IN THE CONSTITUTIONAL COURT OF ZAMBIA **APPEAL NO. 14 OF 2017**
HOLDEN AT LUSAKA **2016/CC/A037**
(Constitutional Jurisdiction)

IN THE MATTER OF: **A PARLIAMENTARY ELECTION PETITION RELATING TO KALABO CENTRAL PARLIAMENTARY ELECTIONS HELD ON 11TH AUGUST, 2016**

AND

IN THE MATTER OF: **ARTICLE 73 (1) OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF: **SECTION 96 (c) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

BETWEEN:

RICHARD SIKWEBELE MWAPELA **APPELLANT**

AND

MIYUTU CHINGA **RESPONDENT**

CORAM: **Chibomba, PC, Sitali, Mulembe, Mulonda, Munalula JJC on 30th August, 2017 and 23rd January, 2019**

For the Appellant: **Mr. F. Besa of Besa and Company**

For the Respondent: **Mrs. N.Mutti of Lukona Chambers**

J U D G M E N T

Sitali, JC, delivered the judgment of the Court.

Cases cited:

1. **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49.**
2. **Moore v Registrar of Lambeth County [1969] 1 W.L.R. 141**
3. **Happy Mbewe v The People (1983) Z.R. 39**
4. **Ilunga Kabala and John Musefu v. The People (1981) Z.R. 201**
5. **Machobane v The People (1972) Z.R. 101**
6. **Katebe v The People (1975) Z.R. 13**
7. **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) Z.R. 138**
8. **Odinga v Independent Electoral Commission and Boundaries Commission and Others (2013) KLR**
9. **John Kiarie Waweru v Beth Wambui Mugo and 2 others (2008) KLR 4**
10. **Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 14 of 2007**
11. **Nkandu Luo v Doreen Sefuke, the Electoral Commission of Zambia and The Attorney-General Selected Judgment No. 49 of 2018**
12. **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia Selected Judgment No. 57 of 2017**
13. **Margaret Mwanakatwe v Charlotte Scott and The Attorney-General, Selected Judgment No. 50 of 2018**
14. **Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49.**
15. **Zulu v Avondale Housing Project (1982) Z.R. 172**
16. **Attorney-General v Kakoma (1975) Z.R. 212**

Legislation referred to:

1. **The Electoral Process Act No. 35 of 2016, section 97 (2) (a).**

The Appellant, Richard Sikwebele Mwapela, has appealed against the judgment of the High Court delivered on 24th November, 2016 by which the Court dismissed his petition and upheld the declaration of the Respondent, Chinga Miyutu, as the duly elected Member of Parliament for Kalabo Central Constituency.

The Appellant and the Respondent and two other individuals were candidates in the parliamentary election for the Kalabo Central Constituency which was held on 11th August, 2016. The Appellant was the candidate for the Patriotic Front party (PF) in the election while the Respondent was the candidate for the United Party for National Development (UPND). The other two candidates stood on the Forum for Democracy and Development Party (FDD) ticket and as independent candidate, respectively. The Respondent emerged victorious with 11,832 of the valid votes cast and was declared as the duly elected Member of Parliament for Kalabo Central Constituency. The Appellant obtained 3,219 votes while the other two candidates shared the remaining valid votes cast.

The Appellant petitioned the High Court and sought to nullify the election of the Respondent as Member of Parliament for Kalabo Central Constituency. He alleged that the Respondent was not validly elected as he had committed several electoral offences under the Electoral Process Act No. 35 of 2016 (henceforth referred to as the Act). Specific allegations which the Appellant leveled against the Respondent were that the Respondent and his agents during the campaign period distributed unbranded chitenge materials, salt

and second hand clothes to the electorate in Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mitwi, Kandambo and Mapungu Wards. That the Respondent and his agents collected voters' cards and national registration cards from the electorate which they returned to them upon recording the details.

Further allegations were that during their campaign rallies in Mitwi, Ndoka, Ngumai and other wards, the Respondent and his agents spread lies and false information about the Appellant and the PF to the effect that the Appellant and the PF were advocating for gay and lesbian rights through the referendum and that they intended to grab land and banish people from the villages who were perceived to be their enemies. That in Buleya ward, the Respondent's agent, chief Mundia, openly threatened to banish the the Appellant's sympathisers from their villages and to burn their houses once they were identified. That the Respondent and his agents corruptly gave out money to traditional leaders and the electorate in various wards of the Constituency as an inducement for them to vote for him. Further, that after the close of the campaign period at 18:00 hours on 10th August, 2016 and on

polling day, the Respondent and his agents continued campaigning and distributing gifts to the electorate.

The Appellant contended that as a result of these illegal practices committed by the Respondent and his agents, the majority of the voters in the Constituency were prevented from electing their preferred candidate.

The Respondent filed an Answer to the petition and denied that he or his agents had engaged in any corrupt practices by giving money to the traditional leaders or the electorate or by distributing unbranded chitenges and salt to the electorate as alleged by the Appellant. He further denied that he and his agents had collected national registration cards and voters' cards from the electorate and threatened to banish them from their villages and burn their homes for supporting the Appellant and the PF candidates. The Respondent further denied that he and his agents spread lies about the Appellant and the PF party advocating for gay and lesbian rights in the referendum or that he and his agents threatened to dispossess the people they perceived to be enemies of their land if they won the elections. He alleged that it was the Appellant who

engaged in corrupt acts and spread lies to the electorate that the Respondent was a *mbingwa* (stingy person) whom they should not vote for.

At the trial of the petition, the Appellant testified in support of his petition and called eleven (11) other witnesses. The Respondent testified in rebuttal and called fourteen (14) other witnesses. The learned trial Judge considered the evidence adduced by the parties and stated that the petition was anchored on allegations of corrupt practices and bribery, undue influence and intimidation.

The learned Judge observed that the burden to prove the allegations against the Respondent lay on the Appellant and that in order to succeed in his petition, the Appellant had to prove his allegations to a fairly high degree of convincing clarity, which is a standard higher than the balance of probabilities required in ordinary civil actions but lower than the standard required in criminal matters. The learned Judge relied on the case of **Akashambatwa Mbukusita Lewanika and Others v Fredrick Jacob Titus Chiluba**[1] regarding the standard of proof in election petitions.

The learned trial Judge analysed the evidence adduced by the Appellant on each allegation and held that the Appellant had failed to prove all the allegations made to the required standard. The learned trial Judge thus held that the Respondent was duly elected as Member of Parliament for Kalabo Central Constituency and dismissed the petition.

Dissatisfied with the judgment of the lower Court, the Appellant appealed to this Court and advanced eleven grounds of appeal as follows:

1. **The learned trial Judge erred in law and fact in refusing to accept the evidence of PW12, Max Kasabi, on the respondent's illegal distribution of salt on the ground only that he was in court for 5 minutes when other petitioner's witnesses were testifying when throughout cross examination, the evidence of the said PW12 was unchallenged.**
2. **The learned trial Judge erred in both law and fact when she refused to believe the evidence of PW3 that he had been given a bribe of K6,000 by the respondent on the basis that PW3 had an interest to serve without stating what that interest was.**
3. **The learned trial Judge erred both in law and in fact in believing the purported alibi of the respondent on the day he was alleged to have bribed PW3 when the court believed an alibi using a schedule of meetings which went up to 18:00 hours when the evidence of PW3 was to the effect that the respondent bribed him around midnight.**
4. **The learned trial court erred in both fact and law when she held that she could not rely on the evidence of PW10 to link and establish that the respondent was distributing salt in Buleya ward using his ward campaign team when the respondent had confirmed that he had a campaign team in Buleya and PW10 told the court that he was part of his campaign team.**

5. **The learned trial Judge erred in both law and fact when she refused to accept the evidence of PW2 to the effect that PW2 was given unbranded chitenge, a fact which was corroborated by PW12 on the grounds that the respondent gave a schedule of his meetings when the court conceded that the schedule only showed afternoon meetings, and when she further held that the petitioner did not show the distance between where PW2 was staying and where the respondent was conducting meetings during the day.**

6. **The learned trial Judge erred in both fact and law when she refused to believe the evidence of bribery of K2,000 which was given to PW5 by the respondent and witnessed and corroborated by PW11 on the grounds, according to the court, that they were "accomplices" when this was not a criminal trial and hence criminal law principles of evidence are not applicable to election petitions.**

7. **The learned trial Judge erred in both fact and law when she refused to accept the evidence of PW4, PW6 and PW12 of the respondent's distribution of salt, second hand clothes and unbranded chitenges in Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mitwi, Kandambo and Mapunga wards by completely and exclusively relying on the principles of law and authorities on corroboration derived from criminal law when an election petition is not a criminal trial; and the principles of law and standard of proof are different.**

8. **The learned trial Judge erred in both law and fact in her evaluation of the evidence regarding the respondent's acts of distributing unbranded chitenge materials in Liumba ward in that she held that the petitioner had failed to adduce evidence to prove this allegation despite the petitioner testifying that he had personally witnessed this activity; a fact which was not challenged in cross examination.**

9. **The learned trial Judge erred in both law and fact when she failed to accept the evidence of PW8 which she conceded was ably corroborated by PW9 to the effect that Swana Kaguma was threatening violence against any person who would vote for the appellant or PF or yes in the referendum on the premise according to the learned Judge, that "Swana Kaguma could not go into a PF meeting and pass disparaging remarks without any action being taken against him by those who were present at the meeting of between 100 to 200 PF supporters.**

10. **The learned trial Judge erred in both fact and law in that when the appellant testified that the respondent after close of**

campaign period continued to distribute salt, unbranded chitenge materials, blankets, and other commodities in Lwanginga, Yuka, Liumba, Buleya, Mapunga, Lukona and Kandombe, the learned trial Judge simply stated that 'the petitioner did not adduce any other evidence to show that the respondent or his agents distributed gifts to the electorate." without the Judge stating which "other evidence" she expected to believe the Appellant's testimony.

11. **The learned trial Judge erred in her exercise of the discretion to award costs to the respondent in that she appeared to contradict herself when in one breath she held that an election petition is one of public interest but she still proceeded to condemn the appellant in costs of the petition.**

The Appellant filed heads of argument in support of the appeal which Mr. Besa, counsel for the Appellant, relied on and augmented with brief oral submissions. In arguing ground one, the Appellant submitted that in evaluating the evidence of PW12 on the Respondent's illegal act of distributing salt to the electorate, the learned trial judge stated that she had attached less weight to PW12's evidence because he was in court when the other witnesses were testifying although he subsequently left. It was contended that while the learned trial Judge had the discretion to decide what weight to attach to the evidence of the witness who was present in court, the learned Judge ought to have demonstrated that the evidence which was given less weight was on the same subject that the other witnesses had testified about so that the witness may have been influenced to testify in the manner that he did.

The Appellant argued that since the trial Judge had properly guided herself on how to treat PW12 and the evidence he tendered although he had been present in Court, on the authority of **Moore v Registrar of Lambeth County** [(2)] cited in **Happy Mbewe v The People**,[(3)] the trial Judge should have explained why she opted not to rely on the evidence of PW12. It was contended that since PW12 left the courtroom soon after the witness on the stand had stated his particulars, the testimony of the other witness had no material effect on the credibility of his testimony so that the trial Judge should have attached considerable weight to it.

The Appellant thus urged us to accept the evidence of PW12 to the effect that the Respondent was involved in the illegal distribution of salt, which illegal act, according to the Appellant, ultimately affected the outcome of the election in his favour. He therefore urged us to uphold this ground of appeal.

Grounds two, three and four were argued together. Mr. Besa submitted that although the learned trial judge held that PW3 was a witness with an interest to serve, she did not explain what interest he had to serve. He contended that in the absence of an

explanation, the learned Judge's findings of fact did not emanate from the evidence before her and should therefore be overturned. Counsel went on to argue that the Appellant tendered irrefutable evidence showing that the Respondent had engaged in bribery and said at page 107 of volume 2 of the record of appeal that the Respondent gave PW3 K6,000 between 22:00 and 23:00 hours to distribute to people to vote for him.

That in his defence, the Respondent did not dispute the time of the alleged bribe but only produced a handwritten timetable which showed his movements. The Appellant contended that there was no evidence that the timetable was religiously followed but that even if it were followed, it only went up to 18:00 hours and did not account for the Respondent's movements after 18:00 hours. He submitted that the timetable could not be used as an alibi to show where the Respondent was at 22:00 hours when he was alleged to have gone to bribe PW3.

The Appellant argued that the case of **Ilunga Kabala and John Musefu v The People** [4] which was cited by the lower Court was distinguishable from the facts of this case because for an alibi

to stand, the person putting forward the alibi should demonstrate that during the time he is alleged to have committed a particular offence, he was in a different place. That it is only at this stage that the person putting forward the allegation would be expected to debunk or refute the alibi. That in this case, PW3 testified that the Respondent went to bribe him around 22:00 hours while the Respondent's schedule of meetings ended at 18:00 hours. That the Respondent was not at a meeting at 22:00 hours according to his timetable and given the four hours between 18:00 hours and 22:00 hours, he had ample time to drive to any part of the Constituency. He submitted that in the circumstances, the legal principle that once an alibi has been put forward, the person making the allegation has the duty to debunk the alibi, did not apply in this case, as there was effectively no alibi put forward in view of the time at which the Respondent was alleged to have bribed PW3.

The Appellant contended that in the absence of an alibi and as the Respondent did not rebut the bribery allegations made against him, the allegation of bribery had been proved to the standard required for election petitions.

In arguing ground five the Appellant contended that the trial Judge was wrong when she held that she could not rely on the evidence of PW10 to link the Respondent to the distribution of salt in Buleya ward by his campaign team when the Respondent had confirmed that he had a campaign team in Buleya ward and PW10 told the Court that he was part of his campaign team. The Appellant submitted that PW10 had testified that he was a member of the UPND and was campaigning for the UPND in Buleya ward. He contended that RW2 who was the presidential campaign chairperson for the UPND in the whole of the Western province had testified that when he visited Kalabo Central Constituency before the Respondent was adopted as the UPND candidate for the constituency, PW10 had organized a meeting for Dr. Muyenga Atanga who was vying for adoption as a candidate at that time. He stated that RW2 testified that PW10 was giving out unbranded chitenge materials and salt among other things to potential voters.

The Appellant submitted that this evidence established that PW10 was a member of the UPND which sponsored the Respondent, that PW10 was in the Respondent's campaign team in Buleya and that the Respondent and members of his party

habitually gave out salt, unbranded chitenge materials and other things to the electorate with a view of influencing the outcome of the elections. The Appellant submitted that section 97 of the Act upon which the petition was anchored clearly provides that the illegal acts complained of need not be committed by the candidate or his election agents personally but it is sufficient if the illegal acts are committed with the knowledge and consent or approval of the candidate or that candidate's election or polling agent.

The Appellant further submitted that whereas the trial Judge in refusing to accept the evidence of PW10 stated that she could not link the activities in Buleya Ward to the Respondent, the trial Judge did not establish that these activities did not take place. He contended that it was not logically possible that the Respondent could have a campaign team campaigning for him and not be aware of the illegal activities they were engaged in for his benefit. The Appellant submitted that the Respondent was fully aware of the illegal distribution of salt, unbranded chitenge material and other bribes by his campaign team because he must have bought the items for distribution to the electorate. He thus urged us to uphold ground five.

Grounds six, seven and eight of the appeal were argued together. In ground six, the Appellant contended that the learned trial Judge was wrong to refuse to believe the evidence of PW5 that he was bribed with K2,000 by the Respondent, which evidence was corroborated by PW11 on the ground that the two witnesses were accomplices when this was not a criminal trial and criminal law principles of evidence do not apply to election petitions. The Appellant submitted that the undisputed evidence was that PW5 was bribed with K2,000 and that his nephew PW11 witnessed the act of bribery and was given some of the money to share with his siblings. He submitted that the trial Court refused to accept the corroborative evidence of PW11 on the ground that he was an accomplice. The Appellant cited the definition of the word accomplice given in **Black's Law Dictionary**, 9th edition and argued that neither PW5 who was bribed nor PW11 who witnessed the giving of the bribe could be considered as an accomplice to the crime of bribery which was committed only by the Respondent. The Appellant contended that PW11 was the best witness to corroborate the evidence of PW5 that he was bribed as a witness to the

commission of the electoral offence. The Appellant urged us to uphold ground six.

In ground seven, the Appellant contended that the learned trial Judge erred in fact and law when she refused to accept the evidence of PW4, PW6 and PW12 on the Respondent's distribution of salt, second hand clothes and unbranded chitenge materials in Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mitwi, Kandambo and Mapunga wards by relying on principles of law and authorities on corroboration derived from criminal law. He argued that an election petition is not a criminal trial and the principles applicable and standard of proof are different. The Appellant argued that the learned trial Judge in disregarding the evidence of widespread bribery, illegal distribution of unbranded chitenge material and salt and all manner of malpractices primarily relied on criminal law principles and the case authorities of **Machobane v The People**[5] and **Katebe v The People** [6] which was a misdirection.

The Appellant contended that the learned trial Judge was not at liberty to use case authorities wherein the standard of proof is different and higher than that applicable in election petitions which

is lower than beyond reasonable doubt but higher than the balance of probabilities required in ordinary civil cases. The Appellant submitted that the standard of proof in election petitions is clearly set out in the case of **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others**[7] wherein it was held that in order for a petitioner to succeed, the petitioner must adduce evidence establishing the issues to a fairly high degree of convincing clarity in that the proven defects and electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred.

The Appellant submitted that when this correct standard of proof is applied, the Appellant had clearly proved the allegation of widespread electoral malpractices, corrupt and illegal practices such as intimidation, undue influence, illegal publication of false statements by the Respondent and his party agents and supporters contrary to the provisions of the Act. The Appellant submitted that his evidence and that of his witnesses clearly established widespread distribution of salt, second hand clothes and unbranded chitenge materials in the Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mitwi, Kandambo and Mapunga wards to a fairly

high degree of convincing clarity. He consequently urged us to uphold ground seven.

In arguing ground eight, the Appellant submitted that the learned trial Judge was wrong in her evaluation of the evidence regarding the Respondent's act of distributing unbranded chitenge materials in Liumba ward in that she held that the Appellant had failed to adduce evidence to prove this allegation despite the Appellant testifying that he had personally witnessed this activity, which fact was not challenged in cross examination. The Appellant contended that the learned trial Judge refused to accept the evidence of the Appellant without giving a legally tenable reason as to why she could not accept his evidence.

In arguing ground nine, the Appellant contended that the learned trial Judge erred when she failed to accept the evidence of PW8 which she conceded was ably corroborated by PW9 to the effect that Swana Kaguma was threatening violence against any person who would vote for the Appellant or the PF or vote "yes" in the referendum on the premise that Swana Kaguma could not go into a PF meeting and pass disparaging remarks without any action

being taken against him by those who were present at the meeting of 100 to 200 PF supporters. The Appellant submitted that the learned trial Judge confirmed that the evidence of PW8 on intimidation and violence by Swana Kaguma was corroborated by PW9 who attended the meeting of 18th July, 2016 at Nyuka ward and heard Swana Kaguma threatening violence.

He contended that whereas the trial Judge acknowledged that Swana Kaguma went around Nyuka area making disparaging remarks, the learned Judge, without referring to any evidence that may have disproved the allegation against Swana Kaguma, merely stated that Swana Kaguma could not go into a PF meeting of 100 to 200 people and utter disparaging words without any action being taken against him. The Appellant submitted that this conclusion by the learned trial Judge was not supported by the evidence before her but was based on prejudice as she expected the 100 to 200 PF cadres to have been violent and taken the law into their hands. The Appellant submitted that this was erroneous and that ground nine must therefore be upheld.

In arguing ground ten, the Appellant submitted that the learned trial Judge was wrong to find that the Appellant did not adduce any other evidence to prove the allegations that the Respondent continued to distribute salt, unbranded chitenge materials, blankets and other commodities in Lwanginga, Yuka, Liumba, Buleya, Mapunga, Lukona and Kandambo Wards after the close of the campaign period, without stating what other evidence this amounted to. He argued that the learned trial Judge operated under the mistaken impression that as long as the Respondent or his election or polling agents did not hand out the salt or individually engage in illegalities, it was permissible for his supporters, campaigners, election agents and UPND campaign structures to indulge in all manner of widespread illegalities, electoral malpractices and violence for his benefit and with his knowledge and consent. The Appellant argued that this approach contradicted the provisions of section 97 of the Act which stipulate that it is enough if the illegal act was done "*with the knowledge and consent or approval of the candidate or of that candidate's election agent or polling agent.*"

The Appellant argued that the candidate or his election or polling agent therefore need not personally indulge in illegal acts to be liable. That it is enough to demonstrate that he was aware or consented to or approved the illegal acts from which he infact benefitted. He contended that the evidence in this case shows that the Respondent demonstrated a reckless disregard for the law as provided for in the Act and the Electoral Code of Conduct.

The Appellant submitted that he had adduced evidence in the lower Court of corruption, voter intimidation and spreading of false information against the Appellant which occurred throughout the campaign period in all the twelve wards of the constituency and that having established that, this appeal has satisfied the requirements of section 97 (2) (a) of the Act and that there can be no doubt that voters in the entire constituency were influenced by these electoral malpractices and were therefore prevented from voting for a candidate of their choice. The Appellant contended that the trial Judge fundamentally erred in failing to evaluate the evidence presented before her and urged us to uphold this ground of appeal.

In conclusion, the Appellant submitted that all the ten grounds of appeal had merit and that we should therefore overturn the judgment of the High Court and consequently nullify the election of Chinga Miyutu as Member of Parliament for Kalabo Central Constituency as he was not validly elected. He prayed that the Respondent be condemned in costs.

The Appellant did not advance any arguments in support of ground eleven.

At the hearing of the appeal, Mr. Besa in his oral submissions more or less restated the written arguments in support of the appeal. We therefore will not restate the oral submissions here.

The Respondent filed heads of argument in opposition to the appeal on which Mrs. Mutti, counsel for the Respondent, relied and augmented with brief oral submissions.

In opposing ground one, the Respondent submitted that the learned trial Judge cannot be faulted for attaching less weight to the evidence of PW12 as he admitted that he was in court when some of the Appellant's other witnesses were testifying though he subsequently left. He argued that the learned trial judge properly

guided herself on how the evidence of PW12 was to be treated. That the learned trial Judge at pages 61 to 63 of the record of appeal evaluated the evidence of PW12 and found that there was no evidential value in his testimony as he was not present when the alleged illegal act of distributing salt was done and that he stated that he was only told of the alleged act by other people. That the learned trial Judge found that the evidence of PW12 did little to prove the allegation as PW3 said he did not attend the meeting in Ndoka ward and so did not see the person who was distributing the salt.

The Respondent submitted that the lower Court was on firm ground when it found that the Appellant had not proved the allegation to a fairly high degree of convincing clarity and therefore dismissed it. He urged us to dismiss ground one for lack of merit.

Grounds two, three and four were opposed together. The Respondent submitted that the trial Judge was on firm ground when she refused to believe the evidence of PW3 that he was given a bribe of K6,000.00 by the Respondent on the ground that PW3 had an interest to serve and that his evidence needed corroboration.

The Respondent contended that in deciding that PW3 had an interest to serve, the lower Court considered both the evidence of the Appellant's witness PW3 and the evidence of the Respondent's witnesses RW4 and RW5. That on one hand, PW3 testified that on 5th August, 2016, he got a bribe of K6,000.00 from the Respondent. After the Respondent had left, he called RW4 whom he informed about the said money and asked him to calculate the amount to be distributed to the 38 headmen for onward distribution to their subjects so that they should vote for the Respondent. That each headman was given K150 leaving a balance of K300 which he gave to RW4 to buy two bags of mealie meal and a spare part. He said he later gave RW5 K50. RW4 and RW5 on the other hand denied receiving money from PW3.

The Respondent submitted that the lower Court faced with the conflicting evidence of the parties decided the matter based on the credibility of the witnesses having observed their demeanor. That the lower Court accepted the evidence of RW4 and RW5 and rejected the evidence of PW3 whom it found was not a credible witness as his testimony was inconsistent and contradictory.

The Respondent further submitted that he had given a reasonable explanation and alibi which placed him far away from PW3's house on 5th and 7th August, 2016 as shown by the campaign programme at page 323 of the record of appeal. He contended that if the Appellant believed that the timetable was not religiously followed, he should have called witnesses to confirm his suspicion. The Respondent agreed with the learned trial Judge's holding that once an alibi was raised, it was the duty of the Appellant to debunk the alibi as held in the case of **Ilunga Kabala and John Masefu v The People**.[4] The Respondent submitted that no evidence was adduced to show that the alleged acts of bribery prevented the majority of the voters from electing their preferred candidate.

In opposing ground five, the Respondent submitted that the lower Court cannot be faulted for holding that she could not rely on the evidence of PW10 to link the Respondent to the distribution of salt in Buleya ward. The Respondent contended that the mere fact that he had a campaign team in Buleya Ward could not be used to assume that PW10 was part of that campaign team. He submitted that it was not enough for the Appellant to make logical conclusions regarding the commission of the alleged act of bribery without

adducing cogent evidence to link the Respondent to the commission of the said act.

Grounds six, seven and eight were also opposed together. The Respondent submitted that the learned trial Judge was on firm ground when she refused to believe the evidence of PW5 and PW11 regarding the alleged bribery of K2,000.00 purportedly given to PW5 by the Respondent. He contended that the lower Court took into consideration factors other than that PW5 and PW11 were to be treated as accomplices whose evidence could not be relied upon as the probative value to be accorded to their evidence was in question. That accomplice evidence needs to be taken with a pinch of salt and that the argument by the Appellant that PW11 was not an accomplice cannot be sustained as it flies in the teeth of the evidence on record and the law as the evidence was that PW11 received part of the K2,000.00 allegedly given to PW3 by the Respondent. It was contended that for that reason, PW11 was an accomplice to the alleged bribery and fits into the definitions of accomplice from **Black's Law Dictionary**, 9th edition quoted by the Appellant.

The Respondent drew our attention to pages 122 and 123 of the record of appeal where the lower Court gave its reasons for refusing to accept the evidence of both PW5 and PW11. He acknowledged that this matter is an election petition and not a criminal matter but argued that the allegations of bribery made by the Appellant against the Respondent related to electoral malpractices such as bribery which require a higher standard of proof. In support of this submission, the Respondent cited the Kenyan cases of **Odinga v Independent Electoral and Boundaries Commission and Others**[8] and **John Kiarie Waweru v Beth Wambui Mugo and 2 Others**[9] wherein it was held that the standard of proof to be discharged by the petitioner in an election petition is above the balance of probabilities though not as high as beyond reasonable doubt.

He contended that in view of this standard of proof, it was important for the Appellant to have called independent and truthful witnesses to prove his allegations against the Respondent. The Respondent submitted that ground six has no merit and should therefore fail.

Turning to ground seven, the Respondent submitted that the learned trial Judge was on firm ground when she refused to accept the evidence of PW4, PW6 and PW12 on the allegation that the Respondent distributed salt, second hand clothes and unbranded chitenges in Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mitwi, Kandambo and Mapunga wards. It was submitted that since the trial Court was dealing with allegations of electoral malpractice involving criminal activities such as bribery, the trial Court was correct in applying the principles outlined in the cases of **Machobane v The People** and **Katebe v The People**. The Respondent submitted that PW4 was indeed an accomplice as he admitted to receiving a bribe from the Respondent although his confession was not conclusive evidence against the Respondent. It was submitted that since PW4 was an accomplice, the danger of false implication was not ruled out.

The Respondent submitted that there is no distinction regarding the principles of evidence applicable to criminal cases and to election petitions which are civil in nature. That what is applied differently is the burden of proof. In this case, the evidence of PW4, PW6 and PW12 was considered together with the evidence of RW6

and RW7. That after assessing the evidence of the Appellant and the Respondent and their witnesses, the lower Court had to resolve the issue of their credibility. It was submitted that since the evidence of PW4 was uncorroborated, the lower Court correctly guided herself on the issue and rightly concluded that the Appellant had not adduced sufficient evidence to prove, to the required standard, the allegation that the Respondent distributed salt to the electorate as an inducement for them to vote for him. The Respondent cited the case of **Mubika Mubika v Poniso Njeulu**[10] in support of this submission. In conclusion on this ground, the Respondent added that the Appellant had failed to satisfy the requirements of section 97 (2) (a) of the Act with regard to the bribery allegations and urged us to dismiss ground seven.

In opposing ground eight, the Respondent submitted that the learned trial Judge was on firm ground when she refused to accept the Appellant's evidence as there was no credible and tangible evidence to support the allegation. He adopted the arguments advanced in support of ground seven under ground eight. He contended that the ground has no merit and should therefore fail.

With regard to ground nine, the Respondent submitted that the learned trial Judge was right when she did not accept the evidence of PW8. The Respondent conceded that the lower Court did state that the evidence of PW8 was ably corroborated by PW9. However, the Respondent proceeded to state that the evidence of PW8 and PW9 was not accepted by the lower Court because it was not corroborated. He further submitted that the gist of the evidence of PW8 and PW9 was that Swana Kaguma was an agent of the Respondent although they failed to produce evidence to prove that assertion. That in fact, the learned trial Judge referred to the definition of agent in the Act and correctly concluded that the Appellant had not adduced sufficient evidence to prove that Swana Kagumu was the Respondent's election agent and that he acted with the Respondent's knowledge and consent or approval when he uttered the words complained of and threatened violence.

The Respondent contended that the remarks complained of by the Appellant in relation to ground nine were made in passing by the lower Court as the Court found it strangely odd that Swana Kagumu could go into a PF meeting and make disparaging remarks without any action being taken against him by about 100 to 200 PF

supporters who were present at the meeting. The Respondent submitted that after making those observations, the lower Court went on to state that there was no evidence adduced to prove the scale of the intimidation and threat of violence in the various wards and that if Swana Kagumu was heard by a number of people, they should have been called to testify to that effect. That the lower Court further found that there was no evidence adduced to link the remarks to the voting pattern to explain why some people did not vote or to show that the intimidation prevented the majority of voters from choosing a candidate of their choice. She therefore found the allegations not proved and dismissed the allegations of intimidation and threats of violence. The Respondent thus urged us to dismiss ground nine for lack of merit.

In opposing ground ten which was argued last and on its own, the Respondent submitted that the lower Court was right in holding that the Appellant did not adduce any other evidence to prove the allegation of distribution of salt, unbranded chitenge materials, blankets and other commodities in Luanginga, Yuka, Liumba, Buleya, Mapungu, Lukona and Kandombe. The Respondent submitted that the lower Court in evaluating the evidence, stated at

page 143 of the record of appeal, volume one that the Appellant in support of this allegation, testified that he was told by people that the Respondent and his agents engaged in the alleged illegal and corrupt activities.

He further submitted that no person was called to testify that the Respondent or his agents distributed gifts to the electorate after the close of the campaign period in the mentioned wards. The Respondent submitted that he denied that he distributed salt, unbranded chitenge material, blankets and other commodities to the electorate in the stated wards as alleged. He contended that the lower Court cannot be faulted for stating that the Appellant did not adduce any other evidence to show that the Respondent and his agents distributed gifts to the electorate in the named wards after the close of the campaign period as no person was called to testify to that effect.

The Respondent went on to submit that the Appellant cannot, at this stage, ask what other evidence the lower Court was looking for when the lower Court stated at page 146 of the record of appeal, volume one, the nature of the evidence the Appellant ought to have

adduced to prove his allegations against the Respondent. It was contended that section 97 (2) (a) of the Act has set a very high standard of proof and that the lower Court cannot be called upon to draw inferences from the evidence which was lacking in any event. It was contended that a petitioner is required to state with precision what specific illegal acts the candidate or his election or polling agent mentioned by name committed as a result of which specified individuals were induced to vote for the Respondent or refrained from voting for the Appellant. It was submitted that, in this case there was no evidence tendered in the lower Court to show that the Respondent demonstrated a reckless disregard for the law as contended by the Appellant in his heads of argument.

It was finally submitted in relation to this ground that the learned trial Judge cannot be faulted for concluding that the Appellant had failed to produce cogent and credible evidence to satisfy the requirements of section 97 (2) (a) of the Act and dismissed the petition. The Respondent urged us to dismiss ground ten for lack of merit.

In conclusion, the Respondent submitted that the Appellant had lamentably failed to prove his allegations to the required standard in terms of section 97 (2) (a) of the Act and that the appeal was frivolous and vexatious and should be dismissed with costs.

In augmenting the written submissions, Mrs. Mutti, counsel for the Respondent also more or less reiterated the arguments contained in the Respondent's heads of argument in opposition to the appeal. We therefore will not reproduce the oral submissions.

We have considered the grounds of appeal, the respective parties' heads of argument and the authorities cited. We have also considered the judgment of the Court below.

In determining this appeal, we have examined the law upon which the election of a candidate may be declared void. Section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 on which the petition in this case was based provides as follows:

> **"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –**
>
> **(i) by a candidate; or**

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

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

In terms of the provisions of section 97 (2) (a) of the Act, the election of a candidate can only be nullified if the petitioner proves to the satisfaction of the Court that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.

A petitioner must further prove that as a result of the corrupt or illegal practice or misconduct complained of, the majority of the voters were or may have been prevented from electing the candidate whom they preferred. It is therefore not sufficient for a petitioner to prove only that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without further proving that the illegal or corrupt practice or misconduct

was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice.

In developing jurisprudence relating to the revised electoral legislation, we have construed the provisions of section 97 (2) (a) of the Act regarding its import in several of our judgments including the cases of **Nkandu Luo v Doreen Sefuke, the Electoral Commission of Zambia and The Attorney-General,**[11] **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia**[12] and **Margaret Mwanakatwe v Charlotte Scott and The Attorney-General.**[13]

In an election petition, as in any other civil matter, the burden of proof lies on the petitioner to prove the electoral offences complained of in keeping with the legal principle that the burden of proof lies upon the party who substantially asserts the affirmative of the issues: see **Phipson on Evidence,** 17th edition, paragraph 6-06, page 151. However, the standard of proof in an election petition is higher than a balance of probabilities which is required in an ordinary civil action. According to settled Zambian case law, the evidence adduced in support of allegations made in an election petition must establish the issues raised to a fairly high degree of

convincing clarity. The leading authority on the standard of proof in election petitions is the celebrated case of **Akashambatwa Mbikusita Lewanika and Others v Fredrick Titus Jacob Chiluba,** [14] a persuasive authority, wherein the Supreme Court said:

> **"... Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability...(sic) ...the issues raised are required to be established to a fairly high degree of convincing clarity."**

We entirely endorse this sound principle of law. We will bear these principles of law in mind as we proceed to consider the grounds of appeal.

Before we proceed to consider the grounds of appeal, we wish to state by way of preliminary observations that the Appellant in all his grounds of appeal which he argued before us has essentially challenged the lower Court's findings of fact and asked us to overturn them. It is settled law that, as an appellate Court, we will not easily overturn or interfere with the findings of fact made by a trial Judge who had the benefit of seeing the demeanor of the witnesses and evaluating their evidence, unless it is shown that the findings of fact were either perverse or were made in the absence of any relevant evidence or were premised on a misapprehension of the facts, or were findings which could not have been made by a

trial court correctly directing itself and on a proper evaluation of the evidence. In **Zulu v Avondale Housing Project**[15] it was held that:

> **"An appellate court will not reverse the findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or were made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court, acting correctly, could reasonably make."**

We have endorsed this sound principle of law in our earlier judgments in determining appeals where we were called upon to overturn findings of fact made by a trial Judge. We similarly endorse this principle now.

We further wish to observe that we have also noticed that the Appellant, in arguing his grounds of appeal, generally did not address the requirements of the law set out in section 97 (2) (a) of the Act. We say so because in all the arguments which were made before us in support of the grounds of appeal, there was no attempt made to demonstrate that the Appellant as the Petitioner in the Court below had adduced cogent evidence which proved with convincing clarity the allegations he made against the Respondent in his petition.

The Appellant's election petition was premised on section 97 (2) (a) of the Act. Thus, the Appellant was obliged to prove with

cogent evidence first, the commission of the corrupt or illegal practices or other misconduct by the Respondent or his election agents, or by someone else with the Respondent's knowledge and consent or approval or that of his election or polling agent. Secondly, the Appellant needed to prove, with like evidence, that as a result of the electoral offence complained of, the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

Having said that, we turn to consider the grounds of appeal. In ground one, the Appellant challenges the lower Court's refusal to accept the evidence of PW12 regarding the alleged distribution of salt by the Respondent on account that the witness was in court for five minutes when the Appellant's other witnesses were testifying. The Appellant contended that this was notwithstanding the fact that the evidence of PW12 remained unchallenged in cross examination.

The Appellant further contended that the learned trial Judge misdirected herself when she decided to attach less weight to the evidence of PW12 without demonstrating that PW12's impugned evidence was on the same subject as that which the other witnesses

testified on while PW12 was present in Court. The Appellant argued that the lower Court had no basis upon which to attach less weight to the testimony of PW12 since he left the courtroom soon after the witness on the stand gave his particulars. The Appellant therefore urged us to accept the testimony of PW12 and hold that the Respondent illegally engaged in the distribution of salt to the electorate and that this activity had the effect of preventing the electorate in the Constituency from electing their preferred candidate.

The Respondent on the other hand submitted that the lower Court was right to attach less weight to the evidence of PW12 since he was present in court when some of the Appellant's other witnesses testified. He contended that the trial Judge properly guided herself on how she was to receive and treat the evidence of PW12. The Respondent pointed out that the record of appeal shows that the trial Court did consider the evidence of PW12 as recorded on page 119 of volume one of the record of appeal.

We have considered the respective parties submissions on this ground. We should state at the outset that although the Appellant contended that the learned trial Judge misdirected herself when she

decided to attach less weight to the evidence of PW12, the issue is not that the lower Court did not attach much weight to the evidence of PW12. The real issue for our determination is whether or not the evidence adduced by PW12 assisted the Appellant to prove the allegation that the Respondent illegally distributed salt to the electorate or that the distribution of salt was done by his election agents or by someone else with the Respondent's knowledge and consent or approval or that of his election agents.

In determining the issue, we examined the evidence of PW12 which is set out in its entirety at pages 741 to 785 of volume three of the record of appeal. We note that in his evidence in chief, PW12 did not at all testify that the Respondent or his election agents distributed salt to the electorate or even that the alleged distribution of salt to the electorate was done with his knowledge and consent or approval or that of his election agent. We have also carefully considered the witness' evidence and answers in cross examination.

We see no evidence given by this witness regarding the distribution of salt to the voters to induce them to vote for the Respondent. Thus in our view, the learned trial Judge was on firm

ground when she held in her judgment at page 119 of volume one of the record of appeal, that the evidence of PW12 was not capable of proving the allegation regarding the distribution of salt as he was only informed of it by unknown people who were not called to support the allegation. The trial Judge therefore cannot be faulted for holding that the allegation of bribery involving the distribution of salt was not proven to a fairly high degree of convincing clarity and therefore dismissing it. We agree with that finding. Ground one therefore has no merit and we accordingly dismiss it.

We shall consider grounds two, three and four together as they are related. In ground two the Appellant contended that the trial Judge was wrong when she refused to believe the evidence of PW3 that the Respondent gave him K6,000 on the ground that PW3 had an interest to serve but did not say what the interest was. In ground three, the Appellant contended that the lower Court ought not to have held that the Respondent had put up a plausible alibi for the time when he was alleged to have bribed PW3 with K6,000 when the schedule of meetings he produced showed that his meetings ended at 18:00 hours on that day and that the bribe was given around midnight.

In ground four, the Appellant argued that the learned trial court was wrong when she held that she could not rely on the evidence of PW10 to link and establish that the Respondent was distributing salt in Buleya ward using his ward campaign team when the Respondent had confirmed that he had a campaign team in Buleya ward and PW10 told the court that he was part of his campaign team.

The Appellant's contention in ground two was essentially that although the learned trial Judge held that she could not believe the evidence given by PW3 that the Respondent bribed him with K6,000 because he was a witness with an interest to serve, she did not state what interest PW3 had to serve. The Appellant therefore urged us to overturn that finding of fact.

The Respondent on the other hand agreed with the learned trial Judge's finding that PW3 was a witness with an interest to serve whose evidence needed to be corroborated by independent evidence.

In support of the allegation of bribery with K6,000, the Appellant called PW3 who testified that on 5th August, 2016 between 22:00 hours and 23:00 hours, the Respondent went to his

home in the company of another man and gave him K6,000 in K20 notes to distribute to his subjects so that they could vote for him. After the Respondent had left, he called a man called Maswabi Maswabi to his home and informed him that the Respondent had given him K6,000 cash to give to voters. He asked Maswabi Maswabi to calculate how much money each headman should be given. Each of the 38 headmen was given K150 to distribute to his subjects. A balance of K300 remained which he gave to Maswabi Maswabi to buy two bags of mealie meal and a spare part for a plough.

A few days later, Damian Lubinda (PW6) went and inquired from him whether the Respondent had given him K6,000 as a bribe to induce voters to vote for him. PW3 said he confirmed to PW6 that the Respondent had given him K6,000 to distribute to voters as an inducement for them to vote for him. PW3 said he gave K50 to PW6 and he left. In cross examination, PW3 conceded that he had no proof before court that the Respondent gave him money or that he distributed the money in issue to 38 village headmen as he did not record their names. He named only ten headmen to whom he allegedly distributed the money.

The evidence in rebuttal on this ground was given by RW4 and RW5. RW4 whom PW3 said helped him to calculate the money to be given to each of the 38 village headmen stated that PW3 was his brother and that on 5th August, 2016 when PW3 was allegedly given the K6,000 bribe, he was in the Barotse plains where he had gone to fish from 10th April, 2016. He said he only returned on 11th August, 2016 to vote. He denied that he helped PW3 to calculate the money to be given to the village headmen as PW3 alleged.

RW5 Sililo Namushi a village headman whom PW3 said he gave some of the money denied receiving money from PW3.

Faced with conflicting evidence given by the Appellant on one hand and by the Respondent on the other, the learned trial Judge resolved the matter based on the credibility of the witnesses. She found that PW3 was not a truthful witness as he was evasive in cross examination and gave contradictory evidence regarding his political inclination. The lower Court observed that he initially said in examination in chief that he was non-partisan only to admit that he was a supporter of the PF party when pressed in cross examination.

The lower Court also observed that PW3 was inconsistent on the date he was allegedly bribed having initially said the Respondent went to his home in the night on 5th August, 2016 but later said it was on 7th August, 2016. The learned trial Judge believed the evidence of RW4 in rebuttal that he was in the Barotse plains from 10th April, 2016 to 11th August, 2016 and that therefore he did not help PW3 to calculate the money each village headman would be given. The lower Court observed that the evidence of RW4 was not shaken in cross examination and that his demeanor was unquestionable.

It is settled law that a trial court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings based on the evidence before it having seen and heard the witnesses giving the evidence as was held in the case of **Attorney-General v Kakoma.** [16] We therefore cannot fault the learned trial Judge for accepting the evidence of RW4.

We further agree with the lower Court that PW3 was a witness with a possible interest to serve because not only was he a partisan witness, but he also alleged that he had taken a bribe. Therefore,

his testimony required to be corroborated by independent evidence. Further, the disparity in the dates stated in the petition and the date on which PW3 said he was given K6,000 by the Respondent did not assist the Appellant to prove his allegation as it cast doubt on his evidence.

It is our firm view that the evidence on record in support of the allegation of bribery involving the sum of K6,000 did not prove that the Respondent committed the corrupt act. Having found that the alleged act of bribery was not proved, we need not consider whether or not the act complained of had a widespread effect and that it prevented or may have prevented the majority of voters from electing their preferred candidate. The lower Court therefore rightly held that this allegation was not proven to the requisite standard of a fairly high degree of convincing clarity in terms of section 97 (2) (a) of the Act.

In ground three, the Appellant essentially challenged the lower Court's decision to believe the alibi put forward by the Respondent on the day he was alleged to have bribed PW3 based on the schedule of meetings which went up to 18:00 hours, when PW3's evidence was that he was bribed around midnight. This ground of

appeal is related to the allegation of bribery relating to the sum of K6,000.

In determining ground two, we clearly stated that the lower Court had determined the allegation of bribery involving the sum of K6,000 based on the credibility of the witnesses. On pages 113 to 114 of volume one of the record of appeal, the learned trial Judge said:

> **"On the issue of the alibi raised by the Respondent placing him away from PW3 on the 5th August, 2016, I agree with the submissions by counsel of the Respondent that once raised, it is the duty of the Petitioner to debunk the alibi. Counsel for the Petitioner attempted to dislodge the truth of the defence of alibi by stating that the schedule of meetings only went up to 18 hours in a day and therefore Respondent's (sic) movements were not known after 18:00 hours. In cross examination, the Respondent insisted he did not go to PW3's home. The Court has to carefully evaluate the evidence of PW3 and the Respondent. Each has a different interest to serve. The burden of proof lies with the Petitioner. No evidence has been adduced to show that the alleged acts of bribery prevented the majority of the electorate from voting for a person of their choice. I therefore find that the Petitioner has failed to prove this allegation and I accordingly dismiss it."**

As we stated earlier on in this judgment, the lower Court cannot be criticised for arriving at the position she did as she had the opportunity to observe the demeanor of the witnesses as they testified. We have not had that opportunity. There is no basis on which we can fault the findings of fact on the issue. We agree with the learned trial Judge that quite apart from the fact that the

Appellant's evidence did not prove that the Respondent or his election agents or someone else with their knowledge and consent or approval bribed PW3 in order to induce him and others to vote for the Respondent, there was no cogent evidence to prove that the majority of voters in Kalabo Central Constituency were or may have been prevented from electing their preferred candidate as per requirements of section 97 (2) (a) of the Act. Ground three therefore lacks merit and is dismissed.

In ground four the Appellant challenges the learned trial Judge's finding that she could not rely on the evidence of PW10 to link and establish that the Respondent was distributing salt in Buleya ward through his campaign team. The Appellant contended that the Respondent had a campaign team in the area and that PW10 told the lower Court that he was part of that team.

The evidence of PW10 was that he was campaigning in Buleya ward for the UPND presidential candidate and for the Respondent. He testified that on 10th August, 2016 he saw UPND youths going around the area distributing salt to the people especially to PF members to entice them to join the UPND. He alleged that the salt was given to the youths by the Respondent. In cross examination

at page 682 in volume two of the record of appeal, PW10 stated that he was appointed by the district party chairperson to carry out door-to-door campaigns for the UPND in Buleya ward. On page 691 of the same record of appeal, PW10 said Chishwashwa who was a member of his campaign team delivered salt and distributed it to the people in Buleya ward. He conceded that the Respondent was not present at the time the salt was delivered. He further conceded at page 692 of the record of appeal in volume two that he (PW10) was not present when the salt was distributed. He stated that the only person he saw Chishwashwa give salt to was his neighbour Jessica Nyambe. He also conceded that he would not know if any salt was given to the electorate in Buleya ward as he was not present.

In rebuttal, the Respondent testified in his own defence and denied that he gave salt to UPND youths to distribute in Buleya ward. He further denied that PW10 was part of his campaign team. He also called RW2, RW3 and RW15 in support of his case. RW2 testified that as far as he knew, PW10 was a member of the UPND party and that he had organized meetings for Dr. Atanga Muyenga in the UPND primaries.

RW3 on the other hand, told the lower Court that PW10 was not in good standing with the UPND party and that he had defected to join the PF party. RW15 denied that PW10 and Chishwashwa were part of the Respondent's campaign team in Buleya ward.

The lower Court evaluated the evidence on this allegation and held in her judgment at page 116 of volume one of the record of appeal that PW10 had failed to establish that the Respondent was the person who gave salt and unbranded chitenge to the youth in Buleya ward. She stated that PW10 based his assertion on the fact that he was aware of what was going on in the UPND in Buleya ward. The lower Court found that PW10 did not see the Respondent give the alleged youths who were allegedly distributing salt and unbranded chitenges. The lower Court held that there was no information availed to the Court as to the quantity of salt and unbranded chitenges purportedly given out, and to whom these were distributed. The lower Court found that there was no evidence adduced from the recipients of the salt and unbranded chitenge who allegedly received the bribes. The lower Court found that the evidence of PW10 had not been corroborated by anyone who received salt in Buleya ward or any other ward. The Court further

observed that PW10 testified that salt had been distributed to Jessica Nyambe who was never called as a witness to support what PW10 told the Court.

The lower Court stated that although Counsel for the Appellant as Petitioner in the lower Court had argued that PW10's evidence was unshaken in cross examination, PW10 lacked credibility as could be seen from his insistence on holding positions in the UPND which three other witnesses refuted. The lower Court found that the allegation had not been proven to the requisite standard and dismissed it.

After a careful examination of the evidence of PW10 on the record of appeal, we entirely agree with the lower Court that PW10's evidence did not connect the Respondent to the alleged distribution of salt and unbranded chitenge material in Buleya ward. Further, PW10 admitted in cross examination that he did not see the Respondent give salt to the alleged UPND youths and, more significantly, that he did not see the youths give the salt to people in Buleya ward as he was not present. He stated that the only person he saw Chishwashwa give salt to his neighbour Jessica

Nyambe who was not called to testify to that effect. Similarly, none of the other alleged recipients was called to confirm the allegation.

In the circumstances, the learned trial Judge was on firm ground when she held that the evidence of PW10 did not link the Respondent to the commission of the electoral offence. There is therefore no basis on which we can reverse the lower Court's findings of fact on the allegation of the alleged distribution of salt in Buleya ward. Ground four of the appeal fails and is dismissed.

In ground five, the Appellant challenged the lower Court's decision not to accept PW2's evidence that he was given unbranded chitenges by the Respondent, which evidence according to the Appellant, was corroborated by PW12. The issue we have to determine under this ground is whether the Appellant's evidence on the allegation that the Respondent gave unbranded chitenge material to PW2 was sufficiently proven in terms of section 97 (2) (a) of the Act.

The evidence regarding the unbranded chitenges to which this ground relates was given on behalf of the Appellant by PW2 and was to the effect that on 5th August, 2016 in the night, the Respondent visited him at his home and gave him 27 unbranded

chitenges so that he could help him in the election. He said he gave one chitenge each to 25 village headmen and kept two. In cross examination, he conceded that he had no proof that he received 27 chitenges from the Respondent and further, that the chitenge material in issue was ordinary and could be purchased from any shop in Kalabo. He also said he was alone when he received the chitenge from the Respondent and had no proof of receiving the chitenge material. He conceded in cross examination at page 459 and 460 of volume one of the record of appeal that there was no evidence to connect the Respondent to the chitenge which he exhibited in court.

PW12 on the other hand merely testified that he approached PW2 to inquire about the allegation that he had been given money by the Respondent. According to PW12, PW2 admitted to receiving the money. He did not testify that he asked PW2 about the issue of the distribution of chitenge material.

In rebuttal, the Respondent denied giving chitenge material to PW2 on 5th August, 2016 as a bribe.

In her judgment at page 119 of volume one of the record of appeal, the learned trial Judge said:

"I find that there are two different versions of events of 5th August, 2016. Whilst I may agree that there is a possibility that the Respondent could have given branded chitenges to PW2 in order to lure voters to vote for the Respondent, the Petitioner has not shown any other independent evidence showing that the Respondent gave him the unbranded chitenges and K3000. I find that the supporting evidence of PW12 is not capable of proving the matters alleged as he too was merely informed by unknown people who were not called to support the allegation. PW2 never told the Court that he met PW12. On the evidence adduced by the witnesses on this allegation made by PW2, I find that the Petitioner has not proved the allegation to a fairly high degree of convincing clarity and the allegation therefore fails, and I accordingly dismiss it."

We cannot fault the learned trial Judge in her finding that the Appellant had not proved the allegation that the Respondent had given PW2 a chitenge to give to his subjects in order for them to vote for the Respondent. Given that the Appellant was required to prove not only that the Respondent committed the alleged corrupt act of giving PW2 27 chitenge pieces, it was also mandatory for the Appellant to prove that the corrupt act complained of had a widespread effect and that it did or may have prevented the majority of voters from electing a candidate of their choice. A scrutiny of the evidence on record which was adduced by PW2 does not show how the distribution of 25 chitenge pieces could have prevented the majority of voters from electing their preferred candidate. Ground five has no merit and we dismiss it.

In ground six, the Appellant impugned the lower Court's finding that PW5 and PW11 were accomplices of the Respondent regarding the bribery of PW5 by the Respondent with K2,000. PW5 told the lower Court that on 7th August, 2016 the Respondent went to his home and gave him K2,000, two bags of salt and chitenge materials and instructed him to vote for him. He further said he distributed the salt, chitenge materials and money to his subjects in Kaande village in order to lure them to vote for the Respondent.

In cross examination, PW5 conceded that he did not keep a record of the people to whom he gave the salt and chitenges. He said he gave 40 people K20 each but conceded that he did not know who the people he gave the salt, chitenge material and money voted for. He testified that he voted freely for a candidate of his choice.

PW11 testified that on 7th August, 2016 he saw the Respondent's motor vehicle at the home of PW5 and that the Respondent and RW11 remained in the vehicle and called PW5. PW11 said PW5 called him to join him and the Respondent. RW11 then gave PW5 K2,000 and instructed him to distribute the money to his subjects to lure them to vote for the Respondent. In cross examination, PW11 told the Court that the Respondent was present

when RW11 gave the money to PW5 but that he did not say anything during the meeting. He said PW5 gave him K200 in K50 notes from the money he was allegedly given by RW11. PW11 conceded that his testimony differed from what was stated in the petition regarding who gave PW5 money as the petition showed that PW5 was given money by the Respondent whilst his testimony was that he saw RW11 give money to PW5. He also conceded that he did not have any evidence before court to prove that the Respondent gave money to PW5.

The Respondent denied the allegation that he gave PW5 money on the material date as he was in Lukona Namulilo ward and said that he was not with RW11 who was in Kaande. He denied that he met RW11 and that they gave money to PW5.

The trial Judge considered the evidence adduced by the parties and observed at pages 122 to 123 of volume one of the record of appeal as follows:

> **"I have considered both the evidence of the Petitioner and Respondent and their respective witnesses in relation to the allegation by PW5. I find that PW11 who was called as an independent witness to corroborate PW5 was not a credible witness in that one would expect PW11 as an eye witness to the events of 7th August, 2016 to testify with clarity what transpired on the material date. His insistence in cross examination of only testifying about the money and leaving out the salt and chitenge material showed that he was a witness with an interest to serve and could not be**

relied upon to tell the truth. I found his demeanour wavery particularly in cross examination. Both PW5 and PW11 contradicted themselves in relation to who allegedly gave the K2000 to PW5. I find both their evidence unreliable and inconsistent and cannot be relied upon. I find that both PW5 and PW11 evidence are to be treated with caution on account of inconsistencies. I find that there is a motive by PW11 to deliberately and dishonestly make a false allegation so as to cover both the tracks of his uncle and himself on the allegation that they have made against both the Respondent and RW11. The two should be treated as accomplices whose evidence cannot be relied upon and the probative value to be accorded to their evidence is not in question, and in any case accomplices and accomplice evidence has to be taken with a pinch of salt. I find the version of events as testified by the Respondent and his witnesses to be probably true compared to that of PW5 and PW11."

The lower Court found that the Appellant had not proved the allegation that the Respondent or his agent RW11 gave a chitenge and K2,000 to PW5 for him to lure people to vote for the Respondent to the requisite standard of proof and accordingly dismissed it.

It will be observed from the lengthy quotation we have cited from the lower Court's judgment that although the Appellant contended that the learned trial Judge misdirected herself when she refused to believe the evidence of PW5 and PW11 regarding bribery involving the sum of K2,000 because they were accomplices, when this was not a criminal trial and so criminal law principles are not applicable, the Appellant deliberately ignored the clear basis on which the lower Court decided not to accept the evidence of the two

witnesses. The lower Court clearly stated that PW5 and PW11 gave contradictory evidence regarding whether or not it was the Respondent who gave PW5 the sum of K2,000. Further, the Court found PW11, who was intended to corroborate PW5's evidence, evasive and therefore held that he was unreliable and could not be believed.

Whereas we agree that it was a misdirection for the lower Court to have held that PW5 and PW11 were accomplices as this was an election petition trial and not a criminal trial, the misdirection did not take away from the fact that the lower Court did properly evaluate the evidence of PW5 and PW11 on one hand against that of the Respondent on the other, regarding the alleged bribery involving the sum of K2,000. We also agree with the lower Court that the Appellant's evidence in support of the allegation fell far short of the required standard in terms of section 97 (2) (a) of the Act. This is because there was no cogent evidence adduced to prove that the Respondent or his election agent committed the alleged electoral offence.

Further, no evidence was adduced as to how the alleged bribe prevented or may have prevented the majority of voters in the

constituency from voting for their preferred candidate. On the totality of the evidence on record, we agree that the allegation was not proved. Since the basis for disregarding the evidence of PW5 and PW11 was because they were found to be unreliable witnesses on account of their inconsistent evidence, ground six clearly has no merit. We accordingly dismiss it.

We shall consider grounds seven and eight together as they are related. In ground seven the Appellant argued that the learned trial Judge was wrong to have refused to accept the evidence of PW4, PW6 and PW12 regarding the Respondent's distribution of salt, second hand clothes and unbranded chitenges in Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mwitwi, Kandambo and Mapunga wards by completely and exclusively relying on the principles of law and authorities on corroboration derived from criminal law when an election petition is not a criminal trial, and the principles of law and standard of proof are different.

In ground eight the Appellant contended that the learned trial Judge was wrong in her evaluation of the evidence regarding the Respondent's act of distributing unbranded chitenge materials in

Liumba Ward in that she held that the Appellant as Petitioner had failed to adduce evidence to prove this allegation despite the Appellant testifying that he had personally witnessed the activity, a fact which was not challenged in cross examination.

The witnesses who testified on behalf of the Appellant on this allegation were PW4 and PW6. PW4 testified that on 5th August, 2016, the Respondent went to his home at midnight and left him three bags of salt. He testified that on 8th August, 2016 PW6 approached him to inquire about the salt and he confirmed to him that he had received one bag of salt. In cross examination, PW4 testified that he had distributed the salt and conceded that he knew that receiving money was an offence. He admitted that he did not report the matter to anyone. He further conceded that he did not have proof that he was given the salt.

PW6 on his part merely testified that he approached PW4 to inquire about the money which it was alleged was given to PW4 by the Respondent. He said PW4 confessed that he received three bags of salt from the Respondent and that he had already distributed it to members of the public in Shuku, Silamu and Munyama polling stations. In cross examination, PW6 admitted that he was not

present when the Respondent allegedly gave PW4 the salt. He conceded that he did not have proof before court that the Respondent gave salt to PW4.

In rebuttal, the Respondent called RW6 and RW7. RW6 denied that on 5th August, 2016 he received one bag of salt from PW4 which he was supposed to distribute in Silamu branch of Mapungu ward. He testified that he was the chairperson of the PF Silamu branch. He stated that PW4 was his elder brother and that he had come to court to clear the Respondent's name and his own name.

RW7 also denied that he received salt which was distributed by PW4.

The lower Court evaluated the evidence adduced by the respective parties and their witnesses and settled the conflicting stories on the basis of the credibility of the witnesses. She held that the evidence of PW4 was uncorroborated and cited the cases of **Machobane v The People**[5] and **Katebe v The People.**[6] Ultimately, the lower Court found that the Appellant had not proved the allegation of bribery to the requisite standard of proof and further that no evidence had been adduced to prove that the

majority of voters were or could have been prevented from voting for their preferred candidate as a result of the alleged corrupt acts. She therefore dismissed the allegation.

Having examined the evidence on record regarding the alleged distribution of salt, second hand clothes and unbranded chitenges in Lwanginga, Yuka, Liumba, Buleya, Ndoka, Mwitwi, Kandambo and Mapunga wards by the Respondent, we cannot fault the learned trial Judge for holding that the Appellant had not proved the allegations of bribery against the Respondent. The evidence adduced by the Appellant was far below the requirements of section 97 (2) (a) of the Act. Grounds seven and eight fail and are dismissed.

In ground nine the Appellant took issue with the lower Court for her refusal to accept the evidence of PW8 which she conceded was ably corroborated by PW9 that Swana Kagumu was threatening violence against any person who would vote for the Appellant or PF or vote "yes" in the referendum on the premise according to the learned trial Judge that *"Swana Kaguma could not go in to a PF meeting and pass disparaging remarks without any action being*

taken against him by those who were present at the meeting of between 100-200 PF supporters."

The allegation to which this ground relates is contained in paragraph 4 (iii) of the petition and is about threatening violence. The evidence in support of this allegation was adduced on behalf of the Appellant by PW8 and PW9. PW8 testified that on 18th July, 2016, while in Yuka ward, at a meeting which was being addressed by PW9 and PW12, he heard Swana Kaguma threatening to beat and burn the house of anyone who would vote for President Lungu and any PF candidate. PW8 alleged that Swana Kaguma was the Respondent's agent but said he did not have proof of that. He said he reported the matter to the conflict management committee on 19th July, 2016. PW8 testified that the intimidation was widespread.

PW9 testified that he attended the meeting held on 18th July, 2016 at Yuka ward and that he heard Swana Kaguma threatening violence. He stated that on the same day in the night, Swana Kaguma went round Yuka area uttering disparaging remarks. He alleged that as a result of Swana Kaguma's utterances people shunned voting.

In rebuttal, the Respondent denied the allegation. He stated that Swana Kaguma was not his election or polling agent and that he did not send him to utter the words complained of or to threaten violence.

The lower Court considered the evidence adduced by the parties and found that the Appellant had not adduced evidence to support the assertion that Swana Kaguma was the Respondent's election agent or that he had the Respondent's consent to act in the manner he did. The lower Court further observed that the version of events on 18th July, 2016 which was given by PW8 and PW9 regarding Swana Kaguma's remarks at the PF meeting could have been exaggerated and given out of context.

The learned trial Judge further found that there was no evidence adduced to prove the scale of intimidation and threat of violence in the various wards. The lower Court observed that if indeed Swana Kaguma was heard by a number of people, those people should have been called to testify to that effect. The trial Judge added that there was no evidence adduced to link or connect the remarks to the pattern of voting or to why some people did not vote or to show that as a result of the intimidation, the majority of

the voters were prevented from electing a candidate of their choice. The learned trial Judge therefore found that the allegations of intimidation and threatening of violence were not proved and dismissed them accordingly.

Having examined the evidence on record adduced by the Appellant's witnesses PW8 and PW9 on the issue of intimidation and threatening of violence, we agree with the learned trial Judge that the allegations were not proven to the requisite standard as the evidence did not connect the Respondent or his election agent to the commission of the alleged electoral offences as it was not shown that Swana Kaguma was the Respondent's election agent as defined by section two of the Act. We further observe that there was no evidence adduced by the Appellant to prove the widespread nature of the alleged intimidation or threats of violence.

In the circumstances, ground nine has no merit and we dismiss it.

In ground ten the Appellant argued that the learned trial Judge was wrong to have stated that the Appellant did not adduce any other evidence to prove the allegation when the Appellant testified that the Respondent after close of the campaign period

continued to distribute salt, unbranded chitenge materials, blankets, and other commodities in Lwanginga, Yuka, Liumba, Buleya, Mapunga, Lukona and Kandombe wards, the learned trial Judge simply stated that "*the petitioner did not adduce any other evidence to show that the respondent or his agents distributed gifts to the electorate,*" without the Judge stating which "other evidence" she expected to believe the Appellant's testimony.

Only the Appellant testified in support of the allegation that the Respondent and his agents continued to distribute salt, unbranded chitenge materials, blankets, and other commodities in Lwanginga, Yuka, Liumba, Buleya, Mapunga, Lukona and Kandombe wards after close of the campaign period. He stated that he personally witnessed this and that he was also told about it by other people. However, he did not call any other witness from any of the seven wards to testify that they received salt, unbranded chitenge materials, blankets, and other commodities from the Respondent and his agents after the close of the campaign period.

The Respondent in rebuttal denied that he distributed salt unbranded chitenge materials, blankets, and other commodities to the electorate in Lwanginga, Yuka, Liumba, Buleya, Mapunga,

Lukona and Kandombe wards after the close of the campaign period as alleged by the Appellant.

After considering the evidence relating to this allegation, the learned trial Judge held that the Appellant had failed to adduce cogent evidence to prove the allegation. She observed at page 129 of volume one of the record of appeal that bribery is a serious offence and its implications are serious. She added that it has to be satisfied by cogent and uncontroverted evidence in proof of the allegation. And that in this case, it was incumbent upon the Appellant (as the Petitioner) to show that the electoral malpractices complained of were widespread and affected the outcome of the election. She found that the Appellant had failed to show that the majority of the electorate in the affected areas were prevented from electing a candidate of their choice as a consequence of the alleged illegal and corrupt practices. The learned trial Judge found that the allegation had not been proven and therefore dismissed it.

We have considered the evidence in support of the allegation to which this ground relates. We find in agreement with the learned trial Judge that the allegation was not proven to the requisite standard as the Appellant did not prove that the Respondent or his

election agents committed the alleged offence or that the offence was committed by someone else with their knowledge and consent or approval. Neither was there any evidence that the alleged offences were of a widespread nature. As such, we hold that the Appellant did not prove the allegation and that being the case, there is no merit in ground ten. The ground of appeal therefore fails and we dismiss it.

The Appellant did not advance any arguments on ground eleven on costs. We take it that the Appellant had abandoned it. We will therefore not address the eleventh ground of appeal.

As the Appellant did not prove any of the allegations in his petition in terms of section 97 (2) (a) of the Act, all the grounds of appeal have failed. The Appeal therefore fails in its entirety and we dismiss it. We uphold the lower Court's declaration that the Respondent, Miyutu Chinga, was duly elected as Member of Parliament for Kalabo Central Constituency.

Each party will bear their own costs of this appeal.

.....

H. Chibomba,

PRESIDENT, CONSTITUTIONAL COURT

.....

A.M. Sitali,

CONSTITUTIONAL COURT JUDGE

.....

E. Mulembe,

CONSTITUTIONAL COURT JUDGE

.....

P. Mulonda,

CONSTITUTIONAL COURT JUDGE

.....

M.M. Munalula,

CONSTITUTIONAL COURT JUDGE