IN THE CONSTITUTIONAL COURT OF ZAMBIA **2021/CCZ/A0035**

HOLDEN AT LUSAKA

(APPELLATE JURISDICTION)

IN THE MATTER OF:	**ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 CHAPTER 1 OF THE LAWS OF ZAMBIA**
IN THE MATTER OF:	**SECTION 97 (2) OF THE ELECTORAL PROCESS ACT NO.35 OF 2016**
IN THE MATTER OF:	**SECTIONS 70, 96, 98(c), 99(a), 100(2)(a) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.**
IN THE MATTER OF:	**THE PARLIAMENTARY ELECTION FOR MATERO CONSTITUENCY OF THE DISTRICT OF LUSAKA HELD ON 12TH AUGUST 2021**

BETWEEN:	
TOM MICHELO	**APPELLANT**
AND	
MILES SAMPA	**1ST RESPONDENT**
ELECTORAL COMMISSION OF ZAMBIA	**2ND RESPONDENT**

CORAM: Munalula DPC, Mulonda, Musaluke, Chisunka and Mulongoti JJC on 26th July 2022 and 21st October, 2022

For the Appellant: Mr W. Chintungu of Messrs Wallace and Co. Legal Practitioners with Mr S. Milimo of Mesdammes Mushipe and Associates

For the 1st Respondent: Mr P.K. Chibundi of Mosha and Co. with Mr L. Lemba of Mulungushi Chambers, Ms Z. Chirambo and Mr P. Nachima of J and M Advocates

For the 2nd Respondent: Ms T. Phiri and Mr M. Bwalya, In House Counsel, Electoral Commission of Zambia

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J U D G M E N T

Munalula, DPC delivered the Judgment of the Court.

Cases referred to-

1. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)
2. Green Nikutisha and Another v The People (1979) Z.R. 261.
3. Margaret Mwanakatwe v Charlotte Scott CCZ Selected Judgment no. 50 of 2018
4. Nkandu Luo and Another v Doreen Sefuka Mwamba and the Attorney General CCZ Selected Judgment no. 51 of 2018
5. Giles Chomba Yambayamba v Kapembwa Simbao and 2 Others CCZ Selected Judgment no. 6 of 2018.
6. Sunday Chitungu Maluba v Rodgers Mwewa and Attorney General 2017/CC/A004
7. Chewe Taulo v Patrick Mucheleka and Others 2021/CC/A0023
8. Richwell Siamunene v Sialubalo Gift, CCZ Selected Judgment no. 58 of 2017
9. Charles Nakasamu v Simon Kakoma v Electoral Commission of Zambia Appeal no. 2021/CCZ/A0012
10. Luka Simumba v Simon Patson Simwanza v Electoral Commission of Zambia 2022/CCZ/A0024
11. Bowman Lusambo v Bernard Kanengo and Electoral Commission of Zambia 2021/CCZ/A009
12. Mubita Mwangala v Inonge Mutukwa Wina Appeal No. 80 of 2007
13. Sampa John v Brian Mundubile 2021/CCZ/A0036
14. Muhali George Imbuwa v Enock Kaywala Mundia, CCZ Selected Judgment no. 18 of 2018
15. Austin Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018

Legislation referred to-

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

Introduction

[1] The honourable Mr Justice M.K. Chisunka sat with us when we heard this matter in July. He has since proceeded on leave hence this Judgment is by the Majority.

[2] The Appellant herein, who was the Petitioner in the High Court, appeals against the whole of the Judgment of the said Court delivered on

19th November, 2021 which dismissed his petition and upheld the election of the 1st Respondent as the duly elected Member of Parliament for Matero Constituency in Lusaka District. Notice and Memorandum of Appeal were duly filed on 17th December, 2021 followed by the record of appeal on 17th January, 2022. The appeal was however not heard until 26th July, 2022 due to delays orchestrated by the parties.

Background

[3] The Appellant stood on the United Party for National Development (UPND) ticket whilst the 1st Respondent stood on the Patriotic Front (PF) ticket in the 12th August, 2021 Parliamentary elections. The Appellant received 33, 598 votes losing to the 1st Respondent who garnered 55,612 votes and was thereby declared winner of the Matero Parliamentary seat. Dissatisfied with the result, the Appellant petitioned the High Court for Zambia (henceforth "trial Court").

[4] The Petition before the trial Court, alleged among other things, that the 1st Respondent through some named supporters perpetrated a number of violent attacks which led to the injury of the Appellant's supporters and destruction of property during the campaign period. Further, that the 1st Respondent had caused to be published false

information on a Facebook public page alleging that the Appellant had withdrawn from the election. In addition, the Petitioner contended that the 1st Respondent had engaged in corrupt practices by distributing mealie-meal and money to the electorate in return for votes. Further, that the 1st Respondent and his supporters removed the Appellant's campaign materials and defied the campaign ban imposed by the 2nd Respondent on 15th June, 2021 by continuing to campaign throughout the period of the ban.

[5] After hearing all the evidence before him, the trial Court found that the Appellant had failed to prove the 1st Respondent's link to any of the allegations levelled against him to the standard required under section 97 (2)(a) of the Electoral Process Act (EPA). With respect to allegations on the conduct of the elections, the trial court noted that section 97 (2) (b) of the EPA only applied to the 2nd Respondent and that any allegations in respect of conduct of elections could not be placed on the 1st Respondent. The trial Court also held that the Appellant had failed to prove the allegations against the 2nd Respondent regarding the non-compliance with the electoral laws. The trial court therefore dismissed the petition and upheld the election of the 1st Respondent as Member of Parliament for Matero Constituency.

Appellant's case

[6] Aggrieved by the decision of the trial Court, the Appellant has come to this Court with thirteen grounds of appeal as follows:

1. **That the learned judge of the High Court erred both in law and in fact when he overlooked overwhelming evidence led before him and instead, decided that he found it very difficult to believe that the man named HH AISHA was hacked on 12th June 2021 when the attempted attack at the United Party for National Development (UPND) Matero Constituency office was actually prevented and was unsuccessful and further held that there was no evidence that those that hacked HH Aisha were PF cadres;**
2. **That the learned Judge of the High Court erred both in law and in fact when he decided that the Petitioner failed to prove any link of the 1st Respondent to Chileshe alias Cash Money, Lee Mukupa and Emmanuel Kabita and other Patriotic Front (PF) cadres that were engaged in violence, when in fact there was sufficient evidence linking the named trio directly to the 1st Respondent;**
3. **That the learned judge of the High Court erred both in law and fact when he decided and held that because Lee Mukupa was a candidate in the Local Government elections the notion that he was running the 1st Respondent's campaign is outrageous because Lee Mukupa was campaigning for himself and further held that there was no evidence connecting Lee Mukupa and Chileshe alias Cash Money to the 1st Respondent as his appointed election and/ or polling agents, when in fact there was sufficient evidence on record connecting Chileshe alias Cash Money and Lee Mukupa's illegal conduct and/or electoral malpractices during campaigns, directly to and/or as acting with the consent and approval of the 1st Respondent;**
4. **That the learned judge of the High Court erred both in law and in fact when he decided to ignore and disregard the overwhelming evidence of acts of violence laid before him and instead held that there was no evidence to show that acts of violence were widespread and prevented the majority of voters in Matero Constituency from electing the candidate of choice;**
5. **That the learned judge of the High Court erred both in law and in fact when he decided and held that the Petitioner (now the Appellant herein) failed to prove allegations of undue influence, when such allegations were in fact proven;**
6. **That the learned judge of the High Court erred both in law and in fact when he contradicted himself by holding on the one hand that from the**

article at page 1 and 2 of the Petitioner's Bundle of Documents, Boba TV was an initiative of the 1st Respondent when he was a Mayor of the City of Lusaka in 2020, while on the other hand held that the coming on scene by RW3 that he is the owner of the Facebook page Boba TV and responsible for the article complained of, no cogent evidence exist *(sic)* to prove that Boba TV is owned by the 1st Respondent. This is despite RW1 and RW3 admitting in cross examination that Boba TV belonged to the 1st Respondent;

7. That the learned judge of the High Court erred both in law and in fact when he overlooked and disregarded evidence proving that Boba Tv together with the post on false publication complained of, was widely seen and read by many who believed the said post to be true and instead decided and held that despite Boba TV Facebook having a large following and the post having gone viral, there was no tangible evidence to prove that the post was made by the 1st Respondent or with the knowledge and consent or approval of the 1st Respondent or his appointed agent and further held that no evidence existed to prove that by virtue of the said post, the majority of the voters in Matero Constituency were prevented from electing their preferred candidate;
8. That the learned judge of the High Court erred both in law and fact when he disregarded cogent evidence led by PW2 Elias Siwale and corroborated by PW3 Steven Musonda who were both part of the PF team instructed by the 1st Respondent to carry out the distribution of mealie meal to the voters in selected wall fenced premises/places in Matero Constituency during the campaign ban period effected by the 2nd Respondent, and instead decided and held that the distribution of mealie meal during the campaign ban period cannot be said to have been done by the 1st Respondent or with the knowledge and consent of the 1st Respondent or his agent or that the same prevented the majority of the voters in Matero Constituency from electing their preferred candidate;
9. That the learned judge of the High Court erred both in law and in fact when he decided on the one hand to rejected *(sic)* and/or disregarded *(sic)* the evidence showing a series of violent attacks carried out by PF cadres acting with the knowledge and consent of the 1st Respondent, on UPND supporters and held that it was illogical to conclude that the 1st Respondent and his team were the perpetrators of an alleged attack on Gilbert Liswaniso a UPND member, while on the other hand, held without any evidence that the 1st Respondent was instead hacked by UPND cadres;
10. That the learned judge of the High Court erred both in law and in fact when he decided to accept the tainted evidence of RW4 Shepe Marglorious and rejected the cogent evidence of PW12 Phenias Kazongo a witness who personally carried out the vote manipulation by changing figures for 67 wards and rewriting new GEN 20s which are the primary

source documents, and this was despite RW4 accepting in cross examination that with the use of the computer system it was possible to manipulate and interchange votes for one candidate over another;

11. **That the learned judge of the High Court erred both in law and in fact when he decided and held that there was no evidence that the electoral process was so flawed and not conducted in conformity with the law or the few mentioned miscalculations by the presiding officers affected the result, when in fact such evidence existed and was led before him;**
12. **That the learned judge of the High Court erred both in law and in fact when he decided that the 1st Respondent having been declared winner of the Matero Constituency with 55,612 votes leaving a huge margin of 22,014 between him and the Petitioner/Appellant herein shows that the people of Matero Constituency elected the candidate of their choice freely as the results speaks *(sic)* for themselves, and thus the learned judge failed to direct his mind to the fact that an illegal activity once proven as was the case, entitles him/the Court to nullify an election regardless of the difference in the number of votes amassed by a candidate;**
13. **That the learned judge of the High Court erred both in law and in fact when without any evidence, he decided and held that the 1st Respondent was duly elected as Member of Parliament for Matero Constituency.**

[7] The Appellant filed arguments in support of the appeal in which he contended that the provisions of section 97 of the Electoral Process Act and a plethora of authorities reveal that the trial Court ought to have nullified the election because there was ample evidence establishing the allegations advanced against the 1st Respondent.

[8] The Appellant argued grounds one, two and nine together and contended that the evidence adduced in favour of the Appellant, revealing acts of violence was sufficient and had established that, the attack on his supporters was done with the knowledge and consent of the 1st

Respondent. Further that the said acts were proven to the highest degree of convincing clarity, to be so widespread as to have swayed or may have swayed the majority of the electorate. That during the campaign period the 1st Respondent and his agents armed with firearms, golf sticks, tear gas canisters, catapults, machetes and other weapons attacked the Appellant's agents and perpetrated violence at the UPND Matero Constituency office. The Appellant contended that the reason for this assertion was clear from the fact that most of the attacks were led by a person named Chileshe (nicknamed Cash money) who was head of the 1st Respondent's security detail. He averred that there was evidence pointing to their close relationship in the picture produced at page 257 of the Record of Appeal. That Chileshe was sometimes accompanied by Lee Mukupa councillor for Muchinga ward 24, Matero Constituency.

[9] We were referred to the evidence of PW4 as evidence of the attempted attack on the UPND office and on the Appellant, allegedly by a member of the 1st Respondent's security team, and that a docket had been opened by the police. We were also referred to pages 610 to 636 and 802 to 896 as evidence of massive violence and threatening of voters. That this Court should frown upon anyone who finds their way to Parliament on a platform of bribery and corruption.

[10] With regard to ground three, the Appellant argued that the trial Court's finding that a Lee Mukupa was campaigning for himself and not the 1st Respondent was not supported by any evidence. Citing **Wilson Masauso Zulu v Avondale Housing Project Limited**[1] the Appellant argued that the trial Court's finding cannot stand.

[11] With regard to ground four and five, the Appellant alleged that the trial Court ignored overwhelming evidence of the widespread nature of the violence perpetrated by the 1st Respondent. In the Appellant's view, the evidence tendered by PW5 and PW6 was enough to establish that the violence was widespread, and this justified the nullification of election results. In summary, the Appellant submitted that there was enough evidence pointing to the undue influence that the 1st Respondent exerted on the electorate in Matero Constituency.

[12] The Appellant argued grounds six and seven together as they relate to the alleged publication of a false statement by the 1st Respondent to the effect that the Appellant had withdrawn from the election. It was the Appellant's position that the information was published on a Facebook page belonging to the 1st Respondent with a large following of approximately 335,000. This, the Appellant argued had the effect of reducing the Appellant's chances of being elected Member of Parliament.

[13] With regard to ground eight the Appellant argued that the trial Court ignored the evidence of PW2 and PW5 of wide scale bribery at the instance of the 1st Respondent through the distribution of mealie-meal in the five wards of Matero Constituency.

[14] In ground ten, the Appellant referred to PW12's testimony in which he admitted to tampering with election results from 67 polling stations on the instruction of RW4, the Returning Officer. He argued that the decision of the trial Court to reject PW12's testimony in preference for that of RW4 was wrong.

[15] Lastly, in grounds eleven, twelve and thirteen, the Appellant contended that the trial Court's declaration of the 1st Respondent as winner of the Matero Parliamentary elections was inherently wrong. He argued that this decision was not supported by the series of acts of electoral misconduct which were proved to have been perpetrated by the 1st Respondent. He contended further that the trial Court's reliance on the evidence of RW4 without corroboration was equally wrong. The Appellant based this argument on the case of **Green Nikutisha and Another v The People.**[3]

1st Respondent's case

[16] The 1st Respondent filed two sets of heads of argument in response. He originally filed heads of argument relating to grounds one, two, four, five, nine, eleven, twelve and thirteen on 22nd February, 2022. Grounds one, two, four and nine were argued together by submitting that there was no evidence linking the 1st Respondent to the violence perpetrated by third parties and to the allegation that the violence prevented or may have prevented the majority of voters from voting for their preferred candidate. Counsel contended that the 1st Respondent can only be held liable for acts done by him or his election or polling agent. He submitted that the persons alleged to have perpetrated the violence were not the 1st Respondent's official agents and thus their acts could not be linked to the 1st Respondent. He cited the cases of **Margaret Mwanakatwe v Charlotte Scott**[3] and **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuka Mwamba and the Attorney General**[4] in support of this principle.

[17] In response to ground five, the 1st Respondent submitted that the Appellant failed to prove that the alleged acts of undue influence were carried out by the 1st Respondent or his official agent. Therefore, the trial Court was on firm ground in dismissing the allegation for lack of merit.

[18] With regard to ground eleven, the 1st Respondent submitted that the trial Court was right to disregard the testimony of PW12 as the testimony of RW4 had rebutted PW12's evidence and shown that the 2nd Respondent had conducted the election in line with the EPA. The 1st Respondent argued that sections 71 and 72 of the EPA provide for an elaborate process which makes it possible to easily pick up on anomalies between the results announced at polling stations and the ones recorded at the totalling centre. He submitted that the trial Court was thus right to disregard the Appellant's position which implied otherwise.

[19] In response to ground twelve, the 1st Respondent contended that since section 97(2) (b) of the EPA relates to the 2nd Respondent, the body charged with the conduct of elections, the alleged non-compliance with the electoral laws could not be placed on the 1st Respondent as held in the case of **Giles Chomba Yambayamba v Kapembwa Simbao and 2 Others**.[5]

[20] In response to ground thirteen, the 1st Respondent submitted that the Appellant failed to discharge his burden of proof on all the allegations advanced. Further, that the evidence proffered did not meet the requisite standard of convincing clarity and contained contradictions.

[21] With leave of the Court, the 1st Respondent filed supplementary heads of argument on 29th July, 2022 responding to grounds three, six, seven, eight and ten.

[22] In response to ground three, it was contended that there was no perverse finding which was made by the trial Court in relation to whether Lee Mukupa was campaigning for himself or for the 1st Respondent as the trial Court merely agreed with the 1st Respondent. That the Appellant's evidence failed to link the 1st Respondent to Chileshe, alias Cash money, Lee Mukupa, Mike Katiba and alleged PF cadres who engaged in acts of violence nor did it meet the threshold required by law.

[23] In response to grounds six and seven relating to the posting on BOBA TV that the Appellant had withdrawn from the election, it was contended that the evidence fell short as it was mostly speculative. That the evidence was not cogent enough to prove that the 1st Respondent was the owner of BOBA TV more so in the face of RW3's testimony that he was the owner. Further, that there was no proof that the posting did sway the majority of the voters from voting for the Appellant. We were referred to the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuka Mwamba and Attorney General**[4] in support.

[24] In response to ground eight, it was contended that the trial Court did not err when it disregarded the evidence of PW2 and PW3 as there were

no pictures showing the distribution of mealie-meal. Further, that the pictures shown of mealie-meal being loaded were taken on 11th August, 2021. That no witness testified to receiving the mealie-meal. That there was no evidence that the 1st Respondent engaged in the distribution of the said mealie-meal nor was there evidence of any swaying of minds as a result thereof. We were referred to the case of **Sunday Chitungu Maluba v Rodgers Mwewa**[6] in support. It was therefore concluded that the ground had no merit.

[25] In response to ground ten, it was argued that the election was conducted in substantial conformity with the law and that detected errors were corrected by the system. It was said that RW4 was a reliable witness as demonstrated by her demeanour whereas the credibility of RW12 was highly questionable. That the ground therefore ought to be dismissed.

[26] The 1st Respondent contended in closing that the arguments fell short of the required standard as stated in the case of **Chewe Taulo v Patrick Mucheleka and Others**[7] and implored the Court to dismiss the Appeal.

2nd Respondent's case

[27] The 2nd Respondent filed arguments in response in which they argued, on grounds one to nine, that under section 97(2) (a) of the EPA,

the wrongdoer has to be identified and a candidate is only liable for conduct linked to self or appointed agent. In the 2nd Respondent's view, the Appellant failed to proffer cogent evidence linking the 1st Respondent to the alleged corrupt and illegal practices. This being the case, the 2nd Respondent invoked the holding in the case of **Richwell Siamunene v Sialubalo Gift**[8] to the effect that an act of a party member without further proof does not impute liability for the act to the candidate. The 2nd Respondent also submitted that the Appellant had further failed to prove that the alleged corrupt or illegal practices were widespread enough to have an impact on the majority of voters as envisaged in section 97(2)(a) of the EPA.

[28] Turning to grounds ten and eleven, the 2nd Respondent submitted that the trial Court was on firm ground when it preferred the testimony of RW4 over that of PW12 because the few incidents of miscalculations by presiding officers which were pointed out had been corrected at the totalling centre. That in line with the case of **Charles Nakasamu v Simon Kakoma and The Electoral Commission of Zambia**[9] and **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**[4] the electoral flaws alleged by the Appellant did not warrant a nullification of the election. The 2nd Respondent thus prayed that the appeal be dismissed.

Reply

[29] The Appellant filed heads of argument in reply to specific grounds.

In the said heads of argument, responding only to the 1st Respondent's supplementary heads of argument, the Appellant reiterated in relation to ground three that the trial Court had made a perverse finding unsupported by any evidence that Lee Mukupa was campaigning for himself. That he, Mike Katiba and others were under the tutelage of the 1st Respondent and therefore in perpetrating violence, they were acting with his knowledge and consent. **Wilson Masauso Zulu v Avondale Housing Project Ltd**[1] and **Luka Simumba v Simon Patson Simwanza and Electoral Commission of Zambia**[10] were cited in support. It was contended that the acts of violence were so widespread as to have affected the majority of the electorate in Matero Constituency. **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuka Mwamba and the Attorney General**[4] was also cited in support.

[30] Turning to grounds six and seven, the Appellant averred that the disclaimer as to postings on the BOBA TV webpage which applied to the 1st Respondent could only lead to the inference that he is the owner of the said page. We were asked to take judicial notice that BOBA TV is the brainchild of the 1st Respondent and that he was using BOBA TV as an information dissemination platform to the public long before the 2021

general elections and continued to do so throughout and even after the election. It was contended that BOBA TV has a large following of 335,000 hence the statement that the Appellant had withdrawn from the election must have affected a large number of voters.

[31] That if in the alternative the Court found that he was not the owner, it was contended that he nevertheless continued to disseminate political information on the said platform and did not dissociate himself from it. **Bowman Lusambo v Bernard Kanengo and Electoral Commission of Zambia**[11] was cited in support

[32] In relation to ground eight, it was contended that the evidence of PW2, a member of the 1st Respondent's campaign team corroborated PW1 and and PW3's evidence on the distribution of ECL and Miles Sampa branded t-shirts, mealie-meal and pieces of chitenge material across all five wards during the election ban period effected by the Electoral Commission of Zambia on the PF and the UPND. That PW2 testified that he was personally instructed by the 1st Respondent to do the distribution and thereby solicit for votes. That 2000 bags of mealie-meal were distributed. That the wrongful acts were an inducement and similar acts were not condoned in the **Bowman Lusambo**[11] matter. That the impugned acts were widespread in Matero Constituency and thus prevented the majority of the electorate from electing the candidate of their choice. The cases of

Mubita Mwangala v Inonge Mutukwa Wina[12] and **Chewe Taulo v Patrick Mucheleka and Another**[7] were cited in support.

[33] On ground ten, the Appellant narrated the evidence of PW12. It was said that PW12 testified to acting on the instructions of RW4 to make the 1st Respondent win the elections by tampering with various documents and changing figures at the totalling centre. That police officers found 'them' destroying GEN 20 forms and generating new ones upon the instruction of the town clerk who was instructed by the 1st Respondent as he stood to benefit. That PW1 also testified to the irregularities upon the closing of the polling stations and that his being denied some GEN 20 forms made it difficult for him to verify the results. That over 60 out of the 177 polling stations in Matero Constituency were affected. That a complaint was made to ECZ but while verification for accuracy was going on the returning officer announced the results. That the issue of manipulation of figures was also reported to Lusaka Central Police station. That after a search police officers recovered some unsigned GEN 20 forms completed in similar handwriting when each presiding officer only fills out one GEN 20 form. That the returning officer (who took the stand as RW4) struggled to explain the resulting discrepancies in the results and admitted that figures could be manipulated and changed in favour of a

particular candidate. It was averred that the trial Court disregarded this cogent evidence without proper factual or legal justification.

[34] In conclusion it was contended that the appeal was meritorious as the 1st Respondent's election was marred by massive irregularities and malpractices disapproved by the Electoral Process Act No. 35 of 2016 and in particular section 81 (1) and regulations 2 and 15 (2) of the Electoral Code of Conduct. That the Appellant was denied an opportunity to freely campaign. And further that the violence was reported in all the wards and was therefore widespread. The Appellant reiterated the prayer that the 1st Respondent was not validly elected as Member of Parliament for Matero Constituency and that we ought to nullify the election.

Consideration and decision

[35] We have considered the record of appeal, the Judgment of the High Court, the Appellant's heads of argument, the 1st and 2nd Respondents' heads of argument in response, the 1st Respondent's supplementary heads of argument and the Appellant's heads of argument in reply.

[36] We are beseeched to reverse the findings of the trial Court. In appealing against the whole Judgment as set out in the thirteen substantive grounds of appeal, the Appellant seeks a reversal of the

findings of both fact and law by the trial Court. We shall therefore begin with the principles and the law that apply in the event of an appeal against a trial court's findings of fact.

[37] Firstly, in **Richwell Siamunene v Sialubalo Gift**[8] this Court affirmed the principle long held in our Jurisdiction that an appellate court will not reverse findings of fact made by a trial court unless it is satisfied that the findings in question are either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they are findings which on a proper view of the evidence, no trial court acting correctly can reasonably make. We re-affirm the principle.

[38] Secondly, with regard to the law, it is helpful at the outset to cite the provisions of section 97(2) of the EPA. Section 97 (2) reads:

> **97. (2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –**
> **(i) by a candidate; or**
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;**
> **(b) Subject to the provisions of subsection (4) there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or Tribunal that the election was not conducted in accordance with the principles laid down in such**

> **provision and that <u>such non-compliance affected the result of the election.</u>** *(emphasis added)*

[39] This provision has been found by this Court in numerous judgments such as **Sunday Chitungu v Rodgers Mwewa and Attorney General**[7] to entail that a person challenging the election of a Member of Parliament must prove to the satisfaction of the court trying the matter, to a fairly high degree of convincing clarity, that the candidate at fault or their agent or another person acting with the candidate or their agent's knowledge and consent or approval committed a corrupt practice, illegal act or other misconduct. Further, that as a result of such proven offence, the majority of the electorate were or may have been prevented from voting for the candidate of their choice. This matter having come to us on appeal, the perversity of the trial Court's findings of fact in the face of the evidence on record must be established before this Court can reverse the said Court.

[40] Further, in the case of **Sampa John v Brian Mundubile**[14] we pointed out that the swaying of the minds of the voters is what brings the electoral misconduct in issue within the purview of an election petition. Thus there must be equally cogent evidence at the same high degree of convincing clarity supporting a finding that the alleged offence has been proven as establishing that the electorate were or could have been influenced to vote against their preferred candidate.

[41] We wish to begin by noting that the common thread that runs through and links the grounds of appeal in *casu* is the claim by the Appellant that sufficiently cogent evidence of electoral misconduct tied to the 1st Respondent as well as cogent evidence of the impact of the misconduct both on the conduct of the election and on the minds of the voters was led before the trial court. With this in mind, we have carefully perused the grounds of appeal which, for convenience, are considered sequentially with the exception of grounds three and nine.

Grounds one, two, four and nine

[42] Ground one is premised on the trial Court's finding that a person named HH Aisha was not hacked by PF cadres on 12th June, 2021. The Appellant contends that the evidence on this allegation was given by PW1 and PW10. They both testified that on 12th June, 2021 some PF supporters attacked the UPND office in Matero which resulted in the injury of UPND supporters, including a person named HH Aisha. It is not clear if HH Aisha and Steven Malali are the same person as the trial Court referred to a Steven Malali.

[43] The evidence before the lower court on this allegation was a video. The said video was marked as video number 1. The trial Court noted that

in the video, the victim is seen wearing a head sock with blood oozing from his head. The Court found that the video did not show the assailants. This was admitted by PW10 in cross examination at page 907 of volume three of the Record of Appeal. PW10 also admitted that there was no medical report produced in relation to this incident. The Court found further that PW8's evidence contradicted that of PW1 and PW10 as it proved that the violent attempt on the UPND offices was prevented. The Court stated that it was not able to ascertain that the man in the video was hacked on 12th June, 2021.

[44] Further, that the trial Court found that there were inconsistencies in the identities of the alleged attackers which resulted in a failure to prove the allegations to the required standard. In light of this evidence, the trial Court went on to determine in paragraph 13.42 of the Judgment that there was no cogent evidence that the said HH Aisha was injured by PF supporters on 12th June, 2021. The trial Court held further that there was no cogent evidence to link the 1st Respondent or his polling or election agents to the misconduct complained of.

[45] Our perusal of the record of appeal which includes the evidence of PW1, PW10 and video number 1, shows the evidence adduced by the Appellant does not indicate who the assailants were, and thus the trial Court was on firm ground in the finding it made. Further, this ground

appears to be of no consequence as it does not speak to the requirement set under the law that relevant misconduct must be tied to the 1st Respondent. The evidence on record does not link the 1st Respondent to the alleged assault of HH Aisha and thus had no relevance in the Petition. Ground one has no merit.

[46] Ground two quarrels with the trial Court's finding that the Appellant had failed to prove that the 1st Respondent was linked to the persons that perpetrated violence in Matero Constituency. The named persons being Chileshe also known as Cash Money, Lee Mukupa and Emmanuel Kabita. It was alleged that the three participated actively in (and spearheaded) the violent attacks that happened in Matero Constituency. Once again, this ground of appeal is misconceived. This is because section 97 (2) (a) of the EPA requires the violence to be tied to a candidate. It does not require a candidate to be linked to a perpetrator of misconduct but rather it requires that the candidate be linked to the misconduct either by the fact that the misconduct was done by a third party with the candidate's knowledge and consent or that of his election agent or polling agent. The trial Court rightly addressed its mind to this when it observed in paragraph 13.41 that the question was-

> **... whether there was cogent evidence that the 1st Respondent directly or through his election and polling agent or with his consent, committed electoral malpractices or misconduct complained of by the Petitioner.**

[47] In assessing the linkage between the 1st Respondent and the three individuals, the trial Court was concerned with assessing the existence of evidence linking the 1st Respondent to the violence. This is apparent from paragraphs 13.56 to 13.60. The trial Court's concern was with whether the alleged acts by the three persons could be tied to the 1st Respondent. He found no such evidence.

[48] A review of the record of appeal, particularly the evidence of PW1, PW8 and PW10, speaks to specific incidents of violence and reveals that there is no evidence linking the 1st Respondent to the violent acts allegedly perpetrated by Chileshe, Lee Mukupa or Katiba. PW10's evidence that he learnt that the 1st Respondent had instructed Chileshe to attack UPND offices was hearsay and there was need for other evidence without which the trial Court was right to discount the allegation. On the whole, there was no cogent evidence showing that the violence was perpetrated by the 1st Respondent or with his knowledge and consent or that of his election or polling agent. We see no merit in this ground.

[49] Ground four challenges the trial Court's dismissal of the widespread nature of the violent acts perpetrated by PF supporters. This ground finds its basis in the earlier grounds in which we upheld the lower Court's holding that the allegations of violence had no merit. A perusal of grounds

one and two above show a failure on the part of the Appellant to prove that the violence was linked to the 1st Respondent. This Court stated in **Muhali George Imbuwa v Enock Kaywala Mundia**[14] that once the misconduct cannot be tied to the 1st Respondent, there is no need to proceed to assess whether there was evidence pointing to the majority of voters being affected by the alleged misconduct. It follows that engaging in an analysis of this ground would be a mere academic exercise. It is equally dismissed.

[50] We now turn to ground nine. Ground nine contended that evidence of alleged widespread acts of violence carried out by PF cadres with the 1st Respondent's knowledge and consent was not accepted and taken into account by the Court but without any evidence, the Court found that the 1st Respondent was hacked by UPND cadres. The trial Court considered the evidence and found that the allegations had also not been proved to the requisite standard. That there were various inconsistencies in the evidence of the Appellant's and the 1st Respondent's witnesses in relation to the stabbing of the 1st Respondent.

[51] We have considered the evidence on record relating to ground nine. Our short answer is that the issues canvassed in ground nine are sufficiently dealt with in grounds one, two and four. We can see nothing

improper in the Court's assessment of the evidence so as to justify a reversal on this point. This ground lacks merit and is dismissed.

Ground three

[52] The contention in ground three was that the evidence established that Lee Mukupa and Chileshe ,alias Cash Money's misconduct was connected to the 1st Respondent making them his election/polling agents. The trial Court reviewed the evidence that linked the 1st Respondent to one Chileshe alias Cash Money which was a picture of the two of them at a wedding. The trial Court held that there was no evidence from the picture that the said Cash Money provided security services to the 1st Respondent. It further, found that the Appellant made reference to one Katiba who had been arrested and had a case subsisting in the subordinate court resulting from an attempted attack on the UPND offices but was unable to sufficiently link this person to the 1st Respondent. It also found that there was no evidence that any of these acts were done with the knowledge, consent and approval of the 1st Respondent.

[53] Ground three is more or less the same as ground two, save to add that it focuses on a finding of the trial Court in paragraph 13.54 of the Judgement. In the trial Court's own words, it found the suggestion that Lee

Mukupa was running the 1st Respondent's campaign outrageous. The Court stated that this was because Lee Mukupa was a candidate in the Local Government Elections in that Constituency. It is clear from the record that the question which the trial judge was mainly concerned with was whether the 1st Respondent was linked to the violent acts done by the said Lee Mukupa and two others.

[54] The issue of whether Lee Mukupa campaigned for the 1st Respondent or not had no bearing on the question which the trial Court was seeking to answer. Whether or not Lee Mukupa campaigned for the 1st Respondent was immaterial. The Appellant's evidence ought to have shown that Lee Mukupa's illegal acts were done in his capacity as an agent of the 1st Respondent or with the approval, knowledge and consent of the 1st Respondent. The record shows that there was no evidence before the trial Court to that effect. Thus it's finding on Lee Mukupa campaigning for himself is of no consequence to this Appeal. Ground three is dismissed.

Ground five

[55] We now turn to addressing ground five in which the Appellant disputed the trial Court's finding that he had failed to prove the allegations

of undue influence. Once again this ground stands and falls on evidence showing that the actions complained of can be sufficiently linked to the 1st Respondent. The undue influence alleged under this ground is connected to the violent acts alleged in the grounds above. However, as we have already determined from the record, the Appellant did not lay sufficient evidence before the trial court to show a link between the illegal acts and the 1st Respondent. The alleged undue influence perpetuated through violent acts was not linked to the 1st Respondent by the evidence in the manner and to the standard required by section 97(2) (a) of the EPA and as such this ground lacks merit and it is dismissed.

Grounds six and seven

[56] Grounds six and seven were considered together. Grounds six and seven contested the trial Court's finding on the publication of false information about the Appellant on Boba TV, a Facebook page. The Appellant alleged that the false information was published with the knowledge and consent of the 1st Respondent as he was the owner of the Facebook page, and it was his sole campaign platform as per pages 254-255 of the Record of Appeal.

[57] The evidence on this issue came from PW1 and PW7 who testified to having seen a statement alleging that the Appellant had withdrawn his candidacy. PW7 testified that the statement was posted on Boba TV, a Facebook page with a following of 140-144,000 followers. He testified that the post amassed 353 likes and 122 comments. He said it was shared by three users to other platforms which inferred that the publication was viewed by persons beyond the 1st Respondent's social media following.

[58] It was PW7's testimony that he rebuffed the posting within 15 minutes of it being posted. PW7 admitted that a third party could have posted the false statement on behalf of the 1st Respondent. The 1st Respondent offered evidence in rebuttal through RW1 and RW3. RW1, an Information Computing Technician testified that though the 1st Respondent was affiliated with Boba TV, it was a public page, and any person could post on the page. The page even had a disclaimer distancing itself and the 1st Respondent from the views of third parties.

[59] RW3 testified to being a co-owner of the Facebook page. He stated that he and his partner, a Nando Sibitwane sought the 1st Respondent's permission to use the Boba Tv page and popularised the channel. RW3 admitted to having posted the statement on the alleged withdrawal of the Appellant from the election. He testified that he got the story from some on-line social media groups he had access to. Shortly after reading the

comment posted in the Appellant's name, RW3 deleted the post. This was after the post had gone viral.

[60] The trial Court reviewed the alleged publication of false statements on Boba TV which the 1st Respondent had denied issuing. It considered the evidence that the publication was deleted when it was discovered that the information was false. The trial Court endeavoured to consider the issue of ownership of Boba TV. Faced with conflicting evidence as to who owned Boba TV, the trial Court preferred the evidence of RW3. It determined in paragraph 14.22-14.24 of the Judgment that RW3 was a credible witness and was unshaken in his evidence. It thus saw no link between the publication and the 1st Respondent seeing as RW3 had admitted to making the post.

[61] The trial Court was entitled to resolve the conflict as it did on the basis of decisions that have been made by this Court with regard to the same. In **Austin Liato v Sitwala Sitwala**[15] this court observed that a trial court faced with conflicting narratives, is mandated to make a finding on the evidence before it, having seen and heard the witnesses. This is what the Court did in the case at hand.

[62] It must be stated that in the circumstances of the publication involved, the pertinent issue for the purposes of section 97(2)(a) of the EPA ought in our considered view, to have been whether the 1st Respondent made

the publication and if it had an impact on the majority of the electorate and not necessarily the ownership of Boba TV. Nonetheless, a detailed review of the evidence on this issue shows that the trial Court cannot be faulted in its finding as indeed the Appellant failed to offer cogent evidence showing that the publication was issued by the 1st Respondent or with his knowledge and approval or that of his election agent. This is more so that RW3 testified to posting it without the 1st Respondent's knowledge and to removing it upon discovering that it was false. The weakness of grounds six and seven is settled in our view by the admission of the Appellant at page 704 of the record of appeal that the election was not won in cyberspace but on the ground. Ground six and seven do not hold. They are dismissed.

Ground eight

[63] Ground eight alluded to bribery by the 1st Respondent stemming from the evidence of PW1, PW2 and PW3. Ground eight is thus concerned with the alleged distribution of mealie meal during the period that the 2nd Respondent had effected a campaign ban. The Appellant argued that the evidence of PW2 and PW3 was cogent enough to establish the allegation.

[64] PW2, who identified himself as a core-member of the 1st Respondent's campaign team and PF Vice Chairperson in Dolphin Branch of Ward 28 of Matero Constituency testified that the distribution of mealie meal was done across all the five wards in Matero Constituency on instruction by the 1st Respondent. The distribution of mealie meal was continued during the period that the 2nd Respondent had effected a ban on campaigns in Lusaka district between 15th June and 11th July, 2021. According to PW2 the distribution of mealie meal was in locations where the electorate would be invited. PW2 averred that about 2,000 bags of mealie meal were distributed in this manner.

[65] As further evidence, PW2 referred to photos produced at pages 292-294 of the Record of Appeal showing bags of mealie meal at the back of a vehicle, present in one picture is the 1st Respondent, PW2 and other unknown persons. The photos were said to have been taken on 10th August, 2021. PW2 admitted in cross-examination that this date was after the campaign ban was over.

[66] PW3 a subpoenaed witness testified that he was the PF Chairperson of Dolphin Branch in Ward 28 of Matero Constituency and a key member of the 1st Respondent's campaign team. He narrated that the campaign team engaged in a series of activities. Relevant to the allegation at hand were the voter education caucuses they used to have in selected

households at the end of which they would hand out mealie meal to the attendees. PW3 indicated that he was displeased with some of his party members and was not pleased that the 1st Respondent had won the election.

[67] The trial Court noted the evidence of PW2 and PW3 but highlighted that the photos relied upon by the witnesses did not show the distribution of mealie meal as the pictures only showed mealie meal loaded in a motor vehicle. The trial Court also found PW3's testimony questionable on account of his displeasure at the 1st Respondent's election victory.

[68] The trial Court thus found that the Appellant had failed to prove this allegation as well for a number of reasons. The video footage proffered in evidence showed the 1st Respondent distributing campaign materials permitted by law after the campaign ban had been lifted. The trial Court found that distribution of campaign materials was legal. On the issue of mealie-meal however, the Court took a different approach despite it being branded with campaign signage. The Court treated the distribution of mealie-meal as illegal but found no evidence of the 1st Respondent distributing mealie-meal. Further room for doubt is created by the Appellant's admission in his evidence that both parties were supplying food to their 'foot soldiers' or campaign teams.

[69] Once the trial Court analysed the testimony of PW3 and discounted it on the basis of his having an interest to serve, it is clear that the evidence of PW2 required independent corroboration. We affirmed the need for corroboration of the testimony of partisan witnesses in **Muhali George Imbuwa v Enoch Kaywala Mundia.**[14] We see PW2 as having an interest of his own to serve because he was an office bearing member of the PF. In fact, he was the vice branch chairperson and therefore number two to PW3. Yet, he was testifying for the opposition. It is telling that whilst he was forthcoming in examination in chief, PW2's answers in cross examination were evasive. For instance he testified that he had lost and changed the phone on which he had pictures of mealie- meal being distributed. Although 2000 bags of mealie-meal were said to have been distributed no witness testified to having received the mealie-meal and to have changed their vote because of the mealie-meal received. Without corroboration by something else PW2's testimony could not carry enough weight.

[70] For the aforesaid reasons, we cannot fault the trial Court. It is evident from the record that there was insufficient evidence before the trial Court to establish to the required fairly high degree of clarity that the 1st Respondent did directly or through his agent or with his knowledge and consent distribute mealie-meal to the electorate so as to induce them to vote for him

during the period in which campaigning was banned by the Electoral Commission of Zambia. Ground eight is accordingly dismissed.

Grounds ten and eleven

[71] Ground ten and eleven relate to the alleged non-compliance with the EPA on the part of the 2nd Respondent. The two grounds challenge the trial Court's preference of RW4's evidence over that of PW12 to the effect that the votes were tampered with.

[72] The evidence on this issue mainly came through PW12 who testified that he was a Presiding Officer at Matero Community Hall as well as serving as Assistant Returning Officer at Matero Boys Secondary School during the 2021 general elections. He testified to having been approached on the 11th of August, 2021 by a Geoffrey Bwalya Mwamba who threatened him with a gun and offered him a sum of money to put pre-marked ballot papers in the ballot boxes. That he refused to do so.

[73] Further, that after the voting process ended and the counting was done, PW12 was called by RW4 to assist at the Constituency totalling centre at Matero Boys Secondary School. He was specifically instructed to swap election results in some polling stations so as to ensure that the 1st Respondent got more votes than the Appellant. The swapping of votes

was done at the totalling centre and every time he altered the results in favour of the 1st Respondent, he shredded the GEN 20 forms filled in at the polling stations and wrote out fresh GEN 20 forms with forged signatures.

[74] As a result, the information on the GEN 20 forms did not tally with the record of proceedings received from polling stations. When they sought to submit them to ECZ, they were rejected twice and they were instructed to reconcile the figures, an activity they engaged in until they were arrested by the Police at Nakatindi Hall, the totalling centre for Lusaka Constituency.

[75] PW12's testimony was in direct contrast with that of RW4 who testified to having been the Returning Officer for Matero Constituency. She relayed that though some GEN 20 forms from a number of polling stations had anomalies, the anomalies were easily picked up at the totalling centre and they were corrected as they were being entered in the computer system which is preprogramed to pick up errors. She testified that for the bulk of the results, the information on GEN 20 forms was in order. She explained the results that PW12 had testified were tampered with.

[76] It was RW4's testimony that PW12's assertion that she had instructed him to tamper with results was false and that the transparent manner in which the results were handled at the totalling centre could not have

allowed for tampering as results were announced before tallying of results commenced.

[77] On the allegation of the 1st Respondent's involvement in the capture and entry of votes, the trial Court found the allegation to be misplaced as a matter of law because the 2nd Respondent was responsible for this process. Of particular interest was the evidence of PW12 which the trial Court found to be implausible when he testified that he had altered results from 67 out of 177 polling stations under the instruction of the 1st Respondent over the phone. Other inconsistencies in this witnesses' testimony led the trial Court to believe that his evidence was not credible. This witness testified that he had replaced Gen 20 forms and manipulated 1,233 votes. The trial Court discounted the figures in light of the margin of 22,000 votes separating the two candidates.

[78] The trial Court found that in as much as there were some anomalies in the manner that the election was conducted in Matero Constituency, they did not invalidate the election. With specific reference to tampering with election results, the trial Court found RW4's evidence to be more credible than that of PW12 on the premise that the electoral processes post announcement of results at polling stations could not allow for the feat that PW12 claimed to have pulled off.

[79] The trial Court reasoned that at the time the results were transmitted to the totalling centre, they were in the public domain, and any difference in figures at the totalling centre to those announced at the polling station could easily be spotted. This, in the trial Court's view made RW4's assertion of tampering with results at the totalling centre unbelievable. More so as while PW12 testified to withstanding the threats and pressure allegedly aimed at him by Geoffrey Bwalya Mwamba, he easily accepted instructions from RW4 to tamper with the results. We agree that PW12 was not a credible witness. During cross-examination he contradicted himself several times. He also admitted in cross-examination to seeking favour with the new government so he would be appointed as a returning officer in future.

[80] It is our firm view that with respect to the evidence on vote counting and tallying allegations, the trial Court cannot be faulted for accepting RW4's testimony over that of PW12. Aside from having the benefit of having seen both PW12 and RW4 testify, the trial Court thoroughly analysed the evidence and gave sound reasons for its decision; which reasons we find convincing enough.

[81] We further agree with the conclusion drawn by the trial Court, that while there is evidence pointing to some miscalculations and unsigned GEN 20 forms, these errors were not significant enough to affect the

outcome of the election. As this Court held in **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuka Mwamba and the Attorney General**[4] not every flaw in the conduct of the election attracts annulment; where the evidence shows that there has been substantial conformity with the electoral laws, an election cannot be annulled. It follows that grounds ten and eleven have no merit whatsoever and they are dismissed.

Grounds twelve and thirteen

[82] The allegation in these grounds is that the trial Court upheld the election of the 1st Respondent without considering the proven illegal activity and without any evidence. In our considered view, this claim is defeated in *toto* by our findings that in fact none of the allegations of illegality have been proven to the required standard under the law. The two grounds therefore have no basis and they must fail. We dismiss them.

[83] The sum of our decision is that we uphold the finding of the trial Court that on the totality of the evidence, the allegations were not proved to the requisite standard under section 97(2) of the Electoral Process Act.

[84] All the grounds having failed, the appeal is dismissed in its entirety. We uphold the trial Court's decision to declare the 1st Respondent the duly elected Member of Parliament for Matero Constituency.

[85] Each party to bear their own costs.

M.M.Munalula JSD
DEPUTY PRESIDENT CONSTITUTIONAL COURT

P. Mulonda
CONSTITUTIONAL COURT JUDGE

M. Musaluke
CONSTITUTIONAL COURT JUDGE

J.Z.Mulongoti
CONSTITUTIONAL COURT JUDGE