and could not vote.



2. That Mr. Betts Shamwaze, a PF candidate for Councillor informed the Respondent that Mr. Muhila who had been hacked had died, while he had gone into hiding as he feared being attacked. Further, that the news of his death spread in Itezhitezhi thus causing fear and leading to PF members' failure to come out and vote. In addition, that it was established much later at 15:00 hours on that particular day that Mr. Muhila was not in fact dead.
3. That on 11<sup>th</sup> August, 2016, at Shambala which is within Mbila, Mr. Augustine Sompani a PF Ward Chairman and Agent was assaulted by UPND members thereby instilling fear in PF members in Shambala. The matter was reported to Police.

Particulars relating to contravention of **Sections 89 (1) (e)** and **Section 83** of the **Electoral Code of Conduct Act No. 35 of 2016** were highlighted as follows: -

1. That at Busanga Ward, at Iyanda Primary School on polling day, a PF Campaign Manager called Mr. Kazovu was attacked by a team of UPND youths namely: Funetu Malambo, Kenneth Simwemba, Robert Hachombwa and Tom Shamalabi and the matter was reported to the Police. Further, that the said youths intimidated and threatened PF members in the vicinity.
2. That the said youths also threatened voters, at Masemu Ward, and urged them to vote for the UPND. Further that the threats



were heard by Emmanuel Biye who was threatened to be shot by Godfrey Beene, the Deputy Campaign Manager for UPND.

3. That having been threatened at Mbila Polling Station the PF agents were not present during the counting of votes at Mbila Polling station.

Following these allegations that purportedly led to the Petitioner losing the Itezhitezhi Parliamentary Constituency Number 5, the Petitioner prays that it be determined that the Respondent was not duly elected or returned and that the election was void. He also seeks the following reliefs against the Respondent, namely: -

- a) *A declaration that the election was void;*
- b) *A declaration that the Respondent was not duly elected;*
- c) *Such declarations and Orders as the Court may deem fit;*  
*and*
- d) *Costs of and incidental to the Petition.*

The Affidavit Verifying the Petition was a repetition of the contents of the Petition and need not be repeated here. The Petitioner also filed herein an Affidavit in Reply to the Affidavit in Opposition, on 19<sup>th</sup> October, 2016, where he basically denied the contents of the Affidavit in Opposition, in particular that he never abrogated the provisions of the Constitution of the Electoral Process Act, as alleged by the Respondent.



The Respondent filed an Amended Answer dated 17<sup>th</sup> October, 2017 wherein it was stated that ECZ declared the results for the Itezhitezhi Parliamentary Constituency Elections held on the 11<sup>th</sup> day of August, 2016 as follows: -

- Herbert Shabula of UPND polled 21,018 votes
- Greyford Monde of PF polled 2,727 votes
- Sheik Chifuwe of Rainbow polled 1,756 votes
- Ireen Shilupizi of FDD polled 180 votes

The Respondent stated that on 13<sup>th</sup> August, 2016 the Returning Officer from the ECZ in exercise of the power vested in him pursuant to the provisions of *inter alia*: **Section 72 (1) (b)** of the **Electoral Process Act No. 35 of 2016**, declared the Respondent as duly elected Member of Parliament for Itezhitezhi Constituency.

The Respondent averred that he was duly and validly elected as a Member of Parliament for Itezhitezhi Constituency in the elections held on the 11<sup>th</sup> day of August, 2016 without any vitiating factors. Further, that the Respondent did not interfere with the rights of the people of Itezhitezhi by threatening them and/or interfering with their right to freely vote for the candidates of their choice.

The Respondent stated that he cannot be held at ransom for acts of independent individuals. Further, that the provisions of **Section 97 (2) (a) and (b) of the Electoral Process Act** provide *inter alia* that for a candidate to be amenable to allegations of misconduct he should either do it himself or indeed it should be shown that it was perpetrated by his/her agent with the knowledge and consent or approval of the candidate. He added that in relation to the





Respondent's allegation herein, all the requirements under the said section are negated.

It was stated that the Respondent did not say anything against the Petitioner or make unsubstantiated claims as alleged by the Petitioner. Further, that to the contrary what was mentioned was to the effect that that the PF and the Petitioner were distributing mealie meal in the area. In addition, that the same is true.

The Respondent asserted that the Petitioner was using government resources during the campaigns even after the Judgment of the Constitutional Court, where the Court held *inter alia* that, Ministers and their Deputies were illegally holding on to ministerial positions after the dissolution of Parliament. Further, that the Petitioner is the former Minister of Livestock and Fisheries, therefore he had no right and was in no capacity to use any government resources for his campaigns. In addition, that due to the use of government resources the Petitioner had an unfair advantage over the Respondent as he was finding it easy to campaign whilst the Respondent was struggling financially as he was using his personal funds.

According to the Respondent, Gift Chilombo Luyako, during the radio interview, did not utter the words alleged by the Petitioner. Further, that said Gift Chilombo Luyako stated that there were people distributing mealie meal and that they had pre-marked ballot papers and thus he merely urged the people to do something about it.



It was stated that the Constituency in question is a UPND stronghold therefore, the Petitioner cannot attribute his loss in all the Wards of the Constituency to allegations raised in the Petition. Further, that the Petitioner was in the habit of giving out money and bicycles to lure the electorates' vote. In addition that, in Sinambili Ward he gave the sum of ZMW700.00 to a Headman.

The Respondent asserted that at Itumbi Ward, the Petitioner made a donation of thirty (30) iron sheets to Munyanja Primary School and he also pledged to give twenty (20) pockets of cement at New Apostolic Church in Masemu Ward. Further, that in Lubanda Ward the Petitioner donated iron sheets to roof Batunga United Church of Zambia and urged congregants to vote for him. In addition, that the Petitioner donated iron Sheets to roof the classroom block in Makunku.

The Respondent stated that he was not at Mbila Ward when violence ensued. He added that reports concerning the said violence were reported to the Police. Further, that it was in fact the Petitioner and his agents that were involved in acts of violence.

It was averred that Mr. Muhila whom the Petitioner claimed had died is in fact alive. Further, that the Respondent won the elections in question based on issue based campaigns. He added that he was informed by his agents that the PF agents were present during the counting of the votes. He went on to state that contrary to the Petitioner's claims the Petitioner is in fact the one who abrogated the provisions of the **Constitution** and the **Electoral Regulations**.



Further, that the Petitioner committed the following electoral malpractices: -

- (i) The Petitioner's team of fourteen (14) people led by one Mr. Jacob on the voting day of the 11<sup>th</sup> of August, 2016 travelled from Itezhitezhi to Mbila where they went to disturb the voting, with some of them clad in masks and respirators. Further, that the said 14 member team had in their possession pangas and machetes, which they used to vandalise the Respondent's motor vehicle, a white Toyota Hilux Registration No. ALB 4065, which was parked four hundred meters away from the Polling Station.
- (ii) The Petitioner brewed beer which he gave to the electorate and urged them to vote for him.
- (iii) The Petitioner distributed footballs, and bicycles to the electorate so as to win their vote.
- (iv) The Petitioner distributed branded mealie meal throughout the Constituency to lure the electorate to vote for him.

It was the Respondent's prayer that the Petition be dismissed with costs as it lacks merit as the Respondent was legally elected as a Member of Parliament for Itezhitezhi Constituency.

The Affidavit in Opposition to the Petitioner's Affidavit Verifying Petition, filed on 17<sup>th</sup> October, 2017 was a repetition of the Respondent's answer and need not be repeated.

When the matter came up for trial, the Petitioner called Ten (10) witnesses. PW1 was Ackim Lushy Maunga, a reporter at Itezhitezhi



Community Radio Station. He stated that he oversees the day to day running of the radio station.

It was PW1's testimony that on 10<sup>th</sup> August, 2016 at around 16:00 hours the UPND were scheduled to have and did in fact have an interview at Itezhitezhi Community Radio Station. He stated that the UNPD panel comprised of the Campaign Manager and Deputy Campaign Manager namely: Oliver Sitengu (RW7) and Mr. Godfrey Beene. Further, that also present at the interview were the Respondent and a UPND Council Chairman candidate called Gift Chilombo.

PW1 testified that the said interview began by the radio station making a disclaimer to the effect that the views expressed by those being interviewed were not attributable to the radio station. He added that at the end of the interview the panellists gave their concluding remarks. He went on to add that the interview was recorded and that a copy of the recording was before the Court. Further, that the recording was done on machines that are state of art equipment and in perfect condition. That the said recording was in PW1's custody the whole time.

The audio recording was admitted into Court and marked "**P1**". It was played in Court and translated to English by the Clerk of Court. Of relevance to these proceedings were the sentiments by the panellists 45 minutes into the recording and their concluding remarks.





It was PW1's evidence that the radio station covers about 120 kilometres. Further, that the areas covered include the whole of Itezhitezhi itself, parts of Lusaka West, Mazabuka, Monze, Choma, Kalomo, Namwala and some parts of Kaoma. PW1 added that the radio station was charged with unprofessional conduct and inciting violence by Independent Broadcasting Authority (IBA) following the UPND interview of 10<sup>th</sup> August, 2016. Consequently, the radio station was shut down.

Under cross examination PW1 reiterated the fact that the interview in question took place on 10<sup>th</sup> August, 2016 between 16 to 17 hours on a Tuesday. Further, that the radio station reaches out to about 48, 000 listeners. He added that the number of registered voters in Itezhitezhi was approximately between 30, 000 to 40, 000.

PW1 conceded that not everyone could have listened to the radio interview as others were working at the time. PW1 further testified that Itezhitezhi radio is a community radio station which was funded by DANIDA through PANOS. He added that a Mr. Jeff Kaande was the Board Chairman of the radio station. PW1 stated that he was not aware that Mr. Kaande was a PF Campaign Manager and that Board Members are strictly for policy making.

PW1 informed the Court that he interviewed the panellists from UPND in his capacity as producer of the radio program. Further, that he was not sure whose Campaign Managers two of the panellists were, save for the fact that they belonged to the UPND. PW1 proceeded to describe to the Court how the radio program was



recorded in the studio and how it was eventually copied to the DVD on record. PW1 stated that all recordings are safely kept in a passworded computer and are never manipulated although clients may be given copies edited to their specification.

PW1 testified that from what the panellists said on the program it can be argued that they were inciting violence. Further that PW1 did not know of any violence that took place after the interview although the radio station received a verbal report of the violence in Mbila on polling day. PW1 added that according to the verbal report, UPND cadres attacked PF counterparts. He went on to add that the report was not investigated as the radio station is 75km from Mbila and had no resources to carry out investigations. According to PW1 Mr. Gift Chilombo Luyako has not been arrested for the statement that he made during the interview.

PW1 informed the Court that Itezhitezhi radio station was closed on 22<sup>nd</sup> August, 2016 and that the reason for its closure by IBA was unprofessional conduct. Further, that the reason given was not because of the interview. He added that PW1 was suspended and his assistant Mr. Ndambwa took over operations of the radio station. He went on to state that he was not aware which party Mr. Ndambwa or Jeff Kaande belonged to.

In re-examination PW1 testified that he was suspended by the Radio Station for unprofessional conduct having carried on a UPND interview that led to misunderstandings in Itezhitezhi District owing to some statements made by the panellists. That Mr. Gift Chilombo



Luyako a panellist urged the people of Itezhitezhi to get mealie meal from those giving out mealie meal and then do something to whoever was giving out the mealie meal. He reiterated that he was suspended for a few days.

PW2 was Royd Muzundu, a PF Ward Chairman for PF. It was PW2's testimony that on 14<sup>th</sup> June, 2016 he went to make a clutch pane around 08:30 hours in preparation for government officers who were to come and inject cattle on 21<sup>st</sup> July 2016. Further, that he knocked off around 12:30 hours and proceeded to look for top-up voucher for his phone. He added that on his way he met the Respondent and a person called Gift Chilombo Luyako whom he greeted. PW2 narrated to the Court how shortly after meeting the Respondent and Gift Chilombo Luyako, he was forced by two men, one of whom wore a mask, to go to a Pool house where they requested PW2 to buy them beer. PW2 went further and informed the Court that while in the Pool house, several people clad in UPND regalia confronted him and questioned why he was supporting the PF. Further, that they threatened to kill him using machetes and guns. PW2 went on to narrate how these people numbering ten (10) in total dragged him to a place where the UPND were holding a meeting. Upon reaching the meeting place, eight (8) of the people that dragged him to the said meeting, joined the multitude of people gathered for the meeting leaving him with two (2) people who held him captive.

It was PW2's evidence that the place where he was taken to is called Kasamu in Senior Headman Lufungula's area. Further, that shortly



after his arrival he was taken in a building where he found the Respondent and Gift Chilombo Luyako. He went on to state that while in the building the jersey he had on was removed and he was given a UPND t-shirt to wear.

PW2 told the Court that Mr. Gift Chilombo Luyako informed the people gathered at the meeting that PW2 was a hard worker, the two having worked together in the PF. Further, that PW2 was told to gesture the UPND party symbol which he refused whilst photographs of him were being taken. He added that eventually the Respondent and Mr. Gift Chilombo Luyako managed to hold and position his hands to show the UPND symbol. He went on to state that he was told to address the crowd that had gathered for the meeting of about six hundred (600) people, which he did for fear of the machetes and guns he had earlier been threatened with. In addition that he urged the crowd to vote for the UPND and all its candidates as the PF government was not taking the people anywhere. After addressing the crowd, he was told to sit among the UPND members who were putting on the UPND party regalia.

PW2 told the Court that after the meeting had finished he was taken to a place where food had been prepared where he was later informed that he should join the UPND for their next meetings in Mahunga and Itezhitezhi. He testified that he pleaded with them not to accompany them on the pretext that he was not properly dressed to attend their meetings and that if he accompanied them to Mahunga, he would find that hyenas have attacked his animals that he kept as he lived alone at his home. He added that he was





dressed in torn clothes and shoes, which were his work clothes. He went on to state that as they got into their cars, he asked for his phone back and they told him that they would pick him up when going to Itezhitezhi. That by this time, the shops were open and he managed to buy a top-up voucher. In addition that, when he tried to call Itezhitezhi police station, he was not able to get through to the station.

It was PW2's testimony that he eventually managed to call and inform PF party officials of his 'abduction' namely, Mr. Chikwe Mweemba (PF Constituency Chairman), Butone Manje (PF District Chairman) and the Petitioner. Further, that the Petitioner eventually informed the Police at Itezhitezhi who went to his house where he narrated to them the events at the meeting. That after hearing PW2's version of events, the Police advised PW2 to physically report the matter to the police station so that a docket may be opened. PW2 informed the Court that he only managed to have the docket opened on 16<sup>th</sup> June, 2016 as he was tired the previous day.

PW2 referred this Court to a picture on page 10 of the Petitioner's Bundle of Documents, which he testified that it was taken by unknown person at the meeting where he was forced to gesture the UPND symbol. That in the said picture, PW2 is wearing a UPND T-shirt, with Gift Chilombo Luyako standing on his left and the Respondent on his right. He also referred this Court to page 14 of the Respondent's Bundle of Documents, which is a picture showing PW2 wearing a UPND T-shirt and seated on a wooden stool. He



testified that the picture was taken by unknown person after he had addressed the meeting and was told to sit among the people that attended the meeting. When a video recording was played in Court showing PW2's 'defection' to the UPND, PW2 maintained that he was told what to say by the UPND officials and that he proceeded to speak because of the threats on his life.

PW2 testified that following these events the people of Itezhitezhi believed that he had defected to the UPND despite PW2 informing them that he had not defected. He further testified that most of the voters refused to believe that he had not defected from PF to UPND.

*Under cross examination* PW2 testified that he knew Mr. Gift Chilombo Luyako from 2006 when Mr. Gift Chilombo Luyako was a member and District Political Secretary of the PF. PW2 reiterated that on 14<sup>th</sup> June, 2016 he met Mr. Gift Chilombo Luyako standing by some shops in Kasamu area in Lubwe District. PW2 testified that he believed that the Headman may have been at the meeting that was held in Kasamu.

PW2 reiterated that he was dragged to the meeting by about ten (10) people whom he did not recognize. Further, that he only recognized some people at the meeting in issue. PW2 denied having gone to the said meeting willingly. When shown a photograph at page 10 of the Petitioner's Bundle of Documents, PW2 stated he was being forced to gesture his hand in the UPND symbol. Further, that the people that took the photographs were not at the place where PW2 was threatened with machetes and guns to attend the meeting.



It was PW2's testimony that he did not know where the machetes were taken although he reported the matter to the police. Further, that no UPND supporters were arrested as the police are still conducting their investigations. He went on to add that the photographs of him in a UPND t-shirt were posted on the internet so that they could confuse people into believing that PW2 defected to the UPND and that is where he acquired the picture shown at page 10 of the Petitioner's Bundle of Documents.

PW2 denied having eaten nshima with the Headman in his house. PW2 reiterated that he addressed the people at the meeting where he denounced PF because he was earlier threatened with machetes and guns by UPND supporters. PW2 informed the Court that he is a member of the neighbourhood watch although he denied ever having been arrested in connection of a theft of ZMW900.00 or put in Police cells. PW2 denied having stolen any fishing nets and money from a person called Bright Shampande. PW2 reiterated that the issue of the guns and machetes is still being investigated by the police.

It was PW2's testimony that because of him being dragged to a UPND meeting where he was paraded as a defector, the Petitioner lost votes. Further, that the Petitioner also lost because the people campaigning for UPND were saying that they would do something to whoever votes for PF. PW2 told the Court that he is well known in the Ward of his Constituency as he was born there. He added that the Petitioner won in Lubwe Ward in 2011 under the UPND ticket and that Mr. Godfrey Beene won in the same Ward in 2006. He



went on to add that the UPND is popular in the area although other parties including PF are also popular.

PW2 stated that when he joined PF in 2006, UPND got more votes against PF because PF were new in that area. He conceded that the UPND has won elections in Itezhitezhi since 2011 but he maintained that in the August, 2016 election the people were scared as the people who appeared on the radio interview had stated that whoever votes for the PF should be beaten. Further, that even if the law does not allow one to put on party regalia on voting day, the people in that Ward knew each other and would be able to ascertain who belonged to which party on polling day. PW2 went on to testify that in all the areas where there was violence, people were beaten at polling stations in those areas and that some officers manning the stations rescued victims of violence. He also testified that dockets were opened at Itezhitezhi Police Station. PW2 reiterated that he did not join the UPND and that had he wished to join UPND, he would have done so freely.

There was no re-examination of PW2.

PW3 was Lawrence Chibulamukowa, a PF Constituency Vice Treasurer for Itezhitezhi District. It was his testimony that on 11<sup>th</sup> August, 2016 he was a PF Observer at Mbila Polling Station. He stated that some of his duties as an Observer were to ensure that the people voted accordingly and that the rules were followed. That it was also his duty to observe things that were happening on that particular day.





It was PW3's evidence that when the people started voting at Mbila Polling Station at 06:00 hours, the place was peaceful. Further, that at around 09:00 to 10:00 hours, the Respondent in the company of Fanwell Sitongwa (RW5) and Edward Mulowa visited the polling station. He added that RW5 was the councillor at Mbila Ward and Edward Mulowa was standing as Ward Chairman for Mbila Ward.

PW3 testified that the voters left the polling station immediately after voting, but that after a while he noticed that people that started gathering at the polling station after voting. It was PW3's testimony that, at that particular time, he was informed by his friend in the PF, Andrew Maimbo, that Mr. Augustine Sompani (PW4), a Ward Chairperson for Mbila Ward, was beaten by UPND supporters at Shambala Polling Station where he had gone to monitor elections.

PW3 testified that the voters who had gathered at the polling station after voting started saying that since PW4 and his friend had been beaten at Shambala, the PF members at the polling station would also be killed. PW3 recognized the said voters as UPND members as they were part of the UPND campaign team during the campaigns.

PW3 informed the Court that around 11:00 hours, whilst he was in one of the classrooms at the polling station, he saw a white van pass by at full speed. He stated that the said van was being stoned by a group of UPND supporters. Further, that PW3 saw a person



running towards the church whilst being pursued by a group of people who were throwing stones at him. He added that when the group of people caught up with the said person they threw stones at him and beat him up with sticks.

According to PW3, a Mr. Mweemba informed the Police officers manning the polling station that a person was being beaten. Further, the officers rescued the said person and brought him to the front of the school. That PW3 went to check on that person whom he found to be badly beaten. He recognized the said person as Muhila, a member of the PF Youth Wing.

It was PW3's testimony that the people at the polling station were scared after this incidence and that some of them even left the polling station. He added that the said Muhila was taken to Mbila Clinic by police officers.

PW3 testified that soon after the incidence, the situation at the polling station was not good. That as he left to go to the toilet, a woman by the name of Royna Machila approached and informed him that he should find means to leave the polling station as UPND supporters planned to kill him. Further, that shortly after, PW3 escaped from the Polling station through a window sometime between 17:00 and 18:00 hours.

According to PW3, when he got home, his wife informed him that while at the market she found UPND supporters who told her that if they won't kill PW3 at the polling station, then they would follow him home where they would kill him. He added that around 20:00



hours he called a person called Edward Mulowa, the owner of the place where the UPND members usually gathered and informed him that if the UPND supporters wanted to kill him they would find him at his home.

It was PW3's testimony that no one attacked him that night and that he proceeded to report the matter to the police the following morning. PW3 concluded his examination in chief by stating that the violence is still ongoing in Itezihitezhi to date.

Under cross examination PW3 reiterated his duties as an Observer and what was expected of him as an Observer. Further, PW3 reiterated that he saw the white open van pass behind the polling station whilst he was in the classroom and that he witnessed these events through a window whilst he was in the classroom. That he could not count the number of people in the van as it was moving at a very high speed since people were throwing stones towards the vehicle.

It was PW3 evidence that his friend had phoned to advise him that the van in question was sent from Itezihitezhi to pick up PW4 who had been beaten in Shambala. Further, that the said vehicle was at Mbila because the route to Shambala passes through Mbila. He added that the distance between Mbila and Shambala is about twenty-five (25) kilometres. PW3 testified that the said vehicle could not have been the Respondent's vehicle. When referred to pictures at pages 17 - 18 of the Respondent's Bundle of Document, PW3 stated that the vehicle that he saw is not the one in the



pictures. PW3 could not confirm that the Respondent's vehicle was attacked by PF cadres.

PW3 told the Court that the said white van was supposed to take PW4 to a hospital in Itezhitezhi but that he did not know why the vehicle passed through Mbila. PW3 denied seeing the people in the white van throwing stones or that some of the occupants fell off the vehicle and were injured. In addition, PW3 stated that he was aware that Itezhitezhi radio announced that there was violence at Mbila although he did not know who made the report to the radio station. That all the matters of violence at Mbila were reported to the Police.

It was PW3's evidence that three (3) police officers were manning the polling station at Mbila. Further, that he made a report to one of the officers whose name he did not know, to the effect that members of the PF were being beaten in Shambala. He added that he is not aware of any arrests made by the police regarding the violence. He went on to state that he could not tell the number of PF supporters that were attacked in the white van. In addition, that the only person he saw was a person called Muhila Muloba. PW3 stated that he left the polling station before close of voting and that at the time he left Muhila had been taken to the clinic.

According to PW3, the message that came was that Muhila had died when in fact he had not died. That at the time of giving his testimony in Court, Muhila was at home waiting to go for review at the University Teaching Hospital (UTH) as his eye is badly damaged.





PW3 testified that he had been a member of PF for five (5) years and conceded that UPND had polled the highest votes in the area since 2011.

There was no re-examination of PW3.

PW4 was Augustine Sompani. He testified he was a Monitor at Shambala Polling station and that on 11<sup>th</sup> August, 2016, he asked his friend Beeve Hancholombe who is the PF Vice Chairperson for Mbila Ward to take him to Shambala where he was due to carry out his monitoring duties. PW4 testified that he was wearing a head sock and a helmet as they were riding a motorbike. Further, that before they got to Shambala, they passed two people whom he recognized as Titus Ndimuna and Kangiwe, but did not stop as people were going to vote. Upon passing Titus Ndimuna and Kangiwe, some people told them that they were being called, thus PW4 asked his friend to stop the motorbike so that they could see the people who were calling them. That upon stopping, they saw Titus Ndimuna and Kangiwe coming towards them. That Kangiwe went and stood in front of the motorbike, whilst Titus Ndimuna stood behind the motorbike. That upon seeing this, the people who were heading to the polling station to vote, stopped and surrounded them. According to PW4, Kangiwe a member of the UPND, asked PW4 why he was campaigning on polling day. He added that Kangiwe accused PW4 of distributing t-shirts, money and that he had pre-marked ballot papers. He went on to state that he challenged Kangiwe to show him the people that he had allegedly given money or t-shirts to and that is when Titus Ndimuna stated



that PW4 was a PF leader and should therefore be killed. Further, that the two proceeded to beat up PW4 who fell to the ground. That upon seeing this, his friend Beeve Hancholombe, ran off on the motorbike and was followed by the people that had surrounded them. He added that he eventually got up and ran into a house that belonged to a teacher called Welcome Munsaka. That people surrounded the said house and started throwing stones at the house shouting that PW4 should come out of the house as it was his day to die. He further testified that Welcome Munsaka told the people to stop throwing stones as they would destroy things in his house and that he would remove PW4 from the house.

According to PW4 four (4) people entered the said house and that he managed to recognize three (3) of them, two being neighbourhood watch officers called Winnie Kakwiliba and Peggy Kabombo. The third person that he recognised was Senior Headman Fanwell Sinambili. He added that the fourth person whom he did not recognise was an officer from the polling station, who was wearing a uniform.

It was PW4's evidence that he was handcuffed by Winnie Kakwiliba, whilst Headman Sinambili took his phone, head sock and helmet away from him. That he was then taken to an office at Shambala school. He stated that he was being beaten by people on the way to the said school. He went on to state that at around 15:00 to 16:00 hours, police officers from Itezhitezhi came and took PW4 to Itezhitezhi police station.



PW4 informed the Court that he gave a statement at the police station which statement was recorded in the Occurrence Book (OB) and he was given a medical form which he took to the hospital. Further, that he admitted at Itezhitezhi Hospital for four (4) days where he received medical attention until he was discharged. He added that when he got home some people informed him that owing to the incidences of violence they did not manage to cast their votes.

Under cross-examination PW4 testified that he did not carry out his duties as a monitor as he was beaten by a person called Titus Ndimuna, whom he had known to be a UPND supporter, owing to the fact that he had seen him campaigning for the UPND during the campaign period. PW4 maintained that even if he was arrested by the two neighbourhood watch officers who handcuffed him, he was not found with a case to answer as that they did not find anything on him. PW4 denied calling the Petitioner to inform him that Muhila had died and stated that when he got to the hospital he discovered that Muhila was injured but not dead. PW4 denied being the cause of why people did not go to vote.

PW4 informed the Court that police officers from Kabwe and Itezhitezhi picked him up at around 16:00 hours. He reiterated that he did not commit any criminal offence.

In re-examination PW4 reiterated that he was harassed by UPND members even though he did not commit any crime.

PW5 was Jacob Mubambo, a member of the PF. He stated that he was part of the PF campaign team for Itezhitezhi Constituency



during the just ended elections and that he was also an election monitor on polling day at Mbila Polling Station.

PW5 testified that on polling day he visited the following polling stations namely: Kasangala, Muyasani, Yomena, Mbila and Shambala polling stations. Further, that he went to Mbila polling station around 11:00 hours with a person called Davy and parked his motor vehicle about eleven (11) kilometres from the polling station. He added that as he walked towards the polling station he saw a group of 15 to 20 people approaching him. He went on to state that from the group he was able to identify a person called Fanwell Sitengu and the Respondent.

According to PW5, the people started shouting that they should kill him. Further, that PW5 proceeded to go to stream 3 at Mbila polling station. That he reached into his pocket to take out his Identification Card (ID), which he needed to show the Polling Assistant as proof that he was a monitor, the same group of people came near the class room and stood by the windows. That they started shouting that he was reaching into his pockets to produce pre-marked ballot papers. He added that he only spent about three (3) minutes at the said stream. He went on to state that he did not check the other streams as he intended to do since he was scared. Consequently he went back to where he had parked the vehicle.

PW5 testified that as he went back to the vehicle a group of about Hundred (100) people followed him, then picked up stones and started to hail threats at him. Further, that they asked him if he





had heard the radio interview where they were instructed to beat up PF members. PW5 testified that when he got to the vehicle, he called one of the officers called Mazuba Chembo, who was manning the polling station who then came and urged PW5 to leave the polling station as the group of people was too big to be contained by the police officers.

PW5 told the Court that he was driving a Toyota Hilux, grey in colour at the time. He added that when he left the polling station he went to park in the bush and called Mr. Godfrey Beene, a Deputy Campaign Manager for the UPND. He asked him to ask the Respondent to calm down his supporters. That Mr. Godfrey Beene told him to leave the place as the UPND supporters were looking for PW5 and the Petitioner as they suspected that they were carrying pre-marked ballot papers in their vehicles. In addition, that PW5 called the Petitioner and informed him of what was happening and that the Petitioner stated that he would report the matter to the police station.

PW5 testified that he had known Mr. Godfrey Beene for a very long time and knew Mr. Godfrey Beene's position in the UPND during the campaigns because Mr. Godfrey Beene always introduced himself as the UPND Deputy Campaign Manager in the Constituency. PW5 was able to identify Mr. Godfrey Beene in Court as the man wearing a black suit. Further, that PW5 received a call from the Petitioner informing him that the Police officers were on their way to Mbila which is about 70 kilometres away from



Itezhitezhi. He added that the police officers arrived around 16:00 hours.

PW5 told the Court that whilst still parked in the bush he received a phone call from an unknown person who informed him that a PF youth had been beaten up near Mbila Polling Station. Further, that when the police officers arrived PW5 went with them to Mbila clinic where PW5 identified the badly beaten youth as Muhila Muloba. He added that the police officers helped put Muhila in PW5's vehicle who then took him to the District hospital at Itezhitezhi. PW5 went on to state that Muhila was attended and the following day he was evacuated to UTH in Lusaka owing to the seriousness of his injury where he spent four (4) weeks undergoing treatment. He further added that Muhila had gone back to UTH for review and the doctors recommended that his injured eye be plucked out. PW5 identified a photograph at page 3 of the Petitioner's Bundle of Documents as that of Muhila.

PW5 denied having caused any disturbances at Mbila polling station as alleged by the Respondent in paragraph 33 (i) of his Amended Answer and maintained that he passed through several polling stations in his capacity as a monitor. PW5 further denied being in the company of fourteen (14) other people in his vehicle and maintained that he was only with a person called Davy in his vehicle. PW5 further maintained that what took him to Mbila Polling Station was to carry out his duties as a Monitor and that the voting at that particular station was disturbed by UPND members



who wanted to attack him. He also denied that he had vandalised the Respondent's car as alleged.

PW5 informed the Court that during the campaign period PW5 was in Itezhitezhi campaigning for the Petitioner with the Petitioner, a Mr. Kazoka who was the Campaign Manager and other PF candidates who were standing for councillors in Itezhitezhi. Further, that the Petitioner did not brew any beer for the electorate, neither did he distribute any bicycles and footballs as alleged by the Respondent in paragraph 33 (ii) of his Amended Answer. PW5 added that the only bicycles distributed were to PF party members which they were to use for their transport during their campaigns. PW5 went on to state that the Petitioner did not distribute any branded mealie meal to the electorate and that he never saw any branded mealie meal.

It was PW5's testimony that he had earlier made an unsuccessful application for adoption as a parliamentary candidate in Itezhitezhi Constituency under the UPND. That consequently, PW5 left the UPND after realising that there was nepotism, corruption and dictatorship tendencies in UPND. PW5 added that he did not vandalize any vehicle.

Under cross-examination PW5 testified that he joined the political arena in 2001 under the UPND. Further, that he never contested any elections in 2006 and 2011. He added that he had hopes of contesting the seat for Member of Parliament for Itezhitezhi Constituency under the UPND in the 2016 General Elections and



that he was aware that about twelve (12) people also wanted to be adopted by the UPND for the Itezhitezhi seat. He also added that UPND did not adopt him.

PW5 testified that when the UPND adopted the Respondent to stand as Member of Parliament for the UPND he defected to the PF although he maintained that he was not upset at not being picked by the UPND. He added that he was not aware that it was UPND policy for all losing candidates in the primaries to rally behind the adopted candidates.

It was PW5's evidence that in 2011, the Petitioner stood under the UPND ticket when Itezhitezhi was part of Southern Province and that after the 2011 elections, Itezhitezhi was made part of Central Province. PW5 further stated that the PF did not win any parliamentary seats in Southern Province although Itezhitezhi is now in central province.

PW5 denied having misappropriated funds given to him as UPND Campaign Manager and stated that if that had been the case, he would have undergone the UPND disciplinary process. PW5 conceded that the PF had bales of Chitenge material during the campaign period although he could not recall the number of bales.

PW5 reiterated that no bicycles or footballs were distributed to the electorate or headmen save for the bicycles distributed to PF *'foot soldiers'* to aid their campaign movements. Further, that the Petitioner did not distribute any mealie meal to the electorate as alleged by the Respondent. When referred to page 21 of the





Respondent's Bundle of Documents, PW5 testified that he had never seen the picture of the bicycle that was shown to him and that the 20 - 25 bicycles that they distributed to the PF '*foot soldiers*' were smaller than the bicycle in the picture.

It was PW5's testimony that he was deployed as an election monitor at Mbila Ward which includes Shambala polling station. Further, that when he checked at Shambala polling station between 07:00 - 07:30 hours, the voting process was going on well. He added that he visited Mbila polling station at 11:00 hours in a grey Toyota Hilux but he could not recall the registration mark of the said vehicle. He went on to add that the owner of the said vehicle was the Petitioner.

PW5 denied having agitated people at Mbila polling station. He testified that some people standing around the polling station asked him to leave the polling station and not the people who were in the queue. Further, that he did not gesture any PF symbols at the polling station. PW5 denied leaving the polling station and coming back with PF cadres with masks and respirators later that day. He added that he came back to the polling station at past 16:00 hours in the company of police officers.

It was PW5's evidence that Mbila polling station was being manned by 3 police officers although he only saw one of them called Constable Mazuba Chembo. Further, that PW5 was aware that each police station ought to be manned by eight (8) officials from



ECZ. It was PW5's evidence that when he returned to the polling station at Mbila, he was with about five (5) police officers.

PW5 maintained that Muhila Muloba did not fall off a motor vehicle that he was driving and that the matter was reported to the police although he was not sure if any arrests were made by the police. PW5 reiterated that he did not damage the Respondent's vehicle. Further, that the vehicle at pages 17 - 18 of the Respondent's Bundle of Documents does not look damaged.

In re-examination PW5 reiterated that the vehicle appearing at pages 17 and 18 of the Respondent's Bundle of Documents does not seem damaged and that the report shown at page 13 of the Respondent's Bundle of Documents did not mention that PW5 and PF cadres damaged any vehicle. Further, PW5 denied that UPND did not adopt him because of funds that he allegedly misappropriated and stated that he was never prosecuted for monies that he was allegedly to have stolen during the 2015 presidential by-election. It was his testimony that no action had ever been taken against him by UPND for funds that were allegedly embezzled.

PW6 was Quinet Mweemba, a PF polling agent during the August, 2016 elections who was stationed at Mbila polling station. PW6 narrated to the Court his duties as a polling agent. PW6 testified that four PF polling agents were at Mbila polling station namely: Fandress Sibanda; Precious Mundia; Gift Mashole; and PW6.



PW6's description of the events leading up to the fracas that ensued after UPND supporters started throwing stones at a grey Toyota Hilux is a repetition of PW5's evidence and need not be repeated save to state that PW6 went further and stated that the UPND supporters were saying that they would beat up any PF supporter. PW6 added that being a PF member he was scared, as the people outside continued issuing threats that they would beat PF supporters up to the time of vote counting.

PW6 informed the Court that at the time the ballot papers were being counted PW6 noticed that his fellow polling agents and PF monitors namely PW3 and PW5 were not at the polling station. Further, that seeing that he was the only PF polling agent at the polling station, PW6 found difficulties to continue counting the ballot papers and left the polling station for his home on the pretext that he was going to the toilet.

PW6 informed the Court that he saw the Respondent at Mbila polling station around 12:00 hours.

Under cross-examination PW6 reiterated that he was a polling agent at Mbila polling station. He added that Mbila polling station had three streams. He went further to state that other political parties were represented at the polling station including UPND, Rainbow and the FDD. In addition, PW6 testified that he was aware that ECZ officials and police officers were at the polling stations although he did not know how many of them were there.



It was PW6's evidence that while at the polling station he saw the vehicle that PW5 drove during the campaign period parked approximately 70 or 80 meters away from the polling station. Further, that he heard noise being made by UPND members outside the polling station when he peeped through the window. He added that he knew the people belonged to UPND because they said so themselves. He went on to add that he did not report to any of the ECZ officials or the police officers as they were there and saw for themselves what was happening. In addition, that two police officers went to rescue the people that were being beaten outside.

It was PW6's testimony that the people on the voting queues stopped voting owing to the fact that they were scared because of the fracas. He added that he could not tell which people came to vote for specific political parties while they were on the queue as votes are secret.

According to PW6 he saw PW5's vehicle but he did not see PW5. Further, that all he saw was PW5's vehicle speeding off as he peeped through the window at Mbila polling station. He added that when he saw the vehicle for the second time, people were throwing stones at the vehicle. He went on to add that only one person fell off the vehicle, whilst one person did not manage to get on that vehicle.

PW6 told the Court that he did not leave the polling station because his party was losing. PW6 added that he did not get the GEN 12 form because he was scared. Further, that he did not know the





voting trend in Itezhitezhi in the past years although he is aware the Respondent won the parliamentary seat in Itezhitezhi under the UPND.

In re-examination PW6 testified that he has not been telling the Court lies as was put to him by counsel for the Respondent in cross-examination.

Penjani Kaluba was PW7. He stated that he is the Constituency Youth Secretary for the PF. PW7 testified that on 11<sup>th</sup> August 2016, after voting at 09:00 hours, he went to the PF campaign centre in Masemu, Itezhitezhi where he met several PF youths including O'Brien Monde, Boyd Lufunda, Mwiya Mwiya, Muhila Muloba and McJoe Phiri. That as they were chatting, he received a phone call around 11:00 - 12: 00 hours from the Petitioner who informed him that PW4 had been attacked. Further, that when the police officers did not show up after reporting the incident, the Petitioner asked PW7 to get other youths so that they could pick PW4 up in a vehicle.

According to PW7 he picked up 12 youths and they proceeded to Shambala. Further, that when they got to Mbila they started looking for Mr. Betts Shamwaze so that he could lead them to Shambala where PW4 was as they did not know the route very well. PW7 told the Court that he checked the Polling station at Mbila but did not find him. He added that they eventually found Mr. Shamwaze at the market but he refused to escort them to Shambala for fear of being killed by UPND supporters. He went on



to add that they were eventually escorted by Mr. Shamwaze's brother, who agreed to do so on condition that once they got to Shambala, he would remain in the car as he did not want any UPND member to see him.

PW7 testified that enroute to Shambala they had to pass through Mbila Basic School where the polling station was. Further, that they found a white Hilux parked on the road with two people on board. He added that this was around 14:50 - 15:00 hours. He went on to state that when they hooted, the driver of the White Hilux whom PW7 recognized as Oriet Siamakaba, did not move the vehicle from the road.

PW7 told the Court that while all this was happening the Respondent was standing behind a school building in the company of some youths. Further that PW7 told the PF youths to ask the driver of the white Hilux to move the vehicle. He added that suddenly stones were thrown in their direction and they hit both vehicles on the road. He went on to add that, the White Hilux only moved off the road after people started throwing stones in their direction. In addition, that PW7 was in the process hit by a stone on the eye. He testified that most of the youths sustained injuries.

It was PW7's testimony that as they tried to escape from the attacks, two of the youths, namely Mwiya Mwiya and Muhila Muloba, that had gotten off the vehicle failed to get back on and were left behind. He added that Mwiya Mwiya had fallen off the



vehicle after he was hit with a stone and that O'Brien Monde and Boyd Lufunda were also injured in the process.

PW7 testified that, following the incident and the injuries sustained, they decided to go to Itezhitezhi District Hospital for treatment, although they first passed through the Police Station so that they could get medical reports of which they did. He added that medical forms were issued to the following: PW7; O'Brien Monde; and Boyd Lufunda. In addition, that shortly after arriving at the hospital a Toyota Hilux driven by PW5 came in and brought Muhila Muloba. PW7 stated that later Mwiya Mwiya and PW4 were also brought to the hospital by Police Officers. It was PW7's testimony that Mwiya Mwiya was seriously injured with three cuts on the head, but that the worst injured was Muhila Muloba.

It was PW7's evidence that after leaving the hospital, he proceeded together with O'Brien Monde, Mwiya Mwiya and Boyd Lufunda to the Police Station, where they opened dockets for their respective cases. Further, that both Mwiya Mwiya and Muhila Muloba were beaten by a mob when the vehicle left them behind. PW7 identified pictures of Mwiya Mwiya, O'Brien Monde, Boyd Lufunda and Muhila Muloba together with their respective medical reports issued on 11<sup>th</sup> August, 2016 on pages 1 - 9 and 11 - 18 of the Petitioner's Bundle of Documents.

Under cross examination, PW7 testified that he went to Mbila Polling Station twice between 14:00 hours and 15:00 hours. Further, that the first time he went to Mbila Polling Station was the



time he was looking for Mr. Betts Shamwaze and the second time was when they passed through enroute to Shambala to pick up PW4.

PW7 reiterated that at the time that they went to Mbila, they were using a white Ford Ranger. Further, that PW7 and 12 other youths parked at the polling station behind the voting queues near the school flag as they were looking for Mr. Betts Shamwaze. He added that they were not disguised in any way at the time that they were at the polling station. He explained to the Court that he came with 12 other youths so that they could assist remove the car from the sand if at all it got stuck as the road from Itezhitezhi to Mbila is not good state.

It was PW7's testimony that the youths got off the vehicle at the polling station to look for Mr. Betts Shamwaze and when they could not find him they left to go to Mbila market.

PW7 denied having used any stones or pangas to hit against the White Hilux that was found behind Mbila polling station. PW7 further denied the fact that a mob of people only attacked them when they attempted to attack the woman in the white Hilux. PW7 testified that the stones that were thrown at their vehicle came from behind a building at the polling station were the Respondent was. Further, that even the people that were in the queue for voting started throwing stones at PW7 and the other PF youths although the Respondent did not throw any stones.





It was PW7's evidence that the people on the voting queue were dressed in ordinary clothes. Further, that the medical reports on record are faint and that the date stamp cannot be clearly seen although the medical reports were issued on 11<sup>th</sup> August, 2016. He added that the injuries sustained by Mwiya Mwiya and Muhila Muloba were not as a result of them falling off the vehicle but from beatings inflicted on them. He went on to state that even if they were 13 in total in the Ford Ranger, they would have still managed to carry PW4 in front cabin of the car as the Ford Ranger being one ton had enough space and capacity for 12 persons behind.

There was no re-examination by counsel for the Petitioner.

PW8 was Dawson Kazovu, an MMD District Chairman. He stated that during the 11<sup>th</sup> August, 2016 elections, he was part of the PF campaign team.

It was PW8's testimony that on 11<sup>th</sup> August, 2016 after voting at Iyanda Polling Station he proceeded to deliver food to the PF polling agents at different polling stations. Further, that while delivering food to a polling agent at Iyanda polling station a white taxi approached PW8 at full speed. He added that the people in accused him of carrying pre-marked ballot papers.

PW8 informed the Court that he only got to know two of the people in the taxi when he reached Itezhitezhi police station. Further, that the two persons were called Kennedy Luma Nyendo and Tom.



Under cross-examination PW8 reiterated that on polling day he was distributing food to the PF polling agents and that during the campaigns he was campaigning with the Petitioner. Further, that PW8 did not distribute any bicycles to the electorate although footballs were given to schools that approached PW8 and his team.

PW8 denied having distributed any branded mealie meal and ever seeing in Itezhitezhi pictures that were shown to him on pages 15, 16 and 20 of the Respondent's Bundle of Documents. Further, that the '*foot soldiers*' were given mealie meal which was bought from Melissa Supermarket during the campaign period and bicycles called Humber which had small tyres. PW8 added that Chitenge Materials and T-shirts were also given out.

It was PW8's evidence that he did not report to the police when he was threatened at the polling station although when he passed through the police station on his way from the polling station he found that his attackers had been apprehended at the police station although he did not know why they were in police custody.

PW8 informed the Court that there was no violence at Masemu Ward but that there was violence at Iyanda Ward. PW8 reiterated that he did not report the threats to the police as he was not injured and that when he passed through the Police Station, he found the persons that threatened him in police custody for some other offence.



It was PW8's testimony that violence was reported at Mbila Ward station and Lubwe Ward although PW8 was not present to witness the said violence.

In re-examination PW8 reiterated that he did not distribute any bales of *salaula* to the electorate. PW8 further testified that the pictures of the mealie meal appearing at page 15 of the Respondent's Bundle of Documents were not taken at Itezhitezhi as he did not distribute any of it to the electorate. He added that bicycles were only distributed to the PF's *'foot soldiers'* to assist in their campaign movement.

PW9 was Greyford Monde, the Petitioner, herein. PW9 narrated to the Court the events of 14<sup>th</sup> June, 2016 regarding the abduction of PW2 by UPND supporters, the same is a repetition of PW2's evidence save for the following facts namely that; when he tried to call PW2 to find out what was going on PW2's phone was off. Further, that a person called Mrs. Shaloba, a PF chairlady for Lubwe Ward called PW9 to advise him that PW2 was being attacked and led to a meeting by some UPND members who had guns and other weapons. He went on to state that when he heard of what had happened to PW2 he reported the matter to the main police station in Itezhitezhi who assured him that they would travel to Lubwe.

It was PW9's testimony that when he finally got through to PW2, PW2 narrated the events leading up to his abduction, the abduction itself and being taken to a UPND meeting where he was forcefully



made to denounce the PF. PW9 added that the police informed him that they had met with PW2 and they were yet to record a formal statement at Itezhitezhi main police station which PW2 gave the following day.

When PW9 was shown a picture appearing at page 10 of the Petitioner's Bundle of Documents, he identified the people in the picture as the Respondent, PW2, Muzundu Royd and Mr. Gift Chilombo Luyako.

PW9 narrated to the Court the events of the interview held by the UPND on Itezhitezhi Community Radio Station on 10<sup>th</sup> August, 2016, where the panellists were the Respondent; Mr. Gift Chilombo Luyako, UPND council aspiring candidate for Itezhitezhi; Mr. Oliver Sitengu, UPND Campaign Manager for Itezhitezhi; and Mr. Godfrey Beene, UPND Deputy Campaign Manager for Itezhitezhi. PW9 testified that he listened to the radio program in issue as it was well advertised. It was his testimony that during the said interview, Mr. Godfrey Beene stated that they had just finished the tour of the entire Constituency consisting of thirteen (13) Wards and that in total they had done seventy (70) various meetings in the Constituency. Further, that Mr. Godfrey Beene stated that what they were going to say on the radio was the climax of the entire campaign message that they had presented to the entire Constituency through those 70 meetings. He went on to testify that PW9 was particularly concerned with the following allegations made by the panellists namely that: PW9 had stolen a motor grader bought by the council in 2013, which was meant for the





Constituency; that PW9 had bulldozed the process of procuring a water drilling machine that was meant to provide boreholes and water to the people of Itezhitezhi; that PW9 had misappropriated the sum of ZMW1,000,040.00; that PW9 connived with water drilling companies with a view of sharing the CDF funds. Further, that PW9 and the PF were incompetent. He added that the panellist urged the people of Itezhitezhi to become soldiers of the UPND and beat or do anything to the people that will be distributing pre-marked ballot papers and mealie meal on 11<sup>th</sup> August 2016, the polling day.

PW9 told the Court that on polling day he was at Itumbi Ward at Bwachinga polling station. Further, that around 10:00 to 11:00 hours, PW9 received a phone call from PW5 informing him of how he had been harassed at Mbila polling station, where he was victimised and accused of distributing pre-marked ballot papers by a group of people in the company of the Respondent. He added that PW5 informed him that PW4 had been attacked by UPND members at Shambala. PW9 went on to state that he informed the police officers at Itezhitezhi concerning the reports he had received from PW5.

It was PW9's testimony that he directed PW7 to get a vehicle and go and pick up PW4 who had been beaten. Further, that PW9, on his way to Itezhitezhi Central town, he passed through Masemu Polling station, where he was threatened by four (4) UPND youths in a Toyota Corolla. He added that a PF member called Emmanuel Biye heard the UPND youths say that they would follow and attack the



Petitioner whom the alleged had pre-marked ballot papers and was distributing money to the electorate.

It was PW9's evidence that on his way to Ikonkaile polling station PW9 received a phone call from Emmanuel Biye who informed him that the UPND youths he had met earlier were trailing PW9. Further, that Mr. Godfrey Beene threatened to shoot the said Emmanuel Biye. PW9 was able to identify Mr. Godfrey Beene as the person who was sitting next to the Respondent in Court. He added that in fear of the threats he had received PW9 went home. PW9 went on to add that while he was home he received a phone call from PW8 informing him that he had been attacked by some UPND members at Iyanda Polling Station in Busanga Ward.

PW9 told the Court that shortly after the call from PW8 he received another phone call from a Mr. Betts Shamwaze around 14:00 to 15:00 hours who informed him that one of the PF members was killed by UPND members in Mbila and as a result, he was in hiding as he feared for his life. Further, that when PW9 went to report PW8's case at the Police Station at Itezhitezhi, he found 4 UPND youths at the Police Station claiming to have been attacked by PF members. PW9 added that he recognized the 4 youths as the same youths that had been trailing him. He went on to add that the 4 were placed in police custody as the police waited for PW8 to arrive.

It was PW9's testimony that while at the police station several PF youths arrived in the company of PW7 and most of them were injured. PW9 stated that he recognized some of the youths as PW7,



Mwiya Mwiya, Christopher Kunda, Lufunda Boyd and O'Brien Monde. PW9 further stated that he was informed of the attacks on these youths in Mbila by PW7, where a group of UPND members had accused the youths of distributing pre-marked ballot papers and materials.

PW9 told the Court that while at the police station PW5 arrived carrying Muhila Muloba who was in a critical condition. Further, that a police vehicle also arrived carrying PW4, who had been attacked at Shambala, Mwiya Mwiya and other PF members. PW9 added that all these events took place on 11<sup>th</sup> August, 2016. PW9 proceeded to identify the photographs of those attacked as appearing in the Petitioner's Bundle of Documents at pages 1 - 13. PW9 testified that Muhila Muloba was badly injured and that his eye was so damaged such that the Doctors at UTH recommended that it be removed.

When referred to the allegations appearing under paragraph 18 of the Respondents Amended Answer, PW9 denied having given any Headman the sum of ZMW700.00. Further, that there was no Headman called Sinambili in Itezhitezhi. He added that he did not use any government resources during the campaign period as alleged by the Respondent.

In relation to allegation appearing at Paragraphs 33 (2) and 33 (3) of the Respondent's Amended Answer, PW9 stated that he did not brew any beer to give to the electorate, neither did he distribute any materials to influence the vote of the electorate. Further, PW9



denied distributing mealie meal throughout the Constituency to lure voters to vote for him as had been alleged by the Respondent.

It was PW9's testimony that soon after being appointed Deputy Minister by the Late President Michael Sata, he received an expulsion letter from the UPND. Further, that prior to him receiving the expulsion letter PW9 had received a letter inviting him to appear before the disciplinary committee to exculpate himself for allegations levelled against him. He added that he did not attend any of the hearings.

PW9 testified that he did not know where exactly the picture appearing at page 15 of the Respondent's Bundle Documents was taken. Further, that he had never seen any of the bags appearing in the pictures at pages 15 - 16 and that his name did not appear on any of the said bags in the pictures.

It was PW9's testimony that Mbila Ward had the largest number of registered voters of about seven thousand (7000) and that it received the most incidences of violence on polling day. Further, that PW9 was informed by his party members that the Respondent was seen at the said Ward on polling day and that according to the record that he saw, the Respondent voted from Mbila.

PW9 informed the Court that owing to the many threats that PF members received most of the PF's polling agents and monitors abandoned their duties from about 11 hours to 22 hours. PW9 added that the violence continued even after the elections.





PW9, the Petitioner herein, urged the Court to nullify the Respondent's election as prayed in the Petition.

Under cross-examination PW9 testified that he joined active politics in 1999 under the UPND. Further, that his first contested election was in 2011 in Itezhitezhi under the UPND ticket which seat he won. PW9 admitted that he did contest to be adopted as UPND candidate for Itezhitezhi in 2001 and in 2006.

PW9 denied having been charged with gross misconduct by the UPND after his election in 2011. PW9 however admitted having been written to concerning several allegations levelled against him shortly after he was appointed Deputy Minister in 2013. Further, that PW9 did not attend any of the disciplinary hearings owing to the fact that he had received threats via the media on dates unknown. He added that a Mr. Cornelius Mweetwa, the Deputy Spokesperson of the UPND had threatened to sort PW9 out for accepting an appointment in the PF government.

It was PW9's testimony that he did not vacate his parliamentary seat having been expelled from UPND as he had challenged the reasons for his expulsion in the Courts of law. Further, that after the dissolution of parliament PW9 opted to stand on the PF ticket. He added that he did not campaign for the PF prior to joining them in 2016.

PW9 told the Court that he recalled Mr. Godfrey Beene scooping the parliamentary seat in Itezhitezhi in 2006. Further, PW9 informed the Court that he won the Itezhitezhi parliamentary seat in 2011



without going around threatening and instilling fear in people in order to get them to vote for him because he was a responsible candidate who adhered to the Electoral Code of Conduct. PW9 maintained that the August, 2016 elections were marred with violence and falsehood perpetrated against him which led to PW9 losing the said elections. PW9 denied that the PF had registered remarkable improvement in Itezhitezhi since 2006.

It was PW9's testimony that Itezhitezhi is not a UPND stronghold and that it is only during the August, 2016 elections that the UPND scooped all the Councillor seats in Itezhitezhi. PW9 maintained that several Ward were affected by the violence on polling day and had the elections been fair, he was confident that PF would have won some seats. He added that the Respondent's interview that was aired on radio a day before the election also affected the voting as it was heard in the whole District. He maintained that the entire Itezhitezhi District listens to this radio station.

PW9 conceded that the UPND did not have any parliamentary seats in Eastern Province just as PF did not have any parliamentary seats in Southern Province. He added that MMD and some independent persons won some seats in Eastern Province. PW9 denied that PW2 defected to the UPND willingly. Further PW9 conceded that there were no guns shown on the photographs appearing at page 10 of the Petitioner's Bundle of Documents and page 14 of the Respondent's Bundle of Documents indicating that PW2 was forced to join the UPND.



It was PW9's testimony that the video on record showing PW2 'defecting' to the UPND shows that PW2 was in fear as he addressed the people. Further, that the video showed that people were surrounding PW2 while some kept vigil in the trees.

PW9 reiterated that the issue involving the abduction of PW2 was reported to the Police and that PW2 consequently gave a statement to the police. Further, PW9 conceded that the meeting at which PW2 'defected' to the UPND was held in Lubwe Ward, Kasamu Village under Headman Lufungula. PW9 stated that he held several meetings in that area as well. He added that he did not raise the issue of PW2 with the area Headman as Headmen deal with village matters. He went on to state that getting permission from the Headman before holding a meeting in his area is merely done out of courtesy as Headmen cannot stop political gatherings or issue permits for them to take place.

It was PW9's evidence that at a gathering in Lubwe the issue of PW2 was brought to the attention of Sub Chief Shaloba although the matter was already reported to the police. He added that the police have not made any arrests as investigations are ongoing.

PW9 told the Court that he could not describe the guns used to threaten PW2 as he had been told of the incidence by Mrs. Shaloba and PW2 later confirmed the story.

It was PW9's evidence that no grader was ever purchased by the Council. Further, PW9 informed the Court that by virtue of him being area Member of Parliament he sat as a councillor on the



Council of Itezhitezhi District. He added that in 2013, in the yellow book, there was a provision for road rehabilitations although the money was never released to the council facilitate the road works. PW9 maintained that he was not aware of the release of the sum of ZMW1,700,000.00 to Itezhitezhi council. In addition that PW9 was never called to give an explanation as to the whereabouts of the said money. PW9 added that in any event he has never been in the Finance Committee of the Council, neither has he been a treasurer or a signatory to Council funds for Itezhitezhi. He went on to state that there has not been any report to the relevant authorities to the effect that he stole money from the Council and that the allegation by the Respondent and his agents was meant to unfairly discredit him. He maintained that there had never been a time when money went missing at the council during his tenure and that if ZMW1,700,000.00 had gone missing, it would have attracted national interest. He added that to the best of his knowledge, he had never been linked to any financial embezzlement for Itezhitezhi District in the Auditor General's Reports, which are up to date.

PW9 told the Court that he was aware that the Council received a sum of about ZMW1,400,000.00 as part of the CDF, that the council resolved to purchase a water driller, which was purchased at a fee of over ZMW1,000,000.00. PW9 denied the allegation that a small water driller was purchased and that there was an unaccounted sum of ZMW240,000.00 after the said driller was purchased. PW9 denied having issued any invoices in his name or dubious companies regarding the water driller.





PW9 reiterated that when the violence was going on in Mbila he was in Itumbi Ward particularly at Bushinga Polling Station which is 40 kilometres away from Itezhitezhi. Further that PW4 was injured following the violence in Mbila although there are no pictures or medical report on record indicating the extent of the injuries. He added that more than four people were injured following the violence.

It was PW9's testimony that at Mbila two vehicles were used by the PF, a Toyota Hilux and a Ford Ranger. PW9 testified that he was not aware that one of the PF vehicles parked behind a queue of voters at Mbila polling station and that he was not privy to the number of youths who had gone on the said vehicle to Mbila Ward from Itezhitezhi. PW9 denied the fact that the said youths were putting on masks and respirators because none of his members ever moved around in masks and respirators.

PW9 testified that the PF members did not instigate any violence at Mbila as none of the UPND members were assaulted. Further, that on polling day no one was allowed to put on party regalia within the radius of the polling stations although in a village set up, the population is very small and as such people normally knew which party one belonged to.

PW9 denied having been aware of the fact that a lady was attacked by his members at Mbila and in the process a Toyota Hilux she was in was damaged. When shown photographs of the said vehicle at



page 17 and 18 of the Respondent's Bundle of Documents, PW9 stated that the photographs did not show any damage.

It was PW9's testimony that the injured PF youths did not sustain injuries because they fell off a moving vehicle. PW9 maintained that the youths were on their way to Shambala to pick up PW4 when they were attacked and that the route to Shambala passes through Mbila. He added that the reports of the violence were made at Itezhitezhi police station although he was not aware whether or not any reports were made to the police officers that were manning Mbila Polling station.

PW9 confirmed that he was called by Betts Shamwaze informing him that Muhila Muloba was killed. Further, that it was later discovered at the hospital that the said Muhila Muloba was not dead but merely unconscious. He added that he did not issue a statement at Itezhitezhi Radio Station to the effect that Muhila Muloba had died and never heard that statement on radio. In addition, PW9 stated that he only made a report to Itezhitezhi police station and that he was not aware how police officers from Kabwe and Kamfinsa got involved.

PW9 testified that he was in fact popular in Itezhitezhi and was the UPND's greatest challenger. He added that the allegations of calling him a thief and threats of violence are what caused his loss in the election. PW9 denied having used his position as Minister to campaign. He added that as Minister he drew a salary and continued to enjoy many benefits as he was entitled to do so.



It was PW9's testimony that he did not personally distribute campaign materials although the PF had branded Chitenge materials and T-Shirts which were given to PF party members. PW9 denied having given bicycles to the electorate. Further, that the PF only gave out about 20 - 30 bicycles to their *'foot soldiers'*. PW denied distributing branded mealie meal to the electorate.

PW9 denied having used government vehicles during the campaigns. Further, that he did not stay in a ZESCO house during the campaign period.

PW9 conceded that he donated iron sheets to Munyanja Primary School in Itumbi Ward and Batunga United Church of Zambia in Lubanda Ward although it was in 2015 and way before the 11<sup>th</sup> August, 2016 elections. PW9 denied having pledged to donate 40 pockets of cement to a New Apostolic Church in Masemu Ward. Further, PW9 denied having given ZMW700.00 to a Headman called Sinambili and that there was no Ward in Itezhitezhi called Sinambili.

In re-examination, PW9 testified that Itezhitezhi was not a UPND stronghold as members from other parties had won elections there. PW9 stated that the MMD which was the ruling party at the time, won the Itezhitezhi seat in 2001 even though Itezhitezhi was part of Southern Province, while in 2006 the candidate that won the seat was from an alliance of UPND, FDD and UNIP that was formed at the time called the United Democratic Alliance. Further, that it was only in 2011 that the Petitioner emerged as the first Member of



Parliament for UPND. PW9 added that in 2013 the PF won a by-election in Busanga Ward.

It was PW9's testimony that he lost the 11<sup>th</sup> August, 2016 elections because of the violence that characterized the election and the allegations made against the Petitioner by the Respondent during the 10<sup>th</sup> August, 2016 radio interview, which allegations were made at 70 meetings that the Respondent had throughout the Constituency. Further, that the people of Itezhitezhi do not like thieves and anyone associated with being a thief would be a rejected person in the area. Thus the allegation made by the Respondent that he was thief who stole a grader and water driller equipment meant for the people of Itezhitezhi unfairly disadvantaged PW9.

PW9 denied all the allegation levelled against him during the radio interview concerning the grader and the water driller. Further, that after Muhila Muloba was beaten he became unconscious and most people thought that he was dead, thus the report PW9 received from Bates Shamwaze to the effect that Muhila Muloba had been killed although the news of his 'death' had spread through social media, phone calls and various media.

PW9 informed the Court that he was informed that police investigations are still ongoing regarding the violence in Mbila Ward. On page 10 of the Petitioner's Bundle of Documents, PW9 informed the Court that the picture showed PW2 being helped to gesture a UPND symbol by the Respondent and whose left hand was held by Mr. Gift Chilombo Luyako. Further, that the picture





showed PW2 wearing tattered trousers and torn shoes, which are not befitting a powerful and popular Ward Chairman that PW2 was.

PW9 also testified that the picture shown to him at page 14 of the Respondent's Bundle of Documents showed PW2 not looking happy and sitting at the very edge of a stool. Further, that he was not in any picture distributing bicycles to woo voters.

PW10 was Smart Mwanza, a Criminal Investigations Officer at Itezhitezhi Police Station. PW10 testified that he had been subpoenaed by the Court to bring an Occurrence Book (OB) for Itezhitezhi for the period July to 11<sup>th</sup> August, 2016, which is a book where all reported cases are recorded by the police be it criminal or civil. He added that the entries in the OB are entered by Inquiries Officers.

PW10 told the Court that the OB, which he had brought to Court was in his custody and that it does contain entries of reported incidences of violence at Mbila. The OB was identified as "**ID2**" and admitted into evidence marked "**P2**". PW10 made reference to and confirmed the following reports appearing in the OB: Report Numbers 5192; 5193; 5194; 5163; 5164; 5167; 5168; and 1840. PW10 went further and confirmed that ZP form 32 is a medical form that is issued by the police. He added that the medical forms appearing in the Petitioner's Bundle of Documents were issued by officers at Itezhitezhi police station and processed at Itezhitezhi Hospital. That these are the reports that were recorded in the OB.



PW10 confirmed that he authored the report appearing at page 13 of the Respondent's Bundle of Documents, which report he issued to enable the Respondent travel to Lusaka. PW10 conceded that he did not inspect the Respondent's vehicle before he authored the report as he was merely directed by the Officer-In-Charge to issue the report. He went on to add that the information contained in the report was given to him by the Respondent. When shown the pictures appearing at page 17 - 18 of the Respondent's Bundle of Documents PW10 testified that the car had slight damages and do not show that the vehicle was vandalized.

Under cross-examination, PW10 conceded that the subpoena had specifically directed PW10 to bring the OB which had entries from June, 2016. PW10 testified that he did not bring the OB reflecting entries from 14<sup>th</sup> June, 2016 as most of the violence occurred on 11<sup>th</sup> August, 2016. Further, that he could not bring the OB with earlier dates as he was not stationed in Itzehitezhi District at the time and therefore could not confirm when the offences for that period occurred. PW10 confirmed that the extracts shown at pages 24 - 25 of the Plaintiff's Bundle of Documents were the same as in the OB.

It was PW10's testimony that it is also his duty to make entries in the OB when investigating crime. He added that Sergeant Ndhlovu made the entries in the OB of the offences that he narrated before the Court. He went on to state that when medical forms are issued to complainants, those dockets are transferred to the Criminal Investigations Division (CID) for further investigations.



PW10 conceded that the medical reports appearing at pages 14 - 18 of the Petitioner's Bundle of Documents do not clearly show the dates when the medical forms were issued or the police station that issued them, but that these details were visible on the original medical forms that were issued to the complainants. He reiterated that the medical forms were issued on 11<sup>th</sup> August 2016 and that the hospital that processed them was Itezhitezhi Hospital. He added that had the subpoena specifically ordered him to bring the original medical forms, he would have brought them before the Court.

PW10 stated that he had carried out investigations at Mbila and confirmed through interviews with the local neighbourhood watch that two of the people that attacked Muhila Muloba were in fact UPND cadres. He added that the officers stationed at Mbila polling station told him that they had been overpowered by the group of voters that had left the queue to join in the fracas. He went on to state that the said officers could not have given him particular names of the attackers as they had just been deployed in the area because of the elections.

PW10 confirmed that the entry in the OB indicated that PW4 was attacked by Males Thai and Kangiwe, whose other names are not known. He further confirmed that some of the entries in the OB indicated that the attackers were suspected UPND cadres, while some did not conclusively establish who the attackers were. He confirmed that no arrests have been made, as investigations are ongoing. He added that during his investigations in Mbila no one



was given a warn and caution statement as such statements are recorded from suspects. Further, that for all the entries in the OB, they had opened dockets.

It was PW10's testimony that a report was made regarding malicious damage to the Respondent's vehicle although he was not informed that the damage was caused by 14 PF cadres allegedly wearing masks and respirators. He reiterated that he was directed to author the report appearing at page 13 of the Respondent's Bundle of Documents. Further that he did not inspect the vehicle as the Respondent had informed him that he was on an urgent trip to Lusaka and would be back later to give a formal statement and opening of the docket.

PW10 testified that there was one incidence of violence reported at Shambala although the report was merely verbal as it had not reached the police station. Further, that PW10 could not recall any incidences of violence at Iyanda in Busanga Ward. PW10 confirmed that to date no arrests have been made regarding the reported incidences of violence during the election period.

It was PW10's testimony that he heard the radio interview of 11<sup>th</sup> August, 2016 with regard to violence, although it was not reported at the Police Station. It was also his testimony that it was normal procedure to have officers from other Districts assist during elections. Further, that he was not told by officers at Police Head Office not to come with part of the OB with entries of 14<sup>th</sup> June,





2016. He added that there were no alterations made to the entries in the OB.

In re-examination PW10 stated that he was not a witness with an interest to serve. Further, that there were no masks or respirators found at Mbila. He added that he was summoned at the Police Service Headquarters for other matters and not to alter the entries in the OB.

That marked the close of the Petitioner's case.

The Respondent called ten (10) witnesses, including the Respondent. RW1 was Thomas Mainda Chuunga, a Senior Village Headman in Lufungula village. RW1 testified that four (4) different political parties held meetings in his village and that these parties included the PF, UPND, Rainbow party and FDD.

It was RW1's testimony that the UPND held a campaign meeting in his area on 14<sup>th</sup> June, 2016. Further, that PW2 was in attendance at the said meeting and that RW1 did not see PW2 being dragged to the meeting. He added that towards the end of the meeting it was announced that a member of the PF, PW2, was defecting to UPND and that he wanted to address the people. He went on to state that PW2 confirmed that he had joined the UPND and urged the people present to vote for the UPND candidates.

It was RW1's testimony that after the meeting RW1 invited the Respondent and PW2 to have a meal with him at his house, which they did. He added that he did not see the Respondent or Mr. Gift



Chilombo Luyako threaten PW2 with guns. He went on to add that he received both the Petitioner and the Respondent when they wanted to have meetings in his area.

RW1 testified that the MMD used to win elections in Itezhitezhi when it was a strong party but after it became unpopular the UPND has been winning the elections.

Under cross-examination RW1 testified that he is not a member of the UPND. He added that he did not know where PW2 was before he came to the rally and that he was not aware of the fact that PW2 was threatened with guns prior to him attending the UPND meeting. When shown the picture appearing at page 10 of the Petitioner's Bundle of Documents RW1 stated that PW2 was not being forced to gesture the UPND symbol.

When referred to page 14 of the Respondent's Bundle of Documents, RW1 testified that PW2 did not look afraid in the picture taken at the UPND campaign meeting and that if people had done something bad to him, he would have complained to RW1, who is the Headman. He added that the Petitioner did pay a courtesy call on him for the last meeting that the PF had in his area, although he could not recall the exact date.

RW1 confirmed that the Petitioner won the Itezhitezhi seat in 2011 under the UPND ticket.

There was no re-examination of RW1.



Fanwell Sinambili, a village Headman in Shambala, was RW2. He testified that he was visited by the Petitioner in the company of PW5, the District Commissioner and PW4 who requested that RW2 tells his members in that village to vote for the Petitioner. Further, that the Petitioner urged RW2 to vote for him and gave him ZMW700.00. He added that the Petitioner further gave RW2's family members chitenge materials and t-shirts.

RW2 testified that after voting on 11<sup>th</sup> August, 2016 he was informed that someone had entered Mrs. Munsaka's (a teacher) house. Further, that when RW2 entered the house and pulled the person from underneath the bed in a spare bedroom, he discovered that he was wearing a helmet and his face was covered with a head sock. He added that when he removed the head sock he identified the person as PW4.

It was RW2's testimony that police officers took PW4 from the house in handcuffs. Further, that the Police officers stated that PW4 was handcuffed because he was beating up people. He added that no one had been sent to pick up PW4 as no vehicle was seen. He went on to add that PW4 was not beaten and that he did not see any injuries sustained by PW4.

RW2 testified that the people were not gripped with any fear and they voted on polling day. Further, that in fact the voter turnout was more than it had been in recent years. He added that PW4 was taken to the police.



Under cross-examination RW2 testified that he did receive the sum of ZMW700.00 from the Petitioner. Further, that he did not know that it was illegal to receive money under the circumstances. He added that he did not report to anyone that he had been given money by the Petitioner. RW2 conceded that he did not have any evidence showing that he was given money by the Petitioner, neither did he have any evidence showing that his family members were given chitenge material and t-shirts.

RW2 denied knowing that PW4 was admitted in the hospital for four days, neither was he aware that PW4 reported to the police that a person called Thai and Kangiwe had beaten him. RW2 further denied knowing Thai and Kangiwe.

It was RW2's testimony that he was not aware that PW4 was beaten before he ran into the teacher's house. He added that the police report appearing as Report No. 5192 in the OB is a fabrication. RW 2 maintained that he knew that PW4 was not beaten before he ran into a teacher's house.

In re-examination RW2 maintained that PW4 was handcuffed because he was beating up people.

Mazuba Jembo, a police officer, was RW3. RW3 testified that he authored a report dated 16<sup>th</sup> August, 2016. RW3 also testified that he was deployed to operate at Mbila Polling Station on 11<sup>th</sup> August, 2016 together with two (2) other officers namely Constable Silomba and Constable Trymet Mwiinga.





It was RW3's testimony that he received a phone call from PW5 informing him that there was violence at Shambala polling station and that he wanted a uniformed officer to escort him there. He added that shortly after, PW5 called a second time informing him that he was behind the Mbila polling station and that he needed protection. RW3 went on to add that as he was briefing his fellow officers, he saw people leaving the voting queues and rushing behind the polling station. RW3 stated that he then informed the presiding officer, Mr. Mweemba Matongo, of what was going on.

RW3 told the Court that when he went behind the polling station in the presence of another Police Officer Constable Mwiinga and the presiding officer, he found people advancing towards where PW5 was parked. That these people who had left the voting queue, were demanding that PW5 remove his car from where he had parked and RW3 urged PW5 to move his vehicle from there. RW3 added that they managed to calm the crowd that was demanding that PW5 leave the polling station and the officers advised PW5 to leave the polling station to which he complied.

It was RW3's testimony that at midday a Ford Ranger bearing Registration Mark 8217 parked behind the queues at the polling station and around 10 to 14 persons disembarked from the said vehicle. Further, that the said vehicle was being driven by a person called Mr. Chikumba.

According to RW3 two of the people that got off the vehicle were wearing long masks that covered their faces, save for their eyes and



respirators. Further, that they did not talk to the said individuals and neither did they approach them. That after a short while later they all got back on the vehicle and left. He added that a short while the Ford Ranger came back and parked behind the Mbila polling station where they found a Toyota Hilux registration number ALB 4065. He went on to add that the people in the Ford Ranger began demanding that the vehicle they found there, a Toyota Hilux registration number ALB 4065, be removed from there. In addition, that as they demanded that the vehicle be moved, they started hitting the vehicle with machetes and other objects. That the driver of the Hilux then drove the vehicle forward away from where he was parked.

It was RW3's testimony that when the people on the queues saw this, they rushed there and started hitting the Ford Ranger with objects. He added that the people in the Ford Ranger managed to get back on the vehicle and the vehicle sped off. He went on to add that one of the people fell off the Ford Ranger as the vehicle negotiated a curve. Further, that people rushed towards the man who had fallen off the Ford Ranger and started beating him.

RW3 told the Court that he and Constable Mwiinga rushed to assist the person that was being beaten but he ran off after the people beating him scampered upon seeing the two officers. Further, that RW3 remained briefing his superiors while Constable Mwiinga went back to the stream that he was manning at the polling station. RW3 added that as Constable Mwiinga was heading towards his stream, some people informed him that another person had in fact



fallen off the same vehicle and Constable Mwiinga rushed to the said person. He went on to state that Constable Mwiinga told him that the other person who had fallen off the vehicle was badly injured and was subsequently taken to Mbila Rural Health Centre. RW3 stated that the injured person was later taken to Itezhitezhi District Hospital by the Officer-In-Charge.

It was RW3's testimony that the vehicle that the people in the Ford Ranger demanded to be moved belonged to the Respondent. Further, that at the time Mrs. Shabula (the Respondent's wife) and her driver were in the vehicle. He added that the people in the voting queues that descended on the Ford Ranger were not clad in any party regalia. RW3 produced before this Court a Report that he issued, which was identified as "**ID3**" and admitted marked "**R1**"

Under cross-examination RW3 testified that he had served in the police service for ten (10) years and that the 11<sup>th</sup> August, 2016 elections were not his first to police. RW3 maintained that the two individuals in masks and respirators were still putting them on when they came a second time although no photographs were taken. He testified that he did not know the actual name of the item that these two individuals were wearing and for lack of a better term he called them masks. However, RW3 conceded that masks are different from head socks when it was pointed to him that he had given two conflicting versions. In evidence in chief, RW3 testified that the two individuals were wearing head socks and in "**R1**" he called them masks.



RW3 told the Court that the people in masks were not arrested owing to the fact there was not enough man power and that making an arrest would have created confusion. RW3 confirmed that there was violence and confusion at the polling station, which led to some people leaving the voting queue. He also confirmed that the voters that left the voting queue were disrupted from voting although the voters who remained in the queues were protected and not disrupted.

It was RW3's evidence that the Toyota Hilux was parked beside the road, about 3 to 5 meters away from the polling station. RW3 conceded that he did not indicate in his report the extent of damage to the Toyota Hilux although he had inspected the vehicle and saw that it was damaged. RW3 conceded that he did not indicate in his report that machetes were used to damage the vehicle or that the windscreen was damaged. He added that he was aware that the Respondent made a report at Itezhitezhi police station that his vehicle had been damaged, although he did not read that particular report.

RW3 gave evidence that he saw the Respondent at the polling station around 19:00 hours, when the Respondent asked him about what happened during the day, although he did not mention this fact in his report. Further, that he did not see the Respondent at the polling station during the violence that ensued at around 15:00 hours.





RW3 was shown page 13 of the Respondent's Bundle of Document where it was indicated that the vehicle was damaged at around 09:00 hours contrary to his testimony before the Court that the incident happened in the afternoon. He testified that he was not lying before the Court and maintained that his testimony before the Court was a true account of how the events unfolded on 11<sup>th</sup> August 2016. Further that he was not part of the Report which he identified to be on Zambia Police headed paper and shown at page 13 of the Respondent's Bundle of Documents.

When referred to pages 17 and 18 of the Respondent's Bundle of Documents, RW3 stated that he was able to see dents on the vehicle shown on the picture. Further, that Counsel for the Respondent requested for RW3's report admitted at "**R1**". He added that the report was initially to the officer in charge although RW3 remained with a copy of the said report. RW3 conceded that the said report has no date stamp indicating that the officer in charge acknowledged receipt of the report in question.

It was RW3's testimony that his report covers the major happenings at Mbila Polling Station on 11<sup>th</sup> August, 2016, although he omitted some vital information. RW3 conceded that the report was not written on a Zambia Police headed paper and that he did not indicate in the said report the times when the polling station opened and closed. RW3 could not give any reason why he left out such details in his report.



In re-examination RW3 testified that after the confusion had died down at Mbila Polling station the people went back to vote. Further, that under normal circumstances every police officer gives a report of what happened at a place he has been deployed.

RW4 was Lenity Mutinta Lubobya. She testified that on 11<sup>th</sup> August, 2016 she cast her vote from Mbila polling station around 13 hours. Further, that after voting she called her driver to pick her up and take her to the farm. She added that the driver came to pick her up from behind the polling station. She went on to add that shortly after the driver stepped out of the vehicle to go and drink water, a Ford Ranger, carrying several people approached the vehicle in which she was in.

It was RW4's testimony that some of the people from the Ford Ranger were putting on head socks that covered their faces while others had respirators on. Further, that some of them had machetes, stones, sticks and iron bars. She added that when they came to the car they started hitting it whilst saying that she should move the vehicle from where it was parked. She went further and added that the driver eventually came and tried to move the vehicle whilst the person from the Ford Ranger who had a machete continued hitting on the bonnet with the said machete. In addition, that when people who were voting heard the commotion they started running towards where RW4 was and the people in the Ford Ranger sped off as people threw stones at them. RW4 stated that after some minutes, the police officers approached her to ask what had happened and she explained to them.

she accompanied to Meximexhi Police Station. Further, she testified that a report was made on 13<sup>th</sup> August, 2016 by the Respondent upon the polling station following the attacks on her and that another piece of evidence was that she reported the matter to the police at the polling station at around 14:00 hours.

The Respondent in the morning on the day of the election and that different polling stations. She went on to state that she only saw some of the violence but she was aware that he was going round. She added that she did not know where the Respondent was at the violence. Further, that the said incident did not disturb voting. That the act of throwing stones by voters cannot be said to be but that they were merely trying to rescue KWA. She maintained that KWA testified that the voters on the queue were not being violent. Pages 17 - 18 of the Respondent's Bundle of Documents.

Concerning the extent of the damage as seen from the photographs and also that the windscreen needs to be changed. KWA showed the screen on the vehicle cracked after it was hit by an iron bar. The vehicle was scratched by the machetes on certain areas. Further, that damaged by machetes, sticks and stones and that the paint on the under cross-examination. KWA testified that the vehicle was as per pages 17 - 18 of the Respondent's Bundle of Documents.

damaged by the attackers as is evidenced by the pictures appearing more than ten (10). Further, that the vehicle she was in was according to KWA the people that attacked her in the vehicle were

that she is not happy that the Respondent's election is being challenged although she cannot lie before the Court.

RW4 confirmed that the Respondent is her husband and that they live together. Further, that she has no interest to serve. She added that the fourteen (14) people attacked her for no reason at all. When further examined on the number of people who allegedly attacked her, RW4 stated that only two people came off the Ford Ranger, one with a machete and the other with an iron bar. She went on to add that she was not injured during the attack. RW4 reiterated that the attack took place around 14:00 hours and not 09:00 hours as appears on the police report shown at page 13 of the Respondent's Bundle of Documents. According to RW4, she was in the voting queue at 09:00 hours.

In re-examination RW4 testified that she was not injured during the attack as the attackers were hitting the vehicle. Further, that she was not happy that the Respondent's election was challenged because he was not involved in any of the allegations that have been made against him. It was also her testimony that the document shown at page 13 of the Respondent's Bundle of Documents referred to the event at Mbila on 11<sup>th</sup> August, 2016.

RW5 was Fanwell Sitongwa, a former Council Chairperson at Itezhitezhi District Council. He testified that he had been Council Chairperson for fifteen (15) years where his duties included supervising and ensuring that Council Resolutions were implemented. That he knew the Petitioner as he was one of the



Councillors at the time that he was Council Chairperson. Further, that in the year 2012 the council resolved to buy a drilling rig from the CDF and that the Petitioner together with the Council acting District Planning Officer were tasked to acquire quotations. He added that the sum of ZMW1,040,000.00 was disbursed for the purchase of the drilling rig. RW5 also added that when the quotations were brought the Council opted to buy the drilling rig from a Company called Atlas Copco.

It was RW5's testimony that the drilling rig which was actually purchased was a smaller type and it cost ZMW800,000.00. Further, that the balance of the money allocated for the drilling rig was never accounted for by the Petitioner and the District Planning Officer.

RW5 told the Court that in 2012, the government released the sum of ZMW1,700,000.00 to Itezhitezhi District Council for the rehabilitation of rural roads. Further, that the Council resolved to purchase a grader instead. According to RW5, the Petitioner was given the mandate to source for the purchase of the grader. He added that during one of the Council meetings the Petitioner informed the council that the process of purchasing a grader was underway. He went on to state that the Petitioner eventually informed the council that during the realignment of Itezhitezhi from Southern Province, the grader was taken by Southern Province and no documentation for its purchase were brought by the Petitioner.





According to RW5, when the Petitioner was appointed Minister, the Council decided to set up a committee which was funded by the Council itself to follow up the issue of the grader.

It was RW5's testimony that the community in Itezhitezhi is aware of the issues regarding the drilling rig and the grader and that the issue is in the Auditor General's Report. RW5 denied having listened to the UPND radio program aired on 10<sup>th</sup> August, 2016. Further, that he was not sure how many people listened to the radio program that was aired on 10<sup>th</sup> August, 2016.

Under cross examination RW5 testified that he is a UPND District Secretary and that he was Council Chairperson up until 2013. RW5 further, testified that he did not bring any of the Council resolutions to Court and did not know the number of the said resolution. He added that he had no proof to show that the sum of ZMW1,040,000.00 was released to the council.

RW5 conceded that he had no evidence showing that the Petitioner was summoned by the council to explain issues regarding the allegations. Further, that the Petitioner was not a signatory to the council accounts. RW5 added that he has no proof to show that the money was in fact released by the government. Neither did he have any proof that the Petitioner went on radio to tell the people of Itezhitezhi that the council had procured a grader as alleged.

RW5 reiterated that the Council had selected a quotation that came from Atlas Copco and conceded that the 2014 Auditor General's report, where the said issue was raised has not been produced



herein. He added that he was not aware whether or not the Petitioner had been summoned by the Auditor General or the Police.

RW5 informed the Court that he served as Chairman of Plans, Works and Social Development of the Council between June, 2014 and June 2015.

In re-examination RW5 testified that the evidence he has given to the Court was the truth and that he could not bring any documentation to support his evidence as the same was in the custody of the Council. Further, that the issues of the grader and drilling rig was dealt with in the Works, Plans and Development Committee where RW5 was the Chairperson.

Pius Gondwe was RW6. He testified that on 12<sup>th</sup> June, 2016 when he attended church at New Apostolic Church he saw the Petitioner and Mr. Chibandika, the District Commissioner who were in attendance. Further, that at the end of the church service the Petitioner addressed the congregation and told them that he had noted that the Church was incomplete and requested that the elders meet him at his office to give a list of what they required from him, especially the number of bags of cement that was required to complete the floor of the church building. He added that the Petitioner urged the congregants to vote for him and thanked them.

RW6 told the Court that the church had a membership of 1000 and that it was located in Masemu Ward. Further, that RW6 did vote and was aware that the Petitioner's poll of 950 votes in Masemu Ward was his highest in the August, 2016 elections.



Under cross-examination RW6 testified that he did not hold any position in the church and was merely a church member at New Apostolic Church. He added that the Petitioner had stated that he would deliver on his pledge to the church after two weeks but did not deliver on any of the promises he made to the church. He went on to add that the members of the church were not happy with the Petitioner when he failed to honour his pledge. RW6 maintained that the people of Masemu still voted for the Petitioner because the Petitioner told them that he would fulfil his promise when they vote for him.

RW6 testified that the church was big enough to accommodate 1000 people. He denied having received any payment from the Respondent to come and tender evidence in Court. He added that he incurred all travel costs on his own and that he was staying with his relatives in Lusaka. He further added that he got on the bus on condition that his elder brother would pay for his fare once he reached Lusaka.

RW6 reiterated that he a member of New Apostolic Church although he had no evidence to prove that he was indeed a member of the Church. Further, that the Church asked RW6 to testify on its behalf as the members heard that he was already scheduled to travel to Lusaka for a family visit. He added that he had no proof showing that the church members had selected him to testify on their behalf. He went on to state that he was appointed to testify on behalf of the church at a church meeting chaired by Mr. Peter Chilufya, one of the church members.



It was RW6's testimony that he voted for the Petitioner even if he did not honour his promises as he knew that if he won the seat he would deliver on the promises. Further, that he was testifying against the Petitioner because they were disappointed that after they voted for him, the Petitioner did not fulfil his promises.

There was no re-examination of RW6.

Oliver Sitengu, the Respondent's Campaign Manager, was RW7. He told the Court that the conduct of the Respondent's campaign was not violent and that their campaigns were conducted in a very peaceful manner. He further told the Court that he attended a UPND rally in Kasamu area where PW2 defected to the UPND. He went on to state that PW2 was not dragged nor forced to join the UPND under gunpoint and that the photograph shown at page 10 of the Petitioner's Bundle of Documents do not show that PW2 was forced to join the UPND. In addition, that PW2 did not show signs of being unhappy or being coerced in the picture shown at page 14 of the Petitioner's Bundle of Documents and that immediately after the meeting PW2 shared a meal with RW7 in the Headman's house.

RW7 narrated to the Court how each panellist on the 10<sup>th</sup> August, 2016 radio interview had specific items to talk about. He added that he only learnt about the grader and driller when the issues were mentioned and that he is still learning about these issues. RW7 denied hearing Mr. Gift Chilombo Luyako inciting violence or calling the Petitioner a thief. He went on to state that the police





had summoned both the PF and the UPND just so there could be harmony between them.

It was RW7's evidence that the PF members were never brutalized by the UPND members. Further, UPND never caused any violence that would deter any person to win the elections and that he did not know what took place in Mbila as he was not there. He added that Gen 12 forms were availed at the Civic Centre and signed by all parties that participated in the elections. He went on to state that the Respondent won the Itezhitezhi parliamentary election and that the documents shown at pages 10 - 11 of the Respondent's Bundle of Documents are genuine copies as he was there when they were signed by all the parties.

Under cross-examination RW7 testified that he joined the UPND in 2010. Further, that he was asked to stand under the PF ticket in 2016 although he opted not to stand before the adoptions. He went on to state that he was Food Reserve Agency (FRA) Manager for Itezhitezhi District until 2012 when his contract came to an end and he opted not to apply for a renewal. He denied being fired for failing to account and mismanagement of funds in 2013.

RW7 testified that the UPND had conducted more than 70 meetings in Itezhitezhi District and conceded that the radio interview held on 10<sup>th</sup> August, 2016 was a wrap up of the Respondent's campaigns. He denied having instigated or advocated for violence during the radio interview and calling the Petitioner a thief.



It was RW7's evidence that he did not know the extent of coverage for Itezhitezhi radio although he was aware that it is commonly listened to by the people of Itezhitezhi and that the people of Itezhitezhi heard the summary of the campaign outlined during the interview. He added that during the interview Mr. Gift Chilombo Luyako did not urge the UPND members to beat up people distributing pre-marked ballot papers but urged them to 'do something' to them.

RW7 reiterated that the photograph on page 10 of the Petitioner's Bundle of Documents do not show that PW2 was being forced to gesture UPND symbols. RW7 denied having been with the people that that brought PW2 to the meeting but maintained that PW2 was seated in front of him at the meeting before he was called upon to address the people.

In re-examination RW7 testified that considering the day and time that the interview in question was aired, about ten (10) percent of the population would have listened in as it was a working day.

Herbert Shabula, the Respondent herein, was RW8. RW8 began his testimony by giving a background of his popularity through activities as a church elder in the Seventh Day Adventist (SDA) church and a marriage counsellor with programs airing on TV and on the radio.

RW8 testified that he was born in Itezhitezhi District and that he is a village Headman in Mapulu Village. Further, that he knows the Petitioner very well, whom he refers to as his son. He added that he



underwent the adoption process in the UPND before being finally adopted. He added that he contested the primary elections against eighteen (18) candidates. He went on to add that PW5 was one of the unsuccessful candidates he contested against. In addition, that PW5, having failed to be adopted by the UPND joined the PF.

It was RW8's evidence that the UPND had been winning the parliamentary seat in Itezihitezhi since 2006. He added that even if there was an alliance of the opposition parties in 2006, individual candidates were fielded by each party although the fusion of the parties did increase the votes. He went on to add the Godfrey Beene of the MMD won the Itezihitezhi seat in 2006.

According to RW8, the Petitioner won the Itezihitezhi seat in 2011 because of the party that he stood under as the people of Itezihitezhi support the UPND. Further, that the Respondent carried out his campaigns in line with the Electoral Process Act. He added that the members of his party were sensitized on the conduct expected of them during the election period and that he personally took part in talking to them of the need for a peaceful campaign.

It was RW8's testimony that there were about 39, 000 registered voters in Itezihitezhi District. RW8 denied the fact the PW2 was forced to attend his meeting at Kasamu and that RW8 did not force PW2 to lift his hand and gesture the UPND party symbol otherwise PW2 would have protested, as the meeting was held in an open place. He added that RW8 has not been summoned by the police in relation to the allegations raised by PW2 which are serious.



RW8 testified that he was not aware whether or not PW2 had spoken to the village Headman at the meeting but confirmed that PW2 was present when they had a meal in the Headman's house.

When asked about the interview that aired on Itezhitezhi radio on 10<sup>th</sup> August, 2016, RW8 testified that each of the panellists attended in their personal capacity and each had specific issues to discuss. He added that Mr. Gift Chilombo Luyako was to speak on his own behalf and sell himself as an aspiring candidate at local government level while RW7 and Mr. Beene spoke on party activities and on behalf of RW8 as his campaign agents.

It was RW8's testimony that during the interview Mr. Gift Chilombo Luyako stated that the people of Itezhitezhi should 'do something' to anyone found distributing pre-marked ballot papers and mealie meal. He added that the Petitioner failed to highlight to the court the number of people that failed to vote owing to the alleged radio interview. He went on to add that the issue of the grader talked about during the interview was merely a way of finding out its whereabouts as the people of Itezhitezhi expected to have a grader.

RW8 denied that there was any hate speech used during his campaigns as they were issue based. He added that it was difficult to assess how many people actually listened to the radio or in fact owned a radio in the absence of a survey. He went on to add that it was difficult for most people to have listened to the radio program considering the time it was aired.





It was RW8's testimony that it could not have been possible for four polling stations to have caused the Petitioner to lose elections as there were over 40 polling stations in Itezhitezhi District. He added that there was no evidence before the Court indicating that the PF supporters did not vote owing to the fear instilled in them. Further, that PW4 would not have been arrested if he was the one who was beaten. He went on to add that in fact there is no medical report on record indicating injuries sustained by PW4.

RW8 testified that after voting at Mbila polling station at 07:00 hours, he immediately left for other polling stations, leaving his wife, RW4, on the queue. Further, that he did not meet PW5 at any time on polling day as he had gone to other polling stations to monitor voting. He added that he only got back to Mbila polling station in the evening. He went on to add that he was later informed that his wife had been attacked by PW5 and some other people.

RW8 testified that the medical reports produced in Court by the Petitioner do not indicate the date, name of hospital and even the nature of the injuries sustained making them questionable. Further, that the Petitioner failed to bring the individuals allegedly assaulted by the Respondent's supporters to Court so that they can give their testimonies. He added that there has been no allegation to the effect that the Respondent assaulted anyone.

It was RW8's testimony that while at Mbila polling station he did not see any person clad in party regalia, therefore it was not



possible to distinguish which party an individual belonged to. Further, that there is no report on record indicating that the Petitioner's monitors did not sign the Gen 12 Forms. He added that Betts Shamwazi alarmed the people when he claimed that a PF supporter had died when in fact not. He went on to state that on polling day he did not go Iyanda and did not know any of the events that took place there.

RW8 testified that Mr. Beene did not threaten to shoot anyone and that if that was the case he would have been reported to the Police and charged. Further, that the Petitioner during the campaigns used government resources and distributed roofing sheets at Munyanja Primary School in Itumbi Ward as well as UCZ church. He added that the Petitioner promised the people of Masemu UCZ church 40 bags of cement which the Petitioner consequently failed to deliver. He went on to state that the Petitioner gave a bicycle to a Mr. Musumina, a UPND Chairman.

It was RW8's evidence that the Petitioner has failed to adduce any evidence to the effect that indeed bicycles were distributed to the *'foot soldiers'*. He added that the Petitioner also distributed footballs, chitenge materials and t-shirts. He went on to add that the Petitioner distributed branded mealie meal to the electorate.

RW8 confirmed that his vehicle had been damaged after RW4 was attacked at Mbila polling station. He further stated that the damage to the vehicle is evident from the photographs on record. He went on to state that RW4 reported the incidence at Mbila on



11<sup>th</sup> August, 2016 and that he reported the matter to Itezhitezhi police station on 13<sup>th</sup> August, 2016 and a police report was issued.

It was RW8's evidence that he reported the incidence at Itezhitezhi at 15:00 hours despite the entry in the OB at 5192 showing that the report was at 09:45 hours. He added that his signature did not appear in the OB as is required by procedure to verify that indeed a report was made. RW8 indicated to the Court that he noted that different handwritings appeared on the report at 5192. Further, that the OB was in fact labelled ZESCO Police instead of Itezhitezhi Police Station where the report was made.

RW8 testified that he polled more votes than the Petitioner did in 2016 to win the Itezhitezhi parliamentary seat. He added that he was validly elected as winner in the Itezhitezhi parliamentary elections of 11<sup>th</sup> August, 2016.

Under cross-examination RW8 testified that he was not aware that the Itezhitezhi parliamentary seat was won by the MMD. He added that he was aware that the alliance in 2006 scooped the seat from the MMD. He went on to state that he was not aware that the MMD won 7 seats compared to 6 won by the UPND at local government level in Itezhitezhi in 2006. RW8 conceded that the UPND lost the Busanga Ward by-election in 2013. RW8 maintained the Itezhitezhi was still a UPND stronghold despite this history.

RW8 testified that he joined politics under the UPND on 2<sup>nd</sup> March, 2014. Further, that the August, 2016 elections were the first to be contested by RW8. He added that during the adoption process the



UPND can pick any member at District, Constituency or provincial level.

RW8 told the Court that he does not recall the Petitioner calling him to congratulate him over his adoption as UPND parliamentary candidate. Further, that RW8 only came to know PW2 after he addressed the crowd at the UPND rally.

RW8 recalled testifying in examination in chief that he referred to the OB where he reported the malicious damage to his car at Itezhitezhi Police Station and that the OB number was 5192/16. Further, that ZESCO Police is written on top of the said OB. He added that he now has a problem with the extracts from the said OB that are indicating ZESCO OB.

It was RW8's testimony that he was not aware that PW2's defection had been reported to the police. He added that only PW2 defected to the UPND on that day. He conceded that in the village set up like Lubwe, a Ward Chairperson is viewed as an influential man. He added that PW2's defection alone is proof that he was not influential. Further, RW8 conceded that PW2 was the only one wearing torn clothes but denied PW2 was coming from his clutch pane on the day of the alleged defection.

RW8 confirmed that he attended the interview at Itezhitezhi radio with three (3) other individuals to summarise the UPND's entire campaign message to the people of Itezhitezhi, which message they had given throughout their campaigns. He further confirmed that this radio programme was targeted at the electorate and was





listened to by many people according to RW7. He conceded that the message delivered on radio by RW7 was agreed to by all the participants from UPND prior to going live on the radio.

RW8 was referred to paragraph 14 of his Amended Answer where it was alleged that the PF and Petitioner were distributing mealie meal. He testified that the averment was true and added that he did not bring any mealie meal distributed by the Petitioner before Court. He conceded that he was not there when the said mealie meal was distributed and that the Petitioner is not in any of the pictures shown to him at pages 15 - 16 of the Respondent's Bundle of Documents.

It was RW8's testimony that there were pre-marked ballot papers, which he had seen, although he did not bring them or a picture of them before the Court. Further, that when Mr. Gift Chilombo Luyako called upon the people of Itezhitezhi to be soldiers of the army of UPND, he was not recruiting any soldiers during the radio interview. RW8 denied that any of the panellists during the radio interview uttered the words "beat them". The exhibit marked "**P1**" was played to him and translated from Ila to English by the Court Interpreter as follows: -

***"...all my relatives of Itezhitezhi, I want you to be the soldiers of UPND. This area, people agreed that it is Hakainde Hichilema in this area. If you see those people who bring mealie meal, get the mealie meal then beat them and do something. Even those who will bring ballot papers, if you will find them, catch them and do something to them. Those are the people who want to sell the***



***country. In conclusion, my relatives, they say that you should point those who will come as PF who want that you vote for them. You should ask them in Kapulwe and in Kela what they have done because in Itezhitezhi, in Masemu where they say that there is a road, it is not just this roads which ends on the mountains. You should ask them and tell them that what have you done?"***

After hearing the recording, RW8 still maintained that he was not lying as he did not hear the words "beat them". He added that he did not bring any proof regarding the allegations of the grader and the ZMW1,700,000.00 made against the Petitioner. RW8 conceded that the Council has its own bank account although he could not confirm whether or not the Petitioner was a signatory. Further, that he did not have any proof to show that the grader was bought by Itezhitezhi Council.

RW8 testified that the Petitioner was not in the Procurement Department, neither was he on the Finance committee nor a Treasurer of the council. RW8 conceded that Itezhitezhi District now owns a driller although it was not the same one that the people had requested for.

It was RW8's evidence that although he averred in paragraph 33 (ii) of his Amended Answer that the Petitioner brewed beer which he gave to the electorate to vote for him, he did not actually see the Petitioner brewing any beer. Further, that he did not bring any evidence to support his allegation that the Petitioner gave out footballs and bicycles in Itezhitezhi District. He added that he had no list of people that had benefitted from the Petitioner's



distributions and had no pictures of the Petitioner distributing footballs and bicycles.

RW8 conceded that his Amended Answer does not indicate the date and time that the Petitioner is alleged to have delivered the roofing sheets. RW8 stated that he was not aware that people were in fact beaten following the interview aired on 10<sup>th</sup> August, 2016. He went on to state that Itezhitezhi radio was not closed because of inciting violence. When shown the pictures at pages 1 - 4 of the Petitioner's Bundle of Documents, RW8 stated that the people in the pictures do not look like they were beaten.

In re-examination RW8 testified that in 2006 the UPND fielded a candidate on behalf of the alliance which candidate won the parliamentary election in Itezhitezhi. He added that one win by the PF in Basanga Ward in 2013 does not necessarily entail that Itezhitezhi is its stronghold. He went on to state that had PW2 been forced to attend the meeting using guns, RW8 and his team would have been charged or arrested.

It was RW8's testimony that the OB brought before Court was subject to manipulation as it did not have any cover neither were its pages numbered. He added that PW2 was a loner and did not influence any voters. He went on to state that it was the tradition of the UPND to give a new member a t-shirt thus PW2 was given a UPND t-shirt.



RW8 reiterated that during the radio interview no words were used to instigate violence. He also confirmed that he did not see the Petitioner brewing beer.

RW9 was Mulambo Willard. He testified that when the Petitioner held a meeting in Munyanja in July, 2016 the village Headman asked him when he was going to bring the roofing sheets he had promised them. Further, that the Petitioner informed him that he would bring them the following day. He added that indeed, a blue canter brought 30 iron sheets which were delivered to the Headmaster and Deputy Headmaster at Munyanja Community School in the presence of RW9.

Under cross-examination, RW9 informed the Court that he was the Chairman responsible for building at the said community school appointed by the members of the community. RW9 stated that he did not have any proof indicating that he was in fact appointed Chairman by the community. He added that the name of the Headman who was with him at the time was Mushimara of Shikabumbo village.

It was RW9's testimony that it was the Petitioner's driver that delivered the iron sheets although he did not get its number plate or bring any evidence indicating that the school received the iron sheets. Further, that no photographs of the roofing sheets were in fact taken.

In re-examination, RW9 reiterated that the Petitioner promised the school iron sheets which his driver later delivered.





Mpofu Stena was RW10. He narrated to the Court events concerning the violence at Mbila polling station on 11<sup>th</sup> August, 2016, which events have already been alluded to by witnesses on record save for the fact that RW10 testified that the people he spotted in a white van were gesturing symbols of fists before the parked their vehicle behind the Respondent's vehicle. He added that people from the white van started hitting the Respondent's vehicle with machetes, stones and sticks.

It was RW10's testimony that when the people who were voting went to see what was happening, the people in the white van drove off. RW10 stated that he was part of the voters on the voting queue. He added that when the vehicle drove off some of the people fell off the vehicle and the police officers came to pick up one of the persons that had fallen off the vehicle.

Under cross-examination RW10 confirmed that he voted from Mbila polling station and managed to vote at 16:00 hours. He added that the people that came in the white van were more than 10. He denied the fact that people that came from the voting queues were throwing stones.

It was RW10's testimony that there was only one person in the Respondent's vehicle namely, his wife. He added that the Respondent was not at Mbila polling station at the time. He went on to add that the two people in the white van were putting on masks that covered their faces.



There was no re-examination of RW10 and that marked the close of the Respondent's case.

The Petitioner filed into Court submissions dated 4<sup>th</sup> November, 2016. The Petitioner submitted that the Petition was made pursuant to **Article 73 (1)** of the **Constitution of Zambia** and the provisions of **Section 97 (2)** of the **Electoral Process Act Number 35 of 2016**.

It was argued that the basis for seeking the nullification of the election is due to the fact that the said election was characterized by undue influence, contravention of the Electoral Code of Conduct, violence, as well as publication of false, defamatory and malicious statements by the Respondent against the Petitioner leading to the people of ItezHITEZHI in not voting for the candidate of their choice. The Petitioner submitted that the Respondent breached the provisions **Section 15 (1), a, b and c of the Electoral Code of Conduct 2016** which stipulates that:

**15. (1) 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;**
- (b) Carry or display arms or weapons, traditional or otherwise, of any kind at a political meeting or in the course of any march, demonstration or other public gathering of a political nature;**



**(c) Make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election**

The Petitioner submitted that the Respondent and his agents breached the above provisions of the law as highlighted in the Petition under paragraph 1 (i) to (iv). It was argued that the events concerning the 'abduction' of PW2 were reported to the police as is evidenced by extracts obtained from the OB at Itezhitezhi Constituency, although the Respondent raised issues against the said extracts on pages 24 - 25 of the Petitioners Bundle of Documents, without necessarily making any objections to the document being admitted into evidence. My attention was drawn to the case of **Pankaj Parmer (T/A Mugodi Drillers and Building) vs. Albidon Zambia Limited**<sup>(1)</sup> where Mutuna J., observed as follows at page 6:

***"...It was at the stage of discovery and inspection that the parties were required to raise objection against a document or documents that either of them were not comfortable with. Therefore, if they had abided by the orders for directions they would have avoided the predicament they both find themselves in and there would have been no need for this application...By their actions, the parties are taken to have waived their liberty to object and I accordingly find that the two applications are misconceived..."***

The Petitioner contended that the fact that PW2 immediately after he left the UPND rally made efforts to report the matter to the Police



indicates that he did not voluntarily resign from the Patriotic front to join the UPND.

It was argued that the contents of the radio recording, "**P1**", which was played in Court, particularly from minutes number 45 to 50 as well as from 1hour 3minutes into the recording, which were the concluding remarks, are in line with the Petitioner's allegations from paragraph 1 (v) to (viii) of the Petition.

It was submitted that the defamation perpetuated by the Respondent and his campaign team was intended at ensuring that the people of Itezhitezhi do not vote for the Petitioner. Further, that no evidence was brought before Court to entitle the Respondent to a defence of justification. My attention was drawn to the case of **Saul Zulu vs. Victoria Kalima**<sup>(2)</sup> where the Supreme Court of Zambia held that: -

***“Defamation was an offence and there was un-contradicted evidence of legally indefensible inexcusable defamation repeated in furtherance of the elections campaigns at well- attended rallies, which must have affected the election results....The recent case of Leonard Banda vs. Dora Siliya, also fortifies this position as we made it clear in that case on similar issues that:- “...it is inconceivable to detach a parliamentary candidate from false, defamatory or inflammatory statements made against the candidate’s presidential candidate and political party. We are of the view that false, defamatory or inflammatory statements against a political party or that party’s presidential candidate***





***affect the parliamentary candidate contesting elections on that party's ticket."***

I was further referred to the cases of ***Alex Cadman Luhila vs. Batuke Imenda***<sup>(3)</sup> and ***Batuke Imenda vs. Alex Cadman Luhila***<sup>(4)</sup> where the Court frowned upon opponents defaming each other during election campaigns. The Petitioner urged the Court to consider the decision of the Court in the case of ***Eileen Mbuyana Imbwae vs. Misheck Mutelo, Electoral Commission of Zambia and The Attorney General***<sup>(5)</sup>, which case, according to the Petitioner is on all fours with the case *in casu* in certain respects. In the said case, the Court dealt with the issue of publishing false statements. The Court eventually found that being branded a thief would have an impact on an election candidate.

It was the Petitioner's contention that the threats and actual violence coupled with inciting violence on a radio interview by the Respondent and his agents was in breach of **Section 83** and **Section 97 (2) (a) of the Electoral Process Act No. 35 of the 2016** which warrants nullification of the Respondent's election. My attention was drawn to the case of ***Brigadier General Kenneth Kankinza and Others vs. Sara Sayifwanda and Another***<sup>(6)</sup> where Kaoma J., held that:

***"a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorized by the candidate or was expressly forbidden and that the reason for this stringent law is that a candidate put***



*forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise”*

The Petitioner argued that the Respondent was present at the interview and he did nothing to retract the statements which were said. Further, that the Respondent admitted in cross-examination that the message to be discussed on radio interview was agreed upon by all the 4 UPND participants on the programme.

It was submitted that, the defamatory words targeted at the Petitioner coupled with the inciting of violence, plus the violence itself did or may have prevented the voters from voting for their preferred candidate in the 11<sup>th</sup> August 2016 election in Itezhitezhi Constituency.

The Petitioner contended that he has discharged his burden of proof to the required standard of proof required in election petitions and in line with **Section 97 (2) of the Electoral Process Act No. 35 of 2016**. I was referred to the case of *Josephat Mlewa vs. Eric Wightman*<sup>(7)</sup> where the Supreme Court of Zambia, in considering the provisions of **Section 18 (2) of the Electoral Act Number 2 of 1991** which is in substantial conformity with the now **Section 97 (2) of the Electoral Process Act number 35 of 2016** held that: -

*“...Proof of one of the grounds is enough for a court to nullify an election. We are satisfied that subsection 2 of Section 18 sets out four independent and separate grounds which if any of them is*



*proved to the satisfaction of the High Court then the election of a candidate as a member of the National Assembly shall be nullified. We are fortified in our interpretation of Section 18 (2) by a number of decided cases, both unreported and reported.”*

My attention was further drawn to the case of **Brelsford James Gondwe vs. Catherine Namugala SCZ App No. 175 Of 2012<sup>(8)</sup>** where the Supreme Court of Zambia emphasized the grounds for nullification of an election when they interpreted the provisions of **Section 93 of the Electoral Act No. 12 of 2006**, which is similar to **Section 97 (2) of Act No. 35 of 2016**.

The Petitioner contended that he has proved his case despite the Respondent, through his witnesses, tendering into Court matters not specifically pleaded. My attention was drawn to the case of **Brelsford James Gondwe vs. Catherin Namugala (supra)** where the Supreme Court of Zambia held that: -

*“...In election petitions the pleadings must give sufficient notice of the wrongs complained of, specific persons (by means of names and peculiar features of identity) who perpetrated the wrongs and specific places where the wrongs were committed...”*

The petitioner also cited the case of **Saul Zulu vs. Victoria Kalima<sup>(2)</sup>** where the Supreme Court of Zambia gave guidance on the function of pleadings. The Court was urged to assess the weight placed on unpleaded matters in line with the Respondent's Amended Answer.



The Petitioner argued that the Respondent's argument was to the effect that the Petitioner lost the election because Itezhitezhi was a UPND strong hold. Further, that what is in contention in this matter is not the issue of strongholds but the fact that the election was conducted in a manner that contradicts the provisions of the **Electoral Process Act** and as such ought to be nullified.

It was the Petitioner's contention that the illegal acts of inciting violence, defamatory acts as well as the violence that surrounded the elections in Itezhitezhi leads to the conclusion that the majority of voters in the Constituency were prevented from electing the candidate whom they preferred. Further, that the Petitioner has satisfied the requirements of **Section 97 (2) (a) of the Electoral Process Act No. 35 of 2016**.

The Petitioner prayed that the election of Herbert Shabula, the Respondent herein be declared void as he was not duly elected as a Member of Parliament for Itezhitezhi Constituency.

The Respondent in his submissions filed into Court on 4<sup>th</sup> November, 2016 argued that for a Petitioner to succeed in an Election Petition he must prove that the alleged offences prevented a majority of voters from electing the candidate of their choice. My attention was drawn to the Supreme Court case of **Mubita Mwangala Vs. Inonge Mutukwa Wina<sup>(9)</sup>**.





The Respondent argued that the standard of proof required in proving any allegations of electoral malpractice is higher than the ordinary balance of probabilities in civil matters but less than beyond all reasonable doubt. I was referred to the cases of ***Lewanika and Others vs. Chiluba***<sup>(10)</sup> and ***Kamanga Vs. The Attorney General and Another***<sup>(11)</sup> where the Supreme Court of Zambia had occasion to discuss the standard of proof in Election Petitions.

It was the Respondent's submission that the burden of proof is placed on the Petitioner not only to prove the allegations of electoral misconduct to a standard higher than the ordinary standard required in civil matters, but also to establish the allegations to a fairly high degree of convincing clarity that it was as a result of the allegations that the electorate did not vote for the Petitioner. I was referred to the case of ***Michael Mabenga vs. Sikota Wina and Others***<sup>(12)</sup> where the Court opined that: -

***“An election Petition like any other civil claim depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability.”***

The Respondent contended that the Petitioner failed to establish, at trial, the allegations as contained in the Petition so as to justify the challenge of the Respondent's election in line with the provisions of **Section 97 (2) of the Electoral Process Act No. 35 of 2016**. Further, that the Petitioner raised several allegations of violence against the Respondent which he failed to substantiate at trial. In



addition, that the evidence adduced at trial did not establish how the electorate was influenced. My attention was drawn to the case of ***Mubika Mubika Vs. Poniso Njeulu***<sup>(13)</sup> where the Supreme Court stated that: -

***“The provision for declaring an election of a Member of Parliament void is where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or, might have been prevented from electing a candidate of their choice... it must be shown that the prohibited conduct was wide spread in the Constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election...”***

It was argued by the Respondent that the violence in Mbila cannot be attributed to the Respondent’s statements made on the radio because no statistical evidence was adduced at trial to show how many of the electorate heard the statement of the Respondent and that as a result they did not vote for their preferred candidate. Further, that the violence at Mbila could not be attributed to the Respondent as no one at the polling station was clad in party regalia indicating which party they belonged to. In addition that PW7 testified that the attacks at Mbila by voters were aimed at both the Respondent’s vehicle and the PF vehicle, thus it cannot be inferred that the Respondent was at the polling station at that time of the violence. I was referred to the case of ***Kafuka Kafuka vs. Ndalamei Mundia***<sup>(14)</sup> where the Court asserted that: -



***“Indeed simply because the attackers came from the direction where the Respondent was having a meeting cannot lead to an inference that he was responsible for the attack.”***

The Respondent argued that most of the evidence tendered in by the Petitioner’s witnesses was hearsay and ought not to be admitted by the Court. In support of this argument, the Respondent cited the case of ***Suburumaniam Public Prosecutor***<sup>(15)</sup> where the Court was of the view that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the aim of the evidence is to establish the truth of the said statement.

It was the Respondent’s contention that the photographs of injured individuals without any corroboration by either the casualties themselves or a Medical Practitioner who attended to them raises doubt as to what incident the said pictures actually portrayed. My attention was drawn to the case of ***Green Nikutisha and Another vs. The People***<sup>(16)</sup> where the Court stated that: -

***“The need for calling of other witnesses arises when doubt is cast upon the evidence of a witness to the extent that further evidence is required to corroborate that witness and thus remove the doubt...”***

The Respondent argued that the authenticity of the medical reports and pages of the OB are questionable as the medical reports have missing details and the OB make reference to ZESCO Police. I was referred to a passage in ***Edward J. Imkwinkelreid’s Evidentiary Foundations, 4<sup>th</sup> Edition, Lexis Law Publishing, Charlottesville,***



**Virginia, 1998** where the learned authors noted that common law requires the proponent of evidence to prove the evidence's authenticity as a condition of the evidence.

It was the Respondent's contention that the alleged violence in four Wards cannot be attributed to the statements made on the radio and the violence in four Wards cannot constitute a majority of the voters as envisaged by the Court in the cases of ***Mubita Mwangala vs. Inonge Mutukwa Wina (Supra)*** and ***Josephat Mlewa vs. Eric Wightman***<sup>(7)</sup>.

The Respondent argued that what led to the Petitioner losing the election was the fact that he had defected to the PF from UPND since Itezhitezhi is UPND's stronghold since 2006.

It was the Respondent's contention that the Petitioner used his position as Minister to his advantage by distributing bicycles, footballs and mealie meal to the electorate contrary to the guidance of the Court in the case of ***Matilda Macarias Mutale vs. Sebio Mukuka and Electoral Commission of Zambia SCZ Appeal No. 45/2003***<sup>(17)</sup>.

In conclusion, the Respondent submitted that the allegations of electoral malpractice outlined in the petition had no effect on the majority of the voters in the Itezhitezhi Constituency as the violence was only reported in 4 polling stations out of 44 polling stations. Further, that that the Respondent was validly elected in conformity with the law and that it was in fact the Petitioner who was in breach of the law. The Court was urged to dismiss the Petition.





I have carefully considered the submissions by Learned Counsel for both parties herein, as well as the authorities cited, for which I am very grateful for. I have also considered averments in the Petition, Affidavit Verifying Facts, Amended Answer, Affidavit in Opposition filed herein and very critically analysed the *viva voce* evidence of all the witnesses that testified before this Court.

It is a fact that both parties herein were Parliamentary Candidates in the Itezhitezhi Constituency in the elections held on 11<sup>th</sup> August, 2016. It is also a fact that the Petitioner contested that seat under the auspices of the PF Party, while the Respondent contested under the auspices of the UPND. The Returning Officer from ECZ declared the Respondent as duly elected Member of Parliament for Itezhitezhi Constituency and it is that election that the Petitioner now challenges.

Having carefully considered the evidence, it is imperative to note from the onset that the following issues are not in dispute, namely that: -

1. On 10<sup>th</sup> August, 2016 the Respondent held a live radio interview, which was aired on Itezhitezhi radio at around 16:00 hours. The interview was meant as a summation of the 70 campaign meetings that the UPND conducted in Itezhitezhi Constituency. In attendance, for the said interview together with the Respondent, were RW7 (Mr. Oliver Sitengu), Mr. Godfrey Beene and Mr. Gift Chilando Luyako.



2. On 11<sup>th</sup> August, 2016, on the polling day, violence ensued at Mbila Polling Station which resulted in people being injured. In addition, there was an isolated report of violence at Shambala Polling Station.

It is also imperative to note that the High Court is vested with the requisite jurisdiction to hear and determine parliamentary election petitions. **Article 73 (1) of the Constitution of Zambia**, as amended provides that: -

***“A person may file an election petition with the High Court to challenge the election of a Member of Parliament.”***

Further, **Section 98 of the Electoral Process Act No. 35 of 2016**, provides for the presentation of election petitions and stipulates that: -

***An election petition may be presented to the High Court or a tribunal by one or more of the following persons:***

- (a) a person who lawfully voted or had a right to vote at the election to which the election petition relates;***
- (b) a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates;***
- (c) a person claiming to have been a candidate at the election to which the election petition relates; and***
- (d) the Attorney General.***



Having established the source of the High Court's power to entertain election petitions, it is essential to establish what ought to be proved and the nature or standard of proof required by law in election petitions. Looking at **Section 97 of the Electoral Process Act No. 35 of 2016**, it is my view that the election of a candidate as a Member of Parliament will be rendered void if any one of the grounds set in **Subsection 2 (a) - (c)** is established and also if the provisions of **Section 97 (2) (a)** of the **Electoral Process Act No. 35 of 2016**, as regards the effect on the overall outcome of an election, as was confirmed in the case of **Christopher Kalonge vs. Annie Munshya**<sup>(18)</sup> where the Court held that: -

*“Allegations made in the petition if proved must affect the results of the election in a substantial manner. Without a bearing on the results, the election cannot be avoided.”*

**Section 97 (2) of the Electoral Process Act No. 35 of 2016** states that:

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

A party such as the Petitioner, who alleges has the burden of establishing any one of the allegations in the election petition, in keeping with the well settled principle in civil matters of "*Affirmati Non Neganti Incumbit Probatio*" in English translated as, "*he who alleges must prove*". However, it is also pertinent to state from the outset that the standard of proof required in an Election Petition is higher. Election petition proceedings, despite being civil proceedings, require a higher standard of proof than a





preponderance of probability, as is the case in other civil actions. This is because most allegations in election petitions are of a criminal nature. However, the standard employed is not like that in criminal proceedings, therefore proof of allegations ought not to be beyond reasonable doubt. The Supreme Court has in a plethora of cases discussed the standard of proof required in Election Petitions. For example, in the case of **Michael Mabenga vs. Sikota Wina & Others**<sup>(12)</sup> the Supreme Court held as follows: -

*“proof of an Election Petition, although a civil matter was higher than balance of probability but less than beyond all reasonable doubt... As the allegation[s] in an election petition are of a criminal nature...”*

The Supreme Court, in the **Mabenga case** (supra), went further and stated that: -

*“An election petition is like any civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a balance of probability...”*

In the cases of **Lewanika and Others vs. Chiluba**<sup>(10)</sup> and **Mazoka and Others vs. Mwanawasa**<sup>(19)</sup>, the Supreme Court held that the burden of proof required is a fairly high degree more than a balance of probabilities. I am therefore of the view that the standard of proof in Election Petitions under our laws is indeed above one on the balance of probabilities, but less than beyond reasonable doubt.



Having established the standard of proof expected in Election Petition cases, I now turn to the issues raised herein by the Petitioner. I have carefully perused the Petition and I am of the view that in summary, the basis for the Petitioner seeking the nullification of the Respondent's election is due to the fact that the said election was allegedly characterized by undue influence; contravention of the Electoral Code of Conduct; violence; and publicising of defamatory statements by the Respondent against the Petitioner leading to the people of Itezhitezhi Constituency in not voting for the candidate of their choice. In a nutshell, the Petitioner argued that the Respondent was in breach of **Sections 89 (1) (e)** and **Section 83** of the **Electoral Process Act No. 35 of 2016** as read together with **Section 15 (1) (a), (b) and (c)** of the **Electoral Code of Conduct**.

The Respondent on the other hand disputes the allegations made by the Petitioner and avers that it is in fact the Petitioner who perpetuated violence and breached the Electoral Code of Conduct.

Accordingly, the issues raised by the Petitioner, which this Court has been called upon to determine are as follows: -

1. *Whether or not the Respondent and his agents forced a person called Royd Muzundu to join the UPND by the use of threats and force, which matter may have substantially affected the outcome of the August, 2016 election results;*



2. *Whether or not the Respondent and his agents incited violence in a radio interview aired on Iteshitezhi radio on 10<sup>th</sup> August, 2016. Further, whether or not the Respondent and his agents, during the said interview, engaged in misinformation and disseminating defamatory statements meant to discredit the Petitioner thereby substantially affecting the outcome of the August, 2016 election; and*
3. *Whether or not the Respondent and his agents were responsible for the violence and threats that took place on 11<sup>th</sup> August, 2016 at Mbila, Shambala, Masemu and Iyanda Polling Stations, that may have substantially affected the outcome of the August, 2016 election results.*

I will proceed to determine this matter by addressing the issues raised in the order that they are presented in the Petition. The first issue raised regards the allegation, by the Petitioner, to the effect that the Respondent and his agents forced a person called Royd Muzundu (PW2) to join the UPND by the use of threats and force, which allegation the Petitioner states contravenes **Section 15 (1) (b)** of the **Electoral Code of Conduct of The Electoral Process Act No. 35 of 2016**. The said section provides that: -

**15. (1) A person shall not—**

**(b) carry or display arms or weapons, traditional or otherwise, of any kind at a political meeting or in the course of any march, demonstration or other public gathering of a political nature;**



The record will show that the Petitioner (PW9) and Royd Muzundu (PW2) led evidence in support of this first allegation made by the Petitioner. PW2 himself gave evidence to the effect that he was taken by UPND members, who had two guns to a Pool House within the Itezhitezhi Constituency where he was threatened and eventually forced to join the UPND at their meeting. PW2 added that he was in fact forced to give a speech at the said meeting. Further, that the photographs on record show that he was forced to gesture the UPND symbols at the said meeting. PW9, the Petitioner herein, informed the Court that PW2 narrated the events of his 'abduction' to him and the matter was reported to the Police Station at Itezhitezhi.

The Respondent denied having forced PW2 to join the UPND and argued that PW2 joined the UPND voluntarily without any threats. The Respondent argued that in fact the photographs and video footage on record do not show that PW2 was forced to join the UPND.

I have perused the record and viewed the photographs and video in question. I am of the considered view that the same are not conclusive enough to show that PW2 was being forced to gesture the UPND symbols. Further, the video footage on record shows PW2 making a speech and denouncing the PF at a gathering. There was no visible sign of any person holding a gun or weapons of any kind, that could have indicated that PW2 was under threat. The





said gathering was in an open place. I opine that PW2 was in a position to alert the people gathered that he had been coerced to defect to the UPND and to give a speech. In addition, no other evidence has been adduced to conclusively show that PW2 was forced to join UPND and no Police record or report was produced showing that indeed, PW2 reported the matter to the police and to substantiate his claims that he was threatened with guns. In order to successfully bring a claim under **Section 15 (1) (b)** of the **Electoral Code of Conduct**, that the Petitioner cited, the Petitioner and PW2 ought to have shown to the Court that there were arms and weapons at this particular gathering that put PW2 under threat as provided in the section cited above, but this was not done.

I am therefore of the considered view that the Petitioner has failed to establish his allegation regarding the abduction of PW2 with the requisite clarity and standard of proof required under the relevant applicable laws. My view is fortified by the case of **Anderson Kambela Mazoka vs. Levy Patrick Mwanawasa and Another**<sup>19)</sup>, where the Supreme Court discussed how a Petitioner is expected to adduce evidence in election proceedings. The Supreme Court in the said case stated that: -

***“For the petitioner to succeed in the present Petition, he must adduce evidence establishing the issues raised to a convincing degree of clarity in that proven defects and flaws were such that the majority of Voters were prevented from electing the candidate who they preferred or that the election was so flawed that the***



***defects seriously affected the result which can no longer be said to represent the true and free choice of the majority of voters.”***

The Petitioner having failed to satisfy this Court on this allegation with the requisite clarity and standard of proof required under the relevant provision of the law, I opine that the allegation lacks merit and accordingly dismiss it.

The next issue for determination is whether or not the Respondent incited violence through an interview aired on Itezhitezhi Radio, a day before the elections in issue, contrary to **Section 15 (1) (a) and (c)** of the **Electoral Code of Conduct of The Electoral Process Act No. 35 of 2016**. The said section provides that: -

**15. (1) 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;**
- (b) ...**
- (c) make false, defamatory or inflammatory allegations concerning any person or political party in connection with an election;**

It is not disputed that the Respondent and three (3) others gave an interview on Itezhitezhi Radio on 10<sup>th</sup> August, 2016. The interview was recorded and a copy produced and played in Court. In the presence of the Respondent, Mr. Gift Chilombo Luyako, a member



of the UPND informed the people of Itezhitezhi, during the interview, that there were people in Itezhitezhi with pre-marked ballot papers in their homes and offices. He further urged the people of Itezhitezhi to 'do something' to people found distributing mealie meal and pre-marked ballot papers. A review of the evidence on record shows that both the Respondent and RW7 confirmed that Mr. Gift Chilombo Luyako urged the people of Itezhitezhi to 'do something' to the people distributing pre-marked ballot papers and mealie meal. Further, the record will show that RW7 testified that each panellist during the radio interview in issue had specific items to address and that the radio interview was a summation of the Respondent's campaigns in the area. The Respondent also confirmed that the radio interview was intended to summarise the UPND's campaign message to the people of Itezhitezhi, which message had been disseminated throughout their campaigns.

The exact words used by Mr. Gift Chilombo Luyako during this interview is contained in an exhibit marked "**P1**", which is a recording of the radio interview. It was translated from Ila to English by the Court Interpreter as follows: -

***"...all my relatives of Itezhitezhi, I want you to be the soldiers of UPND. This area, people agreed that it is Hakainde Hichilema in this area. If you see those people who bring mealie meal, get the mealie meal then beat them and do something. Even those who will bring ballot papers, if you will find them, catch them and do something to them. Those are the people who want to sell the country. In conclusion, my relatives, they say that you should point those who will come as PF who want that you vote for them.***



*You should ask them in Kapulwe and in Kela what they have done because in Itezhitezhi, in Masemu where they say that there is a road, it is not just this roads which ends on the mountains. You should ask them and tell them that what have you done?" (emphasis mine)*

I am of the firm view that the words uttered by Gift Chilombo Luyako, a member of the Respondent's team and in the presence of the Respondent during the radio interview in issue were contrary to the provisions of **Section 15 of the Electoral Code of Conduct** as they were likely to lead to violence or intimidation. **Section 15 (1) (a) of the Electoral Code of Conduct** provides as follows: -

*" 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;" [ Emphasis mine]*

I must hasten to add that **Section 15 (1) (a) (supra)** does not in any way entail that the language used ought to actually cause violence or intimidation, it is enough that the language used is likely to cause violence or intimidation.

I am satisfied that the Respondent not only heard these words spoken by one Gift Chilombo Luyako, but also condoned it as he did not do anything to have those words retracted or dispelled. I therefore find merit in this particular allegation against the





Respondent and his team as the words uttered during the radio interview were likely to cause violence and intimidation.

The other issue raised and related to the radio interview was the fact that the Respondent during the same interview in question did defame the Petitioner by accusing him of having misappropriated funds meant for the purchase of a grader and a water driller. The Petitioner denied misappropriating funds meant for the purchase of a grader and water driller. In his testimony, PW9 stated that in fact the water driller was not purchased by the Itezhitezhi District Council and that the monies intended for the purchase of the grader were not even disbursed by the government. He added that in any event he ought not to have been queried over the same as he was not part of the Procurement or Finance Committee at the Council.

The Respondent argued that all they did during the interview was to urge the Petitioner to account for the monies relating to a grader and drilling machine. Further, that it was actually true that the Petitioner misappropriated the said funds.

The record will show that at the trial of this matter no evidence was produced by the Respondent showing that the Petitioner did in fact misappropriate funds save for the testimony of RW5. The record will show that RW5 did not bring before Court any proof to show that the funds were released to the Itezhitezhi District Council for the purchase of items in issue. **Section 15 (1) (c)** of the Electoral



Code of Conduct prohibits the making of false statements concerning any person in relation to elections. The said Section stipulates that: -

***“ A person shall not—***

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

I refer here to the case of **Alex Cadman Luhila vs. Batuke Imenda**<sup>(3)</sup> in which Munthali J. as he then was, said the following: -

***“Those who think they can find their way to Parliament on the platform of lies and calumnies intended to defame the characters of opponents, those who think they can find their way to Parliament on the platform of illegal practices of various shades, those who think they can find their way to Parliament on the platform of bribery and corruption, the message is this: The Courts will not hesitate to show them the door.”***

Considering the evidence adduced before Court, I am convinced that the Respondent and his team made false allegations during the radio interview under reference, which allegations were not substantiated. In my view, making such statements was a calculated scheme on the part of the Respondent and his team, unsupported as it were, by any cogent proof, only meant to discredit the Petitioner in the public eye and thereby disadvantaging him in the election in issue. The issue of defaming the Petitioner was significant in my view, considering that the Respondent confirmed that the message delivered on radio was agreed to by all the



participants from UPND prior to going live on radio. Further, the Respondent confirmed in cross-examination that the radio programme was targeted to the electorate and was listened to by many people, which fact was also confirmed by RW7 in cross-examination when he stated that the radio is commonly listened to by the people of Itezhitezhi. RW7 also stated that the people of Itezhitezhi heard the summation of the campaign meetings outlined during the interview.

On the foregoing, I am of the considered view that the Respondent and his team, having made the allegations during the radio interview, did not justify or prove that the Petitioner did in fact misappropriate funds meant for the purchase of a grader and drilling machine.

The last issue is with regards the violence that ensued on polling day resulting in injuries to several people, which the Petitioner alleged contravenes the provisions of **Section 15 (1) (a)** of the **Electoral Code of Conduct**, as read together with **Sections 83** and **89 (1) (e)** of **The Electoral Process Act No. 35 of 2016**. **Section 15 (1) (a)** of the **Electoral Code of Conduct** is stated above and will not be repeated here. **Section 83** of **The Electoral Process Act No. 35 of 2016** relating to undue influence provides 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;*



- (b) inflict or threaten to inflict by oneself or by any other person, or by any supernatural or non-natural means, or pretended supernatural or non-natural means, any physical, psychological, mental or spiritual injury, damage, harm or loss upon or against any person;**
- (c) do or threaten to do anything to the disadvantage of any person in order to induce or compel any person—**

  - (i) to register or not to register as a voter;**
  - (ii) to vote or not to vote;**
  - (iii) to vote or not to vote for any registered political party or candidate;**
  - (iv) to support or not to support any political registered party or candidate; or**
  - (v) to attend and participate in, or not to attend and participate in, any political meeting, march, demonstration or other political event;**
- (d) interfere with the independence or impartiality of the Commission, any member, employee or officer of the Commission;**
- (e) prejudice any person because of any past, present or anticipated performance of a function under this Act;**
- (f) advantage, or promise to advantage, a person in exchange for that person not performing a function under this Act; or**
- (g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event.**





- (2) *Subject to the other provisions of this Act, a person shall not prevent another person from exercising a right conferred by this Act.*
- (3) *A person, knowing that another person is not entitled to be registered as a voter, shall not—*
- (a) *persuade that other person that, that other person is entitled to be registered as a voter; or*
  - (b) *represent to anyone else that the person is entitled to be registered as a voter.*
- (4) *A person, knowing that another person is not entitled to vote shall not—*
- (a) *assist, compel or persuade that other person to vote; or*
  - (b) *represent to anyone else that the other person is entitled to vote.*
- (5) *A person who contravenes any of the provisions of subsections (1) to (4) commits an offence.*
- (6) *A person who, by abduction, duress or any fraudulent device or contrivance, impedes or prevents the free exercise of the vote of any voter or thereby compels, induces or prevails upon any voter either to give or to refrain from giving the person's vote at any election, commits an offence.*

**Section 89 (1) (e) of The Electoral Process Act No. 35 of 2016**  
provides that: -

- 89. (1) A person shall not—**
- (e) *on any polling day, at the entrance to or within a polling station, or in any public place or in any*



***private place within four hundred metres from the entrance to such polling station***

- (i) canvass for votes;***
- (ii) solicit the vote of any person;***
- (iii) induce any person not to vote; or***
- (iv) induce any person not to vote for a particular candidate;***

It is not disputed that there was confusion at Mbila Polling Station on 11<sup>th</sup> August, 2016. The cardinal issue is who actually caused the violence.

In a nutshell the Petitioner has alleged that the UPND members caused the violence, when they attacked PF members, who were on their way to pick up PW4 at Shambala.

The Respondent on the other hand has argued that it was in fact the Petitioner who caused the violence when a group of PF members, parked at the Polling Station in masks and respirators. Further, that PF members attacked RW4, the Respondent's wife, when the vehicle she was in was parked at the roadside at Mbila Polling Station.

The record will show that the Petitioner did not adduce evidence to conclusively show to the required standard of proof that the Respondent and his agents caused the violence at Mbila Polling Station. In fact, the Respondent has argued that PF members



caused confusion when they came and parked behind the queues at Mbila Polling Station and later behind the Polling Station. The Petitioner's witnesses confirmed that a group of about 12 PF youths had gone to Mbila Polling Station on their way to Shambala. PW7 in fact confirmed in Court that the people that threw stones at their vehicle that was parked behind the Polling Station were voters who had queued to cast their votes. I opine that one cannot ascertain, with certainty, the political parties that the voters on the voting queue belonged to. The voters that left the queue to throw stones could have belonged to any political party that participated in the election.

For the foregoing, it is my considered view that the third issue raised by the Petitioner fails, because the Petitioner has not proved the said allegation to the required standard of proof. Consequently, I find no merit in this particular allegation and accordingly dismiss it.

Having carefully and critically considered the evidence before me, and drawing guidance from the case of **Michael Mabenga vs. Sikota Wina and others**<sup>(12)</sup>, I find that the Petitioner has successfully proven the allegation of misconduct, by the Respondent, of publicising a false statement against the Petitioner, to the required legal standard for Election Petitions. Having found this, I now ask myself whether the conduct complained of by the Petitioner is such that it prevented the majority of the electorate in



that area from voting for a candidate of their choice, as envisaged under the law, so as to affect the result of the election to warrant the same to be nullified by this Court. I am satisfied from the evidence adduced before me that the answer to the question posed above is in the affirmative. Being branded a thief, as the Petitioner was by the Respondent and team, on a widely listened to platform by the electorate, especially in a rural setting such as one concerned with in this Petition, when there was no justifiable cause for so doing is injurious and can certainly influence the electorate to withhold their vote against a person so accused, as the ramifications from such unfounded accusations in the population of a rural set up has real effect to their welfare. Attempts by candidates in elections to assume public office through unacceptable means such as backstabbing and character assassination should be frowned upon and discouraged in the strongest terms. This kind of conduct is an affront to democracy, good governance and moral decency. On the strength of the ***Mabenga vs. Sikota Wina and Others***<sup>(12)</sup> case, I find merit in this Petition and I therefore find that the election of the Respondent, Mr. Herbert Shabula, as Member of Parliament for Itezhitezhi Constituency, in the August 2016 election, was void on account of the misconduct carried out by the Respondent and/or his Agents, which the Petitioner has successfully proven. The reliefs sought by the Petitioner, as outlined in his Petition succeed. For avoidance of doubt, costs are awarded to the Petitioner to be taxed in default of agreement.





Leave to Appeal is granted.

**Delivered at Lusaka this 24<sup>th</sup> day of November, 2016.**



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**P. K. YANGAILO**  
**HIGH COURT JUDGE**

