



**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY**

**ELECTORAL CASE NO. 40 OF 2019**

**IN THE MATTER OF PARLIAMENTARY AND PRESIDENTIAL  
ELECTIONS ACT (SECTIONS 100 AND 114(1))**

**BETWEEN:**

**DR. JESSIE KABWIRA ..... PETITIONER**

**-AND-**

**MALAWI ELECTORAL COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MR. ENOCK GENASI PHALE ..... 2<sup>ND</sup> RESPONDENT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**  
Mr. D. K. Itai, Court Clerk

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**ORDER**

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*Kenyatta Nyirenda, J.*

There is before the Court a petition brought by Dr. Jessie Kabwira (Petitioner) against the Malawi Electoral Commission (1<sup>st</sup> Respondent) and Mr. Enock Genasi Phale (2<sup>nd</sup> Respondent). The Petitioner contested in the Parliamentary Elections which were conducted by the 1<sup>st</sup> Respondent on 21<sup>st</sup> May 2019.

According to the Notice of Motion filed with the Court on 31<sup>st</sup> May 2019, the Petitioner challenges “*the manner in which the 2<sup>nd</sup> Respondent was elected as a Member of Parliament for Salima North West*”.

The Petition is couched in the following terms:

- “1. **THAT** on or around the 21<sup>st</sup> May, 2019, Malawi went to the polls where the electorates had to choose their president, members of parliament as well as councilors.
2. **THAT** the Petitioner contested for a position of a Member of Parliament for Salima North West Constituency under UTM political party ticket.
3. **THAT** among other contestants, the Petitioner faced competition from the second Respondent herein, a Mr. Enock Phale, who represented Malawi Congress Party in the elections.
4. **THAT** the final parliamentary results were released by the first Respondent on or about the 26<sup>th</sup> May, 2016 where the first Respondent declared the second Respondent as winner of the parliamentary race.
5. **THAT** the Petitioner had prior to the announcement of the results and just after the counting of the results lodged complaints with the second Respondent challenging fairness of the electoral process especially against the second respondent who violated electoral laws in so many ways but the first respondent never responded to the Petitioner.
6. **THAT** further to the above, the first Respondent has on the date above written announced the results of the parliamentary race for the constituency concerned without addressing the complaints of the Petitioner hence this challenge before the court for court’s order that the elections in the constituency concerned were not free, fair and credible due to the fact that they were marred with a lot of irregularities.
7. **THAT** some of the irregularities were:-
  - 7.1 The second respondent’s campaigning after the campaign period had been closed by the first respondent.
  - 7.2 The second respondent’s giving of handouts to the electorates on the polling day.
  - 7.3 The second respondent’s mimicking of the Petitioner’s death before announcement of the elections results.
  - 7.4 The second respondent’s dishing out of cash to people on their way to cast their vote on the actual polling day through a Mr. Sinosi, his financier and other agents.
  - 7.5 The allowing of students from Matenje Secondary School to vote at Matenje Polling Centre when the students had not registered to vote hence had no registration certificate and were not even on the voter’s roll register or at all.
  - 7.6 Second respondent’s failure to declare interest that the presiding officer at Msiyanyanda Polling Centre was second respondent’s brother-in-law

*hence likelihood of bias was inevitable and biased selection of null and void votes.*

8. **THAT** *due to the first Respondent's inability to address the complaints lodged by the Petitioner on the Irregularities stated, the Petitioner decided to seek court's intervention to address the same.*

**WHEREFORE** *the Petitioner humbly prays that this Honourable court will exercise its discretion in her favour and declare as follows:-*

- (a) *That the incumbent winner of the 2019 Parliamentary elections in Salima North West Constituency, the said Mr. Enock Phale, was not duly elected in a free and fair manner hence not legitimate due to the many irregularities that have been raised by the Petitioner;*
- (b) *The elections in the said constituency being Salima North West Constituency were not free, fair and credible hence the court should make an order nullifying of the parliamentary elections results in Salima North West Constituency and give a proper direction of the same;*
- (c) *In the alternative that the court may order a re-run of the parliamentary elections in the said constituency.*
- (d) *Costs to be in the cause”*

The Petition is supported by a statement sworn by the Petitioner which states as follows:

- “1. **THAT** *I am the Petitioner in this matter and by reason thereof duly authorized to make this statement.*
- 2. **THAT** *during the just ended tripartite elections I contested as a Member of Parliament for Salima North West Constituency on the UTM Political Party ticket.*
- 3. **THAT** *there were other 4 contestants including the 2<sup>nd</sup> Respondent herein.*
- 4. **THAT** *on the polling day, the 2<sup>nd</sup> Respondent was seen visiting various polling stations within the constituency which is not allowed.*
- 5. **THAT** *further on 19<sup>th</sup> May, 2019 when campaign period was closed, the 2<sup>nd</sup> Respondent attended church service at Matenje CCAP Church where among other things he delivered campaign speech and promised to finish the church building if voted into power.*
- 6. **THAT** *on the same date as in paragraph 6 above, the 2<sup>nd</sup> Defendant gave out cash to the church choir as a way of coercing church members to vote for him.*
- 7. **THAT** *as an interest party, I complained to the 1<sup>st</sup> Respondent but my complaints fell on deaf ears as I did not receive any feedback until the 1<sup>st</sup> Respondent*

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*announced the 2<sup>nd</sup> Respondent as a winner, I hereby attach copies of my complaints and marked “JKI”.*

8. *THAT on the same polling date, without any explanation, the 1<sup>st</sup> Respondent’s presiding officer at Makanje Polling Centre allowed students from Makanje Secondary School to vote even though their names did not appear in the voter’s roll.*
9. *THAT further my monitors’ mobile phone were taken by the security officers on instructions from pressing officers as such my monitors were unable to report some malpractices that were happening at the polling centres.*
10. *THAT in some centres, my monitors were denied complaint forms without any proper justification or reason.*
11. *THAT my monitors to wit a Mr. Zebron Frackson and Lyson Hardwell of Khotekhote and Chilanga Polling Centre respectively reported to me that at their centres some teachers were seen advising voters to vote for the 2<sup>nd</sup> Respondent and when they reported the same to the 1<sup>st</sup> Respondent’s Presiding officer nothing was done.*
12. *THAT my monitors were not given results sheet for the Parliamentary elections for reasons best known to the 1<sup>st</sup> Respondent’s agents.*
13. *THAT I understand that this sworn statement shall be used in these proceedings and that I may be guilty of perjury if I willfully make a false statement.”*

I have carefully gone through the Petition and the sworn statement in support thereof. The first question to consider is whether or not the Petition has been competently brought.

The Petition is headed/titled “**IN THE MATTER OF PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT (SECTIONS 100 AND 114(1))**”. Section 100 of the Parliamentary and Presidential Elections Act (Act) deals with election petitions in respect of election to the office of the President and it is worded as follows:

*“100 – (1) A complaint alleging undue return or undue election of a person 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 48 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 that election; or*
- (b) *alleging himself to have been a candidate at such election.*

(2) *In proceedings with respect to a petition under subsection (1), the Commission shall be joined as a respondent.*

(3) *If, on the hearing of a petition presented under subsection (1), the High Court makes an order declaring-*

(a) *that the President was duly elected, such election shall be and remain valid as if no petition had been presented against his election; or*

(b) *that the President was not duly elected, the Registrar of the High Court shall forthwith give notice of that fact to the Commission which shall publish a notice in the Gazette stating the effect of the order of the High Court.*

(4) *Pursuant to an order of the High Court under subsection 3(b) declaring that the President was not duly elected, a fresh election to the office of the President shall be held in accordance with this Act.*

(5) *A declaration by the High Court under subsection (2) (b) shall not invalidate anything done by the President before that declaration.” Emphasis by underlining supplied*

It is clear from a reading of section 100 of the Act that the provision has to do with election petitions in connection with election to the office of the President. It has nothing to do with election petitions in respect of election to the office of a Member of Parliament. The Petitioner did not contest in Presidential elections but in Parliamentary elections. In the premises, it is my holding that the provisions of section 100 of the Act are not applicable to the present case.

I next turn to consider section 114 of the Act. Section 114 of the Act falls within Chapter XI of the Act which Chapter deals with complaints and appeals. It is necessary that I quote Chapter XI of the Act in full:

*“PART XI – COMPLAINTS AND APPEALS*

*113. 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 effects thereof.*

*114. (1) An appeal shall lie to the High Court against a decision of the Commission confirming or rejecting the existence of an irregularity and such appeal shall be made by way of a petition, supported by affidavit of evidence, which shall clearly specify the declaration the High Court is being requested to make by Order.*

(2) *On hearing a petition under subsection (1), the High Court-*

(a) *shall subject to subsection 3, make such order or orders as it thinks fit;*

(b) *in its absolute discretion, may or may not condemn any party to pay cost in accordance with its own assessment of the merits of the complaint.*

(3) *An order of the High Court shall under subsection (2) not declare an election or the election of any candidate void except on the following grounds which are proved to the satisfaction of the court-*

(a) *that voters were corruptly influenced in their voting contrary to any provision of this Act; or had their ballot papers improperly rejected, or voted more than once;*

(b) *that persons not entitled to them were improperly granted ballot papers;*

(c) *that persons entitled to them were improperly refused ballot papers:*

*Provided that the court shall not declare an election void, after proof of any ground in paragraphs (a), (b) or (c), if it is satisfied that the number of votes involved could not have affected the result of the election;*

(d) *non-compliance with this Act in the conduct of the election:*

*Provided that, if the court is satisfied that any failure to comply with this Act did not affect the result of the election,*

*it shall not declare the election void; or*

(e) *that the candidate was at the time of his election a person not qualified for election or that he was not properly nominated, or that a duly qualified candidate had his nomination improperly rejected by the returning officer.*

(4) *The court shall have power to direct scrutiny and recount of votes if it is satisfied, during proceedings on an election petition, that such scrutiny and recount are desirable.*

(5) *At the conclusion of the trial of an election petition the court shall determine whether the member whose nomination or election is complained of, or any*

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*other and what person was duly nominated or elected, or whether the election was void, and shall report such determination to the Commission. Upon such report being given such determination shall be final.*” – Emphasis by underlining supplied

My understanding of the provisions of section 114(1) of the Act is that an appeal under that section lies within a very narrow circumscribed compass. It is not all decisions of the Commission that can be challenged under section 114(1) of the Act. The only appeals that can be entertained under this provision are those that challenge “*a decision of the Commission confirming or rejecting the existence of an irregularity*”.

In short, the provisions of section 114 of the Act come into play after a complaint, submitted under section 113 of the Act, “*alleging any irregularity at any stage, if not satisfactorily resolved at a lower level of authority,*” has been examined and decided on by the Commission. The non-exercise by the Commission of its duties under section 113 of the Act might be a subject of judicial review (See **The State v. Malawi Electoral Commission and the Attorney General ex parte Ellock Maotcha Banda, HC/ Zomba District Registry, Election Case No 13 of 2019, unreported**) but it is certainly not a matter for inquiry by way of an appeal under section 114 of the Act.

In the present case, I have read and re-read the Petition and the sworn statement in support thereof in search of “*a decision of the Commission confirming or rejecting the existence of an irregularity*” but my search has been in vain. In short, this Petition is not coming to this Court by way of an appeal against a decision of the Commission confirming or rejecting the existence of irregularities alleged by the Petitioner. In the premises, I find the Petition to be misconceived and it is, accordingly, dismissed.

Pronounced in Court this 13<sup>th</sup> day of June 2019 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda  
**JUDGE**