

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

2021/CCZ/A0020

IN THE MATTER OF: **ARTICLE 47(2), 54, 68, 72(2) (C), 99 OF THE
CONSTITUTION OF ZAMBIA, CHAPTER 1 OF
THE LAWS OF ZAMBIA**

IN THE MATTER OF: **SECTIONS 81, 83, 89, 97(1), 98(c), 99, 100(2)
AND 106(1) (a) OF THE ELECTORAL PROCESS
ACT NO. 35 OF 2016**

IN THE MATTER OF: **THE CODE OF CONDUCT RULES**

IN THE MATTER OF: **PARLIAMENTARY ELECTION PETITION
RELATING TO THE PARLIAMENTARY
ELECTION HELD IN LUNTE CONSTITUENCY ON
12TH AUGUST 2021**

IN THE MATTER OF: **AN ELECTION PETITION BY CHASAYA
KATONGO AND JUSTINE CHONGO**

BETWEEN:

MUTOTWE KAFWAYA

AND

CHASAYA KATONGO

JUSTINE CHONGO

ELECTORAL COMMISSION OF ZAMBIA



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM: **Sitali, Mulenga, Mulonda, Munalula, Mulongoti, JJC on 9th
February, 2022 and 13th April, 2022**

For the Appellant : Mr. T. S. Ngulube,
Miss K. Mwila and
Mr. F. Chipompela of
Tutwa S. Ngulube and Company

For the 1st Respondent : Mr. B. Sitali of
Butler and Company Legal Practitioners

For the 1st and 2nd Respondents: Mr. J. Mataliro and
Mr. D. Mwaba of
James and Doris Legal Practitioners

For the 3rd Respondent : Mr. B. Musenga and
Mr. M. Bwalya
In-house Counsel

J U D G M E N T

Sitali, JC, delivered the judgment of the Court.

Cases cited:

1. Alfonso G. Chungu and Others v Anthony Kasandwe and Another, 2021/HN/EP/004
2. Haonga and Others v The people (1976) Z.R. 200
3. Attorney-General v Kakoma (1975) Z.R. 212
4. Simasiku Kalumiana v Geoffrey Lungwagwa and the Electoral Commission of Zambia, 2006/HP/EP/007
5. Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007
6. Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13 of 2017
7. Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney-General, Selected Judgment No. 51 of 2018
8. Margaret Mwanakatwe v Charlotte Scott, Selected Judgment No. 50 of 2018
9. Nakbukeera Hussein Hanifa v Kibule Ronald and Another (2011) UGHC 64
10. Christopher Kalenge v Annie Munshya and Two Others, 2011/HK/Ep/03
11. Changano Kakoma Charles v Kundoti Mulonda, Appeal No. 5 of 2017
12. Abiud Kawangu v Elijah Muchima, CCZ Appeal No. 8 of 2017
13. Chrispine Siingwa v Stanley Kakubo, CCZ Appeal No. 7 of 2017
14. Steven Masumba v Elliot Kamondo, Selected Judgment No. 53 of 2017
15. Mbololwa Subulwa v Kaliye Mandandi, Selected Judgment No. 25 of 2018

16. Godfrey Chimfwembe v The People SCZ/9/145/2013
17. Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa (2005) Z.R. 138
18. Madubula v The People SCZ Judgment No. 11 of 1994
19. Chief Chanje v Paul Zulu SCZ Appeal No. 73/2008
20. Attorney General v Marcus Achiume (1983) ZR 1
21. GDC Hauliers (Z) Limited v Trans Carriers Limited (2001) Z. R. 47
22. Saul Zulu v Victoria Kalima, SCZ Judgment No. 2 of 2014
23. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z. R. 97
24. Austin Liato v Sitwala Sitwala, Selected Judgment No. 23 of 2018
25. Richwell Siamunene v Sialubalo Gift, Selected Judgment No. 58 of 2017
26. Kufuka Kufuka v Mundia Ndalamei, CCZ Appeal No. 15 of 2016
27. Examination Council of Zambia v Reliance Technology Limited SCZ Judgment No. 46 of 2014
28. Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia Selected Judgment No. 57 of 2017

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment Act No. 2 of 2016).
2. The Electoral Process Act No. 35 of 2016, section 97 (2) (a).

1.0 INTRODUCTION AND BACKGROUND

[1.1] The Appellant, Mutotwe Kafwaya, who was the 1st Respondent in the Court below, appeals against the decision of the High Court to nullify his election as Member of Parliament for Lunte Constituency. The Appellant and the 1st and 2nd Respondents, Chasaya Katongo and Justine Chongo, were three of five contenders for the Lunte Constituency seat in the parliamentary election held on 12th August, 2021.

[1.2] The Appellant was the candidate for the Patriotic Front party (PF) in the election, the 1st Respondent was the candidate for the United Party for National Development (UPND) while the 2nd Respondent was an independent candidate. Two other candidates contested the election on the Democratic Party (DP) ticket and on the Socialist Party (SP) ticket, respectively.

[1.3] The Appellant was declared as the duly elected Member of Parliament for Lunte Constituency having received six thousand, nine hundred and ninety-two (6,992) votes; the 1st Respondent was runner-up having received five thousand, three hundred and ninety-one (5,391) votes; while the 2nd Respondent was in third place with five thousand and eighteen votes (5,018). The other two candidates shared the remaining valid votes which were cast.

[1.4] Dissatisfied with the election results, Chasaya katongo filed a petition before the High Court against Mutotwe Kafwaya and the Electoral Commission of Zambia as 1st and 2nd Respondents, respectively, while Justine Katongo filed a separate petition against Mutotwe Kafwaya only. Both petitioners sought a declaration that the Appellant was not duly elected as Member of Parliament for Lunte Constituency and that the election was a nullity. The two petitions

were subsequently consolidated by the learned trial Judge. In the consolidated petition, the Court designated Chasaya Katongo as the 1st Petitioner, Justine Chongo as the 2nd Petitioner, Mutotwe Kafwaya as the 1st Respondent and the Electoral Commission of Zambia as the 2nd Respondent, respectively.

[1.5] In his petition, Chasaya Katongo, the 1st Respondent, alleged that the campaigns and voting in the election were characterized by bribery, corruption and undue influence of voters and general violations of the Electoral Process Act No. 35 of 2016. He alleged that on 11th August, 2021 and on the polling day, 12th August, 2021, the Appellant and his agents commandeered the disbursement of social cash transfer funds in the entire Lunte Constituency and increased the amount from the authorized K130 to K300 which they paid to voters as a bribe and an inducement for them to vote for the Appellant.

[1.6] He also alleged that on polling day, the Appellant and his agents prepared nshima, beef and chicken which they positioned on routes to polling stations. They gave K20.00 to each voter and instructed them to vote for the Appellant and return to eat the food. It was alleged that prior to voting, the Appellant and his agents informed

the voters that there were cameras in the polling booths and that if they did not vote for the Appellant, they would be identified and would be disqualified from receiving future social cash transfer funds and would also not partake of the meal.

[1.7] It was further alleged that on polling day, an NGO known as GGOZA affiliated to the PF, together with the Appellant's agents, hired vehicles and ferried voters to polling stations. A PF official was deployed on the vehicles to direct voters to vote for the Appellant and to inform them that if they did not vote for the Appellant, they would be identified by cameras placed in the polling booths.

[1.8] Furthermore, it was alleged that on polling day the Appellant went to Fitaba, Mukolwe, Sambala and Filipino polling stations and took pictures of the inside of the polling stations in the presence of the presiding officer. He then announced to voters on the queue that the pictures he had taken of the polling booths would be uploaded on to the computer and that anyone who voted for the UPND would be identified and dealt with.

[1.9] The 1st Respondent alleged that the Appellant and the 3rd Respondent's agents denied him and his campaign manager access to the totaling center at Vincent Bulaya while the Appellant was

allowed in as the results were announced; and that although Lunte Constituency has 65 polling stations, he and his agents were only given Gen 20 forms for 20 polling stations.

[1.10] The Appellant filed an Answer to the 1st Respondent's petition with an opposing affidavit in which he denied engaging in any acts of corruption involving the distribution of K20.00 notes to voters or cooking food for voters in the vast constituency as alleged. He further denied that he told voters that there were cameras placed in polling booths and asserted that if that were true, he would have obtained 100% votes in the election.

[1.11] He further denied any involvement in distributing social cash transfer or increasing the amount to K300.00 which he averred was not possible to do in such a vast constituency. He denied any involvement in the preparation of nshima for the electorate on polling day. He also denied any knowledge or linkage to the Non-Governmental Organisation (GGOZA) before or during the elections. He contended that he was duly elected as Member of Parliament for the constituency.

[1.12] The Electoral Commission of Zambia (as 2nd Respondent) filed its Answer to the petition in which it denied all the allegations set out

in the petition. It averred that it did not receive any objection from the Petitioner in the prescribed form or at all and asserted that its electoral staff complied with the provisions of the electoral laws and regulations before, during and after the elections.

[1.13] The 2nd Respondent, Justine Chongo, alleged in his petition that the Appellant engaged in corrupt and illegal practices prior to and during the elections. He specifically alleged that the Appellant and or his agents on 11th August 2021 bribed and induced voters by handing out sums of money so that they could vote for him. That on polling day, they handed out money to groups of voters at the barrier and entrance to polling stations.

[1.14] He further alleged that the Appellant and or his agents threatened the voters by telling them that those who did not vote for the Appellant would be detected by security cameras placed in polling booths. He contended that the Appellant and or his agents bribed voters through mass distribution of mealie meal, cooking oil and sugar at all polling stations; and that on the polling day they slaughtered numerous cows, goats and chickens and prepared meals. He alleged that they told the voters to go and vote for the Appellant and return to partake of the meals prepared.

[1.15] It was further alleged that the Appellant and or his agents widely disseminated false information to voters in the constituency, particularly targeting those eligible for the social cash transfer, that if the Appellant was not duly elected as Member of Parliament for the constituency, the social cash transfer programme would be discontinued.

[1.16] Lastly, the 2nd Respondent contended that although he had two polling agents in each of the 65 polling stations in Lunte Constituency, his polling agents in some polling stations did not counter sign for the election results announced by the presiding officer at those polling stations as being true and correct.

[1.17] The Appellant filed an Answer to the 2nd Respondent's petition in which he denied engaging in any corrupt or illegal practices before and during the elections as alleged. He denied handing out cash to voters or distributing food stuff to voters at polling stations; he asserted that he did not slaughter any cows, goats or chickens to feed voters and stated that the places where this was allegedly done were not disclosed and that the allegations were a smear campaign intended to show that his campaign was bad.

[1.18] He also denied that he had any connection to, or that he influenced, the social cash transfer programme and stated that he could not be held accountable for it. He further asserted that he only had one election agent and was not responsible for the conduct of elections; that any complaints should have been reported to the Electoral Commission of Zambia or to the law enforcement agencies. He stated that he was duly elected as Member of Parliament for Lunte Constituency.

[1.19] In his reply, the 2nd Respondent reiterated that the Appellant engaged in corrupt and illegal practices prior to, and during, the election; that individuals who worked on his behalf during the campaign period handed out cash to voters and distributed food to persuade voters to vote for the Appellant; that the activities complained of were widespread and influenced the outcome of the election in the constituency. He also stated that he would prove that the Appellant was not duly elected as Member of Parliament for Lunte Constituency.

[1.20] At the trial of the petitions, Chasaya Katongo (1st Respondent) testified in support of his petition as PW1 and called twenty-three other witnesses. Justine Choongo (2nd Respondent)

testified as PW25 and called twelve other witnesses. In rebuttal, the Appellant, (as 1st Respondent) testified as RW1 and called two other witnesses. The Electoral Commission of Zambia, as the 2nd Respondent, did not call any witnesses.

[1.21] The learned trial Judge identified four allegations (from both Petitions) for his determination: the first allegation was that the Appellant with the assistance of his agents commandeered the disbursement of social cash transfer funds in the entire Lunte Constituency, from the person duly authorized to disburse the said funds and erected and manned pay points at which social cash transfer money was being disbursed to the electorate as an inducement for the electorate to vote for the 1st Respondent.

[1.22] Secondly, that the Appellant and his agents were involved in treating of registered voters through mass distribution of foodstuff at all polling stations, particularly mealie meal, cooking oil and sugar and prepared nshima with beef and chicken, which they positioned on various routes to polling stations to secure the vote of the Appellant by voters; thirdly, that the Appellant's polling agents in some polling stations were not allowed by the presiding officers to countersign on the Gen 20 forms and that there was non-compliance

in the conduct of the elections; and fourthly, that the campaigns and voting in the election were characterised by bribery, corruption and undue influence of voters and that the Appellant and or his agents further enticed the registered voters through the gifting of sums of money and threatened them by cautioning them that cameras would be placed in the polling booths to determine whether or not they voted for the Appellant.

[1.23] The learned Judge set out the evidence adduced by the petitioners on the four allegations and held that the petitioners had not proved the first three allegations made against the Appellant to the required standard and dismissed them. The trial Judge found that the allegation that the Appellant gave money to the voters and threatened them by alleging that cameras placed in polling booths would detect those who did not vote for him had been proved to the required standard and therefore, upheld the petitions and accordingly declared the election of the Appellant void. He further declared that the Appellant was not duly elected as Member of Parliament for Lunte Constituency.

[1.24] Aggrieved by the decision of the lower Court, the Appellant appealed to this Court and advanced eleven grounds of appeal set out verbatim as follows:

- 1) **The trial judge erred in law and in fact when he nullified the election of the Appellant despite almost all witnesses disputing the 1st Respondent's version of the testimony and inspite of all the witnesses refusing having seen the appellant in most of the alleged places.**
- 2) **That the trial court erred in law and in fact when he held that the malpractices were widespread despite knowing that the Appellant had not campaigned in all the polling stations in Lunte Constituency.**
- 3) **The trial court erred in law and in fact when he failed to warn himself of the dangers of receiving evidence from partisan witnesses who alleged that the Appellant herein was giving out money during various meetings held before elections.**
- 4) **The trial court erred in law and in fact when he failed to resolve the contradictory statements of the Respondent's witnesses and make a finding but instead believed all the contradictory statements at once and relied on them to nullify the Appellant's election.**
- 5) **The trial court misdirected himself when he made a finding of fact that the Appellant took advantage of the illiteracy of the general populous in Lunte Constituency without any evidence laid before him to support the alleged illiteracy in Lunte and thereby fell into grave error.**
- 6) **The trial court erred in law and in fact when he was fortified that the misconduct of the Appellant herein was widespread in the absence of cogent evidence from the Respondents to prove the alleged meetings the Appellant was attending in the wards that constitute Lunte Constituency.**

- 7) **The trial court erred in law and in fact when he failed to analyse the evidence of the parties to the Petition and their witnesses both in examination in chief and cross examination before nullifying the election of the Appellant.**
- 8) **The trial court erred in law and in fact when he nullified the election of the Appellant herein based on the evidence of malpractice which was not proven to a standard required under the law.**
- 9) **The trial court misdirected himself when he considered the admission of documents during cross examination of a witness by the 2nd Respondent without due regard to the prejudice that was going to be occasioned to the Appellant herein who had already cross-examined the witness.**
- 10) **The trial court erred in law and in fact when he failed to critically analyse evidence before him when he ignored some questions put across in cross examination by the Appellant herein thereby misdirecting himself.**
- 11) **The trial court erred in law and in fact when he ignored the responses given by various witnesses who in cross examination pointed out that they did not see the Appellant herein giving out money but that the same was being given by party officials.**

2.0 APPELLANT'S ARGUMENTS

[2.1] The Appellant filed heads of argument in support of the appeal which Mr Ngulube, counsel for the Appellant, relied on and augmented with oral submissions. Grounds one, four, seven, ten and eleven were argued together, grounds two and six were also argued together while grounds three and eight were argued

separately. No written arguments were proffered on grounds five and nine of the appeal.

[2.2] In arguing grounds one, four, seven, ten and eleven, the Appellant submitted that the 1st and 2nd Respondents' witnesses gave contradictory evidence in the Court below. The Appellant argued that PW4 and PW5 whom the trial court heavily relied upon, failed to identify the Appellant and gave contradictory statements regarding what the Appellant was wearing on the material day and what vehicle he was driving.

[2.3] He stated that PW4 on page 433 of volume 2 of the record of appeal testified that the Appellant was driving a mini bus while PW5 at page 442 of the same record testified that the Appellant was wearing a blue shirt and driving a canter. The Appellant contended that PW5 said most of PW4's testimony was false when asked similar questions to those PW4 was asked.

[2.4] He submitted that PW8 at page 470 of the record of appeal testified that the Appellant was distributing money to the public and was wearing a white shirt and driving a canter in contradiction of the testimony of PW5. The Appellant further submitted that PW7, PW8 and PW9 gave contradictory statements regarding the incident at

Filopo where it was alleged that the Appellant gave money to the electorate. PW7 and PW9 testified that the Appellant threw the money in the air while PW8 testified that the money was put on the table.

[2.5] Regarding the allegation relating to social cash transfer, the Appellant submitted that PW29 at page 271 of the record of appeal in cross examination testified that the Appellant had nothing to do with the registration and distribution of the social cash transfer, that at page 772 PW29 said he was not aware of any meals being cooked at Chitoshi polling station while at page 774, he said that he was not given any money by the Appellant to vote for him.

[2.6] The Appellant referred to the evidence of PW30 in examination in chief on page 780 of the record of appeal where he testified that he was given mealie meal and cooking oil by the ward chairman. In cross examination at page 784 to 786 of the record of appeal however, PW30 said he got the mealie meal and cooking oil from the Appellant.

[2.7] He also referred to PW37's testimony on page 896 of the record of appeal where he said the Appellant was giving money to would be voters. However, in cross examination at page 909 of the record of appeal, PW37 said he never received money from the Appellant and

denied seeing the Appellant give money to Victor Bwalya. The Appellant submitted that this witness contradicted himself regarding who was cooking meals for voters. Further, that the witness said the Appellant was not present when the mealie meal and other food were distributed. The Appellant contended that it was very dangerous to invalidate an election based on the testimony of such witnesses.

[2.8] The Appellant submitted that the trial court did not address the contradictions or warn itself regarding the contradictions. Instead, the learned Judge at page 85 of the record of appeal made a finding of fact that the Appellant was guilty of bribery. The Appellant cited the learned authors of Halsbury's Laws of England, 4th edition, volume 15 at paragraph 780 cited by the High Court in the case of **Alfonso G. Chungu and Others v Anthony Kasandwe and Another**

⁽¹⁾ wherein the Court held that:

due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however, insignificant that act may be, is sufficient to invalidate the election; for this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive. (Emphasis added)

[2.9] The Appellant contended that in the present case, the trial court relied on evidence that was neither conclusive nor sufficient. He

submitted that no video, audio or other documentary evidence was produced by the 1st and 2nd Respondents in the lower court making the testimonies of their witnesses suspicious and requiring corroboration. The Supreme Court case of **Haonga and Others v The people** ⁽²⁾ was cited in support of the submission that where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his evidence is reduced. Further reliance was placed on the case of **Attorney-General v Kakoma** ⁽³⁾ wherein it was held that a Court is entitled to make findings of fact where the parties advance directly conflicting stories, and the Court must make those findings on the evidence before it, having seen and heard the witnesses giving that evidence. The Appellant invited us to take into account the Latin maxim *allegens non est audienus* which means he that alleges things contrary to each other should not be heard.

[2.10] The Appellant submitted that in light of all the contradictions, the learned Judge in the lower court misdirected himself by drawing conclusions from contradictory and uncorroborated evidence. He cited the case of **Simasiku Kalumiana v Geoffrey Lungwagwa and the Electoral Commission of Zambia**⁽⁴⁾ in support of that argument.

submitted that no video, audio or other documentary evidence was produced by the 1st and 2nd Respondents in the lower court making the testimonies of their witnesses suspicious and requiring corroboration. The Supreme Court case of **Haonga and Others v The people** ⁽²⁾ was cited in support of the submission that where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his evidence is reduced. Further reliance was placed on the case of **Attorney-General v Kakoma** ⁽³⁾ wherein it was held that a Court is entitled to make findings of fact where the parties advance directly conflicting stories, and the Court must make those findings on the evidence before it, having seen and heard the witnesses giving that evidence. The Appellant invited us to take into account the Latin maxim *allegens non est audienus* which means he that alleges things contrary to each other should not be heard.

[2.10] The Appellant submitted that in light of all the contradictions, the learned Judge in the lower court misdirected himself by drawing conclusions from contradictory and uncorroborated evidence. He cited the case of **Simasiku Kalumiana v Geoffrey Lungwagwa and the Electoral Commission of Zambia**⁽⁴⁾ in support of that argument.

[2.11] In arguing grounds two and six, the Appellant began by stating that the two grounds centered on proof of widespread malpractice or wrongs during the campaign period. The Appellant submitted that although the trial Court at page 84 of the record of appeal made a finding of fact that the alleged malpractice by the Appellant was widespread and further that the Appellant only campaigned in 8 of the 14 wards in Lunte constituency, no statistics were produced by the 1st and 2nd Respondents and no evidence was adduced as to whether the 8 wards had the majority of registered voters in the constituency in order to prove how many would-be voters were or may have been affected by the alleged actions of the Appellant.

[2.12] The Appellant proceeded to submit that where it is proved that a corrupt practice or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or the candidate's election or polling agent, the petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency were or may have been prevented from electing the candidate whom they preferred. The cases of **Mubika Mubika v**

Poniso Njeulu,⁽⁵⁾ Jonathan Kapaipi v Newton Samakayi,⁽⁶⁾ Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney-General⁽⁷⁾ and Margaret Mwanakatwe v Charlotte Scott,⁽⁸⁾ were cited in support of that submission.

[2.13] The Appellant further submitted that the mere fact that the Appellant in this case had campaigned in 8 of the 14 wards of Lunte constituency did not mean that it was proven that the Appellant's alleged corrupt or illegal practices were widespread in the constituency and prevented or may have prevented the majority of voters from electing their preferred candidate. It was submitted that Lunte constituency has 65 polling stations and yet the Respondents' witnesses referred to only a few polling stations and did not prove whether those polling stations had the greater number of registered voters so that it could be said that the Appellant's actions were widespread.

[2.14] In arguing ground three, the Appellant submitted that the 1st and 2nd Respondents' witnesses were partisan as the 1st Respondent was a member of the UPND and his witnesses were primarily members of the UPND. He contended that while the 2nd Respondent was an independent candidate and his witnesses were

seen to be independent, they also had an interest to protect. The Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and Another** ⁽⁹⁾ which was referred to in the persuasive case of **Christopher Kalenge v Annie Munshya and Two Others**⁽¹⁰⁾, was cited in support of the submission regarding partisan witnesses. In that case the Court held that in an election petition, just like in the election itself, each party is set out to win. Therefore, the Court must cautiously and carefully evaluate all the evidence adduced by the parties. And that the evidence of partisan witness must be viewed with great care and caution, scrutiny and circumspection.

[2.15] It was submitted that this Court has stated that in election matters, witnesses from a litigant's own political party are generally witnesses who fall into the category of partisan witnesses and the evidence of such witnesses should be treated with caution and requires corroboration in order to eliminate the danger of exaggeration and falsehood as such witnesses tend to exaggerate claims to support their own political parties during elections.

[2.16] The case of **Changano Kakoma Charles v Kundoti Mulonda**⁽¹¹⁾ was cited in support wherein we said that the mere fact that a witness is not partisan does not mean that such a witness is

credible and that the issue of credibility is broad and includes the demeanor and perception of truthfulness of the witness and the consistency of his testimony. The Appellant submitted that PW8, PW15, PW19, PW34 and PW37 whom the trial Court heavily relied upon admitted to being members of the UPND and therefore fell in the category of witnesses with an interest to serve as was held in the case of **Abiud Kawangu v Elijah Muchima**.⁽¹²⁾ He submitted that in that case, we held that witnesses from the same political party fall under the category of witnesses with an interest to serve and that their testimony ought to be treated with caution. He contended that in this case, the lower Court did not caution itself of the dangers of relying on witnesses with an interest to serve.

[2.17] The Appellant cited section 97(3) of the Electoral Process Act No. 35 of 2016 and submitted that the evidence adduced by the Respondents and their witnesses did not show that the Appellant took part in, or authorized the practice of any corruption; and that all the allegations were hearsay or speculation and did not establish any ground to justify the nullification of the election of the Appellant as Member of Parliament.

[2.18] In arguing ground eight, the Appellant submitted that the judgment at page 85 of the record of appeal reveals that the malpractices upon which the Appellant's election was nullified were bribery and undue influence. He contended that although the lower Court made a finding of fact that the Appellant and his agent breached section 81 of the Act, the 1st and 2nd Respondents did not adduce cogent evidence to prove that the Appellant had actually committed the wrongs complained of.

[2.19] Further, that the 1st and 2nd Respondents made accusations against the PF in general and no evidence was led to prove that the people complained against were named in the Appellant's nomination papers as his agents. The case of **Chripine Siingwa v Stanley Kakubo**⁽¹³⁾ was cited to press the point that an election agent must be specifically appointed and named in the candidate's nomination paper and that not everyone in a candidate's political party is his or her election agent.

[2.20] The Appellant submitted that the lower court referred to the testimony of PW4, PW6, PW7, PW8, PW10, PW11, PW16, PW18, PW27 and PW29 who alleged that they saw the Appellant give money to would be voters. He contended, however, that the lower Court

ignored their testimony in cross examination wherein they denied or contradicted their testimony in examination in chief. He submitted that the evidence did not prove the allegations against the Appellant to the high standard of proof required in election petitions as guided in the **Nkandu Luo**⁽⁷⁾ case.

[2.21] The Appellant contended that the 1st and 2nd Respondents lamentably failed to prove the allegations against him as Lunte Constituency has 65 polling stations and therefore, there was need for evidence to corroborate the commission of the alleged malpractices in the majority of the polling stations.

[2.22] The cases of **Steven Masumba v Elliot Kamondo**⁽¹⁴⁾ and **Mbololwa Subulwa v Kaliye Mandandi**⁽¹⁵⁾ were cited in support of the submission that corroborative evidence is independent evidence which strengthens or confirms other evidence and that something more was required to confirm or strengthen the allegations by the 1st and 2nd Respondents' witnesses.

[2.23] The Appellant contended that the 1st and 2nd Respondents' allegations were not corroborated by their witnesses. Therefore, the trial Judge misdirected himself in drawing conclusions from

contradictory and uncorroborated evidence and erred in nullifying the election of the Appellant.

[2.24] The Appellant further submitted that the 1st and 2nd Respondents did not satisfy the requirements of section 97(2)(a) of the Act and that the learned Judge erred when he concluded in his judgment at page 81 of the record of appeal that there was widespread misconduct because the Appellant held meetings in the majority of the wards. He contended that holding meetings did not entail that there was misconduct.

[2.25] Further, that the learned Judge drew conclusions relating to the illiteracy of the general populous in Lunte constituency without statistical evidence. Lastly, the Appellant contended that the 1st and 2nd Respondents failed to distinguish the Appellant and his election or polling agents from the entire Patriotic Front party; and that the allegations ought to have been specific to the Appellant and his election or polling agents but were instead made against the Patriotic Front in general.

[2.26] The Appellant urged that the decision of the High Court be reversed and the Appellant be declared as the duly elected Member of Parliament for Lunte Constituency.

[2.27] At the hearing of the appeal, Mr. Ngulube more or less reiterated the written arguments in support of the appeal. He added with respect to ground nine that the trial Judge misdirected himself when he nullified the Appellant's seat for Lunte Constituency based on what he termed as allegation 4 in his judgment. He submitted that under allegation 4, the Court believed the testimony of the same witnesses he did not agree with when he dismissed allegations one, two and three, and ended up nullifying the seat. He contended that PW4 and PW5 whom he believed under allegation 4 contradicted each other, just as PW10 and PW11 did and that the learned Judge did not resolve those contradictions.

[2.28] He contended that out of the 65 polling stations in Lunte Constituency, the allegations of bribery and undue influence under allegation 4, only related to 4 polling stations namely Fitaba, Kapatu, Filipino and Kalangu. Counsel contended that the learned Judge attached much weight to the testimony of partisan witnesses who needed corroboration.

[2.29] He further submitted that there was no evidence before the lower Court to suggest that the allegations relating to the 4 polling stations were also present in the other 61 polling stations. He argued

that the evidence in the lower Court did not pass the test set by section 97(2)(a) of the Act and that the Learned Judge misdirected himself by failing to apply the test set by the Act before nullifying the Appellant's seat.

[2.30] In augmenting grounds two and six of the appeal, Mr. Chipompela referred to section 97(2)(a) of the Act and submitted that the learned Judge in the lower Court did not clearly address whether the majority of the voters were actually affected by the alleged conduct of the Appellant. He argued that in order for a Court to determine the majority or widespread effect of the acts complained of, numbers or statistics ought to have been produced before the lower Court so as to reveal the number of would-be voters who were affected by the Appellant's actions. That the register which the lower court relied on at page 79 of the record of appeal contained 157 registered voters and that the Court did not consider any other number or register.

[2.31] Counsel contended that given the number of votes which each candidate obtained in the election as stated on page 19 of the record of appeal, even if the 157 votes were substituted for any of the candidates, that would still not change the outcome of the election.

[2.32] Counsel therefore prayed that the decision of the lower court be set aside and the Appellant be declared the rightful winner of the election for Member of Parliament for Lunte Constituency.

3.0 1ST RESPONDENT'S ARGUMENTS

[3.1] In opposing the appeal, the 1st Respondent filed heads of argument on 1st January, 2022 which Mr Sitali, Counsel for the 1st Respondent relied upon and augmented with brief oral submissions. In opposing grounds one, four, seven, ten and eleven, the 1st Respondent submitted that contrary to the Appellant's submission, the 1st and 2nd Respondents' witnesses did not contradict themselves regarding what the Appellant wore or the vehicle he was driving on 12th August, 2021. He contended that the Appellant had picked immaterial and inconsequential details, and cast them as material contradictions warranting the dismissal of the witnesses' testimony. He argued that it is not every contradiction or inconsistency, assuming any existed, which should lead to dismissal of the witnesses' evidence.

[3.2] Regarding the motor vehicle which the Appellant was driving, on the polling day, Counsel referred to the evidence of PW4, PW6 and PW7 and submitted that PW4 (Evans Chanda) said he voted at Fitaba

polling station in the morning of 12th August, 2021 according to his evidence at pages 429-438 of the record of appeal and that he met the Appellant who was driving a white mini bus.

[3.3] That PW6 (Gladys Mwaba) testified that on her way to vote at Kapatu Polling Station at 10:00 hours on 12th August, 2021, she met the Appellant who was driving a white mini bus.

[3.4] PW7 (Felistus Kasonde) who also voted at Kapatu polling station said at page 456 of the record of appeal that in the morning of 12th August, 2021 after voting she was with Gladys Mwamba around 10:00 hours when the Appellant drove up to them in a white bus.

[3.5] The 1st Respondent submitted that the three witnesses who met the Appellant on the morning of 12th August, 2021 at Fitaba and Kapatu polling stations said that he was driving a white mini bus; and that there was therefore no contradiction in the evidence of the witnesses.

[3.6] He submitted that only PW5 (Cleopatra Nsama) who met the Appellant around 14:00 hours on 12th August, 2021 at Moseni polling station said at that time the Appellant was driving a canter according to her evidence on page 440-447 of the record of appeal.

[3.7] The 1st Respondent contended that the explanation for this disparity in the evidence was simply that in the morning the Appellant was driving a mini bus, (as consistently testified by the three witnesses who saw him), while in the afternoon, he had changed vehicles and was now driving a canter. Counsel submitted that the Appellant admitted in cross examination at page 931 of the record of appeal that he had a white Hiace mini bus among his campaign vehicles.

[3.8] It was submitted further that the Respondents' witnesses therefore did not contradict themselves regarding the motor vehicle the Appellant was driving on 12th August, 2021.

[3.9] Further, that the alleged contradiction between PW4 and PW5 regarding what shirt the appellant was wearing on 12th August, 2021 was similarly explainable by the difference in time.

[3.10] He argued that it was not in dispute that the Appellant gave PW4, PW5, PW6, PW7 and other voters money so that they could vote for him, and told them that if they did not do so, they would be identified through cameras placed in the polling booths, and would be excluded from receiving social cash transfer payments in future. He argued that none of the 1st and 2nd Respondents' witnesses

contradicted themselves on these material particulars. There was cogent evidence of extensive and repeated bribery of voters by the Appellant who gave money to would be voters on various occasions so that they could vote for him. He contended that therefore, the Court below was on firm ground when it held that the Appellant was giving out money to would be voters.

[3.11] That PW4 at pages 429-438 of the record of appeal, stated that on 12th August, 2021 the Appellant gave him and other people K20 notes and instructed them to vote for him.

[3.12] PW5 similarly informed the court below at pages 440-447 of the record of appeal that in the afternoon of 12th August, 2021 on her way to vote, the Appellant who was driving a canter truck laden with people, stopped to give her a lift to Moseni Polling station. He then gave her and the other people in the canter truck K20 notes each so that they could vote for him.

[3.13] PW6 also testified that as she was going to vote at Kapatu polling station in the morning of 12th August, 2021 she met the Appellant who was driving a white mini bus and he gave her K50.00.

[3.14] PW7 who voted at Kapatu polling station informed the court at page 453-457 of the record of appeal that in the morning of

12th August, 2021 she and PW6 met the Appellant who gave them a K50.00 each.

[3.15] PW8, a former headwoman also informed the court below of yet another incident at which the Appellant gave money to would be voters during a meeting which was held at Filipino village on 11th July, 2021 so that they could vote for him causing a scramble for the money. After the scuffle, the Appellant still produced more money which he gave a bana Muwowo to distribute to would be voters. He submitted that PW8's testimony was corroborated by PW10 and PW11 who also received money from the Appellant.

[3.16] At another meeting held on 8th August, 2021 at Kalangu school, the Appellant produced K3,140.00 which was later distributed to would be voters after establishing that there were 157 voters, and instructed that each registered voter should be given K20.00 in order to vote for the Appellant.

[3.17] It was submitted that an Electoral Commission of Zambia voter register for Kalangu 1 polling station, which was used by the Appellant at the meeting of 8th August, 2021, and the names of the people who were given K20.00 notes was produced in the court below at the instance of counsel for the 2nd Respondent and corroborates

the evidence of PW18. That during cross examination, PW18 stated that he got a copy of the voter register and that the names of the would-be voters were ticked in the register of voters.

[3.18] It was argued that the said voters register which comprises the 1st Respondent's supplementary record of appeal clearly shows how the Appellant paid money to the electorate so that they could vote for him. He submitted that PW29 also testified on how the Appellant gave money to would be voters so that they could vote for him.

[3.19] The 1st Respondent submitted that the learned trial judge after recounting in his judgment various incidents where the Appellant had dished out money on pages 78-80 of the record of appeal, observed in his judgment on page 80 of the record of appeal that it was evident on the record that the majority of the witnesses who attended the various meetings held by the 1st Respondent in wards, polling stations or villages witnessed at least an event where the 1st Respondent produced money to give the gathering.

[3.20] He submitted that in the face of the overwhelming evidence laid before him, and having observed the demeanour of the witnesses, the learned trial Judge was on firm ground when he found as a fact

that the Appellant gave money to would be voters to vote for him. He further submitted that the Appellant also attacked the lower court's finding that the Appellant was threatening would-be voters.

[3.21] It was contended that the court below rightly found that there was evidence that the Appellant used undue influence and threats to the electorate to vote for him. That in one such incident, the lower Court in its judgment on page 80 of the record of appeal recounted how some distraught villagers approached their headman, (PW29) to find out what they would do if the Appellant withdrew the social cash transfer from them if they did not vote for him.

[3.22] It was submitted that in determining the meaning of 'undue influence', the lower court referred to Halsbury's Laws of England and Black's Law Dictionary, in relation to the activities proscribed by section 81 (1) of the Electoral Process Act. He submitted that the Court below rightly observed that the Appellant had on numerous occasions threatened the electorate that if they did not vote for him, they would not receive the social cash transfer money.

[3.23] Our attention was drawn to the following passage in the High Court's judgment on page 80 of the record of appeal where the lower court said:

It is strikingly outstanding in the majority of the witnesses called by the Petitioners that there were verbal threats uttered by the 1st Respondent during the respective meetings that if they did not vote for him there shall be a camera in the polling booth that will detect such a voter and that those who shall not vote for him will stop receiving social cash transfer.

[3.24] He submitted that the learned trial judge was therefore on firm ground when he found that the Appellant had used undue influence and threats to persuade voters to vote for him during the 12th August, 2021 election.

[3.25] It was submitted that the Appellant highlighted minor discrepancies in the witnesses' testimony about the events which occurred at a meeting held at Filipino village on 11th August, 2021, as reason why the lower court should have disregarded the evidence of the said witnesses. The 1st Respondent submitted that whether or not the Appellant threw the money in the air or put it on the table was not material. What was material was the fact that the Appellant at that meeting gave the electorate money so that they could vote for him.

[3.26] He further submitted that not every inconsistency or contradiction in evidence is material and that an inconsistency or contradiction will only be relevant if it is on a material particular. The case of **Chimfwembe v The People**⁽¹⁶⁾ was cited in support of that submission.

[3.27] Further, that in the case of **Attorney General v Kakoma**⁽³⁾ which was cited by the Appellant, the Supreme Court stated that even where witnesses have advanced directly conflicting stories, the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence.

[3.28] He submitted that, aside from the minor discrepancies being immaterial, the trial Judge made his findings on the evidence which was before him having seen and heard the witnesses give evidence.

[3.29] In opposing grounds two and six of the appeal, the 1st Respondent submitted that although the Appellant argued that the alleged malpractice he committed was not widespread and therefore did not warrant the nullification of his election, the learned judge in the court below addressed his mind to how widespread the malpractices were, and the extent to which they affected the election.

That in the judgment on page 83 of the record of appeal the learned Judge said:

The very fact that he held several meetings in the many parts of Lunte constituency with the same attitude, denotes that his misconduct was widespread and had the effect or like effect of preventing the majority from electing a candidate of their choice.

[3.30] The learned judge on page 84 of the record of appeal went on to expound the meaning of the word “widespread” and also called into aid the case of **Anderson Kambela Mazoka and Others v Patrick Mwanawasa and Others**⁽¹⁷⁾ wherein the meaning of widespread was explained.

[3.31] He submitted that the learned judge went on to state that of the 65 polling stations, the Appellant had campaigned in all but 8 polling stations thereby campaigning in the majority of the polling stations. This was also borne out in cross-examination.

[3.32] The 1st Respondent submitted that it was clear from the evidence in cross examination that, out of the 65 polling stations, the Appellant campaigned in the majority of them, thereby making the malpractices which he committed widespread enough to have affected the election.

[3.33] He argued that contrary to the Appellant’s argument that he did not campaign in 8 wards out of the 14 wards, in the evidence

in court, the Appellant was talking about polling stations, as opposed to wards, and admitted that out of the 65 polling stations, he did not campaign in only about 8. Therefore, he campaigned in the majority of the polling stations, as opposed to wards.

[3.34] It was further submitted that the learned Judge was equally alive to what the Appellant had stated in cross examination regarding the number of polling stations in which he had campaigned. In this regard, the learned Judge in his judgment on page 84 of the record of appeal stated as follows:

The 1st Respondent under cross examination indicated that he did not campaign at Mulilo, Kafubu, Chongo Chibimbi, Lwangwa and two other more polling stations making up 6 to 8 polling stations. This clearly indicates that the 1st Respondent campaigned in at least 57 polling stations thereby constituting the majority polling stations.

[3.35] The 1st Respondent submitted that since the Appellant had misconducted himself wherever he campaigned, and since he campaigned in the majority of the polling stations, his malpractices were widespread enough to have affected the outcome of the election in that the majority of the voters were prevented from electing a candidate of their choice.

[3.36] In opposing grounds 3 and 8 of the appeal, the 1st Respondent reiterated his arguments above. He submitted in conclusion, that the learned Judge was on firm ground when he declared the Appellant's election as Member of Parliament for Lunte Constituency null and void on account of the repeated and widespread malpractices committed by the Appellant and urged us to dismiss the appeal.

[3.37] In augmenting the written submissions, Mr. Sitali, relied on the written heads of argument. In response to the assertion by Counsel for the Appellant that the trial was rendered unfair by the trial Court's acceptance of the voters register containing 157 voters, Counsel submitted that the said register was admitted in evidence at the instance of the 3rd Respondent (as 2nd Respondent) in the Court below during cross examination. He added that the Appellant therefore cannot argue that the admission of the register into evidence rendered the trial unfair. He further submitted that there was nothing unusual about the voters register being found at the polling station as it had been circulated by the Electoral Commission of Zambia so that voters could verify their names. He argued that the appeal be dismissed.

4.0 1ST AND 2ND RESPONDENTS' ARGUMENTS

[4.1] On 1st February, 2022, Mr. Mataliro and Mr. Mwaba, filed heads of arguments on behalf of the 1st and 2nd Respondents. They began by submitting that the Appellant's memorandum of appeal and heads of argument offend the provisions of Order XI rule 9(2) and (10) of the Constitutional Court Rules, S.I. No. 37 of 2016, respectively, making it difficult to follow which points of law or and facts were allegedly wrongly decided by the lower Court.

[4.2] Counsel, however, proceeded to oppose the grounds of appeal in the order they were argued by the Appellant. In opposing grounds one, four, seven, ten and eleven, the 1st and 2nd Respondents submitted that the Appellant failed to specify which part of the Respondents' version of the testimony their witnesses disputed and which witnesses said they did not see the Appellant in most places. They argued that the Appellant did not demonstrate which part of the judgment was faulty based on the allegations.

[4.3] The 1st and 2nd Respondents asserted that there were no contradictions in the evidence which grounded the findings of fact on bribery and threats upon which the trial Judge nullified the election of the Appellant. They further argued that PW4, PW5 and PW8 did

not contradict each other as the Appellant himself stated the vehicles he used in the campaigns; that those were the vehicles the 1st and 2nd Respondents' witnesses talked about. They argued that for one person to have seen him driving a canter and later on another person seeing him in a minibus was not contradictory as the witnesses did not describe an event which happened at the same place and time.

[4.4] The 1st and 2nd Respondents referred to page 80 of the record of appeal where the trial Court made findings of fact that the majority of witnesses who attended the meetings held by the Appellant witnessed an event where the Appellant produced money to give to the gatherings and further that they testified that the Appellant uttered verbal threats during his meetings that if they did not vote for him, there would be cameras in the polling booths to detect such voters; and that those who would not vote for him would no longer receive social cash transfer money.

[4.5] The 1st and 2nd Respondents referred to the testimonies of PW4, PW5, PW8, PW29, PW30, PW36 and PW37 and submitted that these witnesses testified about incidents where the Appellant offered money to potential voters at his meetings and further said that those who did not vote for him would be detected on cameras placed inside

polling booths and would no longer receive money under the social cash transfer programme.

[4.6] The 1st and 2nd Respondents argued that it is not always that when witnesses contradict each other on any issue, then they are untruthful on the existence of a fact, that the contradiction must be one which goes to the root of a dispute or which relates to a fact in issue relevant to the determination of a dispute. The Supreme Court case of **Madubula v The People**⁽¹⁸⁾ was cited in support of that argument. They contended that case law guides on what should be done if evidence is conflicting or contradictory; that it should be demonstrated that the inconsistencies taint or affect the evidence in a material particular as was held by the Supreme Court in **Godfrey Chimfwembe v The People**⁽¹⁶⁾.

[4.7] The 1st and 2nd Respondents further contended that appellate courts have opined that it is the duty and privilege of the trial Court to observe the witnesses and decide which witnesses to believe. And further that a trial court is entitled to make findings of fact where the parties advance conflicting stories and that the Court must make those findings on the evidence before it, having seen and heard the witnesses giving that evidence. The cases of **Chief Chanje v Paul**

Zulu⁽¹⁹⁾ and **Attorney General v Marcus Achiume**⁽²⁰⁾ were cited in support of these submissions. So were the cases of **GDC Hauliers (Z) Limited v Trans Carriers Limited**,⁽²¹⁾ **Steven Masumba v Elliot Kamondo**⁽¹⁴⁾ and **Attorney General v Kakoma**.⁽³⁾

[4.8] The 1st and 2nd Respondents argued that the Appellant had failed to demonstrate how the witnesses contradicted each other and had picked incidences that occurred in different places and on different days and expected those events to be explained in the same way. They contended that witnesses could not be expected to talk about events which they had not witnessed and which occurred in different places and on different days. Further, that in this case, even if one or two witnesses gave contradictory statements, the trial Court decided who to believe having had the benefit of listening to and observing the demeanor of the witnesses. They urged us not to interfere easily with the findings of fact and submitted that these five grounds of appeal must fail.

[4.9] The 1st and 2nd Respondent opposed grounds two and six together and submitted that although the Appellant alleged that the incidents of malpractice that led to the nullification of his election were not widespread, the lower Court found that they were

widespread as the majority of witnesses attended various meetings where the Appellant committed the malpractice. They quoted the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others**⁽¹⁷⁾ on the importance of the word widespread and contended that from the record, the Appellant's conduct of giving money and threatening voters that if they did not vote for him, cameras would detect them and he would stop bringing social cash transfer, was witnessed in many areas creating a standard of conduct.

[4.10] They further submitted that contrary to the Appellant's submission that he campaigned in eight of fourteen wards, the evidence on record was that he campaigned in 57 polling stations of the 65 polling stations leaving out only 8 polling stations. They contended that the meetings were held in villages and not polling stations which are demarcations for administrative convenience. It was argued that it cannot be said that campaigning is done in polling stations but in villages and that as on record, people would move from nearby villages to attend campaigns.

[4.11] The 1st and 2nd Respondents' contended that by his own admission, the Appellant campaigned in the entire constituency and

that his conduct was shown to be consistent as he gave money to the voters in as many areas as he was seen campaigning; it was argued that the Appellant's argument that the Court should have been given information by the statistics office to determine the number of affected voters was flawed; that the Supreme Court in the case of **Saul Zulu v Victoria Kalima**⁽²²⁾ guided that what is expected of a petitioner is to show that the corrupt or illegal practice was committed on a large scale so as to prevent the majority of voters from voting for their preferred candidate. Therefore, that a petitioner need not analyse the results from different polling stations in order to prove that the electoral malpractice substantially affected the results. That this means that the petitioner need not analyse the number of persons as what the court considers is whether the number of meetings or campaign rallies where the electoral malpractice was committed are a large number. They urged us to dismiss these two grounds.

[4.12] In opposing ground three, the 1st and 2nd Respondents referred us to page 75 of the record of appeal where the trial Judge in his judgment cited the case of **Steven Masumba v Elliot Kamondo**⁽¹⁴⁾ wherein we said:

The evidence of partisan witnesses should be treated with caution and requires corroboration from an independent source in order to eliminate the danger of exaggeration and falsehood.

That on the same page 75 of the record of appeal, the trial Judge made the following observations:

In this matter even though this evidence was led by witnesses who might be perceived to be partisan, I do not question the credibility of the witnesses who deposed to the fact that they were not availed with the Gen 20 forms for them to counter-sign. The witnesses were forthright and this piece of evidence stands unperturbed.

[4.13] It was submitted that the above quotation revealed that the trial Judge was aware of the dangers of relying on evidence of partisan witnesses and warned itself of the dangers but stated his impression of the witnesses. The case of **Chief Chanje v Paul Zulu**⁽¹⁹⁾ was cited in support wherein the Supreme Court stated that:

We cannot fault the learned Judge for so finding as he was perfectly entitled to decide whom to believe as he had the opportunity to observe the witnesses and to form the impression he did.

[4.14] The 1st and 2nd Respondents submitted that by arguing that all the witnesses were partisan, the Appellant ignored the fact that PW29 was a village headman whose evidence showed that he was a neutral person and that PW36 and PW37 were members of the Appellant's party. They added that as they submitted on bribery and

its widespread nature, the trial Judge relied on the evidence of witnesses who saw the Appellant giving out money and not that of any other person as he stated in his judgment on page 80 of the record of appeal in relation to the threats the Appellant issued.

[4.15] They submitted that the lower Court was alive to the requirements of section 97 (2)(a) of the Electoral Process Act and limited itself to the acts of the Appellant. They urged that ground three be dismissed.

[4.16] In opposing ground eight, the 1st and 2nd Respondents submitted that the lower Court was on firm ground to have nullified the election of the Appellant as the evidence on record was overwhelming and met the requirements for nullification. They further submitted that in order for us to resolve this ground, we must consider whether the evidence on record met the standard we set down in the celebrated case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney-General**⁽⁷⁾ that the corrupt practice or illegal practice or other misconduct was committed by the candidate personally or with the candidate's knowledge and consent or approval or that of his or her election or polling agent. Further, that the malpractice must have

been widespread and swayed or may have swayed the majority of the electorate from electing a candidate of their choice.

[4.17] The 1st and 2nd Respondents submitted that the lower Court was on firm ground to have nullified the Appellant's election as there was clear evidence on record which proved corruption and undue influence to the required standard and further, that the malpractices were widespread. They argued that ground eight should also fail.

[4.18] In conclusion, the 1st and 2nd Respondents urged us to dismiss the appeal and uphold the judgment of the lower Court and declare that the Appellant was not duly elected as Member of Parliament for Lunte Constituency.

[4.19] In augmenting orally, Mr. Mataliro similarly reiterated the 1st and 2nd Respondents' written arguments in opposition to the appeal and urged that we uphold the lower Court's nullification of the Appellant's election.

5.0 3RD RESPONDENT'S ARGUMENTS

[5.1] The 3rd Respondent filed its heads of argument on 21st January, 2022 which Mr. Musenga entirely relied on at the hearing of the

appeal. The 3rd Respondent began by submitting that the standard of proof required in an election petition though, a civil matter, is higher than on a balance of probabilities. The cases of **Akashambabwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**⁽²³⁾ and **Saul Zulu v Victoria Kalima**⁽²²⁾ wherein the Supreme Court held that election petitions are required to be proven to a standard higher than a mere balance of probabilities and that issues raised in an election petition must be established to a fairly high degree of convincing clarity, were cited in support.

[5.2] The Ugandan case of **Nakbukeera Hussein Hanifa v Kibule Ronald and Another**⁽⁹⁾ was cited in further support wherein the Court observed *inter alia*, that in an election petition, partisan witnesses must be viewed with great care and caution, scrutiny and circumspection.

[5.3] The 3rd Respondent further submitted that the law relating to parliamentary election petitions is premised on section 97 (2) of the Electoral Process Act No. 35 of 2016 and that this Court has ably guided on the import of the provisions in the case of **Nkandu Luo v Doreen Sefuka Mwamba and Attorney General**.⁽⁷⁾

[5.4] Regarding the burden of proof, the 3rd Respondent submitted that this Court in the **Nkandu Luo**⁽⁷⁾ case reiterated the long-standing principle that the burden of proof rests on the shoulders of the person alleging to adduce cogent evidence to prove the allegation, without which judgment would not go in his or her favour. It was submitted that this Court reiterated this position in the case of **Abiud Kawangu v Elijah Muchima**.⁽¹²⁾

[5.5] The 3rd Respondent further submitted that it is imperative that a petitioner should satisfy the trial court that the Respondent personally committed a corrupt practice or illegal practice or other misconduct in connection with the election or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent; that anything below that threshold should not be entertained by this Court. It was further submitted that as guided by this Court, there is the additional requirement to prove that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing their preferred candidate. The case of **Austin Liato v Sitwala Sitwala**⁽²⁴⁾ was cited in that regard.

[5.6] The 3rd Respondent proceeded to submit that a candidate can only be held liable for their own conduct or misconduct or that of their appointed agent in line with section 97(2) of the Electoral Process Act.

[5.7] It was submitted that a general allegation that supporters of a particular party were implicated in misconduct is not enough to attach responsibility to the Respondent. The cases of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**⁽²⁾ and **Richwell Siamunene v Sialubalo Gift**⁽²⁵⁾ were cited in support of that argument.

[5.8] The 3rd Respondent cited the cases of **Kufuka Kufuka v Mundia Ndalamei**⁽²⁶⁾ and **Steven Masumba v Elliot Kamondo**⁽¹⁴⁾ to press the point that even if an electoral malpractice has been proven to have been committed by a candidate or with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent, it must further be proven that the malpractice complained of was widespread and had the effect of dissuading the electorate from voting for a candidate of their choice. The cases of **Richwell Siamunene v Sialubalo Gift**⁽²⁵⁾ and **Jonathan Kapaipi v Newton Samakayi**⁽²⁷⁾ were further cited on this point.

[5.9] The 3rd Respondent submitted that the authorities cited should have guided the trial Court so that the evidence placed before it should have been analysed and critically examined and findings made by the Court based on that evidence.

[5.10] The 3rd Respondent went on to submit that in the case of **Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa**,⁽²¹⁾ the Supreme Court dismissed the presidential election petition based on the majority requirement even when the petitioners in that action had proved six of the 36 allegations.

[5.11] The 3rd Respondent further cited the case of **Mubika Mubika v Poniso Njeulu**⁽⁵⁾ and argued that since no statistics were given to the trial Court in the present case, the petitioners did not discharge the burden of proof and that as the evidence currently stood, anything short of that evidence would lead to speculative conjecture on the part of the trial Court.

[5.12] The 3rd Respondent went on to submit that in addition to the numerous authorities cited, international electoral law instruments are categorical on the sanctity of election results and guide that election results should not be lightly or easily disregarded. The International Foundation for Electoral Systems Guidelines for

Understanding, Adjudicating and Resolving Disputes in Elections (2011 p86/7) were quoted as providing as follows:

Elections are meant to give voice to the will of the people. The results of elections should not be disregarded lightly or easily. Election outcomes should only be overturned in extraordinary circumstances, where evidence of illegality, dishonesty, unfairness, malfeasance or other misconduct is clear and, importantly, where such improper behavior has distorted the vote outcome. Absent such extraordinary circumstances, candidates and parties that lose elections should accept electoral outcomes rather than routinely claim the elections and the governments they produce are illegitimate. Complaints adjudication mechanisms should not be manipulated to continue political battles after the election and to undermine the finality of official election results. Persons who violated the law may still be pursued through administrative or criminal processes without holding up election results.

[5.13] In applying the foregoing to this appeal, the 3rd Respondent submitted that the 1st and 2nd Respondents had lamentably failed to prove any electoral malpractice or misconduct to the required threshold; and further that the 1st and 2nd Respondents did not adduce any cogent evidence to prove that the alleged electoral malpractice or misconduct, if any, was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

[5.14] It was further submitted that there was no evidence on record that the electorate were prevented from participating in the election and that none of the witnesses specified any provision of the

law that the 3rd Respondent breached. It was submitted, in conclusion, that the 3rd Respondent duly conducted the elections in substantial conformity with the law; that the election be upheld and that the appeal be allowed with costs to the 3rd Respondent.

6.0 APPELLANT'S ARGUMENTS IN REPLY

[6.1] In the heads of argument in reply, the Appellant essentially reiterated his written arguments in support of the appeal. We will therefore not restate the arguments here.

7.0 EVALUATION AND DECISION

[7.1] We have considered the grounds of appeal, the respective parties' written and oral arguments, the authorities cited and the judgment of the Court below.

[7.2] In determining this appeal, we start with an examination of the relevant law. Section 97 (2) of the Electoral Process Act No. 35 of 2016 (which we will refer to as the Act) sets out the grounds on which the election of a candidate as Member of Parliament, among others, can be nullified in the following terms:

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial

of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election-

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

[7.3] The import of section 97 (2) (a) of the Act, as we have previously explained in our judgments, is essentially that both the commission of a corrupt or illegal practice or other misconduct by the candidate personally or with the knowledge and consent or approval of the candidate or his or her election or polling agent and the widespread nature of the corrupt or illegal practice or misconduct in the constituency, district or ward must be proved to the required standard.

[7.4] As is the case in any other civil action, the burden to prove the allegations in an election petition lies on the petitioner. The learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him.

[7.5] This equally applies to an election petition. If a petitioner fails to discharge the burden of proving the allegations in the election petition to the required standard, the decision must be against such a petitioner.

[7.6] It is settled law however, that unlike in an ordinary civil action where allegations must be proved on a balance of probabilities, the evidence adduced by a petitioner in support of an election petition must prove the allegations to a fairly high degree of convincing clarity. The case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Titus Jacob Chiluba**,⁽²³⁾ clearly supports this position of the law. We shall bear these sound principles of law in mind as we determine this appeal.

[7.7] In determining this appeal, we shall first consider grounds seven, ten and eleven together as they are interrelated. We shall then consider grounds two, six and eight together and consider grounds one, three, four and nine individually. Before proceeding, we note that the Appellant did not proffer any arguments on ground five of

the appeal. We therefore take it that the ground was abandoned and shall say no more about it.

[7.8] That said, in ground seven of the appeal, the Appellant contends that the learned Judge erred when he failed to properly analyse all the evidence given by the parties and their witnesses before nullifying his election. In ground ten, the Appellant faulted the learned trial Judge for his failure to analyse the evidence before him and ignoring some questions asked in cross examination, thereby misdirecting himself. In ground eleven, the Appellant reiterated that the learned Judge ignored the witnesses' testimony in cross examination that they did not see the Appellant give out money but that it was given by party officials.

[7.9] These three grounds of appeal relate to the allegation made by the 1st and 2nd Respondents that the Appellant gave money to the electorate and further informed them that there would be cameras placed in polling booths to detect those who would not vote for him so that they would no longer receive social cash transfer money in order to induce them to vote for him. The issue we have to determine in relation to these grounds is whether the evidence adduced by the 1st and 2nd Respondents proved the allegations of bribery and undue

influence made against the Appellant to the required standard. The evidence regarding the alleged acts of bribery and undue influence was adduced by PW4, PW5, PW6, PW7, PW8, PW10, PW11, PW16, PW18, PW27, PW29, PW36 and PW37 on behalf of the 1st and 2nd Respondents. We consider it necessary to summarise the evidence adduced before the lower Court by these witnesses in order to provide a clear background to our decision in this appeal.

[7.10] PW4 alleged that on 12th August 2021, he went to vote at Fitaba polling station. While he was on the queue, the Appellant arrived and went to the front of the queue where he took pictures of the posters at the entrance. He then turned to the voters and asked them if the UPND were causing them problems. When the voters said they were not being troubled by the UPND, the Appellant informed the voters that there were machines inside the polling booths so that whoever voted for the 1st Respondent would be removed from the social cash transfer. PW4 said he left the queue and went to the roadside where he found the Appellant's councilor. The Appellant arrived there and asked the councilor if PW4 and others were his people. The councilor answered in the affirmative and the Appellant then gave K20.00 to each person and urged them to vote for him.

[7.12] PW5 Cleopatra Nsama said on 12th August, 2021 on her way to vote at Moseni in Lunte Constituency the Appellant gave her a ride in his canter. On their way, the Appellant stopped the canter and gave her and a lot of other people in the canter K20.00 each and instructed them to vote for him. He also informed them that a computer had been placed in the polling booths to identify those who would not vote for him so that they would no longer receive social cash transfer money. PW5 said the Appellant was wearing a blue long-sleeved shirt.

[7.13] PW6 Gladys Mwamba said on 12th August, 2021 while on her way to vote at Kapatu polling station, the Appellant gave her K50.00 and told her that if she voted for him, she would be receiving social cash transfer money. PW7 Felistus Kasonde also testified that on 12th August, 2021, she voted at Kapatu polling station in Lunte Constituency. On her way back she met PW6 and as they conversed, the Appellant drove up to them in a white minibus and produced K50 and demanded that she vote for him as Member of Parliament.

[7.14] PW8 Hilda Kuyela a former village headwoman said on 11th August, 2021, the Appellant went to Filipino Market where a lot of people had gathered and campaigned for the people to vote for him.

He produced a bunch of money and gave it to a young woman called Hellena with instructions to give K20.00 to whoever would vote for him. A scramble for the money ensued. PW10, PW11 and PW27 similarly testified that they were present at Filipino market when the Appellant addressed the electorate and produced money in K20 notes to give to the people and caused a scramble for the money.

[7.15] PW16 testified that on 8th August, 2021, the Appellant held a meeting at Kalangu School. He obtained the voters register from the school PTA Chairman Mr Darius Chishimba and produced K3,140.00 which he gave to the PTA chairman to distribute K20.00 each to the 157 registered voters. He said the Appellant also said that there would be a machine in the polling booth to detect those who would not vote for him. In cross examination, PW16 admitted that not all the 157 registered voters voted or received the K20.00. PW18 gave similar evidence to that of PW16. He, however, admitted in cross examination that no one signed for the receipt of the K20.00 but said that their names were ticked off in the voters register and the money which remained was kept by the PTA Chairman. He also admitted that he did not witness all the 157 registered voters receive

K20.00 but said that he made a photo copy of the register after the distribution of money was concluded.

[7.16] PW29 headman Buntungwa who said he was non-partisan, testified that on 9th August, 2021, the Appellant addressed a meeting in Buntungwa village and said if the people did not vote for him, they would no longer receive social cash transfer money. At the same meeting, he gave a single woman called Chifwesa K150 and said he had engaged her. The Appellant then left to go to Mukupa Kaoma and Chenda Eka. He got to the vehicle and started giving money to the people who were near him. He threw money and people scrambled for it. Later on, two elderly women called PW29 and asked him what would happen to them if they stopped receiving social cash transfer money for not voting for the Appellant. In cross examination, PW29 admitted that the Appellant did not give him any money to vote for him and also that he did not see how much money the Appellant gave to the people who followed him to his vehicle. PW29 further admitted that he did not see anyone distributing social cash transfer money or mealie meal or cooking food for voters at Chitoshi polling station where he voted.

[7.17] PW36 and PW37 testified that the Appellant attended a meeting held at Lubushi and Lungula village where he gave K150 to the women who danced for him and demanded that they should vote for him. At the same event, the Appellant gave K300.00 in K50 notes to the ward secretary for him to share with other voters.

[7.18] In rebuttal of the evidence given by PW4, PW5, PW6 and PW7, the Appellant denied that he gave money to the electorate at Fitaba, Moseni and Kapatu polling stations on 12th August, 2021. He said he only visited Kapatu polling station where he voted on that day. He stated that he wore a brown Nigerian shirt and was driving a Ford Ranger as his campaign canter was in Kasama at the time.

[7.19] In rebuttal of the evidence given by PW8, PW10, PW11 and PW27, the Appellant denied the allegation that he gave money comprising a bunch of K20 notes to the electorate at Filipino market on 11th August, 2021 and said that he did not campaign at Filipino throughout the campaign period. He also denied the allegation that he said there would be hidden cameras installed in polling booths to identify voters who did not vote for him. He further denied the allegation by PW29 that he gave money to the electorate at Buntungwa village on 9th August, 2021.

[7.20] In rebuttal of the evidence given by PW36 and PW37, the Appellant denied the allegation that he gave K150 to the women who danced for him or K300 to the ward secretary and stated that he merely danced with the women.

[7.21] In his judgment at page 78 of the record of appeal, the learned trial Judge stated that the 1st and 2nd Respondents had availed several witnesses from different wards of Lunte Constituency who adduced evidence to the effect that they were lured by the Appellant to vote for him. He further observed that the 1st and 2nd Respondents had provided witnesses to portray how the campaigns and election were marred by bribery and corruption. The learned Judge specifically cited the evidence of PW4, PW5, PW6, PW7, PW8, PW10, PW11, PW16, PW18, PW27, PW29, PW36 and PW37 which we have set out above all to the effect that the Appellant gave money to voters at different times to woo them to vote for him. The learned trial Judge made no reference to the Appellant's evidence in rebuttal to the allegations of bribery and undue influence regarding the hidden cameras to detect those who did not vote for him and only said that the Appellant's evidence consisted of bare denials contrary to the evidence on record.

[7.22] The learned Judge proceeded to observe in his judgment at page 80 of the record of appeal as follows:

It appears eminent on record that the majority of the witnesses who attended the various meetings held by the 1st respondent in wards, polling stations or villages, as the case may be, witnessed at least an event where the 1st respondent produced money to give the gathering.

[7.23] The learned Judge further observed that the Appellant used the social cash transfer programme as a bait for the people of Lunte Constituency by misrepresenting that if they did not vote for him, cameras placed inside the polling booths would identify them and they would no longer be recipients of the social cash transfer funds. To that effect, the learned Judge observed on the same page of the record of appeal that it was:

strikingly outstanding in the majority of the witnesses called by the Petitioners that there were verbal threats uttered by the 1st Respondent during the respective meetings that if they did not vote for him there shall be a camera in the polling booth that will detect such a voter and that those who shall not vote for him will stop receiving social cash transfer. (sic)

[7.24] The learned Judge in his judgment on page 81 of the record of appeal stated that the issue of influencing voters through gifts of sums of money appears to have been a trend or method

employed by the Appellant to lure voters. He quoted the provisions of section 81 (1) (a) of the Act and stated that the conduct of the Appellant offended that section and held that the 1st and 2nd Respondents had sufficiently proved the allegation of bribery against the Appellant.

[7.25] We have examined the evidence on the record of appeal given by the 1st and 2nd Respondents' witnesses relating to the allegations of bribery and undue influence allegedly exerted on the electorate by the Appellant through threats regarding the social cash transfer money and have equally examined the Appellant's evidence in rebuttal to those allegations. It is evident from the evidence on record that the trial Court was faced with directly conflicting evidence adduced by the 1st and 2nd Respondents' witnesses, on one hand, and by the Appellant, on the other hand.

[7.26] We say so because while PW4 alleged that the Appellant went to Fitaba polling station on 12th August, 2021 and took pictures of the posters at the entrance before he addressed the voters on the queue and warned them that cameras placed in polling booths would detect those who did not vote for him; and further that the Appellant later gave K20 notes to voters at the roadside near Fitaba polling

station, the Appellant denied that he visited Fitaba polling station on that day and stated that he only went to one polling station, namely Kapatu polling station where he voted. The evidence of PW4 that the Appellant asked the voters at Fitaba polling station if they were being troubled by the UPND and addressed them to warn them about the hidden cameras in the polling booths to identify those who would not vote for him needed to be corroborated before it could be accepted. There is no independent evidence on record to support this allegation.

[7.27] In examining the evidence of PW4, we are mindful that section 4(2)(e) of the Code of Conduct of the Act prohibits a candidate from continuously remaining at a polling station during elections while section 4(2)(f) of the Code of Conduct proscribes any form of campaigning within 400 metres of a polling station on the polling day. The trial Judge made no reference to the aspect that corroborating evidence was required to support the evidence of PW4 nor did he make any reference to the fact that if indeed the Appellant had addressed the voters at Fitaba polling station as alleged by PW4, that would have been tantamount to campaigning at a polling station

which conduct is prohibited by section 4(2)(e) and (f) of the Code of Conduct.

[7.28] Regarding the evidence of PW5 that the Appellant on 12th August, 2021 gave her a ride in his canter on her way to vote at Moseni polling station and gave her and other voters in the back of the canter K20.00 each and asked them to vote for him and also said there were cameras in the polling booths to detect those who did not vote for him who would no longer receive social cash transfer money as a result; and further that the Appellant wore a blue long-sleeved shirt, the Appellant denied that he went to Moseni polling station on 12th August, 2021. He asserted that he wore a brown Nigerian shirt and was driving a Ford Ranger because his campaign canter was in Kasama at that time.

[7.29] With regard to the evidence of PW6 and PW7 that the Appellant gave them K50.00 each near Kapatu polling station and urged them to vote for him; and that he was driving a white minibus at the time of that incident, the Appellant denied the allegation and said that he was driving a Ford Ranger on that day.

[7.30] Regarding the evidence of PW8, PW10, PW11 and PW27 that the Appellant gave K20.00 notes to voters at Filipino market on

11th August, 2021 to woo them to vote for him, the Appellant testified that he did not campaign at Filipo market throughout the campaign period. As regards the evidence of PW16 and PW18 that the Appellant gave Darius Chishimba K3,140.00 so that the 157 registered voters at Kalangu school could be given K20.00 each, the Appellant denied the allegation and stated that no such incident took place. Regarding PW29's evidence that the Appellant gave K150 to a woman and said he had engaged her; and that he later gave money to people who walked with him to his motor vehicle, the Appellant denied that allegation.

[7.31] Regarding the evidence of PW36 and PW37 that at a meeting held in Lubushi and Lungula village, the Appellant gave K150 to women who danced for him, the Appellant denied that assertion and said that he merely danced with the women and did not give them any money. He also denied that he gave K300 to the ward secretary to share it with other voters.

[7.32] In light of the foregoing evidence adduced by the parties on both sides, it was incumbent upon the learned trial Judge to critically analyse and evaluate the evidence and to clearly state in his judgment which of the witnesses he believed and why. We say so

because the law is settled that a trial court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings based on the evidence before it having seen and heard the witnesses giving the evidence as was held in the case of **Attorney-General v Kakoma**.⁽³⁾ Further, in the case of **Chief Chanje v. Paul Zulu**⁽¹⁹⁾ which was cited by the 1st and 2nd Respondents, the Supreme Court stated that:

We cannot fault the learned Judge for so finding as he was perfectly entitled to decide whom to believe as he had the opportunity to observe the witnesses and to form the impression he did.

[7.33] In other words, a trial Court is entitled to determine a matter based on the credibility of the witnesses and to make findings of fact based on the evidence before him. In the present case, however, the learned trial Judge did not analyse the evidence adduced by the parties on both sides and he made no findings of fact regarding the allegations of bribery and undue influence relating to the alleged hidden cameras in polling booths, save to state that the 1st and 2nd Respondents had proved the allegations to the required standard. As we earlier pointed out in this judgment, the trial Court completely ignored the Appellant's testimony and instead stated that

his testimony comprised bare denials. The learned Judge further made a sweeping statement that the witnesses called by the 1st and 2nd Respondents witnessed at least one incident where the Appellant gave money to the electorate without elaborating and notwithstanding the evidence given by the Appellant in rebuttal.

[7.34] The learned Judge made no attempt to evaluate the evidence of PW4, PW5, PW6, PW7, PW8, PW10, PW11, PW16, PW18, PW27, PW29, PW36 and PW37 whom he relied upon in arriving at a determination that the 1st and 2nd Respondents had sufficiently proved the allegation of bribery against the Appellant, as can be seen from his judgment on pages 78 to 81 of the record of appeal. He further did not state why he believed the testimony of those witnesses as against the testimony of the Appellant and also did not address the issue of corroboration. Furthermore, the trial Judge's observation in his judgment at page 80 of the record of appeal that the Appellant's evidence comprised general denials in rebuttal of the allegations, suggests that the trial Judge absolved the 1st and 2nd Respondents of the burden to prove their allegations of bribery against the Appellant to the standard required in election petitions, which the trial Judge could not legitimately do in light of the

provisions of section 97(2)(a) of the Act that it is for the Petitioner to prove the allegations to the required standard.

[7.35] We therefore agree with the Appellant's contention that the trial Judge was wrong when he failed to critically analyse the evidence before him as given by the parties on both sides. The same observation applies to the trial Court's determination that the 1st and 2nd Respondents had proved the allegation that the Appellant unduly influenced the electorate by threatening them that if they did not vote for him, their manner of voting would be detected by cameras in polling booths and they would consequently no longer receive social cash transfer money.

[7.36] We are mindful that as an appellate court, we ought not to interfere with the findings of fact made by a trial court except on very clear grounds. However, in this case we have pointed out that the trial Judge did not analyse the evidence adduced by the respective parties and therefore did not demonstrate in his judgment that the allegations of bribery and undue influence were proved to the required standard. Further, having carefully examined the evidence adduced by the 1st and 2nd Respondents in support of their petitions, our view is that the evidence did not support the allegations of bribery

and undue influence to the required standard. We therefore are left with no option but to reverse the lower Court's decision that the allegations were sufficiently proved by the 1st and 2nd Respondents as that finding is not supported by the evidence on record and is a finding which a trial Court properly directing itself would not have made. Grounds seven, ten and eleven therefore have merit and we accordingly uphold them.

[7.37] In ground two the Appellant contended that the trial Court was wrong to hold that the bribery and undue influence were widespread when he knew that the Appellant had not campaigned in all the polling stations in Lunte Constituency. In ground six, he reiterated that the trial Court erred in holding that the misconduct of the Appellant was widespread in the absence of cogent evidence from the 1st and 2nd Respondents to prove the alleged meetings he (the Appellant) was attending in the wards of Lunte Constituency and in ground eight, the Appellant contended that the trial Court was wrong to nullify the election of the Appellant based on evidence which was not proven to the required standard under the law. We shall consider these grounds together as they are related.

[7.38] In support of these grounds, the Appellant essentially argued that although the trial Court found that the Appellant's alleged malpractice was widespread and that the Appellant campaigned in eight of the fourteen wards in Lunte Constituency, the 1st and 2nd Respondents did not produce any statistics or evidence that the eight wards had the majority of registered voters in the Constituency to prove that the majority of voters were or may have been influenced by the Appellant's actions against voting for a candidate of their choice.

[7.39] He contended that the mere fact that he campaigned in eight of the fourteen wards in Lunte Constituency did not mean that the alleged corrupt or illegal practices or misconduct were widespread in the Constituency to the extent that they prevented or may have prevented the voters from electing their preferred candidate. Further, that whereas Lunte Constituency has 65 polling stations, the 1st and 2nd Respondent's witnesses only referred to a few polling stations and did not prove that those polling stations had the greater number of registered voters so that it could be said that the Appellant's malpractices were widespread.

[7.40] He submitted that the evidence adduced by the 1st and 2nd Respondents did not satisfy the threshold set by section 97(2)(a) of the Act for nullification of the election of a Member of Parliament.

[7.41] The 1st and 2nd Respondents opposed grounds two and six together and submitted that although the Appellant alleged that the incidents of bribery and undue influence that led to the nullification of his election were not widespread, the lower Court found that they were as the majority of witnesses attended various meetings where the Appellant committed the malpractice. They contended that from the record, the Appellant's conduct of giving money and threatening voters that if they did not vote for him, cameras would detect them and he would stop bringing social cash transfer was witnessed in many areas thereby creating a standard of conduct.

[7.42] They further submitted that contrary to the Appellant's submission that he campaigned in eight of fourteen wards, the evidence on record was that he campaigned in 57 of the 65 polling stations leaving out only 8 polling stations. They contended that contrary to the Appellant's submissions, the meetings were held in villages and not polling stations which are demarcations for administrative convenience. They further argued that it cannot be

said that campaigning is done in polling stations because it is done in villages and that it is on record that people would move from nearby villages to attend campaign meetings.

[7.43] The 1st and 2nd Respondents contended that by his own admission, the Appellant campaigned in the entire constituency and that his conduct was shown to be consistent as he gave money to the voters in as many areas as he was seen campaigning; it was argued that the Appellant's argument that the Court should have been given information by the statistics office to determine the number of affected voters was flawed. They submitted that the Supreme Court in the case of **Saul Zulu v Victoria Kalima**⁽²²⁾ guided that what is expected of the petitioner is to show that the corrupt or illegal practice was committed on a large scale so as to prevent the majority of voters from voting for their preferred candidate. They urged us to dismiss these two grounds.

[7.44] In opposing ground eight, the 1st and 2nd Respondents submitted that the lower Court was on firm ground to have nullified the election of the Appellant as the evidence on record was overwhelming and met the requirements for the nullification. They further submitted that in order for us to resolve this ground, we must

consider whether the evidence on record met the standard we set down in the celebrated case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and Attorney-General.**⁽⁷⁾

[7.45] The 1st and 2nd Respondents submitted that the lower Court was on firm ground to have nullified the Appellant's election as there was clear evidence on record which proved corruption and undue influence to the required standard and further that the malpractices were widespread. They urged that ground eight should also fail.

[7.46] On the other hand, the 3rd Respondent supported the appeal and essentially stated that the 1st and 2nd Respondents lamentably failed to prove the allegations raised in their petitions to the required standard of proof both regarding the commission of the alleged corrupt or illegal practices by the Appellant and regarding the widespread nature of those corrupt or illegal practices.

[7.47] We have considered the arguments on both sides. The issue we have to determine in relation to grounds two, six and eight is whether the lower Court was on firm ground when he nullified the election of the Appellant in light of the law and the facts. We should

state at the outset that the threshold for nullifying the election of a candidate as Member of Parliament is clearly stipulated by section 97 (2) of the Act. Specifically, section 97 (2) (a) of the Act on which the petitions in this case were based clearly stipulates a twofold threshold to be satisfied by the petitioner as we held in the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuka Mwamba and Attorney General**⁽⁷⁾ wherein we stated that:

In order for a petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the petitioner to prove to the satisfaction of the Court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election; or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent.

We further stated that:

In addition to proving the election malpractice or misconduct alleged, the petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

[7.48] In this case, the 1st and 2nd Respondents' witnesses testified, in the main, that it was the Appellant who personally offered money to the electorate during his campaign meetings and on polling day and instructed them to vote for him. They also alleged that the

Appellant repeatedly stated that there were cameras in the polling booths to detect how the electorate would vote so that those who voted against the Appellant would be excluded from receiving social cash transfer money in future.

[7.49] As we stated earlier on in this judgment, the learned trial Judge held that the allegations of bribery and undue influence were committed by the Appellant. He also held that the said bribery and undue influence were widespread in the constituency and on that basis nullified the Appellant's election. In view of that position, the question we have to determine is: was cogent evidence adduced by the 1st and 2nd Respondents, as petitioners in the court below, to prove that the bribery and undue influence attributed to the Appellant was so widespread in the constituency that it may have or did prevent the electorate from electing their preferred candidate?

[7.50] We have thoroughly examined the evidence adduced by the witnesses which the lower Court accepted. We note from the record that five polling stations, one market, two villages and one school were mentioned by the witnesses, namely Fitaba polling station, Moseni polling station, Kapatu polling station, Mukolwe polling station, Mukupa Kaoma polling station, Filipino market,

Lubushi and Lungula villages and Kalangu school, as the areas where the Appellant gave money to different people and informed the electorate that if they voted against him, they would be captured on camera and would no longer receive the social cash transfer money.

[7.51] We are mindful that the learned Judge in his judgment said the Appellant in cross examination said that he campaigned in every polling station except for 8 polling stations. However, it is not clear from the witness testimony on record how many wards may have been or were affected by the alleged bribery and undue influence attributed to the Appellant out of the 14 wards in the Constituency for it to be determined that the bribery and undue influence attributed to the Appellant were widespread.

[7.52] In our view, even the voters' register which was exhibited in the supplementary record of appeal filed by the 1st Respondent did not assist the 1st and 2nd Respondents to prove that the impugned bribery and undue influence complained of were widespread, as the mere fact that the names in the register were ticked did not prove that all the 157 voters got the K20.00 as alleged. In any case, and as Mr. Sitali submitted, the register in question could very well have been availed by the Electoral Commission of Zambia for the

concerned voters to verify the accuracy of the details entered therein. More importantly, the learned Judge did not hold that the 157 registered voters whose names were in that register may have been or were influenced against voting for a candidate of their choice or that their votes tilted the vote in favour of the Appellant.

[7.53] As the law requires that before the election of a candidate can be nullified, it must be proved that not only did the candidate commit the impugned electoral malpractice or that the malpractice was committed with the candidate's knowledge and consent or approval or that of the candidate's duly appointed election or polling agent, and, in addition, that the malpractice complained of was so widespread that it may have or did influence the voters in their manner of voting, it was incumbent upon the 1st and 2nd Respondents to adduce cogent evidence to prove both aspects.

[7.54] We note that the learned trial Judge in his judgment at pages 82 to 83 of volume one of the record of appeal stated as follows:

The court heard the testimony of PW25 (2nd Petitioner) to the effect that Lunte Constituency is vast and the biggest problem in Lunte is the high level of poverty and illiteracy, and that the 1st Respondent took advantage of the high levels of poverty and engaged in corruption in the period before and up to the date of the election. I do not question this observation because the 1st Respondent was seen

in person giving out money during the various meetings he held before elections.

The learned Judge further observed as follows:

In the same vein I do not doubt that the 1st Respondent took advantage of the illiteracy of the general populous in Lunte to make them believe that he was a force behind the social cash transfer and that he would place hidden cameras in the polling booths. The utterances have been construed to be threats tantamount to undue influence.

The learned Judge went on to state that:

On this head I hasten to state that the 1st Respondent had misconducted himself during the campaign. The very fact that he held several meetings in the many parts of Lunte constituency with the same attitude, denotes that his misconduct was widespread and had the effect or like effect of preventing the majority from electing a candidate of their choice. I am fortified in stating that the misconduct of the 1st Respondent was widespread because he had meetings in the majority of the wards that constitute Lunte Constituency. (Emphasis added)

[7.55] It will be observed from the excerpt of the learned Judge's judgment quoted above that the learned Judge did not refer to any specific evidence by any witness to support his finding that the impugned conduct of the Appellant was widespread in the Constituency. Further, a careful examination of the evidence

adduced by the 1st and 2nd Respondent on record and which we have set out earlier in this judgment does not support the learned trial Judge's conclusion that the malpractices of bribery and undue influence attributed to the Appellant were widespread in the Constituency.

[7.56] We say so because there is no evidence on the record of appeal regarding how many wards were affected through the five polling stations, one market, two villages and one school where the witnesses alleged that the Appellant gave money to the electorate and allegedly said that cameras would be placed in polling booths to identify those who voted against him so that they would be excluded from receiving social cash transfer money. The 1st and 2nd Respondents' submission that campaigns are conducted in villages and not polling stations and that voters normally travel from other villages to attend the campaign meetings is not supported by any evidence on record and is tantamount to adducing evidence from the bar.

[7.57] We have settled this matter in our numerous judgments where we emphasized on the need for both the commission of the impugned electoral malpractice by the candidate or with his or her

knowledge and consent or approval or that of his or her election or polling agent to be proved to the requisite standard of proof by the petitioner as stipulated by section 97(2)(a) of the Act; including the case of **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**⁽⁷⁾ which we quoted earlier on in this judgment. Further, in the case of **Richwell Siamunene v Sialubalo Gift**⁽²⁵⁾ we held on this point that:

“Just because an offence has been found to be proved against the Respondent whether directly or indirectly, does not mean a nullification is warranted because evidence of an offence does not necessarily constitute evidence of a negative and widespread impact. The impact on the electorate must be proved in its own right by the party alleging it to the same standard of a fairly high degree of convincing clarity.”

[7.58] We reiterated in the case of **Jonathan Kapaipi v Newton Samakayi**⁽⁶⁾ that:

“It is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in great numbers were influenced as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a great number of registered voters were prevented or might have been prevented from electing their preferred candidate.”

[7.59] We wish to re-emphasise that the widespread nature of a corrupt or illegal practice or other misconduct committed by a

candidate or with the candidate's knowledge and consent or approval or that of his or her election or polling agent and its effect on the electorate must be proved with cogent evidence adduced by the petitioner alleging an electoral malpractice. It cannot be presumed by the trial Court in the absence of evidence to that effect. This is because the nullification of an election is a weighty matter and the decision to do so must be based on clear and cogent evidence to justify the nullification.

[7.60] The requirement for cogent evidence to be adduced to prove that the electoral malpractice complained of was widespread entails that in the absence of evidence to that effect, the trial Court cannot speculate on whether or not the malpractice was widespread nor can the court fill out the gaps in the evidence.

[7.61] Considering that the standard of proof in election petitions is above a balance of probabilities, it was incumbent upon the 1st and 2nd Respondents to prove their allegations against the Appellant to that high standard. They did not do so. As a result, the lower Court resorted to making assumptions in order to fill out the gaps in the evidence in support of the allegations. The learned judge observed that the Appellant campaigned in many parts of Lunte Constituency

with the same attitude of giving bribes and issuing threats, which denoted that his conduct was widespread. That approach was erroneous as by assuming that the Appellant gave out bribes and uttered threats everywhere he campaigned and that the malpractices were widespread, the lower Court absolved the 1st and 2nd Respondents of the burden to prove their case against the Appellant to the required standard. We reiterate that the 1st and 2nd Respondents in this case should have proved both the commission of the electoral malpractices of bribery and undue influence by the Appellant and further that the alleged bribery and undue influence was widespread and may have or did influence the electorate in the manner they voted.

[7.62] As we stated earlier on in this judgment, as an appellate court, we will not lightly interfere with the findings of fact made by a trial court except on very clear grounds. In **Examination Council of Zambia v Reliance Technology Limited**⁽²⁸⁾ which we cited with approval in the case of **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia**,⁽²⁹⁾ the Supreme Court held that an appellate Court will not lightly interfere with findings of fact of the trial Judge who had the benefit of seeing and evaluating the

witnesses unless it is shown that the findings of fact were either perverse or were made in the absence of relevant evidence or were premised on a misapprehension of the facts.

[7.63] In the present case, the record of appeal reveals that the learned trial Judge's finding that the bribery and undue influence attributed to the Appellant were widespread in the Constituency was not supported by the evidence on record. In the absence of that evidence, we find that this is a proper case for us to interfere with the trial Judge's finding of fact that the bribery and undue influence allegedly perpetrated by the Appellant were widespread in Lunte Constituency. We accordingly reverse it. Ground two, six and eight of the appeal therefore succeed.

[7.64] In ground one of the appeal the Appellant contended that the trial Judge was wrong to nullify his election despite almost all witnesses disputing the 1st Respondent's version of the testimony and in spite of all the witnesses denying that they saw the Appellant in most of the alleged places. In ground three he contended that the trial court erred in law and in fact when it failed to warn itself of the dangers of receiving evidence from partisan witnesses who alleged that the Appellant was giving out money during various meetings

held before elections. In ground four, the Appellant contended that the trial Court was wrong when it failed to resolve the contradictory statements of the Respondent's witnesses and make a finding but instead believed all the contradictory statements at once and relied on them to nullify the Appellant's election. In ground nine he contended that the lower Court misdirected itself when it considered the admission of documents during cross examination of a witness by the 2nd Respondent without due regard to the prejudice that was going to be occasioned to the Appellant herein who had already cross-examined the witness. These four grounds relate to the allegations of bribery and undue influence which we have fully considered earlier in this judgment. Since we have upheld grounds two, six, seven, eight, ten and eleven of the appeal relating to the same allegations, it is our considered view that it is not necessary for us to consider grounds one, three, four and nine of the appeal as the learned Judge did not properly analyse the evidence before him before nullifying the Appellant's election.

[7.65] As we have found that the 1st and 2nd Respondents did not prove that the bribery and undue influence they complained of were committed by the Appellant as they alleged or that the alleged

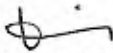
1 electoral malpractices were widespread in the Constituency, as a mandatory requirement of section 97(2)(a) of the Act, the appeal succeeds.

[7.66] We therefore set aside the lower Court's decision to nullify the election and declare that the Appellant, Mutotwe Kafwaya was duly elected as Member of Parliament for Lunte Constituency.

[7.67] Each party shall bear their own costs of this appeal and before the lower Court.



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A. M. Sitali
CONSTITUTIONAL COURT JUDGE



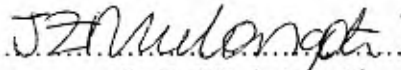
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M. S. Mulenga
CONSTITUTIONAL COURT JUDGE



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P. Mulonda
CONSTITUTIONAL COURT JUDGE



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M. Munalula
CONSTITUTIONAL COURT JUDGE



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J. Z. Mulongoti
CONSTITUTIONAL COURT JUDGE