IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

APPEAL NO. 8 of 2017
2016/CC/A039

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

AND

IN THE MATTER OF: SECTIONS 81 (1); 97 (2) (a) (i) and (ii) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.

AND

IN THE MATTER OF: THE IKELENG'I PARLIAMENTARY CONSTITUENCY ELECTION HELD ON 11TH AUGUST 2016

BETWEEN:

ABIUD KAWANGU APPELLANT

AND

ELIJAH MUCHIMA RESPONDENT

CORAM: Sitali, Mulenga, Mulembe, Mulonda and Munalula JJC on 13th July, 2017 and 9th February, 2018

For the Appellant: Mr. N Yalenga of Messrs Nganga Yalenga and Associates
For the Respondent: Mr. T Chilembo and Mr. L Banda of Messrs T. S Chilembo Chambers

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JUDGMENT

Munalula JC, delivered the Judgment of the Court.

Cases referred to:

1. Attorney General v Marcus Kampumba Achiume (1983) Z.R. 1
2. Anderson Mazoka and Others v Levy Mwanawasa and Others (2005) Z.R. 138
3. Albertina Bulongo Pota v Hastings Sililo Appeal No. 11 of 2012 (unreported)

4. Mushemi Mushemi v The People (1982) Z.R. 71 (S.C.)
5. Mlewa v Wightman (1995-97) Z.R. 171
6. Lewanika and others v Chiluba and Others (1998) Z.R. 79
7. Wilson Masauso Zulu v Avondale Housing Project (1982) Z. R. 172
8. Zvokuseka v Bilita, RDC (SC/13) 2015, ZWSC (Zimbabwe)
9. Stephen Katuka and Law Asssociation of Zambia v Attorney General and Ngosa Simbyakula and 63 Others 2016/CC/0010/0011 (unreported)
10. Mwalimu Simfukwe v Evaristo David Kasunga Appeal No.50 of 2013 (unreported)
11. Norris v United States C.C.A.Neb 86 F.2d 379 (8th Cir. 1936)
12. Reuben Mtolo Phiri v Lameck Mangani S.C.Z Judgment No. 2 of 2013 (unreported)
13. C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General (2004) Z.R. 216 (S.C)
14. Steven Masumba v Elliot Kamwendo Selected Judgment No. 53 of 2017
15. Ndongo v Moses Mulyango and Another (2011) 1 Z.R. 187
16. Samson Mbavu and Others v The People (1963-1964) Z. and N.R.L.R. 164 (C.A.)

Legislation referred to:

The Constitution of Zambia (Amendment) Act No. 2 of 2016

The Electoral Process Act No. 35 of 2016

The Electoral Act No. 12 of 2006 (repealed)

The Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia

Work referred to:

Halsbury's Laws of England, 4th Edn, Vol. 15.

The Appellant, Abiud Kawangu, who was the Petitioner in the court below, appeals against the Judgment of that court wherein the trial Judge

dismissed his Petition and declared that the Respondent was duly elected Member of Parliament for Ikeleng'i Constituency. The brief facts are that the Appellant was a candidate in the Ikeleng'i parliamentary elections held on 11th August, 2016 under the sponsorship of the Patriotic Front (PF) and polled a total of 1,929 votes. Among the other contenders was the Respondent who stood under the ticket of the United Party for National Development (UPND) and polled a total of 10,395 votes. The other candidates were Richard Kavwanda (whose party affiliation is unknown) who received 787 votes and Winfred Luwi of the Forum for Democracy and Development (FDD) who polled 187 votes. The Respondent was declared winner and duly elected Member of Parliament for the Ikeleng'i Constituency.

Dissatisfied, the Appellant petitioned the High Court alleging electoral misconduct on the part of the Respondent. The Appellant alleged in his Petition that the Respondent in April, 2016 had, together with the President of the UPND, held a rally at Lwakela Secondary School grounds and that after the rally, the Respondent had with his agents taken part in distributing certain household items to the entire population in the Constituency. He also alleged many other cases of vote buying at the Catholic Church in Nyakaseya and a place called Nkemba and that between July, 2016 and

11th August, 2016, the Respondent allegedly informed the people that the Appellant had received traditional charms from a person known as Francis Kanema with instructions that he uses the same for bathing at the grave yard, among other things, to enable him win the parliamentary election.

The Appellant also alleged that there were cases of his supporters being beaten up by the Respondent's supporters at several places in the constituency and that numerous cases were reported to the Ikeleng'i Police Station some of which were still before the courts of law.

The trial Judge found as a fact that the witnesses of the Respondent impressed him more than those of the Appellant. That the meeting at Lwakela actualized an understanding between the Respondent as the sitting Member of Parliament and his community in which he was to provide them with certain essential items whilst they provided manpower to carry out a local project. That the meeting was not a campaign rally. Further, that since only a small part of the community was affected, it had no bearing on the results of the whole Ikeleng'i Constituency.

The trial Judge further found that the meeting in Nyakaseya area had been organized by the executives of the UPND and Movement for Multi-party Democracy (MMD) who wanted to come together and support one

candidate. The Judge found that certain unauthorized persons who strayed into the meeting had perceived the hospitality extended to the delegates as treating, bribery and corruption perpetrated by the Respondent at the meeting. The Judge also found that this incident had happened outside the campaign period and before parliamentary candidates had filed in their nominations and thus the allegations lacked merit. He found that the Appellant had not proved the allegations against the Respondent. The trial Judge then dismissed the petition.

In appealing against the decision of the court below, the Appellant raised the following grounds which we quote verbatim:-

1. *The learned trial Judge erred in law and fact when he held that the meeting held at Lwakela Basic School where the Respondent distributed soap, salt, pots, plates and donated K5,000 was not a campaign rally and therefore the donations did not constitute electoral malpractice and corruption.*
2. *The learned trial Judge erred in law and fact when he held that the meetings held by the Respondent at the Catholic Church grounds in Nyakaseya village and Nkemba where the Respondent distributed pots, plates, meat and mealie meal was a consultative meeting and not a campaign rally and therefore the items distributed to the people therefore did not constitute electoral malpractice corrupt practices. (sic)*

3. *The Honourable Judge in the Court below erred in law and fact when he held the meeting of the Patriotic Front's supporters at Lwakela area by reasons persons in the Respondent's entourage did not constitute an electoral malpractice as it was not widespread and therefore did not prevent the meeting of the voters from electing a candidate of their choice. (sic)*
4. *That the learned trial Judge in the Court below erred in law and fact when he held that the Respondent did not publish falsehood about the Appellant as he did not find the Appellant evidence credible.*

The Appellant filed heads of argument in support of the first two grounds of appeal. In arguing ground one, Counsel submitted that the Appellant from the outset had indicated in his Petition that prior to the election date, the Respondent and his agents, with the intention of procuring votes from the electorate, had held a rally at Lwakela Secondary School where pots, plates and salt were distributed to the villagers. He argued that the Respondent on the other hand had denied distributing any items at the said school and swore an Affidavit to that effect.

It was contended that this denial was proved to be untrue by the testimony of Stanford Dilema, PW6, who had taken a video of the meeting in question where the Respondent is alleged to have been distributing the pots, plates, salt and soap.

Counsel argued that during trial, the Respondent told the court below that he attended the meeting at Lwakela Secondary School in his capacity as Member of Parliament under the MMD in April, 2016. That it was a developmental meeting for the construction of a secondary school by way of upgrading the then existing basic school and that the items given out could not constitute corruption or bribery as the people had asked for them in exchange for their labour. Additionally that the Respondent had denied having campaigned for the UPND or asking people to vote for him.

He submitted that during cross examination, the Respondent was shown the paragraph in the Petition dealing with the acts in question at Lwakela Basic School as well as his denial in his Answer and Affidavit. That the Respondent admitted having denied the allegations but maintained his testimony that he had in fact given out the aforesaid items to the people. That after further cross examination coupled with the video evidence earlier alluded to, it was clear that the Respondent admitted having campaigned and solicited for votes on the UPND ticket and not as an incumbent MMD Member of Parliament and that the meeting was not a developmental meeting. Counsel asked this Court to take judicial notice of the fact that the hand is the symbol for the UPND.

Counsel attacked the finding by the trial Judge that the allegation of treating and bribery failed to hold water and stated that it came with a sense of shock as it flew in the teeth of the evidence that was before the trial court. It was contended that the only other witness to testify on behalf of the Respondent, apart from the Respondent himself, was RW2, Henry Funina, who informed the trial court in his evidence in chief that people had asked the area Member of Parliament, the Respondent, for soap and salt as the work they were doing of ferrying bricks and sand was a dirty job. That the witness said that there was nothing else that the people asked for, from the Respondent. It was submitted that the said witness also testified to the effect that the Respondent had gone to 'sell' himself under the UPND. That in cross examination the RW2 stated that in fact the Respondent had gone on to bring the people pots and plates and that people voted for the Respondent because he had a merciful heart. He indicated that this witness in his reexamination stated that people could not vote for someone without a merciful heart. Based on the foregoing, Counsel submitted that the decision of the trial court was thus not supported by the evidence tendered into that court.

Counsel relied on the decision in the case of **Attorney General v Marcus Kampumba Achiume**[1] to argue that an appellate court will not

lightly interfere with the findings of fact made by the trial Judge unless it is established that firstly, the findings in question were either perverse or made in the absence of any relevant evidence; or the findings were made upon a misapprehension of the facts; or lastly that the findings were, on a proper view of the evidence, findings that no trial court acting correctly could reasonably make. He urged the Court to invoke its jurisdiction to reverse the findings of fact made by the trial court on the ground that they were perverse as they were based on a misapprehension of the facts.

Counsel further asked the Court to determine whether the fact that the meeting took place in April, 2016 which was outside the official campaign period entails that the same was outside the purview of the repealed Electoral Act of 2006. It was submitted that the so called developmental meeting ran afoul of section 81 (1) (c) of the Electoral Process Act No 35 of 2016 (henceforth referred to as the EPA, 2016) which almost word for word replicates section 79 (1) of the Electoral Act of 2006 and prohibits treating, bribery and corruption. He proceeded to cite **Anderson Mazoka and Others v Levy Mwanawasa and Others**[2] where the Supreme Court considered donations or other gifts made outside the election period by stating that the candidates cannot be said to be candidates in an election on nomination day as it would lead to an absurd situation of prospective

candidates engaging in corrupt activities or illegal practices prior to nomination only to stop on nomination day. He stated that this position was affirmed in the case of **Albertina Bulongo Pota v Hastings Sililo**[3] in which the court nullified the election of the Respondent for donations he had made prior to the campaign period.

Counsel asked this Court to take judicial notice of the fact that the official campaign period begun on 11th May, 2016. And that this Court should question why the Respondent would be donating money and other items so close to the election campaign period if not for purpose of being "remembered" by the electorate. It was contended that the court below should have made a finding regarding the credibility of the Respondent who was shown to have made contradictory statements from his answer about the happenings at the meetings. Counsel cited **Mushemi Mushemi v The People**[4] wherein it was stated that:-

> *The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others.*

It was submitted that the acts of the Respondent were done with the election in mind to remind the voters of what he was capable of doing and in line with the decision in **Mlewa v Wightman**[5] where it was opined that

the satisfactory proof of even one act of electoral corruption is sufficient to nullify an election which position ought to justify the nullification of the Respondent's election.

Under, ground two, counsel submitted that the evidence on record shows that the Respondent had admitted to have already applied to stand on the UPND ticket even at the meeting he held at Nyakaseya village where there were about 200 to 300 people in attendance. That RW2 stated that the number was about 250 to 500 people. Counsel submitted that this number is far too many for a consultative meeting; and that it was in fact a campaign rally as there is evidence to show that the Respondent used it to solicit for votes.

Counsel indicated that the Respondent had stated that he applied for adoption under the UPND ticket sometime between March and April, 2016. That this was before the meeting and that RW2 confirmed that the Respondent had asked for votes after the consultative meeting. He stated that there was other contradictory evidence from RW6 who stated that the Respondent or MMD officials had indicated that it was better for him to stand on the UPND ticket in May, 2016. He ended by urging this Court to reverse the finding that what took place at Nyakaseya was a consultative meeting and instead hold that it was in fact a campaign rally and that it

included treating of voters, whether they be UPND or MMD, to meat, pots, plates and mealie meal. And that it be found to be a corrupt practice for the same reasons cited in ground one.

When the matter came up for hearing, Counsel for the Appellant, Mr. Yalenga, informed the Court that grounds three and four had since been abandoned

In his filed heads of argument in opposition Respondent's counsel begun with two issues; firstly that the Appellant had made five allegations in his petition but had abandoned two by not calling any evidence or witnesses regarding the same and secondly that the Appellant had admitted during the trial that all his allegations were purely hearsay. Counsel questioned the credibility and trustworthiness of the Appellant's witnesses and argued that the evidence did not meet the standard of proof in election petitions. He cited the case of **Mushemi Mushemi v The People**[4] in support.

Counsel submitted that on the guidance given in **Lewanika & Others v Chiluba and Others**[6] once allegations are made, they have to be proven to a fairly high degree of convincing clarity. He stated that all the grounds of appeal had not raised any points of law and that this amounts to the

Appellant asking this Court to play the role of a trial court. The case of **Wilson Masauso Zulu v Avondale Housing Project**[7] was cited to show that an appellate court cannot reverse the findings of fact of a trial court lightly.

The case of **Zvokuseka v Bilita and RDC**[8] a decision of the Supreme Court of Zimbabwe was also cited wherein it was stated that:-

> *An appeal to the Supreme Court must be based on points of law. What constitutes a point of law has been stated in a number of decisions of the Supreme Court. If an appeal is related to facts, there must usually be an allegation that there has been a misdirection of facts which is so unreasonable that no sensible person who had applied his mind to the facts would have arrived at such decision. And a misdirection of facts is either a failure to appreciate all the facts at all, or a finding of fact that is contrary to the evidence actually presented.*

Based on this, Counsel argued that the meeting referred to in ground one took place in April, 2016 before Parliament was dissolved and before the election campaign period and that the Respondent had a duty towards his people in the constituency. Thus, the P.T.A meeting at Lwakela Secondary School was one such arrangement.

It was argued that none of the Appellant's witnesses in their evidence testified to confirm the allegation including PW2 and the Appellant himself. Counsel contended that the Appellant had not defined a political rally or

provided a legal basis to qualify the meeting at the school as such. It was also indicated that since corruption is a criminal offence proscribed under the Anti-Corruption Act No. 3 of 2012, it was unfair for the Respondent to be called corrupt without undergoing a legal process to confirm such accusation. Counsel stated that the Appellant had failed to elaborate on the legal nature of corruption so that this Court can apply it to the actions of the Respondent and neither had he proven how the Respondent's acts amounted to electoral malpractice.

Counsel submitted that in order for an action to amount to electoral malpractice, it must have occurred during the campaign period and that providing of essential items by an MP to the people of Lwakela outside the campaign period is called responsible leadership which was not prohibited by the Electoral Act of 2006 or the EPA, 2016.

The Respondent's Counsel averred that section 81 (1) (c) of the EPA, 2016 and section 79 (1) of the Electoral Act of 2006 are not similar and stated that the **Mazoka and Others v Mwanawasa and Others**[2] case cited preceded the 2016 Constitutional amendment and the enactment of the EPA, 2016. The Republican President previously used to set the time and date for the elections as the election period was not prescribed. As a result, it was argued, election candidates would be caught up in electoral

malpractices once the President declared the date of the election. Counsel averred that things had changed and the election period relating to the impugned meetings ran from 15th May, 2016 to 9th August, 2016. Thus the Respondent's actions were legitimate and outside of the campaign period. They could not be termed electoral malpractice. It was submitted that a person could not be punished on the basis of old law and this Court is bound by the Constitution as it stands now and not by the repealed law on which the **Albertina Bulongo v Hastings Sililo**[3] case was based.

Counsel argued in opposition to ground two that the meeting at Nyakaseya grounds was arranged by the UPND and MMD in the process of forming an alliance and the agenda of the meeting at the Catholic Church was to endorse a candidate for the 2016 parliamentary elections. It was averred that 230 delegates were invited to represent the wards at the meeting in accordance with the inter-party democracy alliance they wanted to form. The Respondent was present as Member of Parliament for the Constituency and the money raised went to providing food for the delegates as well as cooking utensils. That evidence of the event was used by the Appellant to allege that there was treating for purposes of the campaign. That the Appellant had failed to establish his allegations through the evidence in the court below.

It was contended that the Appellant had not demonstrated how the trial court's findings of fact were perverse, in order to warrant a reversal. The cases of **Attorney General v Marcus Kampumba Achiume**[1] and **Wilson Masauso Zulu v Avondale Housing Project Limited**[7] were cited. Counsel ended by quoting the latter case where it was held that:-

> *I think that it is accepted that where a plaintiff .....makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case. As we said in Khalid Mohamed v The Attorney-General, quite clearly a defendant in such circumstances would not even need a defence.*

At the hearing counsel for the Appellant, Mr Yalenga, augmented grounds one and two orally. He averred that even though the literal interpretation of section 97 of the EPA, 2016 demands that an election can only be nullified upon proof that the majority of voters were or may have been prevented from electing a candidate of their choice as a result of the said illegal act, this Court should go further and apply other rules of statutory interpretation for purposes of removing from the electoral process the mischief of most politicians engaging in illegal or corrupt practices. Further, Counsel informed this Court that he was not aware of any statutory definition of a campaign or political rally but was relying on the case of **Mazoka and Others v Mwanawasa and Others**[2] and **Albertina Bulongo**

Pota v Sililo[3], to argue that a candidate is not a candidate only after filing of his nomination papers. When the Court prodded further, counsel conceded that no evidence was led to show that the majority of voters were affected by the meeting at Lwakela.

The Respondent's Counsel, in their oral response, relied upon their filed submissions. By way of addition, Mr. Banda, relying on articles 1, 8 and 267 of the Constitution as amended, argued that the Members of Parliament had a duty to their Constituency and their mandate extended to carrying out the aspirations and wishes of the people. He argued therefore that there was need to respect the wishes of the majority of the people in the Constituency. He contended that from the evidence on record, the Respondent had received over 10, 000 votes as against the Appellant's 1, 000 votes showing that the majority will had been expressed in the results. That this expression of will placed a higher burden on the Appellant to show how over 90% of the electorate were swayed by an electoral malpractice. He submitted that the appeal must fail as the Appellant did not demonstrate with sufficient clarity which provisions of the law had been breached.

In his brief reply, Mr. Yalenga conceded the arguments raised by the Respondent but submitted that persons who have engaged themselves in

illegal or corrupt practices in order to find themselves in Parliament have no place in our democratic dispensation. In closing he pleaded that each party bear his own costs.

We are grateful to counsel for the extensive submissions. We have carefully scrutinised the entire record of appeal including the judgment of the trial court. The issue as we see it is whether the trial court misdirected itself by finding that the allegations of electoral malpractice and corruption arising from the Respondent's actions at the meetings held at Lwakela Basic School, Nyakaseya village and Nkemba, were not proved to the standard required by the EPA, 2016 in order to nullify the election of the Respondent. That the trial court erred when it upheld the election of the Respondent.

Since grounds three and four were abandoned, there are two substantive grounds of appeal upon which the Appellant is asking this Court to reverse the findings of fact and law by the court below. We will deal with the two grounds in the order in which they have been argued. Before we go into the merits of the two grounds we wish to clarify some points of law and procedure raised by the appeal.

Firstly, we note that the record of proceedings in the court below shows that the Respondent's witnesses are referred to as DW as opposed to RW. The trial Judge however referred to the Respondent's witnesses as RW in his Judgment. It follows that, we will in this judgment, refer to the Respondent's witnesses as RW, as they appeared in the Judgment of the trial court.

Secondly, the Appellant has questioned the use of previous court precedents generally and in relation to the EPA, 2016 in particular. We wish to state that this Court can choose to adopt the *ratio decidendi* in any particular case where the same is still good law and applicable to the facts in issue. We said this in the case of **Stephen Katuka and Law Association of Zambia v Attorney General and Ngosa Simbyakula and 63 Others.**[9] Although the authorities cited are based on the repealed Electoral Act of 2006, and are not binding on this Court, they may nevertheless be good law. It follows that we will, where fitting, adopt the precedents established prior to the EPA, 2016.

Thirdly, the burden and standard of proof. We agree with the Respondent's submission that the burden lay on the Appellant as Petitioner in the court below to prove the allegations made in his petition against the Respondent. This is because the one alleging, that is the Appellant in this

case, (Petitioner in the court below), carries the burden of proving all the allegations. He must prove the allegations to the required standard with cogent evidence otherwise no Judgment will be entered in his favour. This principle was applied by the Supreme Court in many election petition appeals including that of **Mwalimu Simfukwe v Evaristo David Kasunga**[10] wherein it was stated that:

> *...the burden of proof was on the Respondent, who was the Petitioner in the Court below. He was required to prove all the allegations in the Petition, to a standard higher than on a balance of probabilities:*

Further, the Appellant had to prove the allegations to a fairly high degree of convincing clarity. The standard remains higher and distinct from that required in an ordinary civil matter but lower than the standard of beyond a reasonable doubt required in criminal matters. As the Supreme Court opined in the case of **Lewanika and Others v Chiluba and Others**[6] Parliamentary election petitions are required to be proved to a standard higher than on a mere balance of probability and issues raised are required to be established to a fairly high degree of convincing clarity.

We now turn to the substance of the appeal. For convenience we begin by quoting the applicable law found in section 97(2) (a) of the EPA, 2016 which provides that:-

> **97(2)The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent;**
>
> **and the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;**

Under section 97(2) (a), an election may be annulled where a petitioner shows that the alleged corrupt or illegal practice or misconduct was committed in connection with the election by the respondent or with the knowledge and consent or approval of the respondent or his election or polling agent and that, as a result, the majority of voters in that constituency were or may have been prevented from electing the candidate of their choice.

Having stated the applicable law, we now apply it to the evidence on record to determine whether the impugned acts are acts of bribery,

corruption and treating as opposed to developmental or political party meetings and if so whether they had or could have had an impact on the parliamentary choice exercised by the majority of the electorate in Ikeleng'i Constituency.

In ground one, Mr. Yalenga contended that the finding of the trial court that the meeting at Lwakela Basic School where the Respondent distributed soap, salt, pots, plates and donated K5,000.00 was not a campaign rally and therefore not an electoral malpractice or corruption, was an error both in law and fact. The Respondent on the other hand supported the lower court's finding and argued that the event in question took place outside the campaign period and was in fact responsible leadership.

We have considered the evidence on the record of appeal, through which counsel for the Appellant endeavored to demonstrate how the lower court's finding was a misdirection, by referring this Court to the statement made by the Respondent in his written answer that contradicted his subsequent testimony at the trial. Evidence that the inconsistency was confirmed by his witness RW2, Kapinga Christopher. And evidence of PW6, Stanford Dilema, who took video evidence of the meeting at Lwakela School showing that the Respondent addressed the meeting and asked

people to vote for him and as he was doing so gave out plates, pots, sugar and salt.

The record of appeal shows that the Appellant (PW1) in his testimony, said the Respondent campaigned at the School. The Appellant further testified that this was so because the video evidence showed that he had been using the hand symbol which is well known to be the symbol for the UPND despite the fact that he was the MMD Member of Parliament for Ikeleng'i Constituency. However, the Appellant admitted in his evidence that he was not present at the meeting held at Lwakela Basic School and merely "witnessed" the events in question through the video recording which he did not shoot himself.

Be that as it may, upon further perusal through the record we find that there was indeed a contradiction in the Respondent's evidence as his earlier denial in his answer turned into an admission in his evidence in chief that he had distributed the items as seen at pages 46 and 285 respectively of the record of appeal. The apparent contradiction in the Respondent's evidence is reason for us to seriously consider whether the Respondent's actions on the material day amounted to campaigning.

The EPA, 2016 does not define a campaign but provides a definition of a campaign message under section 29 (4) which provides that:-

> **29. (4) For the purposes of this section "campaign messages" means an activity, statement or any other form of expression aimed at promoting particular political ideas, policies and strategies for purposes of obtaining votes for a candidate or political party contesting an election.**

This definition is almost similar to that provided in the case of **Norris v United States**[11] at page 382 where a campaign was defined as:-

> *All the things and necessary legal and factual acts done by a candidate and his adherents to obtain a majority or plurality of the votes to be cast in any election for a public office.*

For the sake of clarity, we wish to draw a distinction between a campaign action and a philanthropic activity. Whilst both may be constituted by the same course of conduct the purpose and timing of undertaking the action distinguishes them. And whilst the former is confined to a specific time frame, the latter is not. In **Reuben Mtolo Phiri v Lameck Mangani**[12] it was stated that:

> *Philanthropic activities is the practice of helping the poor and those in need, especially by giving money and services....In Zambia, philanthropic activities include developmental projects.*

This is the definition we wish to adopt in order to determine whether the Respondent was campaigning or conducting some philanthropic activity as the incumbent Member of Parliament for the Constituency.

In as much as the Respondent has argued that the acts in question were part of his responsibility as Member of Parliament in that constituency, the evidence shows that he asked for votes during the said meetings. This is the evidence of his own witness RW3, which evidence also confirms that the Respondent had expressed a desire to stand under the UPND ticket. The Respondent, when asked in cross examination whether he had told people to vote for him stated at page 326 of the record of appeal as follows:-

> *Of course, it's natural at every meeting for a politician. Every time, you have to remind them, when you have got enemies, who are campaigning already.*

From the foregoing and other facts alluded to earlier, we find that the Respondent was soliciting for votes at the meeting at Lwakela School which act falls within the definition of a campaign aforementioned.

The decision of the court below at J28 was that-

> *At Lwakela Secondary School .....the Respondent stated that this was another get together for the members of the Parents and Teachers Association (PTA) of the school who had held the meeting to appraise the Respondent progress made on the school which was being extended. There was also an understanding that*

him as Member of Parliament will play the role of providing essential items they were lacking and them as a community to offer manpower. This was an ongoing arrangement with the community of Lwakela area. I find this to be true. And I find this arrangement to affect a small part of the community and therefore limited to that area only and did not have a bearing on the results of the whole Ikeleng'i Constituency.

.....this incidence happened in April, 2016 while the Respondent was still the incumbent Member of Parliament of the area under the Movement for Multi-party Democracy (MMD.)(sic)

Whilst we appreciate the fact that the Respondent was the Member of Parliament for Ikeleng'i Constituency and was expected to perform his duties at the time, the finding at page J28 that that was all he was doing, when there is overwhelming evidence to show that he was asking for votes is not tenable. The finding by the trial Judge that the Respondent was not campaigning was made on a misapprehension of the evidence on record which shows otherwise.

We are mindful that an appellate court, will not lightly interfere with the findings of fact of a lower court and not reverse those findings unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. The case of **Attorney General v Marcus Kampumba Achiume**[1] is on point. However our

analysis of the evidence on record as well as the applicable law goes to show that we are justified to reverse this finding. In so holding, we draw on established precedents.

Having found that the Respondent's actions at Lwakela School went beyond philanthropic activity to campaigning, we must consider the fact that the activity took place in April, 2016 whilst the Respondent was still Member of Parliament for Ikelen'gi and before the official campaign period was announced by the Electoral Commission of Zambia (henceforth referred to as the ECZ). We see three distinct questions: First, whether the impugned actions are covered by the EPA, 2016. Second, whether the Respondent was a "candidate" at the time of the impugned actions. And third, whether it is possible to clearly discern the campaign period so as to exclude the impugned actions.

We begin with the applicability of the EPA, 2016. The meeting at Lwakela School was said by the Respondent's counsel, to have taken place in April, 2016 before the election campaign period had been announced which period began on 11th May, 2016 and that therefore it did not constitute a political campaign rally. It is not in dispute that the meeting was held before the official campaign period had been set by the ECZ. As per the Appellant's argument, the question is indeed whether the fact that

these acts were done outside the declared official campaign period means they are not caught up by the EPA, 2016 as an illegal or corrupt practice or electoral malpractice. The question that has therefore arisen is whether the facts in issue are governed by the EPA, 2016 and further whether they constitute electoral misconduct as envisaged by section 97 of the EPA, 2016. We see no difficulty.

The repealed Electoral Act of 2006 in section 79 (1) (c) provided that:-

> **(79) (1) Any person who corruptly either directly or indirectly, by oneself or any other person—**
>
> .....
>
> **(c) makes any gift, loan, offer, promise, procurement or agreement to or for any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;**

The equivalent of section 79 is section 81 of the EPA, 2016. Section 81 (1) (c) of the EPA, 2016 provides that:-

> **81 (1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly—**
>
> .....
>
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavour to procure the return of any candidate at any election or the vote of any voter at any election;**

The said section 81 (1) (c) only shows minor variations in the phrasing. A close look at the subject matter of the two provisions shows

that the same actions proscribed under the EPA, 2016 were already proscribed by section 79 of the Electoral Act of 2006. Thus the wording of section 81 does not per se create any different or new offences from those under section 79 of the repealed Act.

To prove his case, the Appellant previously had to establish under the repealed section 79 and presently under the current section 81 that the Respondent directly or indirectly, by himself or through his election or polling agent or with any other person corruptly made gift(s), loan(s), offer(s), promise(s), procurement or agreement and that the said act(s) were made to or for the benefit of himself or any other person; that the said act(s)were intended to induce the person to procure or to endeavor to procure the return of any candidate (including the Respondent himself) at any election or the vote of any voter at any election. To the extent aforesaid the law has not changed.

Furthermore, we take cognizance that the Constitution provides in Article 267(3) that:

> **A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force and accordingly-**
>
> **(d) a reference in a provision applying that provision to another provision shall be read with any modification necessary to make it applicable in the circumstances and any reference to the modified provision shall apply as modified;**

We are mindful of the position enunciated by section 14 (3) (e) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia which provides that:-

> **(3) Where a written law repeals in whole or in part any other written law, the repeal shall not-**
>
> .....
>
> **(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.**

The impugned conduct was prohibited by the repealed law and when the new law came into force, it continued the prohibition thereafter without any break. We are alive to the Supreme Court decision in the case of **C & S Investments Limited, Ace Car Hire Limited, Sunday Maluba v The Attorney General**[13] where it was opined:-

> *That it is well settled that merely a wrong reference to the power under which certain actions are taken by government would not per se vitiate the actions done if it can be justified under some other power under which the government could lawfully do these acts..... If the effect of the repeal, is to resurrect the provisions in substantially the same form in another enactment, such new enactment would in our view, be a legitimate source of power. (emphasis ours)*

As the law proscribing election corruption, bribery and treating has been continuously in force during the period when the events at Lwakela, Nyakaseya and Nkemba took place, resort to section 81 of the EPA, 2016

is not fatal under the circumstances. Additionally the nature of the allegation put forward suggests that it was committed in connection with the elections that were subsequently held in August, 2016 when the EPA, 2016 had come into operation.

We now turn to the question of the Respondent's candidature. Article 52 (1) of the Constitution (Amendment) Act No. 2 of 2016 provides that:-

> **(1) A candidate shall file that candidate's nomination paper to a returning officer, supported by an affidavit stating that the candidate is qualified for nomination as President, Member of Parliament or councillor, in the manner, on the day, and at the time and place set by the Electoral Commission by regulation.**

The facts on record show only that the Respondent had applied to be adopted as an aspiring candidate under the UPND between March and April, 2016 which was before the official filing of nominations with ECZ. The Respondent cannot be considered to have been a candidate in the August, 2016 general elections at the time the meeting was held at Lwakela Basic School as he had not received the sponsorship of UPND nor had he filed in his nomination with ECZ. The mere fact that he had used the hand symbol to solicit for votes or even expressed intention of standing under the UPND ticket does not mean that he was officially a candidate. Therefore the case

of **Mazoka and others v Mwanawasa and others**[2] does not help the Appellant as it was stated in that case that:-

> *.....we find that a person becomes a candidate, for purposes of participating in a Presidential election, from the day that he or she accepts the nomination or sponsorship of a political party. We are, therefore, satisfied that in terms of the constitutional provisions, the Electoral Act and the Regulations made thereunder, a person becomes a candidate and, therefore, qualified to stand in the Presidential elections well before nomination day....*

In addressing the final question whether the campaign period was clearly demarcated, we refer to section 28 (1) (a) (v) of the EPA, 2016 whose provisions are as follows:-

> *(1) Subject to the Constitution, the Commission shall, before the polling day—*
> .....
> *(a) compile an election timetable for each election to provide for the following:*
> .....
> *(v) the opening and closing dates of the campaign period;*

The mandate for setting the official commencement date of campaign activities is assigned to the ECZ. Section 2 of the EPA, 2016 goes further to elaborate that the campaign period is a period of three months before the holding of an election. Moreover article 56 of the Constitution of Zambia as amended by Act No. 2 of 2016 provides that the holding of a general election shall be on the second Thursday of August after every five years from the last general election. This entails that the day of the elections is now known well before hand and in addition, there is a clear-cut period that

has been set for political parties and/or independent candidates to conduct their campaigning in anticipation of any upcoming elections.

These provisions were enacted in the Constitution and the EPA, 2016 for good reason; particularly considering the fact that many potential candidates in the anticipated general elections will before such a time be performing their respective duties at different levels in their respective wards and/ or constituencies or even ministries. The law therefore draws a line between performing their government related duties and their vying to stand for elective office.

Even though we are of the considered view that the Respondent was campaigning at the Lwakela School meeting before the campaign period, the EPA, 2016 cannot be invoked in the circumstances. Whether a sitting Member of Parliament is allowed to campaign in the process of carrying out his official duties or whether he commits an illegal act by campaigning before the campaign period is not provided for under the invoked provisions of the EPA, 2016.

We are mindful that Mr. Yalenga has urged this Court to apply other canons of interpretation; however we are of the considered view that there is no ambiguity in the circumstances that would warrant this Court to divert

from the literal interpretation of section 97(2) (a) which is clear. We are fortified in this approach by the **Mazoka and others v Mwanawasa and others**[2] case wherein it was stated that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other canons of interpretation. We conclude that the impugned events at Lwakela did not constitute electoral malpractice that satisfies the threshold in section 97(2) (a). Ground one is therefore only partially successful in that the trial judge misdirected himself in his finding that the meeting at Lwakela School was not a campaign rally. However, the reversal of the trial Judge on that one element is insufficient to support nullification of the election under section 97(2) (a) of the EPA, 2016.

We are also alive to the fact that there is a further element to nullification under section 97(2) (a) of the EPA, 2016 as mere proof of a corrupt act does not suffice. The evidence has to show that the majority of voters were or may have been prevented from electing the candidate whom they preferred as a result of a proven proscribed act. In our considered view, having found that the campaigning took place outside of the official

campaign period envisaged by the EPA, 2016 there is no material upon which to consider the second element of the offence, which is its impact on the majority of the voters in Ikeleng'i Constituency. It follows that, the trial court's finding on the second element that the act was limited to the Lwakela School area and had no bearing on the results of the whole constituency was unnecessary once the court found the first element was not proved.

In ground two, the Appellant is also asking this Court to reverse findings of fact made by the trial Judge. Ground two relates to two meetings. The first at Nyakaseya and the second at Nkemba. The evidence in relation to both events was disputed by the parties and the court's findings appear at page J27 to J28 of the Judgment. We quote from the judgment verbatim:-

> *The Respondent has not denied that he held a meeting on the grounds of the Catholic Church in Nyakaseya. He stated that this meeting was organized by the two executives of the two political parties that is UPND and MMD who wanted to merge and float one candidate for the elections as a member of parliament. The local officials are the ones who arranged this consultative meeting to call all the office bears in all the 9 wards in the constituency. Each ward had to send 24 people from each party and that meant approximately 432 people from UPND and MMD. The organizing committee even on their own raised money through donations to come and host these delegates. There were the ones who were treated by two the parties together (sic). The unauthorized people who attended*

this consultative meetings they strayed into this gathering of the parties and to them it seemed as if the delegates were being treated by the Respondent. I believe the explanation put up by the witnesses of the Respondent who impressed me rather than the witnesses of the petitioner...

In relation to Nyakaseya, the Appellant alleges that at the time of the meeting the Respondent had already applied to stand on the UPND ticket a claim which is supported by his testimony at page 332 of the record of appeal which also shows that he had asked for votes. Counsel referred us specifically to the evidence of RW2 at page 373 of the record of appeal where he tells the trial court that the Respondent wanted a vote from the officials after the consultation. Further, PW4 testified that the meeting held at the Catholic Church was announced in church by the Church Secretary who stated that the Respondent was coming to the area and that he wanted to meet with the members of the Nyakaseya community. PW3 is also on record saying that she witnessed the Respondent distributing meat at a rally held at the Catholic Church in Nyakaseya and asking people to vote for him. Finally, the Appellant argued that the number of people in attendance at the Catholic Church in Nyakaseya was far too many for a consultative meeting which ranged from approximately 200 to 500 considering the evidence of the Respondent and his witness RW2.

However, other evidence on record shows that this meeting in Nyakaseya at the Catholic Church, was not open to the general public. That it was restricted to the UPND and MMD party officials for purposes of nominating someone from UPND or MMD to stand in the scheduled parliamentary elections. According to RW1, the gathering was a consultative meeting which he organized so that he could be guided on the strategy as to the way forward as MMD was "torn apart" by having members being "pulled" by the PF and UPND. There is also evidence at page 292 of the record from RW1 to show that various items like pots and plates as well as food were given out at the meeting as the party officials had to be fed by the party organizing committee.

The evidence of PW4 is in tandem with the evidence of PW3 when she alleges that the event at the Catholic Church took place and that the items in question had been distributed. It does not however support the allegation that it was a public meeting as PW4 identified himself to have belonged to the UPND at the time of the meeting which sits well with the Respondent's claim that the meeting was restricted to the UPND and the MMD officials.

The Appellant did not prove his allegation to the required standard of a fairly high degree of convincing clarity. We cannot fault the trial judge's

finding that the meeting at Nyakaseya was not a campaign rally but was restricted to UPND and MMD officials.

With regard to the meeting at Nkemba, the Respondent testified that, the meeting, did not take off as it rained heavily just when he was about to address the meeting. He averred that they all proceeded to a market shelter but even there they could not hold the meeting and they subsequently dispersed. RW2 also informed the trial court that the meeting at Nkemba was a consultative meeting for the general public. He confirmed that a few minutes after the meeting had started the rain began and there was no distribution of any items. PW5 on the other hand testified that the meeting at Nkemba did take place and the Respondent distributed various items from which she was given a pot. She also told the court that she held the position of chairlady in the PF whilst PW3 said that she was a member of the PF. We find that the claim that a meeting allegedly took place at Nkemba at which items were distributed to people is not supported by any independent evidence on record. We are fortified by our decision in the case of **Steven Masumba v Elliot Kamwendo**[14] wherein we indicated that witnesses from a litigant's own political party are partisan witnesses who should be treated with caution and require corroboration in order to eliminate the danger of exaggeration and falsehood.

We see no reason to interfere with the trial judge's finding beyond our own finding that the Respondent himself gave contradictory evidence and assigning his remaining testimony less weight. The said contradictions could not have formed the basis for the lower court to disbelieve or totally discard the testimony of the Respondent or his witnesses given the principle in **Ndongo v Moses Mulyango and Another**[15] wherein, the Supreme Court declined to do away with evidence of a Respondent even after finding contradictions in his evidence as it was able to find other evidence from the appellant's own evidence to support the fact in issue.

The trial court had the benefit of seeing the witnesses' demeanor and hearing their evidence first hand and therefore in exercising our appellate role, we will not, as we have said before, lightly interfere with its finding in relation to the credibility of witnesses; mindful as we are, that the trial court found the Respondent's witnesses more credible and believed their testimony rather than that of the Appellant's witnesses. And particularly, in the absence of cogent evidence to show a misapprehension of the facts on record, we find the case of **Samson Mbavu and Others v The People**[16] to be on point in this regard. It was stated in that case that:-

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do*

so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

We cannot fault the trial Judge in finding as he did. This is because the Appellant's witnesses were suspect witnesses with a possible interest to serve who had to be treated with caution. It was incumbent upon the Appellant to corroborate his witnesses' evidence by presenting before the trial court independent evidence of the allegations put forward. Since the Nyakaseya meeting was essentially a private gathering for the benefit of the political parties in question, the Appellant has not shown how the activities of the Respondent therein could be an electoral malpractice.

We reiterate what we have already stated on numerous occasions, he who alleges must prove and in this case the burden lay on the Appellant to show how the Judge had misdirected himself in the findings in ground two. We thus find that ground two of this appeal has no merit and it is

dismissed in its entirety as the evidence on record falls short of meeting the required standard set in election petitions of a fairly high degree of convincing clarity. The appeal stands dismissed. We uphold the decision of the lower Court to declare the Respondent, the duly elected Member of Parliament for Ikeleng'i Constituency.

Since the appeal garnered partial, albeit insignificant success, in ground one, each party shall bear their own costs.

.....

A.M. Sitali

Constitutional Court Judge

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M.S. Mulenga

Constitutional Court Judge

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E. Mulembe

Constitutional Court Judge

.....

P. Mulonda

Constitutional Court Judge

.....

M M Munalula

Constitutional Court Judge