



IN THE REPUBLIC OF MALAWI IN  
THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CIVIL DIVISION  
ELECTION PETITION CASE NUMBER 23 OF 2019

Between:

Dr. Beatrice NyaKumwenda.....Petitioner

and-

Electoral Commission .....1st Respondent

Jacob Hara .....2nd Respondent

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Coram;

The Honourable Justice D. A. DeGabriete

Mr. C. Mwale (on *brief*)

Mr. W. Chibwe

Mr. A. Mhone

Mrs J.N. Chirwa

of Counsel for the Petitioner

of Counsel for the Respondent

Official Interpreter

Court Reporter

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**DeGabriete, J**

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**JUDGEMENT**

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**1. Introduction**

1.1. On 31 May 2019 the Petitioner Dr Beatrice NyaKumwenda , filed this petition under section 100 of the Parliamentary and Presidential Elections Act (Cap. 2:01 of the Laws of Malawi), here inafter referred to as the PPE. The Petitioner is seeking an order of the Court annulling the election of the 2nd Respondent as a member of the National Assembly for the Mzimba Solora Constituency, on two general grounds: namely(a) that there was vote rigging , vote tampering and abject neglect by the 1st

Respondent in its conduct, control and administration of the said election; and (b) that the 2nd Respondent was campaigning and influencing people to vote for him after the legal campaign period had closed, in particular, on the day before voting and on the voting day itself. The petition was filed with a sworn statement verifying the petition. The Respondents denied all allegations reflected in the petition. The 1st Respondent filed 3 sworn statements of Chandiwira Shaba, Suffie Mbizi and Willie Chidunasiyana. The 2nd Respondent filed a sworn statement supported by a joint sworn statement of Petro Mbewe and Petros Mkwini. The Respondents sworn statements were filed together with skeleton arguments.

1.2. The petition as filed by the Petitioner is lengthy and a summary is presented here. The first section headed "*the Parties*" establishes that the Petitioner had competed in the 21 May 2019 election for the position of Member of Parliament for Mzimba Solora Constituency under the United Transformation Movement (UTM). The Petitioner is therefore entitled to bring this petition. The 1st Respondent is established under section 75 of the Constitution of the Republic of Malawi (hereinafter referred to as the Constitution) for the purposes of ensuring compliance with the provisions of the Constitution, and any Act of Parliament as regards management of elections and performing such other functions as may be prescribed by the Constitution or any Act of Parliament. The 2nd Respondent was among several persons who competed as Member of Parliament in the same Mzimba Solora Constituency. The 2nd Respondent competed on a Malawi Congress Party (MCP) ticket and he was declared the winner of the polls by the 1<sup>st</sup> Respondent.

1.3. The second section outlines the purpose of the petition, which is challenging the exercise by the 1st Respondent of its constitutional power to announce and declare that the 2nd Respondent has been elected into the position of Member of Parliament for Mzimba Solora Constituency following the 21 May 2019 elections given the evidence of vote rigging and tampering and abject negligence in the conduct, control and administration of the said elections by the Respondent. The Petitioner is seeking an order of the Court annulling the said election of the 2nd Respondent. Paragraph 11 of the petition outlines the irregularities complained of as follows:

**11, THAT** it is the position of the Petitioner that the 1<sup>st</sup> Respondent has committed the following wrongs in the conduct, control and administration of the elections which amounts to a gross and unjustifiable dereliction of its constitutional duty under section 76 to ensure that the elections are carried out in accordance with the provisions of the Constitution or any Act made thereunder.

a. There is overwhelming evidence that the 1<sup>st</sup> Respondent has been generally negligent and unfair in its control and administration of the election of the Member of Parliament for Mzimba solora Constituency by failing to electronically collate, tally and transmit results as accurately as required by law, and failing to ensure that the relay of results from the polling stations was secure, accountable, accurate and verifiable.

b, The 1<sup>st</sup> Respondent permitted and condoned certain activities which materially affected the outcome of the election and proceeded to announce the results of the election despite such activities even through a letter dated 24<sup>th</sup> May, 2019. The Petitioner had written the 1<sup>st</sup> Respondent demanding that the relevant candidates either be qualified or the election nullified as the powers of the 1<sup>st</sup> Respondent under section 59 of the Parliament and Presidential Elections Act, A copy of the said letter is attached hereto. Duly exhibited and is marked **BK-3:** and

c, The said activities as follows:

- i. The 2<sup>nd</sup> Respondent his representatives and officials continued to aggressively campaigning after closure of campaign. For instance, on 19<sup>th</sup> May, 2019 the 2<sup>nd</sup> Respondent at around 18:00 hours in the evening gave handouts (19 plates to Group Village Headman Magodi Shumba). Jerrings Kumwenda, was the one who received the plates on behalf of the chief.
- ii. There is extensive evidence that villagers within the said Mzimba Solora Constituency were, during the night preceding the day of the election, given money (MK2, 000.00), soap, salt,

*plates as an incentive and handouts for them to vote for the 2<sup>nd</sup> Respondent.*

*iii. During the day and night preceding the day of the elections and even on the actual voting day, the Respondent's representatives and officials were not allowed to verify the ballot with instructions from teachers of which was not their duty and all the assorting was done by teachers. The same happened at Kuluweya and Enthuzini. The cash was also distributed at Mtangatanga and Champheta, and*

*iv. At Thambani Jean Shumba ( a monitor for the independent shadow MP, Fikani Nyirenda, Lot Gondwe and Agness Lukhele concurrently reported that they saw some discrepancy of the votes counted and what the presiding officer had endorsed on the forms to be submitted to the tally centre. For instance, councillor, Kanyinji, had 400 votes instead they endorsed 10 and increased Councillor Kefasi Chis's votes.*

*d. Inconsistent tally sheets were being returned by the 1st Respondent to presiding officer at various polling centres within the said constituency including Manyamula and Perekezi for the presiding officers to rectify the records for the inconsistencies when that is not the proper and credible procedure for dealing with such inconsistencies and which is a procedure contrary to enduring free, fair and credible elections".*

14. The third section, headed "*the counting and transmission of votes during the 21 May 2019 elections*", explains the way votes are counted and transmitted during the conduct of an election in cases where the electoral system is functioning at its best. The fourth section, headed "*the irregularities in the election of the member of the national assembly for the Mzimba Solora Constituency*", spells out further irregularities observed by monitors at polling stations and tally centres. The monitors had identified massive systematical tampering collusion and other irregularities

perpetrated during the 21 May 2019 tripartite elections as outlined in paragraph 11 of the petition; instances of negligence and gross unfairness on the part of the 1st Respondent in their control, management and administration of the 21 May 2019 election by potentially allowing the above mentioned tampering, collusion and other

irregularities to take place; negligent conduct of the 1st Respondent as it failed to act with due diligence in the control, management and administration of the 21 May 2019 elections; and failure by the 1st Respondent to properly respond to written communication urging it to conduct an audit of the election. All these irregularities amounted to gross unjustifiable dereliction of the 1st Respondent's constitutional duties under Chapter VII of the Constitution.

1.5. The last section of the petition outlines the declarations, orders and reliefs sought, as follows;

*"a. A declaration that the non-compliance irregularities and improprieties in the May, 2019 election to the office of the Member of Parliament for the Mzimba Solora Constituency were substantial, significant and that they affected the result thereof.*

*b. A declaration that the failure by the 1st Respondent to remedy the non-compliance, irregularities and improprieties in the conduct of the aforementioned election amounts to a gross and unjustifiable breach of section 76 of the Constitution.*

*c. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and from the computation of the result of the election of the office of President.*

*d. A declaration that Jacob Hara was not validly declared as a Member of the National Assembly for Mzimba S0/oa1 Constituency and that the declaration is null and void.*

*e. A declaration that there be a transparent, open and accountable recount or physical audit of the election process in the polling stations, constituencies and tally centres around the country affected by the non compliance, irregularities and improprieties in the May, 2019 elections: and*

*f. An order that costs of the Petition be for the Petitioner".*

1.6. On 26 June 2019, the Petitioner filed sworn statements in reply to the Respondents' sworn statement in opposition of the petition, which statement outlined further alleged irregularities supported by some polling station forms. This

was filed together with skeleton argument and a joint sworn statement of Bray Mtonga and Mission Mwale.

## 2. Issues for determination

2.1 Through her skeleton arguments, the Petitioner raised one issue for determination, namely whether this petition can be granted. The Respondents, raised three issues for this court to determine, as follows: (a) whether there were irregularities in the election process that resulted in the 2nd Respondent being declared as the Member of Parliament for Mzimba Solora Constituency ; (b) if the answer is in the affirmative, whether the irregularities, if any, affected the results of the elections; and (c) if the answer is in the affirmative, what will be the appropriate remedy. Based on the petition and on the sworn statements in support and in opposition, the Court sees that there are two main issues for determination, which are

- a. Whether the alleged irregularities by the 1st Respondent resulted in the 1st Respondent's neglect of its constitutional duties, and
- b. Whether the alleged irregularities in the conduct of the 2nd Respondent gave the 2nd Respondent undue advantage in the final outcome of the polls

2.2 A number of preliminary issues arose. The Petitioner was represented by Messrs Kawelo Lawyers. On 14 June 2019, which was the date of first hearing, the Petitioner was represented by Counsel Kondowe of Messrs Kawelo Lawyers and Counsel sought an adjournment of the matter as the Petitioner had just received replies to the petition on that date. Counsel sought to amend paragraph 1 of the petition, to show that the Petitioner was a member of the UTM and not the People's Transformation Party (PETRA). Further, Counsel notified the Court that the document marked as **BK1** and **BK2** and referred to in paragraph 2 of the petition could not be found and produced in court. These documents were nominations papers and copy of certificate from Electoral Commission respectively. Counsel undertook to produce the two documents marked as **BK3**, a letter to the 1st Respondent on complaints referred to in paragraph 11.b. and **BK4** a bundle of sworn statements totalling 87 referred to in paragraph 27 of the petition. These exhibits as well as the skeleton arguments were to be produced at the date of the next hearing. The Respondents did not object to the adjournments and the

amendments sought. The Court granted the amendments as requested and the documents marked as BK1 and BK2 were to be disregarded. The Court further set the matter for hearing on 24 June 2019, and directed that all processes should be concluded by that date.

2.3. At the hearing on 24 June 2019 the Petitioner was represented by Counsel Mwale who held brief for Messers Kawelo and Lawyers. Counsel Mwale sought an adjournment on the ground that the Petitioner and her Counsel had not managed to file responses to sworn statements in opposition of the petition and were unable to bring evidence in form of the document marked as **BK3**. Counsel for the Respondents objected to the adjournment noting that the Petitioner and her Counsel had failed to obey the direction of the Court made on 14 June 2019, that all processes need to be concluded by the date of the next hearing. Counsel Mwale then indicated that he had the skeleton arguments and the responses to the sworn statements in opposition to the petition at hand, had served the same on the Respondents, but had not filed them with the Court. The Court ordered that Counsel present his case to avoid delays and file the documents later. The Respondents did not object to the direction of the Court. Counsel made an application to proceed without exhibit **BK3** as it could not be found and the Court granted the application and allowed the Petitioner's counsel to proceed without the said exhibit **BK3**.

2.4. Under paragraph 27 of the petition, the Petitioner undertook to give specific instances of irregularities, set out in 87 sworn statements of persons who witnessed the irregularities explained under paragraph 11 of the petition. The Petitioner refers the Court to a bundle where all these statements are contained, which is marked as **BK4** in the petition. However, a thorough look at all the documents presented before this Court discloses that there was no bundle of 87 sworn statements marked as **BK4**. At the hearings, Counsel for the Petitioner only sought to have the exhibits marked as BL1, BK2 and BK3 excluded as they could not be produced. The absence of the bundle marked as B.K4 does affect the Petitioner's case as the petition indicates that the bundle contained eye witness evidence to support all the alleged irregularities under paragraph 11 of the petition.

2.5. Finally, in paragraph 28.c of the petitioner the Petitioner is seeking a declaration that 'all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and from the computation of the result of the election of the office of President'. This is certainly an anomaly in this petition as the petition was never about the office of the President. Perhaps counsel ought to have drafted the petition with due diligence to avoid this kind of unwarranted mistake.

### 3. The Law

3.1 This petition has been brought under section 100 of the PPE, which provides that:

*"A complaint alleging an undue return or an undue election of a person as a member of the National Assembly or to the office of President by reason of irregularity or any other cause whatsoever shall be presented by way of petition directly to the High Court within forty-eight hours, including Saturday, Sunday and a public holiday, of the declaration of the result of the election in the name of the person-*

- a) *claiming to have had a right to be elected at election; or*
- b) *alleging himself to have been a candidate at such election"*

Section 3 of the PPE defines irregularities as follows:

*"Irregularity" in relation to the conduct of an election means non compliance with the requirements of this Act"*

It is therefore imperative that the Petitioner herein, who is alleging undue return of the 2nd Respondent as a Member of Parliament due to irregularities, brings evidence to prove the allegations. The Petitioner must also prove that the alleged irregularities occurred due to the 1st Respondent's negligence in the conduct, control and administration of the elections. The burden of proof lies fully with the Petitioner. The Malawi Supreme Court of Appeal held in the case of **Commercial Bank of Malawi v Mhango {2002-2003} MLR 43 at page 45** that:

*"the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case*



*of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule is Ei qui affrmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative."*

- 3.1. The Petitioner herein must bring evidence that shows or proves that electoral process and the election of the 2nd Respondent as a member of Parliament was not in compliance of the PPE. In the case of **Chikweza v Electoral Commission [1994] MLR 36 (HC)** the court held that any election that does not comply with the Law in this case the PPE, is no election at all, consequently irregularities arising from such noncompliance can only be cured by a re-run. In order for any court of law to order a re-run, any petitioner must bring evidence to prove to the satisfaction of the court hearing that the irregulars were so grave that the court has no choice but to invoke Section 114 (3) and declare the election invalid.
- 3.2. The Malawi Supreme Court of Appeal emphasised the need for a Petitioner to prove irregularities because mere allegations that are not substantiated amount to nothing. The Petitioner is expected to lead clear evidence and not just expect the Respondents to prove their innocence, see **Electoral Commission and Billy Kaunda v Harry Mkandawire MSCA Civil Appeal Number 67 of 2009 (Unreported)**. The Petitioner herein must show that the irregularities complained of affected the overall results of the election. This principle was clearly laid down in the case of **Loveness Gondwe and Malawi Electoral Commission v. NyaHara M.S.C.A Civil Appeal No. 3 of 2005**, where the Supreme Court of Appeal stated that:-

*Finally, even assuming that there was some irregularity relating to the verification of the voters' roll it has not been shown how that affected*

*the result in Mzimba West Constituency. The burden would be on the respondent as petitioner to establish that the alleged irregularity affected the election result, especially, as happened in this case the irregularity could not be blamed on the 1st appellant. That burden has not been discharged by the respondent.*

#### **4. Whether the alleged irregularities by the 1st Respondent resulted in the 1st Respondent's neglect of its constitutional duties**

4.1. The Petition as filed alleges irregularities in the way the election of the 2nd Respondent was conducted, controlled and administered by the 1st Respondent. The Petitioner alleges that the said irregularities amounted to gross and unjustifiable dereliction of 1st Respondent's constitutional duty under section 76 of the Constitution, which duty is to ensure that the elections are carried out in accordance with the provisions of the Constitution or any other Act. Section 76 of the Constitution provides, *inter alia*, that the 1st Respondent herein has a duty to determine electoral petitions and complaints related to the conduct of elections, and to ensure compliance with the provisions of any Act of Parliament. Consequently, section 113 of the PPE gives the 1st Respondent powers to determine election complaints and provides that;

*"Save as otherwise provided in this Act, any complaint submitted in writing alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided on by the Commission and where the irregularity is confirmed the Commission shall take necessary action to correct the irregularity and the effects thereof"*

The Petitioner herein or her agents never raised any complaints for the 1st Respondent to determine. It is on record that the letter of complaint purportedly written by the Petitioner and referred in the petition itself as **BK3** could not be found and produced before this Court. In order for this Court to hold that the 1st Respondent had failed to fulfil its constitutional duty under section 76 of the Constitution, or indeed its duties and powers under section 113 of the PPE, it was essential that the Petitioner proves by evidence that complaints regarding irregularities were notified to the 1st Respondent and that the 1st Respondent

failed or chose not to determine the same. The complaints procedure under section 113 of the PPE allows the 1st Respondent to receive complaints pertaining to any irregularity at any stage of electoral process in order that such complaints be dealt with timely, and with all concerned stakeholders still fully involved in the process. Therefore, this Court can only conclude that such a letter of complaints was never written, or if it were written, it was never communicated to the 1st Respondent.

4.2. As shown by the petition and the sworn statement in reply to the Respondents' sworn statements in opposition of the petition, all alleged irregularities were reported to the Petitioner by monitors. The Petitioner's political party, UTM provided monitors at polling stations and tally centres within Mzimba North East Constituency but the Petitioner did not mention the names of the monitors assigned by the UTM to the affected polling stations. The Petitioner mentioned some independent monitors who observed irregularities at Thabani polling station, namely Jean Shumba, Fikani Nyirenda, Lot Gondwe, and Agness Lukhere; but none of these monitors have been called to give specific evidence on the discrepancies observed. The Petitioner has also alleged that some monitors were denied access to the process and to execute their duties during the voting process. The polling stations mentioned as being affected by the alleged irregularities in the above documents include Thambani, Manyamula, Njoka, Kazengo, Emazwini, St Francis, Kamwamphimbi, Chasato, Kuluwe ya, Emthuzini, Mtanganganga, Champheta, Thabani and Perekezi. In its evidence, the 1st Respondent has shown that the UTM had accredited monitors, namely Jere Hlumazi for Emthuzini polling station and Christopher Francisco Beza for Kalweya polling station.

4.3. The role of monitors for political parties and independent candidates during an election is very important and crucial to the process as it provides real time checks and balances, allowing the participating stakeholders to raise concerns, issues and audit the system as the process is ongoing. In paragraph 23 of the petition the Petitioner recognises the need for all political parties, including the UTM, to have election monitors at each and every polling station, constituency, district and national tally centres. Section 72 of the PPE clearly states that political parties do have a right to monitor voting at polling stations and they must do so through their designated representatives, who are notified to the commission and are given

identification documents. This process of accreditation is essential so that the accredited monitors can fulfil their rights and duties as stipulated under section 73 of the PPE. In this case, the evidence of the accredited monitors would have carried more weight as the monitors are legally present and participating in the process. The duty of the 1st Respondent is to work with accredited political party monitors and accredited monitors for independent candidates. The orderly manner in which voting is done would deteriorate if any uncredited person is allowed to interfere in the process.

4.4. The Petitioner alleges that monitors were denied access to the process but does not mention which monitors and which polling stations this occurred at. The sworn statement of Chandiwira Shaba, who was the presiding officer at Emthuzini, one of the polling station with alleged irregularities, shows under paragraph 11 that accredited monitors including those from the Petitioner's party were allowed to be part of the process, but all other party representatives who had not been accredited as monitors were denied access in accordance to the rules and regulations of the 1st Respondent. Again the same sworn statement shows that an accredited monitor for the UTM by the name of Jere Hlumazi was present and he signed the results-sheet. If at all any accredited monitor was denied access, the 1st Respondent would have seriously breached its statutory duty and it must be held accountable. However, the Petitioner herein has not brought evidence to show which monitors were denied access. The Petitioner gives evidence of what happened to two monitors who were sent to go and collect transfer letters for voters. This Court would have understood the issues better if these particular monitors had been brought to Court to give evidence under oath. The Petitioner has submitted that some monitors were denied access to form 66B or were not given a copy, but there is no evidence as to who these monitors were; whether or not they had been accredited; and how such denial of access to form 668 or the refusal to give a copy of the form affected the overall results. It is the finding of this Court that the Petitioner has failed to prove that accredited monitors were denied access to the electoral process in the polling stations that alleged irregularities occurred.

4.6. In paragraph 11.c.iii of the petition, the Petitioner alleges that

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*"During the day and night preceding the day of elections and even on the actual voting day, 1<sup>st</sup> Respondent's representatives and officials were not allowed to verify the ballots with the instructions from teachers of which was not their duty and all sorting was done by teachers. The same happened at Kuluweya and Emthuzini. The cash was also distributed at Mtangatanga and Champheta".*

This is a very serious allegation as it potentially shows that the 1st Respondent had failed to carry out its duties and that teachers hijacked the process. The Petitioner has not brought any evidence to support this allegation. One of the polling stations where this allegedly occurred is Emthuzini, which as noted above, had an accredited monitor from the UTM, and yet the monitors has not been called to give evidence to this Court on how teachers took over or hindered the representatives of the 1st Respondent from carrying out its constitutional duties the day before voting and on the voting day itself.

- 4.7. The presence of teachers is explained by the evidence of Chandiwira Shaba, who states that the 1st Respondent had engaged different people as polling clerks and some of those engaged as polling clerks were teachers. He further stated that no other person who was not engaged by the 1st Respondent or who was not accredited in any way was allowed to remain at the station after voting. The Petitioner alleges that the same discrepancies and anomalies also occurred at Kuluweya polling station. In his sworn statement, the Constituency returning officer for the Mzimba Solola Constituency, Suffie Mbizi stated that there were no polling stations known as of Kuluweya and Pelekezi. However, as the sworn statement of Willie Chidunasiyana shows that there was a polling station by the name of Kalweya. The evidence of the sworn statement shows that the accredited monitor for the Petitioner's party was Christopher Francisco Beza at that polling station, and it further shows that the teachers present were engaged by the 1st Respondent as polling clerks and it would have been absurd that teachers would then go against the 1st Respondent and not allow any other representatives of the 1st Respondent to carry out their functions. This Court concludes that the Petitioner has failed to prove with clear evidence how teachers purportedly hindered the 1st Respondent and its representatives from carrying out its constitutional duty.

4.8. Under paragraph 6 of the sworn statement made by the Petitioner in response to the sworn statements in opposition of the petition. The Petitioner has explained issues and irregularities at a number of polling stations and has referred to result sheets for Njoka, Manyamula and St Francis polling stations as attached, but the actual result-sheets have not been physically exhibited for the Courts's perusal. The Petitioner has exhibited the result-sheets for Kazengo, which is illegible because it is very faint, such that the Court was unable to cross reference the explanation given in the sworn statement. The Petitioner also exhibited identical result-sheets for Thambani polling station but has not explained or shown the Court what it should be looking at or what the alleged irregularities were as concerns the election of the Member of Parliament. The only evidence for Thambani polling station is in regard to the election of a councillor. The Petitioner alleges that a monitor by the name Jean Shumba reported some discrepancies in the votes counted and what the presiding officer had endorsed on the forms to be submitted to the tally centre, where a councillor by the name of Kanyinji had accrued 400 votes, but only 10 votes were endorsed. The Petitioner claims that votes were increased for Councillor Kefasi Chisi. A quick examination of SM2 attached to the sworn statement of Suffie Mbizi shows that at Thambani polling station number 06355, councillor Kanyinji received 310 votes while councillor Kefas Chisi received 162 votes. This Court does not see what the irregularity was on this point. Perhaps, if the said Jean Shumba or the other monitors had sworn statements, it would have enlightened the Court. Further, it is not clear from the Petitioner's evidence what the results in the election of a councillor had to do with the alleged undue return of the 2nd Respondent as a Member of Parliament for Mzimba Solora Constituency.

There is no evidence to connect the two elections. If it is to prove the mismanagement by the 1st Respondent or vote tampering by the said Kefas Chisi, the numbers show that there was no tampering.

4.9. The Petitioner has alleged that some presiding officers failed to sign some forms as is required by law and this was reported by a shadow MP Precious Chisi. This Court notes that the said Precious Chisi was a contestant for the Member of Parliament in the same constituency. However, it is not clear to whom the said Precious Chisi had made his report of the alleged irregularities. The Petitioner has also alleged that some presiding officers allegedly made mistakes bringing in some

unbalanced sheets to tally centres as confirmed by Salomy Munthali, and Patrick Kapemba who were both tally centre monitors. Examples were for Chasato, Kazengo and Manyamula. However, the Petitioner has failed to present evidence to substantiate the alleged irregularities. This Court is therefore not convinced that there was foul play or mismanagement by the 1st Respondent as regards the undue return of the 2nd Respondent.

4.10. The Petitioner has also exhibited the results-sheet for Emazwini polling station number 06359. The Court notes that, contrary to the Petitioner's allegation, the numbers indicated in the *station total* on the left are correctly reflected in words in the column on the right labelled *'station total'*; and that the total ballot papers received was 1200, unused ballot papers were 318, null and void ballot papers were 36 and valid ballot papers were 846. A simple addition means that the total valid votes cast were (846 + 36) 882. The Court agrees with the Petitioner that when a simple addition of the votes cast for all candidates is done, it comes to a total of 746 and not 882, meaning that there are 136 cast ballots which were not accounted for. The Court also notes that from this polling station, the majority votes were accumulated by Patrick Akim Mwanza of the Democratic Progressive Party (OPP). The 2nd Respondent had 41 votes and the Petitioner had 31 votes. There is no evidence from the Petitioner that the 136 cast votes were legitimately cast in the Petitioner's favour, and were through undue influence appropriated by or on behalf of the 2nd Respondent. A look at the Mzimba Solola Constituency final results marked and exhibited as **WC1**, in particular results for Emazwini polling station number 06359 shows that the votes cast for the 2nd Respondent was 141 instead of the 41 reflected at the polling station. However, the subtotal remained the same as that reflected at the polling station results-sheet, which was 882 votes cast with 36 ballots declared null and void and 846 ballots declared valid.

4.11. This Court observes that at the Emazwini polling station the 1st Respondent did make mistakes in the tallying of the votes and a total of 136 valid votes which were cast were not accounted for. These votes fell off the count and were not accredited to any on the candidates. This is very serious because in a democratic process each vote counts. Each vote shows those voting what their choice is. In this case the choice of 136 people was disregarded, regardless of which candidates those 136 people voted for. The Court also notes that the Constituency tally centre made

a mistake in entering 141 votes in favour of the 2nd Respondent and not the 41 votes as was reflected at the polling station. This is indeed a serious breach by the agents of the 1st Respondent both at this polling station and the constituency tally centre. There is great need that the tallying at a polling station be scrutinized and audited by all to ensure that no vote that has been cast is left unaccounted for. For this specific proven case of unaccounted for ballots, this Court finds that the 1st Respondent was grossly negligent in the way it managed the vote counting and tallying at the polling centre and at the constituency centre.

4.12. The next question to determine is whether the 136 unaccounted for votes would make a difference in the result of the Petitioner as against the results of the 2nd Respondent. At the Emazwini polling station itself, the 136 unaccounted for votes did not make any difference in the results of the Petitioner (31 votes) and the 2nd Respondent (41 votes). There is no evidence that the whole 136 or part of the 136 unaccounted for votes were cast for the Petitioner or that if those votes had been accounted for the Petitioner would have acquired the majority, and hence change her result at the polling station. The Mzimba Solola Constituency final results, marked and exhibited as WC1, shows that the Petitioner accumulated 7,490 votes and the 2nd Respondent accumulated 12,577 votes. The final result sheet was signed by accredited monitors for the MCP, the UTM and the DPP. It is the conclusion of this Court that the 136 votes unaccounted for would not have affected the overall results as the difference that has been proved is negligible. The courts can invalidate an election or order a re-run of the election if the irregularity complained of has negatively affected the votes of the petitioner. In the case of **Loveness Gondwe and Malawi Electoral Commission v Catherine Gotani NyaHara MSCA Civil Appeal Number 3 of 2005 (Unreported)**, confirming their earlier decision in the case of **Gama vs Omar and Malawi Electoral Commission MSCA Civil Appeal No. 24 of 1999**, the Malawi Supreme Court of Appeal held as regards invalidating election results that

*"The law in this country with regard to disputed elections is simple. It goes like this. An election will be invalidated if the irregularity, mistake or error complained of did affect the result of the election"*



In this case, even if the 136 votes that were unaccounted for at the Emazwini polling station were proved to be unduly taken from the Petitioner, they would not make any difference to the final votes accumulated by the Petitioner as against the 2nd Respondent. The final poll results would not significantly change at all. Therefore, this Court would not declare null and void the whole election OR order a recount on the basis of the proven unaccounted for ballots at Emazwini polling station.

5. Whether the alleged irregularities in the conduct of the 2nd Respondent gave the 2nd Respondent undue advantage in the final outcome of the polls

5.1. The Petitioner has alleged that the 2nd Respondent, his representatives and officials continued to aggressively campaign contrary to section 57 (2) of the PPE and after close of official campaign period and on the actual voting day, and that the 2nd Respondent's representatives and officials were distributing within the said constituency soap, salt, plates and money as an incentives and handouts for them to vote for the 2nd respondent. The Petitioner has alleged that the 1st Respondent condoned some activities carried out by the 2nd Respondent which activities were against the law. The Petitioner even goes on to refer to the evidence tendered by

Danika Nyirenda on the 2nd Respondent's presence in the Magodi Shumba village influencing voters to vote for him. However, there is no evidence by Danika Nyirenda produced before this Court.

5.2. The joint sworn statement of Bray Mtonga and Mission Mwale in support of the petitions states that every paragraph of the petition is true and that a Mr. B. F Ndhlovu, who was the presiding officer at Mawowo polling centre instructed Mission Mwale and many others, to vote for the second respondent. On his own he does not state whether or not he did vote for the 2nd Respondent and whether the 'many others' acted in accordance with the instruction. It is not also clear how many of the "many others" there were compared to the registered voters who actually cast their ballot, and how many polling stations were affected. The said mission Mwale also stated that the 2nd Respondent *used to distribute desks to the school at Mawowo* but has not stated how often this was done and how long before the election. If the position of the Petitioner is that the 2nd respondent campaigned after the 19 May 2019, then the issue of distribution of desks would be relevant only if that

distribution was done within the period the campaign was closed or on the polling day. It is only when such is established that this Court can conclude that the distribution of desks was done to give the 2nd Respondent undue advantage on the polling day. This equally applies to the other statement that the 2nd Respondent was *"roofing schools a week before the voting and one such school was Chizimba School"*. The evidence of the Petitioner does not show what the relevance of roofing a school a week before the elections had impacted on her result, and how that activity done within the legal campaign period can be construed as being an offence under section 118 of the PPE.

5.3. The same sworn statement states on behalf of Bray Mtonga that he was instructed to vote for the 2nd Respondent, but like Mission Mwale above he does not state whether he voted in accordance to the instructions. The said Bray Mtonga states that he *"witnessed voters especially the aged who were angry that the presiding officer had voted or ticked on the MCP symbol ballot paper on their behalf"*. There is no evidence of which polling station this incident occurred and what impact it had on the overall results. Furthermore, the best evidence would have been to have one of the *"many aged voters"* who suffered this injustice to give direct and valuable evidence to this Court. It is the conclusion of this Court that this joint sworn statement is full of assertions which are not proved by direct evidence.

5.4. The Petitioner has alleged that a man who could be identified was telling people who to vote for and was accompanying the elderly into the voting booth. This man could have been compelled to come to court since he was identifiable, because what he was doing was clearly illegal and against the democratic principle of the secret ballot and he was violating the right of an individual to choose a leader of their own choice. Above all the evidence of the Petitioner does not show if the said man induced people and the elderly to vote for the 2nd Respondent only. It is the finding of this Court that whether or not a person was orally induced or receives something that induces them to vote for the giver, the ultimate decision would be for that person to decide who to vote for by themselves. The Petitioner herein would need to prove on a balance of probabilities that **X** number of people out of the **XY** number of registered voters received incentives to vote for the 2nd Respondent and indeed that **X** number of voters are reflected by the result as

having voted for the 2nd Respondent, thereby proving the undue advantage or undue influence .

5.5. In the skeleton arguments the Petitioner has raised just one simple issue for determination, which is whether the election Petition dated 31st day of May 2019 should be granted. In the submissions on the issues pertaining to the petition, the Petitioner has focused her attention to the issue of campaign. The Petitioner has rightly pointed out that all political parties shall have the right to complain in an election where irregularities are noted, and that public campaign by every political party shall be for a period of two months closing forty-eight hours before the opening of the first polling day, as stated in sections 56(1) and 57 (1) of the PPE. Any person who contravenes the campaign process as indicated in the sections above, commits an offence under section 115 of the PPE. It is not immediately clear to this Court what the Petitioner is seeking, whether to have the agents of the 1st Respondent or the 2nd Respondent declared to have committed an offence under section 115 of the PPE or to have the elections annulled. In the case of **Loveness Gondwe Case (supra)** the Malawi Supreme Court of Appeal cited its own ruling in the case of **Nseula v Attorney General MSCA Civil Appeal No 32 of 1997** (unreported) as regards pleadings, stating that

*"in our Judicial System it is the parties themselves who set out the issues for determination at the court through their pleadings and both of them must strictly adhere to the pleadings....It is wrong for the Judge to decide on a matter which has not been raised by the parties in their pleadings and he should not have made it a definitive basis for his decision"*

It is the finding of this Court that the pleadings in this case were set out in the petition and the petition did not invoke section 115 of the PPE.

## 6. Finding

6.1. Having looked at the whole petition, this Court concludes that the petition lacks merit because on the whole the allegations of irregularities are not supported by evidence. This petition has raised a number of serious allegations pertaining to irregularities in the way the election was managed, and administered. These allegations and irregularities are very serious and if unchecked, such irregularities would have a negative impact to the development and maturing of democracy in

this country. However, evidence must be brought forward to prove the allegations so that necessary steps would be taken to address the same and hold those responsible accountable. It is lamentable that the Petitioner, who showed throughout the petition that there were people who directly witnessed the irregularities failed to call such people to give evidence at court. This Court is of a strong view that failing to call such crucial witnesses or failing to bring crucial evidence is an abrogation of the duty of the Petitioner to the electoral process. Indeed the Petitioner mentioned in the sworn statement in response to the sworn statements in opposition to the petition that she is challenging the concept of majority win in that *"it's not the issue of just numbers but free and fair elections with integrity and without corruption"*. This Court would agree with that position fully in as far as the need to have an electoral process that is credible, where each vote counts and there is integrity in the tallying and in announcing the majority winner. However, the Petitioner is also under a legal duty to prove the allegations of irregularities on a balance of probability, and the Petitioner has failed to do. It is the finding of this Court that making allegations that are not supported by any evidence is tantamount to condoning such irregularities.

6.2. The monitors of the Petitioner's party did sign result-sheets and their signature is a legal indication that they agreed and endorsed that the process and the results. If there were issues of irregularities, such monitors should have raised the same and they should have been brought to court to explain the irregularities they observed and what action they had taken on the same; as this is what is required of them by the law. While the 1st Respondent is expected to offer training to political party monitors, it is equally the duty of each political party to ensure that the monitors they have decided to have accredited by the 1st Respondent do understand the process and can meaningfully engage with the process. Since the electoral process and the election results reflect the democratic rights of people to freely choose their own leaders by secret ballot it is of utmost importance that the integrity of the electoral process be guarded jealously and any irregularities must be proven by evidence. The evidence must also show that the irregularities complained of did affect the result of the election so drastically that a declaration of the election as being null and void as prayed by the Petitioner herein cannot be avoided.

6.3. It is the conclusion of this Court that the Petitioner herein has failed to bring evidence to prove on a balance of probability that the irregularities complained shows that the 1st Respondent was negligent in carrying out its duties under section 76 of the Constitution and section 113 of the PPE in the way it controlled, managed and administered the elections for the Member of Parliament in Mzimba Solora Constituency on 21 May 2019. While this Court finds that the 1st Respondent and its agents were negligent in the counting and tallying of votes at the Emazwini polling station, the 136 unaccounted for votes did not negatively affect the overall results of the election in Mzimba Solora Constituency to warrant this Court to declare the election of the 2nd Respondent null and void. The Petitioner has failed to prove all the alleged irregularities, as well as the substantial impact of such irregularities on the election result on the balance of probabilities.

6.4. Therefore the Petition herein is not granted and it is dismissed in its entirety. The Petitioner is not entitled to any of the reliefs being sought before this Court

6.5. Cost follow the event and are hereby awarded to the Respondents

Pronounced in Open Court at Mzuzu Registry this 29th day of July 2019

  
Honourable D. A. DeGabriele  
JUDGE