

IN THE CONSTITUTIONAL COURT
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(Constitutional jurisdiction)

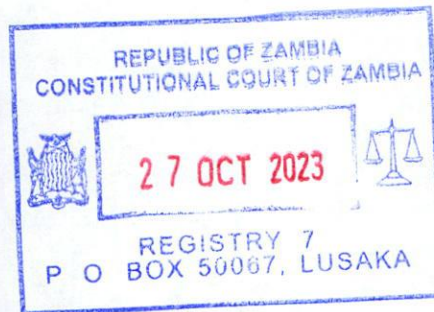
2022/CCZ/A006

IN THE MATTER OF:

LOCAL GOVERNMENT ELECTION
PETITION FOR COUNCIL CHAIRMAN
IN THE MWENSE DISTRICT OF THE
LUAPULA PROVINCE HELD ON 4TH
NOVEMBER, 2022

BETWEEN:

CHARLES MWELWA



APPELLANT

AND

STEPHEN CHIKOTA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

Coram: Shilimi DPC, Mulonda and Chisunka JJC on 14th June, 2023 and 27th October, 2023

For the Appellant:

Mr. N. Siwila of Messrs. Mulungushi Chambers

For the 1st Respondent:

Ms. Martha Mushipe with Ms. Chibale of Messrs. Mushipe & Associates

For the 2nd Respondent:

Mr. M. Bwalya In-House-Counsel

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General, CCZ Selected Judgment No. 51 of 2018
2. Mubika Mubika v Poniso Njeulu, SCZ No. 114 of 2007
3. Jonathan Kapaipi v Newton Samakayi CCZ Appeal No. 13/2017
4. Abuid Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017
5. Margaret Mwanakatwe v Charlotte Scott, CCZ Selected Judgment No. 50 of 2018
6. Anderson KambelaMazoka and Others v Levy Patrick Mwanawasa (2005) Z.R. 138
7. Mubita Mwangala v Inonge Mutukwa Wina SCZ Appeal Number 80 of 2007
8. Akashambatwa Mbikusita Lewanika and Others v Frederick Jacob Titus Chiluba (1998) Z.R. 79
9. Samuel Mukwamataba Nayunda v Geoffrey Lungwangwa CCZ Appeal No. 15of 2017
10. Poniso Njeulu v Mubika Mubika CCZ Appeal No. 9 of 2017
11. Subramaniam v Public Prosecutor (1956) 1 W.L.R 965
12. Richwell Siamunene v Sialubalo Gift CCZ Selected Judgment No. 58 of 2017
13. Mutotwe Kafwaya v Chasaya Katongo and Others 2021/CCZ/A0020
14. Kabwe Taulo Chewe v Patrick Mucheleka and Another 2021/CCZ/A0023
15. Nkhata and Others v Attorney General (1966) Z.R. 147
16. Steven Masumba v Elliot Kamondo CCZ Selected Judgment No. 53 of 2017

Legislation referred to:

1. Electoral Process Act, No. 35 of 2016

When we heard this matter, we sat with our brother, Justice Chisunka, who is currently indisposed. This is therefore a judgment of the majority.

[1] The appellant Charles Mwelwa was one of the two candidates who contested the Mwense District Council Chairperson by-election. The appellant stood under the Patriotic Front (PF) ticket and polled 10,987 votes while the 1st respondent stood on the United Party for National Development (UPND) ticket and emerged victorious having polled 11,313 votes.

[2] Aggrieved by the results of the by-election, the appellant petitioned the Local Government Elections Tribunal sitting at Mwense challenging the election of Stephen Chikota, the 1st respondent herein, as Council Chairperson for Mwense District Council.

[3] The appellant sought the nullification of the election on the following grounds:

- i. That there was widespread intimidation of the electorate by the 1st Respondent and his Party during the campaigns and on poll day;
- ii. That there was widespread violence by the 1st Respondent and his party in Mwense District during the campaign and on poll day;
- iii. That the Appellant and his party members and other opposition parties were prevented from effectively campaigning;
- iv. That the 1st Respondent and his UPND members threatened voters and members of the community in Mwense District with removal from benefiting from the Social Cash Transfer and Constituency Development Fund if they were not voted for; and

- v. The 1st Respondent's election agents working together with the 2nd Respondent prevented the Petitioner's election agents from witnessing the final counting of votes at the totaling centre.

- [4] The 1st respondent disputed the allegation that the election was not free and fair. He contended that the election was conducted in substantial conformity with the law, rules and procedure. That all the allegations of electoral offences set out by the petitioner as itemized in the Petition were mere fabrications on the part of the appellant and that the appellant was not entitled to the reliefs sought. He prayed that the Tribunal should dismiss the petition with costs and declare him as having been duly elected as Chairperson for Mwense District Council.
- [5] The 2nd respondent in responding to the appellant's petition denied having prevented the appellant's election agents from witnessing the final counting of votes at the totaling centre. It was contended that the appellant's petition had not disclosed any breach of the electoral laws and processes by the 2nd respondent. Further, that the by-election for Council Chairperson for Mwense District was conducted in substantial conformity with the electoral laws and procedures. The 2nd respondent prayed that the Petition be dismissed with costs.
- [6] At trial, the appellant tendered evidence in support of his petition and called nineteen (19) witnesses to support his case while the 1st

respondent and the 2nd respondent called two (2) and one (1) witnesses respectively.

[7] After analyzing the evidence before it, the Tribunal in its judgment of 15th December, 2022 made the following findings:

- i. That whereas it was found that actions by people in a vehicle branded UPND and playing UPND songs led to the disruption of a meeting in Katiti Ward, that act was not repeated elsewhere in the 21 wards of Mwense District.
- ii. That there were some proven allegations of personal injury to PW3, PW12 and PW14 and that the 1st respondent was personally involved and present when PW4 and PW5 were being beaten.
- iii. That the incidents of violence were not widespread because out of the 21 wards in Mwense District, violence was only reported in isolated cases in three wards.
- iv. It was also found that while the appellant's agents left the totaling centre at the instigation of UPND supporters, there was no evidence that this was done at the instance of the 1st respondent nor was it with the knowledge of the 2nd respondent.

[8] The Tribunal finally found that the appellant had not proven to a high degree of convincing clarity that the incidents alleged prevented the

electorate from voting for a candidate of their choice and that this affected the outcome of the election. They dismissed the petition and found that the 1st respondent was duly elected as Council Chairperson for Mwense District

- [9] The appellant being dissatisfied with the judgment of the Local Government Elections Tribunal has appealed to this Court raising the following grounds of appeal:

Ground One

The Tribunal erred in both law and fact when it held that the political violence which occurred in Mwense District during the 4th November by-election was not widespread and that it had no bearing on the outcome of the election.

Ground Two

The Tribunal erred in law and fact when it held that the 1st Respondent did not threaten voters with removal from the list of FISP beneficiaries if they did not vote for him.

Ground Three

The Tribunal erred in law and in fact when it held that the 1st Respondent did not prevent the Petitioner from effectively conducting political meeting.

Ground Four

The Tribunal erred in both law and fact by not making a finding on the evidence of RW1 to the effect that the 1st Respondent 's election agent Chewe Mulinda played a dual role as the 1st Respondent's agent and as Presiding officer for Chalwe in Mambilima Constituency in the same election.

APPELLANT'S ARGUMENTS

[10] The appellant filed heads of argument in support of the appeal on 13th February, 2023. Grounds one to three were argued together while ground four was argued separately.

[11] In arguing grounds one, two and three it was submitted that the Tribunal did not consider the evidence laid before it among the facts surrounding the Mwense by-election. It was contended that a perusal of pages 102 to 103 of the Record of Appeal revealed that there was indeed political violence in Mwense District during the election period leading up to the 4th November, 2022, the poll day. That the said political violence was recognized and bemoaned by the 2nd respondent through a press release which was admitted in evidence as CM9. It was submitted that this was a matter of fact and not in dispute because even Paramount Chief Mwata Kazembe complained of the violence when the Vice President visited the area.

[12] It was the appellant's submission that according to the record, his evidence before the Tribunal pertaining to his witnesses' testimonies revealed that the 1st respondent was placed at various scenes where political violence occurred and that this violence was either perpetrated by the 1st respondent or at his instruction and knowledge and that the record further revealed that this evidence was sufficiently corroborated.

[13] The appellant referred us to the provisions of section 97(2)(a) to (c) of the Electoral Process Act No. 35 of 2016(EPA).

[14] The appellant also referred the Court to the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**¹ where 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...

[15] It was the appellant's submission that the election of the 1st respondent as Council Chairperson for Mwense District should not be upheld as the electoral malpractices were perpetrated by the 1st respondent and with his full knowledge.

[16] It was submitted that the Record of Appeal at Pages 146 -147 revealed

that during cross examination of the 1st respondent, he confirmed that he was the Deputy Youth Chairperson in charge of administration for the UPND and he had the authority to instruct cadres, and his youths could possibly carry out his instructions with or without him being present.

- [17]** It was further argued that according to the Record of Appeal, the 1st respondent intimidated the electorate by informing them that they would be removed from the list of FISP beneficiaries if they did not vote for him. It was added that the majority of the electorate in Mwense District are farmers whose livelihood is agriculture.
- [18]** It was the appellant's submission that the evidence on record from PW10 revealed that she was visited by administrators from FISP who categorically informed her that she needed to vote for the 1st respondent in order for her to continue accessing the facility.
- [19]** It was further submitted that according to the timetable issued by the 2nd respondent, the appellant and 1st respondent were not to campaign in one area at the same time. However, the 1st respondent and his party did not follow this timetable. He argued that due to the failure to follow the guidelines, the 1st respondent and his cadres threatened the appellant's supporters by disrupting their meeting and in turn preventing

them from meeting and effectively campaigning.

[20] The appellant submitted that there is a plethora of authorities which set out the threshold under which an election can be nullified. We were referred to the case of **Mubika Mubika v Poniso Njeulu**² a supreme Court decision cited with approval by this Court in the case of **Jonathan Kapaipi v Newton Simakayi**³ where we held that:

The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of the voters in the Constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that that the prohibited conduct was widespread in the Constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate.

[21] We were also referred to a number of decisions including our decision in **Abuid Kawangu v Elijah Muchima**⁴ where we held that:

An election may be annulled where a petitioner shows that the alleged corrupt or illegal practice or misconduct was committed in connection with the election by the Respondent or his election or polling agent and that as a result, the majority of the voters in that constituency were or may have been prevented from electing a candidate of their choice.

[22] The appellant also referred the Court to the case of **Margaret Mwanakatwe v Charlotte Scott**⁵ where this Court held that:

The 1st respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the

election by preventing the majority of the electorate from electing their preferred candidate and so rendered the election a nullity.

[23] It was the appellant's submission that the electoral violence complained of by the appellant was so widespread that the majority of the voters in Mwense District did not vote for their preferred candidate as they feared victimization if they opted for the appellant. That due to violence and intimidation, the 1st respondent instilled fear in the appellant's supporters to the extent that the majority of them opted not to participate in the election. He argued that out of the 21 wards in Mwense District, violence was recorded in over 10 wards.

[24] Under ground 4 it was submitted that the 2nd respondent's witness testified that the election was conducted in accordance with the law and all electoral standards were maintained. That when asked if it was appropriate for an election agent to be a presiding officer at the same time, he answered in the negative. It was the appellant's submission that a witness was referred to an unmarked GEN 20 form showing one Chewe Mulindwa as Presiding officer for Mambilima Constituency while he was also the 1st respondent's election agent. The same witness confirmed that that was a serious anomaly. It was argued that this was an election malpractice contrary to the provisions of the law governing elections.

[25] It was the appellant's submission that the election was marred by violence which was orchestrated by and at the instruction of the 1st respondent. That the 1st respondent was placed at various the scenes where violence occurred and that the appellant's evidence on this aspect was corroborated.

[26] The appellant prayed that this Court upholds the appeal and sets aside the Judgment of the Election Tribunal dated 14th December, 2022.

1ST RESPONDENT'S ARGUMENTS

[27] In opposing the petition, the 1st respondent filed in his heads of argument on 31st May, 2023. With respect to grounds one, two and three, it was submitted that the allegations of electoral offences with respect to violence and intimidation did not affect the election results for the 4th November, 2022 by-election.

[28] It was submitted that the elections were held in a free and fair manner and therefore the appeal is not only malicious, frivolous and vexatious but was also an attempt to prejudice the 1st respondent as well as deprive the people of Mwense District of their preferred candidate to represent their affairs.

[29] It was submitted that the 2nd respondent conducted the by-election in a transparent, free and fair manner. Further, that the alleged electoral

malpractices were not proven and were not widespread to affect or change the outcome of the elections. The 1st respondent referred to the case of **Mazoka and Others v Mwanawasa and Others**⁶ for the principle that the evidence must be proven to a fairly high degree of convincing clarity.

[30] Further, that in the case of **Mubita Mwangala v Inonge Mutukwa Wina**⁷ it was held that:

In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that a majority of the voters in a constituency were or may have been prevented from electing a candidate in that constituency whom they preferred...

[31] It was the 1st respondent's submission that with respect to proving any allegations of electoral malpractice, the standard of proof required in establishing any alleged illegal practice or misconduct is higher than the ordinary balance of probability in civil matters. He cited the case of **Akashambatwa Mbikusita Lewanika and Others v Frederick Jacob Titus Chiluba**⁸ to buttress this point.

[32] We were further referred to the case of **Samuel Mukwamataba Nayunda v Geoffrey Lungwangwa**⁹ where this Court held that:

...under the current regime, as provided in section 97(2)(a), the position on proof of one corrupt or illegal practice or misconduct being sufficient to nullify an election still stands, but only to the extent where it is also proved that the one act in issue prevented or may have prevented the majority of the voters from electing a candidate of their choice.

- [33] The 1st respondent submitted that the appellant failed to establish the allegations as contained in the petition with evidence of convincing clarity that they influenced the electorate not to vote for him. It was argued that the appellant's allegations with regard to ground 1 to 3 were not backed by any evidence required to overturn the election as the same was either hearsay or not in any way connected to the 1st and 2nd respondents.
- [34] The 1st respondent cited section 97(1) and (2) of the Electoral Process Act and submitted that the appellant raised a number of allegations against the 1st respondent with respect to political violence which he failed to substantiate with evidence at trial. It was his contention that the evidence at trial did not demonstrate that the malpractices were widespread and whether the voters were influenced to vote for the 1st respondent.
- [35] We were referred to a plethora of cases including the case of **Mubika Mubika v Poniso Njeulu**² where it was held to the effect that in order to void the election of a member of Parliament, it must be satisfactorily proven that the prohibited conduct was widespread in the Constituency to the level where registered voters in greater numbers were influenced to change their selection of a candidate for that particular election in

that constituency. Further, that in our decision in the case of **Poniso Njeulu v Mubika Mubika**¹⁰ where we held that:

Earlier in this Judgment, we stated, as we have done in numerous cases, that section 97(2)(a) of the Electoral Process Act No. 35 of 2016 requires that for the election of a member of Parliament to be rendered void, it must be proved to the satisfaction of the Court that a corrupt practice, illegal practice or other misconduct has been committed in connection with the election by the candidate or with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent.

[36] It was submitted that premised on the above authority it is clear that a candidate is only answerable for those things which he has done, or which is done by his agent or with his consent. It was his submission that the appellant admitted at page 19 of the Record of Appeal that he had no evidence of the 1st respondent or his agents being connected to the illegal activities complained of. It was the 1st respondent's contention that according to the Appellant's evidence at trial, he testified that he was not present when the incidents of alleged violence were happening but that he received reports from his party supporters which were hearsay. He relied on the case of **Subramanian v Public Prosecutor**¹¹ to support this assertion.

[37] It was the 1st respondent's argument that based on the evidence before this court, it was clear that all the allegations of malpractice against the 1st and 2nd respondents were mere speculation and were not directly

connected to them. It further submitted that with respect to ground 2, the appellant had lamentably failed and neglected to lead evidence to the satisfaction of the Court that the 1st respondent threatened to remove beneficiaries of FISP if they did not vote for him. That he further failed to lead evidence on how the 1st respondent could have removed or influenced the removal of FISP beneficiaries and as to his authority to do so.

[38] The 1st respondent submitted that under ground 3 the appellant failed to lead evidence to the satisfaction of the Court that the 1st respondent directly or indirectly, with his knowledge prevented the appellant or his supporters from conducting political meetings. He urged the Court to dismiss grounds 1, 2 and 3 of the appeal.

[39] It was submitted that the evidence on record does not in any way prove that the majority of the electorate did not vote for their preferred candidate and it would be against the people's will if this election were nullified.

[40] With respect to ground 4, it was submitted that the evidence on record did not prove that the 1st respondent's agent was also the presiding officer. Further, that the appellant had failed and neglected to demonstrate how the said allegation could have affected the outcome

of the elections.

2ND RESPONDENT'S ARGUMENTS

[41] In responding to the appellant's arguments, the 2nd respondent filed its heads of argument on 25th April, 2023. The 2nd respondent referred the Court to several decisions on the key considerations for the Tribunal and the Court when considering whether an election allegation has been proven. The 2nd respondent also referred the Court to the case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba**⁸ where it was held that:

A candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since an election agent has to be specifically so appointed.

[42] It was submitted that general allegations that supporters of a particular party were implicated in misconduct is not enough to attach responsibility to the respondent as was guided by this Court in the case of **Richwell Siamunene v Gift Sialubalo**¹² where it was held that:

Mere proof that the UPND supporters were indeed involved in the said act does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and that is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election.

[43] The 2nd respondent also referred to the case of **Anderson Kambela**

Mazoka and Others v Levy Patrick Mwanawasa⁶ where it was held that:

According to the findings, 30 allegations out of the 36 were not proved. The few partially proved allegations were not indicative that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was flawed that dereliction of duty seriously affected the results which could no longer reasonably be said to reflect the true choice and free will of the majority.

[44] It was the 2nd respondent's argument that the Tribunal was on firm ground when it made a finding of fact, inter alia, that out of the 21 wards in the district of Mwense, violence was only reported in isolated cases in three wards and by the record at the police, only two incidents were reported. That the Tribunal went on to state that:

We are compelled to hold that although there were reports of violence, it was not widespread and had no bearing on the outcome of the election.

[45] It was further submitted that the international electoral law instruments are categorical on the sanctity of election results and guides that election results should not be disregarded lightly or easily. The 2nd respondent referred the Court to the International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections to support its argument. It was submitted that in light of this authority, the appellant had lamentably failed to prove any electoral malpractices or misconduct to the required threshold. That the appellant did not adduce cogent evidence that the

said malpractices were so widespread that the majority of the voters were swayed or may have been swayed from electing the candidate of their choice.

[46] The 2nd respondent submitted that there was no evidence that the electorate were prevented from participating in the election and none of the witnesses specified any provision of the law that the 2nd respondent had breached. It prayed that the appeal be dismissed with costs and the election be upheld.

CONSIDERATION AND DECISION

[47] We have considered the grounds of appeal, the written and oral arguments by the parties and the judgment of the Tribunal. In determining the appeal, we have examined the relevant law upon which an election of a candidate can be nullified. We have examined the provisions of section 97(2) of the EPA which provides as follows:

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 the 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 such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

[48] Section 97(2) of the EPA outlined above sets out the grounds upon which the election of a candidate as Member of Parliament, Mayor, Council Chairpersons and or Councilor can be nullified. The import of the above provision is that, for the election of a candidate to be nullified, the petitioner must prove to the satisfaction of the court that the corrupt practice, illegal practice or other misconduct was committed by a candidate personally or with his knowledge and consent or approval or by his election or polling agent. The petitioner must go a step further and prove that as a result of the electoral malpractice or misconduct, the majority of voters in the constituency, district or ward were or may

have been prevented from voting for their preferred candidate.

[49] We have explained this position in our previous decisions including the case of **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**¹, where we went on to say that:

In addition to proving the electoral 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.

[50] We upheld this position in our more recent decisions of **Mutotwe Kafwaya v Chasaya Katongo and Others**¹³ and **Kabwe Taulo Chewe v Patrick Mucheleka and Another**¹⁴ where in both cases we reversed the nullification of the elections of the respective Members of Parliament for failure to prove that the malpractices were widespread enough to have prevented the majority of the voters in the Constituency from electing a candidate of their choice.

[51] The appellant before us, petitioned the Local Government Elections Tribunal seeking the nullification of the 1st respondent's election as Council Chairperson for Mwense District citing electoral violence and electoral malpractices. We will address the alleged malpractices in turn.

GROUND ONE

WIDESPREAD VIOLENCE

- [52] This Court reaffirms the principle that an appellate court cannot lightly interfere with findings of fact of the trial court unless they are perverse or not supported by evidence as held in the case of **Nkhata and Others v Attorney General**¹⁵. We will review the evidence in the Tribunal below with this principle in mind.
- [53] The allegation of widespread violence was anchored on three separate incidents which were alleged to have occurred namely at Kalanga Market and later escalated to Mwense Police Station, Mulonga Village in Chachacha Ward and at Kweba Village in Kapamba Ward.
- [54] Regarding the violence at Kalanga Market, the appellant testified to having received, on the 25th October, 2022 while on his way from campaigns, a report by phone from a named supporter that his TATA truck Registration No. BCD 2538 had been attacked by the 1st respondent and his supporters and further testified to having been informed that the 1st respondent and his supporters followed his truck to Mwense Police Station where they damaged it and attacked persons on board. Video footage was produced depicting injured persons abode the TATA truck with a shattered windscreen. PW2, who was

present at the time of the alleged attack at Kalanga Market testified to the presence of the 1st respondent at the scene when this attack occurred. The appellant however, conceded that he was merely informed of the 1st respondent's involvement in that incident and that the 1st respondent was not in the video footage.

[55] The Tribunal found as a fact that there was an attack which started at Kalanga Market and continued at Mwense Police Station. The Tribunal also found that this attack was at the instance of the 1st respondent and his supporters without provocation. Further the Tribunal established as a fact that the 1st respondent was present at Kalanga Market when the attack started and that though himself not personally involved, did acquiescence in the conduct of his supporters. The Tribunal found the evidence of PW12 and PW14 who testified to the violence in question as being that of witnesses without an interest to serve.

[56] The second incident of violence was alleged to have occurred at Mulonga Village in Chachacha Ward. PW4 testified to having been at home on a particular day when at around 23 hours the 1st respondent in the company of a Mr. Chiluba and one other person arrived at their home seeking for his father. That upon being informed by PW4 that his father was not home, the 1st respondent slapped him after which the

other two persons with him joined in beating PW4. He further testified that in trying to fight-back, one of the attackers dropped a phone and that the three attackers left only to return a second time when PW4 was in the company of PW5 and the village headman.

- [57] PW4 stated that the 1st respondent and his team asked further questions after which further attacks ensued beating, this time, PW4, PW5 and the mother to PW4. That the assailant also attempted to put PW4, PW5 and the others attacked in their vehicle which attempt was resisted before the attackers left. The incident was reported to Mwense Police Station where the phone earlier dropped by one of the attackers was deposited and medical reports issued and later taken back to the police station. PW4 maintained that the 1st respondent was among his assailants. PW5's testimony was in the main the same as that of PW4.
- [58] The Tribunal established as a fact that the 1st respondent and his companions did attack and beat up PW4 and PW5 upon failing to find PW6 at his home where the duo were at the time of the attack.
- [59] The third and last alleged incidence of violence was at Kweba Village in Kapamba Ward. PW7 testified to having been attacked whilst visiting a friend's house by the name of Davie Chungu. That the alleged attack was at the instance of UPND cadres whom it was alleged were

patrolling the area at the time of the attack. That the attack followed a question posed to PW7 by the alleged UPND Cadres as to what he was doing and his response that he was chatting.

[60] The Tribunal found as a fact that PW7 was attacked and beaten but that there was no evidence that this attack was with the knowledge and consent of the 1st respondent.

[61] In analyzing the evidence before it, the Tribunal found as a fact that there were isolated incidents of violence.

[62] We have carefully considered the evidence in the Tribunal below pertaining to the allegation of violence. With regard to the violence at Kalanga Market which later escalated to Mwense Police Station, we find no compelling reasons to assail the findings of fact by the Tribunal which had the benefit of assessing the evidence from witnesses that appeared before it. We fully endorse the finding by the Tribunal that the 1st respondent did acquiescence in the said violence. This is supported by the testimony of PW2 who positioned the 1st respondent at the scene of the attack at Kalanga Market at page 109 of the Record of Appeal. Concerning the second allegation of violence at Mulonga Village in Chachacha Ward, we note that the Tribunal mainly relied on the evidence of PW4 and PW5 regarding that attack. PW4, at page 112 of

the Record of Appeal, testified to the fact that the 1st respondent was amongst the attackers on the night of the attack. PW5 confirmed witnessing the attack and that he himself was attacked when he went to help PW4. While we note that PW6, at page 116 of the Record of Appeal, confirmed the report of the attack, his evidence is to be treated with caution as his description was that of one in training to be an election agent in the PF and therefore a partisan witness.

[63] While PW5 confirmed this attack, it is noted at pages 114 to 115 of the Record of Appeal that there were no police reports that were issued to these two witnesses to confirm that they reported the matter to the police as they claimed they did. It is our view that the fact that PW4's father is a partisan witness, he could not sufficiently corroborate PW4 and PW5's evidence. They needed something more than mere oral evidence of the alleged attack.

[64] In *casu*, we note that no documentary evidence was tendered to corroborate the testimonies by either PW4 or PW5 on the attack and neither was there evidence tendered by the Police who were said to have received the phone and issued medical forms later returned to the police. It is our view that this alleged attack was not sufficiently proven. We therefore set aside the Tribunal finding of fact and find that this

allegation against the 1st respondent was not proven to a fairly high degree of convincing clarity.

- [65] With respect to the attack on PW7 we agree with the Tribunal that there was no evidence that the 1st respondent was involved or had knowledge of this attack. We wish to add that none of the witnesses placed the 1st respondent or his duly appointed agent at the scene of this attack.

GROUND TWO

THREATS OF REMOVAL FROM FISP

- [66] As we consider this ground of appeal, we still retain our focus on the principle that as an appellant Court we cannot upset lightly the findings of the Trial Tribunal below as settled in the **Nkhata**¹⁵ case referred to above.

- [67] The appellant testified that one of the threats by the 1st respondent was that he would remove those who would not vote for him from the list of those who were to benefit from FISP. He stated that the 1st respondent was captured in a recording where he was heard saying this. Under cross examination, when asked if promising the electorate that they would be included on the list of FISP beneficiaries was the same as threatening their removal from the list, the appellant maintained that the 1st respondent was threatening them. PW10 testified that she was

informed by one Oscar Kashulwe that if they did not vote for the 1st respondent then they would stop benefitting from the funds.

[68] The Tribunal upon reviewing the recording where the 1st respondent was addressing a gathering found that, in that clip, he was seeking votes from the electorate so that he could register new cooperatives and add new people on this list of beneficiaries. This was contrary to the appellant's allegation.

[69] It was however found that the 1st respondent did in fact issue threats to remove officers who were tasked with this responsibility and replace them if they did not work in line with his rules. We do not fault these findings of fact by the Tribunal as they were supported by evidence on record.

GROUND THREE

PREVENTION OF EFFECTIVELY CAMPAIGNING

[70] With respect to the allegation that the appellant was prevented from effectively campaigning, PW2 confirmed that UPND supporters disrupted a meeting that was held by the appellant in Kalanga Ward. This evidence corroborated the appellant's evidence that UPND supporters disrupted a meeting and that the 1st respondent was in Chachacha Ward when the time table showed that he was not

supposed to be there. This allegation was supported by the evidence of PW11 and PW18 who stated that they witnessed this disruption.

[71] The Tribunal found as a fact that indeed there were UPND vehicles that were seen in the area during a meeting at Katiti Ward. That however, there was no evidence that the appellant was stopped from holding that meeting. Careful perusal of the record of proceedings at page 123-124 reveals that at a meeting in Luche Ward a UPND vehicle passed by, playing very loud music. That due to earlier attacks people scattered from the meeting as they feared that they would be beaten. Similarly, at a meeting in Katiti Ward reflected on page 138 of the Record of Appeal, a UPND vehicle passed by while a meeting was in progress and out of fear people scampered from the scene.

[72] It is our view that while driving past, the UPND vehicles disrupted the meetings in the two wards, there was no evidence that the 1st respondent or his duly appointed agent was in the said vehicles and disrupted the meetings. It therefore follows that these acts could not be attributed to the 1st respondent.

GROUND FOUR

[73] Turning to ground four, the appellant alleges that the Tribunal erred in

law and fact by not making a finding on the evidence of 2RW1 to the effect that the 1st respondent's election agent, Chewe Mulinda, played a dual role as the 1st respondent's election agent and Presiding Officer for Chalwe in Mambilima Constituency in the same election.

[74] A careful perusal of the Record of Appeal revealed that this issue arose out of cross examination of the 2nd respondent's witness 2RW1. The witness, under cross examination at pages 152 to 153 of the Record of Appeal, was questioned as to whether it was in order for Chewe Mulinda to have served as Presiding Officer for Chalwe in Mambilima Constituency. 2RW1 in response to this submitted that this was not in order. He however argued, that he was Presiding Officer for Mwense and not Mambilima and added that he could not speak to the contents of Form G20 from Mambilima as it was outside his jurisdiction.

A perusal of the Record of Appeal shows that the petitioner did not plead this allegation in his Petition and neither did he lead any evidence speaking to this allegation. It is trite law that allegations in an election petition have to be specifically pleaded. This position was restated in our decision in the case of **Charles Kasamu v Simon Kakoma and Electoral Commission of Zambia Appeal No. 2021/CCZ/A0012** wherein we stated at page J23 that:

...the Appellant needed to specifically plead the allegations of violence to enable the Respondents prepare their defence and not to be ambushed at trial.

- [75] In casu, the appellant's failure to specifically plead the allegation that the 1st respondent's election agent was also presiding officer for Chalwe in Mambilima Constituency, did not give the 1st and 2nd respondents an opportunity to defend themselves.
- [76] We therefore, find that the Tribunal could not make any findings on matters not pleaded. This ground of appeal lacks merit and therefore fails.

CONCLUSION

- [77] Having carefully considered the evidence on record and the submissions by the parties, we hold the firm view that while there was proof of the 1st respondent's involvement in the violence at the market, the appellant failed to show that the said acts of violence were widespread and that as a result of these acts the majority of the electorate in the 21 wards in Mwense District were prevented from voting for a candidate of their choice.
- [78] Similarly, while it was proven that there was intimidation by the 1st respondent when he issued threats to people at a gathering that was recorded, the appellant did not show that as a result of these threats

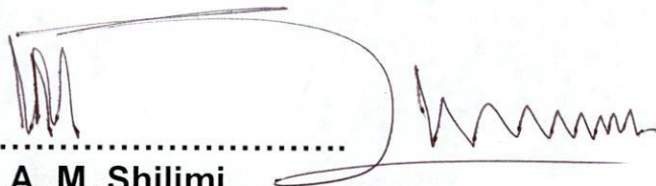
directed at specific people, the majority of the voters were prevented from electing a candidate of their choice.

[79] We sufficiently guided on this position in the **Steven Masumba v Elliot Kamondo**¹⁶, among others, where we stated that:

The requirement in the current law for nullifying an election of a member of parliament is that a petitioner must not only prove that the respondent has committed a corrupt or illegal act or other misconduct or that the illegal act or misconduct complained of was committed by the respondent's election agent or polling agent or with the respondent's knowledge, consent or approval but that he/she must also prove that as a consequence of the corrupt or illegal act or misconduct committed, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred.

[80] We therefore do not fault the Tribunal that the proven acts of electoral malpractice had no bearing on the outcome of the election. We accordingly dismiss the appeal for lack of merit.

[81] We order that each party bears its own costs.



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A. M. Shilimi
Deputy President, Constitutional Court



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P. Mulonda
Constitutional Court Judge