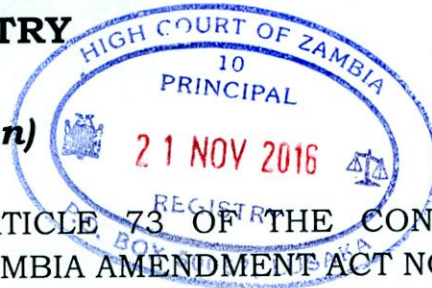


IN THE HIGH COURT FOR ZAMBIA 2016/HP/EP/0004
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)



IN THE MATTER OF: ARTICLE 73 OF THE CONSTITUTION OF
ZAMBIA AMENDMENT ACT NO. 2 OF 2016

IN THE MATTER OF: SECTIONS 81, 83, 84, 89, 91, 97 AND 98 OF
THE ELECTORAL PROCESS ACT NO. 35 OF
2016

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016

IN THE MATTER OF: SINAZONGWE CONSTITUENCY
PARLIAMENTARY ELECTIONS HELD ON 11TH
AUGUST, 2016

BETWEEN:

RICHWELL SIAMUNENE	PETITIONER
AND	
GIFT SIALUBALO	RESPONDENT

**Before the Honourable Mr. Justice M. L. Zulu in Open Court
on the day of2016.**

For the Petitioner: *Mr. B. Mutale, SC of Ellis & Co. and Mr. F. Besa of
Besa Legal Practitioners*

For the Respondent: *Mr. M. Cheelo of MAK Partners*

J U D G M E N T

Cases cited

- 1. Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa & Others (2005) ZR 183**
- 2. Leonard Banda v. Dora Siliya Appeal No. 95 of 2012**
- 3. Reuben Mtolo Phiri v. Lameck Mangani SCZ No. 2 of 2013**

4. **Mlewa v. Whightman (1995/1996) ZR 171**
5. **Lewanika and others v. Chiluba (1998) ZR 79**
6. **Mabenga v. Wina (2003) ZR 110**
7. **Kamanga v. Attorney General and Another Appeal No. 182 of 2007**
8. **Khalid Mohammed v. Attorney General**
9. **Mubika Mubika v. Poniso Njeulu Appeal No. 114 of 2007**
10. **Gondwe v. Namugala Appeal No. 175 of 2012**
11. **Zulu v. Kalima Appeal No. 141 of 2012**

Legislation and Works referred to:

1. **The Constitution of Zambia(Amendment) Act No. 2 of 2016**
2. **The Electoral Process Act No. 35 of 2016**
3. **The Electoral (General) Regulations, 2006**
4. **The Halsbury's Laws of England, 4th edition, Volume 15**

This Petition was presented by the Petitioner challenging the election of the Respondent as Member of Parliament (MP) for Sinazongwe Constituency. It is made pursuant to Article 73 of the Constitution of Zambia (Amendment) Act, 2016 as read with Sections 81, 83, 84, 89, 91 and 98 of the Electoral Process Act.

The background to this Petition is that on the 11th of August, 2016, both parties to this Petition were candidates in the Parliamentary General Election for Sinazongwe Constituency. The Petitioner contested the election on the Patriotic Front (PF) ticket while the Respondent contested the election on the United Party for National Development (UPND) ticket. At the end of the counting of the votes, the Respondent was declared winner with 34,397 votes. The Petitioner polled 6,171 votes.

The Petitioner was not satisfied with the election results. Therefore, on the 25th of August, 2016 he petitioned the High

Court for the nullification of the election of the Respondent as Member of Parliament (MP) for Sinazongwe Constituency on the following grounds:

“Paragraph 5: Your Petitioner states that contrary to the declaration by the Returning Officer that the Respondent was duly elected, the Respondent was not duly and validly elected Member of Parliament for Sinazongwe as his campaign was characterised by widespread electoral malpractices, corrupt and illegal practices such as intimidation, undue influence, illegal publication of false statements by the Respondent, and his party agents and supporters contrary to the Electoral Process Act of 2016 and the Electoral Code of Conduct of 2016. The said practices prevented the majority of voters in Sinazongwe from electing the candidate whom they preferred.

Particulars of Undue Influence and Intimidation contrary to Sections 81, 83 and 91 of the Electoral Process Act No. 35 of 2016

- (i) The Respondent personally and through his agents engaged in various and widespread acts of violence and intimidation in all the Wards of every person / voter who was perceived to be sympathetic to the Petitioner which is contrary to the relevant sections of the Electoral Process Act and Electoral Code of Conduct. That numerous people were beaten by the Respondent and / or his agents with the knowledge and consent of the Respondent for supporting the**

Petitioner, and most of these supporters and would be voters ended up hospitalised at Maamba General Hospital and University Teaching Hospital (UTH).

- (ii) The Respondent on Election Day deployed hundreds of youths at polling stations and completely surrounded the polling stations in all the 14 Wards and ensured that they told every voter who went in to vote that they would be beaten if they voted for your Petitioner.**
- (iii) The Respondent deployed his supporters and agents outside windows next to the polling booths and were able to see which candidate each voter had voted for. The said supporters ensured that those that voted for your Petitioner were beaten as a result of which the voters were denied the principle of 'secret ballot' and hence were intimidated into voting for the Respondent.**
- (iv) The Respondent deployed his supporters on roads and they made illegal road blocks in the Constituency at which they were searching vehicles purportedly for ballot papers to be used according to them for rigging and they were further searching for the entire Petitioner's campaign material.**
- (v) The Respondent generally created an environment of extreme fear and intimidation of the Petitioner's supporters and most of the Petitioner's supporters were prevented from voting as the Respondent's**

supporters who remained at the polling stations after voting were chasing away the Petitioner's supporters.

- (vi) The Respondent's supporters who remained at the polling station directed voters to fold their ballot papers outwards so that before casting their votes, they could confirm that they had voted for the Respondent thereby completely denying the voters their right to vote secretly which further intimidated the Petitioner's supporters.
- (vii) That the environment was so hostile that your Petitioner was physically and forcibly prevented from entering most polling stations by the Respondent and his supporters.

Particulars of Bribery contrary to Section 81 (1) of the Electoral Process Act

- (i) Contrary to the Electoral Process Act, the Respondent, his agents and monitors engaged in various acts of corruption and bribery at all the polling stations on Election Day and openly bought drinks and food for presiding officers and all the Electoral Commission of Zambia (ECZ) officers thereby compromising their impartiality.

Other illegal Practices

- (i) Contrary to the Electoral Process Act which expressly forbids campaigning on the Election Day at polling stations, the Respondent and his supporters openly

continued campaigning at the Polling Stations thereby swaying voters to vote for the Respondent.

(ii) The counting of ballots was characterised by irregularities, at all polling stations, that include amongst others the inclusion of rejected ballots to the valid votes cast.”

According to the Petitioner, these malpractices significantly and substantially affected the outcome of the election such that the results cannot be said to reflect the will of the voters.

The Petition was supported by an affidavit verifying facts. The Petitioner deposed that the Respondent was not duly and validly elected because his election was characterised by widespread electoral malpractices and illegalities.

On the 19th of September, 2016, the Respondent filed an answer together with an affidavit in support wherein he denied the petitioners allegations. The Respondent claims that contrary to the Petitioner’s allegations, it was in fact the Petitioner, who breached the provisions of the Constitution and the Electoral Process Act. To that effect, the Respondent has prayed for an order that the Petitioner should be disqualified from contesting a by-election, if any.

Consequent to the foregoing, the Petitioner seeks the following reliefs:

(i) A declaration that the election of the Respondent as MP for Sinazongwe Constituency is null and void;

- (ii) A declaration that the various illegal acts by the Respondent so substantially affected the outcome of the elections that they can no longer be said to reflect the will of the voters in Sinazongwe District; and**
- (iii) An order that the Respondent pays the Petitioner's costs.**

The Petition was heard at Livingstone High Court. The hearing commenced on 6th October, 2016 and concluded on 14th October, 2016. The Petitioner testified and called 14 other witness. The Respondent also testified and called 5 other witnesses.

PW1 was the Petitioner, Richwell Siamunene. He began his testimony by confirming that he contested the election for the Sinazongwe Parliamentary Seat on the PF ticket. He went on to testify that he was not satisfied that the Respondent was validly elected because there was widespread violence, intimidation and bribery rendering the election not free and fair. According to him, all these incidences and illegalities prevented him from winning the election.

On allegations of undue influence and intimidation, he testified that on 11th August, 2016, he visited 9 out of the 14 Wards in Sinazongwe Constituency, namely; Malima, Senenge, Nang'ombe, Nkandabbwe, Sinazongwe, Maamba, Mweezya, Muchekwa, Tekelo and Mweemba. It was his testimony that he found UPND cadres with sticks on the roads leading to the various Polling Stations, threatening voters that if they voted for him, they would be beaten or killed. PW1 told the Court that the UPND Cadres

were also campaigning by showing 'the hand' which was their party symbol while chanting *Janza! Janza!* which was their party slogan which means 'hand'.

PW1 testified that he saw UPND cadres crowding the Polling Stations, telling people how to vote and forced them to reveal which candidate they voted for by folding the ballot papers outwards. He added that in some instances, those who voted for him were followed afterwards and threatened with violence. He stated that the UPND cadres broke windows so that their instructions could be heard by voters inside the polling stations. According to PW1, this was the trend in all the polling stations he visited.

PW1 testified that at Nang'ombe, he was manhandled and prevented from entering the polling station because the Respondent's campaign manager told people that he was carrying pre-marked ballots. They threw stones at him, bullied him and insulted him. According to PW1, the environment was not conducive for voting because the UPND continued campaigning and could do whatever they wished.

PW1 testified that he reported all these incidences to the Police who manned the polling stations, the Presiding Officers, the Electoral Officers and the Council Secretary for Sinazongwe. He added that these incidences were also captured by the Zambia News and Information Services (ZANIS) and broadcast as news items on TV1. He narrated that the ZANIS footage showed UPND cadres chanting their party slogan *Janza!Janza!* and waving their party symbol on polling day.

PW1 told the Court that after filing his nomination, the Respondent and his team remained near the Nomination Centre and waited for him and his supporters who were headed to the Nomination Centre in a convoy of about 10 vehicles. On their way, he heard shouts in Tonga language saying 'amubaume' which means 'beat them'. Immediately thereafter, he saw sticks and stones being thrown at them from the direction where the Respondent and his team stood. His supporters scampered in all directions for safety. He however, proceeded and filed in his nomination. He testified that 16 of his supporters were injured in the attack. These were given medical report forms at Sinazongwe Police Station and later treated at the hospital. PW1 added that his supporters came from all the 14 Wards such that the entire Constituency heard what happened. As a result, his supporters were afraid to continue campaigning openly while others withdrew their support. In his view, the incidences of violence which occurred during nomination reduced his following in the Constituency.

PW1 told the Court that apart from the attack on the nomination day, the Respondent's supporters at Munyati in Senenge Ward beat up whoever was perceived to be his supporter or found wearing PF regalia. He gave the example of Bishop Simazila (PW2) who was one of the victims.

PW1 went on to testify that after the PF Presidential campaign visit in Maamba in June, 2016, the Respondent through his campaign manager called Chisheta, who was also the UPND aspiring candidate for Maamba, blocked roads and his

supporters assaulted all those who were returning from the campaign meeting. He stated that he verified these assaults because he was at his house in Maamba when the incident occurred. About 10 people were assaulted and some of them were admitted at Maamba General Hospital. This incident was reported to Maamba Police.

PW1 stated that in mid-July, 2016, in Malima Ward, UPND officials attacked a PF supporter commonly known as 'Rasta'. They assaulted him and robbed him of K11, 000.00. The matter was also reported to the police. Further, that in Mweenda Ward in July, 2016, the Court heard that while the Petitioner's campaign agent, Tennyson Mandala and supporters were recruiting members, creating branches and issuing membership cards, they were assaulted on allegations that they were buying votes. The matter was reported to Maamba police.

PW1, also testified that on 2nd August, 2016, the Respondent's supporters put up a road block on Mweemba / Maamba junction and searched all cars and motorists from all directions for pre-marked ballot papers which they alleged was imported by him from Zimbabwe. They reported the incident to the police who acted on their report by apprehending about 4 or 5 suspects who are currently awaiting further process.

PW1 testified that in June, 2016 his Campaign Manager, Sianjila informed him that at Kafwambila in Namazambwe Ward, the Respondent's team that was campaigning and putting up posters searched the villages and beat up whoever was perceived to be

his supporters and those found in PF regalia. This incident was however not reported to the police.

It was PW1's evidence that in mid-July, 2016 after addressing a meeting in Sinazongwe Ward in Makonkoto area at Sinazeze, his Campaign Manager, Doctor Malyango, informed him that UPND cadres ambushed his supporters and attacked them on their way back to the village.

PW1 testified that at Nang'ombe polling station, UPND cadres were marking ballot papers on behalf of other voters to ensure that they voted for the Respondent after threatening them. In some instances, UPND officials assisted voters who pretended not to know how to vote to ensure that their vote was cast in favour of the Respondent. Further, that the Presiding Officer informed him that they failed to control the situation for fear of violence.

On allegations of bribery, PW1 testified that he received reports of bribery during campaigns and on polling day. In one particular incident, he witnessed the Respondent's Campaign Manager, Stenbridge Sikalola, giving out drinks to a lot of voters immediately after voting at Nang'ombe polling station. PW1 said he personally saw people trooping to get drinks after voting and they informed him that the drinks were purchased by Stenbridge Sikalola who was the campaign manager in that area.

PW1 further stated that the reports he received from his agents in the Constituency showed that the aforesaid incidences were a trend in most polling stations. According to him, the hostility, intimidation and undue influence affected the entire outcome of

elections as they prevented voters from exercising their free will when casting their votes.

In cross examination, PW1 testified that at Nang'ombe he was denied entry into the Polling Station and that stones were thrown at him but he was not injured. He stated that he was a member of UPND for 15 years which is why he was able to identify three UPND supporters, namely, 'Major', Stenbridge and Chilandula from the group that attacked them on nomination day. When asked if he had evidence that any of the events in his testimony happened, he responded that there was a video clip to show what transpired.

PW1, reiterated that he did not personally witness the incidences which occurred after nominations where his supporters were attacked in various wards since he relied on reports from his supporters within the Constituency and he would later verify them. He explained that the incident at Namazambwe was not reported because there were no serious injuries and the victims experienced transport challenges because the area was about 50 kilometres from the nearest police station.

PW1 testified that most of the Polling Stations had no 'secret ballot' because the Respondent instructed voters to fold ballot papers outwards. When further cross examined, he said he did not hear the Respondent issuing such instructions, but that a, UPND member, who attended the Respondent's campaign meeting had volunteered to testify to that effect.

Further in cross examination, PW1 testified that on polling day, he was informed that many UPND supporters like Chimbwete

were hovering the Polling Stations and ushering voters in the booths and marking ballot papers on their behalf which the Polling Assistants confirmed. Mean while, his Agents were not allowed to participate or monitor elections as they had been chased away from the polling station. He gave the example of Kayuni Polling Station where such an incident occurred. He denied that his testimony that some of his officers were chased was an afterthought.

The witness further testified that although every Polling Station was manned by Police Offices, they were nevertheless overpowered by UPND Cadres such that the environment at Polling Stations was not conducive for voting. He added that he did not see any Independent Monitors during elections.

In re-examination, PW1 clarified that he relied on his Agents who updated him on what transpired at various Polling Stations since he was not in a position to witness every incident himself.

PW2, was Bishop Simazila, a 42 year old, peasant farmer of Senenge Ward in Sinazongwe Constituency. He testified that on 1st June, 2016 he wore a PF T-shirt and went to a tavern to meet Edcco Siabana. He was attacked by 9 UPND cadres, one of whom he identified as Oliver Simomole. They dragged him and beat him with sticks and stones and robbed him of K4,000. During the attack, he heard his assailants saying that they were taking him to a meeting which the Respondent was addressing in Munyati area. He later reported the matter to the police and was treated at Maamba General Hospital. He referred to his medical report form

on page 2 of the Petitioner's Bundle of Documents to support his testimony.

PW2 told the Court that on 11th August, 2016, he was monitoring elections in all the wards with PW1 and other PF members. They were denied entry into Nang'ombe Polling Station by UPND cadres who were flashing their party symbol and chanting their campaign slogan. He observed that UPND members who were flashing their party symbol entered the polling station freely. They asked police officers to intervene but to no avail.

In cross examination, PW2, testified that the Respondent was not among the people who assaulted him at the tavern and that he never heard the Respondent instructing his assailants to attack him. He disclosed that he was informed by the dealing officer that Oliver Simomole was arrested and awaiting criminal prosecution.

PW2, testified that he voted from Munyati Primary School and left the polling station immediately after voting. He stated that no one prevented him from casting his vote, but that at the time he cast his vote, there was no peace at the polling station because UPND cadres were talking about the hand whilst on the queue. However, he could not identify any of them.

In re-examination, PW2 clarified that he concluded that his assailants were the Respondent's supporters because they wore the UPND party regalia. And that when they dragged him, they said they were taking him to the meeting the Respondent was conducting because PF members were unwanted.

PW3 was Linya Sinamusanga, a business woman aged 34. She also narrated that on 31st May, 2016, she was one of the PF members who escorted the Petitioner to file in his nominations. On their way, their convoy was attacked by cadres wearing UPND regalia and she was injured. It was her testimony that when she looked closely, she saw the Respondent in the company of the said UPND cadres standing at a distance. She added that the matter was reported to the Police.

She testified that she voted from Sinanjola polling station in Senenge Ward where she found a lot of people saying that UPND was going to win the election. She testified that when she entered the polling station, UPND members were requesting voters to fold their ballot papers outwards. That she was told by UPND cadres that if she did not vote properly, she would be assaulted again. She left the polling station immediately after voting.

Under cross examination, PW3 testified that she was not assaulted by the Respondent himself. She stated that she was hit with a stone by Binwell whom she reported to the police but that he was not arrested. She explained that the PF chairman who took her to the police witnessed the assault.

PW3, testified that on the polling day, she walked into the polling station freely. That despite intimidation, she ignored the instruction and folded her ballot paper the normal way. She further stated that she went to vote in the company of her friend, Tryness Siamuchinga, who also witnessed what she saw.

PW4 was Nicholas Lungu, aged 27, a student who was a polling assistant at Nang'ombe polling station in Nang'ombe ward. It was

his testimony that on 11th August, 2016 around 14:00 hours, the Petitioner was prevented from entering the polling station by UPND cadres, who insisted that voting was not going to continue if the Petitioner did not leave. He testified that the ECZ officers tried to calm the situation by stating that the Petitioner was entitled to be present at the polling station. However, they chased the Petitioner whilst flashing the UPND party symbol of the 'hand'.

He testified that whilst inside the polling station, he observed that voters were folding their marked ballot papers outwards. They told him that they were instructed by UPND members to fold them in that manner. According to PW4, the essence of folding the ballot papers outwards was to enable the people peeping through the windows to see who they voted for. That this was the trend throughout the day at the polling station. In his view, their actions amounted to intimidation because the voters could not elect their preferred candidates freely.

He testified that he observed that the UPND assigned people to instruct those who pretended not to know how to vote by showing them where to mark. PW4 disclosed that there were many people who were assisted in that manner. He also observed that some voters remained at the polling station after casting their votes peeping through the windows.

Under cross examination, PW4 stated that when he was making these observations, the Presiding Officer was in another stream next door. He said he liaised with his colleagues from ECZ during elections regarding his observations and they decided to wait for

the Presiding Officer because they could not take any action. He said he reported the anomalies to the Presiding Officer after about 6 hours because there was not enough time as they were under pressure. Further, that the Presiding Officer confirmed that there were similar anomalies in his stream. However, PW4 did not have any proof that he reported the said anomalies.

PW4 further testified that it was one of the party agents who informed him that they were not allowed to assist voters who did not know how to vote. He also stated that he did not know any particular voter who had to show their marked ballot papers after voting to the people in the windows.

In re-examination, PW4 explained that it took him 6 hours to report the anomalies to the Presiding Officer because when he liaised with his colleagues, they agreed to notify him later.

PW5 was Catherine Sikaputa, a 45 year old businesswoman who served as a polling agent for PF at Siyamuyala polling station in Sinazongwe ward. Her evidence was similar to PW4, that on 11th August, 2016, she observed that voters, especially men, remained outside the polling station after voting. When she went outside around 13:00 hours, she found UPND cadres surrounding the voting queue telling people not to make any mistake but vote for 'the hand'. When voting ended, the people outside rounded the polling station and issued death threats to officers inside the polling station saying if any of the PF candidates won the election. She testified that they also accused her of having ballot papers in her handbag until the Presiding Officer took their bags and locked them away.

It was also her testimony that 5 days prior to voting, she had been summoned by the UPND to appear before the headman on allegations that she had brought confusion resulting in her being banished from the village.

Under cross examination, PW5 testified that she voted and did not see anyone being prevented or stopped from voting. She stated that she did not see the Respondent during election. Further, that she encountered the Respondent during campaigns and that he did not threaten her. She went on to state that she knew that the people that remained outside the polling station after voting were UPND because they were chanting the UPND party slogans.

It was her further evidence that she did not complain to the Chief regarding the decision to banish her from the village. She however, denied the assertion that she did not report because no such thing happened.

In re-examination, PW5 explained that she did not complain to the Chief after being chased because the land she occupied did not belong to her. She further clarified that she was said to have brought confusion in the area because she was campaigning for PF.

PW6, Joseph Siamusale, 29, testified that he is a member of the UPND. His evidence was that the Respondent told them during a campaign rally at Nkandabbwe to fold ballot papers outwards when voting. PW6 testified that during the campaigns, he changed and started supporting HH as president and the

Petitioner as MP because he was in good terms with the Petitioner.

In July, 2016, when his friends from UPND heard that he was supporting the Petitioner, they assaulted him with a brick and was rescued by some PF members who also reported the matter to the police and took him to Maamba General Hospital for treatment. Of his attackers, he identified Bruce Mangunje and Nkanda Siaswela who were arrested and are currently being prosecuted in Sinazongwe for assault. He testified that he was informed by the said Bruce Mangunje and Nkanda that they had been bailed out by the Respondent.

Under cross examination, PW6 testified that he did not hear the Respondent instructing his assailants to attack him and that he had never experienced an encounter with him but concluded that it was him who instructed them because they boasted that the Respondent had paid K4,000.00 bail for them.

PW6 testified that the beatings did not affect his decision to vote for his preferred candidate. He disclosed that he voted for Hakainde Hichilema (HH) as President and the Petitioner as MP as he had planned.

PW7, Timothy Simabambaya, 62, testified that on 31st May, 2016, he too was attacked with other PF members on nominations day. A few meters away from the nomination centre, they found UPND cadres gathered on the road chanting *Menya! Menya!* a Nyanja word which means 'beat'. In the process a stone hit him and he lost consciousness. When he regained consciousness, he found himself at Maamba General Hospital. He

was subsequently referred to the University Teaching Hospital (UTH) for continued treatment. PW7 referred the Court to his medical documents on pages 3 to 5 of the Petitioner's bundle of documents in support of his evidence.

He went on to testify that when he arrived at the polling station to vote, he saw some people going around the queues chanting UPND party slogans.

Under cross examination, PW7 testified that the assault did not affect him in the manner he voted because he still voted for his preferred candidate who was the Petitioner. He also stated that he did not know any voters who had a change of heart in voting as a result of his assault.

PW8, was Bernard Kalata, a peasant farmer aged 64 who was also the PF Campaign Manager for Malima ward. His evidence was similar to that of PW1, PW3 and PW7, He testified that in May, 2016, he organised members to support the Petitioner's candidature from Mweenda Ward. On their way, they were ambushed and attacked by UPND cadres with stones and clubs resulting in injury to PW7 and other Members. He organized transport and took the victims to the police where he reported the incident. A medical report form was issued to PW7 and he took him to Maamba General Hospital.

PW8, went further to testify that on his way to vote, he found a number of people in shrubs soliciting for votes in favour of the Respondent. That while on the voting queue, he also heard whispers from the Respondent's supporters telling people to vote for the 'hand', the Respondent's party symbol. They also told

voters not to make a mistake because they had machinery to detect how votes were cast and that the Respondent had already won. PW8 added that voters were told to fold ballot papers outwards to expose the mark. He observed that there were some people standing by the windows at the polling station.

In cross examination, PW8 testified that he voted and that no one prevented him from doing so. He however, stated that some PF members failed to vote. When further cross examined, he could not point out any voter who failed to vote as a result of the alleged threats by UPND cadres.

PW9, Adam Muchocha, aged 39, also told the Court that he was in charge of organising campaigns in Maamba Ward and telling people to vote for PF. He also served as field monitor for PF on polling day and his duties included patrolling the polling stations and distributing food for PF polling agents.

He testified that on nomination day, he went to Sinazeze where he met with a lot of other PF members who came from different places. They departed using different vehicles heading to the District. When they reached Sinazongwe market, they found a gathering of UPND members and the road was blocked. They attacked their members who were in a canter ahead of them. He narrated the details of the attack similar to the testimony of PW1, PW3, PW7, and PW8. He saw that two of the PF members were badly beaten. They were taken to the hospital and the rest of them proceeded to the nomination centre.

He testified that in July, 2016, the UPND Presidential candidate (HH) held a campaign rally at Maamba. After the meeting, UPND

members ran amok and went round attacking anyone they saw in PF regalia. That one of the victims was Obvious Kaleke who was attacked at a bar called Dumbwiza.

It was his further testimony that on polling day, he started by voting at Maamba Private School where he observed that UPND cadres were campaigning on the queue. He then proceeded to visit other polling stations in the company of the PF Constituency Chairlady, Roydah Nyambe. From Maamba, they visited the Catholic and 'GRZ' School polling stations where they found UPND cadres campaigning in the same manner. They proceeded to Chimonselo polling station in Muchekwa Ward, where he was refused entry into the polling station by UPND cadres who accused them of taking 'stolen' votes despite the presence of police officers. They moved to Siatwiinda where they saw UPND cadres standing outside the polling station. They proceeded to Kanchindu polling station in Mweemba Ward where they found UPND cadres showing voters some samples of ballot papers marked in favour the Respondent. They proceeded further to Sinakoba polling station in Simuka ward. At Sinakoba, they also saw people flashing UPND party symbols before proceeding to Dengezain Mweemba Ward where they found voters on the queue saying they were changing government by electing UPND. They reported to the police who promised to control the situation.

They inspected Nyangain Mweenda Ward where they also met with their polling agents and discussed the problems they were facing including the UPND campaigns on voting queues. They agreed to report the issues to the police. They moved to Siameja

polling station in Mweenda ward where they failed to enter because they met UPND cadres near the polling station who stopped them from entering and accused them of carrying marked ballots. At Siampondo polling station in Mabinga ward, Cadres were showing the voters on the queue the campaign symbol for UPND. Further, at Kafwambila polling station in Namazabwe Ward, they found some noise and upon inquiry, they were told that people were fighting on the queue because someone provoked some PF members.

Under cross examination, the witness testified that he was not aware if the Respondent was aware of the campaigns conducted by his supporters on voting queues. He also testified that no one failed to vote as a result of what the UPND cadres were doing. He told the court that he voted and no one stopped him casting his vote but during campaigns, they were intimidated as a party by the UPND. However, that he didn't know of anyone who failed to vote as a result of the alleged intimidation.

In re-examination, PW9 explained that during the campaign some of the PF members failed to campaign because they were scared of being beaten by UPND supporters.

PW10 was Hastings Siampolomba, the PF secretary for Mweenda Ward who was a polling agent for PF at Siameja polling station. He testified that when voting commenced, he heard people making noise outside and saw UPND cadres campaigning on the queue by displaying their party symbol. He then went to a nearby shop called Tusole grocery to buy food where he found people saying that they wanted to change government. The shop was

about 200 meters away from the polling station. It was his testimony that the UPND cadres who were gathered outside the polling station were telling voters not to make a mistake but vote for UPND. He testified that they were also telling people that there were machines which would detect how they voted.

The witness testified that he was approached by Milison Sipanga, the candidate who contested for Councillorship on the PF ticket, who informed him that he had been chased from Kayuni polling station by UPND cadres and that there was no agent left at that station. They reported the matter to Muchocha (PW9) who was their field agent.

When he returned to the polling station, he reported the noise to a police officer but no action was taken. He observed that ballot papers were being folded outwards so that there was no secrecy. He also observed that the Presiding Officer would chase agents who went to assist voters who were perceived as PF cadres. While voters who were perceived UPND were allowed to be assisted by their agents. He testified that around 13:00 hours, he saw two Motor Bikes for UPND which ferried old women to the polling station to vote. Later on around 16:00 hours, he saw a lady from Siampondo area who had difficulties in voting. The Presiding Officer said that the officials taught the lady to vote on the 'hand', which was symbol for UPND. PW10 stated that they could not take any action because the Presiding officer had warned the not to override him that very morning. He added that one of the officers who instructed the woman on how to vote was Malala

who holds a high position and was campaigning for UPND during campaigns.

He testified that on 10th August, 2016, UPND organised a very big meeting at Siameja playground. The main speakers were Daniel Munkombwe, Ackson Sejani and a white man who introduced himself as headman Chisekesi. The Respondent was also present at that meeting. The speakers advised people to carry their 'sweet' beer on polling day and remain at the polling station after voting. Further, that Daniel Munkombwe called him out by name and told him that his candidate would lose.

He went further to testify that the UPND came up with a slogan to insult the Petitioner during their campaigns. During that period, UPND supporters removed two chitenge materials that had been displayed by PF members at their homes.

In cross examination, PW10 stated that as Ward Secretary, he informed their overall official in PF who reported the incidences to ECZ conflict management but it was too late because the polls were set for the following day. He stated that they reported to the District Commissioner and not the police.

He reiterated that the Presiding Officer told them that no one should over rule him. At that time, he did not know where the Respondent was. According to him, it was wrong for an old lady to be taken to the polling station on a motor bike belonging to UPND. And when he spoke to her since she was his grandmother, she told him that she had been forced to cast her vote.

PW10 maintained that UPND cadres were campaigning on voting queues. However, he could not mention any of them. He added that while the Respondent was not present when these anomalies occurred, he suspected that the Respondent was aware because the perpetrators were his cadres.

He disclosed that he did not attend the meeting on 10th August, 2016 but only became aware of what was discussed through his wife. He went further to state that he did not have any encounter with the Respondent during the campaign period.

PW10 insisted that he saw voters folding their ballot papers outwards but that he did not report to the police since the Presiding Officer told him not to overrule him in the morning. He reported the matter to his overall officials in the party the following day. He denied that he only reported the following day because it was an afterthought.

It was PW10's further testimony despite all the alleged anomalies during campaigns, he was not prevented from voting. He did not know of any majority of potential voters that failed to vote as a result of the actions of UPND cadres or anyone who was prevented from voting. He denied that he woke up very early in the morning and managed to vote because he was not threatened.

In re-examination, PW10 explained that they were threatened from nomination day and throughout the campaigns. He also clarified that the people who gathered at Tusole were telling people to vote for UPND candidates. He also explained that the reporting system was that everything was reported to the PF

District Secretary who in turn would report to the conflict management. And that this is the procedure he followed. Further, that the people who were campaigning by showing the UPND symbol outside the polling station.

PW11 was Doctor Malyango, a 40 year old business man of Sinazongwe. He informed the Court that he is the PF Chairman for Sinazongwe Ward. His testimony was similar to that of PW1, PW3, PW7, PW8 and PW9 that on 31st May, 2016, that he escorted the Petitioner to file his nomination in the company of many other PF members using different motor vehicles when they were attacked by UPND cadres with sticks and stones. 16 of their members were injured including Timothy Simabambaya (PW7). However, they still proceeded to the nomination centre.

Under cross examination, he testified that he knew that Jean Siamanjema and Mercy Siavwapa failed to vote as a result of the violence perpetrated by UPND cadres. When asked if there were many people who failed to vote, he said he could not recall. When further cross examined, he stated that he found many people on the queue when he went to vote.

PW12 was Tennyson Mandala, a peasant farmer of Sinyuka village aged 47. He informed the Court that he was the Petitioner's election agent who was spearheading all the campaigns and receiving complaints from PF members. He restated the testimony of PW1, PW3, PW7, PW7, PW8, PW9 and PW11 regarding the incident that occurred on 31st May, 2016, on their way from the nomination centre.

He went on to testify that on 1st June, 2016, he received a report that one of their members, Bishop Simazila (PW2) that he had been beaten by UPND cadres in Senenge Ward and the matter was reported to the police. He testified that there was a lot of violence and PF members were beaten in all the 14 wards, namely, Malima, Senenge, Nangombe, Nkandabbwe, Sinazongwe, Mweezya, Maamba, Mweemba, Tekelo, Mucheka, Mweenda, Namazambwe, Mabinga and Muuka. Between 31st July, 2016 and 11th August, 2016, he received complaints from these different wards through cell phone calls from PF Ward representatives. He stated that there were many other reports which he received as follows:

In June, 2016, he was forming branches and left the forms with the ward secretary for him to enter the National Registration Card (NRC) numbers for their members. The UPND cadres confiscated the registers and tore them. The matter was reported to the police and the suspects were apprehended.

In July, 2016, one of the PF members who wore a PF T-shirt was attacked and the matter was reported to the police.

In August, 2016, after the presidential campaign meeting for HH, the UPND cadres ran amok and went round beating any person who was seen wearing a PF T-shirt. There were serious injuries and some members were admitted in hospital for treatment. The assault was reported to Maamba Police.

PW12 testified that that on 11th August, 2016, he served as a field monitor for PF in Sinazongwe Constituency accredited with ECZ. He testified that he visited 8 polling stations in 5 wards

namely, Nkandabbwe, Nang'ombe, Senenge, Malima and Sinazongwe. During his visits, he was accompanied by Henry Siabuntele, Bishop Simazila (PW2) and the Petitioner himself. He observed that UPND members remained at the polling stations after voting. They stood by the windows flashing the UPND party symbol and told voters to not make a mistake but vote for the 'hand'.

He narrated that at Syanyuka polling station, he observed that the UPND cadres had broken a window. From Syanyuka, they proceeded to Lutuwa polling station in Malima Ward where UPND cadres accused them of carrying ballot papers and attempted to use force on them. Among those UPND cadres, PW12 identified White Muntanga, Lawrence Chabizwa, Bob Manyonga and Clever Mpingili.

He stated that of all the polling stations he visited, the only polling station he was allowed to enter was the polling station he voted from despite having an identification card as an ECZ accredited agent for PF. Whilst on the voting queue, he observed that the person in front of him was instructed to fold the ballot paper outwards so that they could see which candidate he voted for. He voted and left Lutuwa polling station.

They moved to Munyati polling station where he spoke to a police officer called Makanya who told him that they had failed to control the situation. They proceeded to Sinazongwe polling station where UPND cadres prevented them from entering. He also observed that there was no order at Sinazongwe polling

station. Thereafter, they went to Nang'ombe ward where they were also prevented from entering.

PW12 added that many people were beaten and the cases were undergoing prosecution.

In cross examination, he stated that a lot of people failed to vote as a result of the alleged violence. When asked how he knew this, he stated that the Constituency was vast. He approximated the total number of registered voters as 49,000 but he could not recall how many people voted.

Further in cross examination, PW12 testified that he knew that UPND cadres remained at the polling stations after voting because they had ink on their thumbs nails. He stated that the Respondent was the one who instructed the UPND cadres to beat PF members. When asked whether he saw or heard the Respondent issuing such instructions, he said that the Respondent was responsible because all party officials were briefed by ECZ on the code of conduct during elections. He also stated that he did not see the UPND cadres beating the PF members but that he was only informed.

PW12 testified that his preferred candidate was the Petitioner whom he voted for despite the intimidation. However, that he knew of other people such as Kezia Manyika and Margaret Chirwa who failed to vote because of the violence. After voting, he met Esther Siang'andu who told him that she was intimidated because she was told to reveal her mark on the ballot paper by UPND cadres who threatened to burn her house if she did not comply. However, the matter was not reported to the police.

Furthermore, PW12 testified that he was not aware that none of the witnesses who testified before him said they never voted because they were intimidated by UPND.

In re-examination, PW12 clarified that the source of the information in his testimony was the reports he received through the PF party structures and what he personally witnessed. He reiterated that people never voted freely because they were scared of violence and death. Hence, they failed to elect their preferred candidate while others never voted. He explained that he knew that the UPND cadres who were standing on the windows at the polling stations had voted because they were telling people that they should not make a mistake but vote on the 'hand'. And as they were flashing their party symbol, he noticed that their thumb nails were painted with ink.

PW13 was Chief Inspector Derrick Bwalya, the officer in charge at Maamba Police Station. He started by stating that Maamba police station is a grade C station comprising of 23 officers; 6 female and 17 male. It is divided into four (4) departments, namely Criminal Investigations, Traffic, Victim Support Unit and General Duties. He told the Court that they have a challenge in terms of mobility and man power as they cater for the entire area with the few officers mentioned. He testified that they faced challenges because numerous reports of political violence were made against few officers and one vehicle.

PW13 produced a report, P1, containing cases of political violence recorded between 31st May, and 11th August, 2016 as follows:

On 7th June, 2016, PF Mweemba Ward Vice secretary Royda Tempa Tempa reported that her house had been attacked by UPND cadres who broke her windows. They arrested three suspects for malicious damage to property who were later released after the complaint was withdrawn.

On 2nd August, 2016, he received a phone call from unknown caller that UPND cadres had closed Batoka/Maamba Road and were harassing motorists. He rushed there and managed to clear the road. The police apprehended and arrested 4 UPND youths, namely, Yoram Siamunsila, Grievance Muleya, Kingsley Munoki and Lawrence Siamunyanga all from Maamba Ward for conduct likely to cause breach of peace. They admitted the charge and said they were sent by the Zachariah Chikete. He summoned Chikete and warned him.

On 24th July, 2016, UPND leader HH addressed a rally at Maamba Secondary School. During the rally, some UPND youths were going round the Ward beating whoever they found in PF regalia. 8 people were attacked and injured in the process who were later taken to the hospital for treatment. However, the case has not been prosecuted because the victims failed to identify their assailants.

He testified that on polling day, elections were characterised by violence and intimidation. He witnessed an incident at Maamba East polling station where he saw UPND youth trying to manhandle the school headmaster whom they accused of tampering with ballot boxes. He tried to calm the situation by

allowing the UPND youths to inspect the headmaster's office which they did and found nothing.

He testified that there was anxiety and fear in Maamba when a rumour went round that there was an aeroplane from Zimbabwe that was carrying pre-marked ballot papers intended to land at Maamba Collieries Limited, (MCL). As a result, UPND youths started stopping every vehicle coming from MCL direction. He testified that owing to their man power structures, they took the approach of sensitising people on multiparty politics so that the election could be conducted smoothly.

PW13 testified that he received another report involving the UPND and an Independent Candidate Neddy Shanza. That the UPND accused Neddy Shanza of using their party symbol. However, that this incident was not documented because he referred the matter to the district conflict management team to address it.

He went on to testify that on 6th June, 2016, Peter Siavulwe who was the UPND district Secretary made a complaint of misconduct by one individual PF member in Mweemba area. However, the assailant was not apprehended because he had re-located.

PW13 testified that he received another report from the Respondent that some PF members were buying voters' cards in Mweemba area. He followed up the complaint but the PF explained that the exercise they were conducting was that of restructuring their party membership and he was satisfied with the explanation in the absence of any evidence to the contrary.

It was his evidence that voting was influenced by the political violence such that people cannot be said to have voted for a leader of their choice.

Under cross examination, PW13 stated that he received some reports of violence perpetrated by both PF and UPND members except that 90 percent of those reports were made against UPND. He stated that of the 19 cases they received, only two were against PF members while the rest were against UPND. That the reports he received came from Mweemba, Maamba, Muuka and Nyanga Wards.

PW13 stated that he was never intimidated by the UPND at any point. He testified that he received a report that UPND cadres were campaigning as voting was going on at Silwegonde polling station. He went on to state that there are approximately 58 polling stations in Sinazongwe and that he only received one report of that nature. Further, that although he had officers in each and every polling station, there was only one report of the UPND campaigning during voting.

He stated that 5 officers gave him reports that voters were denied a chance to vote by the UPND and that in some cases the queue was disrupted from time to time. He only received 5 reports out of the 24 polling stations in his area because his colleagues were in charge of the other areas.

Regarding the closure of Batoka /Maamba road, PW13 testified that he only spoke to Zachariah Chikete and not the Respondent. Further, that according to his investigation, the Respondent was

not aware of the road block or the assault of people who wore the PF party attire.

It was PW13's evidence that he did not know anyone who was prevented from voting for preferred candidate.

Further in cross examination, PW13 testified that police officers were being over powered at polling stations especially in the West where violence was rife. He stated that the officers were not allowed to be armed during elections because it was not necessary. When it was put to him that there was no violence occasioned by UPND cadres which was why his officers did not carry fire arms, he maintained that the police do not issue firearms to officers during elections.

In re-examination, he clarified that violence was rife West of Maamba where Malima is located.

PW14, was Nalumino Kuyewana, the officer in charge at Sinazongwe Police station. He testified that he prepared a report regarding political cases recorded during the election period using the occurrence book. This report was admitted into evidence as "P2". It was his testimony that on nomination day, Sinazongwe police station recorded a total of 19 cases involving assault occasioning actual bodily harm, theft of chitenge, robbery and malicious damage to a minibus where UPND cadres smashed the window to the bus. These were mostly perpetrated by UPND supporters against PF members.

He testified that on nomination day, PF members were ambushed and attacked by UPND cadres near Sinazongwe market. After the

fracas, the incident was reported and they apprehended one UPND cadre who was identified as the assailant to a victim named Belinda and is currently appearing before the Sinazongwe Subordinate Court. Regarding the cases of robbery involving a cell phone, malicious damage to property and theft of a chitenge material, the police made no arrest because the victims could not identify the suspects.

PW14 went on to point out the following incidents as contained in his report, P2:

1. On 1st June, 2016, a PF supporter called Bishop Simazila (PW2) was attacked and robbed of K4, 000.00 by UPND cadres. PW2 identified one of his assailants as Oliver Simomole who is currently undergoing prosecution for the offence.
2. On 6th June, 2016, a PF supporter called Ben Mwila reported that he was assaulted by a UPND supporter named Justin Siampolyo who is currently being prosecuted for the assault.
3. On 16th June, 2016, the police received a report of assault occasioning actual bodily harm that a PF supporter, Moses Pute had been attacked at Malima by 7 UPND cadres, namely, Sauti Clifford, Foster Mayabbu, Nsabata, Syamutete, Douglas, Haggai and Coaster out of which Sautu and Mayabbu were apprehended and are currently facing prosecution for the offence.
4. On 22nd July, 2016, they received another report of assault occasioning actual bodily harm that a PF supporter Joseph

Siyamunsali, was assaulted by UPND supporters, Bruce Mangunje and Kanda Sianzwela. The two are undergoing prosecution at Sinazongwe Magistrate Court for that offence.

5. On 26th July, 2016, Ostricia Sinyubi reported that she was unlawfully wounded by a PF cadre called Assadi Jawawa who is currently being prosecuted in Sinazongwe for the offence.
6. On 11th August, 2016 between 06:00 hours and 18:00 hours, he received reports from Malima, Nang'ombe, Sinanjola and Syanyuka polling stations that the Petitioner, some PF members and a Zambia News and Information Services (ZANIS) journalist were harassed by suspected UPND cadres as they were going round visiting polling stations in Sinazongwe Constituency. However, no arrest was made.

PW14's report, P2, concluded by indicating that the police received and dealt with 25 cases. The total number of persons arrested were 8; 7 UPND cadres and one PF cadre.

It was PW14's further evidence that on polling day, he went round visiting his officers in the field. At Syanyuka polling station, he found UPND cadres in a 400 meter radius threatening the polling staff including the police. They were intimidating people not to vote for any party other than UPND and the police officers failed to control them. They did not want people who supported any other party apart from UPND. He phoned his superiors at Choma and requested for reinforcement but there

was no manpower available. He then phoned the Respondent informing him that his cadres were misbehaving. The Respondent told him that he was on his way from Choma and promised to address the cadres as soon as he arrived. PW14 also called Alick Muleya, the aspiring UPND candidate for Council Chairman and told him about the cadres who were misbehaving at Sianyuka who assured him that they would send someone to address the cadres. They sent their Constituency Chairman named Edcco Siabana who mobilised the cadres who were at the polling station and addressed them within a radius of 400 meters. Thereafter, the cadres left and regrouped at a bar nearby.

It was his testimony that between 12:30 and 14:00 hours the Petitioner arrived at Syanyuka polling station in the company of a ZANIS reporter and other PF members. The UPND cadres who were at the bar returned and surrounded the Petitioner's vehicle. They threatened him and accused him of attempting to rig the election. They also harassed the ZANIS reporter and attempted to grab the camera from him. They insisted that they did not want to see him and his team at the polling station. PW14 stated that he advised the Petitioner to leave since it was not safe for him and he left. He added that the Petitioner was not allowed to enter the polling station. Further, that he observed that an elections monitor, a white woman was almost prevented from entering the polling station until he intervened whereupon she entered but left after a short period of time.

PW14 testified that he received a verbal report from Syanyuka polling station that UPND cadres harassed the polling staff and

also broke a window. He went further to testify that he received information from his officers from Sinanjola, Malima and Nang'ombe that the Petitioner was denied access into the said polling stations by UPND cadres similar to what transpired at Sianyuka.

PW15 was Mike Munkombwe, a 31 year old editor at Zambia News and Information Services (ZANIS). His evidence was that he covered the events that transpired on nomination day, polling day and post elections in Sinazongwe which were subsequently aired on TV1 and TV2 news. The said footages were produced in evidence on Compact Disks (CD's) and played to the Court.

In cross examination, PW15 testified that the first two footages that were covered on nomination and Election Day, respectively, showed that there was violence during that period. When further cross examined, he stated that the video does not show anyone being attacked. However, in re-examination, PW15 clarified that the first footage shows a blood stained chitenge belonging to a woman who was attacked by UPND cadres. He further pointed out that the said woman appears in the video wearing a PF T-shirt with blood stains as she had been stoned on the head by UPND cadres.

That was the Petitioner's case.

RW1 was the Respondent, Gift Sialubalo, a 47 year old farmer of Chingola. It was his testimony that he only had one Agent namely, George Bbabbi. He denied all the allegations that he personally and through his Agents and with his knowledge engaged in acts of widespread violence, intimidation, illegalities

and electoral malpractices detailed by the evidence tendered by the Petitioner and his witnesses. He testified that he had no control over the electoral process which was the responsibility of ECZ. He stated that Sinazongwe is so vast that he could not be at every polling station and that it was not his duty to supervise the electoral process. He emphasised that voting was purely under the supervision of ECZ who had the responsibility to ensure that elections were free and fair. He added that he is not aware of any people that were hospitalized as a result of the alleged violence.

RW1 testified that he voted from Kanchindu polling station around 06:00 hours. Thereafter, he drove to Choma with Alick Muleya who was the Council Chairman Candidate for UPND. He went further to state that he never had any encounter with the Petitioner during the campaign period and on polling day. He denied that he instructed any of his supporters to engage in the illegal activities allegedly perpetrated on polling day. He also denied that he bought food for ECZ officers thereby compromising their impartiality because he was in Choma on that day. According to him, the Petitioner's complaints should have been made against ECZ because he had no control over the process.

RW1 testified that neither his agents nor he were involved in the counting of ballot papers. He stated that on voting day around 21:00 hours, he drove back from Choma to Kanchindu polling station to see what was happening. He found that there was confusion because 35 ballot papers were not stamped by ECZ. PF agents were saying that the ballots should be rejected. He

testified that being a stakeholder, he decided to side with PF members who had suggested that the said ballot papers be rejected even though they were in his favour.

He denied that the alleged illegal activities his supporters and him engaged in prevented people from voting or electing a candidate of their choice. He stated that Sinazongwe has about 59,000 registered voters and that the voter turnout was very good. He stated that he received about 34,000 votes while the Petitioner polled about 6,000 votes. That the independent and FDD candidates received about 1,900 and 87 votes respectively.

RW1 testified that it is not true that his supporters attacked the Petitioner and his entourage on his way to file in his nomination. RW1 stated that he filed his nomination earlier than the Petitioner. He testified that on their way back from the nomination centre, they met the Petitioner's convoy. He stated that he was accompanied by Mr. Alick Muleya and that they stood at the back of a Hilux which was driven by Peter Siavulwe. His drivers paved way for the Petitioner and they drove passed his convoy for about a kilometre where he addressed his supporters and they later dispersed.

He further testified that on 26th July, 2016, he was addressing a campaign meeting at Siamvwemu in Senenge Ward with the council chairman, the district chairman, his campaign manager and his program manager. Around 17:00 hours, he saw that two of his supporters were injured. One of them was Ostricia Sinyubi who sustained injuries on the head and eye. The other victim was Nchimunya Simainti who sustained bruises on his right hand. He

then instructed Peter Siavulwe to take them to the hospital. He added that to his knowledge, there were no other incidences of violence.

In cross examination, he reiterated that he only had one campaign agent. That he was also assisted by his campaign manager and programs manager. He stated that he had no agents in any of the wards. When asked how he managed to campaign alone, he responded that Sinazongwe is a UPND stronghold such that he did not need to labour when campaigning. When further cross examined, he stated that the UPND party structures were his agents because they assisted him to campaign and marketed him. That without the UPND party, he would not have won the election. RW1 however, stated that Sinazongwe is a vast Constituency and that he was not aware of everything that the UPND cadres did.

He testified that on nomination day, he was in a convoy of about 5 vehicles. He stated that he only became aware that 16 PF supporters were injured by his supporters after the fact but denied that he was responsible for their conduct because the attack was not brought to his attention.

He stated that he was not aware that UPND cadres engaged in a lot of malpractices. He confirmed that he was aware that the officers in charge of Maamba and Sinazongwe police stations testified and produced reports detailing the alleged misconduct by UPND cadres. When referred to the police officers' reports exhibited as P1 and P2, RW1 said he did not dispute them.

RW1 testified that he received a report from Syanyuka polling station from the officer in charge that UPND cadres were stopping the Petitioner from entering the polling station. Unfortunately, he could not accompany the police officer because he was in Choma at the time. He stated that he was not aware that Edcco Siabana went to Syanyuka polling station and addressed the UPND cadres because the police failed to control them. He insisted that he was not aware that UPND cadres were campaigning while on the voting queue or that they all gathered outside the polling station after voting.

He stated that he was not aware that after the UPND presidential campaign rally at Maamba, UPND cadres ran amok and beat up a lot of PF cadres despite the evidence of the officer in charge. He also denied that he was aware that his supporters had set up an illegal road block and that four (4) UPND cadres were apprehended, despite the evidence of the officer in charge. When further cross examined whether he was involved in the campaign because he did not seem to know anything, he maintained that he participated.

RW1 stated that he saw UPND cadres flashing their party symbol on polling day in the footage produced by the ZANIS editor PW15. He however, denied that he was a beneficiary of all the malpractices that were perpetrated by UPND cadres. He also denied that he attended the conflict management committee meeting in Sinazongwe at which ECZ explained the code of conduct during elections. He, however, stated that he had a copy of the electoral rules.

In re-examination, he explained that the party required him to choose one agent which he did. That the other members were merely in the party organs.

RW2 was George Bbabbi, a 42 year old peasant farmer who was the Respondent's agent accredited with ECZ. He informed the Court that his duties were to ensure that the Respondent's campaigns were conducted smoothly. He testified that on 31st May, 2017, he was one of the 9 supporters who accompanied the Respondent to file in his nomination papers. After leaving the nomination Centre, they got into a vehicle and descended to the shops where they met PF members in a convoy. That out of respect for the Petitioner as MP, they paved way for them and diverted to Sinazongwe ground where the Respondent addressed his supporters.

He stated that as the campaign agent for the Respondent, he did not receive any reports after nominations. He however changed his testimony and stated that as an agent, he was told by Peter Siavulwe that Ostricia Sinyubiand Nchimunya Simainti were assaulted.

RW2 testified that on polling day, he went to cast his vote around 07:30 hours at Sinazeze Rest House polling station. After voting, the Respondent informed him that he had gone to Choma. He then began visiting various polling stations to ensure that there was peace during voting. He visited Nkandabbwe School, Sinazeze School, Sinakasili, Mweezya, Sikanyeka, Sinazongwe, Siyamuyala and Mwaledde School polling stations. It was his testimony that in all these polling stations, voting was conducted

smoothly without any complaint. However, that he never visited Syanyuka polling station because his vehicle broke down.

RW2 testified that as an agent, he was campaigning for the Respondent together with other UPND officials and other party members. He stated that he was involved in all the campaigns even those conducted in Respondent's absence and they all ran smoothly. He stated that from the campaign period to polling day, he never had any encounter with police officers. Further, that he did not encounter any malpractices as alleged.

Under cross examination, RW2 said he visited the seven (7) polling stations, accompanied by a driver called Fanwell Munenge. That he used his identity card as an agent to access the polling stations. He clarified that his observations related to what he found inside the polling stations. He however, stated that he observed that the environment outside the polling station was normal. He testified that he never paid attention whether some voters remained at the polling station after voting and he never saw anyone standing on the windows because all the people were on the queues.

Further in cross examination, RW2 testified that he was the only agent for the Respondent who was recognized by ECZ. That Sinazongwe has 58 polling stations out of which he only visited 7. He stated that he did not know what was happening in the other 51 polling stations he never visited such as Syanyuka. He reiterated that he never had any encounter with police officers. When further cross examined and informed that police officers

testified that there was a lot of violence and intimidation at Syanyuka polling station, he could not dispute their testimony.

In re-examination, RW2 explained that he could neither dispute nor confirm the police officers' reports, P1 and P2, because he never saw anything.

RW3 was Ostricia Sinyubi, a 25 year old electrician and business lady of Mamba District. She testified that on 26th July, 2016, she attended the Respondent's campaign meeting at Sianvwemu. That around 17:00 hours, a gentleman informed her that PF members planted nails on the road leading to the meeting place. She and her friends Derrick Siamuntu, Idah Kwandu, Nchimunya Simainti, John Tembo and Auditor Sikalala went to remove the nails. In the process, PF cadres attacked them. She identified one of them as Assad Jawawa who hit her on the head with a machete whereupon she lost consciousness and later woke up at the police. She gave her statement and was taken to Maamba General Hospital. She referred the Court to pictures on page 13 of the Respondent's Bundle of Documents showing the injuries she sustained during the attack. She further testified that to her knowledge, Jawawa attacked her because she was removing the nails he placed on the road which were intended to deflate the Respondent's tyres.

RW4 was Peter Siavulwe, a 48 year old peasant farmer. He told the Court that he was the District Secretary for UPND in Sinazongwe who was responsible for logistics and campaign programs for UPND.

He narrated that on 31st May, 2016, he was driving the Respondent on their way from the nomination Centre. They met a land cruiser for PF flashing lights. He paved way for them to pass and his group proceeded to Sinazongwe ground where the Respondent addressed his supporters by thanking them and they dispersed.

He testified that on 11th August, 2016, he voted from Maamba West polling station. At that polling station, his observation was that there were a lot of voters that formed long queues. He added that the total number of voters in Sinazongwe is not more than 60,000. According to his estimation, the voters who turn out were more than 30,000.

Under cross examination, he stated that he was campaigning for the respondent under UPND. He confirmed that he, George Bbabbi (RW2) and several other UPND members were campaigning together for the Respondent. He denied that that he saw anyone fighting or any UPND cadres throwing stones on nomination day.

He further stated that on polling day, he went back home to sleep immediately after voting. Thus, he could not dispute that there were a lot of electoral malpractices by UPND members because he slept the rest of day.

RW5 was Nchimunya Simainti, a peasant farmer aged 25. He testified that on 26th July, 2016, he attended a UPND campaign meeting held in Malima at Siamvwemu with his friends namely, Ostricia Sinyubi (RW3), Idah Kwandu, Derrick Siamuntu, John Tembo and Auditor Siakalala. Around 17:00 hours, someone

tipped them off that PF cadres had placed nails on the road near the meeting place. He and his friends went and removed the nails. Then a group of PF supporters wearing PF regalia attacked them. He testified that he saw Ostricia Sinyubi being assaulted with a machete on the head by one PF cadre whom he identified as Assad Jawawa. He struggled with them until he fled and reported to his friends who were at the meeting. He testified that he later reported the incident to the Sinazeze Police Station. He and Ostricia were issued with medical report forms which they took to Maamba Hospital where they were treated. He referred the Court to a copy of his medical report form.

RW6 was Edcco Siabana, a 56 year old peasant farmer who is the Vice Constituency Chairman for UPND in Sinazongwe. He informed the Court that he was chosen by UPND to go round the polling stations on Election Day. He testified that on 11th August, 2016, he received a phone call from the officer in charge of Sinazongwe police station who informed him that there was noise at Syanyuka polling station and asked to meet him there. When he arrived, he did not find the noise. Whilst in the polling station, the officer in charge told him that the people at the shops which were about 600 to 700 meters away from the polling station were making noise. He testified that the people referred to were at the shops nearby drinking beer and listening to loud music. He requested the officer in charge to accompany him who declined and told him that the noise makers were outside the red tape, that is, outside the boundary of the polling station. He went alone and requested them to reduce the volume since voting was on going.

According to him, people were eager to vote. They formed long queues and voted freely.

Under cross examination, RW6 insisted that the officer in charge only called him because there were people making noise outside the polling station. He stated that he arrived around 12:00 hours and found the officer in charge inside the polling station near the booths. Whilst there, the police officer requested him to address the people who were making noise outside the parameters of the polling station. He insisted that there was peace at the polling station and people stood in long queues under the sun, eager to vote. That apart from that, there were no other gatherings which he observed. RW6 also insisted that he never saw anyone campaigning using the UPND party symbol despite the footage covered by ZANIS.

RW6 disputed the evidence of PW14 that he called him because the confusion was within the 400 meters radius of the polling station. He maintained that the only thing he did was to address the people at the taverns.

Further in cross examination, RW6 stated that he was at the market when the Petitioner arrived in a motor vehicle. That the said market was about 500 meters away from Syanyuka polling station in an open view. He denied that the Petitioner's motor vehicle was surrounded by UPND cadres who stopped him from entering the polling station. He stated that he never saw the ZANIS reporter whom the officer said accompanied the Petitioner. He maintained that he never saw any UPND cadres who were flashing their party symbols in a disorderly manner despite the

existence of the video clips produced in Court by PW15. He in fact categorically stated that he was disputing the said footages.

That was the evidence tendered by the Respondent and his witnesses.

Learned counsel for the Petitioner filed written submissions dated 19th October, 2016. It was submitted that the Petitioner has proved his case to the requisite standard as espoused in **Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and another**⁽¹⁾ as follows:

“...for any petitioner to succeed, the petitioner must adduce evidence to the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which no longer can reasonably be said to represent the true and free choice and will of the majority voters.”

Counsel submitted that the Petitioner has proved the allegations of widespread electoral malpractices, corrupt and illegal practices such as intimidation, undue influence, illegal publication of false statements by the Respondent and his party agents and supporters, all of which are contrary to the Electoral Process Act and the Electoral Code of Conduct. Learned counsel cited the relevant portions of Section 97 of the Electoral Process Act under which the Petition was presented as follows:

“(1) An election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councillor shall not be questioned except by an election petition presented under this Part.

(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."

In view of the above, it was submitted that the unchallenged evidence of PW1 on the alleged electoral malpractices and illegalities was corroborated by PW2, PW3, PW5, PW6, PW7, PW9, PW10 and PW11 including extreme violence on nomination day, and widespread violence, intimidation and campaigns on Election Day. In addition, it was submitted that this evidence was summed up by the evidence of PW12 who visited all the 14 wards and witnessed the widespread violence, intimidation and illegal campaigns and all manner of malpractices and illegalities that were committed with the Respondent's approval.

Learned counsel added that this undisputed evidence was confirmed by independent witnesses who had no partisan interests either during or after elections. These included PW4 who was a polling assistant from ECZ, Chief Inspector Derrick Bwalya (PW13), Chief Inspector Nalumino Kuyewana (PW14) and the ZANIS reporter, Mike Munkombwe (PW15). That the

testimony of the two police officers and their reports, P1 and P2, have established that there was widespread violence in Sinazongwe Constituency perpetrated by the Respondent's supporters on a scale never seen before in Sinazongwe. All these allegations were evidenced by the ZANIS footages, collectively produced as P3, which were presented by PW15.

Learned counsel further submitted that the Respondent either personally or through his witnesses did not deny or dispute any one of the allegations put forward by the Petitioner. That he merely sought to distance himself from the activities of his supporters and the UPND party which campaigned for him. Counsel went further to submit that the Respondent operated under the mistaken impression that as long as he did not throw stones himself or individually engage in illegalities, it was permissible for his supporters, campaigners, agents and UPND campaign structures to indulge in all manner of widespread illegalities, violence and electoral malpractices for his benefit and with his knowledge and consent. Counsel cited the case of **Leonard Banda v. Dora Siliya**⁽²⁾, wherein the Supreme Court citing Section 93(2)(a) of the Electoral Process Act No. 12 of 2006, which counsel submitted was identical to Section 97(2) (a) of the Electoral Process Act No. 35 of 2016 had this to say:

“Under paragraph (a); it does not matter who the wrong doer is, the election will be nullified if there is wrong doing of the type and scale which satisfies the court that the electorate were or could have been prevented from electing the candidate whom they preferred. The essential element which must be proved under paragraph (a) is that the majority of voters in a constituency were or may have been prevented from

electing the candidate in that constituency whom they preferred.”

In light of the authority above, counsel argued that the Respondent's position that he did not personally indulge in the violence or that he was away in Choma when his supporters perpetrated the illegalities on his behalf and in his name is legally incompetent. The Respondent did not adduce evidence to show that these malpractices did not take place but only issued bare denials of his individual involvement. Further that this approach of denying individual responsibility is no longer the law following the removal of the words **“the individual”** from Section 97(2)(ii) the Electoral Process Act after the Electoral Process Act No. 12 of 2006 was repealed and replaced by Act No. 35 of 2016.

Learned counsel contended that it does not matter who committed the malpractices provided they were widespread and may have affected the outcome of the election. Counsel argued that the Respondent's approach of distancing himself from the malpractices while not denying that they occurred is a misunderstanding of the Electoral Process Act No. 35 of 2016 following the removal of the 'individual clause'. Counsel cited the case of **Reuben Mtolo Phiri v. Lameck Mangani**⁽³⁾, in which the Supreme Court distinguished the provisions of Section 93(2)(a) of the Electoral Process Act No. 12 of 2006 (*now Section 97(2)(a) of the Electoral Process Act No. 35 of 2016*) and Section 93(2)(c) of the Electoral Process Act No. 12 of 2006. The Supreme Court held that:

“In Mlewa v. Wightman, this court considered the difference between paragraphs (a) and (c) of the

Electoral Act, 1991. It is said that under paragraph (a), it does not matter who the wrongdoer is. The election will be nullified if there is wrong doing of the type and scale which satisfies the Court that it has adversely affected or may have affected the election. That paragraph (c) penalises the candidate. Even one or two proven instances of wrong doing are enough; even though they could not conceivably have prevented the electorate from choosing their preferred candidate.”

Learned counsel argued that the Respondent's witnesses RW3 and RW5 merely confirmed the presence of violence in Sinazongwe albeit with counter accusations. It was submitted that the evidence of RW4 and RW5 lacks credibility because the witnesses lied. That RW4 said that the entire UPND party structures campaigned for the Respondent while the Respondent had testified that he only had one campaign agent namely, George Bbabbi (RW2). Therefore, the Respondent cannot disassociate himself from the illegalities when he stated in his testimony that 'he delivered the seat to UPND'.

Further, learned counsel submitted that on the totality of the evidence presented, the Petitioner has proved his various allegations of breach of Sections 81 on bribery, 83 on undue influence, 84 on illegal practices involving allegations that he had ballots papers for rigging the election, and 89 on loitering around the polling station within a 400 meter radius soliciting and inducing voters to vote for the Respondent evidenced by the ZANIS footages. Counsel also submitted that the Petitioner had demonstrated a breach of Section 91 of the Electoral Process Act which requires the secrecy of a ballot. The evidence that voters were instructed to fold ballot papers outwards to show the

Respondent's supporters who were standing on the windows at various polling stations showed that there was extreme fear and intimidation in all those who may have wanted to vote for the Petitioner and thus left them with no choice but to vote for the Respondent for fear of being beaten.

Learned counsel went on to submit that the Petitioner's case has satisfied the requirements of Section 97(2)(a) of the Electoral Process Act. It was argued that as violence, voter intimidation and campaigns during elections occurred in all the 14 wards and all the 58 polling stations, there can be no doubt that voters in the entire constituency were influenced and prevented from voting for a candidate of their choice.

Counsel referred to the Record and pointed out that the Petitioner received 6,171 votes while the Respondent received 34,397. It was submitted that if the violence, intimidation and malpractices had occurred in only one ward, or a handful of polling stations, the difference in the votes the candidates polled would not have been so significant. It was further submitted that all the 34,397 people who voted for the Respondent were all residents of Sinazongwe which was comprehensively infested with violence and electoral malpractices perpetrated by the Respondent. According to counsel, the difference between the votes that the parties received is thus immaterial.

In addition, counsel submitted that the Respondent's testimony that Sinazongwe is a UPND stronghold is irrelevant because the illegalities have been established beyond doubt. Counsel argued that the Electoral Process Act applies with equal measure to all

candidate seven though some may be perceived to be more popular than the others. It was also argued that it is not a valid defence to say that one can indulge in breaching the 'rules of the game' and get away with it on the grounds that he was popular. Counsel added that provided the widespread violence has been established to have impacted the outcome, as the case herein, the election should be nullified. Learned counsel urged the Court to nullify the election of the Respondent, Gift Sialubalo, as Member of Parliament for Sinazongwe Constituency with costs to the Petitioner.

In response, learned counsel for the Respondent filed written submissions dated 25th October, 2016. It was submitted that the Petitioner has lamentably failed to prove his case on the standard of proof required in an election petition which is higher than the standard in an ordinary civil case. The case of **Anderson Kambela Mazoka and others v. Levy Patrick Mwanawasa and others**, supra, was cited as authority for that assertion.

Learned counsel submitted that the following questions must be answered affirmatively if the Petition is to succeed:

- (i) Was there electoral malpractice, corruption, illegal practices such as intimidation, undue influence or illegal publication of false statements against the Petitioner?
- (ii) Was such malpractice directly done by the Respondent or even by his agent with his knowledge or consent?
- (iii) Was such malpractice widespread in the Constituency under contention?
- (iv) Did such malpractice prevent the majority of voters from voting?

- (v) If the voters managed to vote, did they fail to vote for a candidate of their preference?

It was submitted that the evidence adduced by the Petitioner has not proved the five ingredients referred to above.

It was also submitted that from the evidence of PW1, it is clear that Sinazongwe is a UPND stronghold. Counsel stated that under cross examination, PW1 testified that in 2006 he lost to UPND when he contested the election as an independent candidate in 2006. That he won in 2011 under the UPND ticket and subsequently lost the seat in 2016 when he stood on the PF ticket by a margin of over 28,000 votes.

It was counsel's submission that the Petitioner failed to prove that the violence was perpetrated by the Respondent or indeed by his agent or with his knowledge and consent. Counsel stated that the video clip adduced by PW15 only shows the PF woman who was injured but does not show the circumstances under which she was injured or who actually injured her. He added that in cross examination, PW15 lamentably failed to prove that it was the UPND supporters who injured her. Further that the injury could have been inflicted on her through any other means.

Relying on the case of **Leonard Banda v. Dora Siliya**, supra, counsel argued that the Petitioner had failed to prove the essential element that the majority of the voters in the Constituency were or may have been prevented from electing the candidate in that Constituency whom they preferred. Counsel contended that the election of the Respondent should not be nullified because there was no wrongdoing of the type and scale

which could satisfy the Court that it adversely affected or may have affected the election. The case of **Mlewa v. Whightman**⁽⁴⁾, supra, was cited as authority to support that argument. Counsel submitted that it was not enough for the Petitioner to show that there was violence or intimidation or indeed any form of malpractice. The Petitioner ought to have shown that the malpractices prevented voters from voting for their preferred candidate. However, that, in fact, the witnesses who testified that there was violence perpetrated by the Respondent admitted and confirmed under cross examination that they still voted for their preferred candidate. In addition, that none of the witnesses testified that they failed to vote or that if they voted, they voted for a candidate against their will. Counsel contended that this was an indication that the alleged malpractice did not have any bearing on the voting pattern.

Learned Counsel went further to argue that it was fatal for the Petitioner not to call a witness from ECZ to the effect that there was voter apathy. He added that the election results show that there was no voter apathy in the entire Constituency.

As regards the allegations that the Respondent and his supporters were campaigning on voting queues, learned counsel submitted that the said allegations ought to fail because every polling station was manned by police officers and none of the police officers from any of the polling stations in the Constituency were called to testify that UPND supporters were campaigning on the queues on polling day.

In summation, the Respondent reiterated that the Petitioner has failed to prove his case to the requisite standard and prayed that the Petition be dismissed with costs. The Respondent also prayed for a declaration that he is the duly elected MP for Sinazongwe Constituency.

I have considered the Petition, the Answer, the Affidavits, the evidence on record and the submissions by counsel.

The undisputed facts are that the Petitioner and the Respondent contested the Parliamentary Election for Sinazongwe Constituency held on 11th August, 2016 under Patriotic Front (PF) and United Party for National Development (UPND), respectively. The other contestants were Shanza Neddy, an independent candidate and Simunyinka Fudick of Forum for Democracy and Development (FDD). Following the election, the Returning Officer announced the results as follows; the Respondent, 34,397 votes; the Petitioner, 6,171 votes; Shanza Neddy, 1,932 votes and Simunyinka Fudick 87 votes. The Returning Officer proceeded to declare the Respondent as the duly elected MP for Sinazongwe Constituency. Further, that various incidences and form of political violence occurred in some parts of Sinazongwe Constituency involving the PF and UPND.

The Petition seeks to nullify the election of the Respondent as MP for Sinazongwe Constituency. The Petitioner alleges that the Respondent was not duly and validly elected because his campaigns were characterised by widespread electoral malpractices, corrupt and illegal practices such as intimidation, undue influence, illegal publication of false statements by the

Respondent, his party agents and supporters contrary to the Electoral Process Act and the Electoral Code of Conduct of 2016.

The issue that falls for determination is whether the Respondent was not validly or duly elected to warrant the nullification of his election as MP for Sinazongwe Constituency.

The law that governs avoidance or nullification of parliamentary elections is contained in Section 97 of the Electoral Process Act No. 35 of 2016. I must state from the outset that I do not agree with Counsel for the Petitioner that Section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 is identical to the repealed provisions of Section 93 (2) (a) of the Electoral Process Act No. 12 of 2006. For the avoidance of doubt, Section 93 of the repealed Electoral Act of 2006 states as follows:-

“93 (1) No election of a candidate as a member of the National Assembly shall be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say:-

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

- (b) Subject to the provision of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court 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.
- (c) That any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent; or
- (d) That the candidate was at the time of the election a person not qualified or a person disqualified for election.

The Supreme Court interpreted the application of Section 93(2) (a) above in the case of **Reuben Mtolo Phiri V Lameck Mangani**, alluded to above, as follows:

***“...Under paragraph (a), any corrupt practice or other misconduct, committed in connection with an election, by somebody else, but nothing to do with a candidate in a particular Constituency, or his agent, can nullify an election. But it must be shown that by reason of such corrupt practice, illegal practice or other misconduct, “the majority of voters in a Constituency were or may have been prevented from electing the Candidate in that Constituency whom they preferred”:* See: Jere v Ngoma⁽¹⁾; Limbo v Mututwa (unreported); and Mlewa v Wightman⁽¹⁾. The Jere case was decided under Section 16**

(2) (a) of the Electoral Act, 1968. The Limbo case was decided under Section 17 (2) (a) of the Electoral Act, 1973. The Mlewa case was decided under Section 18 (2) (a) of the Electoral Act, 1991. The Sections in question are exactly the same, word for word, as Section 93 (2) (a) of the Electoral Act, 2006...” (Emphasis mine)

In view of the above, it clear that the law as it currently stands has considerably departed from the previous position in the repealed legislation. The present law requires that the alleged malpractices or misconduct must have been committed by the candidate or with his knowledge and consent or approval or of his election agent or polling agent. The agents being those persons appointed by a candidate pursuant to Regulations 50 and 51 of the Electoral (General) Regulations, 2006 as election agent or polling agent. It is thus incorrect to say that the law currently provides that it does not matter who the wrongdoer is. The law no longer allows the Court to nullify an election merely by finding that there were electoral malpractices, irrespective of who the wrongdoer was as long as the majority were or may have been prevented from electing their preferred candidate. That is to say, the wrong doing must be attributed to the Respondent or his election or polling agents. Thus, the cases of **Mlewa v. Whightman, Leonard Banda v. Dora Siliya** and **Reuben Mtolo Phiri v. Lameck Mangani**, among other cases, were decided on old law which distinguishes them from the present Petition.

Section 97 of the Electoral Process Act No. 35 of 2016 which applies to the present Petition provides as follows:

“97 (1) An election of a candidate as a Member of Parliament, Mayor, Council Chairperson or Councillor

shall not be questioned except by an election petition presented under this Part.

(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.”

In addition, it is settled law that in an election petition, the burden on proof lies with the Petitioner to prove his case. The Supreme Court has had occasion to pronounce itself on the standard of proof in election petitions. In the cases of **Mazoka and others v. Mwanawasa and others, supra, Lewanika and others v. Chiluba⁽⁵⁾, Mabenga v. Wina⁽⁶⁾ and Kamanga v. Attorney-General and Another⁽⁷⁾**, among others, the Supreme Court stated that election petitions are required to be proven to a standard higher than on a mere balance of probabilities and that the issues raised are required to be established to a fairly high degree of convincing clarity. In the case of **Khalid Mohammed v. Attorney General⁽⁸⁾**, the Supreme Court held the plaintiff cannot

succeed automatically if a defence fails. He must prove his whatever may be said of the opponent's case.

In view of the foregoing, I am of the considered view that in order to succeed with this Petition, the Petitioner must prove the following to the requisite standard:

- (i) That the alleged widespread electoral malpractices, corrupt and illegal practices were committed in connection with the parliamentary election held on 11th August, 2016 for Sinazongwe Constituency;
- (ii) That the said electoral malpractices, corrupt and illegal practices were committed by the Respondent or with his knowledge and consent or approval or of his election agent or polling agent; and
- (iii) That the majority of voters in Sinazongwe Constituency were or may have been prevented from electing a candidate in that Constituency whom they preferred.

I shall now turn to consider the grounds raised by the Petitioner in the manner that they have been presented in paragraph 5 of the Petition and apply the law as set out above.

1. Undue Influence and Intimidation

(a) Violence

The detailed allegations of undue influence and intimidation as they appear in paragraph 5 of the Petition are that the Respondent in all the wards intimidated and beat up any person who was perceived to be the Petitioner's supporter or who

sympathised with him. The Petitioner alleges that numerous people were beaten by the Respondent and / or his agents with his consent and knowledge and that most of these supporters and would be voters ended up hospitalised at Maamba General Hospital and the University Teaching Hospital (UTH).

There is overwhelming evidence that on nomination day, the UPND supporters attacked and assaulted PF members who had accompanied the Petitioner to file in his nomination. This was confirmed by the officer in charge of Sinazongwe police station, PW14. This evidence was amplified by the footage produced by PW15, the ZANIS editor.

Section 83 of the Electoral Process Act categorises violence as an electoral offence. The relevant portions of Sections 83 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.”

The question that arises is whether the violence on nomination day was perpetrated by the Respondent or with his knowledge and consent or approval or his election or polling agent. The Respondent denies that he instructed his supporters to attack

the PF members or that the attack was committed with his knowledge and consent or approval. The Respondent in his testimony maintained that the only incidents of assault that he knew were the assault of his supporters RW3 and RW5 which occurred in July, 2016 way after nomination day. However, a close scrutiny of the evidence reveals that the Respondent was not forthright in his testimony on that aspect. He was present when his supporters attacked the PF members on nomination day. PW3 who was one of the victims told the Court that she saw the Respondent on the material day who stood with his supporters who were throwing sticks and stones at them. In cross examination, PW3 was only questioned as to whether it was the Respondent himself who assaulted her. The Respondent's election agent, RW2 and the Respondent himself stated in their evidence that they met the Petitioner's convoy on their way from the nomination centre but they deliberately chose not to disclose the events of the attack even in the face of the evidence of the officer in charge, PW14, who received reports of what transpired that day.

In addition, PW1 testified that immediately before they were attacked, he heard someone shout *Amubaume!* a Tonga word which mean 'beat them'. This was supported by PW7's testimony that they found UPND cadres chanting, *Menya! Menya!* a Nyanja word which meaning 'beat', right before they were attacked. During the attack the Respondent and his election agent RW2 were present and did nothing such that 16 PF cadres were assaulted in the process. I am of the considered view that the Respondent's story that the encounter of the two camps (PF and

UPND) on nomination day was peaceful flies in the teeth of the evidence, especially that of PW14 and PW15 which was supported by a police report P2 and the ZANIS footage 'P3'. I, therefore, find as a fact that there was violence on nomination day perpetrated by the Respondent's supporters with his knowledge and consent or approval and that of his agent RW2 against the Petitioner and his supporters.

The question that arises then is whether as a result of these acts of violence, the majority of voters were or may have been prevented from electing a candidate whom they preferred. PW1's evidence was that on nomination day, he was accompanied by many supporters who came from various wards such that the entire Constituency heard what transpired on that day. According to PW1, this reduced his following because some of his supporters were afraid to campaign openly for him while others withdrew their support. His evidence was not challenged in cross examination.

However, other than the evidence of PW8 who stated that he organised supporters from Mweenda Ward to accompany the Petitioner on nomination day, there was no evidence to show which areas other supporters came from. I take judicial notice of the ECZ Register of Voters for 2016 that Mweenda Ward only has 3,468 out of the 59,544 total number of registered voters in Sinazongwe Constituency. Meanwhile, the facts in the Petition reveal that the Petitioner lost the election with a difference of over 28, 000 votes.

Equally, the evidence of PW9 does not shade much light on whether he organised supporters from Maamba Ward to accompany the Petitioner on nomination day. His testimony was that on the material day, he left Maamba and went to Sinazeze which is located in Ndakabbwe Ward where he met with other PF members and did not give an indication of the numbers. Although the Petitioner contends that his supporters came from different wards and that word of the violence on nomination day had spread and reduced his support, he did not adduce sufficient evidence to show the extent of the influence that the incident had on voters in Sinazongwe in order to show that most of the potential voters in the Constituency were or may have been prevented from electing their preferred candidate. I am fortified in my finding on the decision of the Supreme Court in **MubikaMubika v. Poniso**⁽⁹⁾**Njeulu, Gondwe v. Namugala**⁽¹⁰⁾ and **Zulu v. Kalima**⁽¹¹⁾ which are instructive on the application of the 'majority clause' although they were decided on the repealed Electoral Act.

In fact, PW8 testified that no one was prevented from voting. Although, PW8 later changed in cross examination that some PF members failed to vote, he could not point out any person who failed to vote as a result. That was also the evidence of PW3, PW7, PW9, PW11 and PW12 who were part of the Petitioner's entourage on nomination day when the incident occurred. These witnesses who experienced the violence first hand disclosed that the violence did not affect their decision to vote for their preferred candidate and they confidently said that they voted freely. Some went further to disclose that they in fact voted for the Petitioner.

Further, I have considered the testimony of PW11 who stated that Jean Siamanjema and Mercy Siavwapa failed to vote as a result of the violence. PW12 also testified that due to the violence, Kezia Manyika and Margaret Chirwa failed to vote and that Esther Siang'andu told him that she was threatened with violence when voting. It is worth noting that the 5 people mentioned were never called to attest to those assertions. Moreover, the 5 people could not be said to be representative of the majority voters in the Constituency which has about 59, 544 registered voters.

Other incidences of violence which the Petitioner referred to were those he said he received in form of reports from his supporters within the Constituency after nomination day. PW1 referred to the beating of PW2 in Senenge Ward, the assault of 'Rasta' in Malima Ward, the attack of his supporters at Kafwambila in Namazambwe and Sinazeze on different occasions. PW2 confirmed his attack in his testimony. The assault of other PF members in July 2016 after the UPND Presidential campaign rally was confirmed by PW9. However, PW9 only identified one victim called Obvious Kaleke and the said Obvious Kaleke was not called as a witness. PW5 who was a PF polling agent also referred to the threats they received at the polling stations if the PF won the election when they were counting ballots at Siyamuyala polling station. PW6 also referred to his assault by UPND cadres for supporting the Petitioner. However, PW6 disclosed that the beatings did not affect his decision and he voted for the Petitioner. PW12 also referred to some of these

incidences but his evidence was hearsay because he relied on reports from PF members.

The evidence of PW13 confirmed the existence of cases of political violence which are recorded in his report, P1 showing that they received a total of 19 cases, most of which were perpetrated by the UPND supporters. His evidence was supported by PW14 who confirmed the reports and also produced another report, P2. In view of the evidence on record, I find that there were cases of political violence by both UPND and PF cases but mostly perpetrated by UPND cadres.

Upon careful examination of the evidence on violence I find that the said acts cannot be attributed to the Respondent or his election or polling agents. None of the witnesses saw or heard the Respondent instructing their assailant to attack them. PW13 who received the reports confirmed that his investigations revealed that the Respondent was not aware of the beatings and assault of PF cadres. Consequently, the Petitioner has not proved that the Respondent or his election or polling agents knew and consented or approved the incidences of violence after nomination day.

It is significant to note that the reports received by PW13 came from a few areas in 4 Wards and cannot be said to represent the majority of voters in Sinazongwe. The witness could not give details of what transpired in the West where Malima is located and where he said violence was rife. The evidence of PW14 was unclear on the areas the reports he received came from. I accept that Sinazongwe is a vast Constituency and the few reports referred to could not be representative of the majority of voters.

Further, the evidence on record shows that even the few who encountered these incidences of violence post nomination day said they voted, that no one was prevented from voting and they voted for their preferred candidate. Moreover, over fifty percent of the total number of registered voters voted in Sinazongwe Constituency. The Petitioner has also failed to prove the extent of influence which the said acts had on voters in order to prove that the majority were or may have been prevented from electing their preferred candidate.

Having considered the allegations raised by the Petitioner on undue influence and intimidation, I find that the voters who particularly witnessed the incidences that took place on nomination day and in the run up to the elections were not affected by those illegalities. As ably argued by counsel for the Respondent, none of the Petitioner's witnesses testified that they either failed to vote or that if they voted, they were prevented from electing their preferred candidate.

The learned authors of **Halsbury's Laws of England, 4th edition volume 15**, in defining what constitutes threat, state at page 429 paragraph 784 as follows;

“In order to constitute undue influence a threat must be serious and intended to influence the voter, but it must appear that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat.”

Since the test for undue influence is the effect on the person threatened and not the person using the threat, I find that the Petitioner has failed to prove to a fairly high degree of convincing

clarity that the majority of voters were or may have been prevented from electing their preferred candidate when the few who were actually victimised confidently said that they voted freely, and for their preferred candidate.

(b)Lack of Secret Ballot

It is alleged that voters were denied a 'secret ballot' because the Respondent deployed agents on windows at polling stations who instructed voters to fold their ballot papers outwards to show which candidate they voted for and threatened to beat anyone who voted for the Petitioner contrary to Section 89 of the Electoral Process Acts. Sections 89 states that:

“89 (1) A person shall not—

(iv) induce any person not to vote for a particular candidate;

(l) have any communication with a voter while such voter is in the precincts of a polling station for the purpose of voting..”

The evidence of PW1 on this allegation was hearsay. But PW6, a UPND member said he attended a meeting at Nkandabbwe before elections at which the Respondent told people to fold ballot papers outwards. PW6 stated that he was also a victim of violence but despite the assault, he proudly stated that he voted for the Petitioner. The evidence of PW3 was that he voted from Sianjola polling station where UPND supporters told people to fold ballots outwards. She however, ignored the threats and voted

freely. PW8 also testified that he voted from Nyanga polling station where he found the same situation. He added that the voters were also threatened that there were machines which would detect if they voted for another candidate other than the Respondent. PW12 also said he witnessed one voter who was instructed to fold the ballot paper outwards at Lutuwa polling station and threatened with violence if she did not comply.

This evidence was supported by an independent witness, PW4, who was a polling assistant at Nang'ombe polling station. His evidence was that he observed that voters were folding their ballot papers outwards and they told him that they had been instructed by UPND cadres who stood on the windows during elections. I, therefore, find that the UPND supporters were telling voters to fold their ballot papers outwards at Sianjola, Nang'ombe and Nyanga polling stations.

Notably, PW9 whose testimony was that he visited over 10 polling stations including Nyanga polling station did not witness any such incidences suggesting a lack of secrecy. PW9 stated that he visited Maamba Private School, Maamba Catholic Church and Maamba GRZ School in Maamba Ward, Chimonselu and Siatwiinda in Muchekwa Ward, Kanchindu in Mweemba Ward, Sinakoba in Muuka Ward, Dengeza, Nyanga and Siameja in Mweenda Ward, Siampondo in Mabinga Ward and Kafwambila in Namazambwe Ward. Of all the seven Wards he visited PW9 did not mention that he found or received a report that voters were told to fold their ballot papers outwards by UPND cadres on the windows. I therefore, find that these incidences were isolated to 3

polling stations out of the 58 polling stations in Sinazongwe Constituency. On the issue of Machines capable of detecting the voting patterns if any voter voted for any other candidate other than the Respondent, I find the evidence of PW8 to be baseless and unsupported. While it is accepted that the Sinazongwe constituency is largely rural. I do not accept that the majority voters could have have been prevented to vote for a candidate of their own choice on account that the electorates believed the Machine story. All in all, therefore, I find that the said acts may not have prevented the majority of voters in the Constituency from electing their preferred candidate.

Further, there is no evidence to show that the Respondent knew about these incidents because his evidence was that he was away in Choma on that day and that he did not know what was happening during elections was unchallenged. It was in fact buttressed by PW14, the police officer in charge of Sinazongwe police station who stated that when he called the Respondent on polling day, he told him that he was in Choma. The Petitioner has failed to prove that the Respondent or his election agent, RW2 or his polling agents had knowledge and consented or approved the illegalities that UPND supporters engaged in of instructing people to fold their ballots outwards.

(c) Illegal Road Blocks

It is alleged that the Respondent organised illegal road blocks to search vehicles for the Petitioner's campaign material. The Petitioner claims that these acts created an environment of

extreme fear and intimidation amongst voters, most of whom were prevented from voting, or electing a candidate they preferred.

This allegation was supported by the evidence of PW1 who stated that in June, 2016 he witnessed an incident where UPND youths at the instance of Chisheta, closed the road in Maamba and searched all motorists for PF campaign material. PW1 also testified that on 2nd August, 2016, the Respondent's supporters mounted a road block at Mweemba / Maamba junction.

These incidences were confirmed by the Officer in Charge of Maamba police station, PW13. However, PW13 disclosed that according to his investigations, the culprits were sent by Zachariah Chikete and not the Respondent. PW13 also confirmed that his investigations revealed that the Respondent was not aware of the road block. He went further in his testimony and stated that they resolved the issue by sensitising people on multiparty politics. In light of this evidence, I find that some UPND youths blocked the road in Maamba but the Petitioner has failed to prove that the Respondent had knowledge of the road block or that it was done with his consent or approval or of his election agent or polling agent. I opine that even in the event that the Respondent was associated with the road block, I find that there is no evidence that as a result of the said incidents the majority of voters in Sinazongwe were or may have been prevented from electing their preferred candidate.

2. Other Illegal Practices

On this ground, it is alleged that the Respondent continued campaigning openly at the polling stations thereby swaying voters to vote in his favour. PW1, PW2, PW4, PW5, PW8, PW9, PW10 stated that UPND cadres were campaigning on polling day at various polling stations. This evidence was amplified by the ZANIS footage covered on polling day which showed that UPND cadres were campaigning during elections. In that regard, the reporter made reference to Malima, Nang'ombe and Syanyuka polling stations. However, the Petitioner failed to show that the Respondent was aware of those campaigns and consented or approved them. There was also no evidence that the Respondent's election agent or polling agents approved of the said campaigns. While, I accept that there were UPND cadres who campaigned during polls, I find that the said campaigns cannot be attributed to the Respondent as envisaged by Section 97 (2) (a) of the Electoral Process Act to warrant nullification of his election.

The Petitioner further claims that the counting of ballots was characterised by irregularities at all polling stations because rejected ballots were counted as valid votes. There was no evidence led by the Petitioner to substantiate this allegation. For that reason, it cannot succeed.

3. Bribery

In paragraph 5 of the Petition, the Petitioner alleges that the Respondent openly bought food and drinks for presiding officers and all the Electoral Commission of Zambia (ECZ) officers thereby compromising their impartiality contrary to Section 81 (1) of the Electoral Process Act. PW1's evidence on allegations of bribery was primarily hearsay save for one incident he said he witnessed on polling day in Nang'ombe where the Respondent's campaign manager, Stembridge Sikalola, bought drinks which he distributed to voters after voting. I note that PW1 said he was told by voters that the drinks were bought by the Respondent's campaign manager, the said Stembridge Sikalola but none of those voters were called as witnesses.

Additionally, I note that although paragraph 5 of the Petition states that the Respondent bought food for ECZ officers, PW1's evidence was to the effect that the Respondent bought food for voters and not ECZ officials. However, in the footage produced by PW15, one of the Sinazongwe resident she interviewed post elections said that he was surprised to see the Respondent buying drinks for ECZ officers during the election. He did not disclose which polling station he voted from or where the incident occurred and he was also not called as a witness.

The learned authors of **Halsbury's laws of England, Volume 15, 4th Edition (Re issue)** at paragraph 697 state that:

“Where refreshments are a mere incident of a political meeting, there's no offence, but if persons are gathered together merely to gratify their appetites and so influence their votes, then it is corrupt treating. It is not necessarily corrupt, however, to attract people to meetings by offering refreshments of a moderate kind.

The giving of refreshments to persons employed at the election, if done honestly and in good faith, is not illegal”

From the evidence on record, even assuming that the Respondent or the Campaign Manager Mr. Stembridge Sikolola, bought drinks for the ECZ staff, there's no evidence that this was done in bad faith. Consequently, I find that the Petitioner has not proved the allegation of bribery as contained in paragraph 5 of his Petition. In any event, the allegation of bribery during trial was isolated to Nang'ombe polling station out of the 58 polling stations in Sinazongwe Constituency.

Conclusion

Having found that the Petitioner has failed to prove all of the allegations set out in the Petition, I have determined that Mr. Gift Siaubalo, was duly elected Member of Parliament for Sinazongwe Constituency.

As regards Costs, in view of the serious issues raised and being an Election Petition, I am inclined to order that the parties bear their respective cost. I accordingly so Order.

Leave to appeal is granted.

Delivered at Livingstone this 11th day of November, 2016.

MATHEW L. ZULU
HIGH COURT JUDGE