

LAMECK NKIWANE MUYAMBI  
versus  
JAISON KOKERI MACHAYA

HIGH COURT OF ZIMBABWE  
MAKARAU J  
HARARE, 15 January 2003.

**ELECTION PETITION: GOKWE SOUTH**

*Advocate H Zhou*, for the petitioner;  
*Advocate A Matika*, for the respondent.

MAKARAU J: The petitioner was the candidate for the Movement for Democratic Change (“MDC”), in the general elections held on 24 and 25 June 2000. The respondent was his rival and was fielded by the Zimbabwe African National Union-Patriotic Front, (“ZANU-PF”). During the election, he polled 3615 votes while the respondent polled 12644 votes.

On 26 July 2000, the petitioner filed the above petition, seeking an order that the return of the respondent to Parliament be set aside and that fresh elections be held in the constituency. The petitioner alleged that the respondent and members of his party were guilty of corrupt practices, which saw the constituency experiencing a wide range of violent activities.

The petition was opposed.

In support of the petition, the petitioner gave the following evidence. After he became the candidate of his party in April 2000, he put a campaign strategy in place. He had planned to hold several meetings with the electorate in the constituency. He also planned to use flyers with information about his party and to move around the constituency informing the villagers what his party stood for.

His campaign did not proceed as planned. Some of the members of his campaign team were assaulted and some had to abandon their homes as a result of the violence. He was personally severely assaulted on 19 June 2000 when he had gone to furnish the constituency registrar with the names of his voting agents. His assailants used an assortment of weapons that included iron bars, sticks, knobkerries and sjamboks. The group that pursued him was made up of 50 or more persons. As he was being pursued, he did not stop to count them. He was rescued by riot police and was subsequently hospitalised until after the election. During the time that he was in hospital, word went out to his village and constituency that he had died as a result of the injuries sustained in the assault.

He voted on 25 June in the afternoon after pleading with the hospital staff to be allowed to go and dispel the rumour that he had died. He voted at Kana Mission in the constituency and went home to Muyambi village to reveal to his parents that he had not died. He returned to hospital immediately thereafter.

The witness gave his evidence well. He was not shaken under cross-examination. I have no reason why I should not rely on his evidence.

The petitioner then called Previous Hapanyengwi. She gave the following evidence. She resides in Manoti village, in the Gokwe South constituency. She is a member of the MDC. She used to cook sadza for sale at a shopping centre in the constituency. On the day when there was a rally at Gokwe Centre, a group of between 7 and 10 ZANU-PF supporters approached her and searched for MDC cards. They did not find any. They then left the following morning after calling upon her to follow them and buy ZANU-PF cards. During the night they were teaching her slogans and singing party

songs. She did not follow them to buy the ZANU-PF cards as suggested. They returned the following evening and held a meeting at her fireplace. At the meeting they were persuading her to join ZANU-PF. She had visits of a similar nature from this group 2 or 3 days before the poll. Members of this group informed her that the petitioner had died from injuries sustained during the assault of 19 June. She did not vote as the same group had said they did not want to see her at the polling station.

The witness was inconsistent in her testimony. She did not impress as telling the truth. I will reject her evidence as not being credible.

The petitioner also called one Pirwai Gava. His evidence was to the following effect. He resides in the constituency, under Chief Muyambi, the petitioner's father. He is a member of MDC. At one stage before the elections, he was chased away from a school where he had gone to recruit polling agents and election monitors. At Manoti, he was also disturbed from holding a meeting with polling agents of his party. A motor vehicle came to where they were holding the meeting and the occupants of the vehicle set upon them. He fled and was captured and assaulted. He did not know the people who had assaulted him but knew that they were ZANU-PF supporters. On 23 June 2000, he was assaulted again. He had arrived at Manoti business centre at night to look for the other polling agents. He found they had been assaulted and had fled. He also fled and returned on 26 June after the results of the polls had been announced. He did not vote as his metal identity document had been taken away from him on 23 June 2000.

This witness did not give his evidence well. It did not flow smoothly and he was not easy to follow as he testified. His testimony was not consistent and for these unsatisfactory features, I would reject it.

The petitioner then called Ernest Nkomazana. His evidence was to the following effect. He resides in the constituency and contested the general elections as an independent candidate. He witnessed the assault on the petitioner on 19 June 2000. He had also gone to the registrar's office to submit his list of polling agents. He recognised some of the people who assaulted the petitioner. These people are ZANU-PF supporters. He did not see how the petitioner left the registrar's offices.

This witness gave his evidence well. He was forthright in his responses to the questions put to him in cross-examination. He had good demeanour in the witness box and I would rely on his testimony as being credible.

Next to be called was one Murambiwa Ngwerume. His evidence was to the following effect. He resides in Highfield, Harare. He is a member of MDC where he is a driver. During the period in question, he was the petitioner's driver. He drove the petitioner to Gokwe centre on 19 June 2000. When the petitioner left the vehicle to go and make copies of certain documents, a group of ZANU-PF supporters approached their vehicle and assaulted him for being a member of the MDC. Riot police rescued him and took him to the police station together with some of his assailants. He did not see the petitioner after that. He received word that the petitioner had been killed.

The witness gave his evidence well and was not shaken under cross-examination. I found him a credible witness and will accept his evidence.

Charles Shave was called next. He is a member of the MDC. During the run-up to the election, he was in the constituency. He did not manage to campaign for his part as ZANU-PF supporters assaulted him. He was assaulted on 14 June 2000. He owed some money to one of the supporters. He then promised to pay the money back the following

day. He then attended a ZANU-PF meeting to give his creditor the money. 10 men who accused him of selling the land back to the white men then assaulted him. These men had seen him wearing an MDC t/shirt whilst at his communal home. He was assaulted for quite some time before he was released. He then made a report to the police. He was hospitalised but left hospital against medical advice. He then attended a ZANU-PF rally where he surrendered his MDC t/shirt and card. He did not do so voluntarily. He attended several other ZANU-PF meetings at which he denounced the MDC and told the gathering that the petitioner had been killed.

The evidence of this witness did not impress. It did not have a ring of truth around it. I formed the impression that the witness was not telling the truth. I would not rely on his testimony. The petitioner then called one Boniface Gwatiringa. His evidence was to the following effect. He resides in the Gokwe South constituency. He is a member of MDC. On 21 June 2000, he was approached by a group of people, wearing ZANU-PF t/shirts. He was at work at Cottco. The group manhandled him and demanded that he tell them of his work-mates who were also members of MDC. He declined to do so. He was assaulted and then taken out of the premises into a bush where he was detained. He was released around 6.00 p.m. on the voting day, he did not vote as he found some of the assailants waiting by the entrance to the polling station. He was also told that the petitioner had been killed. He did not see the petitioner from 19 June. One of the known ZANU-PF supporters, a Mrs Zivanai Paripari would spread the rumour that the petitioner had died at Manoti business centre.

This witness gave contradictory evidence. For instance while in his oral evidence before the court he testified that he had not voted, in an affidavit sworn before the

petition was filed, he swore that he voted. He testified under cross-examination that because of the assault on him, he gets confused about what happened to him during this period. Due to these unsatisfactory features in his evidence, I would reject the evidence of this witness.

After this witness, the petitioner closed his case.

The respondent gave evidence. It was as follows. He is the Member of Parliament for Gokwe. He represented Gokwe East in the last election. In the third parliament, he represented Gokwe South. He was a councillor for the local District Council prior to becoming a Member of Parliament.

He heard about the assault on the petitioner on 19 June 2000. He did not send any one to assault the petitioner. He did not hear the rumour that the petitioner had been killed.

He knows the petitioner's family and they also know him. He visits the petitioner's family regularly to consult with the petitioner's father who is a chief in the area.

During the run up to the elections he did not personally campaign in the petitioner's area. This he did not do as he thought that the whole area supported the petitioner's candidature. Some people may have campaigned for him in the area.

Most of the witnesses called by the petitioner were also from this area.

He did not know of the incidents that the petitioner's witnesses testified on. He denied that at one rally he said that members of the MDC should be killed. He did not personally send any one to harass members of the MDC.

During the period, he received information about the violence that was in the constituency. Whenever he got news of the violence from the police, it would have ended and so he did not personally do anything about it.

He was aware that some members of MDC believed that the petitioner had died and that and that some did not vote as a result of that news.

The respondent gave his evidence well. He was not shaken under cross-examination and I would accept his evidence as credible.

The respondent did not call any witnesses and closed his case after testifying.

The above represents a summary of the evidence upon which I now have to determine whether or not the election of the respondent should be set aside.

The petition before me was brought in terms of the provisions of the Electoral Act, [Chapter 2:02]. Section 124 (a) of the Act provides that:

*“Subject to sections one hundred and twenty, one hundred and twenty-five and one hundred and twenty-six-*

(a) if upon the trial of an election petition the High Court certifies to the Minister that any corrupt practice or illegal practice has been committed with reference to the election the subject of the petition, by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge and consent of or approval of any of his agents, the election of that candidate shall be void, and a fresh election shall thereupon be held.”

It is trite that in matters of election petitions, we are to be guided strictly by the four corners of the Electoral Act as there is no common law on the matter. Thus in accordance with the provisions of the Act, I must determine whether or not the acts alleged by the petitioner were corrupt acts in terms of the Act.

Corrupt acts have been defined in s105 of the Act to include the use of force or threats to use force against any person to influence the way that person votes. In my view,

section 105 and the other sections in the Act that create illegal and corrupt practices create very high electoral morality for all Zimbabweans.

I have considered the evidence led by the petitioner and have discounted as not reliable most of it. I am however satisfied that the petitioner himself was severely assaulted and that after his assault, a rumour that he had died was circulated and that as a result of this rumour, some voters may not have cast their votes for him. Thus the assault of the petitioner was meant to interfere with free franchise, a concept that the electoral act has been designed to protect.

The respondent has sought to deny that he sent any people to assault the petitioner. This may be so but supporters of his party perpetrated the assault. In accordance with the high electoral morality established by our law, the supporters of his party are deemed to be his agents as their acts were meant to further his campaign and garner more votes for him. He benefited from their actions and the law thus regards the perpetrators as his agents.

To avoid working an injustice against a candidate, who may have been unaware of the acts done by his (political) agents, the law provides an escapee clause in clause 125 which provides as follows:

- “When upon the trial of an election petition the High Court finds that a candidate at the election has been guilty by his agent of the offence of treating or undue influence or of an illegal practice with reference to that election, and the candidate has proved to the satisfaction of the High Court that-
- (a) no corrupt practice or illegal practice was committed at that election by the candidate himself or by his election agent and that the offences mentioned in the said finding were committed without the sanction or connivance of the candidate or his election agent; and
  - (b) the candidate and his election agent took all reasonable precautions for preventing the commission of corrupt practices and illegal practices at that election; and
  - (c) the offences mentioned in the finding were of a trivial, unimportant and limited character;

then the election of that candidate shall not , by reason of the offences mentioned in the finding, be void, nor shall the candidate be subjected to any incapacity under this Act.”

I now turn to consider whether the assault on the petitioner is such an act as may not result in the election being set aside.

It is common cause that the petitioner himself did not commit the offence. His election agent did not commit the offence. The offence was committed by a group of supporters who included one Johannes Dzenga, a member of his campaign team. On the basis of this I am satisfied that the assault on the petitioner was committed without the connivance or sanction of the respondent.

It is on this basis that the election of the respondent has been saved.

Accordingly the election petition is hereby dismissed with costs.

*Honey & Blanckenberg*, petitioners legal practitioners;  
*Ziimbe & Mtambanengwe*, respondent's legal practitioners.