P.(1798)

SELECTED JUDGMENT NO.53 of 2017

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

APPEAL NO. 17/ 2016

IN THE MATTER OF A PARLIAMENTARY ELECTION PETITION FOR MUFUMBWE CONSTITUENCY NUMBER 113 SITUATE IN THE MUFUMBWE DISTRICT NUMBER 006 OF THE NORTH WESTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11TH AUGUST, 2016

AND

IN THE MATTER OF: SECTION 83 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

IN THE MATTER OF: SECTION 15 (1) (a) (b) (c) OF THE CODE OF CONDUCT OF THE ELECTORAL ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE ELECTORAL PETITION RULES STATUTORY INSTRUMENT NO. 426 OF 1968 (As amended)

BETWEEN:

STEVEN MASUMBA (MALE) — APPELLANT

AND

ELLIOT KAMONDO — RESPONDENT

Chibomba, PC, Mulenga, Mulembe, Mulonda and Munalula, JJC
on 29th May, 2017 and on 17th November, 2017

For the Appellant: Mr. K. F. Bwalya, Mr. L. E. Eya, Mr. J. Tembo, Mr. L. Mayemba and Ms. D. Mwewa, all of Messrs. K.B.F. & Partners.

For the Respondent: Mr. M. Katolo of Messrs Milner & Paul Legal Practitioners.

J U D G M E N T

Chibomba, PC, delivered the Judgment of the Court.

Cases referred to:

1. S v Chanda (CA9/05) [2005] NAHC 17 (23 June, 2005).
2. Mutambo v The People (1965) Z.R. 15.
3. Shamwana and 7 Others v The People (1985) Z.R. 41.
4. Subramaniam v Public Prosecutor (1956) 1 W. L. R. 965.
5. Leonard Banda v Dora Siliya, SCZ Judgment No. 127 of 2012.
6. Alex Cadman Luhila v Batuke Imenda, 2002/HP/EP/0017.
7. Saul Zulu v Victoria Kalima (2014) ZR. (Vol. 1) 14.
8. Eileen Mbuyuwana Imbwae v Misheck Mutelo, Electoral Commission of Zambia and the Attorney General 2011/HP/EP/0004
9. Josephat Mlewa v Eric Wightman SCZ Judgment No. 1 of 1996.
10. Limbo v Mututwa 1974 HP/EP/2.
11. Simasiku Kalumyana v Geoffrey Lungwangwa and Electoral Commission of Zambia 2006/HP/EP/11.
12. Attorney General v Marcus Achiume (1983) Z.R. 1.
13. Lee v The Queen (1998) 72 ALJR 1485.
14. Lewanika and Others v Chiluba (1998) Z.R. 79.
15. Khalid Mohammed v Attorney General (1982) Z.R. 49.
16. Jyoti Basu v Debi Ghosal 1982 AIR 983.
17. Sikota Wina and others v Michael Mabenga (2003) Z.R.110.
18. Nkhata and Others v The Attorney General (1966) Z.R. 147.
19. Attorney General v Kakoma (1975) Z.R. 212.
20. Kamba Saleh Moses v Hon. Namuyangu Jennifer- Election Petition Appeal No. 0027of 2011.
21. Wadada Rogers v Sasaga Isaiah Jonny & EC- Election Petition No.31 of 2011.
22. Mubika Mubika v Poniso Njeulu- Appeal No. 114/2007.
23. Peter Lifunga Machilika v The People (1978) Z.R. 44.

Legislation referred to:

1. The Electoral Process Act No. 35 of 2016.
2. The Electoral Act No.12 of 2006.
3. The Code of Conduct of the Electoral Process Act No. 35 of 2016.

Other authorities referred to

1. Black's Law Dictionary, 10th Edition by Bryan A Garner.
2. Longman's Dictionary of Contemporary English, New Edition.

The Appellant who was the Petitioner in the court below, appeals against the Judgment of the High Court which declined to nullify the election of the Respondent as Member of Parliament for Mufumbwe Parliamentary Constituency in the North-Western Province of the Republic of Zambia.

The brief facts leading to this appeal are that both the Appellant and the Respondent together with three others stood as parliamentary candidates for Mufumbwe Constituency at the elections that were held on 11th August, 2016. The Respondent who stood on the United Party for National Development (UPND) ticket, was declared as the duly elected Member of Parliament for Mufumbwe Constituency after polling 8,012 votes. The Appellant who stood on the Patriotic Front (PF) ticket polled 2,687 votes while the rest of the votes went to the two independent candidates who polled 5,438 and 3,084 respectively and the Forum for Democracy and Development (FDD) candidate who got 202 votes.

Dissatisfied with the declaration of the Respondent as the duly elected Member of Parliament for Mufumbwe Parliamentary Constituency, the Appellant, on 26th August, 2016 filed a petition in the High Court in which he sought the nullification of the election of the Respondent on the following grounds:-

"1. **That the campaigns in the said Constituency were characterised by defamation or inflammatory allegations and that this was contrary to Regulation 15 (1) (c) of the Code of conduct.**

2. **That there was intimidation and violence contrary to Regulation 15 (1) (a) of the Code of Conduct.**

3. **That there was undue influence contrary to the provisions of Section 83 of the Electoral Process Act No. 35 of 2016."**

He alleged that the above resulted in voters voting for the Respondent's party. The Appellant also sought any other declaratory orders the Court may deem fit and costs.

In opposing the claims in the petition, the Respondent filed an Answer in which he disputed all the allegations made against him stating that neither he nor his agents defamed the Appellant or brought his name into ridicule. He also denied the allegations that his party members instigated violence at every place where the two political parties met.

The matter proceeded to trial and the learned trial Judge heard evidence from the respective parties which he considered and analysed. He then came to the conclusion that six issues had been raised for the Court's determination which he put as follows:-

"1. **Whether the Respondent and his polling agents told the electorates that gay rights would be introduced into the Constitution through the Referendum if it received a yes vote from them.**

2. **Whether the Respondent and his agents published false statements and assassinated the character of the Petitioner by spreading a message that he was a criminal, thief and convict.**

3. **Whether there was widespread violence, intimidation and threats in the constituency of Mufumbwe that the majority of voters failed to elect the candidate they preferred.**

4. **Whether there was undue influence from the Indunas during the campaign period to sway the electorate from voting for the Petitioner.**

5. **Whether the election officers who worked for the ECZ were barred from performing their duties in the elections.**

6. **Whether there were any corrupt or illegal practices which would be sufficient ground to nullify the election".**

Based on the totality of the evidence before him, the learned trial Judge dismissed the Appellant's petition with costs on the ground that the Appellant had not proved to the required standard, any of the allegations in the petition.

The Appellant has appealed to this Court advancing and arguing three grounds of appeal which we have had to correct as they contained typographical and grammatical errors. These now read as follows:-

1. **The learned Judge erred in law and fact when he held at page 108 that; "in my Judgment there was no evidence to substantiate particulars 1 (i) and (ii) of page 3 of the Petition that during the campaign period the Respondent and two (2) other candidates namely Davies Mbalau and Watson Kyakilika used lies against the referendum in the entire constituency and that the Respondent and the said independent candidates told the electorate that the rights which were to be included in the bill of rights via the referendum contained gay rights and as such the PF was not to be voted for. The**

2 **Petitioner has not proved these allegations to a fairly higher degree of convincing clarity." In the face of unshaken evidence of PW1 at page 5, 9, and 11, the evidence of PW11 at pages 42 and 43, evidence**

of PW12 at page 44 and evidence of PW13 at pages 47, 48 and 50 of the Judgment.

3 **The learned Judge erred in law and fact when he held at page 113 that; "I find that there was no evidence to substantiate the allegation in particular 1 (iii) of page 3 of the Petition that during the campaign period the Respondent's campaign message was that the Petitioner was a thief despite the Presidential pardon against his conviction and that the Petitioner stole money meant to roof Munyambala Primary School and rehabilitate Bulobe Primary School. The Petitioner has not established the allegation to a fairly high degree of clarity." In the face of evidence by PW1 at pages 5 and 6, evidence of PW11 at pages 42 and 43, evidence of PW12 at pages 44 and evidence of PW13 at page 48, 49 and 51 of the Judgment which was not discredited during cross-examination.**

4 **The Learned Judge erred in law and fact when held at page 130 that; "the conclusion that the Court has reached is that the claim of intimidation and violence which would adversely affect voters to vote for a person not of their choice, has not been supported by the evidence on record. Further, if indeed there occurred acts of intimidation and violence there is no sufficient evidence to link them to the Respondent. I find that the petitioner failed to show that political violence affected the final election result." In the face of evidence by PW8 at page 120, evidence of PW13 at page 13 and evidence of PW2 at pages 12 and 13 which was not shaken during cross-examination.**

In support of this appeal, the Counsel for the Appellant, Mr. Bwalya, relied on the Applicant's Heads of Argument filed which he augmented with oral submissions.

In arguing ground one of this appeal, Counsel began by referring to the alleged contravention of Regulation 15 (a) (b) (c) of the **Electoral Code of Conduct** which is cast as paragraph 1 (i) and (ii) of the particulars of contravention highlighted in the petition. This states as follows:-

"(i) **During the campaign period, the UPND candidate Eliot Kamondo and the other two (2) independent candidates alluded to above used lies against the referendum as part of their campaign message throughout the campaign period in all the constituencies for example Chizela ward, Kalambo ward, Kashima East and Kamabuta.**

(ii) **In reference to the referendum, the candidates told the electorates that the rights which were to be included in the bill of rights via the referendum included gay rights. So the candidates implored the electorates not to vote for the PF because according to the UPND, the PF was going to introduce the purported gay rights. The two independent candidates, Webby Iputu, Ben Mufuka, Malachi Tedious, Kalundu Peter and Justine Kaponge will testify that they heard the UPND candidate Eliot Kamondo speak on gay rights in the whole of Mufumbwe constituency and that the two were influenced to say the same against the Petitioner."**

Counsel then went on to refer to and quote extensively some portions of the Appellant's evidence and that of his witnesses, PW11, PW12 and PW13. He submitted that this was the evidence that the Appellant relied upon in the court below to support the above allegations. Details of this evidence are given later.

As regards the programme by the Ministry of Justice for all stakeholders which was held two weeks before the elections over the Referendum, Counsel referred us to the evidence of PW13 which he again quoted extensively. It was Counsel's submission that the evidence of these witnesses is clear, corroborated and was unshaken under cross-examination.

Counsel submitted that although he concedes that no documentary or recorded evidence was adduced by the Appellant to

show that the Respondent made the false statements attributed to him over the Referendum, the Appellant's position was that his evidence was nonetheless, corroborated by the evidence of PW11, PW12 and PW13 who all said they heard the Respondent speak ill of the Referendum as the Appellant perceived and heard him at Chizela market; while PW11 perceived and heard him at Miluji on 14th July, 2016; PW12 perceived and heard the Respondent at Miluji four days before the elections while PW13 heard the questions of participants at the programme on the Referendum organised by the Ministry of Justice two weeks before the elections. Hence, the Appellant's position was that the evidence on record shows that the Respondent and his agents spoke ill about the Referendum in Mufumbwe.

As regards the finding by the court below that the evidence of PW13 was hearsay, Counsel argued that since the issue of the Referendum was reported to this witness by traditional leaders and since PW13 later heard it in church and at the Ministry of Justice programme on the Referendum, her evidence could not be hearsay because she was there and she heard it herself. In support of this argument, the case of **S. v Chanda**[1] was cited in which the High Court of Namibia held that:-

> **"The only further issue which I wish to deal with is the issue of hearsay evidence... It would suffice to state the definition of hearsay to the following effect: And that is that, "oral and written statements by persons who are not a**

party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say."

It was contended that arising from the above case, since PW13 was called as a witness in the proceedings in this case, the trial court should not have treated her evidence as hearsay. We wish to state here, however, that a copy of the above cited case was not filed and as such, we are not able to verify it.

Counsel also contended that if the evidence of PW10 and PW13 was hearsay, the rule on hearsay evidence is that, 'if what was brought' before court was to show that the statements in relation to the Referendum were made and not to show the truthfulness of the statements, then the said evidence is not hearsay and it is admissible. Counsel's position was therefore, that the evidence of PW10 and PW13 was admissible as it was not hearsay. In support of this proposition, Counsel cited and quoted from the cases of **Mutambo v The People[2], Shamwana and 7 Others v The People[3] and Subramaniam v Public Prosecutor[4]**.

As regards the finding by the Court below that PW13 appeared to be a candid and truthful witness, Counsel urged us to find that the

evidence of PW13 was true in relation to the Referendum and that we should accordingly, find that the Appellant had proved this allegation to the required standard.

It was also submitted that the trial court erred when it found that PW11 was not truthful on the ground that he was testifying as if he was with someone else when he was listening to the Respondent and the Headman. However, that PW11 clarified this position under cross-examination when he stated that at the time that he had gone to Miluji, he was not alone, but that at the time he was seeing what was happening, he was alone. Thus, Counsel urged, we should find PW11 a credible witness on the alleged ill speaking of the Referendum by the Respondent. In support of this argument, Counsel cited Regulation 15 (1) (c) of the **Electoral Code of Conduct** of the **Electoral Process Act** which prohibits making of false, defamatory or inflammatory allegations concerning any person or political party in connection with an election. He also cited the decisions by the Supreme Court in **Leonard Banda v Dora Siliya**[5] and **Alex Cadman Luhila v Batuke Imenda**[6].

In support of ground two, Counsel again referred to paragraph 1 (iii) of the particulars of contravention of Regulation 15 (a), (b) and (c) of the **Electoral Code of Conduct** in the petition which alleges that:-

"(iii) **During the campaign period again, the UPND candidate Eliot Kamondo's campaign message was to the effect that the Petitioner was a thief despite the Presidential Pardon against the Petitioner's conviction. That the Petitioner stole money that was meant for the purchase of iron sheets for roofing Muyambala Primary School. That the total money stolen was K77,000 for Muyambala Primary School and K55,000 for Bulobe Primary School."**

Counsel again quoted the Appellant's evidence and that of his witnesses, PW11, PW12 and PW13. A detailed analysis of this evidence is given later in this Judgment.

It was submitted that it is clear from the evidence of these witnesses that the Appellant was defamed as their evidence was not discredited under cross-examination and that the Respondent had no proper defence to it. Further, that the trial court's findings on this allegation were more inclined to the fact that the Appellant did not report the matter to the police or the District Conflict Management Committee (**DCMC**) but that this was wrong as the Appellant in fact reported the matter to the **DCMC** as shown by his evidence on record.

As regards the findings by the learned trial Judge that the Appellant did not bring evidence to support the alleged defamation and that the Appellant did not show the number of people who did not vote for him as a result of being defamed, Counsel contended that the testimonies of the Appellant, PW11, PW12 and PW13 as well as the

final results constituted enough evidence that showed that a lot of people did not vote for the Appellant. According to Counsel, this is so because out of 48 polling stations in the Constituency, the Appellant only won in 10 polling stations. Hence, the finding that the Appellant did not bring evidence to support the claim of defamation was wrong as the evidence in question proved that the Respondent and his agents defamed him.

As regards the trial court's finding that PW13's evidence was hearsay, Counsel argued that since PW13 investigated the matter of the Appellant and former Chief Muyambala being called thieves, her evidence was not hearsay as she got her own information through investigations apart from what she was told by the former Chief. Counsel repeated his submission under ground one as regards hearsay evidence that if what was brought before the court was to show that the statement attributed to the Respondent was made against the Appellant and the Chief and not whether the statement was true, then such evidence is not hearsay and was thus, admissible. To press this point further, Counsel again cited the **Mutambo**[2] and the **Subramanian**[4] cases. He, accordingly, urged us to find that the evidence of PW13 was true as regards the defamation allegation as the court below too in fact stated that PW13 appeared to be a candid and truthful witness.

As regards the evidence of PW11, it was argued that since the trial court did not give any reason for finding his evidence doubtful, this Court should consider the evidence on ground that PW11 heard and perceived the defamatory statement at Miluji and that PW11's evidence was not discredited during cross-examination.

In concluding his arguments in support of ground two, Counsel urged us to find that the Respondent and his agents did not comply with the law as they defamed the Appellant. To this effect, Counsel quoted extensively from the decisions of the Supreme Court in the cases of **Saul Zulu v Victoria Kalima**[7] and **Eileen Mbuywana Imbwae v Misheck Mutelo, Electoral Commission of Zambia and The Attorney General**[8]

In arguing ground three of this appeal, Counsel quoted paragraph 1 (iv) and (v) of the particulars of the alleged contravention of Regulation 15 (a), (b) and (c) of the **Code of Conduct** of the **Electoral Process Act** as cast in the petition which alleges that:-

> "(iv) **During the campaign period, the UPND members led by the Respondent developed a tendency to threaten violence against the PF members around every place they found them in; for instance on the 4th of August about 19.00 hours along M8 road, Kalambo area, Mr. Roy Ifwa who was driving a Hillux motor vehicle registration number AAV 1211 belonging to Machai Clement who was campaign manager for UPND deliberately hit**

into the PF motor vehicle and injured Lastorn Kandela aged 21 years of Kakilufya, injuring his right leg and he is still admitted in Mukinge Mission Hospital. The driver was charged with dangerous driving. The investigating officer was Shambala Rodgers. Evidence will be led to this effect.

(v) On 27th July, 2017 at about 17.00 hours a rally was held at Kamazovu by the Petitioner and his campaign team. The UPND cadres violently disrupted the meeting and started throwing stones at the people who were gathered in the meeting. This matter was reported to the police and a docket was opened for further investigations. The investigations officer in relation to this matter was Mpasela Felix."

Counsel then referred to the evidence of PW2, PW13 and the police officers who testified and investigated the different reports of alleged violence. The evidence of PW2 and PW13 is outlined later.

It was argued that PW2 and PW13's evidence shows that various incidents of violence were reported and that although the learned Judge found that the police officers were lying, he, nevertheless, found that there was violence which he attributed to the PF. And that this was inspite of PW2's evidence that the violence was by all political parties. Therefore, Counsel contended, the learned Judge contradicted himself as in one breath, he found that the police officers were lying while in the other, he found that there was violence. However, Counsel argued that the Appellant's position is nevertheless that since the police officers are the witnesses who mainly testified about the violence and since the trial court found that there was political violence, it follows that the police

officers told the court the truth. Further, that although there could have been contradictions as to the times and dates when the incidences of violence occurred, that did not take away the fact that there was violence. Hence, his position was that political violence is violence regardless of who starts or perpetrates it and that there is no doubt that violence intimidates voters and pollutes the political atmosphere. Thus, although he concedes that the reports on record were against the PF and independent candidates, nevertheless, the Appellant's position was that PW2's evidence shows that some of the reports were made to the **DCMC** and to the Political Liaison Committee and that some of those were against members of other political parties though these reports were not for public consumption. Therefore, Counsel submitted, based on what PW2 told the court, the court below was wrong when it attributed the political violence to the PF as the law is very clear that it does not matter who the wrong doer is provided that the court is satisfied that there was violence just as the court below was satisfied in the current case. To support this argument, Counsel referred to the decisions of the Supreme Court in **Dora Siliya**[5], **Josephat Mlewa v Eric Wightman**[9] and **Limbo v Mututwa**[10].

In augmenting the Appellant's written Heads of Argument, Mr. Bwalya combined his arguments in support of all the three grounds of

Appeal. He, more or less repeated the arguments in the filed Heads of Argument. He, however, emphasized that the main thrust of this appeal is that the parliamentary election in Mufumbwe was not free and fair as it was characterised by violence, intimidation and threats of intimidation and character assassination. Further, that the learned trial Judge overlooked serious evidence before him which he at times glossed over and in some instances, dismissed as hearsay.

To counter the holding by the trial Judge that political violence in Mufumbwe was not so widespread as to have negatively affected the election results, Mr. Bwalya stressed PW2's evidence and that of the other police officers who testified on this aspect and the exhibits produced. He also referred to the evidence of PW13.

In emphasizing the point that political violence and intimidation of elections officers did occur contrary to the finding of the trial Judge, Mr. Bwalya referred to the evidence of PW14 and to the letter written by Clement Machayi and to the pronouncements by the Respondent's presidential candidate Mr. Hakainde Hichilema and the threat which, according to Counsel, was made at a rally on 27th July, 2016. He submitted that this action was contrary to Section 97 (2) (a) of the

Electoral Process Act.

As regards the contention that the learned trial Judge did not properly analyse the evidence as he glossed over some of the evidence, Mr. Bwalya submitted that inspite of the disparities which Counsel conceded as regards the timings of the reports of the violence and the names of the people involved, the learned Judge should have nevertheless accepted the evidence as it showed that the violence was widespread. He cited the case of **Simasiku Kalumyana v Geoffrey Lungwangwa and the Electoral Commission of Zambia**[11] in which the High Court stated that in election petition cases, the testimony of witnesses such as police officers and monitors during an election is more credible than that of party officials and election officers.

In concluding his oral submissions, Mr. Bwalya urged us to find that there was widespread violence and that the Appellant was defamed and that this affected his candidature and that the ill speaking of the Referendum also affected his candidature in the minds of the voters because of the political party on whose ticket he was standing on which was also the party in government and which was also responsible for conducting the Referendum programme. Counsel's prayer was therefore that the Appellant's Appeal should be upheld and that this Court should

find that the Respondent was not duly elected as Member of Parliament for Mufumbwe Constituency.

In opposing this appeal, the learned Counsel for the Respondent, Mr. Katolo, also relied on the Respondent's Heads of Argument filed which he too augmented with oral submissions. In response to ground one, Counsel submitted that it is settled law in our jurisdiction and elsewhere that findings of fact made by the trial judge who heard the evidence and saw and evaluated the demeanour of witnesses can only be reversed on appeal if it is established that the findings in question were either perverse; or were made in the absence of relevant evidence; or they were made on a misapprehension of the evidence. As authority, Counsel cited the case of **Attorney General v Marcus Achiume**[12] where the Supreme Court of Zambia guided on when an appellate court may reverse findings of fact made by the trial court. It was submitted that in the current case, the trial court carefully considered and evaluated the evidence of all the witnesses in arriving at its findings of fact.

In response to the Appellant's contention that PW10's evidence was that the alleged report of intimidation of the electorate in Miluji was made to the Mushima Royal Establishment by Herold Jerome who was

the PF's candidate for Council Chairman, Counsel submitted that PW10 was giving evidence on an out of court statement which was made by a person who was not called as a witness. Counsel submitted that PW10's evidence was clearly hearsay which is inadmissible. Hence, the court below was on firm ground when it declined to admit this evidence. And that PW10 conceded that he did not investigate the alleged intimidation. To press this point further, Counsel cited the case of **Lee v The Queen**[13] where Lord Gleeson, CJ, guided on why the court sets its face against hearsay evidence. Counsel also referred to the definition of the term *'hearsay'* by the learned authors of **Black's Law Dictionary.**

It was argued that in the current case, the evidence on the alleged intimidation of the electorate of Miluji to vote against the PF depended on the credibility of Herold Jerome and not that of PW10 who did not personally witness any of the alleged act(s) of intimidation. However, that PW10 was called to establish that there was intimidation of voters in Miluji by the UPND. Counsel also cited the **Subramanian**[4] case where it was held that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.

In response to Counsel for the Appellant's submission that PW11's evidence showed that at a meeting addressed by the Respondent, he heard someone telling people not to vote for the Referendum as that would allow people of the same sex to marry each other, Counsel argued that the learned trial Judge correctly evaluated the evidence of this witness.

In response to the three grounds of appeal argued in this matter, Counsel for the Respondent submitted that the overriding consideration by this Court should be whether the Appellant met the threshold set out in Section 97 (2) (a) of the **Electoral Process Act** in terms of what must be proved before an election of a member of parliament can be nullified. He pointed out that the Appellant needed to prove, at trial, that the majority of the voters were prevented from electing a candidate of their choice. In further pursuance of this point, Counsel referred to the observations of the learned Judge in the Judgment appealed against that: -

> **"No single witness testified before Court that she or he was prevented from voting for the candidate she or he preferred. Each witness stated that she or he voted freely at the polling station to which they registered. Even PW14, Dorcas Mwambanabantu Shipilo who testified that she was living in fear testified in court that she voted on 11th August, 2016 without any hindrance or at all."**

Counsel also drew our attention to the evidence of PW1, the Appellant himself where, under cross-examination, he conceded that the

result of the poll for Mufumbwe Constituency was based on the independent thinking of the voters of Mufumbwe who are quite independent people. It was argued that the above evidence from the Appellant himself shows clearly that the election results for Member of Parliament for Mufumbwe were based on the independent will and choice of the people of that constituency.

In response to the submissions by Counsel for the Appellant that there was evidence from the Appellant's witnesses that the Respondent and his agents had told the people that if they voted 'yes' in the Referendum, gay rights would be introduced in the Constitution and the contention that this negatively affected the Appellant's candidature as people in Mufumbwe abhor homosexual relationships, Mr. Katolo referred us to the Appellant's own evidence, where he stated that the Referendum was a Government programme and that the Government had circulated countrywide, through newspapers, what was to be contained in the proposed Bill of Rights through the Referendum. Counsel, therefore, invited us to take Judicial Notice of the fact that the Referendum was a separate and distinct programme from the parliamentary elections and the voters were not the same because individuals that were not registered as voters were eligible to vote in the Referendum. While in the presidential, parliamentary and local

government elections, only registered voters were eligible to vote. On this premise, Counsel argued, issues relating to the Referendum, if any, were totally unconnected to the election petition in this matter. And that there was also no evidence to show that anything allegedly said about the Referendum had any bearing on the results of the parliamentary polls.

As regards the decisions in the cases of **Alex Cadman Luhila v Batuke Imenda**[6] and **S. v Chanda**[1], which the Appellant relied upon to support the contention that the law prohibits making of false, defamatory or inflammatory allegations concerning any person or political party in connection with an election and the argument that PW13's evidence was not hearsay, respectively, Counsel submitted that these cases are decisions of the High Court which do not bind this Court and which should also be distinguished from the current case as they related to the electoral law as it then existed prior to the enactment of the **Electoral Process Act No. 35** 2016. And that the **Act,** has introduced a different and higher threshold for nullification of an election of a member of parliament. Therefore, ground one must fail and be dismissed with costs.

In response to ground two, Counsel submitted that the Appellant did not bring any evidence to show that any voter in Mufumbwe was

prevented from voting for him on ground of the alleged defamation. To counter the Appellant's contention that the people of Mufumbwe were influenced not to vote for him as he was defamed and called a thief by the Respondent, Counsel referred us to the Appellant's own evidence where he told the court below that the people of Mufumbwe decided based on their independent decision. He further argued that the results for Nyansonso, Kikonge, Kawama East, Shukwe, Bulobe, Kawama West and Chizela polling stations show that the Appellant in fact scored more votes in those polling stations than the Respondent inspite of what he alleged was said about him. Counsel, thus argued, since the Appellant managed to beat the Respondent in some polling stations, this shows that if at all the alleged defamation existed, it did not have any bearing on the election results.

It was further contended that the Appellant conceded in his evidence that he is the one who told the people of Mufumbwe that he had been incarcerated and released from prison upon a presidential pardon. As such, Counsel submitted, if anyone talked about his incarceration, they would only be repeating the information that the Appellant himself had already told the whole Constituency. Further, that no evidence was tendered in court to prove that the Respondent or any

of his agents, with his knowledge or consent, called the Appellant a 'thief' who had stolen money meant for the rehabilitation of Munyambala School.

In response to the contention that PW13's evidence was proof that the Respondent defamed the Appellant and called him a thief who had misappropriated funds, Mr. Katolo submitted that the learned Judge was on firm ground as he properly evaluated this evidence and came to the conclusion that PW13's evidence was hearsay which was unreliable. Counsel pointed out that former Chief Munyambala was not called as a witness so that his evidence could be tested through cross-examination to establish its veracity. Hence, the Appellant failed to prove the allegations of defamation to a higher degree of clarity. In support of the above submission, Counsel cited the case of **Lewanika and Others v Chiluba**[14] in which the Supreme Court stated that: -

> **"Parliamentary election petitions are required to be proved to a standard higher than that on a mere balance of probabilities and therefore in this case, where the Petition has been brought under Constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore, the issues raised were to be established to a fairly high degree of convincing clarity."**

Counsel pointed out that the Appellant did not also demonstrate how the alleged defamation affected the result of the poll as no single witness testified to not having voted for the Appellant on ground of his

being called a thief. To press this point, Counsel cited the case of **Khalid Mohammed v Attorney General**[15] where it was held that a plaintiff cannot automatically succeed whenever a defence has failed. He must prove his case. Mr. Katolo submitted that in the current case, the Respondent and his witnesses strongly denied the allegation that the acts attributed to him did take place as alleged.

To further buttress this point, Mr. Katolo cited the case of **Jyoti Basu v Debi Ghosal**[16] in which the Supreme Court of India put it thus:-

> **"An election Petition is not an action at common law nor in equity. It is a Statutory Proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concept familiar to common law and equity must remain strangers to election law unless statutorily embodied...In the trial of election dispute the court is put in a straight jacket."**

It was Mr. Katolo's further submission that in the current case, the **Electoral Process Act** has put a court trying an election petition in a similar or same position as regards what must be proved before the election of a member of parliament can be nullified. Counsel, thus, cited Section 97 (2) (a) of **the Act** which provides for avoidance of elections.

Counsel argued that the evidence on record shows that Mufumbwe had a total of 31,964 registered voters out of which 20,199 voters cast their votes. However, that the Appellant did not bring any

evidence to show that the majority of the voters were prevented from electing a candidate they preferred. And that no other person other than the individual voters themselves would know or knew which candidate each had resolved to vote for and as such, the Appellant failed to show how many out of that number of voters were prevented from voting for him.

In concluding his arguments in opposing ground two, Counsel prayed that this ground must be dismissed with costs on ground of failure to meet the threshold set out in Section 97 (2) (a) of **the Act**.

In response to ground three, Mr. Katolo began by drawing our attention to the finding by the learned trial Judge that the alleged disruption of the Appellant's meeting at Kamazovu was not proved as it was premised on fabricated evidence.

As regards the alleged assault on Sydney Wotela, Counsel submitted that the court below properly analysed the evidence of PW6 and made a finding of fact that PW6 was lying. And that the court below also clearly and carefully analysed Exhibits "P1" and "P5", which were the Police Occurrence Books produced in the court below by the Appellant to support the alleged violence. Counsel submitted that the learned Judge found as a fact that although during the period in

question, 68 incidents of assault occasioning actual bodily harm were reported to the police, only 8 reports were identified by the police as being politically motivated. Therefore, Mr. Katolo submitted, it is not correct to assert that political violence was on the increase in Mufumbwe during the campaign period. He further contended that none of the witnesses called testified to being prevented from voting for a candidate of their choice on account of the alleged violence. And that the converse applies as the evidence on record shows that the percentage turn out of voters in Mufumbwe was 63.19 percent. As such, Counsel argued, if political violence was prevalent in Mufumbwe as alleged by the Appellant, this could have negatively impacted on the voter turnout. In conclusion, Counsel urged us to dismiss this appeal with costs to the Respondent.

In augmenting the Respondent's written Heads of Argument, Mr. Katolo too more or less repeated the arguments in the Respondent's Heads of Argument in Opposition. We will not repeat these except to the extent hereunder reflected. Mr. Katolo submitted that this appeal turns on the interpretation of Section 97 (2) of the **Electoral Process Act** which contains thresholds that a petitioner must meet through evidence at trial to warrant the nullification of an election of a member of Parliament. He put these as a corrupt practice, an illegal practice or

misconduct committed by a candidate or that candidate's election agent with the candidate's knowledge, consent or approval. Further, that the petitioner must also demonstrate through evidence that by reason of the alleged corrupt practice, illegal practice or other misconduct, the majority of the voters in the constituency were or may have been prevented from electing a candidate whom they preferred. Counsel's position was that although the Appellant called sixteen witnesses including himself, none of these witnesses testified to having been prevented in any way from voting for a preferred candidate.

In response to the Appellant's submissions concerning the attack on Sydney Wotela, Mr. Katolo referred to the evidence of PW6 who recorded the statement from the victim and to PW5's evidence which according to Counsel, shows that the Appellant himself was a perpetrator of the violence. He argued that the Appellant should not be allowed to profit from his own wrong doing by asking this Court to nullify an election on the basis of his own conduct.

In response to the Appellant's submissions concerning the accident involving PF and UPND motor vehicles, Mr. Katolo argued that PW3's evidence was that his investigation showed that the incident was an ordinary road traffic accident. And that this is supported by the

evidence of RW2 who was an eye witness to the road traffic accident in question and that this witness gave a clear description of how the accident occurred. Counsel also referred to the sketch plan prepared by PW3 which according to him, shows how the accident occurred. His submission was that the Court below cannot, therefore, be faulted for finding that if indeed there was any violence that occurred, sufficient evidence was not adduced to link the Respondent to that violence. Hence, the Appellant failed to show that political violence affected the final election result.

Mr. Katolo further submitted that the Appellant did not adduce evidence to show that the Respondent was personally involved in any act of violence or that any of his election agents were involved in such acts or indeed, that the Respondent personally involved himself in any wrong doing to warrant nullification of his election.

As regards the alleged defamation of the Appellant, Mr. Katolo repeated the submission concerning the Appellant's evidence where he stated that after he was pardoned by the Republican President, he went round Mufumbwe Constituency and informed the people of the pardon.

In concluding this oral submissions, Mr. Katolo urged us to dismiss this appeal with costs. He added that in the event that this Court holds

the view that this is a constitutional matter where costs should not be ordered, his prayer was that the Court should not interfere with the award of costs made by the court below as the said order was not appealed against or challenged by the Appellant on appeal.

In reply, Mr. Bwalya, submitted as regards the statement by Sydney Wotela that there was no premise upon which the learned Judge accepted this evidence so as to kick in the principle that one should not benefit from his own wrongful conduct and that Sydney Wotela was not called as a witness as all that the court below had was a statement recorded by the police. Mr. Bwalya submitted that the veracity of his evidence was never tested in the court below and as such, the court was wrong to have accepted this evidence without any other proof that the Appellant was involved in violence as alleged in the statement which was also hearsay. Mr. Bwalya also referred to PW7's evidence as regards the time the Appellant was alleged to have been in Mufumbwe beating and threatening to kill Sydney Wotela. He submitted that this evidence shows that the Appellant was 82 kilometres away and that his alibi was never refuted.

As regards the argument by Counsel for the Respondent that there was no evidence to connect the alleged violence to the Respondent or

his agents, Mr. Bwalya referred to the letter written by Clement Machayi. He submitted that the letter contains threats of violence and that Clement Machayi who wrote the letter was the Respondent's campaign manager. Hence, it was not correct to argue that there was no relationship between the Respondent or his agents and the violence.

In reply to the arguments relating to the Appellant's presidential pardon, Mr. Bwalya submitted that although the Appellant did in fact visit the Constituency after he was pardoned, what is material is the timing as this happened before or outside the election period while the Respondent was defaming the Appellant during the campaign period.

Counsel urged us to look at the Respondent's intention, which, according to Counsel, the Respondent intended to benefit from and that he in fact did benefit from the damaging statements that he made against the Appellant. In response to Mr. Katolo's argument on costs, Mr. Bwalya submitted that costs are in the discretion of the court. And that since the Appellant appealed against the entire Judgment of the court below, this Court should look at this appeal in that light. Hence, costs must follow the event.

We have seriously considered this appeal together with the Grounds of Appeal filed, the arguments in the respective Heads of

Argument, the authorities cited and the oral submissions by the learned Counsel for the parties. We have also considered the Judgment by the learned Judge in the court below. The major question raised in this appeal is whether the Respondent was not properly elected as Member of Parliament for Mufumbwe constituency on account of the alleged illegal acts or misconduct during the campaign period.

In the judgment appealed against, the learned Judge dismissed all the grounds that the Appellant had relied upon in his quest to have the election of the Respondent nullified. In this appeal, the Appellant alleges that the election was not free and fair as it was marred by defamation/character assassination, violence and intimidation of elections officers and that the character assassination resulted in his candidature being negatively affected.

We wish to state from the outset that in terms of the law as to when an election of a member of parliament may be nullified, the governing provision is Section 97 (2) of the **Electoral Process Act No. 35 of 2016** which provides in part as follows:-

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

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

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

As can be seen from the above, 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. In this respect, we agree entirely with the submission by Mr. Katolo that in order to meet the thresholds set by Section 97 (2) (a) of the **Electoral Process Act** for nullification of an election of a member of parliament, a petitioner must prove through evidence at trial, that a corrupt practice, an illegal practice or misconduct was committed by a candidate or that candidate's election agent or with the candidate's knowledge, consent or approval. And that the petitioner must also demonstrate that by reason of the alleged corrupt practice, illegal practice or other misconduct, the majority of the voters in the

constituency were or may have been prevented from electing a candidate whom they preferred.

In determining the issues raised in this appeal, therefore, we will be guided by the position of the law as illustrated above.

It is also settled that in election petitions, the applicable standard of proof is higher than a mere balance of probability applicable in ordinary civil cases. The Supreme Court aptly explained this in the **Lewanika**[14] case. It also echoed the above position in **Sikota Wina and others v Michael Mabenga**[17] when it stated that the standard of proof in election petitions is higher than the balance of probabilities but less than beyond all reasonable doubt.

The question in this appeal, therefore, is, was the learned Judge on firm ground when he found that the Appellant did not prove the allegations made against the Respondent to the required standard? Was he also on firm ground when he held that the alleged illegal acts or misconduct complained of did not prevent the majority of the voters from voting for a candidate whom they preferred?

For convenience and to avoid repetitions, we shall consider grounds one and two together as they are inter-related. Ground three will be considered separately.

The thrust of the Appellant's argument under grounds one and two of this appeal was that the learned trial Judge was wrong to have overlooked or glossed over serious evidence adduced by the Appellant and his witnesses and in some instances, for dismissing it as hearsay. According to Counsel, this evidence came from the Appellant himself and from his witnesses, PW11 and PW12 who heard the Respondent and his agents speak ill about the Referendum. And that PW13 also heard what the Respondent said about the Referendum from traditional leaders, in church and at the Ministry of Justice programme on the Referendum. It is also alleged that the learned Judge came to the wrong conclusion when he found that the Appellant did not prove that the Respondent defamed him and for also holding that the Appellant had not shown the number of people who did not vote for him as a result of being defamed when there was clear evidence from the Appellant, PW11, PW12 and PW13 that the Respondent was calling the Appellant a thief in his campaign messages. Further, that there was also evidence of the final results on record which showed that out of a total of 48 polling stations, the Appellant only won in 10. And that the learned Judge was also wrong to dismiss the Appellant's evidence in support of the alleged defamation on the ground that he did not report the matter to the Police or the **DCMC** as this was contrary to the evidence on record

which showed that in fact, the Appellant reported this matter to that Committee.

The crux of the Respondent's argument in response was to agree with the trial Judge that the Appellant's evidence did not meet the required threshold. And that the Appellant's contention in this appeal does not meet the applicable standard for this Court as the appellate court to interfere with the findings of fact made by the trial court as the learned Judge did carefully consider and evaluate the evidence of all the witnesses in arriving at his findings of fact which the Appellant now seeks to impugn in this appeal. Further, that the Appellant has also failed to prove that whatever was allegedly said about the Referendum had a bearing on the results of the election or that any voter in Mufumbwe was prevented from voting for him on ground of the alleged defamation or indeed, that the majority of the voters were prevented from electing a candidate of their choice. And that the cases of **Alex Cadman Luhila v Batuke Imenda**[6] and **S. v Chanda**[1] cited and relied upon by the Appellant relate to the electoral law as it existed prior to the enactment of the **Electoral Process Act, 2016.** Hence, the two cases should therefore be distinguished from the current position of the law which now provides for a different and higher threshold for nullification of an election of a Member of Parliament.

We have considered the above submissions and the authorities cited. The question is whether the learned trial Judge erred when he discounted the Appellant's evidence and that of his witnesses PW11, PW12 and PW13 on ground that it was hearsay and whether he glossed over the evidence of the witnesses in question. To ably determine the issues raised, it is necessary to first define or state what constitutes hearsay evidence. **In Black's Law Dictionary, 10th edition, by Brant Garner**, cited to us by Mr. Katolo, the term *"hearsay"* is defined as follows:-

> **"Hearsay-Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence."**

We totally agree with the above definition of hearsay as this is the correct position of the law as regards hearsay evidence and the rationale for its inadmissibility.

The issues raised by Counsel for the Appellant require us to review the evidence of each witness called to support the alleged ill speaking of the Referendum by the Respondent starting with PW11. The sum total of PW11's evidence was that he saw the Respondent's vehicle at Miluji and that someone was telling people that if they voted

for the referendum, people of the same sex will be marrying each other. And that this message was all over the whole district as some of his friends who went to campaign in different areas told him so. Our response is that clearly, the above evidence cannot be said to have connected the Respondent to whatever PW11 said he heard someone telling people over the Referendum simply because he had seen the Respondent's motor vehicle pass by. Further, none of PW11's so called friends, who told him of hearing this message wherever they went to campaign was called to testify to confirm what they heard.

PW12's testimony was that at a meeting he attended which was chaired by the Respondent four days before the elections, the Respondent told people to vote wisely and not to forget what he had told them over the referendum. Clearly, this witness did not at all say what he heard the Respondent tell the people about the Referendum as what he said he heard was the Respondent reminding the people not to forget whatever he had told them. Certainly, the learned Judge and indeed this Court, cannot be expected to speculate on what the Respondent could have been reminding the people who attended his meeting over the Referendum.

PW13's evidence was that she received complaints from different stakeholders who feared that if the PF candidates were voted for and if the Referendum received a 'yes' vote, the Government would introduce homosexuality in the country. And that at the Ministry of Justice programme for all stakeholders which she attended, the overwhelming question by the participants was whether the Referendum was a means by which the Government wanted to introduce gay rights and homosexuality in the country. Surely, the above evidence cannot be said to have linked the Respondent to the alleged ill speaking of the Referendum and the alleged introduction of gay rights in the country.

As regards the alleged defamation, Mr. Bwalya referred us to the Appellant's evidence which was that the Respondent had been going around calling him a criminal on account of his incarceration. PW11's evidence was that the Respondent told the people that the person who was coming was a thief and a criminal and that people would waste their votes if they voted for him. While PW12's evidence was that his friend (PW11) told him that at a meeting he attended, the Respondent told the electorate that if they voted in favour of the Referendum, it would allow people of the same sex to marry each other. And that the Respondent also said that the Appellant was a thief and a criminal. And that he also attended a meeting at which he heard the Respondent tell the people to

vote wisely and not to forget what he had told them about the Referendum. PW13's evidence was that as the Chairperson of the District Disaster Management Committee, former Chief Munyambala summoned her so that she could clarify the allegations which the UPND had been making at public meetings that they held in his area that he, and the Appellant had stolen funds meant for the rehabilitation of Muyambala School whose roof was blown off. And further that the Appellant had also stolen money meant for other schools in the constituency that had experienced disasters.

We have carefully perused the record and considered the evidence of the above witnesses together with the submissions by the learned Counsel for the respective parties on this aspect of this appeal. As regards the evidence of PW11 which Mr. Bwalya argued supports both the alleged ill speaking of the Referendum and defamation of the Appellant by the Respondent, the learned trial Judge rejected PW11's evidence on ground that his demeanour was not impressive. He therefore, found his evidence doubtful as he was not a truthful witness.

It is settled that the question of demeanour of a witness relates to the credibility of that witness and the weight that the court puts to his evidence. In **Nkhata and Others v the Attorney General,**[18] the Court

of Appeal discussed the question of demeanour of a witness and observed, inter alia, that a trial Judge sitting alone without a jury can only be reversed on questions of fact if it is positively demonstrated to the appellate court that the judge did not take proper advantage of having seen and heard the witnesses or where the judge has relied on the manner and demeanour of the witnesses but there are however, other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

In **Attorney General v Kakoma,**[19] the Supreme Court also guided that a court is entitled to make findings of fact where the parties advance directly conflicting stories and that the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence. Although both the **Nkhata**[18] and the **Kakoma**[19] cases are criminal jurisdiction decisions, our firm view is that the principles therein are sound law and they apply to both civil matters and election petitions in so far as they relate to the credibility of witnesses and the weight to be attached to their evidence. In the current case we, as the appellate court, did not have the opportunity to observe the demeanour of PW11 which the learned trial Judge did. He found PW11's demeanour not impressive and hence, the finding that his evidence was not credible.

Therefore, the learned trial Judge cannot be faulted for finding and concluding that PW11's evidence was not credible as his demeanour was not impressive. There is therefore no basis at law upon which we can reverse the trial Judge's finding as regards PW11's demeanour.

As for PW12, the learned Judge rejected his evidence on the alleged ill speaking of the Referendum by the Respondent on ground that he could not possibly have attended the UPND rally at which he claimed to have heard the Respondent speak ill about the Referendum as PW12's evidence in examination in chief was that both he and PW11 were not able to do any field work as they feared the UPND team. The court below had the opportunity of seeing the witness testify which we do not have. PW12's evidence was also that PW11 told him that the Respondent had said the Appellant was a thief and a criminal who would be taken back to jail. Clearly, this aspect of PW12's evidence was hearsay as the record shows that PW11 did not tell the court below that he had told PW12 about the statement attributed to the Respondent. So PW12 was clearly testifying from what he claimed to have been told by PW11 and not what he personally heard the Respondent speak or say about the Appellant's character. Further, PW12's evidence that he personally attended a meeting at which he heard the Respondent

remind people to vote wisely and not to forget what he had told them about the Referendum is a mere statement which was not at all helpful to the Appellant's case as it did not particularise the alleged misconduct of ill speaking of the referendum.

As regards Mr. Bwalya's contention that the evidence of PW13 supported the Appellant's evidence and that of his witnesses that the Respondent was speaking ill of the Referendum and had defamed him by calling him a thief and a criminal and Counsel's contention that the finding by the learned Judge that PW13's evidence was hearsay is wrong, our firm view is that the trial Judge cannot be faulted for so holding as clearly, PW13 was testifying on what was reported to her by other people and not what she personally perceived or heard the Respondent utter. Her evidence was that she was receiving reports from different stakeholders who were concerned about the 'intended introduction' of gay rights and gay relationships by the Government through the proposed amendments to the Bill of Rights. And that she was also told by the former Chief Munyambala about the allegation by UPND that the former Chief and the Appellant had stolen funds that were meant for the rehabilitation of Munyambala School and other schools in the area. Her evidence was also that at the programme by the Ministry of Justice on the Referendum, most of the questions raised by

the attendants was whether the proposed amendment to the Bill of Rights was intended to introduce gay rights in the Constitution by the PF Government.

Clearly, the above evidence from PW13 was caught up in the rule against hearsay evidence as it was based on statements that were attributed to the Respondent by other persons who were not themselves called as witnesses. Her evidence flies directly in the teeth of the definition of what hearsay evidence is and the rationale for its inadmissibility given in **Black's Law Dictionary** which we have recast above. Therefore, the learned trial Judge cannot be faulted for finding PW13's evidence inadmissible as it was hearsay.

As regards Mr. Bwalya's contention that the trial Judge contradicted himself when he stated that he had found PW13 to be a candid and credible witness but in the same breath, he found her evidence inadmissible, our brief response is that the question here is not whether or not PW13 was a candid/ truthful and credible witness but rather, whether she was an eye witness who personally saw and heard the Respondent speak ill of both the Referendum and the Appellant's character to the electorate which, as stated above, she did not.

In what appears to be an alternative and astonishing, if we may say so, argument, Mr. Bwalya contended as regards the finding by the learned Judge that the testimony of PW13 was hearsay, that if PW13's evidence was indeed, hearsay, her evidence was still admissible under the hearsay rule as her evidence was brought to show that the negative statements about the Referendum and character assassination of the Appellant were made and not as proof of the truthfulness of the said statements; our short response is that again, the question here is not whether the alleged negative statements about the Referendum and the Appellant's character were true or not but rather, whether PW13 was an eye witness who saw and heard the Respondent make those allegations. Since she did not, clearly her evidence is still caught up in the realm of hearsay evidence which is inadmissible as she merely repeated what she heard from third parties and the investigations that she did. Therefore, although we agree that PW13 was a candid and truthful witness and we believe her evidence in so far as it relates to what she did upon receipt of the complaints from former Chief Munyambala and other stakeholders and the investigations she conducted which showed that the Disaster Management Unit had not released any money for rehabilitation of the schools in question, her evidence nevertheless cannot be said to have connected the

Respondent to the alleged defamation or ill speaking of the Referendum. As such, PW13's evidence on its own cannot be proof that the Respondent made the statements attributed to him. Therefore, Mr. Bwalya's argument in this respect is legally flawed.

As regards Mr. Bwalya's further argument that the evidence of the Appellant as regards the alleged defamation and ill speaking of the Referendum by the Respondent was corroborated by the evidence of PW11, PW12 and PW13, our considered view is that to ably determine this issue, it is necessary to first clarify what corroborative evidence is. **Black's Law Dictionary** defines ***'corroborating evidence'*** as follows:-

> **"Evidence that differs from but strengthens or confirms what other evidence shows."**

In the case of **Kamba Saleh Moses v Hon. Namuyangu Jennifer,**[20] the Court in Uganda had the occasion of considering the need in election petitions for corroboration of the evidence of witnesses who belong to the same political party. The Court put it thus:-

> **"Kataike's evidence is evidence of a confessed supporter of the respondent. It is also evidence of an accomplice under S68 (2) of the PEA. Such evidence is suspect. Partisan witnesses, as Kataike is in the instant case, are likely to exaggerate their evidence in an effort to tilt the balance of proof in favour of the candidate they support. What was needed in this case was for the learned trial judge to look for independent evidence from a non partisan and independent witness to corroborate the evidence of Kataike. I find no such evidence on record."**

In **Wadada Rogers v Sasaga Isaiah Jonny & EC**[21] the court in Uganda re echoed the above requirement and observed that:-

> **"No number of witnesses is required to prove a fact. In election matters partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations it is necessary to look for 'other' evidence from an independent source to confirm the truthfulness or falsity of the allegation."**

We hasten to mention here that although the decisions in the above cases are not binding on us, they are of persuasive value and they aptly apply in the current case as they provide useful guidelines in similar cases.

Applying the above principles to the current case and to Mr. Bwalya's argument that the above mentioned witnesses corroborated the Appellant's evidence, our firm view is that this proposition is not sound at law. First and foremost, both PW11 and PW12, belonged to the Appellant's own political party and were members of his campaign team and hence their evidence was evidence of partisan witnesses which should be treated with caution and required corroboration in order to eliminate the danger of exaggeration and falsehood. Therefore, their evidence cannot be said to have corroborated the Appellant's evidence. Further, the onus was on the Appellant to adduce some independent

evidence from persons who must have witnessed and heard the Respondent make the statements attributed to him.

As regards Mr. Bwalya's contention that PW13's evidence corroborated the Appellant's evidence, our response is that his claim is also not tenable at law because as already explained above, PW13 was not an eye witness as her evidence was only based on the reports she was receiving from other persons who were not themselves called to testify. Further, PW13's evidence must be viewed in its own right. She merely investigated the reports she was receiving. She did not personally see or hear the Respondent utter the statements attributed to him. Therefore, the learned trial Judge cannot be faulted for finding that the Appellant's allegations were not corroborated and for concluding that the Appellant did not prove to the required standard that the Respondent had ill spoken of the Referendum and had character assassinated him and which could have resulted in his candidature being negatively viewed in the minds of the electorate. We, thus, do not agree that the learned Judge did not properly analyse and evaluate the evidence before him.

We have also considered Mr. Bwalya's argument that the learned trial Judge was wrong when he found that the Appellant did not prove

how many people did not vote for him as a result of being defamed together with Mr. Katolo's submission in response that whatever was alleged to have been said about the Referendum did not affect the parliamentary elections as the Referendum was a separate Government programme from the parliamentary elections. The reason given for this proposition by Mr. Katolo is that the voters in the Referendum were different from those in the parliamentary election. He thus invited us to take judicial notice of this difference.

We have considered the above submissions. As much as we agree that the Referendum was a separate government programme from the general election in the sense that there was a difference as regards the eligibility of voters as only registered voters were eligible to vote in the general election whilst in the Referendum, persons who had attained the age of 18 years and had a green National Registration Card could vote, nevertheless, we have not lost sight of the fact that the government in power at the time of both the general elections and Referendum was the PF and on whose ticket the Appellant stood and that it was the government that initiated the Referendum and that the decision to hold the Referendum at the same time as the general elections was by the government. We are also alive to the fact that Regulation 15 (1) (c) of the **Code of Conduct** which is a Schedule to the

2016 **Electoral Process Act** prohibits the making of false or defamatory allegations against a person or his political party as it states that:-

> **" A person shall not make false, defamatory allegations concerning any person or political party in connection with an election."**

However, the question here is, whether on the evidence that was adduced in the court below, it can be said that the Appellant proved to the required standard that the Respondent or his party did speak ill of the Referendum and character assassinated him and that as a result of the alleged illegal acts or misconduct, the majority of the voters in Mufumbwe constituency were or may have been prevented from voting for a preferred candidate. We say so because as alluded to above, it is a legal requirement under Section 97 (2) of the **Electoral Process Act** that the petitioner must not only prove the commission of a corrupt or illegal act or misconduct by the respondent or his/her election or polling agent, he/she must also prove that as a result of that illegal act or misconduct, the majority of the voters in that constituency were or may have been prevented from electing their preferred candidate.

In **Mubika Mubika v Poniso Njeulu**[22] the Supreme Court aptly guided and stated that:-

> **"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 voters in a**

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 or conduct, it must be shown 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."

Applying the above guidelines to the evidence on record, we find that it cannot be safely concluded that this evidence met the threshold set for nullifying an election of a member of parliament under Section 97 (2) (a) of the **Act.** The learned trial Judge cannot thus be faulted for dismissing the alleged character assassination and ill speaking of the Referendum as the requisite threshold was not met.

Although we agree with Mr. Bwalya's submission that the Appellant was not expected to bring all the electorate to testify as that would amount into requiring a higher standard of proof beyond what is stipulated or envisaged by the law in election matters, we nonetheless find that the totality of the evidence adduced by the Appellant did not at all meet the applicable standard. We also do not agree with Mr. Bwalya's argument that the learned Judge dismissed the alleged defamation on ground of the 'inclination' of not reporting the alleged defamation to the **DCMC** as the correct reason was insufficient evidence. Further, the contention that the Appellant did report the

alleged defamation to the **DCMC** cannot be proof of the commission of the alleged act or misconduct or that it was widespread so as to have negatively impacted on the election result. In any event, the Appellant is on record and Mr. Bwalya conceded in his submission that the minutes of the Committee were not produced to support the claim that the Appellant reported this complaint. As it is, it was the Appellant's word only which the learned trial Judge rejected and he was perfectly entitled to do so. We thus do not also agree with Mr. Bwalya's submission that the Appellant did prove that the majority of the voters did not vote for him because of the character assassination and ill speaking of the Referendum by the Respondent and his party and the suggestion that this is evidenced by the fact that he only won in 10 out of the 48 polling stations. The question here is not where or the number of polling stations each candidate won in but whether the Appellant led sufficient evidence to show that the majority of the voters in the Mufumbwe Constituency were influenced in their choice of a candidate to vote for on account of what was alleged to have been said about him and his party. The Appellant's evidence which we have illustrated above did not at all establish a link between the alleged character assassination and ill speaking of the Referendum and why he polled more votes than the Respondent in only 10 out of 48 polling stations. The only inference that

can reasonably be drawn is that he was more popular among the people who voted in those polling stations than the other candidates. As such, we are not persuaded that the trial Judge glossed over any of the Appellant's evidence.

As regards the argument by Mr. Katolo that speaking about the Appellant's incarceration and release from prison through the Presidential pardon did not amount to assassination of his character as it was the Appellant himself who first informed the people of Mufumbwe about this, Mr. Bwalya's response was to concede that indeed, the Appellant informed the people of Mufumbwe about this. He, nonetheless, urged this Court to draw a distinction in the timing and contended that whilst the Appellant spoke about his incarceration and pardon before or outside the election period, the Respondent did so during the campaign period with the intention of benefitting from the damaging statements about the Appellant and which, according to Counsel, the Respondent did benefit. We have considered the above arguments. Our brief response is that the distinction in the timing as to when the Appellant and the Respondent spoke about the Appellant's incarceration and release from prison is immaterial. What is of import and which point Mr. Bwalya conceded is that the Appellant himself

informed the people of Mufumbwe about his incarceration and subsequent release from prison following a Presidential pardon. As such, even though he did this before the elections period, this information was already in the public domain at the time of the campaigns. Therefore, we agree with Mr. Katolo that if anyone spoke about the Appellant's incarceration and release from prison during the elections period, they would merely be repeating that which the Appellant had himself already told the people and that this did not amount to assassination of the Appellant's character.

We also agree with Mr. Katolo's submission and as conceded by Mr. Bwalya that the two grounds of appeal attack findings of fact made by the learned trial Judge. It is settled as can be confirmed by a plethora of decided cases in Zambia including the **Marcus Achiume**[12] case that the appellate court will only interfere with findings of fact made by the trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts. In the current case, the Appellant has not persuaded us as to why we should interfere with the findings of fact of the learned Judge as his findings were based on the evidence before him.

We therefore, find no merit in grounds one and two of this appeal. We dismiss them.

Ground three of this appeal attacks the learned Judge for dismissing the Appellant's claim that there was widespread violence and intimidation of elections officers and for also attributing the political violence to the PF. The major argument in support of this ground was that in the light of the evidence of PW13 and all the police officers who testified which clearly showed that there was widespread violence in the constituency involving all political parties, the learned Judge should have nullified the Respondent's election. Further, that the learned Judge contradicted himself as on one hand, he found that the police officers who testified on the violence were telling lies while on the other, he agreed that there was violence in the constituency which he must have based on the evidence of the same police officers as they are the only witnesses who testified on violence. Counsel argued that violence pollutes the political atmosphere regardless of who the wrong doer or perpetrator is.

Counsel also criticised the learned Judge for not finding that there was intimidation of elections officers by the Respondent and his party. He argued that this is against the spirit of Section 97 (2) of the **Act** and

Regulation 15 of the Code of Conduct. He contended that the evidence on record clearly shows that the elections officers were intimidated by the UPND presidential candidate, Mr Hakainde Hichilema, when he claimed at a rally that the named officers planned to rig the elections and demanded their removal from participating in the elections as confirmed by the directive in the letter written by Clement Machayi to the Council Secretary which was produced in court.

The kernel of the Respondent's arguments in response was that the learned Judge was on firm ground when he dismissed the allegation of widespread political violence in Mufumbwe as the evidence on record shows that although 68 incidents of assault occasioning actual bodily harm were reported to the police during the period in question, only 8 of the reports were identified by the police as being politically motivated. Further, that the Appellant did not prove that the Respondent was linked to the alleged violence or that as a result of the alleged political violence, the result of the election was affected because no evidence was led to show that any person was prevented from voting for a candidate of their choice on that account. And that there was also no proof of the alleged intimidation of elections officers as claimed by the Appellant.

We have considered the above submissions by the learned Counsel for the parties. The main question raised in ground three is whether on the evidence adduced by the Appellant, it can be said that there was widespread political violence and intimidation of the elections officers in Mufumbwe Constituency during the campaign period and if so, whether the said political violence, affected the parliamentary election results such that it can be held that the majority of voters were or may have been prevented from electing a candidate of their choice?

To ably determine the issues raised under this ground of appeal, it is crucial and imperative that we first identify the incidents of the alleged violence and the intimidation complained of. In this regard, we have identified six incidents. These are: the alleged disruption of the Appellant's meeting at Kamazovu by UPND cadres; the road accident involving the UPND and PF motor vehicles; the alleged attack on Marshal Mungochi, a presiding officer at Kangombe polling station; the alleged assault of Sydney Wotela; the alleged intimidation of elections officers; and the alleged widespread political violence in Mufumbwe Constituency in general.

As regards the alleged disruption of the Appellant's meeting at Kamazovu by UPND cadres, the record shows that although this was

referred to in the introduction in the Appellant's Heads of Argument under ground three of this appeal, it was not argued in both the Appellant's written Heads of Argument and in Counsel's oral submissions. We, therefore, take it that it has been abandoned. Hence, we shall not consider it.

As regards the alleged road traffic accident involving the UPND and PF motor vehicles, the learned Judge relied on the evidence of PW3, a police officer who investigated the incident in arriving at the finding of fact that the incident was a pure road traffic accident which was caused by the negligence of Roy Ifwa (RW9) who was driving the UPND motor vehicle. The trial Judge did not believe the testimony of PW4 who was the victim of the said road traffic accident that the two motor vehicles did not collide but that he was hit by the UPND motor vehicle whilst standing by the PF motor vehicle which was stationary. However, this evidence was in total contrast to that of RW2 who too was a passenger in the same PF motor vehicle. RW2's evidence tallied with the evidence of PW3 who investigated the incident and with the sketch plan that PW3 made and produced in court as to how the accident occurred and where the impact was. RW2's evidence also tallied and supports the evidence of both PW3 and RW9 that there was a collision between the two motor vehicles whilst both were in motion. Therefore,

the learned trial Judge cannot be faulted for finding that this incident was not politically motivated as it was purely a road traffic accident. In addition, we also find that RW2's evidence carried more weight than that of PW4 in that he was a witness who gave evidence against his own party candidate and supporter. Apart from being a PF supporter, RW2 was also a PF candidate as Councillor in the same election.

As regards the alleged attack on Marshal Mungochi who was the presiding officer at Kangombe polling station, the learned Judge referred to PW5's evidence which the Appellant relied on. PW5's evidence was that on 10th August, 2016 he received a phone call from a member of the public about an attack on Marshal Mungochi; he and other police officers rushed to the scene where they found that Marshal Mungochi had locked himself inside one of the rooms and that the perpetrators of the alleged attack had already left the place; the police then dispersed the few UPND cadres whom they found. He also testified that a medical report was not issued to Marshal Mungochi. He testified that the reason for the attack on presiding officers was connected to the allegation made by the UPND President at a rally that was held on 27th July, 2016 that all presiding officers had been paid to rig elections.

We have considered the above evidence. The record shows that Marshal Mungochi who was the alleged victim of the attack was not called to testify by the Appellant. The failure by the police to issue a medical report to Marshal Mungochi was also a dereliction of duty which cast doubt as to whether the alleged attack by suspected UPND cadres did at all occur as all that is on record is the evidence of PW5 who was not at the scene of the alleged attack. Further, this evidence did not at all link the Respondent or his agents to the attack. Therefore, even though the learned Judge did not make any specific finding on this incident, it cannot be said that this allegation was proved to the required standard of convincing clarity as no eye witness(es) were called to testify. Hence, the alleged assault remains a mere assertion.

With regard to the alleged assault on Sydney Wotela, the learned trial Judge identified and referred to the evidence of PW5, PW6, PW7 and PW8, who were all police officers. He, however, rejected their evidence on ground that their evidence was not reliable as they had lied to the court and that their evidence contradicted the Police's own entries in the Occurrence Books and the statement which the police recorded from Sydney Wotela as the entry in the Occurrence Book showed that Sydney Wotela was attended to by PW6 at the Police Station at 19.54 hours over the attack by alleged PF cadres at Mufumbwe Bus Station at

19.00 hours. While PW6 and PW8 said he reported the attack at 17.00 hours. PW8 also confirmed, under cross- examination, that the time of reporting the alleged assault entered in the Occurrence Book tallied with the time that was recorded in Sydney Wotela's statement to the police which PW5 recorded as regards the time when the attack was reported.

In view of the contradiction illustrated above, the learned trial Judge cannot be faulted for resorting to and relying on the entries in the Occurrence Books which were part of the Appellant's own evidence produced to support his case that the violence was widespread. This is more so because the Occurrence Books constituted formal records of the reports that were being received and recorded by the police on the various incidents of violence reported during the period in question.

In **Peter Lifunga Machilika v The People,**[23] the Supreme Court guided as regards the question of credibility of witnesses that once a witness or a complainant has been shown to be untruthful in material respects such as the use of violence, his or her evidence can carry very little weight. Although the above case related to the offence of rape to which a higher standard of proof applies than the one in the current case, a cardinal principle of law was discussed as regards assessment and findings on credibility of witnesses. This is that once a witness is

found to untruthful in material respects, his or her evidence carries very little weight as this goes to the credibility of such a witness. Therefore, the learned Judge was on firm ground when he declined to rely on the evidence of PW6 and PW8 on ground that they were not credible witnesses as they had lied to the court as regards the time of the alleged assault on Sydney Wotela. The least we can say is that for three police officers to contradict their own entries in the documents that they had in their possession leaves much to be desired. Further, PW7 who testified about the whereabouts of the Appellant at the time of the alleged assault on Sydney Wotela, contradicted himself as in examination- in- chief, his evidence was that on the date in question at about 19.00 hours, whilst monitoring the situation at the market in Kalengwa, he saw the Appellant's vehicle passing going back to Mufumbwe but under cross-examination, he changed his statement and stated that he saw the Appellant driving his vehicle and that he stopped at the market and then he saw him greeting people freely. This was a serious contradiction which goes to the credibility of the witness as the Appellant could not have been in Kalengwa greeting people at the market while at the same time, his motor vehicle was seen by the same witness going back to Mufumbwe. Therefore, the court below cannot be faulted for finding that PW7 had contradicted himself on the whereabouts of the Appellant on

the 13th June, 2016 when Sydney Wotela was alleged to have been assaulted at Mufumbwe bus stop.

As regards an issue that emanated from Mr. Katolo's submission which we think requires clarification, whereunder Counsel submitted that since the Appellant was involved in political violence as he was implicated in the assault of Sydney Wotela, he should not be allowed to benefit from his own wrong actions by asking this Court to nullify the Respondent's election on the basis of his own conduct and the argument in response by Mr. Bwalya that since Sydney Wotela was not called as a witness, the learned Judge was wrong when he accepted the statement by Sydney Wotela as proof of the Appellant's involvement in political violence because the statement was hearsay evidence which is inadmissible; our response is that the statement by Sydney Wotela was produced by the Appellant himself as part of his own evidence to show that there was widespread violence. It is rather shocking that the Appellant is now seeking in this appeal to disparage his own evidence. In fact, this contention by Mr. Bwalya flies directly in the teeth of the maxim: ***allegans contraria non est audiendus*** which means that a person should not be allowed to blow hot and cold at the same time. When it suited him, the Appellant sought to rely on the statement recorded from Sydney Wotela to support his claim that the violence in

Mufumbwe was widespread. He has now turned around and attacks it and wishes us to disregard it as hearsay evidence which is inadmissible. If not ingenuity it is a case of the Appellant wanting to have his cake and eat it too.

As regards the alleged intimidation of elections officers by the Respondent and his party, we note that PW14, a Stenographer at Mufumbwe District Council, who was the Assistant Returning Officer, IT, testified on the pronouncements made by Mr. Hakainde Hichilema at a public rally at which he is alleged to have accused the named elections officers of planning to rig the elections. Mr. Bwalya also relied on the letter written by Clement Machayi to the Council Secretary demanding the removal of those officers from participating in the conduct of the elections.

For convenience, the relevant portions of the letter read as follows:-

"...

28th July 2016

The District Electoral Officer
Electoral Commission of Zambia
P.O. Box 13001
Mufumbwe

Dear Sir

REF: REMOVAL OF SUSPECTED ELECTION OFFICERS FROM HANDLING THE 11 AUGUST 2016 GENERAL ELECTION

Please refer to the above caption.

The United Party for National Development (UPND) has received intelligence information concerning the following officers: Hector (Returning Officer). Samuel Mwanza (Planner) Tracy Bwalya (Chief Administrator). Dorcas Shipilo (Secretary to the CS) and Oliver Usheya (human resource officer – DEBS office) that the Officers are working with the Patriotic Front (PF) to manipulate election results in favour of the Patriotic Front (PF).

The United Party for National Development being a major stakeholder in this election demands the express removal of the above mentioned names from handling the 11 August 2016 general election. We further demand that the above mentioned Officers be replaced with non-partisan individuals who will deliver a credible election which will reflect the will of the people of Mufumbwe.

Please note that the above mentioned names are already in public domain and any attempt to mismanage this election by the same Officers will not only plunge Mufumbwe District into chaos but also endanger the lives of the Officers from the general public.

Your prompt action will be highly appreciated.

Yours faithfully,

(Signed)
Clement Machayi
CAMPAIGN MANAGER
UNITED PARTY FOR NATIONAL DEVELOPMENT (UPND)
..."

PW14's evidence was that because of the pronouncement and the above letter, she and the other elections officers mentioned lived in fear and that her colleagues requested and were transferred from Mufumbwe. The learned Judge considered this evidence and the letter in question. He found that PW14 was a very evasive witness who refused to voluntarily answer questions relating to matters that she had dealt with as Assistant Returning Officer, IT. And that the above letter reflected the pronouncements made by Mr. Hakainde Hichilema at the rally but that the said letter did not say that the named elections officers

were to be removed from Mufumbwe as it only demanded their removal from handling the 11th August, 2016 general election. And that the letter did not put the lives of the named elections officers in danger as it clearly stated that any attempt to mismanage the election by the officers would not only plunge Mufumbwe District into chaos but also endanger the lives of the officers from the general public and that it was however, common cause that Mufumbwe District was not plunged into chaos nor were any of the elections officers named in the letter harmed as the election was not mismanaged. He also found that other than PW14's claim in her evidence that as a result of the said pronouncements she and her colleagues could not move freely in Mufumbwe, no other evidence was adduced as none of the three officers were called to testify to show that they requested for transfers and that they were transferred immediately because of that reason. He also found that although PW14 had claimed that she lived in fear but that at the same time, she stated that she was able to walk to and from church during and after the campaign period and that she was not assaulted or harmed by anyone and that she freely voted on 11th August, 2016.

We have considered the above submissions. We totally agree with the learned Judge that PW14's evidence did not at all show how her

life was adversely affected as a result of the alleged pronouncements and the letter in question. Although she claimed that she was living in fear, her own evidence as found by the learned Judge contradicted this as her testimony was also that she was able to freely walk to and from church during and after the campaign period and that on 11th August, 2016 she voted freely at the polling station where she had registered without any incident and that after voting, she went to the totalling centre to perform her job as Assistant Returning Officer, IT. We also note from the record that this witness was indeed, very evasive as found by the learned Judge. Apart from her, none of the other named elections officers were called to confirm the basis of their transfers.

Further, as regards the contents of the letter, this witness, under cross-examination, confirmed that as stakeholders, the UPND had the responsibility to bring any suspicion of possible mismanagement of elections to the attention of the authorities and she too conceded that there was no violence as the elections were not mismanaged. Therefore, the inescapable conclusion is that apart from the above assertion by PW14, there is nothing else on record that shows that the elections in Mufumbwe were mismanaged as the only purported attack on an elections officer highlighted was that on Marshal Mungochi which as stated above, was not proved.

We are, therefore, not persuaded that the Appellant proved that the alleged pronouncements against the elections officers and the letter in question negatively impacted on the parliamentary election results as required by Section 97 (2) of the **Electoral Process Act** and Regulation 15 of the **Code of Conduct**. We, thus find no basis upon which to reverse the findings of fact by the learned Judge as he based these on the evidence before him which he properly evaluated.

As regards the last allegation that generally, violence was widespread in Mufumbwe Constituency, the thrust of Mr. Bwalya's contention was that the learned Judge should have nullified the Respondent's election on ground that the Appellant's evidence showed that there was generally widespread political violence in the constituency as attested by PW2 who was the Officer-In- Charge and a member of the **DCMC**. And that PW2's evidence was that the political violence in the constituency was too much such that the officers under his command could not cope with the reports. Mr. Bwalya also argued that PW2's evidence was that most of the cases or complaints that were reported to the **DCMC** involved violence and that PW13's evidence also supports the Appellant's position and the evidence of PW2 that the violence was widespread. Counsel's position was therefore that

sufficient evidence was adduced upon which the learned Judge should have nullified the Respondent's election as area Member of Parliament.

We have considered the above submissions and the Appellant's evidence and that of PW2 and PW13. In arriving at his findings of fact as regards the claim that the violence was widespread, the learned Judge again referred to the entries in the Occurrence Books which the Appellant produced. He came to the conclusion that although there was political violence in Mufumbwe during the period in question, the violence in question was not as widespread as claimed by the Appellant and his witnesses. We totally agree with the learned Judge that the Appellant did not prove this allegation to the requisite standard of convincing clarity. The learned Judge properly evaluated the evidence before him including the entries in the Occurrence Books which showed that only 8 out of 68 cases of violence recorded during the period in question were identified by the police themselves as having been politically motivated. So the learned Judge cannot be faulted for so finding.

Mr. Bwalya's further contention was that the learned Judge contradicted himself as on one hand he found that there was political violence in Mufumbwe during the period in question which he must have

based on the evidence of police officers who testified in support of the Appellant's claim and yet on the other hand, he found that the same police officers were lying. We have considered the above argument. The question is: did the Appellant's evidence prove to the requisite threshold that there was widespread violence during the period in question contrary to the trial Judge's findings of fact that the violence was not so widespread to justify nullification of the Respondent's election?

We have combed through the evidence on record. We totally agree that the Appellant's evidence did not meet the applicable threshold which could have persuaded the court below and indeed this Court to find in his favour that the political violence was widespread as claimed. Simply put, the Appellant's evidence did not meet the threshold required under Section 97 (2) of the **Electoral Process Act** for nullification of an election of a Member of Parliament. PW2's evidence that the Appellant relied on as proof that political violence in the constituency was widespread is not supported by the Police's own official statistics recorded in the Occurrence Books which the Appellant produced. Admittedly, the question here is not the number of the alleged acts of violence but the magnitude and how widespread the violence was. The analysis of each one of the alleged incidences of violence

highlighted in this appeal, fortifies our position that the trial Judge was on *terra firma* when he held that the alleged political violence was not so widespread as to justify the nullification of the Respondent's election on that basis. In fact, the learned Judge went further and stated that out of those reports that he isolated from the Occurrence Books, they showed that it was the PF cadres who were the perpetrators of the violence. These documents were in the Appellant's own bundle of documents.

Further, PW13's evidence which the Appellant has also sought to rely upon as proof that the violence was widespread, should be considered in its own right as already observed above as the basis of her opinion were the reports that she was receiving from other persons including the parliamentary candidates themselves. However, none of the persons who reported to her were called to testify. PW13 did not personally witness the violence. We thus agree with the trial Judge that this aspect of PW13's evidence was too caught in the realm of hearsay evidence which is inadmissible. Consequently, we are not persuaded that there was sufficient evidence that showed that the violence in Mufumbwe was as widespread as claimed by the Appellant or that the purported violence negatively impacted on the parliamentary election results.

Therefore, although Mr. Bwalya argued with vigour that since the trial Judge found PW13 to be a candid and truthful witness, he should have found that her evidence corroborated the evidence of the police officers who investigated the cases of the alleged political violence, for the reasons given above, this assertion is not at all well founded at law and is thus not tenable. Further, the issue here as alluded to above, is not the credibility of the witness but rather, whether the allegations were supported by the evidence on record which we have found it was not. Therefore, the learned trial Judge cannot be faulted for rejecting PW13's evidence as hearsay which is inadmissible.

Although Mr. Bwalya also forcefully argued that the learned Judge was wrong to attribute all the political violence to the PF cadres when PW2's evidence was that some of the cases of alleged violence against members of other political parties were referred to the **DCMC** to which PW2 as the officer in charge was a member; our brief response is that PW2's own evidence under cross-examination was that the entries in the Occurrence Books showed that all the reports of the alleged political violence recorded were against suspected PF cadres. PW13's evidence also shows that she was only told by the Council Secretary that some of the cases of political violence were reported to the **DCMC**. Mere stating that cases or complaints were made to the **DCMC** cannot be proof that

the violence was widespread. None of the reports or minutes of the **DCMC** were produced in the court below. In fact, Mr. Bwalya conceded this in his submission. Therefore, the only tangible evidence produced in support of the alleged violence were the Occurrence Books upon which the trial Judge based his finding that these showed that most of the reports of alleged political violence were against the PF cadres. We thus, find, no basis upon which we can reverse the findings of fact made by the learned Judge and find that the violence was widespread as claimed.

There was a further and rather strange and shocking contention by Mr. Bwalya that when asked in cross-examination, the Appellant did not give an unequivocal response to the question whether the people of Mufumbwe were capable of making independent decisions on who to vote for because his response was that they were 'quite' capable of doing so. We first wish to refer to the definition of the word 'quite' before we make any comment. **Longman's Dictionary of Contemporary English, New edition** defines ***'quite'*** as follows:-

"Quite – 1. fairly or very, but not extremely,

2. quite a lot/bit/few- in a fairly large number or amount."

In his earlier response under cross-examination, the Appellant categorically stated that in the parliamentary election, the people of

Mufumbwe decided based on their independent decision and that they were quite capable of making independent decisions on who to vote for. Our understanding of the responses by the Appellant if applied to the definition of the word 'quite' is that he confirmed that a fairly large number of the electorate in Mufumbwe were capable and did make their own independent decisions as to who to vote for. In view of the Appellant's own evidence referred to above, there is nothing more to add suffice to repeat that in coming to the conclusion that the Appellant did not prove the allegations against the Respondent to the required standard, the learned Judge looked at the totality of the evidence before him including the Appellant's own evidence in cross-examination. We thus decline to respond to the Appellant's invitation as regards whether by using the word 'quite' the Appellant qualified his statement as doing so would amount to the court engaging in semantics and that this would be an exercise in futility. So going by the Appellant's own responses; it can be deduced that although the voters in Mufumbwe may not have been 100% independent, the majority of them were, nonetheless, capable of making an independent choice as to which candidate to vote for based on their own free will without being influenced as has been argued in this appeal.

For the reasons stated above, we find no merit in ground three. We dismiss it.

All the three grounds of Appeal having failed on account of want of merit, the sum total is that the Appellant's appeal has failed. The same is dismissed.

As regards the issue of costs and the arguments by the learned Counsel for the respective parties, we wish to reiterate that the award of costs is in the discretion of the court. We however, agree with Mr. Katolo's submission that since the Appellant did not in this appeal challenge the award of costs to the Respondent by the court below, there is no basis for us to interfere with the order of the court below.

As regards the costs of this appeal, we order that each party shall bear own costs.

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H. Chibomba
President
CONSTITUTIONAL COURT

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M. S. Mulenga
Judge
CONSTITUTIONAL COURT

.....

E. Mulembe
Judge
CONSTITUTIONAL COURT

.....

P. Mulonda
Judge
CONSTITUTIONAL COURT

.....

M. M. Munalula
Judge
CONSTITUTIONAL COURT