



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

ELECTION PETITION NO. 19 OF 2019

PROMISE SALIMA PETITIONER

and

ELECTORAL COMMISSION..... 1ST RESPONDENT

ANNA KACHIKHO 2ND RESPONDENT

Coram:

Hon. Justice R. Mbvundula

Kamfose, Counsel for the Petitioner

Nkhata & Fraser, Counsel for the 1st Respondent

Chimang'anga, Official Interpreter

JUDGMENT

Mbvundula, J

General background

The petitioner petitioned this court to make the following declarations under section 100 of the Parliamentary and Presidential Elections Act (PPEA):

1. That noncompliance, irregularities and improprieties in the May 2019 elections to the office of member of Parliament for Phalombe North Constituency were substantial, significant and that they affected the results thereof

2. That the failure by the 1st respondent to remedy the noncompliance, irregularities and improprieties in the conduct of the elections amounts to a gross and unjustifiable breach of section 76 of the Constitution. It is well to promptly state here what an irregularity is under the electoral law. It defined under section 3 of the Parliamentary and Presidential Elections Act (the PPEA) as follows:

“‘irregularity;’, in relation to the conduct of an election, means noncompliance with the requirements of this Act;”

3. 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 results of the election to member of Parliament
4. That Anna Kachikho was not validly declared as the member of the national assembly for the constituency and that the declaration is null and void
5. That there be a transparent, open and accountable recount or physical audit of the election process at the polling stations, constituencies and tally centres ... affected by the noncompliance, irregularities and improprieties in the May 2019
6. An order annulling the said election of the 2nd respondent
7. That costs of the petition be for the petitioner.

The petitioner was an independent candidate in the May 2019 parliamentary elections in Phalombe North Constituency. She brought the present petition under section 100 of the Parliamentary and Presidential Elections Act (PPEA). Following the conclusion of the elections the 1st respondent, the Electoral Commission, declared the 2nd respondent, Anna Kachikho, the winner in that constituency, which declaration the petitioner challenges, it being her claim that there is evidence of vote rigging and tampering and abject negligence in the conduct, control and administration in the said elections and that the 1st respondent failed to discharge its duties under section 75 of the Constitution.

The petitioner alleges the following as amounting to wrongs in the conduct, control and administration of the elections which amount to a gross and unjustifiable dereliction of its constitutional duty under section 76 of the Constitution to ensure that the elections were conducted in accordance with the Constitution, namely:

1. That there is overwhelming evidence that the 1st respondent was generally negligent and unfair in its control and administration of the election by failing to ensure that the relay of the results from polling stations was secure, accountable, accurate and verifiable.
2. That the 1st respondent permitted and condoned certain activities which materially affected the outcome of the election and proceeded to announce the results despite such activities even though through a letter dated 23rd May 2019 the petitioner had demanded that there be a recount of the votes of the 1st respondent under section 95 of the PPEA.

Following the announcement of the results the petitioner wrote the 1st respondent on 23rd May 2019 demanding that there be a recount of the votes as permitted under section 95 of the PPEA (exhibit PS2 to her sworn statement in support of the petition), and also on 27th May 2019 asking for a re-run (exhibit PS3). There were no responses to these letters. The petitioner has detailed what she terms “instances of negligence and gross unfairness” on the part of the 1st respondent, as relayed to her by her monitors, amounting to electoral irregularities and affecting the results in various polling stations. There are several sworn statements made by her representatives at various polling stations in that regard to support her case. It is the petitioner’s case that the following polling centres were affected by irregularities: Baani, Chitekesa, Malambwe, Dzanjo, Bona, Khongoloni and Chisengeleni. The following is a summary of allegations she makes against the respondents:

- i) presiding officers and the 2nd respondent’s representatives influencing some voters to vote for the 2nd respondent;
- ii) 2nd respondent’s monitors threatening the petitioner’s monitors for raising complaints;
- iii) 2nd respondent visiting polling stations during the voting day contrary to the code of conduct issued by the 1st respondent;
- iv) presiding officers neglecting to resolve complaints raised by petitioner’s monitors;
- v) failure by presiding officers to avail petitioner’s monitors with a record of results;
- vi) 2nd respondent declaring herself the winner of the elections before the official announcement of the results;

- vii) monitors being compelled to leave polling stations before ballot papers were collected to the tally centre.

Allegations with respect to activities at specific polling stations

The activities complained of are outlined according to the various polling centres in the constituency as follows:

Baani Polling Centre

It is alleged as follows in the petition:

1. That the presiding officer, Patricia Makumbi and Mr Gama who was the 2nd respondent's representative were, on the polling day, telling voters to vote for the 2nd respondent, Anna Kachikho, and even allowed one of Kachikho's monitors to help the voters, and that when the petitioner's monitors complained they received threats from Mr Phwitiko, who was the 2nd respondent's representative, thereby forcing the petitioner's monitors to stop complaining. The petition states that such activities occurred between 6.50 and 9.44 am.
2. That the 2nd respondent, visited the center around 9 pm, contrary to the law and the 1st respondent's instructions meant to ensure free and fair elections.

The petitioner was not herself present at the Baani polling centre but was represented by Innocent Mwandama who filed a sworn statement and appeared for cross-examination. He raised three complaints.

The first complaint was that presiding officers and Mr Phwitiko, a monitor for the 2nd respondent, were influencing voters, particularly elderly voters and those needing assistance, to vote for the 2nd respondent. He stated that he heard voters being advised to mark against the maize symbol, the symbol of the party the 2nd respondent represented, and that monitors were barred from observing the processes. It was Mr Mwandama's assertion, during cross-examination, that the number of voters affected by this malpractice was fairly large though he did not actually count them.

Mr Mwandama correctly conceded, during cross examination, that it was the duty of presiding officers and not monitors to assist voters, such as the elderly, who

required such assistance. That position is correct as being within the provisions of section 87 of PPEA but that responsibility does not extend to any candidate's representative. The section reads:

“87. -Voting by blind and disabled persons

A voter who is blind or is affected by disease or other physical disability may vote accompanied by another registered voter of his own choice or, failing such voter, by a polling station officer who shall assist such person in casting his vote and shall act faithfully to the wish expressed by such person and with absolute secrecy regarding the vote cast by such person.”

If, therefore, the 2nd respondent's monitor did as alleged, it was in violation of section 87 of the PPEA as the authority provided for under the section does not extend to candidates' or party representatives.

Concerning the results management and outcome, Mr Mwandama failed to substantiate the number of 500 voters allegedly influenced by the presiding officers and the 2nd respondent's monitor as his evidence showed that the stream which he was monitoring had only 344 registered voters. His explanation however was that he came up with the figure of 500 because he and his fellow monitors were sharing information, but his said fellow monitors gave no evidence in this court. Mr Mwandama's could only testify on matters he had first-hand knowledge.

The other matter alluded to by Mr Mwandama was that results from each stream were supposed to be recorded separately and then added together but that this was not done. It was his evidence that what happened was that they just learnt about the results from the blackboard with instructions to copy those figures. He stated that after counting was finished he signed for the results but was only given two sheets as well as Form 66 but without being given a chance to verify the results. At the close of cross-examination, however, Mr Mwandama seemed to concede that the results sheet reflected the correct result of the poll at Baani polling station apparently, however, as a result of the immediately preceding question about the correctness of the result. He had been asked to confirm if the results sheet had any

alteration, to which he said there were none. It was from that perspective that he was asked to confirm that the results were therefore correct.

An examination of what purports to be the results sheet for the centre put in evidence by both the petitioner and the 1st respondent's witness, Mr Rudi, the 1st respondent's employee, will show that it does not bear Mr Mwandama's name and/or signature, which seems to support his claim that he had no chance to verify the results and that he was not in agreement with them. But there is a further observation, being that the results sheet does not also bear the name and signature of the presiding officer. This has a bearing on the authenticity, credibility and validity of the said results, under the law.

Section 93 (1) (b) of the PPEA requires that at the close of the polling the presiding officer should prepare a brief summary of the final result, which s/he must shall be legibly signed by the presiding officer and each of the other polling station officers and, if any be present, at least one representative of each political party. Failure to do this is irregular. This is the position taken by the Supreme Court of Appeal in *Mutharika and another v Chakwera and another* MSCA Constitutional Appeal Case No 1 of 2020 (hereinafter to be referred to as "*the Mutharika appeal case*") at page 57 where the court stated:

"Similarly, use of tally sheets that were not signed by presiding officers was irregular. It was mandatory for presiding officers to validate the results sheets by their signature."

Further down the page the court went on to state:

"We, therefore, wish to reiterate our position above and agree with the Court below that the use of tippex, altered tally sheets, duplicate tally sheets, fake tally sheets, uncustomised tally sheets, reserve tally sheets and unsigned tally sheets amounted to an irregularity as defined in section 3 of the Act in that it did not comply with the dictates of the said Act."

Mr Mwandama raised a further point connected to the results management, namely that all monitors were forced to leave the polling centre soon after voting but before arrival of the vehicle that was to collect the ballot boxes. He did not however name who in particular did this. As will be noted below, however, this was not disputed.

In opposition was filed a sworn statement by Patricia Makumbi who introduced herself as having been the Assistant Presiding Officer at the centre. She stated that she was present during the whole voting process and that the proceedings were such that no monitor was allowed to talk to a voter except with the permission of the presiding officer, Mr Gama. Instead, she stated, when voters arrived at the centre they were met by ushers not representing any party who would direct them to a stream corresponding with their name. As such, so she stated, monitors did not come into contact with or talk to voters. This court here makes three observations. Firstly that the fact that monitors could not talk to voters except with the permission of the presiding officer means that monitors were not necessarily precluded from talking to voters. That statement seems to confirm that the presiding officer did allow some monitors to interact with voters. Secondly it is noted that the specific allegation that the 2nd respondent's monitor did advise voters to vote for a particular candidate is not been disputed by Ms Makumbi. She said nothing about it. Thirdly, the court observes, Ms Makumbi also stated nothing of the allegation that presiding officers were influencing voters to vote for the 2nd respondent, in effect, also, not disputing the allegation. The affect, at law, of not disputing an adverse, or indeed any, assertion made against a party is that that party admits the assertion. In this case, therefore, Ms Makumbi is deemed at law to admit that presiding officers and the 2nd respondent's monitor influenced voters to vote for the 2nd respondent, thus affecting the true choice of those voters and denying the petitioner and other candidates their potential votes.

Ms Makumbi disputed the claim that the 2nd respondent visited the polling centre in the evening. She stated that she did not see her "come to the centre at any time", because they were "seated inside classrooms counting the ballot papers such that the 2nd Respondent could not have come near." However, that she did not see her does not necessarily mean that the 2nd petitioner did not visit the centre. Finally Ms Makumbi stated that she not approached by any monitor representing any of the aspirants with a complaint about any of the voting, counting and verification process.

She speaks only of herself but such complaints could have been made to other polling officers and were more likely to be made to the presiding officer than herself, an assistant presiding officer. Therefore that she did not receive complaints does not rule out complaints.

The court's finding as regard Baani polling station is that

- a) to the extent that polling staff and the 2nd respondent's representative influenced voters to vote for the 2nd respondent, a fact not disputed, the poll was not free, fair and credible, the said practice being an irregularity affecting the outcome of the election;
- b) to the extent that the presiding officer did not sign the results sheet the purported results sheet fails to meet the requirements of section 93 (1) (b) of the PPEA and are, therefore, not authentic or credible and are, consequently, are invalid.

The result is that there was no valid return of the election from Baani polling station and that what purports to be such a return is null and void.

Chitekesa Polling Centre

The petition alleges

1. That the deputy head teacher helped voters to vote for the 2nd respondent. The petitioner's monitors, Kedson Mangoni and Gladys Maluwa complained but were not attended to until closure of the voting process.
2. That the petitioner's monitors were not given records of the result and this has remained the case.
3. The petitioner visited the centre at 10 pm contrary to the 1st respondent's direction.

The petitioner was, again not at the polling station, but was represented by Kedson Mangoni..

Mr Mangoni stated in his affidavit that as the voting started teachers (who were acting as polling officials) directed voters to vote for the 2nd respondent. He stated that he confronted these officials whereby they undertook not to continue, but after

an hour he noticed that they had resumed the behaviour and he complained to the head teacher but to no avail. He then reported this to his supervisor who said he would prepare a report.

Mr Mangoni stated further that during vote counting he noticed that the number of votes recorded was exceeding the number of ballot papers that were actually presented and that they tried to balance up without success. It was his case that one of the security officers suggested that the extra votes should be distributed amongst those who had few votes but even then the ballots did not balance.

After this, he stated, he was given a piece of paper which he was required to sign, the contents of which he could not comprehend. His expectation was that he would be given Form 66 but that was not the case. He stated that when he queried why he was asked to sign that piece of paper, which appeared different from Form 66, he was told to cooperate and not waste time. He stated that he reported the matter to Mr Alex Salima who was a monitor at the Constituency Tally Centre who said that he was going to look into the matter.

Another matter which concerned Mr Mangoni, according to his sworn statement, was that in the evening around 10 pm he saw the 2nd respondent's vehicle near the centre. He said he questioned the men who were in the vehicle why they were there who replied that they had come to give the 2nd petitioner's monitor a torch, and whilst he offered to deliver the same a security officer came over and questioned his authority, telling him that it was not his responsibility to ask questions. The security officer was then given the torch and a carton whose contents Mr Mangoni was not able to see, and after a few minutes the vehicle left. He stated that he was able to recognise the vehicle as belonging to the 2nd petitioner because it had been used extensively by her during the campaign period.

Mr Mangoni thus takes the position that the elections at that polling station were not free and fair as some of the officers as well as the 2nd respondent did not act in accordance with the rules.

Mr Mangoni appeared for cross-examination from which the following emerged therefrom.

He estimated that more than 500 votes were affected by the advice from presiding officers to vote for the 2nd respondent, and that he protested he did not fill a complaints form. He said further that he did not know the complaints procedure but knew that if there were issues they should be reported to the officers at the centre. He confirmed that at that centre petitioner got 302 whilst 2nd respondent got 802 and went on to state that out of the 802 for 2nd respondent he estimated that 500 were as a result of the advice given to them by the presiding officer although he could not substantiate them with figures or documents.

Regarding the fact that during vote counting the number of registered voters and the votes cast did not tally he said he could not remember at the trial the numbers but on the material day he did. Asked if everything he calculated was recorded in Form 66 his reply was that he did not see Form 66.

The witness was shown a copy of the results sheet for the centre and asked to note that it bore some signatures and his quick response was that his signature was not there. Mr Mangoni's position was that the signatories of the tally sheet had falsified the results. He also said that when the results form was being signed they had been told to leave the centre.

The 2nd respondent filed a sworn statement in response made by Professor Thokozani Nayopa who was the presiding officer at Chitekesa polling centre. He alluded to the following in his sworn statement: that each contestant was represented by monitors; that he did not receive any complaints from any of the monitors; that voters were received by ushers who directed them to their relevant stream; that voters with disabilities and those who were illiterate were assisted by their relatives or in their absence the polling officials "tried to assist them by telling them to thumb print or tick against a candidate and all this was done without getting close to the voting booth or telling them who to vote for...; that the 2nd respondent did not visit the centre at any time; that they "had Malawi Defence Force security officers who welcomed all visitors and could have reported to [him] or any observers if the 2nd Respondent was seen at the centre"; that after counting of votes all the monitors, independent observers and NGO representatives... and party representatives verified and signed for them; that some of the monitors left before the process was finalised for reasons best known to them; that the counting was done is a transparent

manner in that every aspirant's monitor was present at the counting of votes per stream; that he did not refuse to avail anyone a copy of the results; that he did not receive any complaint from either monitors or independent observers. He thus believes the petitioner's claim lacks merit as none of the alleged irregularities ever occurred.

Against the background that the sworn statement in opposition emphasises that the full participation of all monitors and observers in the voting process including the signing of the results sheet, and also the claim by Mr Mangoni that he never appended his signature to the results sheet and was instead of Form 66 given a strange piece of paper, this court considered it imperative to examine the results sheet for the centre and noted that Mr Mangoni's name, does not indeed appear on the results sheet. The court also noted that the results sheet does not also bear the name and signature of the presiding officer for the centre. The court, in the premises, forms the view that there is nothing to substantiate the return of the election at Chitekesa polling centre and that purported return is invalid for lack of the presiding officer's signature. As earlier pointed out the use of unsigned tally sheets amounts to an irregularity as defined in section 3 of the Act and violates section 93 (1) (b) which makes it imperative for the presiding officer to legibly sign the same. In effect, therefore, there is no valid return of results from that centre. However even if the return was valid it will be noted that Professor Thokozani Nayopa in his evidence does not disputed the following allegations made by Mr Mangoni:

- i) that the votes did not tally and that as a result a security officer proposed that the hanging votes be distributed amongst certain candidates. This was irregular firstly because every vote was supposed to be allocated in accordance with who it belonged to, and secondly because security officers have no role, under the law, in the tallying of votes;
- ii) that instead of Form 66 Mr Mangoni was given a strange piece of paper when he was entitled, as a candidate's representative, to be given a copy of Form 66;
- iii) that representatives were compelled to leave the polling station before the results were signed off, which tends to confirm Mr Mangoni's claim that he never saw Form 66.

In light of these irregularities this court forms the view and finds the purported return of results from Chitekesa polling station is invalid *in toto*.

Malambwe Polling Centre

The petition states:

1. That the 2nd respondent visited the centre at 8pm of 21st May 2019 and handed K60 000.00 to one of her monitors Mr Ishmael Rafik. The 2nd respondent is also said to have openly declared she was the winner of the election yet counting was still underway.

The petitioner's representative, Mr Gowelo, gave evidence.

He stated that during the day he saw the returning (presiding) officer at the centre, telling voters that they should mark against the maize, the symbol for the Democratic Progressive Party, whose parliamentary candidate was the 2nd petitioner. Mr Gowelo stated that in reaction monitors confronted the returning officer which led to suspension of the voting process, in order that the matter be resolved. This, he stated, led to the returning officer undertaking to discontinue the practice. It was Mr Gowelo's case, however, that notwithstanding the undertaking the returning officer continued to tell voters to mark against the maize symbol. Voting was suspended again and further discussions ensued during which the returning officer's conduct was denounced. Mr Gowelo further stated the returning officer also instructed his deputy to do the same and when the monitors complained they received threats, which forced them to just give in.

Mr Gowelo stated further that between the closing of the poll and commencement of vote counting the 2nd respondent came within 5 metres of the polling room (when the rules prescribed that no candidate should go within 100 metres of any polling centre). Mr Gowelo stated that when the 2nd respondent arrived, his monitor, Ishmail Rafiki, went to meet the 2nd respondent who gave him some money amounting to K60 000.00, according to what Rafiki said, and some food. Gowelo stated that before she handed over the money, the 2nd respondent was overhead declaring that she had won the election. This, according to Gowelo, was surprising since vote counting had not yet commenced. Mr Gowelo further stated that when he inquired from Rafiki

what the 2nd respondent meant by her statement Rafiki said he did not know what it meant.

In addition Mr Gowelo stated that after Rafiki parted with the 2nd respondent, the returning officer went to meet the 2nd respondent from whom the returning officer received an unascertained amount of money.

Finally Mr Gowelo stated that at the close of the vote counting he was only given two sheets but was not allowed by the presiding officer to sign the results sheet on the ground that they had already been signed and that the presiding officer also refused to give Mr Gowelo and other independent candidates' representatives copies of Form 66 so they left without such copies.

During cross-examination he reiterated that he heard the presiding officers telling voters to vote for the 2nd respondent but conceded it was impossible to tell how the voters actually voted and could not tell how many people actually followed the advice. He reaffirmed that the 2nd respondent visited the centre and that he actually saw her. He said he did not know why the 2nd respondent went to the centre but she did not interfere with the counting.

There was no evidence in opposition whether by way of a sworn statement or otherwise from the respondents concerning the polling at Malambwe polling station. In effect therefore Mr Gowelo's account of events narrated as amounting to irregularities goes unchallenged and must be accepted as true and admitted by the respondents. By way of summary they are:

- i) the returning officer and his deputy advising voters to vote for the 2nd respondent;
- ii) the 2nd respondent visiting the polling station and among other things giving the returning officer some money and declaring herself the winner even before counting of the votes had commenced; in the absence of an explanation as to why such payment was made to the returning officer, when that was not the candidate's responsibility, the most reasonable assumption would be that the 2nd respondent illegally sought to influence the returning officer with the money so he could help her secure a win;

- iii) refusal by the returning officer to provide the petitioner's representative with a copy of the results when he was entitled under to be given such – section 93 (2) of the PPEA;

In consequence this court finds that the poll at Malambwe was substantially affected by irregularities and cannot therefore be upheld.

Dzanjo polling centre

The petition states

1. Mr James Thawani who was the presiding officer, between 6 am and 11 am on the polling day, helped and told voters to vote for 2nd respondent. He only stopped after the intervention of the petitioner (who had been informed by her monitors, Mr H Rajab and Mr Mitengo) through the constituency CRO, Mr Makungwa who called him to desist from such behaviour.

In support is a sworn statement by Harrison Rajab who was the petitioner's representative at the centre. He stated therein that they stated work at 7 am and in the course of things he noted that the presiding officer, Mr James Thawani, was advising elderly voters to vote for the 2nd respondent and that he single-handedly assisted such voters, and excluded monitors from observing the process. Mr Rajab stated that at one point he followed the presiding officer as he was assisting an elderly lady and overheard the presiding officer telling her to vote for the 2nd respondent and when he questioned him his response was that Rajab had no powers to question the presiding officer.

Mr Rajab stated that he reported these issues to the District Commissioner (DC) by phone, who sent his representative to the centre, arriving some two hours later. A meeting was convened where the DC's representative advised that where there was need for a voter to be assisted all monitors should be allowed to witness what was happening. After this meeting he, stated, everything went well.

Mr Rajab stated further that as vote counting was underway at around 11 pm he saw the 2nd respondent's vehicle outside the centre. He stood to go outside to the vehicle in order to establish what was going on but he was stopped by the presiding officer

but he insisted on the basis that it was part of his duties to see what was going on. When he went to the vehicle, so he stated, he established that it was the 2nd respondent's vehicle and that the presiding officer had gone there and was talking to the 2nd respondent. He stated that he overheard the 2nd respondent asking the presiding officer if all things were in order, in response to which the presiding officer said he would try to do as much as he could. He stated that when the presiding officer noticed that Mr Rajab had been close by he expressed his displeasure and asked him to go back to the vote counting, warning him that if he was not careful he could be arrested, which forced him to apologise, for the sake of peace, so he stated. He went on to state that after narrating the events to his fellow monitors, they advised him to report the issue to a police officer but when he did so the police officer said since vote casting was over there was no problem.

Mr Rajab also stated that he noticed that some ballot boxes were already opened before the voting counting had started.

Finally Mr Rajab stated that due to the manner the matters proceeded he was reluctant to sign the results sheets but was scorned by the presiding and other polling staff and also threatened by a police officer for being a trouble maker, and as a result of fear he just signed the papers.

Pertaining to the same polling centre is the evidence of Mary Naphambo who served as a temporary monitor for the petitioner when Mr Rajab had gone to vote. In her sworn statement she also refers to incidents in which Mr Thawani was allegedly telling elderly voters to vote for the 2nd respondent. She stated that she got to know about this when one elderly voter disclosed that she had been asked to do so.

In opposition was the sworn statement of James Thawani, the presiding officer, wherein he stated, in regard to the voting process, that between 9 and 10 am he received a phone call from a Mr Makungwa that some monitors for the petitioner wanted to place themselves close to the polling booths in order to assist the people and for purposes of transparency, following which, he went to stop them. After some arguments, he stated, the monitors agreed that it was only the presiding officer who could get close to the polling booth, where necessary. After this, so he stated, there were no further issues. It is not clear from the sworn statement where Mr Thawani

was when he received the alleged phone call as he would, as the presiding would be at the polling station.

Mr Thawani further stated that there were no problems with the counting process and that the petitioner won on all the three streams and indeed at the centre. However, he stated, only four monitors signed whilst the others “kept saying they were tired and they had no problem with the ones who signed”. He concluded his statement by stating that in general the voting process went on well without any of the alleged irregularities such that it is his belief that the petition lacks merit.

The evidence Mr Thawani is completely silent on the allegations made by the petitioner’s witnesses, serious as they are. In summary, they are as follows:

- i) that voters were being told by the presiding officer, Mr Thawani himself, to vote for the 2nd respondent;
- ii) that the 2nd respondent visited the centre and met Mr Thawani, the presiding officer, who assured her that he would do with him and his assuring her that he would do his as much as he could, this, it is observed, contrary to his duty of neutrality in the conduct and management of the elections so as to ensure a free and fair outcome, and not being an agent of any contestant;
- iii) that ballot boxes had already been opened by the time vote counting was commencing; (in violation of section 92 (1) of the PPEA that ballot boxes must be opened in the presence of, among others, political party representatives, the basis, among others, being to ensure transparency and the integrity of the poll);
- iv) that Mr Rajab was intimidated and forced to sign the results sheet when he did not agree with them.

This court makes a further observation, and it is that the results sheet bears alterations. As earlier mentioned alterations of poll results according, to the Supreme Court of Appeal, decision earlier on cited is an irregularity and brings into question the credibility of the results.

All in all this court again finds that the poll at Dzanjo polling station was marred with serious irregularities and the return is declared invalid.

Bona Polling Centre

The petition alleges that

1. Mr Kalesi deputy head teacher helped voters to vote for the 2nd respondent between 6 am and 11 am which he stopped with the intervention of Messrs Joseph Mukhava and John.

Other than the above allegation and the petitioner's own sworn statement (who was not an eye witness) there was no evidence to support the claim on behalf of the petitioner.

On the part of the 1st respondent there are two sworn statements, one by Peter Kasenda and the other by Kissinger Kalesi each of whom claims to have been the presiding officer at the centre.

In his sworn statement by Peter Kasenda stated that he was the presiding officer at that centre and that he was present throughout the voting process. He stated further that from the beginning (6.10 am) he encouraged all monitors to work together and ensure transparency and accountability and openness. The centre, he stated, had three streams each of which had a monitor representing each of the contestants.

Further, he stated, he had never met any of the aspirants, and has not met them even after the election.

He went on to state that some monitors sought to assist voters who were "stuck" but this was stopped with the intervention of representatives of two Non-Governmental Organisations who were present. He stated further that during the voting process he was too busy supervising and coordinating the process such that it is not true that he could have had time to talk to voters or tell them who to vote for

Mr Kasenda went on to state that after the counting of votes but before transferring them to the constituency tally centre both the used and unused ballot boxes and papers were sealed in the presence of all monitors and because they did not have a vehicle they left the materials with a security officer. This, he stated, was after the results had been verified and signed for "by all the monitors although some of them did not sign ...out of their own will saying there were too many documents that

needed signing and they were tired”. He stated that all the monitors left with a copy of the results sheet.

Mr Kasenda concluded by stating that he verily believes that the petitioner’s claim lacks merit as the entire process at “Khongoloni (not *Bona*) Centre” happened smoothly without any of the alleged irregular activities.

In the sworn statement in opposition to the petition by Kissinger Kalesi, as earlier stated, also claimed to have been the presiding officer at Bona Centre.

He stated as did Kasenda that from the beginning (at 6 am not 6.10 am as Kasenda did) he encouraged all monitors to work together and ensure transparency and accountability and openness. The centre, he stated, had two and not three streams, as was in the evidence of Mr Kasenda, each of which had a monitor representing each of the contestants. He stated that most voters voted without any help. However when a voter needed assistance it was him who did so and in such cases, he stated, monitors would crowd at the voting booth but he explained to them that this was inappropriate and they stopped but were nonetheless able to follow what was going on. He stated that the only assistance he provided the voters was to advise them not to touch the ballot paper with the index finger because it had just been dipped in ink. He also stated that the voters he helped mostly thumb-printed.

Mr Kalesi went further stating that during the counting process they tallied all the results from the streams on a blackboard and recorded them onto the final results sheet for which all the monitors signed (c.f. what Kasenda said about some monitors not signing).

He then state that as they finished “calculating” the votes it was clear that the 2nd respondent had won at Bona centre and there were no complaints from any of the monitors or observers. He thus verily believes that the petition lacks merit as the process was free and fair without any of the alleged irregularities complained of.

The court wishes to make the following observation. Having examined the results sheet on the record neither Mr Kalesi nor Mr Kasenda appears to have been the presiding officer at Bona polling station, if the result sheet is anything to go by. The said results sheet records the name Tryness Makina as the presiding officer. Further, the results sheet for Bona polling station does not even reflect both Kasenda and

Kalesi as having participated in the poll at Bona. Their respective evidence must therefore be disregarded. However, since as earlier observed the record does not carry a sworn statement in support of the petitioner's claim regarding the poll at that centre this court makes no finding on the petitioner's claims relating to this polling station.

Khogolo Polling Centre

The petition alleges

2. Head teacher Mr Kasenda helped and told voters to vote for the 2nd respondent throughout the polling day. After counting the votes all monitors were asked to vacate the polling centre before the ballots were taken to the tally centre.
3. The 2nd respondent visited the centre at 11.55 pm.
4. What has been stated in paragraph 2 under Bona polling centre equally applies here.

However, no evidence (other than the sworn statement of the petitioner, who, as already noted, was not present at any centre) was brought to substantiate the allegations. Consequently this court dismisses the petitioner's claim in so far as this polling station is concerned.

Chisengeleni Polling Centre

It is stated in the petition that

1. Teachers Mr Wahiya and Mr Msapali between 6 am and 9 am told voters to vote for the 2nd defendant and when the petitioner's monitors noted this they reported to the presiding officer Mr Charles Musah who removed the teachers and replaced them with Mrs Khama. However Mr Kalepa continued to tell voters to vote for the 2nd respondent.

The sworn statement of Barnet Namanja was filed in support in which he stated that after voting had started, at around 9 am he noticed that a Mr Wahiya (who was a teacher at the school/presiding officer) was telling voters, especially those not able

to properly follow the procedures, to vote for the 2nd respondent. He stated that he also noticed another teacher doing the same around 12 noon and he reported the same to the head-teacher, Mr Mussa, who was the overseer at that moment, who warned against the malpractice but to no avail. Mr Namanja stated that he also noticed that even police officers were involved in assisting voters with their voting.

Mr Namanja stated further that at around 3 pm he saw the 2nd respondent's vehicle close to the centre, in violation of the rule that no contender should go within 100 metres of a polling station, and her monitors and police officers went to the vehicle.

Mr Namanja further stated that during vote counting a Mr Sapale would pick more than one vote and declare them in favour of the 2nd respondent without clearly showing that each vote was indeed for the 2nd respondent. He stated that he raised that issue with him and the representative of NICE agreed that that was improper and urged for transparency. And because he did not agree with how the process went he did not sign the result sheet. He stated that he reported these matters to the petitioner.

During cross-examination Mr Namanja would not agree with counsel's suggestion that Mr Wahiya was helping voters at the request of monitors. He said he did not count the number of voters assisted by the presiding officer but he estimated them to be around 800 because the activities occurred from morning to around 10 o'clock. He did not have figures of how many people voted at the centre. The results sheet showed that the petitioner got 283 votes and the 2nd respondent 853 votes. It was his view from the figures that the 2nd respondent was supposed to get only around 53 votes at that centre. The witness was quizzed as to whether voting was secret and would not give a straight answer for some while. In the end when asked if voters were accompanied into the polling booth he said that some were while others were not. Either way he said the numbers were many. He claimed that he could see whom the voters were voting for, and that all those accompanied voted for the 2nd respondent.

He further said that the voters were not accompanied by monitors but he could hear what was being said. It was his assertion that all voters who were accompanied into the booths voted for 2nd respondent because they were being told to do so. He

confirmed that the representative of NICE whom he said also noticed irregularities did sign the results sheet.

In re-examination the witness stated that the polling officers were showing voters the list of candidates and indicating Kachikho's name then he complained to Mr Wahiya who was later replaced by Ms Khama. He said in the afternoon another lady started to behave like Mr Wahiya and she too was criticised for that conduct. As to why he could not come up with the precise number of voters who were unduly influenced he said that it was because he did not take down the figures.

In opposition is a sworn statement of Mr Phunzo Sapali. The greater substance of his sworn statement is about the formal procedure which was followed from the beginning of the voting to closing, which was not in dispute. He however refers to the replacement of one clerk, Mrs Khama, with Mr Wahiya as not being a result of any irregularity but because Mrs Khama was slow in identifying voters and also that her voice was not loud enough. (Mr Namanja's evidence was that Mr Wahiya was replaced by Mrs Khama and not vice versa). Mr Sapali stated that this was done at the request of monitors.

Mr Sapali's evidence did not dispute the following allegations:

- i) that Mr Wahiya was telling voters to vote for the 2nd respondent; (Mr Wahiya did not himself give evidence.)
- ii) that police officers were involved in the management of the actual voting process, dealing directly with voters; (in terms of section 84 (4) of the PPEA the presence of members of the police service and the armed forces is for purpose only of keeping order; they are not therefor to be involved in the management of the poll as those functions are vested in polling station officers under section 68(1) of the Act)
- iii) that during vote counting, Mr Sapale himself manipulated the vote counting in favour of the 2nd respondent.

Concerning these undisputed allegations this court is once again guided by the principle that that which is not disputed or denied is deemed to be admitted.

In his sworn statement (paragraph 13) Mr Sapale claimed that all monitors were satisfied with the outcome of the vote and that as a result all monitors as well as the representative of N.I.C.E. signed the result sheet. An examination of the result sheet for the centre however clearly shows that only three monitors, one for the Democratic Progressive party and two for independent candidates signed the results sheet. The only other signature is that of the representative of N.I.C.E. The record shows that there were seven contestants. Mr Sapale's assertion that all monitors signed for the results and being evidence of their acceptance of the outcome is not supported by the contents of the results sheet itself. As a matter of fact one of those who did not sign is the petitioner's own representative and witness.

A final observation concerns the results sheet. It is observed that the same, as in the case in other polling stations, bears altered figures in several columns both in figures (three columns) and in words (one column). The court repeats what it stated earlier on concerning alteration of figures as to the credibility of the results.

All in all, in regard to Chisengeleni polling station, this court accepts the petitioner's claim that the process was affected by irregularities.

Evidence of the Petitioner's Roving Monitor

Mr Alex Sito's sworn statement shows that he was the petitioner's roving monitor and in exercising his functions he visited four polling centres namely Dzanjo, Mileme, Bona and Baani.

He narrated that when he reached Dzanjo he found out that polling had been suspended as it had been observed that polling staff and the 2nd respondent's monitor were escorting those in need of assistance which did not augur well with the monitors as they considered it an irregularity. This, he stated, was resolved by the 1st respondent's officials who visited the centre. As to Mileme Mr Sito stated that he encountered a similar situation as that at Dzanjo. The issue was equally resolved by the 1st respondent's officials.

Mr Sito further stated that at Bona he was told that the head-teacher and the 2nd respondent were the ones assisting people in need of help in that they were taking voters and showing them to vote for the 2nd respondent. He stated that at the time he

visited the situation had improved although there were sporadic irregularities in the nature of coaching voters to vote for the 2nd respondent.

At Baani, he stated, the PEA and the head-teacher were refusing to allow monitors to work and when he arrived the PEA attempted to stop him from accessing the centre but he managed to sneak in and meet the petitioner's monitors who were eventually allowed to do their work.

During cross-examination Mr Sito conceded that he did not personally witness the alleged incidences as he was only told since being a roving monitor. He said that when an issue arose at a polling centre the monitors there would call him in order for him to have the issues resolved. It was in his evidence that on that day he visited seven polling centres. At some point however he claimed that at Dzanjo he saw persons being directed on how vote, that he observed from a distance then he spoke to his monitors. He made similar claims concerning Baani where he said the fact that the petitioner's monitors were hindered from doing their work affected a lot of votes in that the presiding officer and the 2nd respondent's monitors were able to collude. He later, however, conceded that he did not quite follow what was going on at Baani. As to how many votes benefitted the 2nd respondent as a result of the alleged irregularities Mr Sito stated that he could not tell because he not there all the time as he was roving monitor, that he spent only 40 minutes there. It was clear from his evidence that he relied much on what the petitioner's monitors told him. His evidence could not meaningfully help the petitioner's case.

Petitioner's Representative at the Constituency Tally Centre

Mr Alex Salima was the petitioner's monitor stationed at the Constituency Tally Centre. He stated that on the polling day he received a call from Mr Kedson Khogoni, one of the petitioner's monitors complaining that at Chitekete polling centre the number of recorded voters was exceeded by the number of ballot papers actually presented and that he was not given Form 66 as required, which, he believes was not handed over to the petitioner.

Mr Salima further referred to the fact that after voting and results were being received at the Constituency Tally Centre results from Khongoloni centre which was about 100 metres away had not been delivered by the following morning. A team of

monitors, which included himself, went to find out what was the matter and when they got there they found officials still working on the figures. They were also told that they were having difficulty to balance the figures but the process continued and the results were delivered at the Constituency Tally centre around 8 am. He stated further that when the results were brought he was not given a chance to see the records as they were handed over directly to the presiding officer. It is Mr Salima's view that the foregoing compromised the manner in which the elections were supposed to be conducted as the same was contrary to the briefing earlier made by the 1st respondent prior to the elections. As such he believes that the elections were not free and fair.

During cross-examination Mr Salima claimed that everything he stated in his sworn statement was true but went on to admit that he was not present at any polling centre. He said he became involved in the polling activities around 10 am.

Regarding his claim that the number of voters at Chitekesa was exceeded by the number of votes and that the delay in the transmission of results therefrom meant that something fishy was going on he was referred to the results sheet for Chitekesa whose results were subject of the delay and asked if there were any alterations he confirmed there were none.

As to whether he knew if the petitioner's monitor was offered or not a copy of Form 66 he said he did not know. He further said that he wouldn't know what transpired at the polling centre unless he was told and, further, that he did not verify whether what he was told was true or not.

It was also Mr Salima's case that to him the fact that the officials were trying to balance the figures was an irregularity because results from centres further afield arrived earlier. He himself, he said, did not count the votes, and admitted that his assertions were mere speculation as he only suspected that something was fishy. He also said that he was only told that some monitors raised complaints with the 1st respondent but did not verify the truth of what he was told. In re-examination he said that he believed the delay was a result of manipulation of figures and because he found officials filling up papers and making calculations he suspected that something was fishy.

It observed that the evidence of Mr Salima was largely hearsay and/or conjecture and adds nothing of substance to the petitioner's case.

Evidence of the 1st respondent

No evidence was placed before the court on behalf of the 1st respondent.

Evidence for the 2nd respondent on the complaints handling by the Electoral Commission

The evidence for the 2nd respondent on complaints handling comprised a sworn statement by Mr King Norman Rudi, the 1st respondent's Regional Elections Officer (South), and his responses to cross-examination and re-examination.

In the sworn statement Mr Rudi stated that on 31st May 2019 the petitioner presented a complaint to the 1st respondent via email concerning the parliamentary elections in Phalombe North Constituency (Exhibit KNR 1, an email 31st May 2019). It will be recalled that the petitioner did also state this fact but stated that she submitted two emails Exhibits PS2 – same as KNR1 - and PS3 (not included in Mr Rudi's evidence).

Mr Rudi stated that "We" investigated the matter by interviewing presiding officers from the polling centres the petitioner alleged were marred with various irregularities and all the presiding officers, so he stated, made it clear that they did not receive any complaints about any of the alleged irregularities as the elections went on smoothly from start to finish with the involvement of monitors representing all aspiring candidates as well as security officers and other independent observers. He stated further that all the officers confirmed that the results were verified by all monitors and other observers before being sent to the main tally centre. Mr Rudi exhibited to his sworn statement copies of results sheets from for the centres the results of which the petitioner complains of showing, he stated, signatures of the various monitors for all the aspiring candidates (exhibits KNR 2a, KNR 2b, KNR 2c, KNR 2d, KNR 2e, KNR 2f, KNR 2g). Some of these are among the ones this court has already found not to have been signed by some of the petitioner's monitors or presiding officers.

It was Mr Rudi's expressed belief that from the investigations the elections in "Machinga East Constituency" (yes, he stated "*Machinga East* Constituency" - see paragraph 8 of the sworn statement) were free and fair without any of the alleged irregularities such that the petitioner's complaints were only being made because the petitioner lost in an otherwise fair process. So he prayed that the petition be dismissed with costs.

When asked, during cross-examination, if he was aware that the petitioner wrote two letters wherein she submitted two complaints one of which was that presiding officers were telling voters who to vote for Mr Rudi's reply was that he couldn't really recall.

As to whether he was aware that the people he interviewed were the ones the complaints were raised against Mr Rudi said he was not aware.

Mr Rudi confirmed that his sworn statement was not accompanied by a report of his investigations as part of the evidence and that the sworn statement did not mention who assisted him in his investigations, the dates when he carried out the investigations but only the fact that it was only presiding officers who were interviewed.

In regard to his statement that the results were verified by all monitors, which he quickly said was "very correct", he was asked to confirm that not all monitors signed the results sheets, but he refused to confirm. He was then taken through one result sheet after another and the following emerged from his responses:

- i) that at Malambo school only three signatures of party representatives appeared;
- ii) that at Dzanjo only four monitors signed the results sheet;
- iii) that at Chisengeleni only four monitors signed the result sheet;
- iv) that results from Chitekesa had no signature of the presiding officer;
- v) that results from Baani had no signature of the presiding officer;
- vi) that results from Dzanjo bore some alterations.

On being asked how many votes the petitioner got from the whole constituency Mr Rudi's reply was initially that he did not have the document with him and he did not know if he had exhibited that document. At the end of the day, however, he admitted that he did not know how many votes the petitioner got from the whole constituency.

To the question whether he interviewed a Mr Kasunda he said he could not recall. He also said he did not recall any name of the persons who were interviewed.

He said only presiding officers were interviewed because they were agent of the Electoral Commission charged with the responsibility to oversee the process and if anything they were supposed to know what was happening at the polling centre so "we won't go to anyone other than the MEC representative".

As to why he thought only his sworn statement sufficed he said it was because he "did the investigation and that the matter at the same time", whatever that meant.

The following emerged from re-examination of Mr Rudi.

Mr Rudi confirmed that it was mandatory for presiding officers to sign the results sheets, unless, he said, there was an explanation to the contrary. That signing by the presiding officer was part of verification of the result but he was of the view that failure by the presiding officer to sign for the results does not render the result invalid "unless otherwise, unless the EC..." He could not complete that statement and that was the close of re-examination.

If indeed Mr Rudi carried out any investigations into the petitioner's complaints he most probably purported to do so pursuant to section 113 of the PPEA where it is provided:

"Save as otherwise provided in this Act, any complaint submitted in writing alleging an 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 an irregularity is confirmed the Commission shall take necessary action to correct the irregularity."

The Supreme Court of Appeal in *Mutharika appeal case* held the complaints handling function of the Commission, being a quasi-judicial function, cannot be lawfully delegated. It stated (at page 66):

“Not all employees of the Commission, however, are authorised to handle complaints. If the designated officers have not satisfactorily handled or resolved the complaints, then the complaint will be handled by the Commission itself. There is no delegation of the authority to handle complaints. The complaint resolving committee created at the National tally Centre and the Chief Elections Officer, therefore, had no authority to deal with complaints.”

Sections 97 and 98 of the PPEA are also relevant to the complaints handling process. It is provided:

“97. Analysis of complaints, etc., prior to determination of the national result

At the beginning of determining the national result of a general election, the Commission shall take a decision on any matter which has been a subject of a complaint and shall examine the votes which have been classified as null and void and may affirm or correct the determination thereof at the polling stations and at the offices of District Commissioners but without prejudice to the right of appeal conferred under section 114.

98. Records of the national result of a general election

The Commission shall summarize its determination of the national result of a general election in a written record indicating—

- (a) ...*
- (b) the complaints and responses thereto and the decisions taken on them...”*

In considering the effect of these provisions and duties of the Commission the Supreme Court of Appeal in the *Mutharika appeal case* provided the following guidance, at page 61 of the judgment:

“Before determining the national results, the Commission must comply with section 97 of the Act. The Commission at the National Tally Centre is obliged to take a decision on any complaint registered in the electoral process from polling stations upwards.

...

In our examination of the judgment of the Court below, we find that the Court adequately dealt with the question of noncompliance with statutory requirements, namely, the nonresolution of all complaints before releasing the results, and on complaints handling. The record shows that the Commission did not comply with the requirements of the law on complaint handling. In some cases, the complaints were not resolved. In other cases, the complaints were not resolved to finality.”

In the case at hand it is observed that both the purported handling of the petitioner’s complaints by Mr Rudi or by anyone other than the Commission itself, and the failure in any event of producing a report of the decisions, if any, taken in respect of the said complaints were irremedial or incurable irregularities, they being violations of express statutory provisions.

This court wishes to further observe that it did not, in any event, appear to this court that any investigation of the petitioner’s complaints, worth that name, was carried out in this case. The act of interviewing presiding officers from the polling centres the petitioner alleged were marred with various irregularities cannot be said to be a sufficient inquiry into the conduct of the election. More had to be done. For example, the petitioner’s representatives ought also to have been interviewed. A record of the evidence of every witness interviewed should have had their evidence recorded in writing and kept. Similarly a record of the deliberations of the complaints ought also to have been kept. The same should have been placed before this court. These are but examples of what should have been done. Therefore apart from the fact that statutory requirements were not complied with there were also serious procedural shortfalls.

Mr Rudi does not in fact appear to have inquired into the petitioner’s complaints as his evidence was he inquired from the presiding officers *whether the petitioner’s*

representatives presented any complaints to the presiding officers when he should rather, by way of example, whether at Dzanjo polling station ballot boxes had already been opened by the time vote counting was commencing.

This court, then, comes to the conclusion that the 1st respondent failed to fulfil its duty to resolve the complaints raised by the petitioner regarding the poll in Phalombe North Constituency.

Finding

This court is satisfied from the evidence placed before it that the parliamentary election held in Phalombe North Constituency on 21st May 2019 was affected in various ways by irregularities as defined in section 3 of the Parliamentary and Presidential Elections Act.

Declarations

Having accepted and granted the petition this court declares as follows:

1. That noncompliance, irregularities and improprieties in the May 2019 elections to the office of member of Parliament for Phalombe North Constituency were substantial, significant and that they affected the results thereof
2. That the failure by the 1st respondent to remedy the noncompliance, irregularities and improprieties in the conduct of the elections amounts to a gross and unjustifiable breach of section 76 of the Constitution.
3. That Anna Kachikho was not validly declared as the member of the national assembly for the constituency and that the declaration is null and void
4. That the declaration of Anna Kachikho as the winner in the said election did not reflect the will of the people of Phalombe North Constituency and was not in accordance with the law and is therefore null and void.

Order on the merits

In consequence of the above findings this court makes an order annulling the said election of Anna Kachikho as the winner of the parliamentary election held in Phalombe North Constituency on 21st May 2019 and orders that a fresh election shall be held within 60 days of the date hereof.

Order for costs

Costs of the petition are granted to the petitioner.

Made at Blantyre this 22nd day of June 2020.

R Mbvundula
JUDGE