



THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CONSTITUTIONAL REFERENCE NO.1 OF 2019

BETWEEN

DR. SAULOS KLAUS CHILIMA.....1<sup>ST</sup> PETITIONER

DR. LAZARUS MCCARTHY

CHAKWERA.....2<sup>ND</sup> PETITIONER

- AND -

PROFESSOR ARTHUR PETER MUTHARIKA.....1<sup>ST</sup> RESPONDENT

ELECTORAL COMMISSION.....2<sup>ND</sup> RESPONDENT

MALAWI LAW SOCIETY.....1<sup>ST</sup> AMICUS CURIAE

WOMEN LAWYERS ASSOCIATION.....2<sup>ND</sup> AMICUS CURIAE

CORAM: HONOURABLE JUSTICE H. POTANI  
HONOURABLE JUSTICE I. KAMANGA  
HONOURABLE JUSTICE D. MADISE  
HONOURABLE JUSTICE M. TEMBO  
HONOURABLE JUSTICE R. KAPINDU

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**Mrs. Pindani, Court Reporter,**

**Mr. Mutinti, Court Reporter**

**Mrs. Nyalaya, Court Reporter**

**Mrs. Mboga, Court Reporter**

**Mr. Chitatu, Interpreter**

**Mr. Nkhwazi, Interpreter**

**Mr. Munkhondya, Interpreter**

**Mr. Mathanda, Interpreter**

**Mr. Matchaya, Interpreter**

## JUDGMENT

POTANI, J

### PART ONE

#### INTRODUCTION

1. At the outset, I wish to state that this judgement is a product of the collective deliberations and participation of all members of the panel.
2. On the 21<sup>st</sup> day of May, 2019, the people of Malawi went to the polls in Presidential, Parliamentary and Local Government elections (the tripartite elections) that were held throughout the country. Two of the candidates that contested in the Presidential elections, namely the Right Honourable Dr. Saulos Klaus Chilima and the Honourable Dr. Lazarus McCarthy Chakwera, being the 1<sup>st</sup> Petitioner and 2<sup>nd</sup> Petitioner in the present case respectively, have approached this Court seeking nullification of the results of the said presidential elections by the Electoral Commission. The Electoral Commission, which is the 2<sup>nd</sup> Respondent in the present case, on the evening of the 27<sup>th</sup> day of May, 2019, declared that His Excellency Professor Arthur Peter Mutharika, the 1<sup>st</sup> Respondent herein, had been duly elected President of the Republic of Malawi during those elections. The petitioners are aggrieved by the said declaration by the 2<sup>nd</sup> Respondent based on grounds that will be outlined later in the present judgment.
3. We wish to thank Counsel for both the Petitioners and the Respondents as well as Amicus Curiae for their great industry and dedication in arguing the present matter. Their arguments and submissions have been of much assistance to the Court in arriving at the present decision.
4. At the start of the proceedings, two bodies asked the Court to be admitted as amicus curiae. The first to apply was the Malawi Law Society (MLS) which is a statutory body tasked with, among other things, promoting the highest professional standards among legal practitioners and in legal practice<sup>1</sup> and also protecting matters of public interest touching on, ancillary or incidental to the law.<sup>2</sup> The second body to apply for admission as amicus curiae was the Women Lawyers Association (WLA) which is an independent Non-Governmental Organisation that comprises

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<sup>1</sup> Section 64(a) of the Legal Education and Legal Practitioners' Act, Act No. 38 of 2018.

<sup>2</sup> Ibid, at Section 64(d).

women lawyers from various disciplines, callings or vocations in the country. In its application for admission as *amicus curiae*, the WLA stated that it had noted that the majority of the people who voted in the 21<sup>st</sup> May, 2019 general elections were women and that it sought to highlight some of the gender aspects relating to the electoral dispute herein. The Court was satisfied that there was merit in both applications and admitted the MLS and WLA as *amicus curiae*.

5. At the outset we wish to emphasise what we said at the close of hearing of the case. We are aware that this is a matter that has attracted widespread public opinion and interest. However, what the Court has been focused on has been to analyse the law and the facts as the Constitution mandates us to do in section 9. We agree with the words of Chaskalson, J (President of the Court, as he then was) in the South African case of the *State v Makwanyane and another* [1995] 3 SA 391 (CC) where he stated that:

“Public opinion may have some reverence to the inquiry but by itself, is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication.”

6. Upfront, the Court wishes to point out that it is alive to the enormous importance and the unprecedented nature of the present proceedings and of this judgment in particular, to the nation. The constitutionality, legality and generally the validity of the presidential elections of the 21<sup>st</sup> day of May, 2019 is being impugned by the petitioners. The Court is mindful that this is the first time that the validity of presidential elections has been subjected to a full trial before the courts in this country. We are aware that in 1999, in the case of *Chakuamba and others v Attorney-General and others* [2000–2001] MLR 26 (SCA), there was a challenge of the presidential election results but the said challenge was premised on the interpretation to be ascribed to the meaning of the term “majority of the electorate” as provided for under section 80 (2) of the Constitution. The challenge did not relate to the conduct and management of the said election. The Court reckons that periodic and genuine elections are a key and indispensable element in ensuring the sustained trust of the governed in those who exercise the power of the State. The Court recognises that the right of everyone to take part in the government of his or her country is an essential element in the effective enjoyment by all of their human rights. Holding genuine and regular elections ensures that those exercising the power of the State remain electorally

accountable and, in turn, maintaining an accountable government is a necessary precondition to the nurturing of an effective scheme for the respect, protection, promotion and fulfilment of human rights.

7. The Constitution of the Republic of Malawi is very clear, under Section 12, that the authority of the State derives from the will of the people of Malawi,<sup>3</sup> that all persons responsible for the exercise of the powers of State do so on trust,<sup>4</sup> and that the authority to exercise State power is conditional upon the sustained trust of the people of Malawi.<sup>5</sup> The Constitution goes further to elucidate that such trust can only be maintained through open, accountable and transparent Government and informed democratic choice.<sup>6</sup> It is clear from the scheme of the Constitution that the expression of such democratic choice is what Section 6 of the Constitution envisages by providing that in Malawi, the authority to govern derives from the people of this country as expressed in elections held in accordance with the Constitution, and on the basis of universal and equal suffrage. Section 6 of the Constitution goes further to state that those elections must be conducted in a manner prescribed by an Act of Parliament.
8. Thus, genuine, credible, transparent, free and fair elections form the solid foundation for our pluralist democratic system.<sup>7</sup> Those vested with the duty to conduct such elections, therefore, have a sacred duty and responsibility to all the people of Malawi and, in various ways, the political, social and economic destiny of the country is predicated upon how they discharge such duties and responsibilities.
9. The Court is mindful that an electoral dispute, particularly one that deals with the national leadership of the country at the presidency level, is one that cannot be taken lightly and that it demands of all actors involved to act with the utmost diligence and scrupulousness. Like other courts have stated elsewhere, we wish to likewise quickly state that this Court stands “in admiration of the Constitution’s design to leave the selection of the President to the people...and

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<sup>3</sup> Section 12(1)(a) of the Constitution.

<sup>4</sup> Section 12(1)(b) of the Constitution.

<sup>5</sup> Section 12(1)(c) of the Constitution.

<sup>6</sup> Ibid.

<sup>7</sup> The pluralist character of Malawian democracy is evident from, among others, the provisions of Section 40(1)(a) of the Constitution; Section 40(2) of the Constitution; Section 65(2) of the Constitution; the proviso to Section 80(5) of the Constitution, and Section 32(3) of the Parliamentary and Presidential Elections Act (PPEA). Section 32(3) of the PPEA provides that: “A candidate may stand for election as a member of the National Assembly or for election to the office of President either on the sponsorship of a political party or as an independent candidate, and the rights and duties conferred by this Act on political parties shall apply, mutatis mutandis, to an independent candidate as it applies to political parties.”

to the political sphere". See *Bush et al. v. Gore et al.* 531 U.S. 98 (2000), at 111, *per curiam*. Thus, wherever possible, and ideally, elections to public political offices should squarely be determined at the polls, properly, fairly and transparently managed by the relevant electoral management body, being the 2<sup>nd</sup> Respondent in the present case, without recourse to the courts.

10. At the same time, the Court reckons that "[w]hen contending parties invoke the process of the courts...it becomes our unsought responsibility to resolve the...constitutional issues [that] the judicial system has been forced to confront." See *Bush et al. v. Gore et al.* (as above). The Constitution, under section 10 (1), prescribes that in the interpretation of all laws and in the resolution of political disputes, the provisions of the Constitution must be regarded as the supreme arbiter and the ultimate source of authority.
11. The Judiciary, in this country's scheme of the separation of powers as envisaged in Chapter I of the Constitution, has, under Section 9, the responsibility to interpret, protect and enforce the Constitution and all laws in accordance with the Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law. It is therefore ultimately the duty of the courts to ensure, when properly approached, that political disputes are resolved fairly and expeditiously with the Constitution as the supreme arbiter and the ultimate source of authority.
12. Having said that, the Court is also aware that the task of managing and administering an election, particularly a national election, is a highly involving one that requires substantial preparation time and resources both on the part of the Commission as well as the contesting candidates. Running a successful national election does not come cheap. In other words, the implication of this is that meaningful participatory democracy comes at a substantial national cost. This is a factor which the Court bears in mind as it approaches an electoral challenge such as the instant one. At the same time, the Court also holds the clear view that the costly nature of managing and administering a national election underscores the need for the electoral management body to ensure that it fulfils its duties, functions and responsibilities with meticulous care and attention.
13. In Malawi, the body that has been tasked with the duty, function and responsibility of managing and administering elections is the Electoral Commission, as established under Chapter VII, section 75(1) of the Constitution. The section provides that:

“There shall be an Electoral Commission which shall consist of a Chairman who shall be a Judge nominated in that behalf by the Judicial Service Commission and such other members, not being less than six, as may be appointed in accordance with an Act of Parliament.”

14. Section 76 of the Constitution proceeds to define the powers and functions of the Commission. In its relevant parts for purposes of these proceedings, it provides that:

“(1) The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament.

(2) The duties and functions of the Electoral Commission shall include—

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(c) to determine electoral petitions and complaints related to the conduct of any elections;

(d) to ensure compliance with the provisions of this Constitution and any Act of Parliament; and

(e) to perform such other functions as may be prescribed by this Constitution or an Act of Parliament.

(4) The Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by other authority or any person.”

15. Further to section 76 of the Constitution, a more expansive catalogue of the powers and functions of the Commission is provided for under section 8 of the Electoral Commission Act (ECA). The relevant provisions of section 8 for purposes of the present proceedings are in the following terms:

“(1) In addition to the broad functions and powers conferred on the Commission by the Constitution and, subject to the Constitution, the Commission shall exercise general direction and supervision over the



conduct of every election and, without prejudice to the generality of such functions and powers, it shall have the following further functions—

- (d) to organize and direct the registration of voters;
- (e) to devise and establish voters registers and ballot papers;
- (f) to print, distribute and take charge of ballot papers and voters registers;
- (g) to approve and procure ballot boxes;
- (h) to establish and operate polling stations;
- (i) to establish security conditions necessary for the conduct of every election in accordance with any written law governing elections;
- (j) to promote public awareness of electoral matters through the media and other appropriate and effective means and to conduct civic and voter education on such matters;
- (k) to promote and conduct research into electoral matters and into any matter pertaining to its functions and to publish the results of such research;
- (l) to perform the functions conferred upon it by or under any written law; and
- (m) to take measures and to do such other things as are necessary for conducting free and fair elections.”

16. A key statute in relation to the discharge of the functions, duties and responsibilities of the Commission is the Presidential and Parliamentary Elections Act (PPEA) which makes provision for the conduct of elections for the election of Members of Parliament and the President. Thus the implementation by the 2<sup>nd</sup> Respondent of the provisions of the PPEA must be viewed through the prism and in the context of these constitutional and statutory provisions.

17. In the present proceedings, the Petitioners filed petitions challenging the declaration by the 2<sup>nd</sup> Respondent of Professor Arthur Peter Mutharika as the duly elected President of Malawi after the elections of the 21<sup>st</sup> of May, 2019. The 1<sup>st</sup> Petitioner filed his petition on the 31<sup>st</sup> of May, 2019. This matter was filed as Electoral Case No. 16 of 2019 and it was initially assigned to the

Honourable Justice Ruth Chinangwa. The 2<sup>nd</sup> Petitioner filed his petition on the 3<sup>rd</sup> of June, 2019 as Electoral Case No. 26 of 2019 and came before the Honourable Justice MCC Mkandawire. Both petitions were filed under Section 100 of the PPEA which provides that:

“100.— (1) 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 seven days, 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 respondent.

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

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

(b) that the member of the National Assembly or the President, as the case may be, 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 member of the National Assembly or the President, as the case may be, was not duly elected, a fresh election for the seat of the member of the National Assembly or to the office of President, as the case may be, shall be held in accordance with this Act.

(5) A declaration by the High Court under subsection (3) (b) shall not invalidate anything done by the President before that declaration.”

18. By an Order dated the 4<sup>th</sup> of June, 2019, Hon. Justice Mkandawire, observed that the two matters were similar; that they related to a common question of law; that they arose out of the same transaction and that there was no good and sufficient reason for the two cases to continue

separately. He therefore made an Order in terms of Order 6 rule 9 of the Courts (High Court) (Civil Procedure) Rules, 2017 (CPR, 2017) that the two matters be consolidated. Pursuant to the terms of the said Order 6 rule 9 of the CPR, 2017, the effect of the consolidation Order herein was that the two claims were merged into one proceeding. This is in sharp contrast with a consolidation Order made under Order 6 rule 11 of the CPR, 2017 which entails that two separate proceedings remain separate but are heard together.<sup>8</sup> The two petitions are hence dealt with jointly rather than severally in the present case. This disposes of the issue that lingered among the parties in their written submissions as well as during the hearing of oral submissions on the effect of Justice Mkandawire's order of consolidation.

19. Further to making an order of consolidation, Honourable Justice Mkandawire was also satisfied that the two matters, as consolidated, were constitutional in nature and that they therefore required the attention of the Honourable the Chief Justice for purposes of certification in terms of section 9(3) of the Courts Act (Cap 3:02) of the Laws of Malawi.

20. The learned Judge proceeded to complete Form 20 under the CPR, 2017 wherein he detailed the constitutional issues that, in his view, the said proceedings implicated. He captured the issues as follows:

- (a) Whether the [2<sup>nd</sup>] Respondent breached its duty under Section 76 of the Constitution of the Republic of Malawi;
- (b) Whether the [2<sup>nd</sup>] Respondent breached its duty under Section 77 of the Constitution of the Republic of Malawi; and,
- (c) Whether the [2<sup>nd</sup>] Respondent infringed on the Petitioners' and the citizen's political rights under Section 40 of the Constitution of the Republic of Malawi.

21. By an instrument under Form 16 of the CPR, 2017, made under his hand and duly sealed by the Court, the Honourable the Chief Justice, on the 5<sup>th</sup> of June, 2019 duly certified the consolidated matter as a constitutional one and the same was assigned as High Court of Malawi Constitutional Reference No. 1 of 2019. Pursuant to that Order, the five Judges sitting herein were empanelled

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<sup>8</sup> Under Order 6 Rule 11 of the CPR, 2017, the Court may, on its own motion or on an application by a party, order that several proceedings be heard together where – (a) the same question is involved in each proceedings; (b) the decision in one proceeding will affect the other; or (c) there is no good and sufficient reason for the proceedings to be heard separately.

to hear and determine the constitutional questions, and generally to dispose of the matter in its entirety as required under Section 9(2) of the Courts Act.

22. The three constitutional questions above are therefore central in the determination of the present matter.

23. In addition to determining the constitutional questions, the Court is also called upon to determine and dispose of all other issues raised in the petitions.

## **PART TWO**

### **ISSUES IN THE PETITIONS OR RAISED BY THE PETITIONERS OR THE RESPONDENTS FOR DETERMINATION**

24. In the course of presenting their legal arguments, the parties herein raised the following preliminary issues for determination:

24.1 Whether the Court should deal only with issues that were specifically and explicitly pleaded in the petitions;

24.2 Whether the Respondents were bound to specifically file responses to the petitions in addition to filing sworn statements in response to the petitions;

24.3 What is the standard of proof in the determination of electoral petitions filed under Section 100 of the PPEA?

24.4 Whether, in the determination of electoral petitions under Section 100 of the PPEA the Court applies a quantitative test, a qualitative test, or both;

24.5 What is the effect of the use of the following terms: (a) undue election, (b) undue return, (c) any other cause whatsoever as provided for under section 100 of the PPEA; in the present proceedings?

25. The following issues were raised in the Petitions:

25.1 Whether, in the presidential elections of the 21<sup>st</sup> of May, 2019, the count, audit, transmission, tallying, aggregation of results was replete with:

- (a) intimidation;
- (b) bribing monitors;
- (c) presiding officers and other polling staff influencing voters;
- (d) presiding officers and other staff of the 2<sup>nd</sup> Respondent tampering with tally sheets to alter the result of the vote at a particular polling station or tally centre;
- (e) unauthorized persons being found with ballot papers and ballot boxes;
- (f) *arrest of persons at various places for offences relating to breach of the country's electoral law;*
- (g) failure to deliver the ballot papers under conditions of absolute security.

25.2 Whether the 21<sup>st</sup> of May, 2019 presidential elections were generally marred by blatant and a plethora of irregularities in all the 28 districts of the country.

25.3 Whether the 2<sup>nd</sup> Respondent failed to conduct the electoral process in accordance with the Constitution and electoral laws in that:

- (a) it used duplicate tally sheets as a primary record of the votes polled instead of original tally sheets without plausible justification and in breach of its own procedures as well as international accounting standards;
- (b) it accepted the use of tally sheets defaced with a substance known as tippex as a record of the polled votes in place of the original results tally sheets with no tippex on them without plausible justification and in disregard of acceptable set standards and international accounting standards;
- (c) it accepted the use of results recorded on fake tally sheets without paying any particular regard to such anomalies as signatures of election monitors, barcodes and centre numbers.

- (d) it altered, varied and transmitted results as submitted in clear disregard of the altered figures recorded on the results tally sheets;
- (e) it failed to detect alterations and variations in terms of the votes recorded in the system and the corresponding results tally sheets, or that it did not mind the same;
- (f) it disregarded or transferred missing votes into null and void votes without any verification whatsoever as to which presidential candidate the votes belonged to;
- (g) it adopted, accepted and used results from a stream as representing the total results for a polling centre;
- (h) it accepted and used results tally sheets from centres where the total number of votes cast exceeded the total number of registered voters;
- (i) it accepted and used results tally sheets from centres where the total number of the votes of the candidates was not balancing with the total number of the valid votes cast;
- (j) it accepted and used results tally sheets from centres where the total sum of used and unused ballot papers was lower than the ballot papers issued;
- (k) it delayed in transmitting results from particular areas in Salima, Dowa, Mchinji and Lilongwe and uploading the same after alterations.
- (l) it announced the final Presidential Election results before results from some Polling Centres, particularly from the Central Region, had been uploaded into its system;
- (m) it did not observe processes set by law, for example, by allowing delivery of ballot papers and other election materials without security contrary to the requirements of the law, which demands that such material should be delivered under conditions of absolute security against loss, tampering or interference;

- (n) its Presiding Officers failed to prepare a brief summary of the final result Record of the polling process and to furnish a copy of the duly signed summary of the final result at each polling station to each political party representative as provided for in the PPEA;

25.4 Whether, further to the above enumerated irregularities, the conduct of the 2<sup>nd</sup> Respondent in managing the elections was utterly unjust and unconscionable on account that:

- (a) the 2<sup>nd</sup> Respondent's presiding officer for Mpatasa Tally Centre in Nsanje District was caught with three ballot boxes stuffed with already marked ballots in favour of the 1<sup>st</sup> Respondent and whether he was arrested by Police in this regard;
- (b) the 2<sup>nd</sup> Respondent's Chief Returning Officer for Nsanje Central Constituency, Mr Fred N Thomas, was on 23<sup>rd</sup> May 2019 found tampering with Results Sheets, and this was still within the period for transmission of results;
- (c) the 2<sup>nd</sup> Respondent's presiding officers at some of the polling centres refused to furnish the Petitioner's monitors with copies of the tally sheets contrary to the 2<sup>nd</sup> Respondent's Polling Station Voting Procedure Manual, and Results Management System Processes outlined by the 2<sup>nd</sup> Respondent;
- (d) the 2<sup>nd</sup> Respondent proceeded to announce the contaminated results without taking heed to appreciate the genuineness and the validity of the said results;
- (e) the 2<sup>nd</sup> Respondent proceeded to announce the said results without conducting a thorough audit and verification of the results and in disregard of the several complaints lodged by the 2<sup>nd</sup> Petitioner through Malawi Congress Party.

25.5 Whether the 2<sup>nd</sup> Respondent committed the following wrongs in the conduct, control and administration of the elections which amounted to a gross and unjustifiable dereliction of its constitutional duty under section 76 of the Constitution to ensure that the elections were carried out in accordance with the provisions of the Constitution, the ECA and the PPEA:

- (a) Being generally negligent in its control and administration of the elections by failing to electronically collate, tally and transmit results accurately as required by law; failing to ensure that the relay of results from the polling stations was secure, accountable, accurate and verifiable; and failing to ensure that the result sheets were originals signed by the candidates' agents or monitors and if not that they indicated the reason for refusal to sign.
- (b) There has been massive tampering and irregularities in connection with the recording, counting, transmission and tabulation of votes during the said election which the 2<sup>nd</sup> Respondent was aware or ought to have been aware of if it had exercised reasonable care and professional diligence commensurate with its constitutional and statutory powers and duties. Despite the existence of the said tampering, the 2<sup>nd</sup> Respondent went ahead to announce the results of the elections, including that the 1<sup>st</sup> Respondent had been duly re-elected into the position of the President of the Republic of Malawi, without holding any or any sufficient audit to verify the election results.
- (c) The 2<sup>nd</sup> Respondent has acted and omitted to act in a manner which grossly and unjustifiably infringes on the 2<sup>nd</sup> Petitioner's and the citizens' political rights under Section 40 of the Constitution and breaches the 2<sup>nd</sup> Respondent's constitutional duties under Sections 76 and 77 of the Constitution;
- (d) Further instead of responding to the said 2<sup>nd</sup> Petitioner's complaints and before addressing the problems highlighted by the 2<sup>nd</sup> Petitioner and without waiting for the remaining results from polling centres whose results had not yet been uploaded into its system, the 2<sup>nd</sup> Respondent proceeded to announce the final Presidential results;
- (e) the 2<sup>nd</sup> Respondent declared the 1st Respondent as duly elected President of the Republic of Malawi with 1,940,709 votes representing 38.57% of the votes cast while the 2<sup>nd</sup> Petitioner was declared to have polled 1,781,740 votes representing 35.41% of the total votes cast;



(f) The 2<sup>nd</sup> Respondent failed and neglected to act with due diligence in the control, management and administration of the 21<sup>st</sup> May, 2019 elections and failed to properly respond to the written communication urging it to address the complaints lodged and conduct an audit of the election which amounted to biased conduct and gross and unjustifiable dereliction of its constitutional duties under Sections 76 and 77 of the Constitution;

(g) All in all, the 2<sup>nd</sup> Respondent showed great bias for the 1<sup>st</sup> Respondent and against the 2<sup>nd</sup> Petitioner thereby failing in its duty to act impartially as its position requires in the administration and management of an election.

25.6 Whether, from an analysis of results from 78 constituencies as at the date of filing the 2<sup>nd</sup> Petitioner's petition, the irregularities mentioned herein affected in excess of 1,412, 105 votes as follows:

(a) duplicate tally sheets in excess of	523
(b) tippexed tally sheets in excess of	176
(c) counterfeit or fake tally sheets in excess of	70
(d) tally sheets altered in excess of	634

25.7 Whether from the time that the 2<sup>nd</sup> Petitioner was seen to be leading, votes that were cast for him were not being added to the tally of votes by officers of the 2<sup>nd</sup> Respondent; and that the effect of this was that his total result was not rising significantly whilst that of the 1<sup>st</sup> Respondent, who was lagging behind, was rising.

25.8 Whether the 1<sup>st</sup> Respondent could not have been declared as duly elected as President had the 2<sup>nd</sup> Respondent acted with due diligence in the control, management and administration of the said elections.

25.9 Whether the 2<sup>nd</sup> Respondent was in fact party to the rigging or tampering with the results of the election in that it acquiesced in the acts of its employees, servants or agents of altering and tippexing results recorded on tally sheets by accepting them as official results;

25.10 Whether the 2<sup>nd</sup> Respondent unduly and unlawfully declared the 1<sup>st</sup> Respondent as having been elected as President notwithstanding that results from some Polling Centres in the Central Region including results from Lilongwe South Constituency had not yet been tallied.

### *RELIEFS SOUGHT*

26. The Petitioners herein seek the following reliefs:

25.1 Declaration that the election was null and void *ab initio*;

25.2 Declaration that the failure by the 2<sup>nd</sup> Respondent to remedy the noncompliance, irregularities and improprieties in the conduct of the election amounts to a grave violation of sections 76, 77 and 40 of the Constitution;

25.3 A declaration that the 1<sup>st</sup> Respondent was not duly elected President as he did not obtain a true majority of the votes polled;

25.4 A consequential order for a fresh election;

25.5 Any other order that the court may deem fit and just;

25.6 An order for costs.

## **PART THREE**

### **SUMMARY OF THE ELECTORAL PROCESS UNDER PPEA**

27. For a start, and in order to give proper context for the evidential and legal analyses that follow in the present judgement, it is imperative that we highlight how the PPEA envisages the polling process from the point where polling materials are supplied to the polling stations up to the point of determination of the results. The Court opines that this is a proper starting point in view of the fact that other prior issues, such as those concerning campaigning and registration of voters which

had been raised in the 2<sup>nd</sup> Petitioner's petition were eventually relegated by the 2<sup>nd</sup> Petitioner himself to the status of mere background material and not issues for determination.

28. Part VI of the PPEA deals with polling stations and we highlight some of the important provisions relating to the electoral process for purposes of the present case.

29. Section 68(1) of the PPEA provides that:

“The Commission shall appoint polling station officers in its service whose duty shall be to administer the proceedings at polling stations, including more particularly the casting of votes, and to count the votes cast at polling stations.”

30. This provision clearly demonstrates that the primary duty to administer proceedings at the polling station lies with the 2<sup>nd</sup> Respondent's polling station officers as led by the polling station presiding officer.

31. In administering an election, section 70 of the PPEA outlines the necessary items that the 2<sup>nd</sup> Respondent is mandated to supply to the polling station. The section enjoins the Commission to ensure, in due time, that polling station officers at every polling station are supplied with the following necessary items:

“(a) an authenticated copy of the voters register of the voters registered at the centre served by the polling station;  
(b) the ballot papers and accompanying envelopes for use by voters in casting their votes;  
(c) the ballot boxes;  
(d) the seals, sealing wax and envelopes for the votes;  
(e) indelible ink;  
(f) record sheets for the record required under section 93;  
(g) a lamp or lamps to be lit and used for counting votes at the close of the poll;  
(h) a log book in which formal complaints under section 89 shall be recorded.”

32. It is apparent from a reading of section 70(f) and 70(h) that this provision envisages that the logbook is different from the record required under section 93.

33. Political parties or candidates are guaranteed the right to monitor the voting process at the polling station through designated representatives. This right is clear from Section 72 of the PPEA. Thus every political party that contested in the presidential elections had a right under section 72 of the PPEA to monitor the said election through duly designated political party representatives (hereafter referred to as monitors). It is evident from this provision that it is not mandatory that a political party or candidate must have a monitor or monitors at any given polling centre.

34. Section 73 of the PPEA then outlines the rights and duties of political party/candidate representatives. It provides that representatives of political parties have:

“(a) the following rights –

(i) to be present at the polling stations and to occupy the nearest seats or positions to the polling station officers so as to be able to monitor all the operations relating to the casting and counting of votes;

(ii) to verify and inspect, before the beginning of the casting of the votes, the ballot boxes and the polling booths;

(iii) to request and obtain from the polling station officers any information which they consider necessary relating to the voting process and the counting of the votes;

(iv) to be consulted about any question raised on the operation of the polling station whether during the casting or the counting of the votes;

(v) to consult the voters registers at any time;

(b) the following duties—

(i) to act conscientiously and objectively in the exercise of their rights under this section;

(ii) to co-operate with polling station officers in the operations relating to the casting and counting of votes;

(iii) to refrain from interfering unjustifiably and in bad faith with the duties of the polling station officers so as not to disturb the process of casting and counting the votes;

(iv) to maintain the secrecy of the ballot.”

35. Of particular interest, as shall become evident in the course of the present judgment, is the right under section 73(a)(iv) of the PPEA, that is to say, the right to be consulted about any question raised on the operation of the polling station whether during the casting or the counting of the votes.
36. Part VII of the PPEA addresses issues concerning the vote and the voting process. Section 74 of the Act cements the fundamental democratic and electoral law principle of one person one vote. Again, the Court shall revert to this fundamental principle in the course of the present judgment.
37. Section 75 (1) of the PPEA again prescribes another important rule, namely that, as a general rule, a person (a registered voter) is allowed to exercise his or her right to vote at a polling station located at the registration centre where he or she was registered. However, section 75 (2) of the Act prescribes a qualification to this rule by stating that if it is not possible for a person to vote at a polling station located at the registration centre where that person is registered, the registration officer of that centre or other duly authorized officer may, on the request of such person, grant such person written authorization in the prescribed form to vote at a polling station located in the place where he or she will be present on the polling day and, in that case, the polling station officers at such other polling station must record, in the manner prescribed by the Commission’s instructions in writing such person’s name, the number of his or her voter’s registration certificate and the place of his registration.
38. Section 75 concludes with a rider in the proviso thereof which provides that the registration officer or other authorized officer may at his or her sole discretion refuse to grant the request for transfer.
39. Again we shall revert to this provision, in its context, as we deal with the issue of excess or missing votes or ballots in the present proceedings.
40. Section 86(4) of the PPEA provides that voters are to cast their votes in a manner determined by the Commission. However, it is significant to note that the PPEA specifically defines what votes are to be classified as null and void votes. According to Section 88 of the PPEA:

“(1) A vote cast is null and void if—

- (a) the ballot paper has been torn into two or more parts; or
  - (b) has been classified as such pursuant to section 83 (2) (c).
- (2) A null and void vote shall not be regarded as valid and shall not be counted in determining the results of the elections.”

41. For clarity, the said section 83 (2)(c) provides that:

“Where voting has been adjourned to another day under subsection (1) the votes cast on the original day shall be null and void and shall be classified as such in the records of that polling station prepared under section 93.”

42. The statutory definition of the “null and void” vote is to be contrasted with the definition of the same in the Tripartite Elections Polling Station Procedures Manual (hereafter referred to as the Polling Manual) which provides, under Part 17.1, that:

**“17.1 Null and void ballot papers [s.88 PPE and s.72 LGE]**

The Presiding Officer or Assistant Presiding Officer shall reject any ballot paper that:

- a) Does not have the Polling Station Officer’s initials on the back of it AND is not otherwise satisfied that the ballot paper is genuine;
- b) Has any writing or mark by which the voter can be identified;
- c) The voter has voted for more than one candidate;
- d) Has not been marked for any candidate;
- e) Has any name or signature that will identify the voter.”

43. The language used in the polling manual is rather hazy. It speaks of both “rejected ballots” and null and void ballot papers. The language of “rejected ballots” is used both in the text of Part 17.1 and Part 19.3 of the Polling Manual which is Appendix 4 to the said manual. However, the heading under part 17.1 of the Polling Manual is headed “Null and Void Ballot Papers”. What clearly emerges is that the Commission expanded the statutory definition of “null and void” votes. This is so because the only other possible classification to which “rejected ballots” could have applied is “spoilt ballots”, but a spoilt ballot is specifically defined under the Manual under Part 1 (Glossary of Polling Terms), as follows:

“A ballot paper that has a mistake on it made by a voter before it is placed in the ballot box. The Polling Station Officer may issue a replacement ballot paper. The spoiled ballot paper must be retained for accounting purposes.”

44. *The Commission ought to have strictly applied the statutory definition of null and void votes and then extended the other forms of “rejected ballots” to the “spoilt ballots” category in the definition provided for under the Polling Procedures Manual. The Court makes this observation in view of the fact that the issue of “null and void” votes or ballots has featured quite prominently in the present proceedings. The understanding of the same should have been on the basis of statutory clarity.*
45. *Section 89 (1) of the PPEA confers legal standing to raise doubts and make complaints relating to the voting on representatives of political parties (or candidates) as well as any voter present at the polling station. Section 89 (2) of the Act then confers a correlative duty on the part of any polling station officer not to refuse to receive a complaint presented to him or her under section 89 (1) and it requires such officer to initial every such presentation and to annex it as part of the official record of the polling station. Subsection (3) then mandates the polling station officers to resolve such presentations (complaints).*
46. *Section 90 describes the process of what must happen at the close of the poll at a polling station. However, to properly contextualise this provision, it is also significant to state what must happen at the start of the process. Part of what must happen has been described under section 70 of the PPEA, as discussed above. However, that provision does not, for example, state with specificity, what exactly must happen before polling begins. Form VI made under section 93 of the PPEA makes some specific provisions in this regard. However, it is perhaps appropriate that before the Court examines the specific contents of Form VI under the Act, the proper legal context within which the said Form is to be understood must be laid out.*
47. *The legislature, in 1994 under General Notice No. 13 of 1994, promulgated the “Subsidiary Legislation Parliamentary and Presidential Elections (Forms) Regulations”. These are regulations made under section 121 of the PPEA which provides that “The Minister may, on the recommendation of the Commission make regulations for the better carrying out of the provisions*

of this Act.” According to Regulation 2(1) under those regulations, “The forms set out in the Schedule shall be used for the purposes of the Act, and such particulars as are contained in those forms and not particularly prescribed by the Act are hereby prescribed as particulars required under the Act.”

48. What this means, therefore, is that we need to carefully examine the particulars on the forms and take note whether they make any specific procedural prescriptions which are not contained in the Act. Where we so find, such specific particulars should be taken as formal procedural steps that ought to be followed in the electoral process. Again, the import of Regulation 2 (1), therefore, is that it is imperative that the forms prescribed under the statute should be followed as a matter of law.

49. Form VI has been prescribed as the Form where the record of the entire polling process at the polling station as envisaged under section 93 (1) (a) of the PPEA is to be recorded.

50. Coming back to the issue of the processes to be followed at the opening and closing of the poll, Form VI requires that each polling station must have a recording secretary who must complete Part A of that Form (Form VI) on the opening of the polling station and before polling begins. According to that form, on the opening of the polling station and before polling begins, the recording secretary must record (a) the time of opening the polling station; (b) the polling station number; (c) the total number of registered voters; and (d) the total number of ballot papers received for the election. The form requires the respective signatures of the presiding officer, the recording secretary and the polling station clerks.

51. Part A of Form VI of the PPEA is in the following form:

*FORM VI*

*RECORD OF POLLING PROCESS*

*(under section 93)*

*PART A*

*THIS PORTION OF THE OFFICIAL RECORD MUST BE COMPLETED BY THE  
RECORDING SECRETARY ON THE OPENING OF THE POLLING STATION AND  
BEFORE POLLING BEGINS*

*Time of Opening .....*



*Polling Station Number (from the stamp) .....*

*Total number of Registered Voters: .....*

*Total number of Ballot Papers received for*

*National Assembly Election: (\*1) .....*

*Total number of Ballot Papers received for*

*Presidential Elections: (\*2) .....*

*Presiding Officer .....*

*(Name) (Signature)*

*Recording Secretary .....*

*(Name) (Signature)*

*Clerk 1: .....*

*(Name) (Signature)*

*Clerk 2: .....*

*(Name) (Signature)*

*Clerk 3: .....*

*(Name) (Signature)*

*Clerk 4: .....*

*(Name) (Signature)*

*Clerk 5: .....*

*(Name) (Signature)*

*Clerk 6: .....*

*(Name) (Signature)*

*Clerk 7: .....*

*(Name) (Signature)*

*Clerk 8: .....*

*(Name) (Signature)*

*Clerk 9: .....*

*(Name) (Signature)*

*Clerk 10: .....*

*(Name) (Signature)*

*Names of Political Party Representatives present:*

.....

*Names and affiliation of Local Monitors:*

.....  
*Names of International Observers present:*  
.....

52. As earlier discussed, the requirements under Form VI, in so far as they have not been specifically provided for in the PPEA, are specifically prescribed by relevant regulations under the Act as having the force of law.

53. According to Section 90 of the PPEA:

“At the close of the poll at any polling station, the presiding officer shall proceed by first collecting together and separately all unused ballot papers and placing them in a separate envelope provided to him for the purpose and then sealing the envelope and initialling or stamping it over the sealed area.”

54. Further, Section 91 of the PPEA provides in this regard, that:

“For the purposes of determining the results of the elections at a polling station and, in particular, in counting the votes thereat, the votes cast at a polling station shall be separately classified into—  
(a) null and void votes;  
(b) votes for each of the candidates for election as members of Parliament;  
(c) votes for each of the candidates for election to the office of the President.”

55. In addition to the provisions of section 90 of the Act, Form VI prescribes that the following steps must be followed at the close of the poll. It requires that the recording secretary must record (a) the time of closing (the time at which the last voter left); (b) the total number ballot papers received (as derived from Part A\* 2 of the Form). The Form then mandates the polling station officers to (c) deduct the number of unused ballot papers and indicate the sub-total, (d) to then deduct the number of spoilt ballot papers if any; and then (e) to count the total number of votes

in the ballot box (this count here is marked as D\*1 on Form VI). The Form then requires the signatures of the presiding officer, the recording secretary and the polling staff members.

56. Part D of Form VI is in the following form:

*PRESIDENTIAL ELECTION ONLY*

*CLOSING OF THE POLL*

*PART D*

*THIS PART IS TO BE COMPLETED AT THE CLOSE OF POLLING*

*Time of closing .... p.m. (time which last voter left)*

*Total number of National Assembly Election .....*

*Ballot Papers received: (from Part A\* 2)*

*DEDUCT: Number of unused ballot papers: .....*

*Sub-Total: .....*

*DEDUCT: Number of SPOILT ballot papers if any: .....*

*Total number of votes in ballot box to be counted (D\*1):*

*Presiding Officer: .....*

*(Signature)*

*Recording Secretary: .....*

*(Signature)*

*Polling Staff Members: .....*

*(Signature)*

57. Once this is done, under Part E of Form VI, the polling officers must then keep in mind that the total number of ballot papers to be counted (must be those noted from Part D\*1). The presiding officer must then proceed to count the per candidate votes following the procedure prescribed under section 92 of the Act. Section 92 of the Act further provides that:

“After the close of the poll at any polling station, and only thereafter, the presiding officer shall, in the presence of other polling station officers and representatives of political parties if any be present, open the ballot box and order the counting of the votes to proceed separately according to a procedure entailing the polling station officers—

- (a) picking out of the ballot box one paper and displaying the ballot paper to all present and announcing aloud the classification of the vote as specified in section 91;
- (b) recording on a sheet of paper provided to the polling station officers for the purpose, showing the classification of votes, the votes cast for each classification;
- (c) displaying the already announced ballot papers and separating them into lots corresponding to each classification; and
- (d) announcing, through the presiding officer, the number of votes cast at the polling station under each classification.”

58. Apart from the per candidate votes, Part E of Form VI also requires that the polling officers should count any null and void votes, indicate the sub-total of the per candidate votes and the null and void votes, and then to deduct this number from total number of ballot papers marked as D\*1 under Form VI as discussed above.

59. The polling officers should then observe and the recording secretary should record the discrepancy if any.

60. After this, Part E of Form VI is formally completed and signed by the Presiding Officer. Party Representatives, Local Monitors, and International Observers are allowed to sign the Form if they are present. That Part of Form VI is prescribed in the following form.

*PART E*

*THIS PORTION OF THE OFFICIAL RECORD IS TO BE COMPLETED WHEN THE COUNTING OF VOTES FOR THE PRESIDENTIAL ELECTION HAS BEEN COMPLETED*

*Total Number of Ballot Papers to be counted (from Part D\*1)*

- Candidate A* .....
- Candidate B* .....
- Candidate C* .....
- Candidate D* .....
- Candidate E* .....
- Candidate F* .....
- Candidate G* .....

Candidate H .....  
Null and void votes .....  
Sub-Total ..... (deduct this number  
from total number of ballot papers D\*1)  
Discrepancy if any: .....  
Presiding Officer: .....  
(Signature)

*Name and signatures of Party Representatives:*

.....  
.....  
.....  
.....

*Names and affiliation of Local Monitors:*

.....  
.....  
.....  
.....

*International Observers:*

.....

61. It must be emphasised that under section 93 (1) of the PPEA, the presiding officer is obliged to cause to be prepared by the polling station officers:

“(a) a record of the entire polling process at his polling station containing—

- (i) the full particulars of the polling station officers and representatives of political parties;
- (ii) the total number of voters;
- (iii) the total number of votes for or under each classification of votes;
- (iv) the number of unused ballot papers;
- (v) the number of ballot papers which have been the subject of complaints, if any;
- (vi) the discrepancies, if any, between votes counted and the number of voters;

(vii) the number of complaints and responses thereto and decisions taken thereon by the polling station officers;

(viii) any other occurrence which the polling station officers consider to be important to record; and

(b) a brief summary of the final result, and such record and summary 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.”

62. Further, in terms of section 93 subsections (2) and (3), the presiding officer must recall, respectively, that (a) representatives of political parties at a polling station are “*entitled to a copy of the duly signed summary of the final result of the poll at that polling station*”; and (b) that he or she is obliged by law to “*post at the polling station a copy of the duly signed summary of the final result of the poll at that polling station.*”

63. A few things are to be observed from this procedure, at this stage. First, it appears that the route that the 2<sup>nd</sup> Respondent took was markedly different from the procedure as prescribed under the Act, the Regulations and the prescribed form. As already demonstrated above, the Act envisaged that the record of the polling process under section 93(1) of the PPEA would be separate from the record book. This is clear from Section 70 of the Act. The record sheets for the record required under section 93 of the PPEA are provided for under section 70 (f) of the PPEA, whilst the logbook is described under section 70 (h) of the PPEA as the book in which formal complaints under section 89 of the PPEA are to be recorded. This is a point which Ligowe J likewise observed in the case of *Raphael Joseph Mhone v. The Electoral Commission and Symon Vwawa Kaunda*, Election Petition No. 11 of 2019 (unreported) where the learned Judge stated that:

“The record log book is for recording complaints under s.89. It turns out that the record log book the Electoral Commission provided in the elections this year as exhibited by Aticken Nyirongo, the Presiding Officer at Chisu polling station, was meant to record a lot more of information than complaints under s.89 including a record of the entire process at the polling station as required under s. 93(1)(a).”

64. Indeed, it would appear that the 2<sup>nd</sup> Respondent decided to fuse the provision of record sheets for the record under section 93 of the PPEA and the log book for recording formal complaints under section 89 of the PPEA under one document. This is evident from the titling of the book which was popularly referred to in these proceedings as the record logbook. On the front of this booklet, the heading that appears is: "*Presiding/Assistant Presiding Officer log book 2019 Tripartite Elections: MEC POLL 050.*" Inside the document, the following description of the booklet appears: "*Malawi Electoral Commission: Official Summary and Record of Results.*" These two descriptions clearly show that the 2<sup>nd</sup> Respondent, in its wisdom, decided to depart from the statutory prescriptions and organize them in this fused fashion.

65. Form VII describes the process of how additional ballots received in the course of the polling process were supposed to be handled. The Form is titled "Ballot Papers Audit Trail". It is meant to ensure accountability where a polling station receives ballot papers on transfer from some other place. The form should show the name of the person handing over the ballot papers and the name of the person receiving the same. It also provides for the specific identification of the ballot papers received which must be numbered appropriately. The total number of such additional ballots brought on transfer must be indicated. These processes were meant for specific reasons. Without such an accurate record, which must be open for examination by political party or candidate representatives, and ultimately used by the Commission when determining the national results, it would not be possible to identify the source of additional ballot papers which is such a big security breach in any properly managed election.

66. Form VII is in the following terms:

*FORM VII*

*BALLOT PAPERS AUDIT TRAIL*

*(required for purposes of section 5 and Part VII)*

*RECEIPT ON TRANSFER OF BALLOT PAPERS*

*(Receipt should be in triplicate—one copy for each party involved in transfer of ballot papers and a copy for the Electoral Commission) The Ballot papers listed hereunder were on .....(date) ..... at(time)*

*transferred from:*

.....

*(Name and title of person handing over ballot papers)*

to:

.....

*(Name and title of person receiving ballot papers)*

**BALLOT PAPERS NUMBERED FROM ..... TO**

.....

**TOTAL NUMBER (QUANTITY) OF BALLOT PAPERS**

.....

*(Signature of person handing over ballot papers) (Signature of person receiving ballot papers)*

67. Section 94 of the PPEA requires the presiding officer of a polling station to quickly deliver (with all dispatch) to the office of the District Commissioner of his or her district, under conditions of absolute security against loss, tampering or interference, the following:

- “(a) the record prepared under section 93;
- (b) all the ballot papers collected in separate lots corresponding to the classification under which they were counted;
- (c) all unused ballot papers; and
- (d) all voters registers and other work items provided to that polling station.”

68. In other words, this Court opines, the presiding officer must deliver all the polling materials to the duly designated returning officer at the office of the District Commissioner for purposes of preparation of the district record under section 95 of the Act. Section 95 of the PPEA is in the following terms:

“(1) On receipt of records from polling stations, the Returning officer or an officer of the Commission duly authorized in that behalf shall, at the office of the District Commissioner, compile the result of the elections in his district on the basis of the duly signed summaries received with such records and shall prepare, on the appropriate sheets in the prescribed form provided for the purpose by the Commission, a



record in respect of each constituency in the district and also in respect of the entire district showing—

- (a) the total number of persons who registered as voters;
- (b) the total number of persons who voted;
- (c) the total number of votes for or under each classification of votes in accordance with section 91;
- (d) the discrepancies, if any, between the votes counted and the number of persons who voted; and
- (e) the complaints, if any, received by him and his decisions thereon.

(2) Representatives of political parties duly designated for the purpose, shall be entitled to observe the entire procedure followed at the office of the District Commissioner in compiling the district result of the elections under subsection (1).

(3) The record prepared under subsection (1) shall be legibly signed by the returning officer or other officer supervising the compilation thereof and, if any be present, by at least one representative of a political party which shall in addition, be entitled to receive a copy of the record.

(4) The returning officer or an officer of the Commission duly authorized in that behalf shall publicly announce the result of the election in each constituency and in the entire district in accordance with the record prepared under subsection (1).

(5) The returning officer or a duly authorized officer of the Commission shall, with all dispatch, deliver to the Chief Elections Officer under conditions of absolute security against loss, tampering or interference.

- (a) the record prepared under subsection (1); and
- (b) all items received from all polling stations in the district concerned.”

69. The Form to be used by the 2<sup>nd</sup> Respondent for purposes of section 95 has also been prescribed under Form IX under the Act which is headed: “*Compilation of District Results for Presidential Elections (Under Section 95): Record of Results.*” Form IX contains information on the name of

the polling station and polling station number, total registered voters, total number of persons who voted; number of votes cast in favour of each candidate; number of null and void votes and total number of votes cast. It should be observed that in addition to the information which Form IX was designed to contain, section 95 casts even greater obligations on the part of the district returning officer. As part of the district record, he or she must also record the discrepancies, if any, between the votes counted and the number of persons who voted; and also the complaints, if any, received by him or her and his or her decisions thereon.

70. Just like at the polling station, political party or candidate representatives are entitled to monitor the process at the District Tally Centre and also to sign the district record of the polling process prepared by the returning officer. Upon announcing the district result, the returning officer is obliged, under Section 95 (5) of the PPEA, to quickly deliver (with dispatch) to the Chief Elections Officer under conditions of absolute security against loss, tampering or interference, *"(a) the record prepared under subsection (1); and (b) all items received from all polling stations in the district concerned."*

71. What emerges therefore from this process is that the entire record and items from both the polling stations and the district tally centre must be sent to the Chief Elections Officer. As we shall show shortly, the 2<sup>nd</sup> Respondent is mandated to use all these records in its determination of the final results.

72. According to section 96 of the PPEA:

"(1) The Commission shall determine and publish the national result of a general election based on the records delivered to it from the districts and polling stations.

(2) The determination of the national result of a general election shall begin immediately after the Commission has received records from all districts and shall, subject only to subsection (3), continue uninterrupted until concluded.

(3) If a record from any district or other element necessary for the continuation and conclusion of the determination of the national result of the election is missing, the Chairman of the Commission shall take

necessary steps to rectify the situation and may, in such case, suspend the determination for a period not exceeding seventy-two hours.

(4) Representatives of political parties designated in writing to the Commission shall be entitled to observe the determination of the national result of the election.

(5) Subject to this Act, in any election the candidate who has obtained a majority of the votes at the poll shall be declared by the Commission to have been duly elected.”

73. The import of section 96 (1) of the PPEA is that the 2<sup>nd</sup> Respondent must determine and publish the national result of a general election based on the records delivered to it from the districts and polling stations. Section 93 of the PPEA provides for what should be contained in the record from the polling station, whilst section 95 of the Act provides for what should be contained in the record from the district.

74. Section 97 of the Act details what the 2<sup>nd</sup> Respondent must do at the beginning of the determination of the national result. It provides that:

“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.”

75. Thus, the 2<sup>nd</sup> Respondent must begin by taking decisions on any matters which have been the subject of complaints. The 2<sup>nd</sup> Respondent is also required to also examine any votes which may have been classified as null and void. The 2<sup>nd</sup> Respondent is granted the power to either affirm the determination at the polling stations or offices of District Commissioners, or to correct them. The 2<sup>nd</sup> Respondent at the national level may only correct what went wrong at the polling stations or offices of District Commissioners by examining the full record as prepared under sections 93 and 95 of the PPEA respectively. If the 2<sup>nd</sup> Respondent does not have a full record, then it is

incapacitated to make any proper final determinations because it has insufficient information to base its final decisions on.

76. Once the Electoral Commission has made its determination of the national result pursuant to sections 96 and 97 of the Act, Section 98 requires that:

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

(a) the national result of the election as determined;

(b) the complaints and responses thereto and the decisions taken on them, and the Chairman of the Commission shall legibly seal the national result of the election by signing the summary and every political party shall be entitled to receive a signed copy of the summary.”

77. The provisions of section 98 are couched in mandatory terms. Considering the crucial significance and far-reaching implications of the final determination of the national result, and considering the use of the mandatory term “shall”, the requirements of section 98 of the PPEA are peremptory and must be strictly complied with.

78. According to the scheme of the PPEA, it is only upon complying with the provisions of section 98 of the PPEA that the EC may proceed to publish the national result in terms of section 99 of the PPEA. This is particularly evident from the provisions of section 99 which states that the publication of the results in the Gazette, by radio broadcast and in a newspaper of general circulation must all be done within eight days from the last polling day and not later than forty-eight hours from the conclusion of the determination. The Court is of the view however that considering the mandate of the 2<sup>nd</sup> Respondent, including that of resolving all complaints before final determination of results, this period appears not adequate enough and does not seem consistent with the 2<sup>nd</sup> Respondent’s mandate to resolve such complaints.

79. Section 99 requires that such publication must specify:

“(a) the total number of voters registered for the election;

(b) the total number of voters who voted;

- (c) the total number of null and void votes; and
- (d) the total number of valid votes cast for each classification of votes as specified in section 91.”

80. Once again, the provisions of section 99 are couched in mandatory terms.

81. Part IX of the PPEA then deals with election petitions in respect of election as Member of the National Assembly or to the Office of President. This part of the Act contains only one section, namely Section 100 under which the present proceedings have been brought. The full text of section 100 has already been set out above. To recap, that section essentially 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 must be presented by way of petition directly to the High Court within seven days.

82. It must be noted that under section 100 of the PPEA, in relation to a presidential election, a court is restricted to making a finding of an undue return or undue election of a person as President. It is important to understand what these two terms entail. This Court observes that the two terms are not defined in the PPEA. This Court must therefore define the two terms.

83. With regard to an undue return, perhaps the proper way of understanding the term is to describe what entails a *due return*. This Court takes the view that a *due return* is the proper declaration of the winner of an election. It follows, therefore, that an undue return is an improper declaration of a person as a winner of an election.

84. For purposes of an undue election, the Court is of the view that a *due election* entails that all the processes of the election commencing with the registration of voters throughout the polling process up to the declaration of the election result or return of the winner have been carried out properly and in accordance with the law. An undue election is, therefore, one in which the set processes for the election as set out in prescribed law and other set electoral procedures have not been complied with.

85. The foregoing views of the Court are supported by the persuasive authoritative authors on legal phrases as indicated in Black’s Law Dictionary 6<sup>th</sup> Edition (1990) at 519 who define an election return as the report made to the election board of the number of votes cast for each candidate by

those charged by law with the duty of counting or tallying the votes for or against the respective candidates. In our context, a return will therefore be made at polling station level, constituency level and district level (both at the District Commissioner's office) and at the national level. The same authors define an election contest as involving matters going beyond election returns and inquiring into qualifications of electors, counting of ballots, and other matters affecting validity of ballots. They cite the American case of *Vance v. Johnson*, 238 Ark. 1009, 386 S.W.2d 240, 242.

86. This Court has also considered that the court of Common Pleas in State of Pennsylvania in the *Skerrett's case* reported in second volume of Parsons select cases at p.509, indicated that undue election or undue return are the expressions which constitute an election. The court said as follows:

“Undue election occurs where certain processes have not been followed such as the election not held on the date fixed by the law, the officers or indeed the candidates not having the necessary qualifications and the candidates not properly chosen. On the other hand, undue return relates to falsifying the aggregation of votes, arithmetical error, someone chosen when the documents show that it should have been another to be chosen.”

87. This Court also looked at the case of *Irwin and Macgregor, Petitioners (Renfrewshire Election)* [1874] SLR 11 where the Scottish Court decided a case in which the terms undue return and undue elections were similarly not defined in the relevant Statute and the court stated that election law distinguished two things-complaints against undue return and complaints against undue election. The court observed that there is plain distinction, that a man is elected when he has a majority of votes in his favour, and if he be elected or voted for by a majority of voters, and if the returning officer returns another man who has a minority that is an undue return. The Court added that there may be objections to a return as undue as not being in conformity with the state of the poll. And that there may also be something wrong with the election in respect of objections to votes and circumstances which imply no mistake on the part of the returning officer but some error in the original matter so far as regards the votes given.

88. The foregoing authorities persuasively support the views of this Court on the definition of an undue return and an undue election.
89. The petition alleging an undue return or an undue election must be based on irregularity or any other cause whatsoever. These two terms must also be defined.
90. The term irregularity has been defined in the PPEA. Section 3 of the PPEA states that irregularity in relation to the conduct of an election, means *noncompliance with the requirements of this Act*.
91. Any other cause whatsoever means exactly that. A petition may allege an undue return or an undue election for any other reason. The foregoing position was confirmed by the Supreme Court of Appeal. In *Bentley Namasasu v. Ulemu Msungama and Electoral Commission*, MSCA Civil Appeal Number 8 of 2016 (unreported), it was argued that irregularities as provided in the Act were not proved by the petitioner so as to show that there was non-compliance with the Act. But the Supreme Court held that under section 100 of the PPEA, the grounds for a petition are not limited to *noncompliance with the Act*. The Court said:

“The appellant in his submission sought to impress on this court that “irregularity” should be read to mean “non-compliance with the Act” as defined in section 3 of the PPEA. Despite our invitation that he should address us on the full import of the section 100 of PPEA; that is, that a complaint could be filed “by reason of irregularity or any other cause whatsoever”, counsel declined to do so. We therefore, do not find any justification for limiting reasons for filing a petition under section 100 of the PPEA.”

92. Still, it appears to us that it is perhaps appropriate that we also mention Part XI of the PPEA which deals with complaints and appeals. This part of the Act comprises sections 113 and 114. We feel content to state that in our view, the interplay between the procedure under Sections 113 and 114 of the PPEA on the one hand, and Section 100 on the other, were adequately dealt with and disposed of in the case of *Bentley Namasasu v. Ulemu Msungama*, MSCA Civil Appeal No. 8 of 2016 (Unreported), where the Supreme Court of Appeal stated that:

“Section 113 provides that complaints can be resolved at a lower level. That is, at the level of the polling station, or returning officer or the Commission. If any party is aggrieved by the decision of the Commission, it has a right to appeal to the High Court under section 114 of the PPEA. Further section 97 provides that before determining the national result the Commission is required to analyse the complaints and resolutions thereof and to examine the null and void votes. The decision of the Commission at this point is still appealable to the High Court under section 114. The determination by the High Court of an election petition under section 114 of the PPEA is final: section 114 (5). When the national results have been determined the right to complain is reserved to the person who had a right to be elected or was a candidate. It is no longer open for representatives of a candidate or political party or voters, generally, to file complaints. This right is exercisable under section 100 of the PPEA and the decision of the High Court in such a petition is appealable to the Supreme Court.”

93. It therefore follows that in the instant matter, once the final results were declared by the 2<sup>nd</sup> Respondent, the only remaining option for relief by any aggrieved party was through the avenue of Section 100 of the PPEA unless they wished to lodge an appeal against prior decisions on complaints or petitions lodged with the 2<sup>nd</sup> Respondent under Section 113 of the PPEA.

94. Finally, in so far as the electoral process as it concerns the present matter is concerned, it is germane to bear in mind the self-explanatory provisions of Section 119 of the PPEA which states that:

At the end of its functions, the Commission shall deposit all documents forming the official record of an election (including voters' registers, ballot papers, records from districts and polling stations and summaries thereof and the record and summary of the national result) with the Clerk of Parliament who shall retain and preserve such documents in safe and secure custody without destruction for a period of twelve months.



95. The crucial importance of complying with section 119 of the PPEA was emphasised in *Bentley Namasasu v. Ulemu Msungama* where the Supreme Court of Appeal stated that:

*In this case the first respondent never got to see the ballot boxes which were in the custody of the second respondent. The second respondent and, by necessary extension, the appellant cannot claim that he has failed to establish that the irregularities could have affected the results of the election. It was not enough for them to allege destruction of ballot boxes in a fire. These are security documents which had to be kept secure for twelve months: section 119. It was incumbent on the second respondent to show that the destruction was not due to any fault on its part. The statutory requirement for the preservation of the ballot boxes and electoral materials, is to ensure fairness to the parties in the event of a dispute over election results. This is fundamental to safeguard the integrity of the vote and the electoral system. It is our judgment therefore, that the finding of the Court below that there should be a re-run of elections in this Constituency be upheld and confirmed. For avoidance of doubt it is our finding that the appellant was not duly elected as a Member of Parliament for Lilongwe City South East Constituency.” [Our emphasis]*

96. This is the Court’s overview of the relevant part of the electoral process under the PPEA as it relates to the present matter. It is against this background that this Court will deal with the issues raised in this matter in so far as the electoral process is concerned.

#### **PART IV**

#### **THE EVIDENCE**

##### *1<sup>ST</sup> PETITIONER’S EVIDENCE*

97. At the outset, it should be pointed out that at the commencement of the hearing, the 1<sup>st</sup> Petitioner had intended to rely on evidence from about 38 witnesses whose sworn statements were filed with the Court. However, as the hearing progressed, 34 witnesses along with their sworn statements

were withdrawn. The 1<sup>st</sup> Petitioner elected to rely on the evidence of four witnesses being Dr Saulos Klaus Chilima (the 1<sup>st</sup> Petitioner), Mirriam Gwalidi, Darlington Justin Lazarus Ben Ndasauka and Bright Kawaga.

*Dr Saulos Klaus Chilima*

98. Dr. Saulos Klaus Chilima made two sworn statements. The first is a sworn statement in support of the petition filed on the 4<sup>th</sup> of June, 2019, and the second is a supplementary sworn statement filed on the 16<sup>th</sup> of June, 2019.
99. Materially, the 1<sup>st</sup> Petitioner in his sworn statements stated that during the Tripartite Elections the country held on the 21<sup>st</sup> of May, 2019, he contested, as a presidential candidate, under the banner of the UTM party. The elections were managed by the 2<sup>nd</sup> Respondent. The UTM had monitors present at all polling stations during casting, counting and tallying of votes and during the transmission of results from polling stations to the 2<sup>nd</sup> Respondent's main tally centre at COMESA Hall in Blantyre.
100. The 1<sup>st</sup> Petitioner went ahead to allege that the elections were replete with irregularities, among them, his own name missing from the relevant register at the centre where he registered and presented himself as a voter on polling day. The alleged irregularities prompted UTM to lodge a complaint to the 2<sup>nd</sup> Respondent through a letter exhibited as SKC1.
101. In paragraph 14 of the supplementary sworn statement, the 1<sup>st</sup> Petitioner outlined the alleged irregularities as follows: intimidation of election monitors; bribing of election monitors, presiding officers and other staff of the 2<sup>nd</sup> Respondent influencing voters on the choice of candidates; presiding officers and other staff of the 2<sup>nd</sup> Respondent tampering with result sheets in order to alter the result of the vote at a particular polling station or tally centre; the use of duplicate or fake result sheets, unauthorized persons being found with ballot papers and ballot boxes; arrests of persons at various places for offences relating to breach of the country's electoral law; failure to deal with complaints before announcing the election results; failure to deliver ballot papers under conditions of absolute security, and giving handouts.
102. According to the 1<sup>st</sup> Petitioner, the outlined irregularities seriously compromised the elections prompting him to write a letter exhibited as SKC2 to the 2<sup>nd</sup> Respondent's Chairperson asking

her to resign from her position. In a bid to buttress the assertions on the alleged outlined irregularities, he made reference to various sworn statements in support of the petition, notably those of Darlington Ndasauka and Mirriam Gwalidi.

103. In addition to allegations of irregularities, the 1<sup>st</sup> Petitioner, in paragraphs 17 to 28 of his supplementary sworn statement alleged fraud in the conduct of the elections. In that respect he pointed out a number of instances. First, he alleged that the election result sheets for Rumphu West and Mzuzu City constituencies bore the exact content. In this regard, reliance was placed on the sworn statement of Mirriam Gwalidi. Secondly, he alleged that correction fluid or ink was used to deface or alter the records of results at the polling centres and to buttress the allegation, reference was made to the sworn statements of Darlington Ndasauka and Mirriam Gwalidi. As for the sworn statement of Darlington Ndasauka, exhibits DN1 to DN 5, DN9, DN10, DN 11 and DN14 were particularly singled out. Thirdly, he stated that through the aiding, abetting and connivance of the 2<sup>nd</sup> Respondent's officials, votes in favour of the 1<sup>st</sup> Respondent were inflated at various polling centres. The sworn statement of Darlington Ndasauka was relied on in that respect. Fourthly, he alleged that at Nkhata Bay Tally Centre, the 2<sup>nd</sup> Respondent brought ballot boxes that had been opened in the absence of any political party contesting in the elections. The fifth allegation of fraud was that in Salima North West Constituency, persons not registered were allowed to vote. The sixth allegation was that at Blantyre Secondary School Tally Centre and Blantyre City Central Constituency, results were manipulated as transmitted from polling centres. It was also alleged by the 1<sup>st</sup> Petitioner that in Mzimba South West Constituency, the number of votes exceeded the number of registered voters. He also went on to allege that bogus signatures of monitors were appended to result sheets. Then there was the allegation that in Thyolo West Constituency, the Returning Officer manipulated results in favour of the parliamentary candidate of the Democratic Progressive Party (DPP). It was further stated, as the 10<sup>th</sup> allegation of fraud, that in Mzimba, some voters were given pre-marked ballot papers in favour of the 1<sup>st</sup> Respondent, a fact admitted by the 2<sup>nd</sup> Respondent's Chief Elections Officer but vehemently denied by its Chairperson. To buttress these assertions, a video recording contained in a flash disk was tendered in evidence as exhibit SKC3.

104. Crowning it all on the fraud allegations, the 1<sup>st</sup> Petitioner made two averments. First, that before the announcement of the presidential results, the Chairperson of the 2<sup>nd</sup> Respondent made a public statement that the 2<sup>nd</sup> Respondent did not supply any correction fluid or ink to polling

officials. He tendered a video recording in that respect as exhibit SKC4. The second assertion was that the 1<sup>st</sup> Respondent admitted that there was fraud in the elections and a video recording of the alleged admission was tendered in evidence as SKC5.

105. Dr. Chilima was subjected to lengthy cross examination by counsel for both the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. In answer to some preliminary questions, the witness conceded that under the existing scheme in the management of elections, there were a number of players that took part in the electoral process, including political party representatives(monitors) to ensure transparency and accountability. The rest of the cross examination largely covered the content/allegations in the 1<sup>st</sup> Petitioner's petition and whether the 1<sup>st</sup> Petitioner in his sworn statement had provided sufficient evidence to prove those allegations. It was the testimony of the witness that the evidence in support of his allegations was in the sworn statements made by various witnesses and filed with the court. This invited a litany of questions on the assertions in the statements of those other witnesses notably *Miriam Gwalidi* and *Darlington Ndasauka* whose statements the witness made cross references to in his sworn statement in support of the petition. In answer, the witness on most occasions deferred to the witness who made particular assertions in their sworn statement. What follows are salient aspects of his evidence in cross examination.
106. The witness stated that his petition did not raise any issues relating to events before the polling day. He also conceded that *his petition as presented on pages 3, 4 and 5 of volume SKC 1* did not raise any issue of fraud.
107. The witness told the court that his political party had monitors at each and every polling station in the entire electoral process. He stated that monitors were referred to in the Parliamentary and Presidential Elections Act (PPEA) as 'representatives of political parties' and that they were entitled to bring up complaints in relation to the conduct of the elections. He confirmed that monitors had the right to *sign the summary of results and stated that they were told to never sign for false results.*
108. He proceeded to outline other rights namely: to be given a copy of the results; to monitor proceedings at the District Commissioner's offices and up to the determination of the final results at the national tally centre. He agreed that the monitor's signature on the result sheet was crucial.

109. The witness conceded that the monitoring arrangements were meant to ensure that the 2<sup>nd</sup> Respondent would act in a transparent and accountable manner with no room for secrecy. He told the court that there was no evidence from any of his monitors that the 2<sup>nd</sup> Respondent operated in secret at any polling centre.
110. Dr. Chilima conceded that the stream result was the primary result and monitors did witness the stream polling and vote counting and recording and further agreed that the monitor at the stream level or polling station level would have first-hand information about the correctness of the records pertaining to the polling, vote counting and recording than the one at the National Tally Centre.
111. The witness confirmed that voters had a right to choose a candidate of their choice and agreed that where voters had expressed their choice through the vote, their choice should not be invalidated except on the clearest of evidence of irregularities or anomalies.
112. He further conceded that valid votes determined a winner in a presidential poll, and that unused ballots or cancelled ballots did not. He said that because of this, candidates and political parties' focus at polling stations must be on the valid vote count. He told the court that his party advised its monitors to strictly check the counting and recording of valid votes.
113. The witness agreed with the suggestion that where it was alleged a signature of a monitor had been forged, the best witness to that fact was the monitor. He went on to state that where the monitors had not disowned the result, it could safely be assumed that the result was impeccable.
114. On further cross examination Dr. Chilima said that the fact that the petition was not supported by any evidence from any of their monitors challenging any of the results at any of the polling stations meant they had no problems with the vote count at any polling station but they had other issues unrelated to the vote count.
115. The witness conceded that since the overall national result is derived from stream results, it could only be challenged by showing flaws in the stream results that affected the national result. Further he conceded that any alleged irregularity, had to be of such a magnitude as to affect the result of the election for an election to be nullified.

116. It was also stated by the witness that his monitors signed duplicate forms as well as what he called fake forms exhibited in the sworn statement of Mr. Ndasauka. He admitted that none of the monitors gave evidence before the Court. He conceded that he did not know of any case where his monitors had challenged the valid vote count on any of the forms with alterations either handwritten or by use of tippex, so too any vote count on result sheets that were not signed by his monitors.
117. Moving on, the witness conceded that it was only in paragraph 7(d) of his petition where he complained about tally sheets, namely, that presiding officers and other staff of the 2<sup>nd</sup> Respondent tampered with tally sheets in order to alter the result of the vote at a particular polling station or tally centre. The witness agreed that the complaint was not about fake ballot papers; duplicate tally sheets; failure by monitors or presiding officers to sign result sheets. He admitted that he did not specifically complain about this, and that instead he made a general allegation in paragraph 8 of his petition.
118. Coming to the so called fake result sheets, the witness stated that how the same they found themselves to be part of the stationery could better be explained by those that used it and signed for them. He could not single out any polling station where use of such sheets affected his votes or those of any other candidate.
119. The witness stated that where a mistake had been made in the additions, there was no harm in correcting it as long as it was done in good faith and that his concern was to do with fraudulent corrections. He then was taken through paragraph 7(d) of the petition and asked to isolate any result sheets where there was alteration to benefit or disadvantage any candidate. His response was that the deponent of sworn statements in support of his petition was better placed to do that.
120. The issue of the absence of presiding officers' signatures on some tally sheets also featured prominently during cross examination. The witness stated that since the monitors witnessed the vote count, got copies of Form 60Cs, signed the tally sheets in Form 66C and did not come to court to challenge any of the results on the tally sheets, it would be the 2<sup>nd</sup> Respondent to explain why it allowed them to be used.

121. With reference to exhibit MG 4 in the sworn statement of Ms Miriam Gwalidi on the claim that ballots did not add up, the witness expressed a possibility of wrong count of ballots and went on to admit that if there were votes affected, monitors were the ones to explain that.
122. As the witness had made several cross references to the sworn statement of Mirriam Gwalidi and Darlington Ndasauka, he was cross examined on those sworn statements as well.
123. The witness was referred to exhibit MG 1 being results sheets where Ms Gwalidi alleged had no signatures of presiding officers. It was noted by the witness that all the 25 result sheets had been signed by monitors. He conceded that no monitor had come to Court to challenge any of the candidates' valid vote counts and that the presiding officer's signature would not have changed the unchallenged candidate valid vote counts.
124. Exhibit MG 2 to the sworn statement of Mirriam Gwalidi in which she alleged absence of signatures of monitors in some result sheets also featured in cross examination. It came to light that some had the signatures. The witness stated that monitors were deployed to all the polling stations concerned and that no monitor had provided evidence of any challenge of the results.
125. The witness was also shown exhibit MG 3A on allegations of tippexed results and be observed that *monitors signed the forms. He conceded that the monitors would be able to use stream results if they wanted to question the polling station valid vote count.* He also confirmed that much of the tippex was on the statistical part of the tally sheets. Further, he told the court that between him and the monitors, they were in a better position than him to attest as to whether tippex was used to defraud candidate votes.
126. Next to feature in cross examination were duplicate result sheets tendered as exhibit MG3B to the sworn statement of Mirriam Gwalidi. To begin with he was shown a sheet for Tembwe School in Mchinji. The witness told the court that they had monitors at the centre and none had challenged the valid vote count and noted that they had in fact signed on the sheets. The witness stated that nobody stopped him from asking from his monitors about the correctness of the votes captured on the duplicate result sheets. He expressed ignorance as to whether the valid vote figures on the duplicate sheets were different from those of his party monitors.

127. In the course of the cross examination, a result sheet for polling centre 08095 was singled out as being a duplicate as well as a fake. The witness admitted that it was signed for by his monitor in the name of Chirwa who he said he did not ask if he had another result showing a different vote count.
128. On MG4 comprising 10 result sheets which, it was claimed, had alterations or the figures did not add up, he noted that on most of the sheets, there were no alterations on the candidate valid votes section and that monitors signed on them.
129. When taken to task on the alleged fraud as per his supplementary sworn statement, he conceded that the sworn statements of Ms Gwalidi and Mr. Ndasauksa which he sought to rely on in that respect did not provide sufficient evidence of fraud.
130. With regard to the queries raised by Ms Gwalidi in relation to constituency results for Rumph West and Mzuzu City, as per exhibits MG 15A and MG 15B, it was stated by the witness that the basis of the queries was a mere look at constituency result sheets exhibited. The witness agreed that Form 72 C, a constituency result sheet, was generated from polling station result sheets, namely Form 66Cs, and was then asked if he was able to compare the 2<sup>nd</sup> Respondent's results as printed on Form 72C with the Form 66C for the constituencies involved. His answer was in the negative and he admitted that without such a comparison one cannot tell if constituency results that the 2<sup>nd</sup> Respondent used were wrong. He stated that the main curious aspect was that both had the identical signature of Rebecca Chirwa. He conceded that that none of the monitors at Rumph West or Mzuzu City Constituency tally centres had made statements contradicting the results.
131. As regards the results for Machinga South East which Ms Gwalidi also brought into the spotlight, the witness also admitted that no comparison was done between the figures on Form 66Cs and Form 72C.
132. In further cross examination, the witness conceded that some of the complaints presented to the 2<sup>nd</sup> Respondent also featured in these proceedings. He confirmed that some complaints related to alleged altered or tampered with votes for Thyolo district and conceded that no monitor had come to show that any candidate valid votes were tampered with or altered.



133. The witness was also taken through issues arising from Mr. Ndasauka's sworn statement having cross referenced to it in his supplementary sworn statements. He confirmed that Mr Ndasauka was based at the national tally centre. As regards tally sheet for Mphimbi in Dowa which Mr. Ndasauka alleged was transmitted with the statistical data part partly blocked, the witness confirmed that the candidate valid votes were readable though.
134. Other centres whose tally sheets featured in continued cross examination were Dwangwa FP School, Liwaladzi and Dwangwa JP School. The witness confirmed that no valid vote count was altered for anyone and that no monitor had made statements contradicting the vote count. He was not able to show how corrections to the statistical part of the sheets could have affected the candidate vote count.
135. As regards the result sheets which Mr. Ndasauka in his sworn statement said had no signature of a presiding officer, the witness confirmed that no monitor had come to court to challenge the vote count recorded on any of the forms.
136. At the end of the cross examination by the Honourable Attorney General, the witness conceded that the results could be investigated down to stream level and any queries could be resolved using monitors tally sheets at stream level. He admitted that no monitor had offered evidence to dispute any result.
137. Then came the turn for Mr. Mbeta for the 1st Respondent to cross examine Dr. Chilima.
138. The witness was first taken on exhibit SKC2 regarding allegations that the 2<sup>nd</sup> Respondent did not respond to complaints raised by his representatives. He was shown material in Mr. Ndasauka's sworn statement showing responses from the 2<sup>nd</sup> Respondent whereupon he confirmed that at the national tally centre the 2<sup>nd</sup> Respondent gave his representatives copies of result sheets.
139. When asked on an allegation in paragraph 20 of his sworn statement regarding Nkhatabay Tally Centre, he conceded that neither he nor Ms Gwalidi was a monitor at the centre. He gave the same answer for other polling centres he outlined in his sworn statement and referred to the statement of Ms Gwalidi.

140. When quizzed on the vote count for Hon Atupele Muluzi at Mwenilondo polling centre, the witness conceded that his correct vote was 268 and therefore the vote was not inflated by 30 as previously alleged by Mr. Ndasauka.
141. As regards the allegation in paragraph 23 of his sworn statement in which he alleged that in Mzimba South West Constituency the number of votes exceeded the number of registered voters, he was shown APM Volume 2 at page 303 and he conceded that his allegation was unfounded.
142. On the allegation that some voters at one polling centre were given pre- marked ballots by polling officers, the witness agreed that this was an isolated incident and that he had no evidence that the person was an agent of the 1st Respondent.
143. The witness was also cross examined on the audio clip relating to tippex and he conceded that the Chairperson of the 2nd Respondent did not say that it was used to the advantage or disadvantage of any candidate. He conceded that tippex was used throughout the country even in areas where the 1st Petitioner himself or the 2nd Petitioner got the highest votes.
144. On the issue of Rumphi West and Mzuzu City Constituency results the witness was asked to pay attention to the constituency printed tally sheet Form 72C. The witness conceded that there was no polling station or constituency tally centre monitor that had come to court to dispute the result on the printed Form 72C for either constituency.
145. The tally sheet for Zolokere which the witness described as a fake was also a subject on which the witness was cross examined on. In particular, the witness was asked if his allegation meant that there was no election at all at the centre and his response was he could not say there was no election at the centre.
146. The witness was shown tally sheets for Rumphi West and asked about some specific allegations namely: duplicates, alterations and ballot papers exceeding 800 per stream. He confirmed that his monitors signed the form; valid votes were not altered; and the alterations were only on statistical data. He further admitted that where ballots issued exceeded 800, less than 800 voters voted and that some alterations for Bolero were signed for.

147. With regard to the queries relating to Machinga South East, the witness stated that Ms. Gwalidi had not exhibited the Form 66Cs to prove the result entered by the 2<sup>nd</sup> Respondent in its system was a wrong one. He was then shown the 2<sup>nd</sup> Respondent's official results for the constituency in the sworn statement of Bob Chimkango. He confirmed those results to be the correct ones and not the ones on the sheet that Ms Gwalidi had exhibited.
148. In re-examination, Dr. Chilima stated that at Thazima School in Rumphi West, the query was that one stream had 450 ballots received which was an anomaly as ballots were in booklets each containing 100 ballots and that the Presiding Officer did not write his name.
149. He asserted that the result sheet for Zolokere Primary School in Rumphi West constituency was a fake, going by the barcode.
150. Moving on to Luviri Polling Station in Rumphi West Constituency, the witness noted that ballot papers received were not in 100s and there was also an alteration on the null and void votes?
151. He was also asked about Junbi School in Rumphi West, and he noted an alteration on the statistical data part.
152. The witness confirmed that there were no signatures of presiding officers or their deputies on tally sheets Ms Gwalidi had exhibited as MG1.
153. The witness further stated he would not know if his monitors lodged complaints at the polling stations unless he had access to log books.
154. While he asserted that he deployed monitors to all the 5002 polling stations he did not personally know them.
155. The witness asserted that the originals of Form 60Cs were kept by the 2<sup>nd</sup> Respondent and that to confirm the valid votes cast as recorded on Form 66C, one would have to look at Form 60C.
156. It was the assertion of the witness that where a monitor had not signed a result sheet, the presiding officer was under a duty to record such a matter or any complaint by a monitor in the logbook.

157. The witness closed his evidence by saying that duplicates were not supposed to be used in computation of final results but originals. He also said that the Nasonjo tally sheet was fake; and so were the tally sheets in exhibits DN6, DN 7 and DN8 to the sworn statement of Darlington Ndasauka.

*Ms. Miriam Gwalidi*

158. Miriam Gwalidi presented three sworn statements, two filed on the 16<sup>th</sup> of June 2019 and the other, being a supplementary one, on the 24<sup>th</sup> of July, 2019. Her sworn statements were accompanied by a voluminous number of exhibits marked as MG1 to MG 88.

159. She introduced herself as a member of UTM. She went on to say that during the Tripartite Elections held on the 21<sup>st</sup> of May, 2019, the UTM deployed her as a roving monitor for Blantyre City and at the National Tally Centre. This entailed moving around various polling centres in the city of Blantyre during the polling and attending the results processing exercise at the National Tally Centre after the polling. At the National Tally Centre, apart from herself, the UTM team also included Darlington Ndasauka and Mirriam Mzanda, among others.

160. Ms. Gwalidi asserted that in the course of discharging the responsibilities assigned to her, she received complaints from various monitors within Blantyre and in the Southern Region. At the National Tally Centre, she and her colleagues received result sheets from the 2<sup>nd</sup> Respondent which she and her teammates took time to analyse.

161. She stated that out of the result sheets they received from the 2<sup>nd</sup> Respondent for the presidential election, result sheets for 25 polling stations did not have signatures of presiding officers. She exhibited copies of those result sheets as MG1.

162. Ms Gwalidi also alleged that some of the result sheets they received did not have signatures of all monitors, yet it was a requirement that results must be signed for by at least one representative of each political party. The result sheets in question were tendered in evidence as exhibit MG2.

163. According to Ms Gwalidi, on the 22<sup>nd</sup> of May, 2019, the 2<sup>nd</sup> Respondent's Chairperson assured representatives of political parties that results records with tippex (correction fluid) of manual changes would not be used and that in the event of a mistake, a new sheet would be used so that the result sheet should be neat and clean of alterations. She went on to say that contrary to those assurances, tippex was widely used across the country to initiate changes on result sheets from various polling centres. In some instances, the changes were done manually without using tippex. Tendered in evidence as exhibit MG3 were 54 result sheets allegedly altered using tippex.
164. Further Ms Gwalidi asserted that the procedure on the polling day, in terms of handling of ballot papers was that they were to be counted first and the number entered in the result sheet before polling started. She went on to say that the result sheet also had items labelled as D and E for *number of null and void ballot papers* and *total number of valid votes cast* respectively. And then it had F for *number of cast ballot papers* representing an addition of D and E. She alleged that there were result sheets in which the figures in these three categories did not add up or were manually altered for them to add up. She went on to allege that the changes were made after the sheets had already been signed for by monitors after the 2<sup>nd</sup> Respondent's officers realised that the 2<sup>nd</sup> Respondent's system was rejecting the actual data initially entered. There were tendered as exhibit MG 4 some 10 result sheets which she said would show alterations or figures in the three categories not adding up.
165. The witness brought to the attention of the court result sheets for Mzuzu City and Rumphi West constituencies being exhibits MG 5 (a) and (b). She alleged that both were signed by the same returning officer in the name of Rebecca Chirwa and the figures therein were similar or identical. According to her, this was an anomaly since each constituency had its own returning officer and results for each constituency were supposed to be compiled using results from polling stations within the constituency.
166. Further allegations of anomalies with regard to Mzuzu City and Rumphi West constituencies were made by the witness. In respect of Rumphi West, she alleged that the results on constituency result sheet which she referred to as Form 72 were fundamentally different from the ones entered into and printed from the 2<sup>nd</sup> Respondent's computers yet the two were supposed to be exactly the same. For Rumphi West, she added that the name and signature of the Returning Officer on the manual result sheet was different from that on the computer

generated one. For Rumph West, she tendered two result sheets as exhibit MG6 (a) and (b) and another two result sheets for Mzuzu City as exhibit MG7 (a) and (b). The sworn statement of Ms Gwalidi also contained a tabulated illustration of the scenarios and the net effect. Significantly, it showed that in Rumph West, in the end result, the 1<sup>st</sup> Petitioner lost 24,354 votes, the 2<sup>nd</sup> Petitioner lost 9,151 votes and the 1<sup>st</sup> Respondent lost 7,051 votes. In Mzuzu City, the 1<sup>st</sup> Petitioner lost 468 votes, the 2<sup>nd</sup> Petitioner gained 8 votes and the 1<sup>st</sup> Respondent lost 184 votes. A similar tabulation contained in the sworn statement related to Machinga South East Constituency and showed that the 1<sup>st</sup> Petitioner gained 1,710 votes, the 2<sup>nd</sup> Petitioner gained 1,597 votes and 1<sup>st</sup> Respondent gained 12,799 votes

167. It is also the evidence of Ms Gwalidi that several complaints were lodged with the 2<sup>nd</sup> Respondent from various constituencies and districts but they were not resolved or resolved effectively. She singled out Thyolo district to have had complaints from all constituencies summarised in a document she tendered as exhibit MG 8. She also exhibited as MG 9 what she called *"a batch of copies of other complaints that were lodged with Electoral Commission."*
168. Moving on with her evidence, Ms Gwalidi alleged that some polling centre result sheets (Form 66C) received from the 2<sup>nd</sup> Respondent had different content from the copies/counterparts collected by monitors at respective polling centres yet the copies given to monitors were supposed to be counterparts of the original produced by a simultaneous process using carbon copying. The outlined differences in content were that some Form 66Cs from the 2<sup>nd</sup> Respondent had changes that were not reflected in the forms provided to monitors at the polling centres, whilst some forms had forged signatures and those signatures were different from those on forms collected by monitors at the polling centres. In a bid to prove her allegations, she tendered as exhibit MG10 a batch of Form 66Cs received from the 2<sup>nd</sup> Respondent paired with corresponding ones collected by monitors at polling centres. From this batch, she gave highlights of alleged anomalies at the following polling centres: Mchenga School in Salima North West; Joel Pvt School in Mzuzu City; St. Joseph School in Mangochi Lutende; Kajuwi School in Salima North West; St. Augustine III School; Chiphe School in Dedza South West and Ligowe School in Thyolo North. She reiterated her assertion that complaints were lodged with the 2<sup>nd</sup> Respondent on these and other anomalies but got only four responses which were manifestly inadequate or simply skirted around the complaints without effectively resolving them. She tendered in evidence some of the responses as exhibits MG 11, 12 and 13.

169. In her statement sworn on the 1<sup>st</sup> of June, 2019, and filed on the 16<sup>th</sup> of June, 2019, Ms Gwalidi alleged that on the 2<sup>nd</sup> of May, 2019, at around 11.00 am, she went to Blantyre Secondary School (BSS) Tally Centre where she found monitors complaining that results from Ndirande Matope and Ndirande Community Hall polling centres had not yet arrived at the tally centre and that they were not allowed access to complaint forms. She then rushed to the National Tally Centre, collected complaint forms and delivered them to the monitors. She made a scathing allegation that at around 8 pm, she went back to BSS Tally Centre and found a team of the 2<sup>nd</sup> Respondent's officials and one member of the 1<sup>st</sup> Respondent's party making alterations on result sheets. She joined them in order to appreciate what was happening, but they immediately stopped what they were doing. She then asked the Presiding Officer, a Mrs Namandanje, to give her result sheets for monitors and the answer she got was that they were left behind at the polling station in the Headmaster's office saying she did not know that they were supposed to be given to the monitors. She alleged that what ensued was a long discussion in the presence of monitors and Assistant Presiding Officers one of whom confessed that it was wrong for them to be making alterations without referring to the logbooks. It was then that the witness asked for the logbooks. The reply she got was that they had been locked in the stores and could not be taken out. She alleged that as she was leaving BSS Tally Centre well over a day after polling, results for Ndirande Community Hall had not yet arrived. She asserted that she then lodged a complaint in that respect, but the Presiding Officer and her assistants refused to sign the complaint form. Then at around 1.00 am on May 23, 2019, she went back to BSS Tally Centre with two other roving monitors to beef up her team but found that it had been moved with literally nothing inside including the machines used in the electoral process. She called the monitors to find out why it was closed and they too were at a loss as to why it was closed and the monitors went on to say that they had not been given result sheets and did not sign for any. Later after daybreak, she was called by monitors to rush to Ndirande Matope Polling Centre. Upon her arrival, monitors from different parties told her that the Presiding Officer had come and called some monitors to make alterations on the same result sheets she found at the tally centre on the previous night. It was her allegation that she made enquiries and one monitor confessed that alterations were made on the candidates' side but without referring to the logbook and the monitor did not sign for the alterations. She asked for the result sheet (Form 66C) the monitor was given after voting and she noticed that it had some spaces filled whilst others were blank. She lodged another complaint in which monitors signed for what she had found out.

170. Ms Gwalidi in her supplementary sworn statement filed on the 26<sup>th</sup> of July, 2019, stated that alongside Mr. Bright Kawaga, some selected UTM members and counsel for the 1<sup>st</sup> Petitioner, she took part in the discovery and inspection of documents in the possession of the 2<sup>nd</sup> Respondent pursuant to the order of disclosure made by the Court. She explained that due to the massive volume of documents to be discovered, the approach taken was a sampling one. In that regard they would request the 2<sup>nd</sup> Respondent to produce documents from a select constituency out of which a few polling stations would be selected and then ask for documents for the selected polling centres for inspection. After the inspection, copies were made of the inspected documents as well as notes of what was observed both of which were duly certified by registrars of the Court who were overseeing the exercise. She then outlined the findings from the inspection.

171. With regard to the logbooks, Ms. Gwalidi made the following findings:

172.1 According to the witness, a logbook was a booklet that was used by the 2<sup>nd</sup> Respondent to record various aspects of the polling process including the results. It had pages on which information was recorded. Such information included number of ballot papers received; number of ballot papers used; number of spoilt ballots; number of votes obtained by each candidate in each category – that is Local Government, Parliamentary and Presidential Elections; details of all polling staff and monitors. In addition, it had a part for reconciliation of ballot papers at the close of the polling and recording complaints made to polling staff by monitors, voters and other stakeholders. It was her assertion that all the details to be recorded had a separate page specifically provided for that purpose and that after all had been recorded, presiding officers and monitors were supposed to sign therein. In the 21<sup>st</sup> of May Elections, she further deposed, the 2<sup>nd</sup> Respondent for purposes of easier management of the voters, divided them into streams where their number exceeded 800 at a polling station. Each stream was allocated not more than 800 voters and had its own logbook.

172.2 Ms. Gwalidi observed some discrepancies in the Presidential Election results. The witness alleged that from the constituencies and polling stations that were sampled it was discovered that results for the presidential election as recorded



in the logbooks were different from those recorded in the results the 2<sup>nd</sup> Respondent itself had supplied to the witness and her team as monitors at the National/Main Tally Centre in Blantyre. She exhibited as MG 14A to MG 51 A and MG14B to MG51B result sheets in the logbook and those supplied at the National Tally Centre respectively.

- 172.3 She also asserted that some columns and pages in some of the logbooks were incompletely filled in that they did not have particulars on the number of ballot papers received. In that regard, copies of logbooks were tendered as exhibit MG52A to MG52V.
- 172.4 Ms. Gwalidi also made some observations on the absence of signatures of presiding officers and monitors and she tendered as MG 53A to 53N copies of logbooks which she alleged were either not signed for or some pages therein were not signed for by presiding officers and/or monitors.
- 172.5 She also noted that some logbooks were signed for by only one person. She alleged that on examination of the handwriting in the logbooks, it came to light that pages requiring to be signed for by different participants in the polling process were signed for by one person. Copies of such logbooks were presented as exhibits MG 54A and MG 54B.
- 172.6 Ms. Gwalidi averred that there were some streams that had two logbooks instead of one. She produced in evidence exhibits MG55A and MG55B which were copies of logs book in support of the allegation that some streams had two logbooks instead of one as per the required arrangement.
- 172.7 She also alleged that some logbooks were not filled at all and she made available copies as exhibit MG 56A to MG56 F.
- 172.8 She also stated that there was a problem of some Form 66Cs being manually created. According to the witness, from the sample inspection, it was discovered that for Rumphu Central at Mayembe Ward, St. Dennis School, Station Code 03031, Stream 2, the result sheet submitted to political parties at the Main Tally

Centre showed that it was manually created instead of being filled in the special form provided for by the 2<sup>nd</sup> Respondent, that is, Form 66C. She tendered in evidence in that regard exhibit MG57A and MG57 B.

172.8.1 Ms. Gwalidi stated that for some polling stations she found no logbooks at all.

172.8.2 Ms Gwalidi averred that among the constituencies and polling centres sampled during the inspection, there were a significant number of polling stations that did not have any logbook at all. She segregated the findings according to the three main administrative regions in the country. Her evidence was that for the Southern Region, seven constituencies were sampled and according to the number of polling stations and streams, there were supposed to be 300 logbooks but only 89 were found hence a variance of 211 or 70.33% log books missing.

172.8.3 With regard to the Central Region, 15 constituencies and 58 polling stations were sampled and the expected number of logbooks was 225 but only 6 were found hence a shortfall of 219 or 07.33%. In the Northern Region, logbooks for the entire region were packed in boxes. According to the number of polling stations there were supposed to be 1973 logbooks but only 577 were found hence a shortfall of 1396 or 70.76%. The witness stated that these findings were recorded in her notebook and the notes were certified by the Deputy Registrar of the Court. She produced the notes as MG58A, MG58B and MG 58C.

172. She then made some findings on voter registers.

173. It was the statement of Ms. Gwalidi that part of the polling procedure arrangements was that there were three voter information tools used, that is, two voter registers and one voter reference. The former had all details of registered voters including photographs while the latter only had the name and ID particulars of the registered voters. In terms of usage, one voter register was kept and used by polling staff and the other by monitors and each time after a

voter presented themselves for voting both the polling staff and monitors would concurrently tick off the name of the voter.

174. She alleged that some sampled polling stations did not have the second voter register duly ticked. She produced and exhibited MG59A to MG 65A and MG59B to MG 65B being voter registers and unticked voter registers respectively. She went on to allege that out of the 58 polling stations in the 15 constituencies sampled in the Central Region, only 12 polling stations or 20.69% had voter registers, only 4 or 6.89% had voter references and 45 polling centres or 77.58% had no voter register at all. These revelations, she said, were evident in her notes exhibited as MG58B.

175. She next made findings on ballots. According to the witness, the ballot papers used in the elections were in booklets each with 100 ballot papers with counterfoils such that by looking at the counter foils one would tell how many had been used per stream. She alleged that from the sampled streams, it was found that the record of ballot papers used as recorded in the result sheets furnished by the 2<sup>nd</sup> Respondent at the National Tally Centre was different from what the counterfoils showed. It was her assertion that she recorded these anomalies in her notes which were duly certified by the Deputy Registrar of this Court. She tendered her notes as exhibit MG66A to MG83A and the alleged discrepant result sheets from the 2<sup>nd</sup> Respondent as MG66B to MG83B.

176. She then made other findings related to open and unsealed result envelopes. The sample inspection, it was alleged by Ms Gwalidi, also exposed that results for the presidential election in all the sampled constituencies and polling centres were stored in open and unsealed envelopes contrary to the requirements in the 2<sup>nd</sup> Respondent's Procedures Manual. She tendered as exhibit MG84A and MG84B samples of pictures she took showing the state in which the envelopes were. She further alleged that seals and padlocks on some of the sampled ballot boxes which were supposed to be intact were in fact broken. Exhibited as MG85 to MG88 were copies of pictures she took showing the state in which the ballot boxes were.

177. Ms. Gwalidi was subjected to rigorous cross examination. She stated in cross examination that the 1<sup>st</sup> Petitioner had deployed monitors at all polling stations and that the whole idea of so deploying them was to ensure that all the electoral procedures and processes were duly followed and that there were no anomalies and irregularities. She admitted that it was the duty of the

monitors to be vigilant and ensure that candidates' valid votes were properly counted and recorded. She also conceded that she did not witness any counting and recording of votes from the beginning to the end at any polling centre and that no monitor for the 1<sup>st</sup> petitioner had made a sworn statement questioning the candidates' valid vote count.

178. When Ms. Gwalidi was shown exhibit MG2 being nine result sheets Form 66Cs which she alleged were not signed for by monitors, she admitted that actually 5 were signed for. She also admitted none of the monitors made a sworn statement to challenge the results in the concerned result sheets.
179. With regard to the alleged tippexed result sheets exhibited as MG3, the witness was asked to confirm that in her narrative in her sworn statement, she said that tippex was used to change figures not valid votes which she confirmed.
180. Ms. Gwalidi was taken through result sheets tendered as MG4 which she alleged had altered results. While she was able to confirm the alterations, she conceded that no monitor had made a statement to show that the alterations were wrongly or maliciously made to the advantage or disadvantage of any candidate.
181. The witness was asked a number of questions regarding the allegations she made in relation to the processes at Blantyre Secondary School Tally Centre and surrounding polling centres. When shown result sheets which were duly signed for by monitors and asked if any of the monitors had made sworn statements to support her various allegations she said none had done so.
182. The other area that highly featured in the cross examination of Ms. Gwalidi was in relation to exhibits MG14A to MG 51A and MG14B to MG 51 B. The witness was taken through the various documents she had exhibited and asked a number of questions on almost each and every polling centre the documents related to. She was mostly asked to compare the figures in documents marked with a "A", that is logbooks sampled during the inspection exercise and those marked as "B" being result sheets Form 66C supplied by the 2<sup>nd</sup> Respondent. In a number of instances, the witness stated that in terms of candidate votes, the figures were not different except for Ulongwe and two more centres and the witness confirmed this.

183. As regards exhibits 52A to 52V being alleged incompletely filled logbooks, the witness was taken through Form 66Cs for the concerned centres and she observed that they contained all the details that were missing from the stream log books and? were all signed by monitors.
184. Ms Gwalidi was also shown exhibits MG53A to MG53N being log books allegedly not signed by monitors or presiding officers. She conceded that some stream result log books had been signed by monitors. She also agreed that the stream results for each one of the exhibits were a replica of the results as recorded on Form 66C in HM 2.
185. With regard to allegations relating to exhibits MG54A and MG54B that the logbooks had been written and signed by one person, she confirmed that her party had monitors at the centre. She was shown? Form 66Cs for the centres and confirmed that they were duly signed by monitors for DPP and an independent candidate monitor and further that the results on Form 60s in the record log book for stream 1 matched those on the signed Form 66Cs.
186. The witness was also cross examined on exhibit MG55A and MG55B, for Ifumbo School in Chitipa Central which sought to establish her allegation that some streams had two logbooks with discrepant data. In respect of exhibit MG55B that contained copies of the logbooks, the witness conceded that it had no data on it. She confirmed that the Form 60C for Stream 1 of Ifumbo results was in tandem with the data on the Form 66C in HM2. It was put to her that she had exhibited Stream 2 results on Form 60C for Ifumbo in exhibit MG53G. She compared the data on Form 60C for Ifumbo with the data on Form 66C for Ifumbo in HM2 and it matched and monitors signed the Form 66C in HM2.
187. Moving on to exhibits MG56A to MG56F, being logbooks allegedly not filled at all, it was put to the witness that MG56A related to Rumphi Magistrates court which included Rumphi prison as a separate stream. On the others, the witness was shown the Form 66Cs from HM 2 which were all signed by monitors.
188. On the warehouses where the election materials were kept, the witness stated that they were sealed and guarded by the Malawi Defence Force. She told the court that the inspection covered only a small part of the warehouse due to time constraints.

189. The witness conceded that on the allegations about Nkhatabay Tally Centre, she did not talk to any monitor; so too on the allegation that in Salima, unregistered voters were allowed to vote.
190. On the allegations she made on Thyolo West, the witness was given polling station tally sheets, both typed and handwritten whereupon she confirmed that monitors signed them.
191. In re-examination, the witness said the stream result was generated from the log book which was the primary record. She gave a narrative of data that was supposed to be contained in a record log book and on Form 66C and how the form was supposed to be filled up. She asserted that all monitors were required to sign a result sheet.
192. The witness asserted that tippex or alterations on the statistical part of Form 66C meant that ballot papers had either been deducted or added to some columns of the votes. She said Form 66C should not have had any tippex at all since it was a summary of what happened at stream level and the record on it was merely a transfer of data already recorded somewhere else.
193. The witness stated that in her understanding, results of an election meant the entire data and not just candidate votes. She went on to say that she noted some variances in statistical data between log book data and Form 66C data in exhibits MG14A to MG 51A.
194. The witness told the court that when doing inspection of record log books, they were doing random sampling.

*Mr. Darlington Justin Lazarus Ben Ndasauka*

195. His evidence is contained in his sworn statement made on the 14<sup>th</sup> of June, 2019, and filed on the 16<sup>th</sup> of June 2019. He described himself as someone who was engaged by the UTM as a Consulting Team Leader at the 2<sup>nd</sup> Respondent's main tally centre at COMESA Hall in the city of Blantyre. He asserted that his team was the focal point of the national monitoring team for the UTM and had a largely panoramic view of the national voting process and had access to some documents and information originating from across the country.

*Alleged Irregularities*

196. Mr. Ndasauka quickly went on to scathingly allege that the voting, vote counting, vote tallying and results transmission processes were marred by serious and widespread irregularities that clearly impugned the integrity of the announced results on the presidential election. He added that during the vote tallying at the 2<sup>nd</sup> Respondent's main tally centre, he and his team were given several polling result sheets by the 2<sup>nd</sup> Respondent albeit grudgingly and they found several irregularities in respect of which he gave some detailed account as follows:

*197.1 Mphimbi School Polling Centre in Dowa Central Constituency Polling Code Number 10126*

He alleged that the number of ballot papers shown on the original form was blocked by another paper stuck to the result sheet and that the figures of the result sheet were difficult to understand. He claimed, without elaborating, that there was evidence of cast votes having been tampered with. He added that the figures on the result sheet were manipulated with corrections which were not signed for and further alleged that the result sheet which he produced as exhibit DN1 was not duly authenticated by the 2<sup>nd</sup> Respondent's presiding officer by signing on it.

*197.2 Dwangwa JP School Polling Centre Nkhotakota Polling Code Number 08023*

The witness alleged that the total number of cast votes and unused ballot papers were tampered with. The null and void votes and spoilt ballot papers were manipulated. As a result, the final results were affected since correct figures could not be deciphered from the altered result sheets which he tendered as exhibit DN2, DN3 and DN4.

*197.3 Liwaladzi FP School Polling Centre Nkhotakota Polling Code Number 08025*

The allegation made was that the entries on the result sheet were manipulated and altered with correction fluid (tippex). The numbers in figures were not matching with the numbers in words and the total number of 3,000 received ballot papers

were not tallying with the cast votes. Tendered in evidence to back up these allegations was DN5.

197.4 *Nasonjo Polling Centre Blantyre Polling Code Number 21039*

Mr Ndasauka asserted that the form used was blank on the polling centre and code particulars and these were written with a pen which is totally different from all the centres which had centre name and code already printed. He further alleged that the serial number on the barcode was also different from all results and tally sheets which clearly shows it was what he called a fake result sheet and the results on it were bogus. He tendered a result sheet marked as exhibit DN6 in his bid to prove the allegations.

197.5 *Chamvu Polling Centre Dowa East Polling Centre Code Number 10008*

The same allegations as those made in respect of Nasonjo Polling Centre were made with an additional allegation that cast votes in streams 1 and 2 were tampered with and altered without the corrections being signed for. Result sheet marked as DN7 was tendered to buttress the allegations.

197.6 *Mapuyu Court*

It was alleged that the name of the polling centre was written in ink, there was no polling centre code, so too constituency and district name. The barcode was different from those on other result sheets and exhibit DN9 was relied in on these allegations.

197.7 *Mtsiliza Polling Centre Mchinji Polling Code Number 2151*

Allegedly, the result sheet showed that the figure of null and void votes was altered to zero, so too the number in words and reliance was placed on exhibit DN10

197.8 *Mbaweni CBO Mzuzu City Mzimba District Polling Code Number 06006*



It was alleged that the figures for valid votes and null and void votes were tampered with and the result sheet exhibited as DN11 was not duly authenticated by the 2<sup>nd</sup> Respondent's presiding officer.

197.9 *Kalolo School in Mapuyu North Constituency Lilongwe District Polling Code Number 13002*

Relying on a result sheet exhibited as DN12, the witness alleged that spoilt and void votes were tampered with and changed and so were the votes for presidential candidates.

197.10 *Mphanya School Polling Centre Karonga Central Constituency Polling Code 02071*

The alleged irregularity was that the figures in the result sheet the 1<sup>st</sup> Petitioner's monitor had were different from the 2<sup>nd</sup> Respondent's result sheet and he exhibited the monitor's result sheet and that of the 2<sup>nd</sup> Respondent as DN 13 and 14 respectively.

197.11 *Ulongwe Model School Polling Centre Mulanje Central Constituency Polling Code Number 26031*

Mr Ndasauka alleged that the 2<sup>nd</sup> Respondent's result sheet DN16 and that of the 1<sup>st</sup> Petitioner's monitor DN15 had different votes polled by the 1<sup>st</sup> Petitioner which shows he lost 100 votes as a result.

197.12 *Mwenilondo School Polling Centre Karonga Central Constituency Code Number 02064*

It was alleged that the 2<sup>nd</sup> Respondent's result sheet DN18 showed 268 votes for candidate Atupele Muluzi while that of the 1<sup>st</sup> Petitioner's monitor showed 238 hence the votes for Atupele Muluzi were inflated by 30 votes.

197.13 *Chisawani School Polling Centre Thyolo North Constituency Code Number 24009*

Allegedly the result sheet, Exhibit DN20, relied on by the 2<sup>nd</sup> Respondent had different figures from those in the result sheet, exhibit DN19 given to the 1<sup>st</sup> Petitioner's monitors in streams 3 and 4. He went on to say that effectively the votes for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were reduced and added to those of the 1<sup>st</sup> Respondent. He invited the Court to particularly take note that in both streams the numbers of votes reduced were exactly the same.

197.14 *Mpata School Polling Centre Code Number 25001*

The allegation made was that the number of spoiled votes in the 2<sup>nd</sup> Respondent's result sheet, exhibit DN22 was inflated to 104 from the figure 1 that appears in the monitor's result sheet, exhibit DN21 and that there were so many cancellations and alterations on the 2<sup>nd</sup> Respondent's result sheet which were clearly effected after the monitor had signed and taken his copy.

197.15 *Nyezerera School Polling Station Phalombe*

The witness claimed that the result, exhibit DN24 sheet from the 2<sup>nd</sup> Respondent had a barcode with different format from others which according to him obviously meant it was fake. He further alleged that the tally sheet had many cancellations and alterations, the centre name was not in print but hand written and the 1<sup>st</sup> Respondent's votes were substantially increased as compared to those on the monitor's result sheet, exhibit DN23.

197.16 *Phalombe Polling Centre Code Number 25013*

Apart from the alleged cancellations and alterations, the same allegations made in the case of Nyezerera School Polling Centre were made and reliance was made on exhibit DN25 being a result sheet the 2<sup>nd</sup> Respondent had used. He did not produce the monitor's result sheet.

197.17 *Mlala Polling Centre Code Number 08028*

The allegations made were exactly like those in the case of Phalombe and reliance was on exhibit DN26, a result sheet used by the 2<sup>nd</sup> Respondent. Again he did not tender the monitor's result sheet for comparison.

197.18 *Chamvu Polling Centre Code Number 10008*

The witness repeated what he asserted in relation to Phalombe and Mlala Polling Centres and only tendered, as exhibit DN27, the result sheet allegedly used by the 2<sup>nd</sup> Respondent.

197.19 *Linguni School Polling Station Code Number 25010*

It was the same story like that for Phalombe, Mlala and Chamvu and he relied on DN28 being the result sheet allegedly relied on by the 2<sup>nd</sup> Respondent.

197.20 *Nambiro School Polling Station Code Number 25003*

The claims were the same as those in respect of Phalombe, Mlala, Chamvu and Linguni with an addition that there were alterations and corrections not signed for. He relied on DN29 being a result sheet allegedly used by the 2<sup>nd</sup> Respondent

197.21 *Migowi School Polling Centre Code Number 25034*

The allegations made were that the result sheet used by the 2<sup>nd</sup> Respondent, exhibit DN30 had alterations and cancellations not signed for and that the presiding officer did not sign for it to authentic the results.

197.22 *Linga School Polling Centre*

This was the last polling centre whose results Mr. Ndasauka took issue with and sought to impeach. The claims he made were the same as those made with regard to Nambiro School Polling Station and he relied on DN31, a result sheet allegedly used by the 2<sup>nd</sup> Respondent.

197. In cross examination Mr. Ndasauka after confirming the nature of his engagement by UTM during the elections was asked what academic qualifications he possessed and he said he held a Bachelor's Degree in Business Administration from the University of Malawi.

198. He admitted that in his sworn statement he did not raise any problems with the voting itself. He also admitted that he did not raise any issues with vote counting and went on to further admit that he did not do so since he did not witness the vote count. He went on to say that his evidence on what happened at the polling centres was mainly based on what he got through phone communication and documents from the 2<sup>nd</sup> Respondent.
199. When asked to explain what he meant when he alleged that vote tallying was marred with irregularities, he gave the example of the results for Chisawani School Polling Centre. When asked how many votes in total were involved in all the centres he brought in evidence he said it was 198.
200. The witness was shown exhibits DN2, DN3 AND DN 4 and stated that all except one were not signed for by the 1<sup>st</sup> Petitioner's monitors. He conceded that the alterations in these documents were only in the statistical or data part and that the candidate votes were not tampered with.
201. Mr Ndasauka was asked a blanket question whether he had brought to the Court alternative results for the results he sought to discredit on account of being on duplicate result sheets, fake tally sheets, among others, and his answer was in the negative.
202. The witness told the court that his team at the National Tally could access their party monitors mostly by phone and that the team also had access to some documents from their monitors and some from the 2<sup>nd</sup> Respondent.
203. On the allegation of votes not tallying up the witness conceded that in the whole petition the 1st Petitioner and the entire sworn statement of the witness, was a total of 198 votes that were involved, that is, 68 votes at Chisawani; 100 votes at Ulongwe, and 30 votes at Mwenilondo.
204. On his complaint relating to Dwangwa Junior Primary School (JP) School the witness confirmed that monitors for the PP and DPP signed the results and that candidate votes were not tampered with as the alterations were limited to statistical data.
205. Regarding the complaint on use of duplicate sheets and fake sheets the witness said he did not have any evidence of different valid vote counts.

206. In further cross – examination by Counsel Mbeta the witness said among the people he worked with at the national tally centre was Ms. Mzanda and confirmed being given all the results by the 2<sup>nd</sup> Respondent. He agreed that one of the reasons the results were given out by the 2<sup>nd</sup> Respondent to monitors was for them to verify the accuracy of the information on the tally sheets.
207. The witness conceded under cross-examination that presidential results could possibly be tallied for the whole country using forms 60C and 66C without looking at the logbook. [is this true on the totality of the evidence.
208. The witness was taken through DN2, 3 and 4, 5, 6, 7,8,9,10 11, 12 and 18 relating to alleged tampering or manipulation of votes.
209. When shown tally sheet for Chamvu Polling Centre which admittedly was different from those printed for the purpose, he was unable to show how it was used to manipulate the votes of anybody or let alone the 1st Respondent who only got 6 votes when the 2nd Petitioner got 677 votes.
210. Regarding Mphimbi School, which the witness had complained that a part of the statistical data was blocked out when transmitting, he stated in cross examination that the alteration on the votes for Dr Chilima to 171 was to correct a genuine wrong addition.
211. It was also conceded by the witness that the changes or alterations made at Dwangwa JP School to statistical data did not affect valid votes attained.
212. The witness said for Nkhotakota, he never contacted party monitors to see if the candidate valid vote was affected by the statistical data; so too for Nasonjo.
213. The witness said he had no issues with the vote count at Chamvu apart from that the sheet was fake, so too for Majiga polling centre in respect of which he had no evidence to dispute the valid vote count despite use of tippex.
214. The witness stated he was not challenging the valid vote count for Mtsiliza in Mchinji; Mbawemi CBO in Mzuzu and Kalolo School in Lilongwe.

215. Moving on to Mpata School, the witness confirmed that it is the monitors for UTM who signed the tally sheets that would be able to say if the alterations affected any candidate's valid votes. The similar position was taken for Nyezelera in Phalombe as he was also unable to say whether the votes were manipulated in favour of any candidate. Again for Mlara, Linguni, Nambiro and Migowi, although admittedly there were alterations, the witness said he had no evidence of cheating on candidate valid votes.

216. The evidence of the witness in re-examination was very brief. He stated that the tally sheet that was Form 66C had several parts. He outlined them to be the ballot reconciliation part and the valid votes part. It was his assertion that the two parts were interrelated such that changes on one part would automatically have necessitated changes on the other.

*Mr. Bright Kawaga*

217. Mr. Bright Kawaga introduced himself to be the Deputy Director of Elections for the UTM. He stated that he took part in the discovery and inspection of documents in the possession of the 2<sup>nd</sup> Respondent pursuant to the order of disclosure made by the Court. He explained that due to the massive volume of documents to be discovered, the approach taken was a sampling one. In that regard they would request the 2<sup>nd</sup> Respondent to produce documents from a selection of constituencies for sampling purposes. From the sampled constituencies a few polling stations would be selected and then they would ask the 2<sup>nd</sup> Respondent for documents for the selected polling centres for inspection. After the inspection, copies were made of the inspected documents as well as notes of what was observed both of which had to be duly certified by agents of the Registrar of the Court who were overseeing the exercise.

218. It was also his assertion that he was part of a team of party representatives that accompanied the 2<sup>nd</sup> Respondent's officials to Dubai in the United Arab Emirates to monitor the printing of ballot papers and other polling materials for the 21<sup>st</sup> of May 2019, Tripartite Elections to ensure that no counterfeits were introduced into the polling process for possible rigging. He stated that the 2<sup>nd</sup> Respondent had awarded a contract to a company called Al Ghurair Printing and Publishing Company (Al Ghurair) to do the printing.

219. He went on to say that the involvement of the party representatives in monitoring the printing exercise, led to some interventions. In that regard the design of the results sheets was changed and the printed result sheets for the local government, parliamentary and presidential polls were in different colour and only one copy was an original and the rest of the counterpart copies were duplicate as opposed to the initial design of having all sheets in the same design. The party representatives also inputted security features especially on the ballot papers and he singled out customization as the prominent security feature. He continued to say that all logbooks which he said comprehensively recorded the process and outcome of the polling had printed on the cover the following details: Region to which they related, district and its code, constituency and its code, ward and its code and polling station and its code. There was no logbook that had space for the filling up of these details manually or in handwriting. He made specific mention that page 14 of the logbook was for recording of presidential poll results and that it had names of the presidential candidates already printed and there was no logbook which was blank in that respect as to allow polling staff to fill in names of presidential candidates. He further stated that no logbook marked as "Reserve" was printed.
220. It was also deposed by Mr. Kawaga that for easy management of the voters the 2<sup>nd</sup> Respondent divided registered voters at each polling centre into streams if they exceeded 800 which meant every polling stream had no more than 800 voters. Each polling station had its own customised result sheet indicating the number of streams, district name and code, constituency name and code, polling station name and code and a barcode with simply a serial number below it and no letters at all.
221. According to Mr. Kawaga, the inspection he was involved in revealed that some stationery used in the elections was not as it was supposed to be.
222. Mr. Kawaga claimed in some logbooks details like region, district name and code, constituency name and code, ward name and code and polling station name and code which should have been in printed form were handwritten. He tendered as exhibit BK1 to BK39 copies of the alleged logbooks.
223. The other anomaly in the logbooks he singled out was that names of presidential candidates were handwritten instead of being in printed form and he produced exhibits BK40 to BK49 as proof thereof.

224. He also alleged that in some logbooks, the result sheets had strange barcodes in that they had letters in them which should not have been the case. He cited the case of a logbook for Nyamikolongo Polling Station in Nsanje Central Constituency whose result sheet had a barcode shown as PRE066C2019A4. He produced as BK50A and BK50B the logbook and result sheet in issue.
225. The witness also exhibited BK51A and BK51B being copies of logbook and result sheet for Mileme School Polling Station in Phalombe North Constituency in support of his assertion that in some logbooks columns for additional streams had been handwritten in the results sheet.
226. Further in evidence are BK52A and BK52B which the witness said showed that in some logbooks, result sheets had names of candidates and details about ballot papers handwritten instead of being in print form.
227. The other alleged anomaly pointed out was that there were logbooks marked "Reserve" and which were blank. He tendered BK53A to BK53C being copies of "Reserve" logbooks for Thyolo West Constituency.
228. It was also claimed by the witness that there were logbooks which had page 14 meant for recording presidential poll results markedly different in design as compared to the genuine page 14 as designed and printed by Al Ghurair. In a bid to prove this allegation he produced BK54A and BK54B being copies of a genuine page 14 and the questionable one respectively.
229. Lastly, Mr. Kawaga alleged that there were logbooks found at a warehouse in Blantyre which were not in the form of a booklet but simply loose papers stapled together and he tendered BK55A and BK55B to prove that claim.
230. Mr. Kawaga was cross examined, first by the Honourable Attorney General representing the 2<sup>nd</sup> Respondent and then by counsel Mbeta representing the 1<sup>st</sup> Respondent.
231. The material evidence of Mr. Kawaga in cross examination was that as Deputy Director of Elections for UTM, his duties were, among others, working with other electoral stakeholders and dealing with monitors including training them. He added that monitors were delegated to



help a party to oversee the electoral process and thereby expected to give a true reflection of what happened on the ground.

232. He stated that in the aftermath of the elections, it was possible to contact the monitors at the lowest level of the polling process and to see their Form 60Cs.
233. He conceded that the evidence in his sworn statement solely related to what he discovered during the inspection exercise. He expressed ignorance on whether or not the petition was amended after the inspection.
234. When asked whether the issue of alleged intimidation of monitors had anything to do with logbooks, he said partially it had. When asked a specific question if he found anything about intimidation of monitors in the logbooks, his answer was in the negative.
235. On bribing of monitors, presiding officers and other polling staff influencing voters, arrest of persons and failure to deliver ballot papers under conditions of absolute security, he said these were not also found in the logbooks but they were supposed to be recorded therein by the presiding officer. He said he had an explanation why these matters were not found in the logbooks.
236. Mr. Kawaga conceded that how his party conducted the inspection in terms of the number of people to deploy, the number of polling stations to inspect, and documents to photocopy was entirely up to the party. When it was put to him that the notes taken during the inspection were individual notes taken privately and stamped by the Registrar of the Court, he disagreed. He was then asked if they were co-signed for by the Malawi Congress Party and the 2<sup>nd</sup> Respondent and he answered in the negative.
237. On his allegation of counterfeit polling station result sheets, the witness was asked whether apart from being part of the team that went to Dubai to monitor the printing of the electoral stationery he had exhibited the printing contract to show what exactly was to be printed he said he did not exhibit the contract and did not even see it.
238. The witness was asked whether despite logbooks exhibits BK1 to BK 39 looking different from what he had expected he had brought evidence from any monitor to show that in relation to

those logbooks, a candidate's votes were rigged. He said that he had an explanation why that was not done such an explanation being that there were time constraints.

239. Mr Kawaga was taken through the other logbooks he exhibited as BK40 to 55B in aid of the other various alleged forms of discrepancies in the logbooks and asked if the discrepancies had resulted in the change of what could have otherwise been the figures of the votes as recorded and he answered in the affirmative. When pressed how that would be, he said according to him as long as what was used was not in the prescribed form, it should not have been taken into account.

240. In cross examination by Mr. Mbeta as to how many types of result sheets were printed in Dubai, the answer Mr. Kawaga gave was that it was two types and he confirmed that they were Form 60C and Form 66C and that Form60C would only contain valid votes per candidate. He went on to say that Form 66C was a booklet with 20 sheets and the first sheet was the original while the rest were watermark duplicates. He agreed with counsel that information filled on the first sheet was supposed to be exactly the same as on the rest. He further stated that the watermark duplicate was introduced during the printing exercise in Dubai at the request of political party monitors who included the witness himself and Mr Chapweteka from the Malawi Congress Party, among others, after it was noted that the initial design would have meant having more than one original sheet. He added that it was also agreed that only the original would be used as a master copy in sending results to the 2<sup>nd</sup> Respondent. The witness agreed with counsel that the changes made to Form 66C were indicative that there was no prescribed format.

241. It was suggested to the witness that considering that Form 66C was in a booklet with 20 papers, although the papers were self-carbonated, if one were to write on the top sheet, numbers on the other sheets may not be properly seen. In response the witness while he seemed to accept the suggestion was quick to point out that before the elections, the presiding officers were told how to write on the sheets to make sure that what was written on the first sheet was captured on the rest of the pages and that the sheets were printed with specification to take that into account. In further cross examination, the witness stated that actually the 20 sheets were segmented into four batches of five sheets each and it was the first batch of five sheets that was the original and the rest were the watermark duplicates. He agreed with counsel that in filling them every batch of five was filled separately and that if the Presiding officer messed up the first sheet in the first

batch of five, the remaining four on that batch would also be messed up. He also agreed that in that scenario, in order to come up with a cleaner version, correct information could be filled on the next batch of five sheets and if properly signed for the sheet on top will be regarded as the original and the rest duplicates.

242. The witness was also taken through Form 71C and Form 72C. He said he could not remember how many copies of each were used but was able to tell that 71C was used at the constituency tally centre and 72C at the district tally centre for the presidential results.

243. In re-examination the witness told the court that logbooks were customized to a particular polling station and had security features even imbedded in the marginal lines.

244. He told the court that the notes taken during inspection of logbooks were not co-signed by the other parties.

## 2<sup>ND</sup> PETITIONER'S EVIDENCE

### *Dr Lazarus McCarthy Chakwera*

245. The 2<sup>nd</sup> Petitioner made a sworn statement verifying the allegations in his petition. He did not, however, make his own detailed sworn statement in support of his petition. The 2<sup>nd</sup> Petitioner was therefore only cross-examined by the Respondents on the contents of his petition. He stated the following during his cross-examination by the Respondents.

246. He explained his educational background that he holds a doctorate degree in theology.

247. He confirmed that according to the constitution of his political party the last election was his last opportunity to contest in the presidential election on his party ticket. He however denied that, consequently, he was intent on getting the position of President in the last election at all costs.

248. He agreed that voters' rights to vote for different candidates must be respected.

249. He stated that to verify the results of the election he would rely on the party monitors, totalling over 20 000 who were deployed at the various polling stations. Further, that these monitors would be given result tally sheets, Forms 60C and 66C, and would verify the veracity of the election results. He added that monitors had first-hand information and their signatures on tally sheets would ordinarily mean that they certify what they were signing on.
250. He then said that if the duplicate, altered, unsigned, non-customized or tippexed tally sheets had false information or figures monitors would be able to tell or question such down to stream level at a polling station because they were there when the tally sheet was prepared. He however added that at a certain stage from the polling station all the way to the Commission, someone else would also be able to look at the same tally sheet and say it was not correct.
251. He then agreed that Form 60C was where candidate votes were recorded. He stated that it could be correct that his witnesses' sworn statements did not have evidence that his monitors were not given Form 60Cs.
252. He agreed that he had not brought monitors before this Court. Further, that a monitor's failure to challenge a result was significant. He stated that however his other witnesses could and would challenge the same results in the absence of the monitors.
253. He then stated that his petition was alleging both undue return and undue election of the 1<sup>st</sup> Respondent. He indicated that he was not bringing a challenge in Court on the basis of background pre-voting matters such as registration of voters. He confirmed that he was challenging how the figures on the duplicate, tippexed, altered and fake result sheets were used in determining the election results on the candidate votes.
254. He then stated that he did not know whether barcodes on result tally sheets were ever scanned. He added that what mattered was the correctness of data on a form that affected the election results and not the nature of the form. He however said where the form of a result tally sheet affected the substance he would prove that.
255. He stated that he did not know how duplicate result tally sheets were generated but that he knew that ordinarily data on duplicates had to come from original result tally sheets. He however

agreed that original result tally sheets had counterparts in water marked duplicate tally sheets that contained results and were given to monitors.

256. He then said those he had delegated, and not himself, confirmed with monitors on the results.
257. He then stated that he neither knew whether there were prescribed forms of result tally sheets under the Parliamentary and Presidential Elections Act nor whether that was the reason result tally sheet format was changed upon printing in Dubai.
258. He stated that although some parts of his petition did not mention specific provisions of the Parliamentary and Presidential Elections Act that the 2<sup>nd</sup> Respondent did not comply with, his witnesses would demonstrate the manner in which the 2<sup>nd</sup> Respondent had breached the said Act and how it had not achieved transparency and accountability. He added that he could not speak on the legal or Constitution provisions.
259. He then said that he did not know whether international accounting standards were part of the electoral laws.
260. He insisted that his witnesses would present evidence on his behalf on the sources of the procedures used by the 2<sup>nd</sup> Respondent during the elections.
261. He then stated that on unjustifiable use of duplicate tally sheets on transmission of results from the constituency tally centre to the national tally centre, his witnesses would deal with the same. He could not say which witness. He added that neither did he have a witness from a constituency tally centre with alternative results forms contradicting results on duplicate result sheets. He added that to verify correctness of figures on duplicate result tally sheets one had to check in the stream logbook. He also said that if the use of duplicates to transmit results, on spoiling of original result tally sheets was part of the 2<sup>nd</sup> Respondent's procedures, then that would be justifiable.
262. He then stated that no witness had given names of monitors that were denied result tally sheets.
263. He then stated that the effect of use of tippex or a pen to alter figures would be the same unless tippex was used to hide something. He agreed that monitors could speak to the figures since

they had Form 60Cs. He added that what would be worrying was not the alteration but whether the new figure was correct and how the alteration was done.

264. He then agreed that tippex was used on result tally sheets in his constituency and he was amazed because the 2<sup>nd</sup> Respondent stated that it did not supply the tippex.
265. He then stated that he was questioning where the customized result tally sheets went for the 2<sup>nd</sup> Respondent to be using non-customized reserve tally sheets. He however said that he was not saying the non-customized forms were not signed by his monitors. He was shown a non-customized form that was signed by his monitors.
266. On the allegation in his petition on missing votes, he said he meant votes not accounted for. He agreed that in parts A-F in Form 66C it was figures on ballots that were recorded there. He added that miscounting of those ballots would affect candidate votes but that proper counting would not. Except that miscounting of unused ballots would not affect candidate votes.
267. He then stated that his witnesses were going to demonstrate that some candidate votes were transferred to null and void ballots and that such changes on null and void ballots should not have happened.
268. He stated that his witnesses would prove that on some result tally sheets number of valid votes cast exceeded number of registered voters. He noted changes in total valid votes cast and stated that total number of valid votes cast was not used to determine the national results.
269. He stated that his witnesses would demonstrate that the 2<sup>nd</sup> Respondent announced final results before uploading certain results from the Central Region. He however said that he was not aware of anyone who demonstrated that there was a final result announced by the 2<sup>nd</sup> Respondent less the non-uploaded results.
270. He then stated that his witnesses, not himself, looked at the final election results gazetted by the 2<sup>nd</sup> Respondent in August 2019 to check the disparity of final results.
271. He amended paragraph 25.10 of the petition so it read that the 2<sup>nd</sup> Respondent accepted result tally sheets where total number of used and unused ballots were higher than the ballot papers

issued. He said, although his monitors were not in Court, his witnesses were going to say whether valid votes got affected by that disparity given that used ballots included null and void votes as well as votes.

272. He stated that on delivery of polling material not under absolute security he was referring to both pre and post voting. He added that this was with regard to fake or non-customized result sheets he did not know when and who delivered the same to the polling stations.

273. He then said that, although he claimed that his monitors were not given a summary of the polling results, he was not alleging that the Form 66C was not furnished to his monitors except at three alleged polling stations.

274. He then said he had evidence concerning allegations to do with Mpatsha Tally Centre and Nsanje Central Constituency.

275. Further, that he had witnesses who were going to prove the 2<sup>nd</sup> Respondent's alleged use of contaminated results and that it announced results without thorough audit. And so too, that the 2<sup>nd</sup> Respondent announced results before resolving all complaints.

276. He then stated that on whether results were tampered with during transmission, he was challenging the said results. He also stated that signing of tally sheets was mandatory and that reasons for failure to sign had to be recorded.

277. He then said his witnesses, especially Peter Lackson, was going to demonstrate bias by the 2<sup>nd</sup> Respondent in favour of the 1<sup>st</sup> Respondent because there had been no explanation why alterations of result tally sheets as well as use of duplicate result tally sheets happened nationwide and also failure to upload results before announcement of final results.

278. He then explained that results from 78 constituencies, concerning 1.4 million votes, were affected by irregularities as defined under the Parliamentary and Presidential Elections Act (PPEA).

279. He agreed that the pattern of results announced depended on each candidate's stronghold.

280. He confirmed his allegation of rigging and said that monitors would show such anomalies. He then confirmed some complaints that he did not indicate in his petition.
281. He then stated that the elections were paper based because the data from the original Form 66C was entered on a computer system of the 2<sup>nd</sup> Respondent at a constituency tally centre and transmitted simultaneously with a scanned Form 66C. Further, because the 2<sup>nd</sup> Respondent printed the electronically transmitted data from the Form 66C and approved the same on paper.
282. He was shown some tippexed and altered tally sheets from his own parliamentary election and said that he did not know of the same beforehand but that if anyone wanted to challenge them they would do so. He was given a tally sheet which showed a deficit on ballots of six and said he would not tell if that was six missing votes unless he saw the original tally sheet. He added that a monitor or the record would confirm that aspect.
283. He reiterated that he was challenging tippexing of results in the presidential election.
284. He then stated that the transmission of results was not verifiable even though there were monitors at several levels of result transmission since alterations started at constituency tally centre. He then said the system was accountable in the sense that his monitors could tell where alteration of results started.
285. He then said that he did not know of any result on which auditors did not carry out their function.
286. He then said it would appear his votes were being added at every stage of tallying.
287. During re-examination he stated that monitors were stationed at tally centres but the presiding officers were responsible for completion of election documentation. Further, that a presiding officer had to record why a monitor had not signed for a tally sheet.
288. He then stated that for the United Democratic Front, a single monitor's name appeared as the one who had signed for different polling station duplicate tally sheets namely at Mchengawedi and at Malemia School. He stated that his monitors did not sign on the tally sheets in question.



He added that they were not in Court as witnesses. Further, that the monitor who signed on a tally sheet at Kanjuli School was not a witness in Court.

289. He then stated that he lodged the petition because of information he got from his monitors about disparity of results between polling stations and constituency tally centres and that they observed tippexed result sheets at constituency tally centres after monitors had signed results sheets at stream and polling station level.
290. He said that the 2<sup>nd</sup> Respondent designed an excellent system of accountability but he was in Court because certain things were not followed. He added that alterations ought to have been signed for if they were to be accepted. Further, that tippexed documents would not be accepted in accounting.

*Mr. Richard Chapweteka*

291. Mr. Richard Chapweteka stated in his sworn statement that he was a monitor for the 2<sup>nd</sup> Petitioner at the printing of ballot papers; results tally sheets and other polling materials in Dubai. He stated that the printing was done for the 2<sup>nd</sup> Respondent by Al Ghurair Printing and Publishing, a printing company registered in Dubai. He added that he monitored the printing and packaging of the materials in question in Dubai between the 7<sup>th</sup> and 30<sup>th</sup> of April, 2019. He was in the company of the 2<sup>nd</sup> Respondent's Chief Elections Officer and his Deputy as well as monitors from the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent.
292. He stated further that during the period in question, he suggested, and it was agreed that each original result tally sheet should be printed with attached copies of carbonated papers in quadruplicate so that party monitors should be given their own copies for record and verification. Further, that where there were more than four monitors, another result sheet would be signed but bearing a watermark written 'duplicate' to prevent abuse of copies for tampering/rigging by the 1<sup>st</sup> Respondent's political party.
293. He emphasized that the duplicate was not meant to be accepted and used by the 2<sup>nd</sup> Respondent as primary evidence of results polled. He then stated that when he was at the 2<sup>nd</sup> Respondent's National Tally Centre assisting the 2<sup>nd</sup> Petitioner, he was astonished to know that the 2<sup>nd</sup>

Respondent accepted and used duplicate result sheets in its tally system as well as used counterfeit result sheets.

294. He stated that result sheets for the past election were pre-printed with security features, namely, district name, constituency name, centre name with respective codes as well as a barcode capturing the said codes. He added that stream number and page numbers were also pre-printed. He stated that the counterfeit result sheets he saw at the National Tally Centre were not so pre-marked.
295. He stated that upon noting these anomalies, the 2<sup>nd</sup> Petitioner, through his Party Secretary General lodged a formal complaint which the 2<sup>nd</sup> Respondent ignored and proceeded to announce the results thereby defeating the will of the people.
296. In his sworn statement in reply to that filed by the 2<sup>nd</sup> Respondent's Chief Elections Officer Mr Chapweteka stated that the 2<sup>nd</sup> Respondent issued a Polling Station Procedure Manual which was attached to the sworn statement of Mr Eisenhower Mkaka. He added that political parties and candidates relied on the fact that the 2<sup>nd</sup> Respondent would follow the said Procedure Manual.
297. He added that the Manual provided in paragraph 5.3.1.2, pursuant to section 73 of the PPEA, that monitors had the right to countersign the result of count sheets of the record logbook. He added that although that was not mandatory it would be wrong for the 2<sup>nd</sup> Respondent to retract from its position as indicated in the Manual.
298. He asserted that the monitors of the 2<sup>nd</sup> Petitioner, in collaboration with his coalition partners, the Peoples' Party and Freedom Party, were present at all polling centres. He added that the 2<sup>nd</sup> Respondent could not therefore state that some result tally sheets had no signatures because the 2<sup>nd</sup> Petitioner's monitors were not present. He stated that the truth was that the 2<sup>nd</sup> Petitioner's monitors were denied the opportunity to look at the results tally sheets and also to sign on the same or that the signing was done elsewhere in the absence of the said monitors.
299. He then stated that the 2<sup>nd</sup> Respondent's presiding officers were supposed to note in the record logbook, the reason for refusal to sign result tally sheets by monitors. He noted that the record

log books disclosed by the 2<sup>nd</sup> Respondent in the present matter did not show any such information.

300. He stated that many monitors were denied copies of result tally sheets down to stream level. *He heard of three such incidents from Zomba.*
301. He stated that consequently the affected monitors resorted to sending results by text message and this eventually led to the 2<sup>nd</sup> Petitioner's failure to have credible results at his parallel tally centre to compare with those of the 2<sup>nd</sup> Respondent.
302. He stated that on 23<sup>rd</sup> of May 2019, the issue of use of duplicate result sheets was brought to the attention of the 2<sup>nd</sup> Respondent's Chairperson and the Chief Elections Officer by himself and Mr Eisenhower Mkaka. He added that the Chief Elections Officer admitted the anomaly and promised to address the same but he did not until final results were determined by the 2<sup>nd</sup> Respondent.
303. With regard to printing of reserve tally sheets, that he called counterfeit, he stated that these were not brought to the attention of the 2<sup>nd</sup> Petitioner as a contestant in the past election and if these were indeed printed, that defeated the intended transparency and accountability sought by the pre-printing of details on result tally sheets. He added that the printing of reserves, which he called counterfeit or fake, ran contrary to the contents of the printing contract which he exhibited. He referred to page 25 of the contract on the scope of supply which lists all documents to be printed and the quantities and he noted that the list did not indicate booklets of 'reserve result sheets'. The details of the polling station and other details were manually filled on the reserve Form 66C and not pre-printed.
304. He added that reserve tally sheets defeated the agreement that only one original result sheet would be used as confirmed by Mr Sammy Alfandika, the 2<sup>nd</sup> Respondent's Chief Elections Officer in paragraph 78 of his sworn statement.
305. He then observed that the use of tippex was acknowledged by the 2<sup>nd</sup> Respondent's Chairperson yet the 2<sup>nd</sup> Respondent did not supply the same. He added that such use of tippex was so systematic in the manner the in which figures were altered so that its use was not a mere innocent correction of errors.

306. During cross-examination by the Respondents he stated as follows. That whilst at the National Tally Centre he communicated with people at the 2<sup>nd</sup> Petitioner's Parallel Tally Centre.
307. He confirmed that the agreement in April 2019 to make changes to the tally sheet format to have originals and watermarked duplicates was done after the printing contract had been awarded on 25<sup>th</sup> of March 2019 and after the Polling Station Procedure Manual was developed. He confirmed that this agreed change was not specified in the contract and in the Manual.
308. He however insisted that the result tally sheets were prescribed.
309. He then stated that he was shown the packing list of voting materials at the time of their delivery at Kamuzu International Airport but he did not bring it in Court for a reason. He agreed in that case the Court could not verify the packing list. He added that however he inspected the polling materials once they arrived at the said airport and never saw 'reserve result tally sheets'.
310. He stated that rigging could happen using duplicates since original tally sheet figures were not known. He insisted on this aspect when shown a duplicate result tally sheet. He added that comparison with a monitor's Form 60Cs would be done but he had not brought monitors' copies. He stated that other witnesses would show the disparities in figures on tally sheets.
311. He agreed that he could not explain how the 2<sup>nd</sup> Petitioner's monitors appeared to have signed on the duplicate or reserve/counterfeit tally sheets. He agreed that he was not at the polling station to competently comment on why the 2<sup>nd</sup> Petitioner's monitors did not sign result tally sheets. He added that he had no proof on refusal of monitors to sign.
312. With regard to tally sheets barcodes he agreed that they were never scanned to derive information as was usually the case with barcodes and that instead tally sheets were scanned and transmitted to the National Tally Centre.
313. On duplicates he stated that he expected duplicates to have correct information signed for by monitors and presiding officers of the 2<sup>nd</sup> Respondent. Further that he had not brought evidence by a monitor contesting results on duplicates.

314. He also said he could not personally demonstrate how tippex was used to affect the valid vote count. He left this to other witnesses to show.
315. He was asked to compare a copy of a reserve Form 66C for Chikhala Polling Station from Ntchisi that he got from the 2<sup>nd</sup> Petitioner's monitor and a Form 66C used by the 2<sup>nd</sup> Respondent and the figures on the two Form 66Cs were the same.
316. With regard to the original and watermarked duplicate Form 66C he agreed that the ballot and vote figures were manually filled and so too monitor and presiding officer names. He accepted that the white manually filled watermarked duplicate would be kept by the presiding officer and the copies would be given to monitors. He however insisted that the manually filled watermarked duplicate Form 66C did not become an original because there was only one original Form 66C. He could not say whether data on the original would be different from data on the watermarked duplicate where both were signed by monitors.
317. He then stated that reserves were not required to be printed because reconciliation of ballot papers would be done in the log books and later the data would just be transferred to Form 66C which would not present errors and hence only one original was provided.
318. He then stated that the printer printed 5002 Form 66Cs. He however conceded that the quantity of 5500 Form 66C booklets indicated in the contract price schedule was in excess by 498 booklets. He agreed that it would not be possible to customize the 498 to the 5002 polling centres.
319. He agreed that voters would make mistakes on ticking to indicate their vote hence streams were provided more ballot papers than registered voters. And that more ballots papers were printed than registered voters. He however did not agree that presiding officers would make mistakes transferring data from log book to Form 66C.
320. During re-examination he stated that he saw results tally sheets in Dubai that had all the necessary polling station details pre-printed. He added that he was also shown a packing checklist that he was advised he could not take away for security reasons. He added that he could not take pictures for the same reason. He also said that at Kamuzu International Airport

he was shown a bill of lading with packing list to verify what was delivered but was not given a copy.

321. He then stated that the Form 66Cs from Chikhala on comparison also showed that his Monitor's copy was not signed by the Presiding Officer and the one produced by the 2<sup>nd</sup> Respondent was signed and so that could mean rigging could be achieved considering that difference.

322. He then stated that he never saw the word 'reserve' on the packing list in issue.

323. Mr Chapweteka was recalled and was cross-examined and re-examined on exhibit RC 4A and RC4B which were packing lists used to check documents coming in at Kamuzu International Airport. It also had commercial invoice, delivery note and a customs clearance document. The packing lists indicated pallet numbers for Presidential ballot papers. He said that was the document he was shown at the Airport and not the other voluminous documents sought to be introduced by the 2<sup>nd</sup> Respondent that also contained emails.

324. Mr Chapweteka indicated that on checking the documents he could tell how many documents were packed inside. He added that each pallet had a bar code which if scanned showed all the documents packed in a pallet. He agreed that on the commercial invoice the number of Form 66Cs booklets was 5500. He stated that he could not show a document indicating 5002 Form 66C booklets received. He also indicated that the documents he brought showed that 14 200 logbooks were brought in.

325. He stated that he did not know that the excess were non-customized or reserve logbooks or Form 66C booklets.

326. He concluded by saying that there were no reserve tally sheets or logbooks at the Airport

*Mr. Peter Lackson Chimangeni (Peter Lackson)*

327. Mr Peter Lackson made four sworn statements.

328. In the sworn statements, Mr Lackson stated that he worked as a data entry supervisor for the 2<sup>nd</sup> Petitioner at the 2<sup>nd</sup> Petitioner's Parallel Tally Centre in Lilongwe where they collected

results from the 2<sup>nd</sup> Petitioner's election monitors. He worked hand in hand with other people. He stated that he closely followed the publication of the last election results by the 2<sup>nd</sup> Respondent on its website and downloaded data for record and analysis.

329. He added that he also obtained data from the 2<sup>nd</sup> Petitioner's monitors to feed the parallel tally centre but had challenges getting all the data from monitors some of whom were declined result sheets. For that data which was sent in by monitors using text messages and from notebooks, he managed to get 90 per cent of the data to compare with the 2<sup>nd</sup> Respondent's announced results. For the remaining 10 per cent, he used soft copy result sheets supplied by the 2<sup>nd</sup> Respondent to tally the parallel result to 100 per cent.
330. He stated that he could not rely on the texted results as genuine results to compare with the 2<sup>nd</sup> Respondent's official results. This is the data he used to prepare his sworn statements.
331. The first sworn statement was dated 3<sup>rd</sup> June 2019 and was at page 508 in volume 3 of the 2<sup>nd</sup> Petitioner's trial bundle.
332. He stated that he categorized the data in respect of the irregularities that he had noted, namely, 523 duplicate result sheets, 176 tippexed result sheets, 70 counterfeit result sheets and 634 altered result sheets. Due to the bulkiness of the data he only quantified and determined the affected votes from polling centres of 78 constituencies. He exhibited copies of results sheets from Chitipa, Karonga, Rumphi, Nkhatabay, Mzimba, Lilongwe, Kasungu, Nkhokhotakota, Ntchisi, Salima, Mangochi, Blantyre and Mwanza. He reckoned affected votes were 1, 412, 105.
333. The second sworn statement was a supplementary one dated 20<sup>th</sup> of June 2019 and was at page 1531 in volume 6 of the 2<sup>nd</sup> Petitioner's trial bundle. This sworn statement was superseded and amended by the 3<sup>rd</sup> sworn statement being a second supplementary sworn statement, found at page 4744 in volume 18 of the 2<sup>nd</sup> Respondent's trial bundle, to which Mr Lackson attached the said amended supplementary sworn statement and an amended sworn statement in reply to the sworn statement of Mr Sammy Alfandika.
334. In this second supplementary sworn statement Mr Lackson stated that he was to amplify and explain the various irregularities that marred the past presidential election.

335. He attached exhibit PL 15 which is a constituency based tabulation of results, that was contrary to the announcement by the 2<sup>nd</sup> Respondent, and which showed that the 2<sup>nd</sup> Petitioner got the most votes by 82 212 ahead of the next candidate who was the 1<sup>st</sup> Respondent. Following this disparity, he was asked to analyse and audit the documents used by the 2<sup>nd</sup> Respondent in arriving at its different determination. In the process, he conducted a physical examination of the 2<sup>nd</sup> Respondent's Form 60Cs and Form 66Cs to check whether they were authentic, unaltered and mathematically accurate and adhered to the law and approved procedure.
336. He considered the features of a Form 66C, being part A-F the reconciliation part which had ballot papers received, unused ballots, cancelled/spoilt ballots, null and void votes, total valid votes, total ballots cast and part 1-7 being the candidate votes as well as space for writing numbers in issue in words and the signature of monitors and presiding officers.
337. He also considered the procedure for counting votes at a stream in terms of items outside the ballot box, namely unused, spoilt ballot papers and those inside the ballot box, namely null and void votes and valid votes.
338. He then presented his findings. He stated that from the 78 constituencies whose results sheets he analysed, it showed that 1 129 684 ballots were affected as they appeared on duplicate Form 66Cs used by the 2<sup>nd</sup> Respondent in determining the national result. He exhibited the duplicate Form 66Cs as exhibit PL19.
339. He stated that he downloaded 3062 Form 66Cs and found 176 duplicates which were altered by using tippex and affected 207 600 ballots. He exhibited these as PL20.
340. He found 70 counterfeit Form 66Cs used by the 2<sup>nd</sup> Respondent that affected 84 000 ballots. He exhibited these as PL 21.
341. He stated that he discovered that the 2<sup>nd</sup> Respondent had used 634 Form 66Cs on which figures had been crossed out and new figures were superimposed, i.e. manually altered, and this affected 760 800 ballots. He exhibited these as PL 22.



342. He stated that he also discovered that out of a sample of 624 polling stations, incompletely filled Form 66Cs in 32 polling stations were used by the 2<sup>nd</sup> Respondent affecting 37 399 ballots. He exhibited these as PL 23.
343. He also discovered that out of a sample of 296 Form 66Cs, the 2<sup>nd</sup> Respondent used 88 unsigned Form 66Cs affecting over 355 200 ballots.
344. He stated that he compared his 624 monitors' Form 66Cs to those downloaded from the 2<sup>nd</sup> Respondent's website and found that 152 were forged and were different in terms of votes and signatories or order of signing. He observed that these were forged by the 2<sup>nd</sup> Respondent's officials and uploaded.
345. He stated that he discovered that on 225 Form 66Cs (26% of sampled forms) the sum of candidate valid votes plus null and void votes was less than the total ballots actually cast with 22 4224 votes not accounted for. He called these missing votes and exhibited these in exhibit PL 25B and PL25C. He pointed out that for Makawa School there was a genuine arithmetical error on stream 1 on D, E and F but missing 17 votes in stream 2 and led to tampering. This is repeated for other Form 66Cs exhibited. Presiding Officers did not state what exactly was done during the reconciliation. There is no suggestion that there was a recount before they changed figures.
346. He stated that he also found that 106 Form 66Cs (15.9% of sampled forms) with 23 790 votes where the total number of ballots cast was less than the total sum of valid votes and null and void votes meaning that candidates were unilaterally given what he called extra votes and these were exhibited as PL25A.
347. He stated that he also found that on 32 Form 66Cs (5% of sampled forms), with 4419 votes, the total number of ballots cast plus unused and cancelled/spoilt ballots exceeded the number of ballots provided by the 2<sup>nd</sup> Respondent meaning that some people brought in what he called extra ballots thereby inflating the figures. He exhibited these as PL 26.
348. He stated that he also discovered 20 Form 66Cs (3.2 % of sampled forms) representing 8 236 votes on which the total number of ballots cast plus soiled/cancelled ballots and unused ballots was less than the total ballots received meaning that there was undercounting on valid votes or

ballots cast or unused ballots and other parameters or intentional reduction of votes for any of the candidates.

349. He stated that the 2<sup>nd</sup> Respondent's officials attempted to rectify the irregularities above by either transferring results from the original Form 66C to duplicate Form 66C whilst making alterations on the duplicate to balance up the figures and forging signatures for monitors in order to make duplicates look legitimate which was contrary to the procedure for reconciliation. Or by editing the Form 66Cs using tippex in the absence of monitors. And that in some cases monitors' signatures were missing and/or presiding officers did not sign and the arrangement of signatures was different on supposedly duplicates of the original Form 66Cs.
350. He then made three statements on the overall effect of the irregularities on the final determination of results, namely, that by increasing unused ballots the 2<sup>nd</sup> Respondent created a picture of low voter turn-out which was false and had decreased votes actually cast (missing votes). He asserted that this irregularity affected areas where the 2<sup>nd</sup> Petitioner was more popular than the 1<sup>st</sup> Respondent, in other words, that the 2<sup>nd</sup> Respondent deducted votes from the 2<sup>nd</sup> Petitioner which he had actually polled. He tabulated a per district scenario showing the geographical spread of this irregularity in terms of the least affected to the worst affected districts.
351. He stated that by decreasing the number of unused ballots and null and void votes the 2<sup>nd</sup> Respondent created a picture of high turn-out which was false by increasing votes cast to be more than votes actually cast. He asserted that this irregularity affected areas where the 1<sup>st</sup> Respondent was more popular than the 2<sup>nd</sup> Petitioner. In other words, that the 2<sup>nd</sup> Respondent allocated extra votes to the 1<sup>st</sup> Respondent which he did not poll. He similarly tabulated the per district geographical spread of this irregularity.
352. He stated that there is a possibility of ballot stuffing given that the total number of unused ballots, cancelled and total ballots cast was higher than ballots supplied by the 2<sup>nd</sup> Respondent.
353. He also asserted that the total number of unused ballots, cancelled and total ballots cast was less than the total ballots supplied by the 2<sup>nd</sup> Respondent which raised the possibility of arbitrary allocation of votes to a presidential candidate contrary to the set procedure.

354. He stated that the irregularities did affect more than 1, 412 105 ballots and 108 322 votes cast which was 30% of the total vote cast on 21<sup>st</sup> of May 2019. Further, that based on the magnitude of votes affected by the irregularities there was material evidence that the determination of presidential results was neither credible nor done in accordance with the PPEA. Further, that the 2<sup>nd</sup> Respondent influenced the undue return of the vote in favour of the 1<sup>st</sup> Respondent.
355. He stated that in two cases the 2<sup>nd</sup> Respondent used a local government Form 66A to support a presidential election return. He exhibited these as PL28.
356. The fourth sworn statement was the third supplementary sworn statement found at page 5401 in volume 20 of the 2<sup>nd</sup> Respondent's trial bundle. It was mainly in reply to the sworn statement of Mr Sammy Alfandika who stated at paragraph 52 of his sworn statement that all alleged irregularities relating to Form 66Cs which was an aggregation of data from Form 60Cs for those polling centres with more than one stream and that any doubts leading to such alleged irregularities could easily be resolved by having recourse to Form 60Cs in the possession of the party's monitors instead of concentrating on Form 66Cs.
357. Mr Lackson pointed out that even though the 2<sup>nd</sup> Respondent was ordered to disclose record logbooks that contained Form 60Cs and other reconciliation forms, the 2<sup>nd</sup> Respondent only disclosed 447 record log books out of a total of 11 058 logbooks representing 4% of the logbooks. He exhibited a list of record logbooks disclosed as PL 29.
358. He then asserted that most often the 2<sup>nd</sup> Petitioner's monitors were not shown these. He added that an examination of the disclosed record log books exposed glaring substantial irregularities that occurred during vote counting and determination of results and affected the same rendering the results null and void.
359. He enumerated these irregularities, namely, about 22 fake record log books comprising counterfeit record logbooks exhibited as PL 30B contrasted with a genuine logbook marked as PL30A, non-customized record logbooks with no mark of 'reserve' exhibited as PL30C and non-customized record log books with no option of stream results. He objected to the counterfeit record logbooks since all record logbooks were to be customized to screen out illegitimate logbooks.

360. He stated that he also noted 14 blank record logbooks and wondered where the 2<sup>nd</sup> Respondent's uploaded results came from. He added that in that case the alleged irregularities could not be resolved by recourse to the said record logbooks. He exhibited these blank logbooks as PL31.
361. He observed that he found six record logbooks with data that was transferred to part A-F on Form 66C filled but not the part from which candidate votes were filled being Form 60C. He said that surprisingly results were indicated on the 2<sup>nd</sup> Respondent's Form 66C for the said streams. He exhibited these as PL32.
362. He also exhibited six record logbooks in which candidate votes for the 1<sup>st</sup> Respondent were not filled but the same were indicated on the Form 66C. He exhibited these as PL 33.
363. He also exhibited 166 record log books in which data on part A used for reconciliation was altered in the absence of monitors. He exhibited these as PL34.
364. He also exhibited 14 record logbooks in which the candidate vote part was altered and not signed for by presiding officers and monitors. He asserted that therefore it was not true what Mr Alfandika said in paragraph 68 of his sworn statement that null and void votes and valid votes were not affected by alterations. He exhibited the said logbooks as PL 35.
365. He then exhibited 51 record logbooks in which both the ballots reconciliation parts and candidate vote parts were altered. He marked these as PL 36.
366. He also exhibited 7 record logbooks in which there was a mismatch between votes in there and on corresponding Form 66C. He exhibited these as PL 37.
367. He stated that there was no Form 66C for Chiwale School and yet there was a record logbook exhibited as PL 38.
368. He then stated that for Rumph Central there was a stream result in the logbook but it was not reflected on Form 66C. He exhibited the logbook as PL 39.

369. He also asserted that he found that for Bereu School the 2<sup>nd</sup> Respondent uploaded Form 66C for a different election altogether since only three record logbooks were available for six streams as exhibited in PL 40.
370. He also discovered that at Chiwale School monitors signed record logbooks before information was filled in and there was no data. He added that in other polling centres signatures were forged. He exhibited PL 41 in that regard.
371. He then stated that there was no Form 66C uploaded by the 2<sup>nd</sup> Respondent for Mkwindima School from Lilongwe City South. He wondered what role auditors played. He exhibited the relevant record logbook as PL 42.
372. He then stated that there was a partially filled scanned Form 66C for Mvama School in Lilongwe City Central Constituency with a total of 7021 registered voters with 9 polling streams but only 1 stream record log book was found at disclosures. He noted that 2 streams had no data on unused ballots. And he wondered what auditors were doing in letting this go in like it did. He exhibited the record logbook and Form 66C as PL 43.
373. He also observed that there were polling centres that had over 800 registered voters but streams were provided less than 800 ballots yet on Form 66C these were indicated as having been provided 800 ballots per stream. He exhibited the relevant record logbooks and Form 66Cs in that regard marked as PL 44.
374. Mr Lackson was extensively cross-examined by the Respondents on his sworn statements. He was later re-examined. He stated that he held a Bachelor of Science Degree in Agriculture from LUANAR and a Post Graduate Certificate from the Institute of Agro Studies. He was involved in consultancy work.
375. Mr Lackson did not consult the 2<sup>nd</sup> Petitioner's monitors in the exercise of analysing the Form 66Cs that he got from them when doing comparison with those used by the 2<sup>nd</sup> Respondent. He insisted that monitors were not necessary to his exercise. He did not use Form 60Cs. He also indicated that the exercise he undertook was not complex and could not be exaggerated to the extent suggested that it required a qualified auditor.

376. He admitted that ideally monitors, who were on the ground and trained to sign for correct data, would have been spoken to on alleged irregularities and suspicious results but they were not necessarily the only means to deal with the alleged irregularities. He added that his analysis was not dependent on monitors and he used a different route other than monitors to challenge the results especially because result tally sheets Form 66Cs and others used namely, Forms 59C, 60C and 61C spoke for themselves unless the 2<sup>nd</sup> Respondent denied them. He also noted that it was apparent Form 66Cs were altered in the absence of monitors and so it was not necessary to call them especially after over 70 presiding officers admitted to altering Form 66Cs in the absence of monitors. He accepted that he had not provided a call log for monitors that sent results by text messages. He also said he used Form 66Cs and others without monitors since the 2<sup>nd</sup> Respondent also accepted to use such forms that were not signed by monitors.
377. He then accepted that the 2<sup>nd</sup> Respondent's parallel tally to stream level was not in evidence. He added that categorization of irregularities spoke of form of the result sheet, such as tippexed or altered, and raised red flags in the initial sworn statements which were interrogated further in the subsequent sworn statements as to how they affected valid candidate votes. He added further that he had the capacity to know that categorized result sheets had wrong data. For example, he expected originals to be attached on transmission of duplicates hence a duplicate raised an alarm. And the issue of the signature of the monitor on such duplicates was not important to his analysis.
378. He then stated that the figure of 1.4 million votes being affected and 82 000 votes being the winning margin of the 2<sup>nd</sup> Petitioner were consistent and were borne out of the 2<sup>nd</sup> Petitioner's Parallel Tally Centre as a starting point for investigation into the results determined by the 2<sup>nd</sup> Respondent. He added that this is in view of the fact that actually the prayer made by the 2<sup>nd</sup> Petitioner for his declaration as a winner by this Court had been abandoned in favour of a challenge of the results.
379. He stated that ballots and votes refer to different items but that when he said ballots were affected what he meant was that 1.4 million ballots were not reconciled or accounted for. He added that mishandling of ballots could affect the valid candidate votes on Form 66C. And further, that as a result the related figures on the Form 66C in question were suspicious and not trustworthy.

380. He stated that indeed in the Polling Station Procedure Manual it was stated that an error on statistical data part A-F in Form 66C could go without alteration at the Polling Station but not an error on valid votes. He however said that if figures on ballots received did not add up, one had to interrogate items in A-F on Form 66C including valid votes. He then clarified that valid votes determined elections if properly derived.
381. He reiterated that the constituency parallel tally centre was meant to track or probe differences with the 2<sup>nd</sup> Respondent's results. He added that polling station results were not included because the 2<sup>nd</sup> Respondent did not provide them with record logbooks to verify Form 66C results declared by the 2<sup>nd</sup> Respondent. He however indicated that he was challenging over 1400 polling station and stream results.
382. He said he used Form 66Cs, as opposed to Form 60Cs, to probe the results determined by the 2<sup>nd</sup> Respondent because Form 60Cs only had candidate votes and validation of votes could not be done on that form without looking at Forms 61Cs in the record logbook which was the form for reconciliation of unused and spoilt ballots. He added that in fact Form 59C was also engaged to validate candidate votes as it reconciled ballots received or transferred. Thus Forms 59C, 60C and 61C were used to validate candidate votes as they finally appeared on Form 66C. He said that he verified figures on Form 66C by using tally sheets from monitors and by looking at record logbooks.
383. He stated that the total ballots cast had an effect on valid votes. He stated that some of what were affected by irregularities were ballots but that those ballots and votes were related.
384. He accepted that he had no comparator signature to the alleged forged signatures on Form 66C and that he was not a handwriting expert.
385. He accepted that throwing away votes on duplicate result sheets negated stream results and voter rights but said he had some explanation to justify that.
386. With regard to missing vote Form 66Cs, he was asked to do a comparison of votes on monitor copy with 2<sup>nd</sup> Respondent's scanned Form 66C and he noted that valid votes were found to match. For example, for Makawa School at pages 4834 and 4835 in PL 25. He however stated that the changes made on the scanned Form 66Cs in PL25 were wrong on the Form 66C when

data in the logbook was compared and he added that changes had to be guided by the record logbook. He then said that missing votes indicated vote reduction for an unspecified candidate on the Form 66C. He added that the challenge to such an irregularity was general and not specific to a particular candidate. He observed that arithmetical errors were taken into account and that a wrong addition led to wrong figures.

387. He then explained that the 2<sup>nd</sup> Respondent solved the issue of missing votes on Form 66C for Makawa School at page 4835 at the Constituency Tally Centre by altering parts D, E and F on stream 2. He added that many Form 66Cs had been altered this way up to 80%. Further, that thousands of votes were missing but he could not say who had benefitted. He then said he needed a logbook to get to the bottom of the matter of alterations and see who had benefitted from alterations but he could not get one as not all record logbooks were disclosed by the 2<sup>nd</sup> Respondent. He therefore only compared the 2<sup>nd</sup> Petitioner's monitor Form 66C to the 2<sup>nd</sup> Respondent's Form 66C. He added that the valid votes in Form 66C were questionable until relevant logbooks were looked into and the record logbooks were necessary in that regard.

388. It was put to him that the table summing up missing votes had corrupted data and the example of Chipwayira Polling Centre was used to demonstrate the point. He however insisted that the additions and appreciation by the 2<sup>nd</sup> Respondent on this issue was *wrong considering that the figures in issue were as recorded from the Form 66Cs in question.*

389. He then reiterated that with respect to extra votes being given to some candidate, the sum of ballots cast was less than null and void votes and valid votes. He added that he was discounting arithmetical errors because in most cases the 2<sup>nd</sup> Respondent was altering stream results so it was easier to use the totals on streams in formulating the missing or extra votes. He agreed that *the valid votes were matching on the monitor's and 2<sup>nd</sup> Respondent's Form 66C but that this was not within the scope of his comparison in PL 25A.*

390. He explained that further, on stream 2 at page 5248 in the 2<sup>nd</sup> Petitioner's trial bundle, there were 180 extra votes but it was not known who got them. He stated that the 2<sup>nd</sup> Respondent solved this extra votes issue at page 2325 in the 2<sup>nd</sup> Petitioner's trial bundle in exhibit 25B. He stated that on that stream 2 the 2<sup>nd</sup> Respondent changed total ballots cast to 584 to take care of the 180 extra votes instead of 403 recorded. *With no record logbook he said one could not tell who benefitted.* He said that it was the same story for all exhibits in PL 25A. He added that



comparing scanned Form 66C transmitted to the National Tally Centre with the printed Form 66C used in electronic transmission to the National Tally Centre was wrong since it was the same document. He further stated that the scanned one was altered before scanning and then the data was transferred to the 2<sup>nd</sup> Respondent's kit for transmission and printing at the National Tally Centre. He pointed out that the differences were with the monitor's Form 66Cs.

391. It was put to him that the table summing up extra votes had corrupted data and the example of Kamuzu Institute Polling Centre was used to demonstrate the point. He however insisted that the additions and appreciation by the 2<sup>nd</sup> Respondent on this issue was wrong considering that the figures in issue were as recorded from the monitor's Form 66Cs in question. (Save for Kamuzu Institute, this is a word for word repetition of paragraph 389 above)
392. Mr Lackson insisted that the control figure in his analysis on missing votes was the total valid votes cast which he stated did not change unless you cross checked with the record log book.
393. He reiterated that, with regard to the issue of extra ballots, all aspects in A-F in Form 66C were used to determine a winner although the ballots were not distributed amongst the candidates. He insisted that there was no valid vote if parts A-F were not reconciled and without reconciliation there would be fraud. He elaborated that data on A-F in Form 66C as well as candidate votes in part 1-7 were physically counted. And that if item F was less than or more than the candidate valid votes plus null and void votes one had to investigate even valid votes by doing a count again and not just altering figures in A-F on Form 66C. He stated that the 2<sup>nd</sup> Respondent did not do that, which was illogical. He added that the 2<sup>nd</sup> Respondent accommodated errors in A-F. He added further that alterations should not have appeared on Form 66C since reconciliation ought to be done in the record logbook on Form 61C as per the Procedure Manual. He then observed again that errors were usually random but we were dealing with a pattern of alterations in A-F in this matter yet A-F and vote part 1-7 were all a product of counting.
394. With regard to undercounting of the parameters like votes or total ballots cast or unused ballots under missing votes, he stated that no monitor came in Court to question valid votes but he used a monitor's Form 66C to show the missing votes.

395. He stated that he did not compare candidate votes on counterfeit record logbooks with those in Form 66C and did not bring monitors to question candidate votes on the alleged irregular record log books but he still questioned the said irregular record logbooks.
396. He noted that it was admitted by the 2<sup>nd</sup> Respondent in what it termed as a mis-recording of candidate votes on a comparison of Form 66Cs and the altered stream result in the corresponding record logbook as noted in PL 36. There was a polling stream on which the vote was reduced by 159 votes and another one where the vote was increased by 29 votes. There was also the case of number of actual voters on Form 66C exceeding those voters ticked in the register as per the relevant record logbook.
397. On the mismatch of results in exhibit PL 37, he conceded that the same was rectified on entry of the results into the electronic system of the 2<sup>nd</sup> Respondent and the relevant results in record logbook and the 2<sup>nd</sup> Respondent's Form 66C matched.
398. He then stated that he could comment much on issues of disclosure except that he had analysed only 447 out of the 11 095 stream record logbooks. He added that a partially filled or blank record logbook would put the integrity of Form 66C in question although he did not speak to the monitor for the stream.
399. He admitted that for exhibit PL 38, even though on the 2<sup>nd</sup> Respondent's website there was no Form 66C, there in fact existed a Form 66C with data that matched the record logbook data.
400. On Chiwale, in PL 41, he stated that having noted that there was a pre-signed blank record logbook, he was surprised another record logbook was produced in Court that was properly filled.
401. He then stated that with regard to exhibit PL 44 on streams having less than 800 voters, the requirement that a stream shall have a maximum of 800 voters was administrative and not a legal one. He however rejected the 2<sup>nd</sup> Respondent's suggestion that putting less than 800 voters in a stream would lead to a quick job being done at voting because people were put in pre-selected streams as evidenced by a mobile stream notification system set up by the 2<sup>nd</sup> Respondent. He insisted that splitting voters in streams without reaching 800 voters per stream was not procedural but he had no proof that it caused disadvantage to any candidate or voter.

402. With regard to a table that the 2<sup>nd</sup> Respondent meant to observe that the tables used by the witness were wrong, he maintained that the 2<sup>nd</sup> Respondent was the one who was using a different source to deal with the data in question and that this led to the allegation by the 2<sup>nd</sup> Respondent that the data on the tables was not correct.
403. He then reiterated that the first step after close of poll is to do a ballot reconciliation using Forms 59C and 61C before vote counting as per the Polling Station Procedure Manual. He agreed that differences in ballot received and ballots used were expected because for example some voters would walk away with unused ballots. But he insisted that the difference was supposed to be noted in the record logbook in Form 61C. He added that the number of total ballots cast was recorded in Form 61C and that included candidate votes. He stated further that consequently if there was suspicion on votes, one had to start investigation on Form 66C and not Form 60C.
404. He then stated that record logbook Form 60C contained primary record of votes at stream level since stream results were recorded there as opposed to Form 60C in the booklet although the Polling Station Procedure Manual did not specify the primary record for stream votes.
405. He then insisted that the original was the first page of Form 66C as opposed to Form 66Cs watermarked duplicate and the rest and that the rest did not become originals merely by the manual writing on them. He agreed that there was no provision on this in the Polling Station Procedure Manual. He added that the original was meant for result transmission and the rest were for monitors and audit purposes but all were supposed to have correct data.
406. He observed that the Form 66C bearing results of the count would be put in tamper proof envelope and taken to the constituency tally centre together with record logbooks that were put in a miscellaneous envelope as per the Procedure Manual. He observed that the record logbook was not transmitted to the National Tally Centre.
407. He then asserted that a logbook was needed to correct errors on Form 66C but that however there was no provision in the Polling Station Procedure Manual for correction of errors at a constituency tally centre. He added that constituency tally centre auditors were not to act on aggregation errors. He added further that corrections were to be signed for to show they were

done in good faith. He then stated that auditors at the National Tally Centre were supposed to see the scanned Form 66C and compare it with the printed Form 66C to verify accuracy of figures.

408. He then asserted that alterations were made in favour of different candidates but mostly in favour of the 1<sup>st</sup> Respondent. He added that he investigated alterations on Form 66C using the 2<sup>nd</sup> Petitioner's monitor Form 66Cs even when that monitor was not there at the time of alteration. He added that he also relied on the record logbooks. He observed that many presiding officers, he had a list of 70 of such, made sworn statements that they altered Form 66Cs at constituency tally centres in the absence of polling station monitors when in fact constituency tally centre monitors had not witnessed counting of votes and ballots at the polling station. He accepted that monitors at constituency tally centres were to confirm results received from polling station monitors. He however said that, even if an altered Form 66C was signed by monitors, the alterations themselves were not signed for, making the document invalid as he could not tell if the alterations were monitored.

409. He then stated that he analysed 624 Form 66Cs and that lack of resources barred further analysis. He then explained that the figure of affected ballots could be indeed 1 400 915 instead of 1 412 105 because he was calculating using excel and it involved a large file. Further that he was racing against time in his analysis and forgot to exclude Phalombe data represented by the variance from the aggregate indicated as it was still being analysed.

410. He showed on exhibit PL 33 the allegations on pages 3396 of the 2<sup>nd</sup> Petitioner's trial bundle where there was no vote indicated for the 1<sup>st</sup> Respondent in the record logbook on stream 2 for Ulongwe Model School and the rest of candidate votes were indicated but on Form 66C the said vote appeared as 400.

411. He stated that over 10 000 votes were affected by the irregularities.

*Mr. Anthony Bendulo*

412. Mr Anthony Bendulo made three sworn statements, namely, an initial sworn statement, a supplementary one and a sworn statement in reply to the sworn statement of Honourable Ben

Malunga Phiri for the 1<sup>st</sup> Respondent and sworn statements of Mr Sammy Alfandika, Mr Muhabi Chisi and Mr Henzily Munkhondya for the 2<sup>nd</sup> Respondent.

413. In the initial sworn statement, he stated that he worked as an IT Analyst for the 2<sup>nd</sup> Petitioner although he was not an IT expert by formal qualifications but he was well versed in IT matters by reason of long experience. When he appeared in this Court he did not testify on IT matters but on things that were easily observable on the 2<sup>nd</sup> Respondent's results tally sheets. Among other things, he was involved together with Mr Peter Lackson in monitoring the publication of results by the 2<sup>nd</sup> Respondent on its website and downloading such results together with accompanying result sheets.
414. He stated that he discovered that the 2<sup>nd</sup> Respondent delayed in posting results from 46 polling centres that he enumerated. He adjusted this number to 297 in his supplementary sworn statement. He added that the results were posted hours after the final results were announced and up to the time of trial, one result had not been posted. Although this was a matter of concern, there was however no proof that these results were never taken into account by the 2<sup>nd</sup> Respondent in determining the national presidential result as conceded by the witness himself. He had not seen the Gazette of results which came out way past the time prescribed by law and after he had already made his sworn statement.
415. He then stated that the 2<sup>nd</sup> Respondent used Form 66Cs that were altered, tippexed, duplicates and counterfeit. He added that the 2<sup>nd</sup> Respondent posted Form 66Cs that differed from monitors' Form 66Cs for example for Sankhani School. He added that other Form 66Cs posted had different signatures from those on Form 66Cs given to monitors for Chadza II School Polling Station. He exhibited Form 66Cs for the categories indicated. For Chala School he asserted that the 2<sup>nd</sup> Respondent's Form 66C was altered by tippex resulting in transfer of 27 votes into the null and void category when one compared with the monitor's copy. The Form 66Cs for Chala School were marked as exhibit A11.
416. In the supplementary sworn statement, he stated that he participated in dry runs conducted by the 2<sup>nd</sup> Respondent to test its computerized results management system and was assured that the system was secure enough to manage credible elections. He added that the 2<sup>nd</sup> Respondent indicated that the security feature of a tally sheet to be uploaded on its system had a barcode comprising the code for the polling station, constituency and the centre numbers.

417. He exhibited tippexed Form 66Cs and counterfeit Form 66Cs that had no customized barcode. He also exhibited a customized Form 66C for one polling centre that was altered and used for a different polling centre. He also exhibited a Form 66C which was drawn up on an ordinary piece of paper. He also exhibited Form 66Cs that were given to monitors which were counterfeit but whose counterpart forms that were uploaded by the 2<sup>nd</sup> Respondent were genuine. He also exhibited Form 66Cs that monitors had which were tippexed when counterpart Form 66Cs uploaded by the 2<sup>nd</sup> Respondent on its website were clean.
418. He then stated that the 2<sup>nd</sup> Respondent deleted its website data for the past election and then re-uploaded the same later. He however conceded that he had no proof that data changed.
419. He exhibited a scanned Form 66C and printed Form 66C for Kasungu North Constituency showing that the 2<sup>nd</sup> Petitioner's votes were different on the two documents.
420. In the third sworn statement, he stated that he was replying to the sworn statements of the Respondents that tried to explain away the irregularities alleged by the 2<sup>nd</sup> Petitioner. He added that he did that by virtue of having been a member of the 2<sup>nd</sup> Petitioner's qualitative and quantitative analysis team for the past election and having taken part in designing, establishing and operating a results transmission for the 2<sup>nd</sup> Respondent in the past election.
421. He referred to exhibit DS5 to the sworn statement of Mr Daud Suleman which is a presentation by the 2<sup>nd</sup> Respondent which did not disclose to election stakeholders that additional non-customized or reserve polling materials would be printed. He added that the Polling Station Procedure Manual provided that when tally sheets run out the said fact would be recorded in the record logbook by the presiding officer. He stated that Mr Alfandika for the 2<sup>nd</sup> Respondent had not exhibited a record logbook at all showing that tally sheets run out of tally sheets to justify supply of reserves. But he could not point to which part of the Manual provided for that.
422. He then observed that if reserves were meant to be used in case of shortage, the 2<sup>nd</sup> Respondent would not have printed different types of the same polling materials. He indicated that he had exhibited copies of different record logbooks which had been marked as AB22 but they were not there. He offered other reasons why the 2<sup>nd</sup> Respondent simply wanted to shield those who used counterfeit or reserve tally sheets.

423. He next turned to alterations on Form 66Cs by tippex or otherwise in part A-F to show that the same were not an innocent alteration to correct arithmetical errors as contended by the 2<sup>nd</sup> Respondent. He first alluded to what Mr Lackson stated in terms of extra and missing ballots as exemplified in his exhibit PL25A, PL25B and PL25C to show that it was not true that alterations in part A-F of Form 66Cs did not affect the candidate votes. He then made hypothetical illustrations on how alterations would be used to manipulate the vote.
424. He asserted that the alterations were a deliberate and systematic ploy to hide manipulation of candidate votes. He used Form 66C and the corresponding record logbook Form 66C to show and demonstrate his assertion.
425. He first exhibited Form 66C for Ulongwe Polling Station from Mulanje Central Constituency whose record logbooks were disclosed by the 2<sup>nd</sup> Respondent to show the differences between the candidate votes captured on Form 60C in the record logbook and the same result as captured on Form 66C uploaded by the 2<sup>nd</sup> Respondent. He marked these two as exhibit TB23A and TB23B respectively. He noted that the documents showed that the 1<sup>st</sup> Respondent's vote on stream 3 was recorded as 427 on Form 60C while it was recorded as 529 producing a positive difference of 102 in favour of the 1<sup>st</sup> Respondent. He then observed that an examination of the Form 66C on the candidate vote part 1-7 did not show any alterations while some entries on Part A-F showed alterations. He stated that by simply looking at Form 66C it was not possible to detect that the results had been rigged in favour of the 1<sup>st</sup> Respondent by 102 votes. He added that it was only when one cross-checked results between Form 60C and Form 66C that the truth of the hidden rigging could be discovered.
426. He then exhibited Form 60C and Form 66C for Kazganthundulu Polling Station in Rumphu where Form 60C showed that on stream 1 the 2<sup>nd</sup> Petitioner got 167 but the said result had been indicated as 87 on Form 66C resulting in reduction of the vote of the 2<sup>nd</sup> Petitioner by 80. The two documents were marked as exhibit TB24A and TB24B respectively. He noted that the Form 66C candidate votes did not show any alterations while some entries on Part A-F had been altered. He stated that it was false to say that such alterations in Part A-F did not affect votes.

427. He exhibited as TB25A and TB25B Form 60C and Form 66C for Chizoli Polling Station in Rumphu Central Constituency. He pointed out that on stream 1, Form 60C showed that the 2<sup>nd</sup> Petitioner got 144 votes but that on stream 1 on Form 66C the same was indicated as 67 thereby reducing the vote of the 2<sup>nd</sup> Petitioner by 77. He observed that the Form 66C did not show any alterations on the candidate vote while some entries in Part A-F had been altered. He reiterated that by simply looking at the Form 66C it was possible for one to believe the myth that such alterations had not affected the presidential vote.
428. He then asserted that it was clear that the alterations of Parts A-F of Form 66C were the very means which the 2<sup>nd</sup> Respondent employed in hiding votes unlawfully added to or subtracted from the candidates and that this evidence directly contradicts the assertions made by the Respondents concerning the benign nature of alterations in Part A-F.
429. He then pointed out that while the majority of presiding officers had alleged in their sworn statements for the 2<sup>nd</sup> Respondent that Parts A-F on Form 66C were being used to balance up the figures, the Polling Station Procedure Manual at page 30 stated that presiding officers could check count the candidate's ballot papers in order to balance the ballot papers. He asserted that however this was supposed to be done in the presence of stakeholders at the polling station and not by altering the entries on Form 66C at the constituency tally centres.
430. Mr Bendulo was cross-examined by the Respondents and he stated as follows. That there were several figures of votes being indicated as having been in contention by the 2<sup>nd</sup> Petitioner in terms of votes polled in the past election. He also said that he did not compile a comprehensive parallel tally of votes for the 2<sup>nd</sup> Petitioner because he did not get comprehensive copies of Form 66Cs from the monitors of the 2<sup>nd</sup> Petitioner. He conceded that he did not bring a list of monitors that did not get a copy of Form 66C.
431. He insisted on AB1 and AB2 that the documents spoke for themselves so he did not need to call the monitor to testify especially because the monitor signed for the physically counted items that were later altered to transfer the 17 votes. He added that, according to the Polling Station Procedure Manual, alterations were not to be done on Form 66C because the 2<sup>nd</sup> Respondent's system had an autocorrect function on entry of data on transmission kit at constituency tally centre. Further, that reconciliation of parts A-F was to be done in the record logbook on Form 61C.



432. He then asserted that use of duplicates on transmission of Form 66C to the National Tally Centre from the constituency tally centres defeated the agreed procedure to use originals only.
433. He then rejected the suggestion that votes were mis-posted at Sankhani School given that four personnel of the 2<sup>nd</sup> Respondent let that pass as they checked the same and the 2<sup>nd</sup> Petitioner's vote was reduced by 268 votes and that of the 1<sup>st</sup> Petitioner by 82 votes. He called this direct rigging.
434. On whether fake signatures were appended on Form 66Cs for Chadza II School he admitted that he did not speak to the monitors concerned.
435. On barcodes he had no proof that these were not readable. He however said there was no need for him to talk to monitors on the issue of counterfeit Form 66Cs that had no customized barcode and those were handwritten because the forms spoke for themselves.
436. With regard to Form 66Cs that were used at a different polling centre than the customized one, he said that he did not speak to any monitor and could not say if they occasioned any prejudice and that he could only know after checking in record logbook. For Community Hall Polling Station, the Form 66C was not signed so he did not have a monitor to speak to.
437. He refused to accept that he should have spoken to monitors about data on handwritten Form 66Cs and those with tippexed data given that the candidate votes matched. He also said monitors were not brought in so that there was progress in the matter and could look at the documents in issue.
438. With regard to reconciliation he accepted that a voter could take away a vote and affect figures on Form 66C and that could not lead to nullification of results but that it however depends on where the ballots were missing. He then said that alterations on Part A-F affecting results could be due to physical check or due to arithmetical errors and that to verify the accuracy of votes in that case one had to look at the Form 60C in the record logbook.
439. With regard to the Ulongwe School stream result alterations of Form 66C and variation in valid votes to that on Form 60C in the log book, he rejected suggestions that this was an error that

should have been brought to the attention of the 2<sup>nd</sup> Respondent and insisted that this was direct rigging considering that six verifiers of the 2<sup>nd</sup> Respondent looked at the result and let it pass as it was. He stated that the record logbook used to uncover the issue at Ulongwe was disclosed after time for complaining to the 2<sup>nd</sup> Respondent was already up as well.

440. He then stated that duplicates were supposed to have correct results but that however what was wrong was to use the same for transmitting results to the National Tally Centre since the single original Form 66C was supposed to be used.

441. He then stated that on counting ballots in batches of 50s errors could happen but not on every figure. He added that on aggregation of figures errors could also happen and that correction of genuine errors was not a problem or an irregularity.

442. He then conceded that his illustrations on rigging had no attachments. He was however quick to assert that he had brought up proof of rigging using a comparison of real Form 66Cs and real Form 60Cs from record logbooks.

*Honourable Eisenhower Mkuku*

443. He was Secretary General of the 2<sup>nd</sup> Petitioner's Malawi Congress Party. He was at the National Tally Centre at the time of announcement of the national result in the past presidential election on behalf of the 2<sup>nd</sup> Petitioner.

444. He complained that results once received at the National Tally Centre were announced before being handed to monitors in advance for scrutiny as promised by the 2<sup>nd</sup> Respondent but this changed after parties insisted on the promise.

445. He stated that when he got the results he noted several anomalies such as unsigned Form 66Cs, non-customized result sheets, use of duplicates for transmission of results and variations in results and he consequently lodged complaints with the 2<sup>nd</sup> Respondent starting on 23<sup>rd</sup> May 2019 which were exhibited as EM3 to EM36.

446. He then stated that the 2<sup>nd</sup> Respondent responded to his complaint and the response was exhibited as EM 37. He stated that he then replied to that response indicating dissatisfaction

with the response and the reply was exhibited as EM38. He stated that the Chairperson of the 2<sup>nd</sup> Respondent kept telling the public that there were no complaints and went on to determine the national result for the presidential election without resolving the complaints.

447. He complained that the 2<sup>nd</sup> Respondent did not comply with an order of the High Court on recount of the ballots in certain districts.
448. He stated that one presiding officer signed on Form 66Cs from Mzuzu and Rumphi as exhibited in EM4 and EM41. He added that in Machinga South East votes for the 1<sup>st</sup> Respondent were exaggerated and he exhibited the tally sheets as EM46 and EM47. Further, that the votes for the 1<sup>st</sup> Respondent were exaggerated again in Dedza North West Constituency as exhibited in EM14.
449. He claimed that the 2<sup>nd</sup> Respondent failed to procure services of BDO Auditors by competitive process as indicated in its own report of 15<sup>th</sup> February 2019 exhibited as EM44.
450. He alleged that monitors were not given result tally sheets despite a promise by the 2<sup>nd</sup> Respondent exhibited as EM45.
451. He then stated that the result for Dowa North East was tippexed and he wondered why that was the case and why this was accepted by the 2<sup>nd</sup> Respondent?
452. He then alleged that after announcement of 75 per cent of the polling centre results the next announcement at 100 per cent showed an unrealistic trend in that all top three candidates got the same extra vote of 500, 000 meaning that candidates amassed equal number of votes in the last 25 per cent of polling centres.
453. He then alluded to reports on the past election by a couple of election observers as raising matters in areas that he complained about to the 2<sup>nd</sup> Respondent such as problems with following election procedures and problems with result sheets impacting the tallying process such as failure to reconcile and complete result sheets.
454. During cross-examination he stated as follows. That the response he got from the 2<sup>nd</sup> Respondent on his complaints was for him to provide proof that results on impugned result tally

sheets were incorrect and he did not reply to that response with contrary results to those being impugned because he heard that monitors were denied results tally sheets. He however maintained that the response by the 2<sup>nd</sup> Respondent was inadequate.

455. He stated that tippex was widely used as admitted by the 2<sup>nd</sup> Respondent but use of tippex in his constituency was not rigging. He added that the 1<sup>st</sup> Respondent did not rig the election using tippex and it depended on the 2<sup>nd</sup> Respondent. He stated further that record logbooks had to be used to verify whether tippex affected valid votes or not.
456. He also said that watermarked duplicate Form 66Cs remained duplicates even where they were manually filled. He also stated these were taken to the constituency tally centre by presiding officers.
457. He conceded that generally he did not speak to the 2<sup>nd</sup> Petitioner's monitors. And he conceded that contrary to his earlier assertions probably Mr. Bob Chinkango was present at the National Tally Centre as a monitor for the 1<sup>st</sup> Respondent.

*Mr. Daud Suleman*

458. Mr. Suleman made a sworn statement in reply to that of Mr. Muhabi Chisi who is the Director of ICT for the 2<sup>nd</sup> Respondent and partly in response to the sworn statement of Mr. Alfandika the Chief Elections Officer.
459. He was an IT person with a number of qualifications and many years' experience in the IT sector and was able to speak competently on relevant IT issues to do with the 2<sup>nd</sup> Respondent's electronic results management system (eRMS) having been a consulting person on the same on behalf of the 2<sup>nd</sup> Petitioner at the time the 2<sup>nd</sup> Respondent was consulting stakeholders on the operation of the eRMS. He however conceded that he was not an IT auditor by formal qualification.
460. He did attend the offices of the 2<sup>nd</sup> Respondent, as part of the 2<sup>nd</sup> Petitioner's team, in the course of disclosure of 500 gigabytes of information by the 2<sup>nd</sup> Respondent as ordered by this Court in this matter in relation to the eRMS. He stated that a website application used by the 2<sup>nd</sup>

Respondent to display results and a results management app were not provided as part of the disclosures.

461. He described the 2<sup>nd</sup> Respondent's eRMS. He then presented his findings in relation to the said eRMS after analysing the information that had been disclosed by the 2<sup>nd</sup> Respondent as ordered by this Court.
462. He stated that the eRMS was implemented from the constituency tally centre and operated there and at the National Tally Centre. He was allowed to conduct a simulation of the operation of the eRMS. He referred to a presentation on the same by Mr Chisi as well. He showed that Form 66C was presented by a presiding officer to a constituency returning officer at the constituency tally centre. A constituency returning officer would inspect the Form 66C, confirm the result and pass the same to an external auditor. The external auditor would record the result on Form 66C as received onto an electronic result transmission kit after logging on to the kit using a password. That is the point of entry of results into the eRMS. An external auditor would then pass on the Form 66C to the first ICT officer of the 2<sup>nd</sup> Respondent who logs on to the kit and scans the Form 66C and saves it on the kit. Next the officer captures the Form 66C data on the kit. She is the first capture. She logs out. Then the Form 66C is given to the second ICT officer of the 2<sup>nd</sup> Respondent who again logs on to the kit and enters the result. She is the second capture. She logs out of the kit and the system. Once the first and second capture match, the ICT officer will produce a print-out of what has been captured. This print out would be given to the external auditor to cross check and verify that what was captured is what is on the source document Form 66C. The external auditor will then log on to the system on the kit and confirm the result and then log out. Next, an ICT officer would log on to the kit and transmit the result and scanned Form 66C to the National Tally Centre via a secure link.
463. Mr Suleman stated that, once the result was received at the National Tally Centre it would be approved in the eRMS by the external auditors and then senior officers of the 2<sup>nd</sup> Respondent and lastly by Commissioners of the 2<sup>nd</sup> Respondent.
464. He then explained that a good eRMS was designed to promote transparency, accountability, accuracy, security, secrecy, integrity, uniformity, efficiency and chain of custody. He referred to Electoral Results Management Systems–Catalogue of Options: *A Guide to Support Electoral*

*Administrators and Practitioners to Evaluate RMS Options, Benefits and Challenges* published by the United Nations Development Program (UNDP) and exhibited as DS4.

465. He then stated that the 2<sup>nd</sup> Respondent's eRMS was built using a database technology called Microsoft SQL Server, which is a relational database. He added that, as a database server, the eRMS was a software product with the primary function of storing and retrieving data as requested by other software applications that run on the same computer or on other computers as the eRMS. He added further that the eRMS technology operated on a key element of relationship between data sets within the database, meaning that data in one table had to have a relationship with data in one or more tables in the eRMS. There was supposed to be data integrity at any point since regardless of the table one looked at the data was accurately represented.
466. He then stated that because of the relationship of data tables the eRMS was built for integrity in that polling station results went into the resultset table. Once results were received at the National Tally Centre they would go in the resultset table and the eRMS created a corresponding record in another table called Auditresultset. He stated that the Auditresultset table tracked two events that happened to the result namely, capture or inserting of result and showed that status with a '4' and updating (or approval by the 2<sup>nd</sup> Respondent) of the result and showed that status with a '20'.
467. He added that the Resultset table was made of the stationresult table that held data representing the information on Form 66C would build.
468. He added that automatic commands known as triggers were written into each result table to record data across the tables whenever anything was done on the database. As such an audit trail was created whenever anything was done on the database.
469. He then stated that users of the eRMS were assigned different roles as defined by a software application called Microsoft ASP.NET that was used to manage the identities of the respective users that were to have define rights in the system. This also created a user trail. He noted that there were supposed to be auditors, capture 1 and 2 at the constituency tally centres and then auditor 2 and endorser or updater of record at the National Tally Centre as well as Commissioners as final approver of results.

470. He therefore stated that there was supposed be to an audit trail of all activities in terms of data entered onto the eRMS and which users interacted with that data on the data base in terms of updating, viewing, approving and printing of that data contained on the eRMS.
471. He then detailed his findings on the analysis of the information that his team got from the 2<sup>nd</sup> Respondent.
472. He stated that the 2<sup>nd</sup> Respondent indicated that each result was supposed to be approved individually on the eRMS once it arrived at the National Tally Centre. He noted that 156 results were approved in this way with an indication of who updated each of the 156 results in the eRMS. He however noted that, beyond this, the results were approved by using a computer command that he called a script which approved so many results in batches within a millisecond without indicating which user of the eRMS did the approval.
473. He stated that since there was no indication of who did the approval he called the approver of the batches of results a ghost user. He reckoned that 4846 results were approved by script in three batches. He stated that he found that on 22<sup>nd</sup> May 2019, 1699 results from polling stations were approved within a millisecond. Further, that on 23<sup>rd</sup> May 2019, two thousand and eight (2008) results from polling stations were approved within a millisecond. Additionally, that on 25<sup>th</sup> May 2019, 1169 results from polling stations were approved within a millisecond. He then stated that the script was used to approve results from 4 846 polling centres involving 98.6% of the votes which was 4 880 326 votes which included votes of the 2<sup>nd</sup> Petitioner.
474. He noted that there were 197 kits that were capable of transmitting an equal number of results to the National Tally Centre at any given point of a millisecond. He observed that the 4 846 results should have been generated somewhere and then just imported into the eRMS at once to be approved by a script in batches in a millisecond. He asserted that in that case the eRMS was seriously compromised since a script was used to do the approval of results.
475. He then indicated that the 2<sup>nd</sup> Respondent indicated that each kit was set to transmit results only from one constituency tally centre. He however noted that there were instances where one kit was used to transmit results from different constituency tally centres thereby compromising the

eRMS by departing from set protocol. He gave an example of a person using the same one kit in Mulanje South West Constituency and Thyolo East Constituency.

476. He asserted that the 2<sup>nd</sup> Respondent's eRMS was not secure and fit for sensitive and high security operations and set up contrary to public sector Information and Communication Technology (ICT) standards and common industry standards.
477. He showed that he found that the 2<sup>nd</sup> Respondent's officials used unofficial and personal email addresses to log into the Respondent's eRMS to approve or process results. Such unofficial email addresses were indicated. He pointed out that according to the Malawi Government Public Service Information and Communication Technology Standards (2014), exhibited as DS6, at 3.1.4.6 civil/commercial emails were not to be used on the Government ICT systems unless certain conditions were met such as granting access to the private email to Government audit and use of such email only for Government business.
478. He also found that the 2<sup>nd</sup> Respondent used default user accounts on production servers. He explained that a Microsoft server account of 'administrator' was used by officials of the 2<sup>nd</sup> Respondent on all servers during the election and the password was known by multiple officials meaning that an official would log on the system and do things without leaving an identity trail resulting in a big risk of manipulation of data on the eRMS.
479. He added that the 2<sup>nd</sup> Respondent's officials admitted that they used a default Microsoft SQL Server account called 'sa' in production and the password of this account was known by several users thereby compromising the database administration function.
480. He noted that the 2<sup>nd</sup> Respondent's database allowed mixed mode authentication for access to the database which meant that either the Windows Server Administrator account or the Microsoft SQL Server super user could go onto the database and perform super user functions without leaving a trail thereby defeating the accountability of the eRMS since both accounts' passwords were known by several people. He noted that this was a violation of the Public Sector ICT Standard (2014) 3.1.6.3 and accepted industry standards for sensitive systems which demanded that each administrator have a user account for accountability in the system.



481. He also observed that the 2<sup>nd</sup> Respondent's eRMS had an unknown user who had administrator privileges at database level with identity system@gmail.com but the system had no record of all activities carried out by this user.
482. He stated that in addition to the above gross anomalies he found no audit tables for user activities or any record to help track activities of all users on the eRMS during the election which meant either the system user tracking was disabled or its data was deleted at the time of disclosure of the relevant information. He stated that whichever way, the absence of user activity trail in the eRMS was a very serious and unusual anomaly.
483. He then stated that he found a table in the eRMS called auto-approval which contained results from 3 677 polling stations out of the total 5002. He said that as the name suggested this table seemed to hold results approved with no human effort. He said the function of this table was not clear since according to the workflow for the eRMS there was no point where automatic approval of results would take place.
484. He asserted that, in view of the foregoing anomalies, the 2<sup>nd</sup> Respondent's eRMS was insecure and vulnerable to unauthorized access, tampering, hacking or even internal abuse by the 2<sup>nd</sup> Respondent's own officials and could not be relied upon for the management of the past election as claimed by Mr. Chisi for the 2<sup>nd</sup> Respondent.
485. He then stated that the eRMS was supposed to have segregation of roles of users yet he found that there was no segregation of roles of users and this compromised the in-built checks and balances in the system. He gave the example of auditors who performed multiple roles of FirstEntryUser, SecondEntryUser and verifier. He gave an example of user T698EE41. He also found three operators in the eRMS who were also auditors who discharged multiple roles.
486. He said that he also found an auditor who used two different kits on the same day in two different constituencies in *Machinga East* and *Machinga Central Constituencies*, in *Blantyre South West* and *Blantyre City South Constituencies* and yet the 2<sup>nd</sup> Respondent indicated that each kit would be set to one constituency tally centre.
487. He also said he found that the eRMS did not have any record of auditors' log-in into the system and auditors were not attached to any table in the system.

488. He then noted that Mr Chisi had used different log-in names at different times to use the system as approver, viewer, printer or administrator which was contrary to the set rules on segregation of roles on a critical system like the eRMS.
489. He then stated that he found that the Commissioners and the Chairperson of the 2<sup>nd</sup> Respondent had no user accounts in the eRMS and none of them approved results in the system. Only three IT officials of the 2<sup>nd</sup> Respondent approved 156 results in the eRMS.
490. He observed that he found that there was no record of auditors using eRMS at the National Tally Centre. But some auditors at the constituency tally centre verified huge numbers of Form 66C's which was humanly impossible making him believe that auditor's role was cosmetic contrary to what the 2<sup>nd</sup> Respondent represented their role to be. He said one auditor in Ntcheu verified 22 Form 66Cs in two minutes which was humanly impossible. And that another one audited 5 Form 66Cs within a millisecond. He contrasted these super approval speeds to other scenarios where auditors' approvals were not done for hours. He observed that it was impossible to achieve such speeds technically and humanly.
491. He observed that he found that an auditor at the National Tally Centre verified 1 168 Form 66Cs within a millisecond on 25<sup>th</sup> of May 2019 at 8:23.52.500, then 2 008 Form 66Cs within a millisecond on 23<sup>rd</sup> of May 2019 at 11:19.07.170 and another 1169 Form 66Cs on 25<sup>th</sup> May of 2019 within a millisecond at 8:25.52.500.
492. He then stated that he found evidence of attempted hacking into the 2<sup>nd</sup> Respondent's eRMS before 20<sup>th</sup> of May 2019 which the system was set to record. He stated that strangely the system was not set to record all activities including successful log-in attempts which were against server administration standards. He speculated that since after 20<sup>th</sup> of May 2019 there was no record of attempted hacking recorded but there must have been successful hacking attempts.
493. He was then cross-examined by the Respondents and he stated as follows. He stated that complaints arose when scanned and printed Form 66Cs did not tally with the monitors' Form 66Cs. He agreed that election scan was held without computers.

494. He then said that a good parallel tally centre could have raised red flags on results. He said that he had not done a parallel tabulation of the national result but had capacity to do so.
495. He conceded that the 2<sup>nd</sup> Respondent represented that, at the National Tally Centre, auditing and approval would be done on printed Form 66Cs and not in the eRMS and that only thereafter eRMS would be updated. He was shown such paper approvals but he stated that there was a problem because approvals were meant to be done on the eRMS since only Commissioners had approval powers at law. He insisted that approval in the eRMS entailed determining a winner so approval on paper and by eRMS mattered. Further, that with no Commissioner approvals in the eRMS there was no determination of the national result.
496. He then stated that it was not humanly possible to compare scanned Form 66C result with final result affected by a ghost user.
497. He agreed that he had not demonstrated any effect on the results arising from the use of multiple kits by one person. He admitted that his presentation of evidence did not show any compromised results as a result of the security risks that he had identified in the eRMS but that it showed that the eRMS was heavily compromised.
498. He then accepted that a query typed into the eRMS database showed that the 1<sup>st</sup> Respondent got the highest number of votes in the past election.
499. He then conceded that batch approval of Form 66Cs was possible in the eRMS using a script. He agreed that what really mattered was whether a script was good or bad and not the use of a script in itself.
500. He was shown some triggers for recording delete activities to create audit trail but denied that such triggers existed to follow user log-in on the application side of the eRMS.
501. He could not say whether the use of private email addresses by users of the eRMS meant that data on the eRMS was transferred to those users.

502. He then put queries into the eRMS to show that some records were missing leaving orphaned tables in the relational database. However, he was questioned on queries put by the Respondents in the same database that pulled out 5002 records of polling station results.

503. He had also run queries in the eRMS database to show that there was no audit trail of user activities. A counter query was run in the same database and he was shown triggers that tracked user activities such as deletion of data. That marked the end of Mr Suleman's evidence and the close of the 2<sup>nd</sup> Petitioner's case.

#### 1<sup>ST</sup> RESPONDENT'S EVIDENCE.

504. In response to the consolidated petitions and the sworn statements in support of the same, the 1<sup>st</sup> Respondent filed a total of 42 sworn statements. The following are the witnesses for the 1<sup>st</sup> Respondent who had given their sworn statements to the Court but were not invited to appear in court through notices to be cross examined by the Petitioners.

#### *Mr. James Busile*

505. Mr. Busile stated that he was a roving monitor for the Democratic Progress Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections for Blantyre City and District. He stated that Abida Mia of MCP alleged that the Returning Officer for Nsanje Central Constituency was caught making alterations to the tally sheets at his home. A meeting was called at Nsanje Police Station by the 2<sup>nd</sup> Respondent and he was present.

506. He stated that the District Commissioner produced tally sheets for every polling Centre for Nsanje Central Constituency that were transmitted to the National Tally Centre and compared them with tally sheets that were given to MCP monitors and they were the same and there were no alterations. An agreement was written that the matter was resolved and the same was signed by all the stakeholders present. However, at this point the MCP representative refused to sign and walked away.

*Ms. Catherine Patrick*

507. Ms. Patrick stated in her sworn statement that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May 2019 Tripartite Elections and was stationed at Khwalala School polling station in Mulanje West Constituency. In reference to the sworn statement of Peter Chigwenembe, which statement had been withdrawn who had alleged that some had shouted a DPP slogan, she deponed that when the person was summoned by the security personnel in the presence of all monitors, it was discovered that the person concerned had a mental problem. The case was closed and the man was released unconditionally. According to her, there was no any other incident at the polling centre. She further denied knowing a person by the name of Tondewadula who was involved in the elections.

*Mr. Steven Pingoti*

508. In his sworn statement Steven Pingoti told the Court that he was a member of the Democratic Progressive Party and he was a monitor stationed at Mulanje West Constituency during the 21<sup>st</sup> of May 2019 tripartite elections. He recalled that at Luwanga School Polling Centre voting went on well and after counting was completed and results declared, all monitors present together with the presiding officer signed for the results.

*Mr. Handsome Tikhiwa*

509. In his sworn statement, Handsome Tikhiwa stated that he was a member of the Democratic Progress Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections and a monitor at Mulanje West Constituency and he had no knowledge of a person called Thawale in his Party. He denied that he had seen any person being chased away from the polling centre or anywhere near the polling centre.

*Mr. Charles Maiden*

510. In his sworn statement he stated that he was a member of the Democratic Progress Party as a roving monitor at Mulanje West Constituency during the 21<sup>st</sup> of May 2019 Tripartite Elections. In defence to the consolidated petitions he stated that he had no knowledge of a person called Bolamoyo who was engaged in any capacity at the Mulanje West Constituency. He also stated

that he knew of no incident at Thuchila EPA Polling Centre that would make one conclude that the presiding officer there was biased towards any party.

*Mr. Douglas Kabichi*

511. In his sworn statement Mr. Kabichi stated that he was a monitor for the Democratic Progressive Party stationed at Manekera Polling Centre in Thyolo East Constituency which had three streams with a total of 2443 registered voters. He stated that voting went on very well and after counting, Mr. Ronald Mpeni signed for the results while the monitors for the losing candidates left the place before signing.

*Ms. Mercy Matewere*

512. She told the Court that she was a monitor at Nyeleza Primary School in Phalombe Central Constituency during the 21<sup>st</sup> of May 2019 Tripartite Elections. She stated that she had read the sworn statement of Darlington Ndasauka and that DN 23 was different from DN 24 as DN 23 was a sheet from the stream while DN 24 was for the whole polling station hence the results were different and DN 24 had higher figures than DN 23. She denied that the 2<sup>nd</sup> Respondent had increased figures for the 1<sup>st</sup> Respondent

*Mr. George Makina*

513. Mr. Makina stated that he was a monitor for the Democratic Progressive Party at Chingoli Polling Centre during the 21<sup>st</sup> of May, 2019 Tripartite Elections. He stated that after counting the results from all the streams they signed for the results. He noted that some monitors for the losing candidates left the place before signing the forms. He added that otherwise the polling exercise at the centre went on very well and no complaints were registered by the monitors and every monitor was satisfied with the whole process. In conclusion, he stated that the results he had recorded in his notebook were not different from those announced by the 2<sup>nd</sup> Respondent.

*Mr. Bright Matoga*

514. In his sworn statement he stated that he was a monitor for the Democratic Progressive Party stationed at Mphande Primary School during the 21<sup>st</sup> of May, 2019 General Elections and he was

present when MEC was delivering electoral materials. He told the Court that he did not know one Innocent Walter who claimed to have been a monitor at Mphande School and further claimed that election materials were packed in envelopes. He recalled that there were 5 streams at the centre meaning the number of voters did not exceed 4000. He further denied allegations that the presiding officer was seen making alterations and that all the figures had balanced.

*Mr. Fredrick Khanalawa*

515. Mr. Khanalawa stated that he was a roving monitor for the Democratic Progressive Party in Thyolo South Constituency during the tripartite elections on 21<sup>st</sup> of May, 2019. He stated that none of the ballot papers that were used at the polling station had serial numbers but only on the counterfoils and it was impossible to know which ballot paper had come from which counterfoil.

*Ms. Stella Chiona*

516. She told the Court that she was a monitor for the Democratic Progressive Party at Migowi Primary School in Phalombe Central Constituency. In reference to the statement of Mr Ndasauka, she stated that there were alterations done on the reconciliation part and not on the candidate results and the same did not affect the results at the centre. She then stated that all monitors and the presiding officer signed for the results to authenticate them.

*Mr. John Brown*

517. Mr. Brown told the Court that he was a supervisor for all monitors for the Democratic Progressive Party stationed at Ndirande Community Hall in Blantyre City Central Constituency during the 21<sup>st</sup> May, 2019 Tripartite Elections. He then stated that after the voting had finished, they moved into the Hall which was too small to accommodate everyone. He explained that the Malawi Defence Force (MDF) personnel requested that each party should only have one monitor to create space in the Hall. He stated that at around 03.00 hours some monitors started leaving the Hall before signing for the results. But that however no single monitor at the centre made any complaint.

*Mr. Charles Bishop*

518. Mr. Bishop deposed that he was a monitor for the Democratic Progressive Party at Dinde Polling Station in Nsanje South West Constituency during the 21<sup>st</sup> of May, 2019 General Elections. He deposed further that he was assigned to stream one and after the counting of the votes he signed together with all the monitors from stream three.

*Mr. Brown Mpinganjira*

519. Mr. Mpinganjira told the Court that he was a roving monitor for the Democratic Progressive Party for Mulanje and Thyolo during the 21<sup>st</sup> of May, 2019 Tripartite Elections. He denied the allegations that were made against him by Wyford Chaola whose sworn statement was eventually withdrawn, that he had been to Namalinwe Ward in Ndirande in the City of Blantyre.

*Ms. Elenesi Tchukambiri*

520. She stated that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Folopensi Tally Centre in Thyolo West Constituency. She stated that the allegations made by Mervin Makawa in his sworn Statement which was eventually withdrawn that there were 19 polling stations instead of 18 were not true. She proceeded to list the 18 polling stations and stated that there was no Monekera Polling Centre.

*Mr. Christopher Zingale*

521. Mr. Zingale told the Court that he was a monitor at Namalinwe Polling Station during the 21<sup>st</sup> of May, 2009 Tripartite Elections. He did not state which party or candidate he had represented and basically said nothing about what had happened at that polling station.

*Mr. Gift Chigwere*

522. Mr. Chigwere stated in his sworn statement that he was a monitor at Chisawani Constituency Tally Centre in Thyolo North Constituency during the 21<sup>st</sup> of May, 2019 Tripartite Elections. He did not disclose which party or candidate he had represented but that for the Democratic



Progressive Party it was Dave Steven who had signed for stream three results and others had signed for stream four results.

523. In reference to the sworn statement of Mr. Ndasauka in DN 23 and 24, he confirmed that those were the correct results for the presidential candidates and that reconciliation of results by auditors was taking place at the Constituency Tally Centre and not the polling centre. He stated that if the 1<sup>st</sup> Petitioner's votes were reduced and added to the 1<sup>st</sup> Respondent this was due to the reconciliation of figures.

*Mr. Steve Likacha*

524. Mr. Likacha stated that he was a monitor at Lauderdale Primary School in Mulanje South Constituency for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections. He stated that the UTM had no monitor while the MCP had only one monitor by the name of Nankotokwa. He stated further that the centre had 5024 registered voters with seven streams. He added that, after counting, all the available monitors signed except the MCP monitor who left when he noticed that the results did not go in his candidate's way

525. He then stated that two days later he was summoned back to the polling centre by the 2<sup>nd</sup> Respondent on allegation that there were more voters than those who had registered. He stated that a recount was conducted in the presence of all monitors and it was discovered that the people who had voted were less than those who had registered. And that, thereafter all monitors signed for the results again to signify acceptance of the results. He denied that more people voted than those who had registered.

*Mr. Phillip Chiku*

526. Mr. Chiku told the Court that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Chilumba Primary School and later at Mpatsa TDC Tally Centre in Nsanje Central Constituency. He stated that at Mpatsa tallying was done by announcing the results loudly so that monitors could compare with the results they had. And that thereafter the results were given to the auditors to verify if they were balancing.

527. He denied the allegations that the Constituency Returning Officer had turned down complaints. He asserted that the only proposal that was turned down by all monitors was that the MCP wanted to change the procedure of receiving results at the Constituency Tally Centre. He also denied the allegation by Tione Malizani whose sworn statement was withdrawn that there was editing of results.

528. He stated that the only time that changes were made was when the results were given back to the presiding officer to balance the figures. Further, that after the reconciliation and verification by all monitors, the results were scanned and transmitted to the National Tally Centre and all monitors signed. He added that thereafter Mr. Thomas, the Constituency Returning Officer, (CRO) carried the results to Nsanje Secondary School Hall which was the District Tally Centre.

529. He then stated that the following day he was summoned to go to Nsanje Police Station where he was informed that the CRO had been found with Tally sheets on his way from home to the District Tally Centre. He stated that when asked, the CRO stated that he failed to deliver the results the previous day as he had found the centre closed and he took the results to his home. Mr Chiku then stated that after comparing the results sent to the National Tally Centre and what the CRO had, in the presence of all monitors, it was discovered that the CRO did not alter the results. He added that an agreement was drawn up in respect of the within matter but monitors for UTM and MCP refused to sign the agreement because it was not typed.

*Ms. Maria Richard*

530. Ms Richard told the Court that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed in Phalombe South Constituency. She stated in her sworn statement that she was assigned to monitor voting on stream five and she signed for the results. She stated that monitors were not signing on a single form as they were many and the form (MR 1) she was given had no alterations and looked regular and not fake as the district code, constituency code and polling station code were all there. She denied that votes for the 1<sup>st</sup> Respondent were increased by the 2<sup>nd</sup> Respondent.

*Mr. Mateyu Mokowa*

531. Mr. Mokowa told the Court that he was a roving monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Elections in Mulanje West Constituency. In reference to the sworn statement of Peter Chigwenembe, which was withdrawn, he stated that at Mgumera and Luwangwa Schools he went to these places to visit their monitors and returned to his car thereafter and he did not get near the polling materials.

*Ms. Emma Chikandila*

532. Ms. Chikandila told the Court that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Kabwabwa School in Lilongwe City Centre Constituency. She stated that after voting and counting were completed it was discovered that the teachers present were failing to balance the figures and the original result sheet had several mistakes.

533. She stated further that the Headmistress Joyce Mgusha consulted the Tally Centre at Chimutu School and she was advised to use a fresh tally sheet which was signed by UTM and DPP monitors only as the other monitors had left. She added that the original result sheet was placed in an envelope and sealed in the presence of the monitors. She admitted that the duplicate copies marked AB 3 and AB4 in the statement of Mr. Bendulo were correct as seen in her exhibit EC from stream 10.

*Mr. Chrispin Mbewe*

534. Mr. Mbewe told the Court that he was a monitor for the Democratic Progressive Party at Linga Primary School in Nkhotakota during the 21<sup>st</sup> of May, 2019 Tripartite Elections. In reference to the allegations by Mr. Hascard Mdakalira, he denied that the said person was a monitor at the school and that there was no polling station called Linga Community Day Secondary School.

535. He recalled that there was no incident at the polling station. He stated that all monitors had signed for the results except the roving monitors who were not assigned to a particular polling centre. He stated further that when going to the Constituency Tally Centre the monitors joined in the MDF vehicle and it was not possible for presiding officer to arrive at the CTC with tally sheets

in his hands as alleged by Mr. Mdakalira. He further denied that the number of voters surpassed the registered voters.

*Ms. Thokozani Kaunda*

536. Ms. Kaunda told the Court that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections. She stated that she was a monitor stationed at Mbawemi CBO Polling Centre. She stated further that on 19<sup>th</sup> May 2019 all monitors were summoned to inspect voting materials and that on the 20<sup>th</sup> only DPP, MCP and UTM monitors arrived. She explained that on 21<sup>st</sup> of May 2019 voting went on well and there was no complaint filed and after counting monitors present signed as others had left the centre before signing. She stated that it was not true that there was vote tampering as alleged by Mr. Ndasauka in his sworn statement.

*Honourable Bright Msaka, SC*

537. Hon. Msaka stated that he was the Minister of Justice and in reference to the sworn statement of Tiyamike Muluda which was withdrawn, on the morning of 21<sup>st</sup> May, 2019 he left his house and went to cast his vote at the polling station where he had registered and returned home thereafter. He denied meeting anyone who was involved in the management of the elections.

*Mr. Stanley Mandala*

538. Mr. Mandala told the Court that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> May, 2019 Tripartite Elections stationed at Dwangwa Primary School Polling Station in Nkhotakota North Constituency. He stated that voting and counting went on very well and all monitors whose candidates were trailing left the centre due to frustration and they did not sign the result sheet.

*Mr. Patrick Muhosa*

539. Mr. Muhosa told the Court that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> May, 2019 Tripartite Elections stationed at Linguni Primary School in Phalombe South Constituency. In reference to the sworn statement of Mr. Ndasauka, he denied that the 2<sup>nd</sup> Respondent had used a different format in the barcode. He explained that after analyzing results

sheets from Mulanje, Mzimba, Nkhotakota, Nsanje, Lilongwe and Kasungu he noted that the format was the same as that in Phalombe at Linguni Centre whose code represented district, constituency and polling station codes. He exhibited PM1.

*Ms. Catherine Chiwowa*

540. Ms. Chiwowa told the Court she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> May, 2019 Tripartite Elections stationed at Kamwakhuku School in Mzimba Central Constituency. She told the Court that counting and tabulation of the results at the Kapiri CTC went on well without any incident as alleged by Mr. Harold Singini whose sworn statement was withdrawn. She added that all monitors accepted the results which were not affected by the tabulation and signed for them.

*Ms. Odala Phiri*

541. Ms. Odala Phiri told the Court that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Kanyenda FP School Polling Centre in Nkhotakota North Constituency. She stated that after counting, the results were posted on a blackboard and all monitors were able to see the said results and nothing was hidden and that a Mr. Hascard Dakalira was a roving monitor who was not present at the Polling Centre. He stated that it was not true that UTM monitors were denied access to the results. According to him each monitor was given a copy.

*Mr. Joseph Chavula*

542. Mr. Chavula told the Court that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Kamwankhuku School in Mzimba Central Constituency. His narrative was not different from that of Catherine Chiwowa and we need not repeat the same.

*Ms. Fides Botha*

543. Ms. Botha told the Court that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Kasenga School in Mzimba Central

Constituency. He disputed the allegations made by Harold Singini in his sworn statement which was withdrawn that there were problems with the counting and tabulation of results at Kapili CTC. He stated that, in fact, there was no incident at the CTC as monitors were present during the exercise.

*Mr. Maxwell Majawa*

544. Mr. Majawa stated that he was a monitor at Mgumera School Polling Centre in Mulanje West Constituency for the Democratic Progressive Party during the 21<sup>st</sup> of May 2019 Tripartite Elections. He stated that Mr. Mokowa and Mr. Namowa were roving monitors and when they arrived, they parked their car near the graveyard which was about 150 meters from the voting place. He stated further that voting and counting went very well and no incident was reported. And that after the results were declared all monitors and the Presiding Officer signed for the results. Further that thereafter he left the centre.

*Mr. Gift Chimthere*

545. Mr. Chimthere told the Court that he was a monitor for the Democratic Progressive Party stationed at Chamvu Polling Station. He also told the Court that voting and counting went on smoothly in the presence of the monitors. He stated that thereafter he signed for the results which were not different from what the 2<sup>nd</sup> Respondent had announced.

*Mr. Chikondi Kacherenga*

546. Mr. Kacherenga told the Court that he was a monitor for the Democratic Progressive Party stationed at Liwalazi FP School Polling Centre in Nkhotakota North East Constituency. He stated that after the counting of the votes there was one error on Atupele Muluzi' s votes, and he exhibited CGK 1 a copy of the tally sheet which was corrected by the Presiding Officer a Mr. Evance Nombo and signed for in the presence of the monitors. He then stated that the correction did not affect any candidate's votes.

*Mr. Wilson Simwela*

547. Mr. Simwela told the Court that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections in Chitipa North Constituency. He stated that the allegation in Dr Chilima's sworn statement that the Presiding Officer and other staff of the 2<sup>nd</sup> Respondent influenced voters on the choice of candidate were not true as he was present.

*Mr. James Kajana*

548. Mr. Kajana told the Court that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Chala School Polling Station in Lilongwe South West Constituency. He stated that during the counting 27 null and void votes were discovered and yet the Deputy Presiding Officer Mr. Rodwell Kubwalo had written zero. He added that corrections were made in the presence of all the monitors. And that thereafter the corrected result sheet was signed for by the monitors.

*Mr. Maxwell Botha*

549. Mr. Botha stated that he was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Mbalachanda School in Mzimba Central Constituency. He told the Court that the voting process, the counting and tabulation of results at Kapili CTC went on smoothly in the presence of all stakeholder and party monitors and that there was no incident as all monitors signed for the result sheets.

*Ms. Martha Msukwa*

550. Ms. Msukwa deponed that she was a monitor for the Democratic Progressive Party in the 21<sup>st</sup> of May, 2019 General Elections stationed at Joel Private Primary School in Mzuzu City. She stated that the presidential results reflected on the stream by stream results were the same and were a true outcome of the counting of cast ballots. She stated further that the result sheet for the UTM monitor had wrong figures as compared to the one used by the 2<sup>nd</sup> Respondent which had a figure of 180. That the corrections on the 2<sup>nd</sup> Respondent's document had alterations on the reconciliation part and all monitors including the UTM monitor signed for the results.

*Ms. Felista Shawa*

551. Ms. Shawa deponed that she was a monitor for the Democratic Progressive Party during the 21<sup>st</sup> of May, 2019 Tripartite Elections stationed at Mphimbi School Polling Centre in Dowa Central Constituency. She stated that after counting was completed the results were posted on the blackboard and they were similar to those announced by the 2<sup>nd</sup> Respondent and that monitors present signed for the results and each was given a copy.

*Mr. Jiyasi Christopher*

552. Mr. Christopher stated that he was a monitor at Lifidzi School Polling Station in Dedza West Constituency. He stated further that at the centre voting and counting went on well in the presence of monitors. Further, that after counting all monitors signed for the results sheets and each was given a copy. He stated that what Steven Jezana whose statement was withdrawn stated in his sworn statement was not true.

553. The Petitioners gave notices that they wanted to cross examine two deponents of the 1<sup>st</sup> Respondent, namely, Honourable Ben Malunga Phiri and Mr Bob Chimkango.

*Honourable Benson Malunga Phiri*

554. Honourable Benson Malunga Phiri stated that he was the Director of Elections for the Democratic Progressive Party (DPP) during the 21<sup>st</sup> of May, 2019 Tripartite Elections. He then stated that his responsibilities included planning, directing, coordinating, training of monitors and supervision of the election processes and ensuring that all supporters had registered. And that he was the link between the Party and the 2<sup>nd</sup> Respondent.

555. Honourable Phiri stated that prior to the elections he had attended NECOF meetings and other meetings which were organized by the 2<sup>nd</sup> Respondent. He also observed the dispatch of ballot papers which were printed in Dubai. He then stated that on arrival these materials were delivered under heavy military escort to the various districts through the country until voting day and that no one could tamper with the materials. In respect to the various sworn statements from the Petitioners, Honourable Ben Malunga Phiri stated as follows.



556. *Counting of votes.* That the same was done per stream of 800 voters and the results were recorded in Form 60C. That this form which was a primary record had spaces for signatures of the presiding officer and monitors who were given copies of the forms. These details were then transferred on Form 66C in their respective stream column. That the candidate data contained the number of votes per candidate per stream while the statistical data comprised of number of ballots received, unused, cancelled/spoilt. Null and void, valid votes and total valid votes cast. He stated that while at the National Tally Centre he noticed *sporadic arithmetical errors* that were corrected in the statistical data which were being corrected using correction fluid or overwriting or cancelling the wrong figures and writing a correct one. He denied that the arithmetical errors affected the outcome of the elections. He stated that once this was done the materials were transferred to the constituency tally centre and party monitors were encouraged to escort the presiding officer when delivering the electoral materials.

557. *Auditing of the tally sheets.* He stated that the 2<sup>nd</sup> Respondent had auditors (*not a legal requirement but administrative arrangement to ensure a free and fair election*) at the constituency tally centre who were tasked to verify arithmetical correctness and not tamper or change the results from the polling centres in the presence of monitors from the CTC and their counterparts from the polling stations. He stated further that thereafter results were aggregated on Form 72C.

558. *Transmission of Results.* He stated that these were transmitted by two data entry clerks and an auditor in the presence of a CRO. They used a kit which was specifically designated for the respective constituency tally centre to the National Tally Centre.

559. *Tallying of results.* He deposed that once the results arrived at the National Tally Centre auditors were verifying the arithmetical correctness of the figures as transmitted and after signing the results were given to the 2<sup>nd</sup> Respondent for determination of the results.

560. In response to the allegations in the petitions, Honourable Ben Malunga Phiri stated that the results as announced by the 2<sup>nd</sup> Respondent indicated that the elections were free and fair and the same position was taken by both local and international observers as per his exhibit *BMP I* which declared the 1<sup>st</sup> Respondent a winner with 1, 940, 709 representing 38.57% and that this represented the will of the people. On the issue of a plethora of irregularities, he stated that in Malawi and beyond each election was unique and had its own challenges which do not amount to irregularities as alleged by the 1<sup>st</sup> Petitioner.

561. On the allegations in DN1, 2, 3, 4 and 5, he stated that the corrections that were made did not affect the results of the votes polled in favour of a respective candidate and the same was confirmed by their Team Leader Bob Chinkango who was at the National Tally Centre. On allegation in DN6, 7, 8, 23, 24, 25, 26, 27 and 31, he stated that the 2<sup>nd</sup> Respondent had provided generic forms to be used in the event that the tally sheets were missing, damaged or defaced.
562. As for the differences in words and figures he stated that the differences with respect to DN13, and 14 the Court should consider the results which were duly signed by the Presiding Officer together with all the monitors. As for Ulongwe Model School in DN 15 and 16 in stream one and two the witness noted that this was an isolated incident and did not affect the overall outcome of the results. He added that the same corrections were made in DN 21, 22 and 29 (Nambiro School) on the reconciliation part but the same did not affect the votes for each candidate. Similarly, that the correction in MG3 was made to correct arithmetical errors in the reconciliation sections.
563. In respect of MG1 he confirmed that the result sheet did not bear the signature of the Presiding Officer but that monitors including that for the 1<sup>st</sup> Petitioner signed the tally sheet. In respect of MG2 he also confirmed that the majority of the monitors signed the tally sheet and that other monitors left the tally centres due to negligence or when they noted that their candidates were not doing well in the polls. He observed that however abandonment of the counting process by a monitor would not stop the counting process and this was said by the Chairperson of the Commission on 21<sup>st</sup> of May 2019.
564. He denied that there was a statement from the Chairperson of the Commission on 17<sup>th</sup> of May 2019 that only original result sheets would be used. He stated that he was aware that some stationery had different water mark some bearing inscription of original and duplicate and that MG3 was one of them. He added that the alteration in MG10 was made in the reconciliation section and did not affect the votes per candidate. He denied that the 2<sup>nd</sup> Respondent aided the distribution of cash to voters at any polling station.
565. Honourable Malunga Phiri confirmed that the tally sheets with a water mark written 'duplicate' were materials which were duly printed by the 2<sup>nd</sup> Respondent for use in the 2019 elections and had all the security features and that RC3 was not a counterfeit result sheet. He added that while

at the National Tally Centre the 2<sup>nd</sup> Respondent shared the hard and soft copies of the results with all political parties for their inspection and verification.

566. In respect to Mr. Chapweteka's sworn statement, that the 2<sup>nd</sup> Respondent was not allowed to use tally sheets written duplicate, he stated that this was not true otherwise they could not have been printed. He made reference to AB13, 14, 15, 16 and 17 and stated that the documents exhibited therein were not fake tally sheets and the 2<sup>nd</sup> Petitioner accepted them during the printing exercise. He further stated that exhibits in AB18 and 19 did not affect the candidate votes as no changes were made in the candidates' vote section.
567. As for the barcodes he stated that this was an administrative initiative and not a legal requirement by the 2<sup>nd</sup> Respondent for the management of the elections and that therefore the use or non-use of the same would not render the elections defective. He gave an example of barcode \*PRE066C2019A4\* for Maselema School in Chitipa Central Constituency which he said was not fake.
568. He then stated that the 2<sup>nd</sup> Respondent had informed all parties involved that these extra tally sheets would be made available at all polling stations to cater for eventualities and that tally sheets which had their names crossed out and a new name written were delivered at the wrong centres for example Katutula and Lufita Schools in Chitipa Central Constituency. Similarly, that in Karonga at Chauteka Polling Station the crossing and changing of the centre was countersigned by the CRO.
569. Honourable Malunga Phiri then stated, in reference to Peter Lackson's allegation, that all the alterations that were made were meant to capture the correct figures but that the same were too insignificant to materially affect the outcome of the election. He also stated that the signing of the tally sheet by a monitor was mandatory and there were different reasons why people did not sign.
570. As for Karonga he stated that all the duplicate tally sheets which had alterations in the reconciliation part were duly signed by all monitors including the 2<sup>nd</sup> Petitioner's monitors and votes were not affected. He then stated that in Rumphi duplicate tally sheets were used and duly signed for by all monitors as alterations only affected the reconciliation part and not the valid votes. He gave the example of Phoka School Polling Station in Remphi North Constituency

where tippex was used to make corrections. He then stated that, similarly, the use of a form with a barcode \*PRE066C2019A4\* at the Magistrate Court Centre in Rumphu did not in any way reflect a fake form or barcode and in fact that the aggregated results for Rumphu favoured the 2<sup>nd</sup> Petitioner.

571. He then stated that as for Mzimba, all tally results that were used and the alterations made in the reconciliation part were duly signed for by all monitors and no votes polled for any candidate were affected as no changes were made on the candidate's votes. And that this was the case in most centres in Mzuzu and Mzimba. He however stated that in a few centres results were recorded on an improvised sheet due to non-availability of the official Form 66C.
572. Honourable Malunga Phiri stated that the form used with a different barcode\*PRE066C2019A4\* at Kacheche, Thimalala, Kazuni, Tchesamu, Madise, Wengwani and Kabwanda was a blank form reserved for all stations across the country. He observed that in all the above centres, the 2<sup>nd</sup> Petitioner led against the 1<sup>st</sup> Respondent.
573. He then stated that in Lilongwe there were duplicate tally sheets which were used and duly signed by all monitors and no votes polled were affected. Further, that at Lilongwe City West Constituency, Katsumwa, Kapunula and Chatsala Schools in Lilongwe Mapuyu North Constituency and generally in all centres in Lilongwe the alterations were visibly reconciling numbers of ballots and no candidate votes were affected. Furthermore, that the 2<sup>nd</sup> Petitioner led against the 1<sup>st</sup> Respondent and he referred to exhibit PL6 in that regard.
574. In respect of Kasungu district he admitted that there were four additional votes for the 1<sup>st</sup> Respondent at Munye in Kasungu East Constituency but that at Kambira School in Kasungu East Constituency corrections were made for proper reconciliation and that the 1<sup>st</sup> Respondent got 99 and not 137 votes. He then observed that however the total votes affected were 42 and did not affect the outcome of the elections. He stated that, similarly in many other centres the corrections were aimed at the mathematical errors and did not affect the votes cast per candidate.
575. He then stated that, in addition, all duplicate tally sheets that were used were duly signed by all monitors. He observed that at St Helena School votes were recorded on an improvised sheet due to non-availability of the official form but all monitors signed the improvised tally sheet as

*no candidate votes were affected. He stated that the use of reserve tally sheets \*PRE066C2019A4\* in Kasungu West Constituency did not affect the elections.*

576. In regard to Nkhotakota he told the Court that alterations were made to reconcile 5 votes only in the entire District and all other alterations were made to reconcile the data section. And that the duplicate tally sheets and reserve tally sheets were duly signed by all monitors and therefore were not fake.
577. In regard to Salima he stated that all duplicate tally sheets that were used were duly signed by all monitors and no votes were affected. Similarly, that the alterations only affected the reconciliation of the totals for ballots received, unused, cancelled/spoilt, null and void, valid votes and ballots cast. He denied that the reserve tally sheets used were fake since they were signed by all monitors.
578. In regard to Blantyre he stated that only four votes for Atupele Muluzi were affected at Ngongomwa School in Blantyre Rural Constituency but that the mistake was corrected. He also stated that at Chirimba School the results were recorded on an improvised sheet but that the results were duly signed by all monitors and no votes were affected. Further, that in other parts of Blantyre duplicate and reserve tally sheets were used and alterations were also made affecting the reconciliation part and monitors signed the results and no valid votes per candidate were affected.
579. In regard to Mwanza he stated that duplicate tally sheets were used and alterations on the statistical part were made but no valid votes were affected in places like Mwanza Admarc, Tsanga and Namiwawa School in Mwanza Central Constituency, Tsamika, Thawale, Mpira, Maye and Mpandazi School in Mwanza West Constituency. He stated that all the tally sheets were duly signed by the monitors that were available.
580. In cross examination by Counsel Dr Silungwe for the 1<sup>st</sup> Petitioner Hon Malunga Phiri told the Court that on polling day he was mainly at the National Tally Centre in Blantyre. He admitted that he had attended several meetings organized by the 2<sup>nd</sup> Respondent which were aimed at enhancing knowledge of the stakeholders about the electoral processes. He stated that there were several challenges during the election which included failure of officers to understand terminologies.

581. The witness admitted the use of duplicate tally sheets, tippex and altered results sheets in the 21<sup>st</sup> May, 2019 Elections but that there were other generic forms which were printed in Dubai as reserves in case the other tally sheets had run out and that he did not state in his sworn statement about the use of original result sheets. He insisted that however all the materials that were used in the elections were printed in Dubai.
582. In reference to the BDO Termination Report Hon Malunga Phiri stated that the report indicated that the 2<sup>nd</sup> Respondent was unable to specify what was verified by the auditors and what was not and that results were appearing on the screen before the verification by the auditors and that the 2<sup>nd</sup> Respondent considered those as final results before auditors' approval. And that many of the tally sheets were rejected because of the manual amendments. Further, that later the Commission provided the auditors with an official letter to approve any manual amendments on the tally sheets and forms that were used at the Constituency Tally Centre.
583. He admitted the use of correction fluid (tippex) in the elections despite the fact that the Chairperson of the Commission had said in SKC4 that the Commission never bought tippex and yet it was used from Chitipa to Nsanje, Salima to Mchinji. On the simple majority system (first past the post) the witness admitted that even a single vote could win one an election.
584. In cross examination by Senior Counsel Msisha, Honourable Malunga Phiri told the Court that he did not interact with the 1<sup>st</sup> Respondent on the issue of the BDO Report, security features on the tally sheets, use of tippex and reserve tally sheets because he was not asked to do so. And that all that he told the 1<sup>st</sup> Respondent was that there were challenges in understanding terminologies that were in the result sheets and that in making corrections they had used tippex and that the issue was discussed in that the number which appeared on top of the tippex was the correct one meaning that the first number should have been wrong.
585. He stated that he could not recall the Commission giving a go ahead on the use of tippex if there was an error. He stated that the record logbook was designed to record any occurrence at the polling station such as the number of ballots received, and used and null and void ballots. He could not however remember whether there was a need to amend the number of ballots received. He stated that he was at Kamuzu International Airport when the election materials

arrived and he did not have a look at the packing list and the coming of the reserve tally sheets was announced at one of the NECOF meetings he attended.

586. He stated that the logbook did not contain information as to why the reserve tally sheets were being used. That he did not find a single tally sheet that had adverse information about the 1<sup>st</sup> Respondent. He admitted that in the sworn statement of Mr. Munkhondiya at page 185 paragraph 10.1 it was stated as follows.

‘In accordance with the well-known polling process immediately after the voting the presidential elections streams results of count were recorded in a stream logbook on a form technically described as MEC Poll60c’.

587. He denied however that the logbook was the first to be recorded. As for the reserve tally sheets the witness stated that these sheets were kept at the Constituency Tally Centre to be used by a polling centre whenever need arose. In reference to LMC 3 at page 542 the witness admitted that the duplicate tally sheet thereon was not signed by all the monitors. When the witness was confronted with several tally sheets he admitted that some did not have all signatures from the monitors while others had names only and that duplicates were used but that valid votes were not affected.

588. Honourable Ben Malunga Phiri stated that he did not know whether the 2<sup>nd</sup> Respondent had a discussion on the use of tippex or the alterations that were being made. He then stated that that tally sheets were customized for each polling centre except the reserve tally sheets but that in some cases like Katululu and Lufita this was not the case since tally sheets were sent to the wrong polling centre but he had no knowledge whether these occurrences were recorded in the logbook since these were kept by the 2<sup>nd</sup> Respondent. He added that this prompted the presiding officer to re-write the name of the new centre. In reference to LMC18 and HM2 at page 239 he admitted that there was a difference in the figures and the words as the former was changed to 72.

589. He then stated that even at a polling station with a single stream, mistakes could still be made depending on the challenges that the presiding officer had. That marked the end of the cross examination. In re-examination by Counsel Mbeta Hon Malunga Phiri stated that most presiding officers were failing to differentiate between cancelled and spoilt votes and that affected the

reconciliation in part A to F. Further, that in the 2019 elections, duplicate and reserved tally sheets were used and these were printed in Dubai.

590. He stated that original tally sheets were used in the election and that was why the number of the so called fake tally sheets was only less than 500 out of 5002 constituency tally centres. He then stated that the polling stations which were near education institutions had more than 800 voters per stream due to the students who had arrived but had registered elsewhere as was the case for polling stations near Mzuzu Government Secondary School and that this was done to respect the voting rights of the students.

591. He told the Court that on 24<sup>th</sup> of May, 2019 the 2<sup>nd</sup> Respondent provided results at 100% to all political parties at the National Tally Centre and the BDO report also mentions 100% for the 197 centres as verified in the presidential elections. As to the allegations that some monitors did not sign for the results he stated that none of the said monitors challenged the results and the 2<sup>nd</sup> Respondent allowed those results to go through after verifying with monitors on the ground and provided the presiding officers signed. On amendments, the witness stated that these were expected in the reconciliation part in order to correct the mistakes that were made.

592. He stated that the auditors used the logbook as source document to validate the tippexed entries. He told the Court that he had not seen a single document from monitors challenging the results in the tally sheets. He stated that the use of tippex was intended to hide the old number and put the correct one so that there was no confusion on the summation. Further, that the use of tippex did not affect the final results and where they did the number was too insignificant and it did not materially affect the outcome of the presidential elections.

593. On the simple majority system, Honourable Malunga Phiri said that if only one or two votes were involved then an issue could arise but not in cases where the figure involved was 100 000 votes. He categorically stated that alterations on part A to F could not affect the valid votes and that the 2<sup>nd</sup> Respondent said that the system would allow figures that were not balancing in the statistical data to pass with appropriate message where errors were and on valid votes the system would not allow errors on candidate data.

594. He then stated that all reserve tally sheets were kept at the constituency tally centre to be used by polling centres when need arose and these had security features. He stated that alterations did



not spare a single candidate and there was no relationship between alterations and reserve tally sheets and reference was made to Chamvu School. He stated that the 2<sup>nd</sup> Petitioner was only challenging votes where he did not do well but remained silent where he polled more votes even if alterations were made on reserve tally sheets.

595. Hon Malunga Phiri told the Court that the Polling Station Procedure Manual did not specially state that results from the streams must be recorded in the logbook and that copies for the monitors were taken from the booklet which contained Form 60C for multiple streams since the logbook only had one copy. On signatures of monitors he stated that people signed differently and some simply wrote their names while others just put their initials. In conclusion Hon Malunga Phiri told the Court their monitors played a very important role whenever he wanted to cross check on anything that was happening across the country.

*Mr. Bob Mavuto Chinkango*

596. The last witness for the 1<sup>st</sup> Respondent who was invited to be cross examined by the Petitioners was Bob Chinkango who was a roving monitor and a Team Leader of 25 others for the Democratic Progressive Party during the 21<sup>st</sup> of May 2019 Tripartite Elections stationed at the National Tally Centre at Comesa in Blantyre. His duties included receiving, verifying, auditing and tallying results from the 1<sup>st</sup> Respondent upon comparing with results from the DPP polling centre monitors. He stated as follows.

597. *Tallying of results.* Between 22<sup>nd</sup> and 24<sup>th</sup> of May 2019 he had received a set of 14, 341 electronic copies of the results covering Forms 66A, 66B and 66C from across the country at different times on the said dates and the same had been attached to his sworn statement. That these copies were also given to the representatives of political parties.

598. He stated that when receiving these results there was no preference as to which district results were given first or which ones delayed. He added that these 14, 341 results were eventually printed and put in seven lever arch files for the parties to verify. Together with his team and the Petitioners' monitors they embarked on the verification exercise. That all tally sheets that had been delivered to them were stamped and signed by BDO the external auditors.

599. *Display of results.* Mr Bob Chimkango told the Court that the 2<sup>nd</sup> Respondent had mounted three big electronic screens two of which were inside the Hall while one was outside. These screens were only showing the name of the centres and constituency from where the results came and the same was supported by a pie chart. That on 22<sup>nd</sup> of May 2019 the 2<sup>nd</sup> Respondent announced results at 30% of the total during which the 2<sup>nd</sup> Petitioner was leading. On 23<sup>rd</sup> of May 2019 the 2<sup>nd</sup> Respondent announced the results at 75% of the total and this time the 1<sup>st</sup> Respondent was leading.
600. On 27<sup>th</sup> of May 2019 the 2<sup>nd</sup> Respondent announced results at 100% of the total polling centres and the 1<sup>st</sup> Respondent was declared a winner. The 2<sup>nd</sup> and 1<sup>st</sup> Petitioner came second and third respectively. He stated that all results were given to all party representatives at the National Tally Centre and that allegations made by Mr. Mkaka of MCP to the contrary were not true.
601. In reference to Mzuzu City and Rumphu West where Ms Rebecca Chirwa was involved as a Returning Officer he stated that the figures for the two constituencies were similar when in fact the real figure for Rumphu was 27, 581 valid presidential votes against 27, 907 votes cast and that registered voters were 35, 094. He doubted the authenticity of the tally sheet as it did not come from the 2<sup>nd</sup> Respondent. He stated further that the Returning Officer for Rumphu was a Mr. Rodwell Kayuni.
602. Mr Bob Chimkango also disputed the allegation made by Mr. E. Mkaka that in all 34 centres in Machinga South Constituency the 1<sup>st</sup> Respondent got 6, 047 votes but on comparing with result sheets from the 2<sup>nd</sup> Respondent it was discovered that the 1<sup>st</sup> Respondent actually polled 18, 846. Similarly, he stated that in Dedza North West Constituency the figure was 2, 278 and not 22, 278 as alleged by Mr. E. Mkaka. He also disputed the results for Matanda School Polling Station where it was alleged that the original number recorded for the 2<sup>nd</sup> Petitioner and the 1<sup>st</sup> Respondent were altered using tippex in favour of the latter. Again, he said that in Msinjiyiwi School in Nkhatabay the allegation that figures for the 1<sup>st</sup> Respondent were changed from 29 to 119 was not true. And that in Pundu School in Nkhatabay the actual figure for the 1<sup>st</sup> Respondent was 179 and not 379. He stated that upon checking with the tally sheets from the National Tally Centre it was discovered that the allegations were not true.
603. He further disputed the allegation that at announcing the presidential results at 100% the 2<sup>nd</sup> Respondent had simply given each candidate 500,000 votes meaning that there was no

competition for the remaining 25%. He asserted that the round figure that the 2<sup>nd</sup> Petitioner had brought was intended to mislead the Court. He pointed out that the true figures were as follows; Chakwera 1, 781, 740, Chilima 1, 018, 369 and Mutharika 1, 940, 709.

604. In reference to Dr S. Chilima's assertion that votes for Mzimba South Constituency exceeded the number of registered voters he stated that this was similarly not true after he had checked with the tallied results for the Constituency which was 22, 312 out of 22, 549 votes cast. In reference to Mphimbi School in Dowa, Mr Bob Chimkango stated that the alleged blocking of the result sheet was simply an attachment of a separate paper by way of staples and that the results per candidate as polled were visible and with no alterations.

605. He further stated that at Dwangwa JP School in Nkhotakota North Constituency, the number of votes polled per candidate was visible with no alterations and that documents marked DN3 and 4 had to be considered as one document and not separate. He then stated that the information presented to this Court for Liwalazi FP School in Nkhotakota North East Constituency was false as the total number of votes cast was 1, 960 against 3,000 received ballots. He stated that the alterations which were made at Majiga School in Nkhotakota North East Constituency were necessitated by the errors from the stream count which was 320 and not 203. For Msiliza Polling Centre in Mchinji he admitted that the tally sheet had no figures in words and that at Kalolo School in Lilongwe Mapuyu there were no alterations of figures in words. And that at Mwenelondo the alteration was to correct Atupele Muluzi's votes from 238 to 268.

606. In cross examination by Counsel Theu Mr. Chimkango stated that he and his team had verified with some of their monitors on the ground through phone if they had received the same results as he had which they answered in the affirmative. Further, that they had used their monitors at the CTC to reach the other monitors who were at the polling centres. He admitted that he had received a blank document in HM Vol 10 page 89 and 90 which was in one of the tally sheets but he never checked with his monitor what it was about.

607. As for Chamvu School, Mr Bob Chimkango stated that the presiding officer perhaps did not have the original tally sheet so he decided to improvise despite that all polling centres were given materials for the elections. He stated that, however, their monitors on the ground had confirmed that the document and the entries therein were in order. He refused to comment as to how many ballots in a batch were given to an assistant presiding officer per stream.

608. As for centre code 06024 he admitted that the name of the original centre Nsongwe School was crossed out with ink and replaced by St Michael Private School. In speculating he said that the centre might not have received their original tally sheets. He stated that he and his team mates were not concerned with the statistical part of the tally sheets but only valid vote count. On transmission he stated that he was monitoring the progress of the transmission but not the actual transmission while at the National Tally Centre. On the BDO report he stated that he was unable to say which auditors were being referred to between auditors at the Constituency and those at the National Tally Centre. He confirmed that the auditors stated that the 2<sup>nd</sup> Respondent was treating results on the screen as final before verification by auditors and that accordingly only 60% of the results were verified. Suffice to say that the witness was very evasive in giving his answers despite numerous reminders from the Bench that he was in Court as a witness and not as counsel.

609. In reference to page 175 in Volume 14 for Mchinji Mr Bob Chimkango stated that after reconciliation it was discovered that the centre had 667 extra ballots over and above what was received and the document could not speak for itself as to where the ballots came from. On the scanned copy of Form 66C which was stamped by the auditors and signed, the witness was unable to state whether he had seen any of such a copy. That marked the end of cross examination by the 1<sup>st</sup> Petitioner.

610. Senior Counsel Msisha for the 2<sup>nd</sup> Petitioner opted not to cross examine Mr. Chimkango on the basis that he was satisfied with the way Counsel Theu had conducted the cross examination and went ahead to adopt the 1<sup>st</sup> Petitioner's cross examination.

611. In re-examination by Counsel Mbeta the witness stated that his interaction with their monitors was focused on confirming the valid vote as recorded on Form 66C. On the BDO report the deponent stated that the role of the auditors was to verify and not approve the results and that the statement in the BDO Report was not correct to the extent that results were being displayed before auditors' approval. He stated that Auditors were not allowed to tamper with results. And that according to him results at 100% were all verified.

612. On the Result Management System (eRMS) the Court could not allow Counsel Mbeta to advance questions to the witness as the latter had said that he had no knowledge of the eRMS

during cross examination by Counsel Theu. Mr Bob Chinkango stated that at the National Tally Centre the results were placed on a table and monitors for a particular party were at liberty to inspect the result sheets.

613. He asserted that it was only a small percentage of the total results that was affected by tippex and non-availability of signatures as per the pie chart. In conclusion Mr Bob Chinkango told the Court that their instructions to their monitors were to concentrate on valid votes and not the statistical issues and hence the issue of balancing or not balancing of part A to F was non consequential).

## SECOND RESPONDENT'S EVIDENCE

### *Mr. Sammy Alfandika*

614. The 2nd Respondent's first witness was Mr. Sammy Alfandika. He began his testimony by stating that he was the Chief Elections Officer at the Commission. As Chief Elections Officer, he was also the Chief Executive Officer of the Commission. In the performance of his duties, he was answerable to the Commission. He was also under the Commission's directions, supervision and control. In his work at the Commission, Mr. Alfandika stated that he was involved in the Commission's day to day undertakings as the Commission fulfilled its mandate of managing the conduct and administration of the elections in accordance with the Constitution and the statutes.

615. He specified his duties to include: implementing the policies and decisions of the 2<sup>nd</sup> Respondent; preparing and overseeing the preparation of background papers for conferences and Commission meetings and the Commission's Committee meetings; preparing delegation reports for the Commission; coordinating the Commission's Committees' work; ensuring provision of training and development of staff to enhance effective and efficient operations of the Commission; drafting election results for consideration of the Commission; performing work as delegated by the Commission under the electoral laws; providing strategic and visionary leadership to achieve organizational objectives; oversight over the administration, organization and control of all professional, technical and administrative officers including support staff; planning, organizing and supervising electoral activities; liaising with stakeholders on electoral matters within and outside the country; ensuring availability and provision of suitable training of staff to enhance their contribution to the effective and efficient operations of the Commission;

preparation of reports for the Commission and other stakeholders; preparation of papers at the Commission's direction for presentation at various fora; custodian of the Commission's assets.

616. Mr. Alfandika responded to the consolidated petitions of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners. He stated that the allegations of both Petitioners that the elections were full of the cited irregularities or that the elections were mismanaged so as to cause undue return or undue election of the 1<sup>st</sup> Respondent were unfounded and did not have any merit.

617. He contended that if at all there were any irregularities, the same were very minor and insignificant, both qualitatively and quantitatively, and any such, if at all, were as they would normally occur in any election.

618. He elaborated his contention by stating that the 21<sup>st</sup> of May 2019 Presidential election was conducted in full compliance with all constitutional and statutory dictates under the Constitution, the Electoral Commission Act and the Parliamentary and Presidential Elections Act.

619. Mr. Alfandika stated that the allegations that the petitioners and their witnesses levelled against the 2<sup>nd</sup> Respondent were unfounded. He listed the allegations and singularly responded to each of them.

620. He also responded to allegations of undue return where the alleged issues included that: the result tally sheets (Form 66Cs) were defaced with tippex; there were alterations on result tally sheets; duplicate result tally sheets were used to record votes instead of the original; use of counterfeit or fake result tally sheets; and 2<sup>nd</sup> Respondent's use of result sheets that were not signed by presiding officers or monitors to determine the results.

621. Mr. Alfandika started by discussing the role of the petitioners' monitors in the election process. He referred to sections 73(a), 73(b) and 93 (1) (b) of the Parliamentary and Presidential Elections Act. He stated that the rights, responsibilities, status and the relationship between monitors and the political parties that they represented was well articulated in those provisions.

622. He stated that all monitors had a right to copies of result sheets down to stream level and these could not be withheld from them. He observed that in fact, most parties had Parallel Tallying

Centres because of this. At these parallel tally centres, the parties were using results that were given to them by monitors from polling centres.

623. He stated that these monitors as political party representatives were entitled to observe the entire procedure both at the polling stations, constituency tally centres and the District 2<sup>nd</sup> Respondent's offices.

624. The 2<sup>nd</sup> Respondent, in recognition of these rights, accorded all monitors access to polling stations to observe both the polling and the vote counting, tallying and recording process. This access was also accorded to the monitors at constituency tally centres and at district level.

625. Mr. Alfandika stated that the 2<sup>nd</sup> Respondent did not receive any complaint from monitors at any polling station that they were denied any of the rights as provided in the Parliamentary and Presidential Elections Act.

626. Mr. Alfandika explained that votes were counted at stream level and recorded on Form 60C which was a summary of results at the stream. The recording of the results at this level was witnessed by all monitors who were present, and they signed for the record in the logbooks. The results from the streams were then transferred on to the polling station result sheet (Form 66C). This was also witnessed by monitors. These forms were also signed by monitors present at the polling station and the monitors were entitled to copies of the result.

627. Mr. Alfandika observed that the petitioners in their consolidated petition were not in any way, alleging any problem in the results determination process as witnessed by their monitors.

628. He alleged that the petitioner's main grievance was on the actual tally sheets yet almost all tally sheets as transmitted and received by the 2<sup>nd</sup> Respondent were signed by monitors of political parties whose candidates contested in the election and in cases where not all monitors signed, most of such result sheets had signatures of monitors for candidates that were not in any electoral alliance.

629. Mr. Alfandika stated that the 2<sup>nd</sup> Respondent considered the signatures of monitors as acceptance of the validity of the results as appearing on a particular result sheet. He qualified the

statement by stating that absence of a signature of a political party or candidate's monitor, was not in itself, a cause to invalidate the results.

630. He also stated that absence of monitors' signatures in certain result sheets was not in itself an irregularity. Again, he did not come across any irregularity in the results determination process which was witnessed by monitors.

631. Mr. Alfandika continued to observe that most complaints in the petition related to Form 66C and almost all exhibits were of Form 66C, (the polling centre tally result sheet).

632. He stated that the results on the said Form 66C were a mere reflection or aggregation of the results on stream sheets (Form 60Cs) for polling stations that had more than one stream. It was therefore very easy, where there was doubt or challenge on the validity of the information in Form 66, to have recourse to the information on Form 60C (the stream result sheet) in order to verify whether the information on Form 66C was accurate.

633. He contended that in the matter at hand, all candidates and political party monitors were duly availed with the Form 60Cs, hence the petitioners should have resorted to their monitors for their monitors to double check the data contained in their Form 60Cs. Thereafter the petitioners should have compared the information in the Form 66C against the information in Form 60C.

634. He complained that the petitioners should only have raised an issue where the information in Form 66C was different from the information that was in Form 60C.

635. Mr. Alfandika also responded to the petitioners' allegations on irregularities.

636. He observed that the term 'irregularity' as understood by the 2<sup>nd</sup> Respondent was as defined in the PPEA. He pointed out that according to section 3 of the PPEA, an irregularity as far as it related to the conduct of elections was defined to mean "non-compliance with the requirements of the Act."

637. He observed that in the matter at hand, the petitioners failed to point out any specific non-compliance with the Act in as far as the results sheets were concerned.



638. He stated that the result sheets (Form 66C) that were scanned, transmitted and received by the 2<sup>nd</sup> Respondent at the main Tally Centre were a true reflection of the actual results attained by the contestants. He noted that any errors that were made on the recording were supposed to be corrected by means deemed necessary by the authors of the errors.
639. He said that it was not strange that there were various ways of correcting errors and that these included: crossing out the wrong parts; overwriting on it and use of correction fluid (tippex).
640. Mr. Alfandika stated that the 2<sup>nd</sup> Respondent did not receive any evidence showing different results from the ones that were transmitted to the tally centre with corrections. Hence the corrections that appeared on all affected result sheets were not made to falsify the result but to correct the errors made.
641. He continued with his assertions that if at all the corrections were made to systematically falsify the votes and the results in favour of a particular candidate or candidates, the petitioners would, through their monitors or otherwise, have provided evidence of the falsification by producing their monitors' result sheets as received before the falsification, or by producing stream results on Form 60C.
642. Mr. Alfandika stated that all corrections appearing on the result sheets were examined by the 2<sup>nd</sup> Respondent's Commissioners and after thorough deliberations and consultations, it was resolved that the results contained on the sheets should not be invalidated simply on the basis that the result sheets contained corrections made in whatsoever manner.
643. He also stated that the Commissioners held consultations with external auditors and on advice resolved to process and consider as valid all result sheets which contained corrections and alterations.
644. Mr. Alfandika stated that it was specifically observed by the auditors that most of the corrections did not affect the per candidate valid vote count, but that they arose out of either arithmetical errors of aggregation of valid votes, unused ballots, ballots received, cancelled votes and null and void votes. This was the part of the Result Sheet where the presiding officers were supposed to reconcile the entries in items A-F.

645. Mr. Alfandika also stated that it was observed by the 2<sup>nd</sup> Respondent that in cases where the result sheets contained corrections, the same did not cover both words and figures, and that in most cases where a candidate's results were altered, this arose due to aggregation errors involving the stream results. Hence all alterations and tippexing were justifiable.
646. Mr. Alfandika stated that in his analysis of the documents in issue vis-a-vis tippexing (defacing) and alterations, he came to the conclusion that the corrections did not affect the outcome of the results as recorded per candidate and vote count remained unaffected in a vast majority of cases.
647. With regard to the use of tippex, Mr. Alfandika stated that the 2<sup>nd</sup> Respondent observed that almost all result sheets on which correction fluid was used, the fluid was used on the reconciliation part hence the results were not unduly influenced or falsified in favour of a particular candidate.
648. It was Mr. Alfandika's statement that the 2<sup>nd</sup> Respondent further observed that even in cases where the fluid was used on the figures on the subtotal's column, the votes in words and on the stream columns were intact.
649. With regard to results containing alterations, Mr. Alfandika stated that the 2<sup>nd</sup> Respondent observed that almost all result sheets on which alterations were made, the alterations were mostly done on the reconciliation part of the result sheet.
650. As such the votes were not unduly influenced or falsified in favour of a particular candidate.
651. He said that in cases where an alteration was made on the recorded votes against a candidate, the same was employed to make amendment to arithmetical errors. And in the rare event where a candidate's votes were affected by the alterations, such were justified to correct arithmetical errors.
652. The effect of such alterations on the result was considered minimal and without effect on the eventual outcome of the election.
653. Mr. Alfandika also responded to the falsification allegation in the petitioners' petitions/sworn statements. He said that as corrections using tippex and alterations did not affect the results as

tallied and recorded against each candidate, the corrections were made and employed to rectify arithmetical errors. And in the absence of contrary evidence, the petitions lacked merit.

654. With regard to the fake or counterfeit result sheets, he observed that the allegation that some result sheets were fake was not correct. He gave a background to his contention.

655. He narrated that the 2<sup>nd</sup> Respondent provided pre-printed result sheets that were delivered together with ballots. Apart from the pre-coded result sheets, the 2<sup>nd</sup> Respondent printed other booklets as reserve result sheets to be used in cases of the presiding officers finding themselves in a situation where they could not use the pre-coded copies.

656. Instances where such would happen included where the presiding officers spoilt the pre-coded copies through excessive alterations.

657. The extra result sheets were not customized to any centre as they were reserve sheets meant to be used at any polling centre since they were intended for eventualities.

658. Mr. Alfandika stated that all result sheets that the petitioners termed fake were genuine and they were provided by the 2<sup>nd</sup> Respondent. He noted that they had the same security feature as the original copy. And it was on that basis that the 2<sup>nd</sup> Respondent accepted the results on these result sheets.

659. As of the fake result sheets that bore what the petitioners termed 'fake bar codes' as well as result sheets that were drawn or sketched on ordinary A4 paper, Mr. Alfandika responded that there was no statutorily prescribed tally sheet.

660. He referred to section 93(1) of the Parliamentary and Presidential Elections Act and observed that the law simply provided for what was required to be contained in the summary results.

661. He noted that what was critical was a recording of the true result of the vote count for each candidate.

662. Hence the use of result sheets that had the so called fake bar codes or were drawn on A4 paper was not an irregularity within the meaning of the Act. Again, as monitors and presiding officers signed for the results, he stated that the said results were in order.
663. Mr. Alfandika also reacted to the duplicate result sheets allegations. He explained that the 2<sup>nd</sup> Respondent printed 20 result sheets for each polling station. One result sheet was meant to be used as an original and 19 were to be distributed to the monitors present. Following the discussions that were held with political party representatives an agreement was reached to label 19 copies with a water mark written "DUPLICATE".
664. He stated that the first four white sheets on the result sheet and tally sheet books were identification save for the water mark "DUPLICATE". Only one original result sheet was provided per polling stream and polling station. Except for the white duplicate copies, the duplicates were self-carbonated and therefore what was recorded on the original copy or white "DUPLICATE" was automatically carbon-copied in the carbonated "DUPLICATE".
665. The intention was to differentiate the original result sheet to be submitted to the Constituency Tally Centre from the other copies meant for distribution to monitors.
666. He stated that the 2<sup>nd</sup> Respondent had agreed to the proposal made by Mr Richard Chapweteka, an MCP representative during the printing of ballot papers in Dubai in respect of marking "DUPLICATE" all other result sheets except one.
667. Except for the watermark "DUPLICATE", all these result sheets carried the same security features.
668. Mr. Alfandika stated that this introduction of the watermark "DUPLICATE" was an administrative arrangement aimed at ensuring that the presiding officers were to submit an original copy to the 2<sup>nd</sup> Respondent and give duplicates to the monitors.
669. He stated that there was no law that stated that non-compliance with this administrative arrangement would in any way constitute an electoral irregularity. Hence use of a copy marked 'duplicate' was not an irregularity under the Parliamentary and Presidential Elections Act.

670. It was Mr. Alfandika's evidence that at the National Tally Centre level, the 2<sup>nd</sup> Respondent undertook to examine all cases of duplicate result sheets received from the Constituency Tally Centres and confirmed their authenticity before declaring the results.
671. He contended that the petitioners never demonstrated, using their own copies of Form 66C or using per stream results on Form 60C that the results on duplicate tally sheets were not genuine or valid ones.
672. Mr. Alfandika also amplified on result sheets that were not signed by presiding officers and monitors. He acknowledged that some result sheets were indeed not signed by Presiding Officers. He stated that the Presiding Officers inadvertently omitted to sign the same. He also observed that lack of signatures on some result sheets was not by itself an irregularity that would form a basis to nullify results of an election.
673. Mr. Alfandika stated that in some cases the lack of Presiding Officers' signatures was cured by the monitors' signatures. He observed that none of the monitors lodged any complaint that a result sheet that the Presiding Officer failed to sign, was actually inaccurate or incorrect and none of the monitors provided the court with alternative valid results.
674. As to the absence of monitors' signatures, Mr. Alfandika referred to section 93 (2) of the PPEA and observed that monitors were not obligated to sign the forms, if they were not available a form could not be invalidated simply because no monitor had signed. He also noted that no monitor lodged any complaint that a form that they did not sign contained invalid or incorrect figures.
675. Mr. Alfandika referred to the management of the presidential elections complaints as was alleged by the petitioners.
676. He stated that the 1<sup>st</sup> Petitioner's complaint that on the day of the elections his name as a registered voter was discovered to have been transferred from Chimutu School to a centre on Chizumulu Island was true. It was however resolved on the same Election Day.
677. He explained that the 2<sup>nd</sup> Respondent was certain that the 1<sup>st</sup> Petitioner was a registered voter and that he did not apply to be transferred to another centre. The 1<sup>st</sup> Petitioner was therefore

allowed to vote. The 1<sup>st</sup> Petitioner was therefore not disenfranchised in any conceivable way. Hence the issue did not have any bearing on the validity and outcome of the election. He explained that the 2<sup>nd</sup> Respondent investigated the matter and found that the transfer was done by one of its temporary employees. It was reported to police who took the matter to court for prosecution on the charge of falsifying a voters' register.

678. Mr. Alfandika referred to UTM Party's letter of complaint of 27<sup>th</sup> of May, 2019. In this letter the UTM Party complained to the 2<sup>nd</sup> Respondent that its members were amongst the people who had lodged complaints with the 2<sup>nd</sup> Respondent but did not have information as a party on how the complaints had been resolved.
679. Mr. Alfandika stated that the 2<sup>nd</sup> Respondent in its letter of response, advised UTM that all complaints that were tendered to the 2<sup>nd</sup> Respondent through its formal complaints handling procedure were addressed.
680. Mr. Alfandika also referred to complaints that the MCP had lodged with the 2<sup>nd</sup> Respondent. He stated that on different days in the period between 23<sup>rd</sup> of May, 2019 and 27<sup>th</sup> of May, 2019, the Malawi Congress Party submitted complaints alleging irregularities at some centres. These complaints were submitted at the National Tally Centre. Having considered the complaints as submitted, it was observed that the allegations related to use of duplicates, alterations and corrections by tippex. He stated that the 2<sup>nd</sup> Respondent considered and dismissed them for lack of merit.
681. With regard to the complaint that Mr Fred Thomas of Nsanje Central (Mpatso Tally Centre) tampered with the results, Mr. Alfandika stated that Mr Thomas was apprehended by the 2<sup>nd</sup> Petitioner's representatives on allegations that he was found tampering with results.
682. The 2<sup>nd</sup> Respondent through the District Commissioner for Nsanje, the Officer in Charge of Nsanje Police and other members held an inquiry at Nsanje Police. The meeting was also attended by the 2<sup>nd</sup> Respondent's Directors of Legal Services and Electoral Services as well as party representatives including the Petitioners' representatives.
683. He stated that after deliberations, it was concluded that it was not true that the Constituency Returning Officer Mr Thomas had falsified any results. The Committee went through the results

and they matched the results with what the party representatives and NICE representatives recorded from the centres. Hence the incident did not have any bearing on the determination and outcome of the results.

684. Mr. Alfandika also responded to the allegation that the 2<sup>nd</sup> Respondent delayed in uploading result sheets from Salima, Dowa, Mchinji and Lilongwe and observed that this allegation was not correct.
685. He stated that the 2<sup>nd</sup> Respondent only uploaded the results of an election on to the 2<sup>nd</sup> Respondent's website after the official announcement had been made by the 2<sup>nd</sup> Respondent. In terms of the presidential elections, this was done in three phases at 35%, 75% and 100%.
686. On security of ballot papers, Mr. Alfandika stated that it was not correct that ballots were delivered under insecure conditions. He said that all trucks that transported ballot papers were under the escort of the Malawi Defence Force and Malawi Police Service.
687. The Petitioners had alleged that the announcement of final results was made before the 2<sup>nd</sup> Respondent received results from all centres. Mr. Alfandika disputed the allegation and stated that at the time of the announcement of final results, all results had been received.
688. He said that the 2<sup>nd</sup> Respondent was publicly and progressively updating the percentage of results received at the National Tally Centre. Before the final announcement was made the 2<sup>nd</sup> Respondent had displayed that 100% of the presidential results had been received.
689. On negligence and dereliction of duty on the part of the 2<sup>nd</sup> Respondent, Mr. Alfandika stated the 2<sup>nd</sup> Petitioner did not provide any substance to demonstrate negligence on the part of the 2<sup>nd</sup> Respondent.
690. He also referred to external auditors. He stated that these were engaged to increase transparency and acceptability of the results for the 2019 tripartite elections. They were to ascertain the accuracy of the poll results at constituency and national tally centre.
691. The UNDP provided technical and financial assistance. UNDP also managed the hiring of the auditors using UNDP procurement rules and procedures.

692. The objectives of the external auditors were to provide audit services during the processing and transmission of the 2019 tripartite elections results. They were also to verify the authenticity and accuracy of results that were being transmitted from the Constituency Tally Centres to the National Tally Centre. Mr. Alfandika exhibited a copy of the terms and reference for the external auditors.
693. He also responded to the allegation that in Dedza North West, the 1<sup>st</sup> Respondent got 2278 votes but these were recorded as 22178 in the final tally. Mr. Alfandika stated that this was not correct and that the same could be verified from the results as announced and posted on the 2<sup>nd</sup> Respondent's website.
694. It was also alleged by the petitioners that in Machinga South East, the 1<sup>st</sup> Respondent got 6047 votes but these were recorded as 18,846 votes in the final tally. Mr. Alfandika stated that this was not correct and that the same could be verified from the results as announced and posted on the 2<sup>nd</sup> Respondent's website. He produced scanned copies of all polling station results for Machinga South East together with the printed computer generated Constituency Results whose summation indicated that the 1<sup>st</sup> Respondent got 18,846 votes and not 6047 votes as alleged.
695. With regard to the display of results at the National Tally Centre, the petitioners alleged that at the Tally Centre the 2<sup>nd</sup> Respondent was only showing pie charts and not actual figures on the display. Mr. Alfandika stated that he did not see how the manner of display of the result sheets affected the tallying of the results. He also stated that this was not an electoral irregularity.
696. The petitioners alleged that after the 75% vote tally announcement, all the 2<sup>nd</sup> Respondent did was to add 500,000 votes to every candidate when announcing the final result. Mr. Alfandika disputed the assertion.
697. As to the allegation of Mr Bendulo that results for 297 centres were only entered after the announcement of final result, Mr. Alfandika stated that this was mere speculation. Mr. Alfandika stated that a few days before the announcement of the presidential results, the 2<sup>nd</sup> Respondent held a meeting with the 2<sup>nd</sup> Petitioner at their request. During the meeting, the 2<sup>nd</sup> Petitioner demanded that the presidential results should not be declared until after they had been given time to audit them. He stated that all results were shared with the 2<sup>nd</sup> Petitioner for



verification and the 2<sup>nd</sup> Petitioner never raised anything to the contrary. Another meeting was convened with representatives of all political parties present at the National Tally Centre including the 2<sup>nd</sup> Petitioner where the 2<sup>nd</sup> Respondent updated them on the progress of results transmission and tallying.

*Cross Examination by the 1st Petitioner*

698. He stated that the 2<sup>nd</sup> Respondent had nine Commissioners who included the Chairperson. He was not a Commissioner but that he took part in the deliberations of the Commission as a principal advisor.

699. As Secretary, he took minutes of the Commission's meetings as well as Commission's Committee meetings in which he recorded the Commission's decisions.

700. He stated that he took the unsigned result sheets, tippexed, and altered result sheets to the Commissioners for their approval.

701. He did not know the source of the tippex that was used to change the results. It however was regular for Presiding Officers to use it.

702. It was Mr. Alfandika's testimony that the 2<sup>nd</sup> Respondent did not have the damaged originals for the tippexed and altered result sheets as they were with the Presiding Officers and the Constituency Returning Officers.

703. He conceded receipt of duplicate result sheets. He also conceded that the 2<sup>nd</sup> Respondent did not have the supporting damaged originals.

704. He was also aware that use of duplicates required explanation.

705. Mr. Alfandika stated that he was aware that as Chief Elections Officer he was supposed to prepare a statement stating the results for each candidate together with the complaints and how the complaints were resolved for the Chairperson's report. He conceded that the 2<sup>nd</sup> Respondent had received a number of complaints both from the 1<sup>st</sup> Petitioner's party and the 2<sup>nd</sup> Petitioner's party.

706. He agreed with Counsel that the duty of the political party representatives (monitors) was to observe elections.
707. He stated that a monitor would still know if a Presiding Officer was changing results even if the monitor was not present at the time that the Presiding Officer was doing the alterations. He said that a monitor would know this through paper trail.
708. Mr. Alfandika stated that he was not aware that many presiding officers had made sworn statements stating that they made alterations to the result sheets in the absence of monitors. Whereupon he was referred to some of the presiding officers' statements.
709. He stated that he was aware that under the law [section 93 PPEA] everything that was delivered at a polling station for election purposes was supposed to be surrendered to the District 2<sup>nd</sup> Respondent's Offices. He agreed with Counsel that even Presiding Officers were supposed to submit results to the District Commissioner's office.
710. He admitted that the results in these elections were transmitted to the National Tally Centre from the Constituency Tally Centre and not from the District Commissioner's.
711. He agreed with Counsel for the petitioners that the results were gazetted on 9<sup>th</sup> August 2019, a month after the elections. He was shown the statement in the Gazette and he admitted that no complaints were recorded and there was no summary of the national result.
712. Mr. Alfandika was referred to the BDO auditors' termination report. He stated that the auditors and the 2<sup>nd</sup> Respondent had agreed upon procedures in order to verify that the results that were to be captured and transmitted by the 2<sup>nd</sup> Respondent were mathematically a true reflection of the results.
713. Mr. Alfandika insisted that the election process was in order and followed the required procedures and laws. Whereupon he was referred to the auditor's report and he stated that the auditors had presented their factual findings on the election management and process. He was referred to page 32 paragraph 4 where BDO reported that there was a significant number of Form 66Cs that were scribbled and needed to be replaced with duplicates. He was also referred

to BDO's report that presiding officers disappeared at their centres leaving the forms with junior officers at places like Chiradzulu, Balaka and Lunzu.

714. Mr. Alfandika stated that there were no challenges in the transmission and publication of results at the National Tally Centre. He was then presented with the BDO factual finding that the transmitted results were appearing on the screen at the National Tally Centre before verification of auditors and that the Commissioners considered the transmitted results as final results before the auditors' approval.
715. Mr. Alfandika was told that the tippexed, altered result sheets, or unsigned result sheets were not supposed to be considered by the 2<sup>nd</sup> Respondent as the auditors had rejected them. Mr. Alfandika was then referred to his own letter to the auditors seeking variation to the decision by auditors to reject the result sheets. To this, he stated that there was no problem with the variations.
716. Mr. Alfandika agreed with the 1<sup>st</sup> Petitioner's Counsel that the election was about determining the will of the people. And that every single individual was entitled to make a choice. He also agreed with Counsel that the winner was the one who represented the choice of the majority of the voters. He agreed that in recording the choice of an individual voter, and everyone else, the 2<sup>nd</sup> Respondent was under a duty to ensure that no vote was misrepresented. He agreed that the same also meant that no candidate vote should be misrepresented.
717. He was asked, in respect of his knowledge of the electoral process, about the first thing that was supposed to happen upon closure of a polling station. Mr. Alfandika stated that upon closure of poll, the first thing to happen was to open the ballot boxes and count the votes.
718. Mr. Alfandika stated that the findings on counting with regard to votes were recorded on Form 60C from a booklet. The rest of the information was recorded in the record log book.
719. He was referred to the Polling Procedure Manual where it was stated that 'the Presiding Officer should count the number of unused, cancelled and spoilt ballots and enter the figures in the ballot paper reconciliation Form 61C in the record log book ...'

720. Mr. Alfandika admitted that the fact that there was an order in which the material figures were to be recorded in the Form 60C was meant to ensure accountability.
721. He disputed the concept that all things being equal, the number of ballot papers received that was recorded in Form 66C was supposed to be constant.
722. Mr. Alfandika stated that the information in Form 66C would later be transferred to the Constituency Tally Centre. At the Constituency Tally Centre it would be entered into electronic gadgets and then be transmitted to the National Tally Centre.
723. In the transmission, the system rejected entries where the total valid votes did not tally with the candidate votes.
724. He agreed with Counsel that the design of the system was such that if you added figures for items listed B-E on Form 66C, the total was supposed to give a figure that was the same as the number of ballot papers received. That is, if you entered total candidates' valid votes, null and void votes, spoilt and unused ballots, the total was supposed to be the same as the number of ballot papers received.
725. He stated that if the system rejected because of imbalance, one was supposed to work on the figures on the reconciliation part. In this case one was not supposed to tamper with the candidates' valid vote part. He rejected counsel's proposal that the answer to the problem laid in the recounting of the ballots and votes for that stream.
726. Mr. Alfandika was referred to the computer generated Form 66C for Sankhani School and the manual one. He admitted that there was a difference of 300 for the data on the two forms. He conceded that the computer generated form was not properly recorded. He failed to explain how the 2<sup>nd</sup> Respondent rectified the problem since the Commissioners only used data from computer generated Form 66C (and they were not presented with Form 66Cs in sets).
727. He admitted that on some occasions, one had to give reasons on how the alterations on Form 66C came about.

728. He admitted that change of a candidate valid vote was a significant occurrence that needed to be recorded.

*Cross Examination by the 2<sup>nd</sup> Petitioner*

729. In cross examination, Mr. Alfandika stated that he was appearing in court in his capacity as Chief Elections Officer and that he had powers vested in him to so appear. Again, he stated that he was authorized by the 2<sup>nd</sup> Respondent to so appear.

730. Mr. Alfandika stated that when the dispute herein was lodged by the Petitioners, the Commission held meetings several times to discuss the dispute and its positions regarding the same. Mr. Alfandika failed to state the exact number of times that the Commission had such meetings though he indicated that this was in the period between the 25<sup>th</sup> of May, 2019 and 27<sup>th</sup> of May, 2019.

731. Mr. Alfandika agreed with the 2<sup>nd</sup> Petitioner's counsel that before conducting any meeting, the 2<sup>nd</sup> Respondent was required to prepare a Notice of such meeting together with the Agenda and that minutes of such meeting were supposed to be produced. He was not able to produce such minutes before the court. He stated that he did not produce the minutes as he did not consider them relevant or important. He stated that this was his personal opinion and that if the 2<sup>nd</sup> Respondent had found the minutes important, it would have advised him to include the minutes in his sworn statement. He further stated that the production of minutes in court to support the 2<sup>nd</sup> Respondent's position and deliberations was never presented to the 2<sup>nd</sup> Respondent for it to consider as an agenda item. None of the Commissioners brought up the issue of minutes during their deliberations.

732. Mr. Alfandika repeated that his responsibilities included implementation of the policies and decisions of the 2<sup>nd</sup> Respondent. He admitted that he was not a policy maker nor decision maker for the 2<sup>nd</sup> Respondent. He agreed that there was need for evidence in form of minutes to reflect that the Commission did convene and that it deliberated and agreed to contest the allegations that were advanced by the Petitioners regarding the election dispute.

733. Mr. Alfandika told the court that the Commission based its decisions on the directions and guidance that the Secretariat as the technical team advanced to them; and that upon approval of the guidance, the Secretariat would proceed to implement the same.
734. Senior Counsel for 2<sup>nd</sup> Petitioner wondered if the 2<sup>nd</sup> Respondent was transparent in the manner that it conducted its affairs. Mr. Alfandika stated that the 2<sup>nd</sup> Respondent was very transparent in its functions and duties. And that the issue of transparency was of paramount importance to the Commissioners.
735. He agreed with Senior Counsel Msisha that transparency entailed that the 2<sup>nd</sup> Respondent would ensure that voters and various contestants witness the decision making process, and the determination of results and understand the process that the 2<sup>nd</sup> Respondent undertook to arrive at a particular result. He further agreed that there was no aspect of the process that was supposed to be hidden.
736. Mr. Alfandika discussed the election process starting with the procurement stage.
737. He agreed with Senior Counsel Msisha that the 2<sup>nd</sup> Respondent in procuring the polling materials decided to safeguard the integrity of the electoral process by including security features in the materials. The security features were detailed in the result tally sheets to ensure election security. Election security entailed correctness of results. This decision was included in the Commission's minutes.
738. Mr. Alfandika was referred to the reserve tally sheets. He stated that the 2<sup>nd</sup> Respondent in its deliberations had discussed the reserve tally sheets and knew about their existence. He disagreed with Senior Counsel Msisha when it was put to him that reserve tally sheets constituted a detractor from the security aspects that the 2<sup>nd</sup> Respondent had decided.
739. When Senior Counsel Msisha inquired from Mr. Alfandika on whether reserve tally sheets were customized for particular polling stations in the same manner as the normal result tally sheets, Mr. Alfandika stated that customization was not part of the security features that were provided in the result tally sheets.

740. He stated that the purpose of customization was to lessen the burden of Presiding Officers in filling the information that was already filled by the printer because it had proved hectic and tedious in previous elections.
741. Senior Counsel Msisha asked Mr. Alfandika to provide the security features of the election materials and he stated that there were infra-red sensitive security features that could only be seen with ultra violet light as well as hidden letters. He refused to answer the question whether code numbers on the materials were part of the security features.
742. Mr. Alfandika was referred to the Record Logbook. He stated that a record logbook was included in the election materials as it was a legal requirement. Again record logbook was provided for as a requirement in the 2<sup>nd</sup> Respondent's polling procedure manual.
743. He stated that the logbook was supposed to be filled with all records that happened at the polling stream including complaints from monitors and anyone else that was obliged to complain.
744. He also mentioned that record logbooks were to be completed/filled by Presiding officers and Assistant Presiding Officers. He stated that monitors did not make any entries in the record log books. The Court observes however that in terms of Form VI under section 93 of the Act, the recording was supposed to be done by the recording secretary and not the presiding officer or assistant presiding officer.
745. The information that was to be filled in the record log book included: ballot papers received at a polling station. This was for accountability and transparency.
746. He was referred to the result page (page 19) of the record log book and he stated that on this result page, presiding officers were required to give an account of all electoral materials delivered at each polling station. The record log book would also detail a checklist that included pens, markers, glue sticks, rulers and scissors.
747. Mr. Alfandika was referred to the issue of tippex. He stated that the tippex use surfaced in the course of receipt of results at the National Tally Centre at COMESA Hall in Blantyre.

748. He admitted that the 2<sup>nd</sup> Respondent used tally sheets that had tippex on them to determine the results.
749. Mr. Alfandika stated that upon discovering the use of tippex, the 2<sup>nd</sup> Respondent sent out fact finding missions especially in the first centres that tippex was realized. The missionaries came back with a report and a few samples of the tippex were recovered; answers were found on the origins of the tippex. Whereupon Mr. Alfandika was challenged that the fact finding mission if any, was only undertaken after the determination of the results.
750. Counsel for the 2<sup>nd</sup> Petitioner wanted to know if the 2<sup>nd</sup> Respondent met and made a decision that such tippex should have been recovered because there was widespread use. Mr. Alfandika stated that no such decision was made by the 2<sup>nd</sup> Respondent. Then, Mr. Alfandika stated that the 2<sup>nd</sup> Respondent recorded its position in minutes of 20th to 28th May 2019 regarding the use of tippex and how the tippex impacted on the integrity of the electoral process. The minutes were never produced.
751. Mr. Alfandika stated that there was no need to produce the minutes as there was Form 60 that dealt with the issue, and that he did not see the relevance of including the minutes of the 2<sup>nd</sup> Respondent's resolution in relation to the widespread use of the correction fluid called tippex.
752. He stated that during the fact finding/inquiry, he found that the tippex originated from the Teachers' Development Centres. This was because most Constituency Tally Centres were stationed at these Teachers' institutions. And the institutions had tippex in their offices for office use.
753. Mr. Alfandika stated that the teachers' institutions were inspected by the 2<sup>nd</sup> Respondent and the Secretariat prior to use by the 2<sup>nd</sup> Respondent but the inspection only centred on the suitability of the structures and not necessarily on the contents and materials of the offices. The 2<sup>nd</sup> Respondent did not envisage that tippex, erasures, or anything that could be used to deface documents from the teachers' centres offices would be used for 2<sup>nd</sup> Respondent's business.
754. The witness was referred to the procurement of election materials. Counsel for the 2<sup>nd</sup> Petitioner wanted to know if the 2<sup>nd</sup> Respondent made any statement for transparency purposes, to stakeholders that the 2<sup>nd</sup> Respondent had acquired duplicate tally sheets.



755. Mr. Alfandika's response was that the issue of duplicate tally sheets was introduced in Dubai, through the stakeholders' (political parties) monitors. Again, stakeholders were attendant at Dubai during the printing of the election materials. They were therefore aware of the reserve tally sheets through their monitors who witnessed the activity in Dubai and these stakeholders were present at Kamuzu International Airport on arrival of these materials. Hence the 2<sup>nd</sup> Respondent did not prepare any press release or a statement in an advisory form to all stakeholders about the materials, including the reserve tally sheets that were acquired. Neither did the Chairperson of the 2<sup>nd</sup> Respondent and the Communications Officer make any statement regarding the reserve tally sheets to the press.
756. Mr. Alfandika was referred to the Polling Station Procedures' Manual. He stated that this was a product of the 2<sup>nd</sup> Respondent. It was released to the polling stations' presiding officers and stakeholders that were interested in the electoral process. The purpose of releasing the manual was for them to be guided by its provisions.
757. Counsel for 1<sup>st</sup> Petitioner wanted to know if the manual stated that results at any polling station would be determined by views expressed by monitors. Mr. Alfandika stated that his reading of page 30 of the manual satisfied him that the views of monitors were factored in the determining of results of any polling station. He admitted that whenever a monitor expressed a view, objection or complaint, the obligation was on the presiding officer to make a determination regarding that objection. He also agreed with Counsel that the decision of the presiding officer on views that were expressed by monitors was not final. He explained that a presiding officer would refer his preliminary decision together with a monitor's complaint to the 2<sup>nd</sup> Respondent where a final decision would be made. And there were times when a presiding officer would make a decision at the polling station and such a decision would be final.
758. Mr. Alfandika was referred to page 31 of the manual where a statement read "decision of the presiding officer at a polling station is final." Counsel for the 2<sup>nd</sup> Petitioner wanted to know where the presiding officer would record such decision and Mr. Alfandika stated that the presiding officer's decision would be recorded in the record log book and the complainant would be given a copy for purposes of record and follow up.

759. From the polling station, the record log book would go to the Constituency Tally Centre. From the Constituency Tally Centre it would go to the district where the 2<sup>nd</sup> Respondent's officers would forward it to the National Tally Centre. At the National Tally Centre, the log book with complaints would be considered by a team of complaints handlers from the Legal Department who would either refer it to Mr. Alfandika and the 2<sup>nd</sup> Respondent with recommendations. It would be forwarded to the ICT Department if the complaint was decided satisfactorily. Again log books with no complaints would be referred to the ICT Department for them to take record and then they would be transferred to the warehouse.
760. Mr. Alfandika was referred to the Chairperson's interview on Zodiak Broadcasting Station/Television where she had discussed the issue of tippex. In that interview, she was also queried on whether the 2<sup>nd</sup> Respondent investigated the sources of tippex. In the interview the Chairperson stated that the 2<sup>nd</sup> Respondent never conducted such investigations as the 2<sup>nd</sup> Respondent did not have time for such, considering that it had to render a determination within a constrained time of eight days. She also stated that the 2<sup>nd</sup> Respondent never advised its officers to use tippex and that the 2<sup>nd</sup> Respondent was surprised at the prevalent use of tippex [throughout the country.]. The Chairperson admitted to the Zodiak interviewer that tippexed result sheets were used in the determination of the results.
761. Mr. Alfandika commented on the BDO termination report. He was referred to the sequencing of paragraphs where some paragraphs were missing. He was referred to the report where the auditors had referred to the presiding officers' signatures appearing without corresponding monitors' signatures and the BDO's reluctance to approve the results as they were faulty. He was also referred to his letter to auditors requesting them to approve all papers if they contained the presiding officer's signature to the exclusion of the monitors' signatures. Again, he was referred to a statement from the auditors who stated that they had rejected many tally sheets and forms because they had manual amendments.
762. Mr. Alfandika admitted writing such a letter and stated that there was nothing wrong with the tone of his letter on the subject. He stated that this was a normal practice in the accounting and auditing procedures.

763. He observed that he never departed from the instructions that were in the procedures manual that monitors were to sign and he never departed from the terms of the contract between the 2<sup>nd</sup> Respondent and the auditors.
764. He explained that the auditors had not been given power to reject any result, and that the 2<sup>nd</sup> Respondent was the only institution that had such powers.
765. Mr. Alfandika was also referred to his assertion that at the time that the Chairperson announced the results, all complaints had been resolved. He was referred to LMC 10 at page 2883 at which the MCP Secretary General wrote a letter to the Chairperson dated 23rd May 2019 (exhibit EM30.) The complaints included that monitors had been denied result sheets in Dedza. Mr. Alfandika stated that the monitors were supposed to lodge their complaints with the 2<sup>nd</sup> Respondent and not necessarily to their party. He said that the monitors were supposed to merely inform their party structures and lodge complaints with the 2<sup>nd</sup> Respondent.
766. Later he agreed with Counsel for 2<sup>nd</sup> Petitioner that the party structure was equally entitled to raise those issues with the 2<sup>nd</sup> Respondent and that it was in order for MCP Secretary General to lodge a complaint.
767. It was noted that Mr. Alfandika responded to the complaint on the 25<sup>th</sup> of May, 2019 (EM 37). Mr. Alfandika stated that the 2<sup>nd</sup> Respondent did not deal or address the complaints that MCP monitors were denied results because there was no evidence from MCP that was related to that complaint.
768. Mr. Alfandika was referred to another complaint marked EM 38 dated 27th May 2019 in which a number of issues were raised by the MCP. Mr. Alfandika admitted that the 2<sup>nd</sup> Respondent did not respond to the issues that were raised.
769. He was referred yet to another letter of complaint from the MCP Secretary General. He stated that he could not remember if he dealt with the complaints.
770. Again, another letter of complaint at page 2833 EM 3 was presented to the witness. In his response, he stated that once again, he could not remember off the cuff if he had responded to the same.

771. Mr. Alfandika agreed with Senior Counsel Msisha that the 2<sup>nd</sup> Respondent was required to lay out complaints received and how it resolved the said complaints before announcing the results.
772. The 2<sup>nd</sup> Petitioner's Counsel asked Mr. Alfandika to highlight in the Chairperson's report where she addressed the complaints received and how the 2<sup>nd</sup> Respondent resolved the same. Mr. Alfandika failed to show that the complaints that were lodged by the MCP Secretary General appeared in the Chairperson's report.
773. In re-examination Mr. Alfandika stated that as Chief Elections Officer and Controlling Officer of the 2<sup>nd</sup> Respondent, he was empowered to take any action that the 2<sup>nd</sup> Respondent delegated him to undertake as part of his duties. These duties included implementation of the policy decisions of the 2<sup>nd</sup> Respondent; providing strategic and visionary leadership to achieve organizational objectives as well as plan and supervise electoral activities. He repeated that the secretariat was a technical organ of the 2<sup>nd</sup> Respondent that provided technical expertise for the 2<sup>nd</sup> Respondent to make informed decisions. He also provided the overall management functions. He was also under a duty to provide technical advice to the 2<sup>nd</sup> Respondent.
774. As to his role in the 2<sup>nd</sup> Respondent's meetings, he stated that he took part in the deliberations of the 2<sup>nd</sup> Respondent and that he was present in all 2<sup>nd</sup> Respondent's meetings as the Commissioners continuously met in the dates of 21st May to 27th May 2019. His role was to ensure that all results that were received were passed on to the Commissioners for consideration and approval.
775. Mr. Alfandika mentioned that the Commissioners were appointed by the State President upon consultation with political parties that had representation in Parliament. With regard to the matter at hand, upon receiving the petitions, the Commissioners met and deliberated. They did not see any merit in the petitions and a decision was made to contest the same.
776. Mr. Alfandika stated that the issues of duplicate result sheets, tippex, alterations and the alleged fake tally sheets were raised during the processing of results and before the determination of results. There was no merit in the complaints as the complainants had not attached any alternative result sheets that carried contrary results.

777. He also stated that the 2<sup>nd</sup> Respondent referred to Form 60Cs which were used to record information in the record logbook for comparison, and that auditors were consulted to get confirmation of the results that the Petitioners complained about.
778. Mr. Alfandika stated that he had meetings with the 2<sup>nd</sup> Petitioner on two occasions to discuss the 2<sup>nd</sup> Petitioner's concerns. The Petitioners were advised to present before the 2<sup>nd</sup> Respondent evidence of contrary results if they had any issue with the results that were being published at the National Tally Centre. And the 2<sup>nd</sup> Respondent would use the contrary results in its investigations.
779. With regard to the comparison of the election process and the banking procedure as well as the accounting procedures, Mr. Alfandika stated that the process in the electoral process could not be related to the banking process as the two used different procedures. Again the international accounting standards had no place in the electoral process. The 2<sup>nd</sup> Respondent used electoral procedures and international electoral best procedures in the management of the results. It also used the electoral laws and manual.
780. Mr. Alfandika stated that there were never any fake tally sheets in the elections as the exhibits that were presented as fake in fact originated from one polling station and were used at another polling station.
781. He stated that the other alleged false tally sheets were in fact reserve tally sheets. These were the reserve tally sheets that were printed by the same printer that was engaged to print the original sheets. He said that these reserves had the same security features as the normal tally sheets. And that barcodes were used as identifiers and not security features. These reserve tally sheets were not apportioned to polling stations but that they were positioned in the Constituency Tally Centres as no one knew beforehand which polling stations would require their usage.
782. He further mentioned that the other alleged fake tally sheets were improvised sheets by presiding officers at places where the presiding officers did not have any tally sheets to record their data.
783. Again Mr. Alfandika referred to the other tally sheets where the names of the polling stations were crossed. He stated that this was permissible and presiding officers could request for the

same from other centres. Presiding officers could use ballot papers from other polling stations to ensure continuity of the polling and result management process.

784. He stated that he wrote the auditors to consider the processed tippex results as the Commissioners and himself observed that the tippexing of the results was not constituting any fraudulent behavior. And that use of tippex did not mean that such results would not be submitted to the 2<sup>nd</sup> Respondent for its final decision.
785. Mr. Alfandika was referred to LMC10, exhibit EM43 at page 2943. He explained that this was the announcement of the determination of Presidential Elections of 2019. He mentioned that the report indicated that the 2<sup>nd</sup> Respondent dealt with complaints that were lodged. In the report the Chairperson stated that with regard to a complaint lodged in respect of Lauderdale, investigations were conducted and all monitors confirmed that the numbers that were sent to the 2<sup>nd</sup> Respondent were correct.
786. Mr. Alfandika repeated his statement that election results were mostly about figures. It did not matter whether the figures were tippexed or not. He said that the important thing was to establish whether the tippexed figures were a true reflection of what transpired at a polling stream.
787. He stated that auditors verified these figures using logbooks as well as contacting monitors of various political parties. He referred to the presence of monitors' signatures on alleged fake result sheets and tally sheets. He stated that the presence of monitors' signatures on such result sheets and tally sheets confirmed that these figures were authenticated at a polling station.
788. Mr. Alfandika also mentioned that he was not surprised when he saw handwritten information and results on an A4 paper as the Presiding Officers were teachers and they used the A4 papers as a solution in the absence of formal result sheets.
789. He also stated that the 2<sup>nd</sup> Respondent did not receive any contrary results to the improvised result sheets therefore the data thereon was in order and could be used in the determination of final results.

790. Mr. Alfandika was also referred to the watermarked duplicate result sheets that had been used in the determination of results. He stated that this was introduced in Dubai upon proposal by the 2nd Petitioner's monitors. At the time of the proposal the 2<sup>nd</sup> Respondent has already produced the Procedure Manual and had not used the word 'duplicate' in its documentations including the polling procedure manual because this proposal from the 2nd Petitioner's monitors came in late.
791. He stated that as far as the 2<sup>nd</sup> Respondent was concerned, these duplicate result sheets were admissible and they were treated as original and authentic because they were printed in Dubai to record results.
792. Mr. Alfandika stated that some of the challenges that the presiding officers faced included that they struggled to differentiate between spoilt papers, used ballot papers and null and void ballot papers. And it was the auditors that taught or helped the presiding officers how to complete the election form. He stated that these challenges were about ballot reconciliation and had nothing to do with candidate valid votes. He also stated that the unused ballot record was merely for accountability and not for purposes of determining an election. Again, cancelled and spoilt ballots would not be an issue or in issue as they could not be used to determine an election. As for null and void votes, they could not be in issue as they could not be used to determine an election.
793. Mr. Alfandika stated that the damaged originals were replaced with duplicates and the 2<sup>nd</sup> Respondent did not take charge or possession of the damaged forms because this would have required the 2<sup>nd</sup> Respondent to include them in the transmission process. And such inclusion could have brought more confusion than solution. The 2<sup>nd</sup> Respondent was concerned about the very final authenticated results hence it was not necessary to bring the damaged result sheets in the system.
794. Mr. Alfandika was referred to the result sheets that were not signed by monitors but had been used in the determination of results. He stated that result sheets were to be regarded by the 2<sup>nd</sup> Respondent even if they were not signed by monitors for whatever reason.
795. Mr. Alfandika explained the role of monitors. He stated that the stakeholders including the Petitioners herein had monitors that were present at four levels. They started at stream level,

were present at polling station level as well as Constituency Tally Centres. Then there were monitors at the District Commissioners' Offices as well as roving monitors. Finally, there were monitors at National Tally Centre level. These monitors were present at these levels to authenticate the process.

796. On monitoring of results, Mr. Alfandika stated that it was possible for a monitor that was absent at a polling station to monitor an election. He said that the same could be done through paper trail. Any monitor could get results that were submitted at the National Tally Centre using a stream of paper trail from any level that they wanted to use.
797. Again political parties used monitors throughout the process. This availed the political parties an opportunity to cross check results of which they were in doubt. Further, the 2<sup>nd</sup> Respondent posted results on its website. This gave the political parties an opportunity to access and cross check and verify the information. The petitioners' monitors could also follow the progress of results on radios. All these means gave them opportunity to raise a red flag if at all. The 2<sup>nd</sup> Respondent did not impose any restrictions on any party monitor with regard to communication.
798. Mr. Alfandika was referred to his presiding officers' statements who stated that result tally sheets were altered in order to reconcile the figures in the absence of monitors. He stated that it was still possible to verify such figures though done in the absence of monitors through reference to Form 60Cs which were with monitors. Hence it did not matter to the 2<sup>nd</sup> Respondent that the alteration was done in the absence of original monitors from polling stations. All that mattered to the 2<sup>nd</sup> Respondent was the presence of paper trail.
799. On the role of District Centres in the 2019 elections, Mr. Alfandika stated that District Commissioners prepared the Constituency tally for the Presidential Election and that they came up with the district totals for each contesting candidate.
800. On legitimacy of the constituency tally centres, Mr. Alfandika explained that political parties and the 2<sup>nd</sup> Respondent agreed on the creation of the same to address challenges that were previously experienced at the District Commissioners' offices. Political parties and the 2<sup>nd</sup> Respondent agreed to process the election results at constituency level under the delegated authority of the District Commissioners. The results would be submitted directly to the



National Tally Centre in order to speed up the process of results transmission and deal away with the challenges that were experienced at District level in the previous elections. These challenges included difficulty and impossibility on the part of the monitors from polling stations to follow the results all the way to Districts as some polling stations were far from the Districts.

801. Mr. Alfandika was referred to the announcement of results. He stated that the Petitioners herein and their political parties as well as stakeholders in the electoral process were present at the announcement. And all political parties received the results. He stated that the results were published in August because the printer had problems.
802. Mr. Alfandika referred to the allegation that monitors were detained. He explained that their detention was for a cause as they had invaded a polling station. The Presiding Officer informed the police who detained the monitors. He stated that as these were roving monitors, their detention did not affect the process at the polling station as it had polling station monitors.
803. Mr. Alfandika referred to Ms Gwalidi's testimony about the incidents at Blantyre Secondary School. He stated that the 2<sup>nd</sup> Respondent did not receive any complaints from this centre.
804. As to the complaints from Phalombe, he stated that the 2<sup>nd</sup> Respondent responded to the concerns. He explained that upon investigations, the 2<sup>nd</sup> Respondent found that the alterations and figures complained about did not affect the results as the figures merely showed the number of ballot papers and the statistical part/top part. The latter part (candidate valid votes) showed that the number of actual votes had not been tampered with.
805. Mr. Alfandika insisted on the need to substantiate any complaint lodged with monitors' alternate figures in order for the Commission to address the complaints, which was wrong. He said that the monitors had a right to protect the valid votes of their candidates. They would do that by observing and recording the results to ensure that what had been transmitted to the 2<sup>nd</sup> Respondent corresponded with the result that the candidate obtained at the polling station.
806. As to the blank tally sheet which the Result Management System indicated it represented data from Bowe CDSS, Mr. Alfandika stated that the 2<sup>nd</sup> Respondent sourced the original documentation from the Constituency Tally Centre which data was delivered by hand and the

2<sup>nd</sup> Respondent recorded form as such. The 2<sup>nd</sup> Respondent did not remove from the system for transparency.

807. He was referred to the tippex investigations and he stated that these investigations commenced immediately after announcement of results. As to the statement of the Chairperson that no investigations were conducted as at the time of the interview, Mr. Alfandika conceded that it was true that at the time of the Chairperson's interview, the 2<sup>nd</sup> Respondent had not conducted any investigations on the use of tippex on result tally sheets.

808. With regard to the DBO report, Mr. Alfandika stated that he did not agree with the content of the report hence he raised management comments. He said that this was in line with the accounting and auditing procedures. Mr. Alfandika stated that DBO paid no heed to his management comments.

809. On data capturing, Mr. Alfandika stated that this fell in the province of the Director of ICT and his team.

810. As to the observation that elements such as figures on ballots received, unused ballots, cancelled or spoilt ballots and aggregate votes remaining constant, he stated that this was a wrong assumption because there were a number of determining factors that could vary the figures which ought to have been taken into consideration.

811. He also indicated that it was not true that no error would occur on the ballots received part of the forms. He explained that this could happen in instances where a presiding officer would have requested for additional ballot papers from another polling station. He stated that this request for additional ballot papers was actually endorsed in the Polling Procedure Manual.

812. Mr. Alfandika stated that much as the ballots received were supposed to be in bunches of 100, it was possible for the figure to be different due to printing error.

813. Again, he stated that it would have been difficult to trace spoilt/cancelled ballots as voters would take the ballot papers with them from the polling stations.

814. On variations on the result tally sheets, Mr. Alfandika stated that null and void votes might contribute to the variations because there could be instances where a vote could be categorized as null and void at stream level and this decision could be overturned by a presiding officer at polling station level upon consideration of complaints from monitors. Hence recordings done at stream level could be changed and corrected at polling station level.

*Mr. HENZILY MUNKHONDYA*

815. The 2<sup>nd</sup> Respondent's other witness was HENZILY MUNKHONDYA.

816. He stated that he was the Director of Electoral Services at the 2<sup>nd</sup> Respondent. His duties involved being responsible for day to day functions of the 2<sup>nd</sup> Respondent.

817. His department was responsible for planning all electoral activities which involved the development of the electoral calendar; monitoring the implementation of all electoral activities lined up in the electoral calendar; development of the electoral operational plan which was a guiding tool in the implementation of electoral activities. In responding to the petition and allegations levelled against the 2<sup>nd</sup> Respondent, Mr. MUNKHONDYA stated in paragraph 9 of his sworn statement that the May 2019 presidential election was conducted in full compliance with all constitutional and state dictates under the Constitution and the Parliamentary and Presidential Elections Act.

818. In responding to the several allegations that the Petitioners levelled against the 2<sup>nd</sup> Respondent Mr. MUNKHONDYA stated that in accordance with well-known polling process, immediately after polling process, immediately after voting, the presidential election stream results of count were recorded in the stream log book on forms technically known as Form 66C.

819. The recording of the result of count was done in the presence of party and candidate's representatives. The party representatives had the right to be given a copy of the stream result of count. None of the stream result of count forms recorded in Form 66C contradicted the entries in his exhibit.

820. He presented Form 66Cs in HM2 and stated that these were the forms that were transmitted to the 2<sup>nd</sup> Respondent by the presiding officers. And the Petitioners did not present any Form 66C.

whose content would be materially different from the ones that he exhibited in HM2. He stated that in the processing and determination of results, the 2<sup>nd</sup> Respondent used these Form 66Cs. And they were considered valid. The results as recorded on Form 66Cs were then taken to the constituency Tally Centre for transmission to the National Tally Centre. At the Constituency Tally Centre, the Constituency Returning Officer aggregated all polling Station Results into Constituency Tally Centre results in Form 71C. Form 71C listed results for all polling stations in that constituency for the presidential election. This aggregation would also be in the presence of party representatives. The Form 71C were submitted to District Commissioners who then compiled a summary of all constituency results in their respective districts which was then to be aggregated and printed as district summaries for the presidential election on Form 73B. The presidential result was aggregated at the National Tally Centre and printed on Form 73C. He insisted that the 2<sup>nd</sup> Respondent was not presented with any evidence that contradicted the entries made in all forms mentioned.

821. He commented on the alleged tampering by Fred Thomas at Mpatsa Tally Centre in Nsanje Central. Munkhondya repeated Mr. Alfandika's testimony that Thomas was apprehended on allegations that he was found tampering with results. The 2<sup>nd</sup> Respondent investigated the allegations and they were unfounded.
822. Mr. Munkhondya was referred to paragraph 9 of his sworn statement at which he asserted that the May 2019 Parliamentary and Presidential Elections were conducted in full compliance with all constitutional and statutory dictates under the Constitution, the 2<sup>nd</sup> Respondent Act and the Parliamentary and Presidential Elections Act. He mentioned that he was familiar with the two statutes as he applied them in his everyday work as Director of Elections. And that by full compliance, he meant one hundred percent compliance with the statutory instruments.
823. Mr. Munkhondya stated that he was not a member of the Electoral Commission and that he only worked on the direction of the members of the Commission. In particular, he was under the Commission's Committee whose portfolio was the Electoral Services Committee.
824. This Committee was chaired by Commissioner Dr Jean Mathanga. Commissioner Mathanga did not file any sworn statement in the proceedings. He did not know why Commissioner Mathanga had decided to abstain from participation in the litigation. He stated that the 2<sup>nd</sup>

Respondent had mandated him to appear in court and that he learnt about this from his Chief Elections Officer.

825 As to the events and the Commissioners' role on the polling day, Munkhondya stated that the Commissioners and some of the Secretariat personnel were roving across the country observing and monitoring the voting process.

826 With regard to the conduct of the elections at polling stations and constituency tally centres, Mr. Munkhondya stated that people were stationed at these places to work on behalf of the 2<sup>nd</sup> Respondent. This was because the Commissioners and staff could not be at all polling stations and Constituency Tally Centres. There were 5002 polling centres and 197 Constituency Tally Centres.

827 Mr. Munkhondya expounded on his competence in the statutory laws pertaining to elections and their application, he stated as follows: the 2<sup>nd</sup> Respondent's duties included delivery of elections that were competently managed. The 2<sup>nd</sup> Respondent needed to have in place competent people to achieve this target. Competent people would mean people who knew what they were doing. In that regard, the election was managed in full compliance with statutory laws that he had aforementioned. These competent people were in the 5002 polling stations and the 197 Constituency Tally Centres.

828 He was not directly involved in the recruitment of these people as the recruitment activity was under the portfolio of Department of Human Resources. He was aware that most of the people were interviewed. There were however other people who did not go through any interviews as their engagements were based on their performance in the 2014 elections. They also did not deem it necessary to interview teachers. The quality and calibre of the people that the 2<sup>nd</sup> Respondent sought was persons with a post primary qualification as polling and result management in elections was a tasking exercise. Hence those that had Junior Certificate or an MSCE were considered. Most of these people were primary school headmasters. The headmasters were identified as presiding officers for polling stations. The 2<sup>nd</sup> Respondent also enrolled ADMARC staff members at places where the polling stations were near ADMARC depots. It was important that the people that were recruited should be able to read.

- 829 Mr. Munkhondya stated that the recruits were trained in electoral process and management. The trainings started in March 2019. The 2<sup>nd</sup> Respondent started with Training of Trainers. These trainers were trained by Master Trainers from the 2<sup>nd</sup> Respondent. The Trainers proceeded to train other people in their centres. The training was not prolonged because of the demonstrated routine that was undertaken by the 2<sup>nd</sup> Respondent.
- 830 All Presiding Officers went through the trainers' course. They were trained by the Master Trainers from the 2<sup>nd</sup> Respondent. The expectation was that the Presiding Officers would train other members of staff at their stations. The 2<sup>nd</sup> Respondent did all this in fulfilment of its duty to deliver and competently manage the elections. It was Mr. Munkhondya's statement that this duty was fulfilled by the 2<sup>nd</sup> Respondent.
- 831 Mr. Munkhondya was referred to the Procedures Manual. He explained that the 2<sup>nd</sup> Respondent's expectation was that the procedures that were prescribed in the manual would be followed by the polling staff. The expectation was that the content of the manual would be applied and followed throughout the polling process, that is, from the opening of the polling station to the delivery of results.
- 832 In reference to the production of the manual, Mr. Munkhondya stated that he was involved in its production. It was produced in the period November to December 2018. The 2<sup>nd</sup> Respondent did not seek input from stakeholders. After its production, the 2<sup>nd</sup> Respondent had interactions with stakeholders at different forums that were organised by the 2<sup>nd</sup> Respondent for awareness purpose. And stakeholders became familiar with the content of the manual.
- 833 Mr. Munkhondya stated that in the 2019 elections the 2<sup>nd</sup> Respondent introduced Constituency Tally Centres. There were no such centres in prior elections. The Constituency Tally Centres were introduced as a result of interaction between the 2<sup>nd</sup> Respondent and political parties. It was realized during the 2014 election post-mortem meetings that the system of referring results to the districts disadvantaged some political party monitors as they were not able to follow the results to the districts. Some polling stations were stationed in places that were far from the district tally centre. This introduction of Constituency Tally Centres was an innovation that was in reaction to the lessons learnt. Consequently, the 2<sup>nd</sup> Respondent decentralised the elections' administration to constituency level.

- 834 Again, as a result of the post-mortem of the 2014 election, the 2<sup>nd</sup> Respondent planned the 2019 election in a manner where results would be recorded in both words and figures on documents. There was also decentralisation of the packaging of the non-sensitive electoral materials. Whereas in 2014 packaging for all places was done at the Blantyre warehouse, in 2019, packaging of the non-sensitive materials was conducted at the 2<sup>nd</sup> Respondent's regional warehouses.
- 835 Mr. Munkhondya explained that the issue of duplicates did not originate from the post-mortem exercise. Rather, it arose during the printing of electoral materials in Dubai. It was introduced by the 2<sup>nd</sup> Petitioner's party monitors.
- 836 Auditors were also introduced in the May 2019 elections.
- 837 All these new introductions were devices that were meant to improve the quality of the Presidential Election.
- 838 It was also meant to improve the transparency around the management of elections. This was to ensure that the results were credible, legitimate and acceptable. It was the 2<sup>nd</sup> Respondent's expectation that all innovations were going to work.
- 839 The witness was referred to his sworn statement on the centralization of the packaging of materials. He advised the court that the 2<sup>nd</sup> Respondent, in providing its requirements to the printer instructed the printer that polling station material were to be customized. The contract required that the materials be packed in pallets so that upon offloading at the airport, they would be easily distributed across the country.
- 840 Mr. Munkhondya explained that the administrative reforms that the 2<sup>nd</sup> Respondent introduced were supposed to be within the framework of the law. They were not supposed to contravene the law. He stated that the Constituency Tally Centres that were introduced as part of the reform were not provided for by the law and at the same time, they did not contravene the law.
- 841 Mr. Munkhondya was referred to Form 6 in the schedule of the Parliamentary and Presidential Elections Act. He stated that he was aware of the same.

- 842 The 1st Petitioner's Counsel wondered if Mr. Munkhondya was aware that the law required that the record of the results should be signed by all polling station officers. Mr. Munkhondya stated that the law did not require all polling station staff to append their signatures.
- 843 He stated that this requirement was only applicable to *presiding officers and monitors of political parties*. Whereupon he was referred to Form 6 in the Schedule of the Parliamentary and Presidential Elections Act. The witness indicated that he was familiar with the Form. He said that they did not use the Form 6 from the Act. Instead, they used Form 66C.
- 844 The witness was referred to Form 66C and the number of polling station staff that were supposed to sign on it. He stated that the only officer who could sign on Form 66C was the presiding officer. Whereupon he was referred to the prescribed Form VI, Part E where the Form indicated that a number of polling staff other than the presiding officer were required to sign. On his count, Mr. Munkhondya found that at least five polling station staff were supposed to sign. Mr. Munkhondya explained that the formatting of Form 66C was different from that of Form VI of the schedule but some of the contents of Form VI like number of votes were included in Form 66 C.
- 845 Mr. Munkhondya stated that he did not know why the 2<sup>nd</sup> Respondent did not use the form that was provided for under the laws.
- 846 He was referred to the polling station results tally sheets in HM2 Volume 22 where the result tally sheets therein had one signature of the 2<sup>nd</sup> Respondent's official namely the Presiding Officer. All other persons that signed Form 66C were political party monitors or observers. Mr. Munkhondya conceded that in the thousands of Form 66Cs that he presented as his exhibits he did not have a single Form 66C which was signed by all polling staff that were present at stream level and at the polling station.
- 847 He admitted that in his exhibits, he also had result tally sheets that were not signed by a single polling staff/officer (including presiding officers). There were result sheets from 1120 polling stations that were not signed by any polling staff including presiding officers in the result tally sheets that Mr. Munkhondya exhibited in court.



848 Mr. Munkhondya was referred to the 2nd Respondent's argument that tally sheets that were not signed by presiding officers were still valid since monitors had appended their signatures.

849 The 1st Petitioner's Counsel wanted to know the person, among them all that was acting on behalf of the 2<sup>nd</sup> Respondent at the polling stations. Mr. Munkhondya stated that the presiding officer and the polling staff that were being paid by the 2<sup>nd</sup> Respondent were the 2<sup>nd</sup> Respondent's representatives. He stated that monitors were not accountable to the 2<sup>nd</sup> Respondent, but that they were accountable to their principals who were the political parties that they represented. He also admitted that monitors at times would leave a polling station if they wanted and the 2<sup>nd</sup> Respondent would not stop them. The polling process would not halt in the monitors' absence as it was the polling staff and not monitors that were conducting the elections at stream level. Again the presiding officer received the ballot papers while the polling staff were the ballot issuers. The Presiding Officer and Assistant Presiding Officer of a polling station were responsible for recording events in the record log books at stream and polling station levels. The presiding officer sealed the ballot boxes at the closure of the polls. The presiding officer and the assistant presiding officers were also responsible for the reconciliation process of data and everything that happened at the polling station. The process of classifying votes as null and void was led by the presiding officer. Counting of votes at stream level was the duty of the assistant presiding officer while at the polling station level it was the duty of the presiding officer.

850 Mr. Munkhondya explained that according to the manual, the first thing that was conducted after closure of polling station or stream was the reconciliation of ballots. This, according to him, entailed checking the number of people that registered. These were the people whose names were ticked in the register book. Thereafter reconciliation would begin. The first reconciliation was of the ballots that had not been cast and were outside the ballot box. These included the unused ballot papers, spoilt or cancelled ballot papers. The unused ballot papers would be counted and their total would be recorded. The counterfoils of the ballot papers would also be counted and their number would be recorded. The spoilt or cancelled ballot papers would also be counted and their total would be recorded. Mr. Munkhondya explained that at this point, the people counting would know the number of ballot papers that were expected to be found in the ballot box. The recording of this data would be in Form 61C.

- 851 Thereafter the ballot box would be put on the table. The ballots would be taken from the box and would be counted. At this stage, if a paper was folded, it would be counted in the folded stage without unfolding it. The total would be recorded.
- 852 Then the counting of the votes would begin. The presiding officer would be unfolding the folded ballot papers one by one and show the people and put the vote against the right candidate.
- 853 If a variance was found after the emptying of the contents of the box between the particular heap and what was found in counter foils and unused and spoilt ballot papers, the team would do the counting again. If there were instances where there would be differences because some of the voters took the ballot papers with them after voting, a record of such an event was expected to be reported by the presiding officer in the record log book. This whole process would be witnessed by at least five 2nd Respondent's staff and the monitors.
- 854 Mr. Munkhondya stated that the polling procedure manual did not have any part that dealt with amendments to forms that were used at stream level. He also confirmed that the polling procedure manual did not authorise tippexing of result forms.
- 855 Mr. Munkhondya was asked to confirm that the role of a presiding officer ended after handing over the results, log books and all polling materials to the Constituency Returning Officer. Mr. Munkhondya said that it did not end at that point. Whereupon he was referred to page 33 of the manual which read:

“...the tamper evident envelope with blue label and the miscellaneous envelope must be hand delivered to the constituency returning officer, the envelope must not be placed in the ballot box or boxes containing miscellaneous materials. This process ends the recording process at the polling station and the presiding officer's responsibility on polling day.”

- 856 Mr. Munkhondya explained that the results were in a tamper evident envelope to protect results that the presiding officer would be carrying from the polling station to the constituency tally centre. The results were being protected from tampering.

857 The witness referred to the manual at paragraph 17.6 (iv) and stated that the purpose of handing over the results to the constituency returning officer was for the constituency returning officer to record them. Mr. Munkhondya confirmed that there was no counting of results at the constituency tally centre.

858 He stated that there were no auditors at the polling stations as auditors were stationed at the constituency tally centres.

859 Again, Mr. Munkhondya stated that there was no place in the manual that stated that result forms were to be completed at a constituency tally centre. However, this happened because in practice, there were instances where the Constituency Returning Officer on verification with auditors found that there were some mathematical errors and the Constituency Returning Officer called the presiding officer to correct the errors at the constituency tally centre.

860 Mr. Munkhondya stated that results forms were not supposed to be at the homes of presiding officers, and that he was not aware of any such incident. Whereupon he was referred to the BDO report where under paragraph 11 the auditors recorded their findings on the security of documentation thus:

“some POs used to just dump [Form 66Cs] on the CRO’s desk and they disappeared e.g. Thava and Nkhotakota. Some POs were followed to their homes in order to get their signatures”

861 Mr. Munkhondya confirmed that the classification of the ballot as a null and void vote could only be made after looking at the ballot papers. He was referred to the BDO auditors report at paragraph 11 where it was stated:

“Sometimes the presiding officers were struggling to differentiate between spoilt, unused and null and void ballot papers.”

862 Mr Munkhondya conceded that as these auditors were stationed at the constituency tally centres and not at the polling stations, it meant that the auditors realized the presiding officers’ challenge when the presiding officers brought the results to the constituency tally centres. He admitted that this essentially meant that the mistakes were being identified by the auditors at

the constituency tally centres. Mr Mukhondya was not able to tell the court how presiding officers were struggling since at this stage they had already entered the data in the result sheets.

863 Mr. Munkhondya referred to the report that some presiding officers were being trained by auditors on how to complete the result forms. This training was done at the CTC after the forms were already filled at the polling station.

864 Mr. Munkhondya stated that from the evidence that he had brought to Court, he did not know the exact number of forms that were manually amended. He was told that there were 931 result forms that were manually amended in his exhibits. Mr. Munkhondya was not able to dispute this number. He admitted that these alterations in the 931 result sheets were done at the constituency tally centres and not at the polling stations. He qualified his admission and stated that much as the alterations were done at the constituency tally centres, and in the absence of polling station staff and monitors, the alterations were made in the presence of the 2<sup>nd</sup> Respondent's officer who was the Constituency Returning Officer.

865 Mr. Munkhondya admitted that in terms of the procedure manual, the only person who was required to deliver the results to the constituency tally centres was the presiding officer. He admitted that basically when a presiding officer revisited figures with the assistance of auditors at the constituency tally centre, such a presiding officer was amending a record that he had prepared jointly with four other officers. Mr. Munkhondya however qualified his admission and stated that this was in order since constituency tally centre monitors were present. Mr. Munkhondya was referred to his qualification and he conceded that the constituency monitors could not have been present at the time of the recording of the results at the polling station and they would not have witnessed the count.

866 Mr. Munkhondya agreed that the manual provided an option for monitors to accompany the results to the constituency tally centres. Mr. Munkhondya admitted that the amendments were done in the absence of monitors who witnessed the count at stream level.

867 Mr. Munkhondya was referred to his insistence on monitors' presence during the electoral process. He agreed with the 1st Petitioner's counsel that it was possible for a candidate to have no representative at stream level and at a polling station. He stated that this did not mean that

the 2<sup>nd</sup> Respondent was at liberty to steal or abuse his votes as the 2<sup>nd</sup> Respondent had an obligation to ensure that the expression of the voter was respected and secure at all times. Mr. Munkhondya stated that this obligation on the part of the 2<sup>nd</sup> Respondent did not change whether a candidate had a representative or not.

- 868 Mr. Munkhondya was referred back to the data entries in the various forms in his exhibits. He stated that the entries on Form 66C derived from the stream log book entries. He was referred to Form 60C that did not have information on ballots received. He agreed with the 1<sup>st</sup> Petitioner's counsel that to collate the various sections of Form 66C, one would transfer data from the stream log book Form 59C where data on the ballot papers received would be recorded and from Form 61C where the figures on the reconciliation of ballot papers would be recorded. Data from these two forms, 59C and 60C would then be transferred to Form 66C.
- 869 Mr. Munkhondya mentioned that one of the obligations of the 2<sup>nd</sup> Respondent was to secure the electoral process and that this was the reason for printing the sensitive materials in Dubai. It was equally the reason for entailing security features on the sensitive materials.
- 870 He was referred to Exhibit HM2 in his Volume 23 at page 452 where there was a form with no security features. He stated that this was an improvised result sheet and that data on that form was used in the determination of the national presidential results.
- 871 On being referred to the BDO report, Mr. Munkhondya stated that the auditors verified one hundred percent of the results. Whereupon he was taken to different parts of the report, where the report indicated that the national tally centre findings were that in the review of the transmitted results at the National Tally Centre, it was noted that in terms of controlling and reconciling the transmitted results the 2<sup>nd</sup> Respondent was unable to specify what was verified and what was not verified by auditors. And Mr. Munkhondya's response was that according to the paragraph, verification rate was not one hundred percent. He stated that he was aware that after the draft BDO report, was shared with the management of 2<sup>nd</sup> Respondent raised management comments.
- 872 He was not aware of BDO's response to the management comments that were raised by the 2<sup>nd</sup> Respondent. He was referred to Exhibit SA10 which was the BDO response to the management comments. In the comments, Mr. Alfandika, the Chief Elections Officer and Chief Executive

for the 2<sup>nd</sup> Respondent sought BDO to revisit some of the comments that BDO had made on the basis that they were unfounded, the finding was not a true reflection of how the result management process was jointly conducted by the 2<sup>nd</sup> Respondent and BDO at the National Tally Centre in Blantyre. In particular, Mr. Alfandika referred to factual finding number 13 in the BDO report referred above. He proposed that this paragraph should be removed from the BDO report. BDO refused to remove their observation as per Mr. Alfandika's request. They gave their reasons for the refusal in SA 10. They stated that BDO auditors indeed verified and stamped the received results of the elections, but later, they noted that they were signing and stamping the same papers. Upon such realization, BDO stopped all process of verification and requested the 2<sup>nd</sup> Respondent to provide BDO with a reconciliation of the signed results. The 2<sup>nd</sup> Respondent was not able to provide BDO with the same. BDO advised the 2<sup>nd</sup> Respondent that there was need for this reconciliation since not all result papers that were displayed on screens were approved by auditors. BDO prepared their reconciliation sheet and gave instructions to the 2<sup>nd</sup> Respondent employees on how to reconcile the received forms with instructions to work overnight so that they would be ready the following day, but the 2<sup>nd</sup> Respondent's employees did not do the reconciliation. With this response, BDO refused to change its findings.

873 Mr. Munkhondya confirmed that the national result was determined on the basis of Form 66Cs that were submitted to Commissioners. He admitted that it was important for the forms that were carrying the results of the election not to raise any doubts on presentation to the Commissioners as well as any person that was looking at them. He stated that tippex and alterations would not raise any doubts to any person with a reasonable mind since tippex was a correction fluid.

874 He was referred to tippexed documents. He was shown result sheet with [code 28002] and stated that on looking at the document, a first glance raised doubt but on closer examination he was comfortable after noticing that the alterations were verified by the presiding officer and the constituency.

875 Mr. Munkhondya observed that monitors were at two levels namely, the Constituency tally centre level and the National Tally Centre level. Counsel for the 1st Petitioner wondered if Mr. Munkhondya knew why auditors at the Constituency Tally Centre level rejected the forms that had alterations and tippex. He stated that these auditors rejected these forms because they were

manually amended. He stated that the National Tally Centre auditors started accepting these amended forms after the 2nd Respondent had issued them with a letter to allow the tippexed and altered forms. He stated he did not know why the auditors at the Constituency Tally Centres rejected them.

876 Mr. Munkhondya stated that the letter from the 2nd Respondent to the auditors seeking the auditors to allow altered and tippexed documents did not amount to post election amendment to polling procedures.

877 He also said that the letter did not constitute a shifting of goal posts after the election had already been conducted. He stated that this could not be the case because the election process had not ended since the results had not been announced and elections only ended on announcement of results. He further stated that neither did the Commission shift goal posts after the people had cast their votes. This was because the 2<sup>nd</sup> Respondent had put efforts to correct the mistakes that were in Part A-F of Form 66C where figures could not add up.

878 Mr. Munkhondya was tasked on his position that the sole reason behind the tippexing was to correct errors. Result Forms (Form 66Cs) were presented to him which had mistakes despite the tippexing and alterations that were done. He conceded that in terms of the design of the Form 66C, the number of cast ballot papers plus the number of cancelled and spoilt ballot papers plus the number of unused ballot papers was equal to the number of ballot papers received.

879 He was taken through Form 66Cs of polling station No 28002 in HM2 Volume 29 at page 4 which were result sheets for Nsanje district. Upon calculations, it was found that the total number of ballots received was exceeded by ninety. This discrepancy was on an altered form. Mr. Munkhondya conceded that some Form 66Cs contained errors despite the alterations and tippexing. He stated that much as the discrepancies existed on Part A-F of the form, there was no problem on the part that dealt with candidate valid votes.

880 Mr. Munkhondya conceded that any ballot issue was a potential vote issue. He conceded that a miscalculation that affected 90 ballots, in effect affected 90 potential votes. He speculated that this could have been a miscalculation by a presiding officer.

- 881 The calculations in court for Kaigwazanga Polling station with Code No 12002 showed that the alterations affected 544 ballots. Mr. Munkhondya admitted that these potential votes were not accounted for. He did not know if this misrepresentation was resolved at the time that the Commissioners were declaring a winner of the election.
- 882 In Form 66C of Code 12018, there were 824 ballot papers that were affected with tippexing and alterations. Mr. Munkhondya agreed with the Petitioner's counsel that these were potential votes. At the time of declaring the winner these 824 ballot papers were unaccounted for.
- 883 It was demonstrated in court that whichever Form 66C was picked that had alterations such a form had ballot papers that were not accounted for at the time of the declaration of the winner. And Mr. Munkhondya conceded that all forms that were presented and calculations were done on them had misrepresentation with regard to the number of ballot papers. He admitted that these ballots were unaccounted for at the time that the Commissioners declared a winner in the presidential election.
- 884 Another set of Form 66Cs were presented. This was a comparison between Form 66Cs whose figures were manually generated and Form 66Cs that were computer generated. The data on the computer generated forms was supposed to be the same as the data that was on the manually filled forms.
- 885 Mr. Munkhondya was asked to calculate and reconcile the data of the two forms. There was a difference in the data of the two forms. On the computer generated form this affected 604 ballot papers while on the manually filled forms, 602 ballots were affected. Mr. Munkhondya stated that at the time of announcing the winner, the 2<sup>nd</sup> Respondent had knowledge of what had happened to the ballot papers which were affected by the differences in data. He refused to explain to the court on how the missing ballots were accounted for.
- 886 Another set was presented where at page 175 of MH2 Volume 14, the variance between the computer generated printed tally sheet or Form 66C and the manually generated tally sheet was 667. Mr. Munkhondya could not explain the origins of the 667 ballot papers. He speculated that there must have been additional errors.



- 887 Mr. Munkhondya stated that the 2<sup>nd</sup> Respondent resolved this error by the time the winner of the election was declared. He explained the manner in which the 2<sup>nd</sup> Respondent resolved the same. He stated that there was a proper verification exercise from the polling station, to the constituency tally centre to the National Tally Centre. He admitted that the verification used the same Form 66C that had a problem. He agreed with the 1st Petitioner's counsel that the verification was done using a document that had an error to resolve an error on another document.
- 888 As to the verification with presiding officers, Mr. Munkhondya admitted that according to the polling manual, essentially, presiding officers were required to surrender all materials that had been used at a polling station to the Constituency Returning Officer. He conceded that this essentially meant that the presiding officers had nothing in their possession that related to the election. He failed to explain how, during the verification exercise the National Tally Centre officers would get any information from such a person when the inquiry was about figures and the presiding officer had no material to support any position.
- 889 Again Mr. Munkhondya was tackled on the verification with regard to the logbook and Form 60C as the source of verification. He stated that the log book and Form 60C were the source of data. He was referred to a Form 66C in HM2 Volume 20 (B) for Machinga Centre Code No 18982 Mwayiwathu School. This was compared with the log book for the same Mwayiwathu School in SKC Volume 2 at page 778. It was noted that the log book had no data on presidential candidates. Again no presiding officer endorsed his name or signature. Mr. Munkhondya conceded that as the log book had no details for a presiding officer it would be difficult to validate the Form 66C. He qualified his statement and stated that it was still possible to verify where the log book was empty and had no data or information as there would be Form 60Cs from monitors which could be used to verify. Mr. Munkhondya conceded that it was a requirement for the presiding officers to be filling the record log book with data and information.
- 890 Mr. Munkhondya was also referred to the watermarked duplicate forms (watermarked Form 66Cs). These were duplicate forms that were used by the 2<sup>nd</sup> Respondent in place of originals. He was told that a total of 1428 such forms were found his various exhibits before the Court.

Mr. Munkhondya submitted that he was not in a position to contradict the figure as he did not count his exhibits.

891 He also stated that he did not know the number/figure of valid votes which were recorded in these watermarked duplicate forms as he had not counted the same. He was thereby referred to a count that was conducted by the 1st Petitioner in which 1,593,334 (one million, five hundred and ninety-three thousand, three hundred and thirty-four votes) were affected. Mr. Munkhondya stated that he did not have another figure that would contradict the 1st Petitioner's count as he had not conducted a similar exercise.

892 Mr. Munkhondya was referred to figures with regard to total valid votes that were contained in the altered forms. It was 1,330,486 (one million, three hundred and thirty thousand, four hundred and eighty-six.). Mr. Munkhondya stated that he did not conduct a similar counting exercise and was therefore not in a position to present a contrary figure.

893 The witness was referred to result sheets (Form 66Cs) that were not signed by any officer of the 2<sup>nd</sup> Respondent. He was told by the 1st Petitioner's Counsel that a count of these unsigned result sheets that were Mr. Munkhondya's exhibits, showed that 1,120,104 votes were affected (one million, one hundred and twenty thousand, one hundred and four). Mr. Munkhondya stated that he did not go through a similar counting process and he was therefore not in a position to contradict the 1st Petitioner's finding.

894 Mr. Munkhondya was also referred to tippexed result sheets that originated from his exhibits. He was told that upon counting the tippexed result sheets that Mr. Munkhondya had included in his exhibit bundle, the 1st Petitioner's counsel found that 524,340 votes were affected. Mr. Munkhondya stated that he did not have an alternate figure.

895 Again, Mr. Munkhondya was referred to the result tally sheets that the 1st Petitioner termed fake tally sheets and the Attorney General called them unconventional forms. These forms were sourced from Mr. Munkhondya's exhibits. The 1<sup>st</sup> Petitioner stated that a count showed that 188,172 votes were affected. Mr. Munkhondya stated that he could not present an alternate count as he never counted the votes when he presented the forms as part of his evidence.

- 896 Mr. Munkhondya was shown a particular form on which all data and information therein was handwritten. He stated that this form could be regarded as unconventional or unusual as the presiding officer might have used paper that was different from the forms that were ordinarily used to record information in this election. He stated that much as the paper was different, the information and data that was contained therein was genuine.
- 897 Mr. Munkhondya was also referred to paragraph 10.15 of his sworn statement in which he discussed Form 73B and Form 73C. He conceded that basically these forms fed data into Form 66C. He admitted that if there was rubbish data in Form 66C, it meant that the rubbishy data originated from Form 73C.
- 898 Mr. Munkhondya was also cross examined by the 2nd petitioner. In responding to the questions posed he stated that he was involved in the design of the electoral process. And that to a larger extent the design followed what was contained in the Parliamentary and Presidential Elections Act. The design of the forms was based on the same Act. The Secretariat deliberated and agreed that the forms would follow the forms in the Act and variations would apply whenever necessary.
- 899 The variations included a revisit of Form 6 of the Act into Form 66. The Secretariat agreed to put all stream results columns on one form (which constituted Form 66C). The other information was put in Form 60C.
- 900 Mr. Munkhondya explained that this variation was necessary because one was able to get all information that one needed by just looking at one paper. On the other hand, information in the Form 6 of the Act was disjointed. The other variation was the sharing of the register with monitors at the polling station as a way of enhancing transparency.
- 901 Mr. Munkhondya was referred to the reconciliation (or statistical part) as opposed to the candidate score part of result sheet (Form 66C) and the log book. He explained it was necessary for the two documents to have a reconciliation part so that people would be able to know what was brought to a particular polling station and how consumption of materials like ballot papers was conducted. He said that was intended to allow the citizens of Malawi to know what was happening. He said that this reconciliation was also important to the 2<sup>nd</sup> Respondent as the 2<sup>nd</sup> Respondent would have a fall-back position such that in an event where it encountered a

shortfall, mitigating measures would take place. And the advance planning part as well as the transparency part of reconciliation were for the benefit of both the 2<sup>nd</sup> Respondent and everyone. Everyone was supposed to know how many ballot papers were delivered to a polling station stream. This was important as it allowed people to follow the process. People would be able to know how many people voted against what was supplied. It would also ensure that every ballot paper was properly accounted for.

- 902 Mr. Munkhondya stated that for transparency purposes, it was important for every polling station stream to account for each and every ballot paper that was delivered. He stated that result sheets had a candidate valid vote part which was crucial because at this point, the ballot had been cast.
- 903 He explained that there was a relationship between the candidates' scores and the ballots received in that the total candidates' score could not exceed the total ballot papers received at a given stream. He said that there were isolated instances where this could happen. These were in cases where people were required to vote at places where they did not register. Security people fell in this category. Whenever such isolated instances occurred, they would be fully documented in the record log books. He explained that the rule was that whenever 100 ballot papers were received on a polling stream, everything that happened at that stream would not exceed the total number of ballots received. He conceded that both part A-F, which was the reconciliation or statistical part, and the candidate score part of a result tally sheet (Form 66C), or a record log book were equally important in the transparency and accountability process.
- 904 Mr. Munkhondya was referred to external consultants at the 2<sup>nd</sup> Respondent. He stated that he did not know whether any external consultant was hired by the 2<sup>nd</sup> Respondent. In particular, he did not know if the 2<sup>nd</sup> Respondent's ICT Department hired a consultant. He avoided answering the question and stated that the 2<sup>nd</sup> Respondent's ICT Department was better placed to answer that question. He also said that there were some consultants who were hired by the UNDP and were working for the 2<sup>nd</sup> Respondent. One of them was stationed in the legal section while another was an expert advisor on elections. These consultants had been with the 2<sup>nd</sup> Respondent since 2014.
- 905 On the electoral process designs' details, Mr. Munkhondya explained that the whole design of the electoral process, including the documentation, as well as what was to happen with regard

to transmission of results was done at the Secretariat. He was therefore conversant with all processes that led to the adoption of certain documents. He was also conversant with the 2<sup>nd</sup> Respondent as he had been in its employ since 2002.

- 906 Mr. Munkhondya explained that the election advisor was engaged because the 2<sup>nd</sup> Respondent needed such advice. This did not mean that Mr. Munkhondya was incompetent in that field. The election advisor assisted the 2<sup>nd</sup> Respondent in conducting the 2014 post-election meetings with stakeholders and in trainings with regard to election management and process.
- 907 The witness was referred to presiding officers and the 2<sup>nd</sup> Respondent's advertisement for presiding officers at a time that was very close to the election date. Mr. Munkhondya recalled that on 12th May 2019, the 2<sup>nd</sup> Respondent advertised to engage presiding officers. This was an urgent call. He provided its background. He stated that the 2<sup>nd</sup> Respondent was reacting to reports that it was getting that in the course of campaign some of its presiding officers were compromised. As the position of the 2<sup>nd</sup> Respondent was to have staff that were non-partisan, it investigated and confirmed that indeed some of the people that were to be employed in the election exercise were compromised. Consequently, the 2<sup>nd</sup> Respondent released some of the people that had been trained. It had to replace them and urgently train other people.
- 908 Mr. Munkhondya stated that the training of this new group was not a problem much as 21st May was around the corner since the 2<sup>nd</sup> Respondent had a pool of over 200 master trainers.
- 909 He agreed with counsel that the lessons learnt from that occurrence included that it was possible for the 2<sup>nd</sup> Respondent to train people in a particular aspect, but these people would do the opposite. He agreed that what happened with these people could happen with monitors, constituency tally centre officers as well as presiding officers.
- 910 There were questions on the result sheets (Form 66C). In responding to the questions, Mr. Munkhondya explained that these Form 66Cs came in a bunch. Each bunch had 20 papers and only the one at the top was the original. The next four or five were the carbonated copies of that original. The rest were duplicates and they were not carbonated. These non-carbonated duplicates were in sets of four or five. They had a watermark which read 'duplicate'.

- 911 Mr. Munkhondya explained that in terms of getting an automatic reproduction of a copy, this could only derive from the carbonated copies. For the rest, which were the non-carbonated duplicates, one needed to write again the same information on each duplicate separately. Hence for effective reproduction, what was written on the original form appeared on the carbonated copies. It did not require an author to write again.
- 912 He explained that there were five papers on the carbonated copies part because they were meant to be shared with monitors of political parties. The non-carbonated watermarked duplicates were supposed to be used only in instances where there were more than five monitors.
- 913 With regard to the endorsements on Form 66Cs, Munkhondya admitted that if mistakes were made on the original result tally sheet (original Form 66C), that mistake would reflect on the carbonated copies. He conceded that while the mistake could be reflected on the carbonated copies, such mistake would not be reflected on the non-carbonated duplicates because information and data therein would be entered separately. He agreed with counsel for the 2<sup>nd</sup> Petitioner that if serious errors were made on the original, the station or stream would use one of the duplicates to fill in place of the original. He stated that in such instances, there was no need to attach the damaged original because as it was damaged it would not serve any purpose if it were attached as the information was already transferred to the other form.
- 914 Counsel for the 2<sup>nd</sup> Petitioner, observed that Mr. Munkhondya's basis for the non-attachment lacked merit. Mr. Munkhondya was tasked to explain whether damaged originals ceased to be the 2<sup>nd</sup> Respondent's property. Mr. Munkhondya responded by stating that they continued to be 2<sup>nd</sup> Respondent's property in the same manner that spoilt ballot papers were 2<sup>nd</sup> Respondent's property. He qualified that presiding officers could take the damaged result sheets (Form 66C).
- 915 Mr. Munkhondya gave a definition of rigging in the electoral process. He stated that intentional changing of figures with intent to do something constituted rigging. He said that the design of the result sheet (Form 66C) and record log book had nothing to do with rigging. That the logbook was designed to enhance transparency and not to curtail rigging because all events that were occurring at the polling station were to be recorded in the log book. Later Mr. Munkhondya conceded that all parts of the electoral process focused on transparency in order to avoid possibility or suspicion of rigging.

916 Mr. Munkhondya was taken to the National Tally Centre. He stated that his role at the National Tally Centre was to verify result tally sheets that were transmitted from the various Constituency Tally Centres. These were result sheets that had been scrutinized by the Constituency Tally Centre auditors. After verifying the result sheets Mr. Munkhondya would forward them to the Chief Elections Officer for onward transmission to the Commissioners. He was supervising a team. The team would get both the computer generated and the scanned Form 66Cs. These scanned copies were a reproduction of what had been completed by the Presiding Officers. Mr. Munkhondya would compare the data entered on the scanned result sheet and the data on the printed computer generated Form 66C. He was also checking for arithmetical errors. If mistakes were identified, the Form 66C would then be referred to another desk where officers would check with the Presiding Officer or Constituency Returning Officer who would know the origins of the mistake.

917 Mr. Munkhondya stated that the expectation was that the computer generated Form 66C would reflect exactly what appeared on the scanned Form 66C.

918 With regard to the involvement of Commissioners in the process and management of the whole process, Mr. Munkhondya was queried as to whether the result sheets (Form 66C) that he presented in court as his evidence were signed by Commissioners as evidence that they had approved whatever was contained in them. Mr. Munkhondya stated that he was not able to do so. Whereupon he was taken through his result sheets (Form 66C). Result sheets that bore no Commissioners signatures were presented to him. Again scanned result sheets and computer generated result sheets from his HM2 were presented to him and referred to side by side. A look at them showed that there were differences between the data in the scanned result sheet and the computer generated one. He was told that this was evidence that someone was playing around with the figures and that this was rigging as the data in the two result sheets was supposed to be the same. Mr. Munkhondya stated that he could not subscribe to that observation as he could not tell if the figures had been changed intentionally. Mr. Munkhondya did not know where the additional figures which resulted in changes to some of the candidates' votes in the computer generated result sheet were coming from.

919 He was also asked to compare another set of scanned result sheets and computer generated printed result sheets for other polling centres where, on comparison, it was found that the

candidate votes for candidate Chakwera were reduced on the computer generated result sheet. Mr. Munkhondya conceded that the data in the result sheets was supposed to be the same. He was not able to explain the differences and origins of the strange data on the computer generated result sheet. He conceded that the fact that there were differences in data between result sheets which were supposed to contain similar data was a cause that should have moved the 2<sup>nd</sup> Respondent to conduct an inquiry. He said that no inquiry was conducted by the 2<sup>nd</sup> Respondent on the issue.

920 Mr. Munkhondya was also referred to tippex result sheets that contained data that was different from the data of monitors' copies for the same polling station. He stated that all things being equal, the data in the two forms was supposed to be the similar. He stated that he did not know what happened to cause the discrepancy. He confirmed that this was a cause of concern that ought to have moved the 2<sup>nd</sup> Respondent to conduct an inquiry. He stated that the 2<sup>nd</sup> Respondent had not inquired into the same at the time of the declaration of results.

921 Again Mr. Munkhondya was referred to the contention of Mr. Alfandika that the candidate scores did not change during the alteration and tippexing of result sheets if the only part that was tippexed was the statistical part that was labelled A-F. In order to test this theory, Mr. Munkhondya was presented with result sheets which were tippexed and the candidate scores had changed. In other tippexed result sheets, it was actually the candidates' score that was actually tippexed. These result sheets where presiding officers had tippexed the candidates' scores were sourced from Mr. Munkhondya's exhibits.

922 Then he was referred to differences between log book entries and entries on the result sheet (Form 66C). He asserted that according to the polling process, immediately after voting, presidential election stream results were recorded in the log book known as Form 60C. He was shown record log books and computer generated result sheets for the same streams and polling stations. The examination of the two types of result sheets (Form 60C from log book and the result sheet Form 66C). In examining the two result sheets, Mr. Munkhondya acknowledged that there were differences in the numbers. He could not explain the origins of the discrepancies.

923 There were also differences between other record log books and result sheets that (altered Form 66C). He could not explain what happened for the documents that were supposed to contain



similar data to have differences. He said that the 2<sup>nd</sup> Respondent did not do anything to resolve the issue.

924 Mr. Munkhondya was presented with a document from the 2<sup>nd</sup> Respondent that was presented at a meeting/workshop with stakeholders at Crossroads Hotel in Blantyre on 7th March 2019. The document was titled 'Malawi Electoral Commission Result Management System Process'.

925 The notes therein stated under constituency Tally Centre as follows:

'... The system will not allow figures that are not balancing in the statistical data to pass with appropriate messages where errors are.'

926 Mr. Munkhondya acknowledged that the statistical data was in part A-F on the result sheet (Form 66C). He admitted that at this meeting, the 2<sup>nd</sup> Respondent advised stakeholders that the result management system would flag if there was an error.

927 He admitted that the presentation at the stakeholders' workshop made no reference to tippex or alterations. He conceded that considering that the result management system would flag errors, there was no need for the 2<sup>nd</sup> Respondent's officials to use tippex and deface figures. He also conceded that since transparency was a fundamental issue in the whole process, there was no need for anyone to deface figures or tippex numbers. And any tippexing of the part A-F should have alerted the 2<sup>nd</sup> Respondent that something was wrong.

928 Mr. Munkhondya explained that the 2<sup>nd</sup> Respondent undertook a mission in July 2019 to interview presiding officers on issues affecting results. He conceded that the mission should have gone on the fact finding venture before the declaration of results, 27th May 2019.

929 He was again presented with result sheets (Form 66C) from streams where the total number of ballot papers received was exceeded by the ballot papers that were used on the said stream. There were no explanations in the record log books for those streams. His response was that this was not supposed to happen. He could not give an explanation for those discrepancies.

930 Again, Mr. Munkhondya was referred to result sheets that were computer generated as well as their supporting scanned result sheets that contained same data. However, when a comparison

was made between data from those two result sheets and the record logbook's Form 60C, there was no data in the record log book. Mr. Munkhondya had no information on the source of the data that appeared on the computer generated sheet. He conceded that the 2<sup>nd</sup> Respondent had problems in the record log books and result tally sheets. He stated that the problems were not investigated because the 2<sup>nd</sup> Respondent had a busy schedule and it had to ensure that the results were made available in an eight-day period. He stated that the results were announced before the *expiry of the eight days*.

931 Munkhondya was also cross examined by the 1st Respondent's counsel. He was referred to his sworn statement at which he stated that the results of the poll at stream level were to be recorded at the stream log book technically known as Form 66C. He stated that much as this was the case, at instances where the polling station had a single stream, the data was not recorded in Form 60C but it went straight into Form 66C. He agreed with the 1<sup>st</sup> Respondent's counsel that at such instances the primary source of data for such a station was Form 66C. He agreed with the 1st Respondent's counsel that the recording of data in the record log book was done at the same time as the time that any other event was being so recorded. He also agreed with the 1st Respondent's counsel that on multi-stream polling stations, the primary document for recording valid votes for candidate at stream level was the loose Form 60C in the booklet and not the Form 60C from the log book. He stated that the results were recorded in the log book after finishing counting and entering the results in Form 60C of the booklet. And that sequencing of recording was derived from the Polling Procedure Manual.

932 In re-examination, Mr. Munkhondya was once again referred to paragraph 9 of his sworn statement. He elaborated that his assertion that the 2<sup>nd</sup> Respondent was in full compliance with the *Constitution and the law* was premised on the fact that conducting elections was a complex undertaking and much as the 2<sup>nd</sup> Respondent was to strive to attain one hundred percent perfection, there could be one or two issues that might not go according to plan, but if these unforeseen issues were to happen they would have no bearing on the outcome of the result.

933 The outcome of the May 2019 election was that it was executed according to plan according to the 2<sup>nd</sup> Respondent's expectation and the 1st Respondent was the winner.

934 Mr. Munkhondya stated that the 2<sup>nd</sup> Respondent did not throw away the votes that were altered on duplicate forms or fake forms because it instituted a vigorous verification exercise where

the polling staff as well as monitors from political parties were contacted. Verification was also done at the Constituency Tally Centres and at the National Tally Centre and the 2<sup>nd</sup> Respondent was satisfied that the results that it declared were a true reflection of what happened at each polling station. He also stated that the 2<sup>nd</sup> Respondent could not dispose of such votes as the voters' rights were in issue. That the voters went to vote in order to choose their leaders and the fact that something went wrong through use of tippexing or alterations should not have affected the voters' right to vote. He stated instances where the 1st Petitioner challenged the valid vote count in Mzuzu City which error was rectified by the 2<sup>nd</sup> Respondent. In that case the 1st Petitioner's votes had been reduced at counting.

935 Mr. Munkhondya stated that in the verification exercise, record log books were not inspected at the National Tally Centre. In verifying, they referred to the scanned result sheet Form 66C and the computer generated ones. As to the manually filled result sheet of Kayuni School, it had no alterations and monitors appended their signatures hence the monitors confirmed that the results were correct. In such circumstances, there was no need to correct or check in the record log book.

936 Mr. Munkhondya stated that there was a total of 11,095 streams in the country and the manually originated result sheet originated from only one stream where 610 ballots were in issue. He indicated that even if 610 votes were given to the 2nd Petitioner, he would not have won the election.

937 He referred to tippex that was used on stream results (Form 66C) and stated that this was used to correct mistakes and the results were authentic as monitors appended their signatures. He referred to the stream results where the 2nd Petitioner had observed that a comparison of the monitors' copies and the scanned result sheets from same polling stations indicated that the 2nd Petitioner's votes had been reduced. He stated that monitors signed its content. With regard to the result sheet and record log book which originated from the same polling station stream and the data in the two documents being different, he retorted that record log books were not intended to reach the National Tally Centre, and the only document that was so intended was the document that was duly signed by monitors. He also stated that much as the 2nd Petitioner was lamenting, the vote difference was only ninety-eight (98) and even if this 98 was given to the 2<sup>nd</sup> Petitioner, he would not have won the elections.

- 938 He referred to the occasions where the 2<sup>nd</sup> Petitioner's votes were altered on Forms 66C and 72C and speculated that this happened because the count on the stream level on the null and void votes was revisited by the Presiding Officer and such votes were admitted by the Presiding Officer.
- 939 During cross examination, Mr. Munkhondya was asked questions with regard to alterations that appeared on result tally sheets and he said that these alterations were made to correct mistakes. He also said that whilst the Petitioners presented monitors' copies in court to challenge the data on some tally sheets, these monitors' copies were never presented before the 2<sup>nd</sup> Respondent for it to compare the data at the time of the election.
- 940 As to the result sheet of Luwawa School which had blank scores in figures and words for Professor Mutharika, no complaint was lodged at the National Tally Centre on the same. Again no monitor signed for it so it was not possible for their verification table to follow up on the same.
- 941 Mr. Munkhondya also responded to the observation by the Petitioners that the votes on particular streams were different between the data of computer generated result sheets and the data on result sheets that were manual and had been scanned into the system. He picked out Kaviwale and stated that the total that were cast at stream were 582 and that even if they were to be added to the 2<sup>nd</sup> Petitioner, the 1<sup>st</sup> Respondent would have still been leading.
- 942 He stated that the 2<sup>nd</sup> Respondent still considered results from tally sheets where the figure did not match or balance because there were various issues that contributed to the mismatch. These included voters taking ballots home, a printer printing more or less ballots than the expected number on a bundle.
- 943 As to the statement that some figures on the result tally sheet were supposed to be constant, he retorted that this was an assumption and assumptions were not applicable in elections.
- 944 He also referred to the observation by the Petitioners that at Assembly Chamber Centre in Ntcheu, the computer generated result tally sheet had five stream while the scanned results tally sheet had six streams, Mr. Munkhondya stated that this happened because, in the creation of polling stations, they created 'established' centres and 'non established' or satellite centres.

Prisons were in the category of non-established or satellite centres. And upon finishing voting at prison, no counting was done. Everything was taken from the prison to the established centre where counting was done together with the proceedings of the established centre. The established centre, Assembly Chamber Ntcheu had five streams. The additional materials from the prison, necessitated creation of a new stream. This was reflected on the computer generated form hence the appearance of six streams. He stated that this was normal as results from prison satellite centres were not announced at such centres to maintain their secrecy of ballot. He stated that this process applied to all districts that had prisons.

945 He referred to the 1<sup>st</sup> Petitioner's cross examination bundle and the observation that a total of 188,172 valid votes were affected as a result of record of fake tally sheets. Mr. Munkhondya stated that he disagreed with the observation.

946 As to the 1st Petitioner's observation that a count of Mr. Munkhondya's results sheets that were in his exhibits reflected that 524,340 votes were affected as a result of the tippex, Mr. Munkhondya stated that he had a problem accepting the figure since he did not participate in the count.

947 With regard to the observation that 1,120,104 votes were affected because of result sheets that were not signed by presiding officers. He stated that the 2<sup>nd</sup> Respondent received no complaint that presiding officers had failed to sign result sheets. He also stated that much as presiding officers had not signed, monitors appended their signatures and these results were verifiable.

948 As to Commissioners' non-appearance in court, he said that he did not take part in the decision that Commissioner Dr Mathanga should not testify in this matter. He also stated that the forms and data that he presented in court would not have been different if Commissioner Dr Mathanga was the witness.

949 As to the format of various documents that constituted Form 66C (thus originals, carbonated copies duplicates), Mr. Munkhondya stated that the presidential candidates herein as well as their political parties had representatives (monitors) in Dubai at the printing press. Hence these representatives (monitors) who went to Dubai knew about the design of Form 66C. The team that went to Dubai was also conversant with the log book. There was therefore no need for the 2<sup>nd</sup> Respondent to engage stakeholders in a meeting after Dubai. As for the duplicate

watermarked result sheets (duplicate Form 66C), the introduction of the same originated from political party monitors hence all political parties were aware of the same. He was surprised that the Petitioners were bringing these documents to protest the vote count as they never brought any alternative figures to contradict the 2<sup>nd</sup> Respondent's information.

950 He referred to the statutory Form 6. He stated that apart from the issue of dealing with so many polling staff signing the form, no information that was in Form 6 was left out in the design of Form 66C and the record log book. He said that in fact the record log book had a provision for polling staff.

951 On the role of monitors in the electoral process, Mr. Munkhondya stated that political parties were the principals for monitors. And as principals the political parties were responsible for the monitors' diligence at the polling stations. *These monitors were allowed to witness counting to enhance transparency in the process and bring credibility on the outcome of the results. They signed the result sheets to confirm that the results originated from a particular polling station.*

952 As to the introduction of streams in the 2019 election, Mr. Munkhondya stated that this was an administrative arrangement that was intended to speed up the voting process.

953 On auditing of results, he said that the result sheets underwent audit verification from the constituency level. *There were also auditors at the National Tally Centre who were verifying with their counterparts at constituency level on validity of results.*

954 Mr. Munkhondya said that result sheets would go to the Commissioners as hard copies and not in an electronic form.

955 With regard to the introduction of Constituency Tally Centres, he stated that no political party protested against their introduction.

956 With regard to the BDO audit report that stated that presiding officers were followed to their homes to sign result sheets, Mr. Munkhondya stated that such results were not challenged by monitors in terms of the validity of the candidate vote count. On the issue that BDO auditors did not verify the 2<sup>nd</sup> Respondent's result and that they had rejected result sheets that were

tippexed and altered, Mr. Munkhondya stated that there was no law that empowered auditors to make decisions hence had no power to reject result sheets.

957 As to lack of other polling staff's signatures on the Form 66C, Mr. Munkhondya stated that these were present as a requirement from the 2<sup>nd</sup> Respondent. Lack of their signatures was not an issue as monitors signed such results.

958 With regard to the corrections, alterations and tippexing of result sheets at the Constituency Tally Centre in the absence of monitors, Mr. Munkhondya repeated that there were political party monitors at Constituency level as well as stakeholders that witnessed the same. Thus much as polling station monitors were absent, this did not affect the credibility of the results.

959 Mr. Munkhondya referred to the assertion by the Petitioners that a ballot paper was a potential vote and stated that much as the same was said, if it was a potential vote, then one would not know the beneficiary of such a potential vote. Mr. Munkhondya stated that the existence of extra ballots or the missing of ballots had no impact on the valid vote count.

960 He referred to the 2<sup>nd</sup> Respondent's presentation at Crossroads Hotel where stakeholders had been assured that there would be no changes to the statistical part A-F of the result Sheet (Form 66C) and commented that the form did not matter as long as monitors signed and authenticated the results.

961 On accessing the log books at the National Tally Centre during the verification, Mr. Munkhondya stated that the National Tally Centre had no access to log books because log books remained at the Constituency Tally Centre.

962 In concluding Mr. Munkhondya said that all complaints that were presented to the 2<sup>nd</sup> Respondent were responded to before the 2<sup>nd</sup> Respondent announced the results.

*Mr. Muhabi Chisi*

963 The 3<sup>rd</sup> Respondent's witness was Mr. Muhabi Chisi. He stated that he was the Director of Information and Communication Technology at the 2<sup>nd</sup> Respondent.

964 As Director of ICT he was responsible for the management of the Results Management System.

965 He stated that the May 2019 elections were managed, processed and determined by the 2<sup>nd</sup> Respondent in accordance with the Results Management System.

966 After development, the Results Management System was shared with and vetted by all electoral stakeholders including the representatives of the Petitioners.

967 During development and before finalization, it was presented to all stakeholders for familiarization and to solicit input from the stakeholders.

968 Mr. Chisi provided an outline of the Results Management System as was used by the 2<sup>nd</sup> Respondent to process and determine the results and the same was exhibited hereto marked "MC 1"

969 The results as announced by the 2<sup>nd</sup> Respondent were as transmitted in the manner described in the Results Management System. He contended that the system did not encounter any significant challenge that would have affected the outcome of the results.

#### *Simulation of eRMS by Mr Chisi*

970 He demonstrated that the 2<sup>nd</sup> Respondent's eRMS consisted of two parts, namely, the biometric kit side and the server side located and used at the constituency tally centre and the National Tally Centre respectively.

971 He then confirmed that the kit is the point at which technology is introduced in the 2<sup>nd</sup> Respondent's Results Management System. He added that this was the only point at which data was entered in the eRMS and that data came from Form 66C.

972 He demonstrated that the capture of data on the kit was done offline and a connection to the web service was only needed when an ICT officer pressed the data transmission button and that connection closed immediately the transmission was complete and the kit went offline again. He added that the kit connected to the web service using Microsoft Windows Communication Foundation (MS WCF).



- 973 He explained that the software that run on the kit was windows based and did not operate on ASP.NET which run on the server side.
- 974 He demonstrated that each kit was pre-set to a particular constituency tally centre, totalling 193. For four overlapping wards for the Local Government elections a kit was set to each of those overlapping wards for that election. He showed the example of Blantyre City West and Lutchenza Municipality which straddled Mulanje and Thyolo. He also mentioned Lilongwe City North and Mangochi Town.
- 975 He then showed that there were already set on the kits 34 IT officers, as initial users with administrator rights from the 2<sup>nd</sup> Respondent's head office. These 34 users then added or removed new users on the kits who were polling equipment operators (PEOs) and auditors in the field. He showed that there would be set PEOs as capture 1 and capture 2 and the auditor as verifier on each kit. He stated that PEOs used their national IDs as usernames and supplied a password to access the system. He added that external auditors were not employees of the 2<sup>nd</sup> Respondent and used either a national ID or an email address as a username and also supplied a password to access the system.
- 976 He demonstrated on the eRMS how a result was captured. He used a slot for the parliamentary election for Lilongwe South as that was the only slot available on the eRMS since data could not be rolled back on any presidential election slot and the parliamentary election slot in question had no data since the election did not take place for that constituency.
- 977 He showed how one polling centre result was captured. The Presiding officer would hand over Form 66C to a constituency returning officer and who would then record the results onto Form 71C for the constituency. Then the constituency returning officer would hand over the Form 66C to an external auditor who would check the Form 66C and then hand it over to Capture 1. Capture 1 would log onto kit and scan Form 66C. Then capture 1 would enter the data on Form 66C onto the kit and log off. Capture 2 would log onto the kit and capture the Form 66C data again. Data captured by capture 1 and capture 2 must be the same and Capture 2 would log off if that was done or otherwise they would keep logging in and capturing the result until data matched. Once entries were the same, capture 2 would print out what had been captured.

- 978 He indicated that if there were unresolved complaints requiring the 2<sup>nd</sup> Respondent's attention, these would be scanned and saved after capture 2 had saved and printed the captured Form 66C result but before the auditor verified the result. The print out would be given to the auditor and capture 2 would log off the kit. He showed that the auditor would then cross-check the print out given to him against the handwritten Form 66C to ensure that all entries had been captured correctly. If the auditor noted anomalies he would instruct the data capture 1 and 2 to correct the anomalies.
- 979 He showed that if all entries tallied then the auditor would log onto the kit and confirm the Form 66C result in the system. He added that once the auditor confirmed the result in the system that result would be locked and no further changes could be made to those entries. Then either capture 1 or capture 2 could log onto the kit and transmit the result using either TNM or MTL as primary and secondary web service provider respectively.
- 980 He then demonstrated how the same process would be undertaken to capture multiple Form 66C results and print the multiple captured Form 66Cs. Further, that the auditor may decide to check each entry in the kit one at a time and approve one at a time or they may cross check several results printed on paper and confirm their correctness and then log onto the kit and verify them in quick succession. He also showed that capture 1 or 2 would transmit each captured result individually after the auditor verified it or they could wait for the auditor to verify several results and then transmit them all at once at a click of the button after selecting the said multiple results.
- 981 He then demonstrated the server side that was used at the National Tally Centre. He showed that the software used was a web application that run on an internal local area network. He connected and displayed a dashboard displaying graphs of all centres for which results had been uploaded to the server at the National Tally Centre after successful result transmission. He showed that it printed the scanned and captured results which were taken to the 2<sup>nd</sup> Respondent's senior officers for endorsement and thereafter to the auditors for approval and endorsement and finally to the Commissioners for determination and approval. Once Commissioners determined and signed the results these were the approved results which were given to the IT people to update in the eRMS.

- 982 He showed further, that server side would produce various reports of results at polling station, constituency, district and national level. It showed update of status of approved results and displayed results. These approved results he said were taken from eRMS in a hard drive to the website consultant for uploading and display on the 2<sup>nd</sup> Respondent's website and so there was no direct connection between eRMS and website for security reasons.
- 983 He then indicated that everything on the server was installed on top of the operating system which was Microsoft Windows Server 2016, 64 bit Operating System which had the capability of keeping event logs of all activities happening on any layer above the operating system.
- 984 He then stated that the 2<sup>nd</sup> Respondent used MS SQL Server 2014 as its relational database for the entire eRMS. He explained that this meant data values in a given row of a table in the data base were related. He however stated that *not all tables needed to be joined in the database for it to qualify as a relational database and that it was possible to have stand-alone tables known as independent DBMS working tables such as 'known kit' table in the 2<sup>nd</sup> Respondent's schema.*
- 985 He then stated that the 2<sup>nd</sup> Respondent used batch update query to update status of approved results in the database. He explained that a query was a statement requesting retrieval and update of information. He indicated that although SQL executed the foregoing query it did not support actions such as input from users, output to displays or communication over network hence use of application programs such as RMS.
- 986 He then stated that the eRMS application on the server side was developed using ASP.NET framework. He added that the following tables were automatically created by default by the system as follows. AspNetUsers table, which the 2<sup>nd</sup> Respondent used to hold user account information on the server side in the past election. He then stated that it used email addresses as usernames for unique log in identifiers. He added that this was an industry standard since email addresses were unique and identifiable. He clarified that there was no relation and connection between the email box of the email account and the eRMS. Next, was the AspNetRoles table which was used to hold information about user roles for the past election on the server side which roles included viewer, printer, approver, administrator and CanVoid. He added that a user could be assigned more than one role in the eRMS.

- 987 He then stated that there was the `AspNetUserRoles` table that held information about identity of users and corresponding identity of the roles they were to perform in the eRMS. Then there was the `AspNetUserLogins` table that was used to hold information about third party or external login providers like google for external authentication which table he said was never used for security reasons and that table was empty. He also referred to the `AspNetUserClaims` table which held alternative login (claims) information about users and he said this table was never used.
- 988 He then demonstrated that there was a `StreamResult` table that contained data of transmitted results for each stream and the `resultsetstatus` of results change from initial 4 to 20 when approved results were updated through the eRMS. He showed that any changes in this table automatically fired a trigger to write a new entry in the `Audit StreamResultTable` which tracked and recorded any changes such as insertion, update and deletion done on `StreamResultTable`.
- 989 He then showed that there was the `StationResult` table which contained data transmitted for each polling station and that the `ResultSetStatus` of results in this table changed from 4 to 20 when the approved results were updated in the eRMS. He showed that any changes in this table, *being insert, update or delete automatically fire a trigger to write a new entry in the AuditStationResult table which tracks and records any changes done on the StationResult table.*
- 990 He then showed the `ResultSet` table which was the main table that contained data of transmitted polling stations, the kit that captured the results, capture staff, auditors, date of capture, date of edit, date of approval and users who had updated the results in the system. He showed that the `ResultSetStatus` of results was changed from 4 to 20 when approved results were updated through the eRMS or through batch processing. And changes made in that table being insertion, update or delete would automatically fire a trigger that would write a new entry in the `AuditResultSet` table which recorded and tracked such changes.
- 991 He showed an `Operators` table that showed the kit administrators for the eRMS set on every kit but not the field operators and auditors.
- 992 He then showed the `AutoApproval` table which he said was created to keep track of a list of all polling stations whose results had been updated using batch query only for the presidential election. That it was a counter. He showed that the `resultsetstatus` also changed from 4 to 20

once approved results were updated by batch query. He added that the batch query was run at 35%, 75% and 100 % and that the autoapproval1 table contained records of batch 1 at 35% and batch 2 at 75% and no candidate results.

993 He showed the result of a query on update of approved result in the eRMS for a single result. It showed tables affected, that is, stream result, station and result set table. Then he showed the result of a query on batch update and how it affected the other tables. The batch update only updated the ResultSetStatus table column only from 4 to 20 and created a new record in its corresponding audit table but did not update other tables related to results such as UpdateUser column, that is the name of the one doing the update hence unknown or 'ghost' user from batch query. He then stated that using Windows security log files the user that executed the batch processing query could be pinpointed using the event log in ID 4672 that was logged on at the time of execution of the batch query. He stated that the batch update was used by the Administrator to make sure approved results were available to the public much quicker the same having been approved in large volumes by the 2<sup>nd</sup> Respondent at that stage after the initial 156 approved results were updated slowly using the single entry method. He added that using the audit trails each and every result could be tracked as to when it was captured, verified and transmitted and by who.

994 He showed the result of a query for all results for the 5002 polling stations and that anyone could see all the results on the 2<sup>nd</sup> Respondent's website and compare the scanned Form 66C to the computer generated Form 66C. He concluded that the eRMS effectively and successfully delivered its objective. He showed that one kit could have results from two local government elections wards and also used in those such places by a single kit operator. He explained batch approval and transmission of results from the constituency tally centres to the National Tally Centre. He also showed that the batch approval of results was done at the National Tally Centre by the so called unknown user or ghost user who was an Administrator of the 2<sup>nd</sup> Respondent's eRMS. He also showed that all changes on results could be tracked in the eRMS. Further, that all the polling station results were in the eRMS. He explained the use of personal emails on the Government eRMS. He also showed that Commissioners had no role in the eRMS. He also showed that there was no data in AspNetUserLogins table as alleged by Mr Suleman as that was never used for security reasons. He however did not dispute the lack of segregation of roles and accountability, for instance, on use of one default user account 'sa' and 'Administrator' whose passwords were known by several IT officers of the 2<sup>nd</sup> Respondent as alleged by Mr

Suleman. There was room for compromise there since any of those officers would log into the system without being known.

## THE EVIDENCE OF POLLING STATION PRESIDING OFFICERS

### *SWORN STATEMENTS OF PRESIDING OFFICERS.*

995 There were over 600 presiding officers who responded to the allegation that they had used duplicate, spoiled or altered result sheets. They filed their sworn statements. The Petitioners opted to not cross examine them. With regard to tippexed result tally sheets a total of seventy-five tally sheets (Form 66 C) were tendered.

996 The presiding officers admitted using tippex on the Forms as they had made mistakes on the reconciliation part of the Form. In other instances, the tippex was used to make corrections on the candidate valid vote part. Such corrections were made against the votes of any of the three candidates. Others were made in the column that dealt with the total of candidates votes.

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
1	Dines Walter	Bwaila School	Zomba Central	Zomba	He tippexed the result sheet because the figures were not reconciling
2	Cidreck Charitable	Chinyaza	Zomba Chingale	Zomba	He used tippex to reconcile the figures on the top part.
3	Misonzi	Masangwa Primary	Mulanje North	Mulanje	He used tippex to reconcile figures
4	Cold Beyazi		Kanyandula FP School	Mchinji	He used tippex to reconcile figures.

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
5	Syllex Ashanti	Mphalabungu FP School	Mchinji South	Mchinji	He used tippex to reconcile figures
6	Owen Kamzati	Sundwe FP School	Mnchinji East	Mnchinji	He used tippex to reconcile the figures. Reconciliation was done at the Constituency Tally Centre
7	William Machili	Chitipi School	Lilongwe Nsinja	Lilongwe	He used tippex to make corrections to ballots
8	Bananas Pelekamoyo	Chiulongo School	Lilongwe	Lilongwe	He used tippex to make corrections on ballots
9	Baxietone Jailosi Mkuzi	Kaluwanya	Lilongwe	Lilongwe	He used tippex to make corrections on the reconciliation part
10	Chiwewe	Kachere CBO	Lilongwe North West		He used tippex to make corrections
11	Clifton Philip	Njoka Primay			He used tippex to make corrections
12	Philip Salle	Machete School	Chikhwawa		He used tippex to make corrections
13	Kambani these	Ndalapa FP Scholl	Chikhwawa		He used tippex to make corrections

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
1	Allan Magwaza	St Augustine III	Mangochi		He used tippex to make corrections on the ballot reconciliation
15	Martin Kanyoza	Kaloka	Mangochi		He used tippex for ballot reconciliation
16	Godfrey Julius	Nambande	Mangochi		He used tippex for ballot reconciliation
17	Akon da Mtonga	Ndengu	Mangochi		He used tippex to make corrections on figures
18	Eric Maloya	Unga II	Mangochi		He used tippex for ballot reconciliation
19	Philemon Imwa	Chip ode	Mangochi		He used tippex to make corrections
20	Eric Lupoka	Ntanga	Mangochi		He used tippex to make corrections.
21	Eunice Lysol	Chinam a	Mangochi		He used tippex for ballot reconciliation
22	Antony	Changausya	Mangochi		He used tippex for ballot reconciliation
23	Jillian	Changwale	Mangochi		He used tippex for ballot reconciliation
24	Todesia Kanzule	Makwerani	Mangochi		He used tippex to make corrections



No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
25	Ephraim Kaunda	Majuni	Mangochi		He used tippex to make corrections
26	Esmie	Namisi	Mangochi		She used tippex for correction of candidate vote figures and for ballot reconciliation
27	Mphatso	Malunga	Mangochi		He used tippex for correction of candidates figures
28	Barnard Dillie	Chingwenya	Mangochi		He used tippex to make corrections
	Charles Mkunga	Milimbo	Mangochi		He used tippex to make corrections
29	Angelina	Lungwena	Mangochi		She used tippex to make corrections
30	Felix D	Malombe	Mangochi		He used tippex to make corrections
31	Lester Kananji	Chose			He used tippex to make corrections
32	Master Mlauzi	Boola	Mangochi		He used tippex to make corrections
33	Jump Kafera	Mtimabi	Mangochi		He used tippex to make corrections

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
34	Clement Kasiya	Kadyangunde	Mangochi		He used tippex to make corrections on the candidate votes part and for ballot reconciliation
35	Eric Lupoka	Ntanga	Mangochi		He used tippex to make corrections on candidate votes part
36	Abdul A	Mlenga	Dedza		He used tippex to make corrections
37	Henry Manda Chilota	Chiphe	Dedza South		He used tippex to make corrections
39	Hardwick	Mlewa	Dedza East		He used tippex to make corrections candidates votes
40	Patricia	Mlewa	Mzimba West		She used tippex to make correction on candidate scores
41	Thomas	Mangombera	Mzimba West		He used tippex for ballot reconciliation
42	Argent	Enkondhlow c	Mzimba West		He used tippex for ballot reconciliation
43	Christopher	Nthumba School	Mzimba Hora		He used tippex to correct an error on candidate scores

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
44	Samuel	Namilembe	Nsanje North		He used tippex to correct an error
45	Christopher	Chikale School	Nsanje North		He used tippex for ballot reconciliation
46	YesaAyala	Mpembamoyo	Nsanje North		He used tippex for ballot reconciliation
47	Francis	Mchacha School	Nsanje North		He used tippex for ballot reconciliation
48	Gracc Maya	Nantibule	Nsanje North		She used tippex for ballot reconciliation at the Constituency Tally Centre in the absence of polling station monitors.
49	Macknight Manyasa	Kholoni School	Mnchinji South West		He used tippex for correction of errors and ballot reconciliation at the CTC
50	Henry	Namnjiwa	Mnchinji South		He used tippex to reconcile
51	Ackelo	Chakudza	Mnchinji		He used tippex to correct errors and for ballot reconciliation. Ballot reconciliation was at the CTC

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
52	Charles	Chandwe	Mnchinji South		He used tippex for ballot reconciliation and to correct candidate votes
53	Helemon	Kamwanya	Mnchinji South		He used tippex for ballot reconciliation at the CTC.
54	Alexus	Dole F P School	Lilongwe South		He used tippex to correct candidate votes and for ballot reconciliation at the CTC
55	DAVIS Chatsali	Chiweza Primary	Lilongwe South		He used tippex to make corrections
56					
57	Frank MD Philip	Patsankhondo	Lilongwe		He used tippex for ballot reconciliation
58	Francis MAWERE	CHIMBALU	Ntchisi		He stated that he never used tippex.
59	Stanford Lifa	Mathiyal	Thyolo		He used tippex to correct a mistake on transferring data from Form 60C
60	BASIAN	GOMBE SCHOOL	Thyolo		He used tippex to correct mathematical errors,

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
61	Geoffrey Makie	Namaona	Thyolo North		He used tippex to make corrections on figures that were not correctly captured on transferring data from Form 60C to form 66C.
62	William Mbulle	Nsanje Polling Station	Thyolo		He used tippex to make alterations to capture figures on Form 66C from Form 60C
63	Jonnie Ching'oma	Naphiyo School	Thyolo North		He used tippex to capture correct figures .
64	Alick Bamusi	Namiwawa School	Thyolo		He used tippex to make corrections as he had put wrong figures when transferring data from Form 60C.
65	Davie Makwangwala	Mkaombe School	Thyolo		He used alterations to balance figures on candidate scores.
66	Judith Luhanga	Sakwi School	Salima Central		She used tippex to correct mathematical errors on candidate votes

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
67	Paul Banda	Mikute School	Salima Central		He used tippex to correct mathematical errors
68	Thomas Chauluka	Kulanga School	Ntcheu Bwanje North		He used tippex to erase alterations
69	Isaac Zatha	Chapita School	Salima South		He used tippex for alterations to candidate scores.
70	Charity Chitwere	Chilembwe School	Kasungu East		He used tippex to correct mistakes on the Form 66C
71	Bryson Majawa	Nkapalira I Primary School	Machinga Central		He used tippex to correct mistakes on the administrative/ reconciliation of ballot part
72	Bernard Mtalimanja	Joho School	Machinga Central		Tippex was used at CTC to correct genuine mistakes in the absence of polling centre monitors,
73	Asima Chisambula	Kanjedza School	Machinga Central		Tippex was used at CTC to correct genuine mistakes.
74	Snowden Linje	Manila Trading Centre	Machinga Central		Tippex was used at CTC to correct genuine mistakes

No	Name of Presiding Officer	Polling Station	Constituency	District	Remarks
75	William Sandram	Chilala School	Machinga Central		Tippex was used at the CTC on the ballot reconciliation part to correct mistakes.

997 Presiding officers who did not sign on the forms also filed their sworn statements. In most cases they stated that they did not sign because they were overwhelmed as there were many documents that they were required to sign. Others did not sign because of fatigue. The list of these presiding officers is as follows:

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
1	Bennett	Mbavi FP School	Lilongwe Kumachenga	He forgot to sign
2	Stonard	Namvuu JP School	Nkhotakota South East	He forgot to sign
3	Kizito Mutawo	Chapman F P School	Nkhotakota South East	He forgot to sign
4	Wyson Phiri	Phakwe FP School	Nkhotakota North	He forgot to sign as he was overwhelmed with work
5	Chimwemwe Cosmos	Muyande School	Nkhotakota South East	He forgot to sign

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
6	Humphrey B Mkupu	Chamchenga Primary School	Nkhotakota South	He forgot to sign
7	Peter Kazalera	Kanjedza	Mwanza Central	He forgot to sign
8	Arton	Kahoolawe	Mwanza West	He forgot to sign
9	Evance Phiri	Mwanza	Mwanza Central	He forgot to sign
10	Emma Gowu	Mphete	Mwanza Central	She forgot to sign
11	Joseph Tsikulimodzi	Mph and a	Mwanza Central	He forgot to sign
12	Fuckson Tengeletu	Kadakatali Primary School	Lilongwe North East	He forgot to sign
13	Watson Malachi	Nkhwanzi	Mchinji South	He forgot to sign
14	Patrick Kapalamula	Buluzi	Lilongwe Central	Inadvertently did not sign
15	Baxieton Jailosi Mkuzi	Kaluwanya Village	Lilongwe North	Was not fine and his assistant signed
16	Sangakakutaye	Migowi School	Phalombe Central	Had too many documents to sign
17	Philip Salle	Machete	Chikhwawa South	By inadvertence
18	Thanes	Namphungu	Blantyre North East	Inadvertent omission
19	Jane Phiri	Bangwe	Blantyre City South	Inadvertence
20	Robert Malola	Mpinganjira	Mangochi Central	Did not sign



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
21	Statulo Mwanja	Umbwi	Dedza South East	He forgot to sign
22	Fair Gubudu	Msunduzi	Dedza West	Forgot to sign as she was tired
23	Jones Mfungwe	Chi wire	Karonga North	Forgot to sign
24	Mathias Mwamughunda	St Mary's	Karonga North West	He forgot to sign
25	Daniel	Zuba Chulu	Mzimba South	He forgot to sign
26	Martin Nyirenda	Kabowozga	Mzimba Hora	He forgot to sign
27	Steven Mandingo	Chizima	Mzimba South West	He forgot to sign
28	Ted Chenjerani	Kaka School	Mzimba South West	He forgot to sign
29	Johntone	Matembe	Mzimba South West	He forgot to sign
30	Motto	Mjinge	Mzimba South West	He forgot to sign
31	Mc Bisias	Mtukwa	Mchinji South West	He forgot to sign
32	Kambalame	Kamwana	Mchinji	He was overwhelmed with work and forgot to sign

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
33	Maganizo Kapinga	Mankhamba II	Thyolo West	He forgot to sign as he was overwhelmed with work
34	Laston Mbewe	Meanm a	Thyolo West	He forgot to sign due to pressure of work
35	Mikeus Mandanda	Namitu	Thyolo West	He forgot to sign
36	Bosman Mwale	Chinsikha Centre	Thyolo West	He signed though the one presented showed otherwise.
37	Austin Finyamowa	Mpeni School	Thyolo North	He forgot to sign
38	Maxwell Kazembe	Ndayandika	Thyolo Thekerani	Inadvertent omission
39	Fabiano Nkaombe	Nkhwali School	Thyolo West	He forgot to sign due to pressure of work.
40	Cosmas Jamu	Bvumbwe CDSS	Thyolo North	Inadvertently omitted to sign
41	Precious Fandika	Chikopa	Ntcheu North East	Forgot to sign

*Alterations on the Result Tally Sheet (Form 66C)*

998 Presiding officers who made alterations on the result sheet (Form 66C) also filed their sworn statements. They indicated that they made the alterations to reconcile the number of ballot papers. These changes were made at the Constituency Tally Centres where they were advised

to change the same so that the figures on their tally sheets could be accepted in the system as the system was refusing to transmit their data to the National Tally Centre. They were advised by the PEOs that alterations should not affect the Total Candidate results as well as each candidate vote. Some entries (at least 4) were at the polling station as the results had not been properly transferred from Form 60 onto Form 66. They stated that the alterations were made in good faith.

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
1	Moffat Chavula	Kaulasasi	Nkhata Bay North	Made alterations in order to reconcile figures
2	Patricia Mpapa	Mpingu Primary	Lilongwe South	Made alterations to reconcile figures
3	Marietta Jafolo	Msunga South	Lilongwe South	Made alterations to reconcile figures
4	Glad son Chipyola	Mpondamwala Primary	Lilongwe North	For purposes of reconciliation
5	Grace Kafotokoza	Shire Urban FP School	Lilongwe	To reconcile number of ballot boxes
5	Liviness Chimbayo	Chinsapo LEA School	Lilongwe City West	To reconcile ballot numbers
7	Frida Mwalwafu	Ngwenya LEA School	Lilongwe City South	To reconcile number of ballots.
8	Bennet Kapinda	Mbabvi F P School	Lilongwe Kumachenga	To reconcile number of ballots
9	Rose by Kasakula	Mpungu Primary	Lilongwe City Centre	For purposes of reconciliation of ballot papers

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
11	Huxley Tundulu	Malingunde F P School	Lilongwe	For purposes of reconciliation of ballot papers
12	G L Peter	Kalesi FP School	Nsanje South	To reconcile number of ballot papers
13	Joyce Chitsulo	Chi samba F P School	Lilongwe City South	To reconcile number of ballot papers
14	Christo	Tsabango CDSS	Lilongwe South	To reconcile number of ballot papers
14	Rose Chigeda	Kaufulu F P School	Lilongwe City South	To reconcile number of ballot papers
15	Evance Nombo	Liwaladzi Primary School	Nkhotakota North	To reconcile number of ballot papers
16	Bright S Kamanga	Kaongozi FP School	Nkhotakota	To reconcile number of ballot papers
17	Benson Kawanga	Chivume F P School	Nkhotakota	To reconcile number of ballot papers
18	J Geoffrey	Dwambazi F P School	Nkhotakota	To reconcile number of ballot papers
19	Ethel Mwase	Nkhotakota Community	Nkhotakota	To reconcile figures
20	Reward Manda	Linda CDSS	Nkhotakota	To reconcile figures
21	Bene	Dwangwa JP School	Nkhotakota	To reconcile figures

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
22	Matus Banda	Matumbi Primary	Nkhotakota	To reconcile figures
23	Dickson Gomani	Ntonda Station	Zomba	To reconcile figures
24	James Khando	Chancellor College	Zomba Central	To reconcile figures
25	Damian Nkhona	Matiya Primary	Zomba Central	To reconcile figures
26	Vuto Chikoko	Namitoso F P School	Zomba	To reconcile figures
27	Issac Palero	Mpotola F P School	Zomba Central	To reconcile figures
28	Duncan Chingoli	Msambaisa	Zomba Malosa	To reconcile figures
29	Annex Misewu	Mbidi F P School	Zomba	To reconcile figures
30	Lloyd Ndlovu	Chinamwali Centre	Zomba Central	To reconcile figures
31	Davis Phiri	Zomba CCAP	Zomba Central	To reconcile figures
332	Paul Kanyani	Milare School	Zomba	To reconcile figures
33	Dick Banda	Misangu	Nsondole	To reconcile figures
34	Nancy Bulirani	Mnchengawedi	Zomba Malosa	To reconcile figures
35	Philip Kambwiri	Zaone Trading	Zomba Ntonya	To reconcile figures
36	Calvin Malimero	Guta	Zomba	To reconcile figures
37	Fredrick Mphepo	Ntanangala	Zomba	To reconcile figures

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
38	Bright Mphelo	Chikamveka F P School	Zomba Central	To reconcile figures
39	Haswell Chakuonamasi	Mteka LEA School	Mwanza	To reconcile figures
40	Dismas Nkhoma	Chidoole School	Mwanza	To reconcile figures
41	Moses Chidoma	Michiru F P School	Mwanza	To reconcile figures
	Daiseni Phiri	Namiwawa F P School	Mwanza	To reconcile figures
42	Patrick Nyimbi	Lauderdale	Mulanje South	To reconcile figures
43	Dailesi Tewesa	Sikoya	Mulanje	To reconcile figures
44	Bishop Chibalo	Nsanjama	Mulanje West	To reconcile figures
45	Hilda Matamba	Ulongwe Model	Chisitu	To reconcile figures
46	Henry Mhone	Nkhonzo School	Rum phi	To reconcile figures
47	Smith Ng'oma	Chimyanga	Rumph east	To reconcile figures
48	Chima	Chuba Primary	Chitipa East	To reconcile figures
49	Martha Chitimbe	Kamwendo	Mnchinji	To reconcile figures
50	Syllex Ashanti	Mphalabungu	Mnchinji South	To reconcile figures
51	McOld Beyazi	Kanyindula FP School	Mnchinji South	To reconcile figures
51	Owen Kamzati	Sundwe FP School	Mnchinji East	To reconcile figures

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
53				
54	Chance Magwaza	Pinda Primary	Mnchinji South	To reconcile figures
55	Lastone Banda	Chikuta Primary	Mnchinji South West	To reconcile figures
56	Frighton Nkhunkhudzu	Katondo	Mnchinji North West	To reconcile figures
57	Edman Chikhutu	Mzama School	Mchinji East	To reconcile figures
	Patrick Siliya	Mnchesi FP School	Lilongwe City South	To reconcile figures
58	H Jimmie	Chi samba	Lilongwe City South	To reconcile figures
59	George Khoza	Chipasula	Lilongwe City South	Ballot reconciliation
60	Winberg Chatuluka	Tsabango 1 School	Lilongwe City South East	Ballot reconciliation
61	Joyce Phiri	Kalambo LEA School	Lilongwe City Centre	To make corrections
62	Dorothy Nkhoma	IDA Officer	Lilongwe City Centre	To make corrections and ballot reconciliation
63	Christon Nkhoma	Chikhutu	Lilongwe City North	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
64	Gerald Chadza	Kalolo Primary	Lilongwe Mapuyu	Ballot reconciliation
65	Ndapita Nangoza	Nguluwe FP School	Lilongwe South West	To make corrections and for ballot reconciliation
66	Mac Eliya	Linguni FP School	Phalombe South	Ballot reconciliation
67	Sangakutaye Wyle	Migowi	Phalombe	Ballot reconciliation
68	Charlie Nyopola	Nambilo Primary	Phalombe South	Ballot reconciliation
69	Hastings Kagaso	Namapovu School	Chikhwawa Nkombezi	Ballot reconciliation
70	Chitani Chaponedwa	Gola Primary	Chikhwawa	Ballot reconciliation
71	Emelia Shaba	Chibisa Court	Chikhwawa	Ballot reconciliation
72	Kambani Thesi	Ndalapa FP School	Chikhwawa	Ballot reconciliation
73	Thames Maliyana	Namphungu	Blantyre North West	Ballot reconciliation
74	Jane Phiri	Bangwe CCAP	Blantyre City South	Ballot reconciliation
75	Rose Mdulamizu	Ntenjera CCAP	Blantyre North East	Ballot reconciliation
76	Rhodea Chinyama	Namalimwe	Blantyre City Centre	Ballot reconciliation



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
77	Mercy Sambani	Ndirande LEA School	Blantyre City West	Ballot reconciliation
78	Charity Saka	Manyowe LEA	Blantyre City west	Ballot reconciliation
79	Charles Mathews	Ndirande Community	Blantyre City Centre	Ballot reconciliation
80	Alex Gama	Manyowe Primary School	Blantyre City West	Correction of summation of stream results
81	Fredrick Chipaka	Mgona Ground	Lilongwe City Centre	Ballot reconciliation
82	Joyce Mgusha	Kabwabwa	Lilongwe City Centre	Ballot reconciliation
83	Mary Jinazali	Tsokankanasi	Lilongwe City Centre	Candidate votes corrections
84	Kalebe Banda	Chiputu	Lilongwe	Correction to reconcile figures on candidates votes
85	Allan Magwaza	Muzu Primary	Lilongwe Kuniachenga	Candidate vote corrections
86	Mercy Tsoka	Kachala	Mangochi South	Ballot reconciliation
87	James Banda	St Joseph	Mangochi	Ballot reconciliation
88	Protazio Kalemba	St Augustine III	Mangochi	Ballot reconciliation
89	Nellie Lipenga	Lwanga	Mangochi	Ballot reconciliation
90	Layford Mkombe	St Augustine II	Mangochi	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
91	Margret Morton	Kasolo	Mangochi	Ballot reconciliation
92	Jackson Gumbula	Changan ire	Mangochi	Ballot reconciliation
93	Philip Kalunga	St Augustine I	Mangochi	Ballot reconciliation
94	Paul Katole	Mpale	Mangochi	Ballot reconciliation
95	Barbra Mtepuka	Makawa	Mangochi	Ballot reconciliation
96	Ackim Saidi	Kwiputi	Mangochi	Ballot reconciliation
97	Francis Yunus	Mpilipili	Mangochi	Ballot reconciliation
98	Esau Makunganya	Chi saw a	Mangochi	Ballot reconciliation
99	Godfrey Julius	Nambaude	Mangochi	Ballot reconciliation
100	Akonda Mtonga	Ndengu	Mangochi	Ballot reconciliation
101	Eunice Lysol	Chinama	Mangochi	Ballot reconciliation
102	Lucy Nasambo	Cape Maclear	Monkey Bay	Ballot reconciliation
103	Antony Stephane	Changausya	Mangochi	Ballot reconciliation
104	Jilan Katonga	Changwale	Mangochi	Ballot reconciliation
105	Todesia Kanzuke	Milambe	Mangochi	Ballot reconciliation
106	Norman Chung	Makwerani	Mangochi	Ballot reconciliation
107	Ephraim Kaunda	Majuni	Mangochi South	Ballot reconciliation
108	Esmic Mkumbira	Namisisi	Mangochi South	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
109	Puna Maulidi	Lifalo	Mangochi	Ballot reconciliation
110	Mphatso Thomasi	Malunga	Mangochi Central	Ballot reconciliation
111	Alayika Phiri	Namalweso	Mangochi	Ballot reconciliation
112	Dunstain Mphonde	Habitat	Mangochi	Ballot reconciliation
113	Charles Mkunga	Milimbo	Mangochi	Ballot reconciliation
114	Willard Ng'anima	Namisangu	Machinga	Ballot reconciliation
115	James	Monkey Bay	Mangochi Mokey Bay	Ballot reconciliation
116	Lester	Malombe	Mangochi	Ballot reconciliation
117	Manase Mhango	Chipereka	Mangochi	Ballot reconciliation
118	Wilfred	Magomero	Mangochi	Ballot reconciliation
119	James	Chiwaula	Mangochi	Ballot reconciliation
120	Erick	Ntanga	Mangochi	Ballot reconciliation
121	David	Mpumbe	Mangochi	Ballot reconciliation
122	Phillimoni	Chiponde	Mangochi	Ballot reconciliation
123	Lea	Mkomatulo	Dedza west	Ballot reconciliation
124	Timothy	Chinwangalu	Dedza West	Ballot reconciliation
125	Jalek	Mwerankhuku	Dedza South	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
126	Allan	Madzumbi	Dedza South	Ballot reconciliation
127	Comelius	Kafotokoza	Dedza South	Ballot reconciliation
128	Bernedetta	Makankhula	Dedza Central	Ballot reconciliation
129	Chicco	Chimtengo	Dedza Central	Ballot reconciliation
130	Silvero Kadzakumanja	Mcheneka	Dedza South West	Ballot reconciliation
131	Abdul Juma	Mlenga	Dedza South	Ballot reconciliation
132	Aloysio	Mchenga	Dedza East	Ballot reconciliation
133	Rodgers	Chimkwita	Dedza west	Ballot reconciliation
134	Clara	Msambiro	Dedza South	Ballot reconciliation
135	Maxwell	Mwalawang'ombe	Dedza South	Ballot reconciliation
136	Statulo	Umbwi	Dedza South West	Ballot reconciliation
137	Hallowed	Kanjeza	Dedza South West	Ballot reconciliation
138	Jonathan	Chowo	Dedza West	Ballot reconciliation
139	Ennar	Kamphemba	Dedza West	Ballot reconciliation
140	Geoffrey	Mgundadzuwa	Dedza Central	Ballot reconciliation
141	Mzcc	Khwawa	Karonga South	Ballot reconciliation
142	Harrison	Kangidwa	Karonga North	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
143	Walikona	Uliwa	Karonga South	Ballot reconciliation a
144	Kenneth	Changwina	Karonga North	Ballot reconciliation
145	Mathias	St Mary's Boys	Karonga North West	Ballot reconciliation
146	Fiskani	Ipyana	Karonga North West	Ballot reconciliation
147	Kingsley	Baka	Karonga North West	Ballot reconciliation
148	Elizabeth Mtambo	Old Hospital	Karonga North West	To include data from a satellite centre
149	Ian Kasambo	Kaundi	Karonga North	Ballot reconciliation
150	Godfrey Mbewa	City Assembly site Office	Lilongwe City Centre	Ballot reconciliation
151	Magret Muthete	Mkomachi	Lilongwe City Centre	Ballot reconciliation
152	Elsie Kasonda	Nanjati	Lilongwe City South	Ballot reconciliation
153	Cleanford Banda	Magwelo	Lilongwe City Centre	Ballot reconciliation
154	Harry Gaga	Msinja	Lilongwe	Ballot reconciliation
155	Alfred Kopulande	Mtukwale	Lilongwe Kumache	Ballot reconciliation
156	Verson Chadooka	Malianyama	Lilongwe	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
157	Yokonia Manase	Ukwe	Lilongwe North	Ballot reconciliation
158	Patricia Sinjani	Mlewa	Msinja South	Ballot reconciliation
159	Ollens Msonda	Chiputula FP School	Mzuzu City	Ballot reconciliation
160	Emily Chando	Chamalaza F P School	Mzuzu City	Ballot reconciliation
161	Yotam Mtafaya	Mzuzu Stadium	Mzuzu City	Ballot reconciliation
162	Mazganga Banda	St Michaels Private Secondary School	Mzuzu City	Ballot reconciliation
163	Mary Chawinga	Zolozolo F P School	Mzuzu City	Ballot reconciliation
164	Samson Kanyimbo	Embombeni F P School	Mzimba North	Ballot reconciliation
165	Kondwani Nyasulu	Elunyeni F P School	Mzimba North	Ballot reconciliation
166	George Kumwenda	St Kizito	Mzimba North	Ballot reconciliation
167	Tobias Mwanza	Malokotera	Mzimba North	Ballot reconciliation
168	Clement Chigwani	Manthalu F P School	Mzimba West	Ballot reconciliation
169	Pellings Khoisan's	Enkweleni F P School	Mzimba West	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
170	Helex Mtonga	Kakoma F P School	Mzimba South	Ballot reconciliation
171	Reuben Wanda	Tupwenge	Mzimba South	Ballot reconciliation
172	Henry Kamanga	Kamatawo	Mzimba South	Ballot reconciliation
173	Jonathan Zgambo	Chiwondwe	Mzimba South	Ballot reconciliation
174	Abella Lunyanda	Vibangalala	Mzimba South	Ballot reconciliation
175	Ishmael Mlewera	Luweya School	Mzimba	Ballot reconciliation
176	Musoline Luhansk	Mutemera	Mzimba	Ballot reconciliation
177	Martin Nzima	Chiseng'ezi F P School	Mzimba Hora	Ballot reconciliation
178	Rodgers Kayira	Jandalala School	Mzimba Hora	Ballot reconciliation
179	Bentry Phiri	Endindeni	Mzimba Hora	Ballot reconciliation
180	Alston Mnyenye	Chindindindi	Mzimba Hora	Ballot reconciliation
181	Justice Banda	Ndonda School	Mzimba Hora	Correcting error and ballot reconciliation
182	Patrick Mkandawire	Mtenthe	Mzimba Solola	Ballot reconciliation
183	Candiwira Shaba	Emmthuzini	Mzimba Solola	Ballot reconciliation
184	Mathews Chipofya	Mnjiri CDSS	Mzimba Solola	Correcting error on candidate votes

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
185	Howard Mutegha	Engalaweni	Mzimba South West	Correcting errors on candidate votes
186	Johnstone Banda	Matembe School	Mzimba South West	Correcting errors
187	Oscar Sindani	Berere	Mzimba South West	Ballot reconciliation
188	Lazarus Zgambo	Mzoma School	Mzimba South West	Ballot reconciliation
189	Peter Kayira	Chasimba	Mzimba Hora	Correcting errors on candidate votes
190	Suzgani Nkhata	Chassisi F P School	Mzimba Hora	Correcting errors on candidate scores
191	Hambani Banda	Kamwanjiwa	Mzimba Hora	Ballot reconciliation
192	Regina Phiri	Mtuzuzu	Mzimba South West	Ballot reconciliation
193	Macmillan Maulana	Mpatsa School	Nsanje Central	Ballot reconciliation and correction of mistakes on candidate scores
194	Samuel Mizedy	Namilembe	Nsanje North	Ballot reconciliation
195	Yesaya Alufezemba	Mpembamoyo	Nsanje North	Correcting errors
196	Frank Vito	Fatima School	Nsanje North	Ballot reconciliation
197	February Kampiyao	Chitsa (Nyamithuthu)	Nsanje Central	Ballot reconciliation
198	Bright Chipojola	Namiyala	Nsanje North	Ballot reconciliation



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
199	Foreman Seda	Ng'ombe F O Schhol	Nsanje North	Ballot reconciliation
200	Grace Maya	Nantibule	Nsanje North	Ballot reconciliation
201	Wilbesyd Chidothe	Chiwichiwi School	Dowa North	Ballot reconciliation
202	Lexly Chikafa	Mchinji Secondary	Mchinji Central	Correcting errors and ballot reconciliation
203	Steven Malijani	Zulu Primary	Mchinji Central	Ballot reconciliation and correction of errors
204	Lukas Tembo	Chan khan ga Primary	Mchinji North	Ballot reconciliation
205	Lester Mtuma	Nyalugwe/Chikwilira	Chiradzulu	Ballot reconciliation
206	Antonio Gawani	Lichenza F P School	Chiradzulu	Ballot reconciliation
207	Macduff Nyama	Thuruwa	Chiradzulu	Ballot reconciliation
208	Dickson Chagwanjira	Makanda School	Ntchisi South	To correct genuine mistakes
209	Martin Tembo	Chipwapwala	Ntchisi North	Ballot reconciliation
210	Mikeus Manda	Namita School	Thyolo East	Ballot reconciliation
211	Maria Chilanga	Kankhoma Polling Centre	Thyolo North	Correction of candidate votes
212	Gizania Mphiya	Ngomani School	Thyolo South	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
213	Nictor Chireberenga	Mitembo F P School	Thyolo	Ballot reconciliation
214	Bos man Mwale	Chinsikha	Thyolo West	Ballot reconciliation
215	William Sande	Goliath School	Thyolo East	Ballot reconciliation
216	Geoffrey Makie	Namaona	Thyolo North	Ballot reconciliation
217	Michael Yohanc	Machemba	Thyolo North	Ballot reconciliation
218	Christopher Joseni	Konzaalendo	Thyolo	Ballot reconciliation
219	James Mbewe	Mao nga School	Thyolo West	To correct arithmetical errors made in adding up stream results
220	Mac Action Namoto	Mabuwa School	Thekerani	To correct arithmetical errors made in adding stream results
221	Maclean Pahlavi	Minguni	Thyolo	Ballot reconciliation
222	Johnes Maluwa	Horace School	Thyolo West	Ballot reconciliation
223	Kessy Huwa	Thekerani LEO	Thyolo	Ballot reconciliation
224	Martha Mapira	Chipoka I	Salima South	Ballot reconciliation
225	Oswell Jacob	Msinja School	Salima Central	Ballot reconciliation
226	Petro Siyasiya	Michulu School	Salima North	Ballot reconciliation
227	Master Siyasiya	Chimp hang a Trading Centre	Salima North	To correct data transfer mistakes

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
228	Tabitha Chithangala	Kolakola School	Salima North	Ballot reconciliation
229	Moses Dayan	Makuntha	Salima North West	Ballot reconciliation
230	Joseph Chirwa	Mnchenga School	Salima North West	To correct candidate score mistakes
231	John Swaleyi	Chiluba School	Salima North	Ballot reconciliation
232	Trywell Chātuluka	Ngoni School	Salima South	Ballot reconciliation
233	Gilbert Mwasiya	Kalonga School	Mchinji	Ballot reconciliation
234	Elias Kawuwa	Kachisi Village-Tanya Madzi	Balaka Central East	Ballot reconciliation
235	Sifoti Katsabola	Ching' am a School	Balaka West	Ballot reconciliation
236	Hamilton Kalinga	Msunuzi	Balaka West	To correct arithmetical errors made in transferring data from Form 60C
237	Teresa Marino	Chikopa F P School	Balaka South	Ballot reconciliation
238	Hackson Chikodzera	Chiendausiku CDSS	Balaka South	Ballot reconciliation
239	Patrick Nyangu	Chitimbe F P School	Balaka West	Ballot reconciliation
240	Robert Khwitipa	Utale Railway	Balaka South	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
241	Saustine Mmanjamwada	Ng'onga F P School	Balaka South	Ballot reconciliation
242	Gizania Mphiya	Ngomani School	Thyolo South	Ballot reconciliation
243	Samuel Thanganyika	Makanjira F P School	Balaka South	Ballot reconciliation
244	Goodson Kapoto	Kangankundi	Balaka West	Correcting arithmetical errors
245	Lankeni Zembeko	Mafiosi	Balaka South	Ballot reconciliation
246	Victor Laurent	Ntondo F P School	Balaka South	Ballot reconciliation
247	Julius Mbengo	Njerenje	Balaka South	Correcting arithmetical errors which were made when adding two stream results
248	McFestus Banda	Kasupe	Balaka North	Ballot reconciliation
249	Christopher Chisale	Mawira	Balaka South	Ballot reconciliation
250	Gilbert Winiko	Maduwani	Balaka	Ballot reconciliation
251	Chester Kupunda	Mnchape	Balaka South	Ballot reconciliation
252	Sylevestor Muyaya	Dziwe F P School	Balaka	Ballot reconciliation
253	Peter Makunganya	Maduwani	Balaka	Ballot reconciliation
254	Gray Chalimba	Ludwe School	Balaka	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
255	Davies Chiwalo	Ulongwe	Balaka	Ballot reconciliation
256	Mary Kabinda	Ndandanda School	Balaka North	Ballot reconciliation
257	James Lapansi	Mcheza School	Balaka North	Ballot reconciliation
258	Ernest Matope	M'manga	Balaka South	Ballot reconciliation
259	Stephen Ligomeka	Kankao School	Balaka South	Ballot reconciliation
260	Elia Ching'amba	Mfulanjovu	Balaka West	Ballot reconciliation
261	Dickson Mambulu	Scripture Union	Balaka Central	Ballot reconciliation
262	Mable Mwachumu	Zammimba School	Balaka North	To match the total votes in words and figures
263	Dennis Zingeni	Balaka Community Centre Hall	Balaka West	Ballot reconciliation
264	Jimmy Kändidziwa	Zakazaka School	Ntcheu North	Ballot reconciliation
265	Elijah Tsakalaka	Dzoole School	Ntcheu West	Ballot reconciliation
266	Apton Mataika	Zaunda School	Ntcheu Central	Ballot reconciliation
267	Violet Kasiya	Livalo School	Ntcheu Central	Ballot reconciliation
268	Vasco Juma	Chipula School	Ntcheu North	Ballot reconciliation
269	Fanny Banda	Kadzakalowa	Ntcheu North	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
270	Lackson Chimutu	Mkanda School	Lilongwe Mapuyu	Ballot reconciliation
271	Bridget Kampira	Mkoma School	Lilongwe North East	Ballot reconciliation
272	Felix Lupeska	Chalk School	Lilongwe South	Ballot reconciliation
273	Azele Manase	Mbendera School	Lilongwe South	Ballot reconciliation
274	Brighton Chikwenga	Maliwa School	Mapuyu South	Ballot reconciliation
275	David Lephiter	Kuchipala School	Lilongwe Msinja North	Ballot reconciliation
276	Maurice	Chata School	Lilongwe North East	To collect mistakes made when recording results onto the tally sheet
277	Jonas Malimbwe	Chitala School	Lilongwe South	To correct a spelling mistake
278	Lemott Mlongoti	Mnjolo School	Lilongwe Central	To correct a spelling mistake
279	Billy Chingwalu	Mtauka	Lilongwe North	Ballot reconciliation
280	Rose Chidandale	Catch Them Young Private Primary School	Lilongwe City South	Ballot reconciliation
281	Margret Billiat	Lilongwe Demonstration School	Lilongwe City Centre	Ballot reconciliation

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
282	Balekire Sibande	St Thomas Commercial School	Lilongwe Chimutu	Ballot reconciliation
283	Gertrude Nyondo	Khumula School	Lilongwe City South West	Ballot reconciliation
284	Kelvin Chikombe	Chinkhoma Primary	Kasungu South East	To reconcile ballots received, unused ballots and cancelled/spoilt ballots
285	Thomson Matapata	Guchi School	Kasungu East	To correct a spelling mistake
286	Ruth Katola	Msiwa School	Kasungu East	She had entered wrong figures on the administrative section of the result sheet
287	Petroleum Chikafalimani	Kachembwe School	Kasungu South East	To reconcile the administrative part which did not affect candidates' results
288	Odala Galantia	Damba School	Kasungu North East	To correct mistakes on the "administrative part" (The ballot reconciliation part)
289	Denis Nashala	Ntulira	Machinga Central	To reconcile the administrative part (ballot reconciliation)

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
290	Justin Matekenya	Thobola School	Machinga Central	Ballot reconciliation
291	Emmanuel Tewesa	Maura School	Machinga Central East	Ballot reconciliation in the presence of MCP monitor
292	Raphael Mtapa	Maweha School	Machinga Central	Alteration on Dr Chakwera's votes (candidate votes) after discovering genuine arithmetical errors. Also for ballot reconciliation
293	Asima Chisambula	Kanjedza School	Machinga Central	Ballot reconciliation
294	Danford Tauzi	Nkhwazi School	Likoma Island	To correct numerical mistakes
295	Emmanuel Chirwa	Tofu School	Likoma Island	To correct numerical mistakes
296	Moffat Chavula	Kaulassisi	Nkhatabay North	To correct numerical mistakes
297	Steve Chavula	Chithewere School	Nkhatabay North West	To correct numerical mistakes as figures could not balance
298	Leviton Mwale	Chisambula School	Lilongwe North East	To correct numerical mistakes
299	Thomson Banda	Namulera School	Lilongwe Mpenu	To correct numerical mistakes



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
200	Dobert Kabwabwa	Chibimphi School	Lilongwe South	To correct numerical mistakes
201	Gift Katenje	Kaliyeka School	Lilongwe City South	Numerical mistakes

### *Duplicate Forms*

999 Almost three hundred presiding officers filed their sworn statements in which they gave reasons for their use of duplicate result sheets. They explained that they used the duplicate forms because the originals were spoilt. Most of the spoiling of these result sheets to such an extent that they had to use duplicates happened at the Constituency Tally Centre where they were advised by the PEO/CRO that the numbers of their result sheets were not reconciling. And they spoiled their originals as they were correcting errors. Others explained that they were doing calculations to make sure that the numbers would add up.

1000 Then there were presiding officers who stated that they did not know that there was a difference between an original and the duplicate. They therefore did not pay particular attention on which of the forms was to be presented to the Constituency Tally Centre. In a few other instances the presiding officers posted the originals at their stations to exhibit the count. There were again occasions where the originals were given to monitors.

1001 There were less than five instances where the Presiding Officers stated that they did not understand how duplicates were used because they had submitted originals.

1002 In one instance the Presiding Officer indicated that he used a duplicate because in the process of vote counting he realized that some voters cast the presidential ballots in the parliamentary boxes. This entailed him to start again and he had no choice but use duplicate as he was recording a second time.

1003 In all the 300 instances herein of duplicate Form 66Cs, the original was not transmitted to the National Tally Centres. Most presiding officers stated that upon spoiling the originals, they submitted both the original and the duplicate to the CRO/PEO and it was the PEO who failed to attach the spoilt copy.

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
1	Elida Banda	Luwazi School	Nkhata Bay North West	Original was spoilt through alterations
2	Anne Manda	Kachere School	Nkhata. Bay South	Original was spoilt through alterations
3	McDwellings Nkhoma	Kauvi Primary School	NKHATABAY West	Submitted both original and duplicate
4	Edward Mphande	Chifira School	Nkhatabay South	Submitted both original and duplicate
4	Ian Msutu	Mutazi School	Nkhatabay South	Original was spoilt
6	Charles Cheyo	Mchedwa School	Lilongwe South West	Original was spoilt
7	Grace Kafotokoza	Shire Urban School	Lilongwe Central	Original was spoilt
8	Liviness Chimbayo	Chinsapo School	Lilongwe City West	Original was spoilt
9	Moffat Ching'oma	Lingadzi School	Lilongwe Kumachenga	Original was spoilt
10	Ines Kayira	Ngwenya School	Lilongwe City South West	Was advised to use duplicate at CTC
	John Kachembere	Mnchizampheta School	Lilongwe Msozi South	Original was spoilt in reconciling ballots

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
	Roseby Kasakula	Mpungu School	Lilongwe City Centre	Original was spoilt
	Huxley Tundulu	Malingunde School	Lilongwe South	Original was spoilt
	Joyce Chitsulo	Chi samba School	Lilongwe City South West	Submitted both original and duplicate
	Christopher Khoropa	Tsabango CDSS	Lilongwe South West	Submitted both original and duplicate
	Allan Chaluzi	Katola School	Lilongwe City North	Duplicate mistaken for original
	Mary Flao	St Johns Primary School	Lilongwe City West	Original spoilt
	Mphatso Kuzemba	Namsongole School	Nkhotakota South East	Spoilt at reconciling
	Stonard Chigula	Namvuu School	Nkhotakota South East	Duplicate mistaken for original
	Felix Mgoomezulu	Chanthoma School	Nkhotakota Central	Original was spoilt
	Henry Chigulu	Lozi School	Nkhotakota Central	Duplicate mistaken for original
	Garson Kaphandira	Chakaka School	Nkhotakota South East	Original was spoilt
	Ambali Malithano	Mtandira School	Nkhotakota Central	Duplicate mistaken for original
	Innocent Ngwembe	Mkumbaleza School	Nkhotakota South	Submitted both original and duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
	Magnus Chinkhokwe	Kampala School	Nkhotakota North East	Duplicate mistaken for original
	Emmanuel Nkhata	Kasamba CDSS	Nkhotakota South	Duplicate mistaken for original
	Issa Chitamba	Mpondanga School	Nkhotakota Central	Submitted both original and duplicate
	Wilford Msema	Walemera School	Nkhotakota North	Used duplicate as he did not have original copy
	Edwin Maluwa	Chiphole School	Nkhotakota North East	Duplicate mistaken for original
	Kizito Mutawo	Chapman School	Nkhotakota North	Duplicate mistaken for original
	Yesaya Safari	Chibothera School	Nkhotakota South East	Submitted an original and not a duplicate
	MacHorlex Jumbe	Natityi School	Nkhotakota South East	Denied submitting a duplicate
	Chimwemwe Cosmas	Muyande School	Nkhotakota South East	Duplicate mistaken for original
	Benson Kawanga	Chivumu School	Nkhotakota North	Duplicate mistaken for original
	Dyson Chungu	Chasato School	Nkhotakota North	Duplicate mistaken for original
	Charles Thondwe	Chiselera School	Nkhotakota South	Original spoilt with alterations
	Beston Katanga	Chizewo School	Nkhotakota North	Original spoilt with alterations

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
	Happiness Hamilton	Maliki School	Nkhotakota North	Duplicate mistaken for original
	Ethel Mbewe	Nkhotakota Community Hall	Nkhotakota Central	Duplicate mistaken for original
	Samuel Zondeni	Chantondo School	Nkhotakota South	Denied having used duplicate
	Osborne Mphonde	Mwalawatongole School	Nkhotakota Central	Duplicate mistaken for original
	Gentle Chimaye	Chiluba Primary School	Nkhotakota Central	Duplicate mistaken for original
	Mpilizi Phiri	Kanyenje School	Nkhotakota	Original spoilt
	Joseph Kafuzira	Chitenje School	Nkhotakota Central	Denied having used duplicate
	Maria Munthali	Dema School	Nkhotakota North	Duplicate mistaken for original
	Hestens Scott	St Pauls School	Nkhotakota Central	Duplicate mistaken for original
	Dorothy Chirwa	Lunga School	Nkhotakota Central	Duplicate mistaken for original
	Steven Chimseu	Khwapu School	Nkhotakota South East	Duplicate mistaken for original
	Gloria Kaliwa	Kalinda School	Nkhotakota North East	Duplicate mistaken for original
	Sylvester Chagoga	Mtendere	Nkhotakota South East	Duplicate mistaken for original

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
	Harry Kathumba	St Pauls	Zomba Chisi	Original spoilt
	Romeo Chawinga	Kaduku Primary	Rum phi West	Submitted both original and duplicate
53	Smith Ng'oma	Chi yang a School	Rumph East	Transmitted both original and duplicate
	Overton Kondowe	Chipunga	Rumph east	Submitted both original and duplicate
	Kachaka Gospel	Chanya	Chitipa East	Submitted both original and duplicate
	Jeremiah Mkunga	Mikundi School	Mchinji South West	Original spoilt
	Fradson Kakowa	Mikundi School	Mchinji South	Denied using a duplicate
	Paul Singereti	Katsenga School	Mchinji South	Submitted both original and duplicate
	Foster Kadammanja	Kambulire	Lilongwe City North	Original spoilt
	Jacob Kamanga	Nyawale	Lilongwe Msozi South	Duplicate mistaken for original
	Weston Benart	Kambulire	Lilongwe City North	Duplicate mistaken for original
	Rose Msonda	Chilungamo Orphan Care	Lilongwe City South	Duplicate mistaken for original

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
	George Khoza	Chipasula Secondary	Lilongwe City South East	Submitted both, it was the CRO/PEO who transmitted the duplicate
	Weinberg Chatuluka	Tsabango School	Lilongwe South East	Submitted both original and duplicate but it was the CRO/PEO that transmitted duplicate
	Joyce Phiri	Kalambo School	Lilongwe City Centre	Duplicate mistaken for original
	Joseph Thaulowoyera	Nyama School	Lilongwe Mpenu	Submitted both original and duplicate
	William Machili	Chitipi School	Lilongwe South West	Submitted both original and duplicate
	Patrick Kapalamula	Buluzi School	Lilongwe Central	Submitted both original and duplicate
	Gertrude Nyondo	Khumula School	Lilongwe City South	Treated duplicate as original
	Innocent Mazoni	Mdzobwe School	Lilongwe Mapuyu South	Submitted both original and duplicate
71	Andrew Chisenga	Dambo School	Lilongwe Msinja	Duplicate mistaken for original
72	Mussa Kazembe	Siyamanda School	Phalombe South	Mistakenly gave original to one of the monitors
73	Charlie Nyopola	Nambilo School	Phalombe South	Submitted both original and duplicate but the

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
				PEO transmitted the duplicate
74	Sangakutaye Chilumpha	Migowi School	Phalombe Central	Original was spoilt
75	Phillip Sale	Macheu School	Chikhwawa South	Mistakenly submitted duplicate
76	Kambani thesi	Ndalapa School	Chikhwawa South	Submitted both original and duplicate
77	Jane Phiri	Bangwe CCAP Primary	Blantyre City South East	Submitted both original and duplicate
78	Rose Mdulamizu	Ntenjera School	Blantyre North East	Submitted both original and duplicate
79	Mercy Sambani	Ndirande LEA School	Blantyre City Centre	Presented all copies to the CRO/PEO who transmitted duplicate
80	Charity Saka	Manyowe Clinic	Blantyre City West	Presented both original and duplicate to the CRO/PEO. PEO transmitted duplicate
81	Charles Chaima	Ndirande Community Hall	Blantyre City Centre	Submitted both original and duplicate.
82	Anne Jana	Ngumbe School	Blantyre North East	Submitted both original and duplicate.
83	Fredrick Chipfaka	Mgona Ground	Lilongwe City Centre	Submitted both original and duplicate



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
84	Joyce Mgusha	Kabwabwa School	Lilongwe City Centre	Mistakenly presented the duplicate for transmission
85	Mary Jinazali	Tsokankanasi	Lilongwe City Centre	Mistakenly presented the duplicate for transmission
86	Kalebe Banda	Chimutu School	Lilongwe South	Submitted both original and duplicate
87	Philip Mkongolo	Mphathi	Dedza South West	Original was spoilt
88	Biton Kachinjika	Chimbiya	Dedza Central	Original was spoilt
89	Bernadetta Chikalenda	Makankhota	Dedza Central	Original was spoilt
90	Cornelius Thunga	Kafotokoza	Dedza West	Original was spoilt
91	Clara Nthombozi	Chilambo	Dedza Central	Original was spoilt
92	Jonathan Gideon	Chowo	Dedza West	Original was spoilt
93	Alick Chipetula	Chithimba	Dedza South	Original was spoilt
94	Kalenga Mlongoti	Chikhwawa	Dedza South	Original was spoilt
95	Esinta Selemani	Kalinyeke	Dedza South	Original was spoilt
96	Stewart Israel	Malembo	Dedza Central	Messed up original
97	Horace Mlongoti	Phokera	Dedza Central	Original was spoilt
98	Jones Mfungwe	Chiwira	Karonga North	Original was spoilt

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
99	Ndambo Hartley	Chiduli	Karonga North	Submitted both original and duplicate
100	Harrison Msukwa	Kangidwa	Karonga North	Original was spoilt
101	Walikonadi Hauli	Uliwa	Karonga South	Submitted both original and duplicate
102	Mathias Mwamughuda	St Mary's Boys	Karonga North West	Original spoilt
103	Bornwell Chisamba	Mayoka	Karonga North	Submitted both original and duplicate
104	Benson Mweso	Lupaso	Karonga North West	Submitted both original and duplicate
105	Zgowerani Fwilaseko	Lushununu	Karonga Nyungwe	Submitted both original and duplicate
106	Fiskani Chazama	Ipyana	Karonga nyungwe	Submitted both original and duplicate
107	Kingsley Kamisa	Baka	Karonga North West	Submitted both original and duplicate
108	Ian Kasambo	Kaundi	Karonga North	Submitted both original and duplicate
109	Geoffrey Mbewa	City Assembly Office Area 25	Lilongwe City Centre	Original was spoilt
110	Cleanford Banda	Magwelo	Lilongwe city Centre	Submitted both original and duplicate
111	Doreen Lungu	Kawale	Lilongwe City South West	Mistakenly presented the duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
112	Version Chadoka	Maloanyama	Lilongwe North East	Submitted both original and duplicate
113	Yokonia Manase	Ukwe	Lilongwe North	Submitted both original and duplicate
114	Benett Kwandera	Lilongwe Girls	Lilongwe City South	Submitted both original and duplicate
115	Linly Chavula	Marymount Girl Secondary	Mzuzu City	Submitted both original and duplicate
116	Ollens Msonda	Chiputula	Mzuzu City	Original was spoilt
117	Joyful Matengere	Msiro School	Mzuzu City	Submitted both original and duplicate
118	Yotamu Mtafya	Mzuzu Stadium	Mzuzu City	Original was spoilt
119	Mabvuto Dube	Kabanda School	Mzimba North	Original was spoilt
120	Mwai Chilongo	Ehlonipeni School	Mzimba North	Submitted both original and duplicate
121	Zondani Simkomo	Kazuhiro School	Mzimba North	Could not remember as to whether he sent original or duplicate
122	Benard Tembo	Katokole School	Mzimba North	Original was spoilt
123	Fright Kamisa	Enthongeni School	Mzimba North	Original was spoilt
124	Joe Botha	St Michaels School	Mzimba North East	Original was spoilt
125	Chrispin Mphande	Msipazi School	Mzimba North East	Original was spoilt

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
126	Gilbert Mwamoje	Matuli School	Mzimba North East	Original was spoilt
127	Gift Moho	Wengwani School	Mzimba North East	Original was spoilt
128	Clement Chigwani	Manthulu School	Mzimba West	Original was spoilt
129	Pellings Khosa	Enkweleni	Mzimba West	Original was spoilt
130	Benson Kapondela	Madimba School	Mzimba West	Submitted both original and duplicate
131	Khoweni Chisi	Kasangani School	Mzimba West	Original was spoilt
132	Austin Chiumia	Thunduwike School	Mzimba West	Original was spoilt
133	Agness Jere	Katowa School	Mzimba West	Could not remember submitting a duplicate
134	Lewis Mvalo	Kalwera School	Mzimba South	Submitted both original and duplicate. Did not know the difference between the two.
135	Helen Mtonga	Kakoma School	Mzimba South	Submitted both original and duplicate. Did not know the difference between the two
136	Rhoda Nyirenda	Kaulusi School	Mzimba South	Did not submit a duplicate
137	Jasper Moyo	Zalunga School	Mzimba South	Original was spoilt

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
139	Owen Chirwa	Chasya School	Mzimba South	Mistook the duplicate for the original
140	Sangwani Mvula	Mavungwe School	Mzimba South	Mistook the duplicate for the original
141	Jonathan Zgambo	Chiwondwe School	Mzimba South	Submitted both original and duplicate
142	Irvine Mnyenyembe	Emphangweni	Mzimba South	Mistakenly presented the duplicate for the original
143	Clement Nyirenda	Kasakula School	Mzimba Central	Submitted both original and duplicate
144	Ishmael Mlewere	Luweya School	Mzimba Central	Submitted both original and duplicate
145	Benjamin Nyirenda	Kamubanga School	Mzimba Central	Original was spoilt when correcting errors
146	Jolex Maseko	Malangazi School	Mzimba Hora	Original was spoilt when correcting errors
147	Martin Nzima	Chiseng'ezi	Mzimba Hora	Mistook the duplicate for the original
148	Rodgers Kayira	Jandalala School	Mzimba Hora	Submitted both original and duplicate
149	Hickson Chenje	Mazaza School	Mzimba Hora	Submitted both original and duplicate
150	Chrissy Mwenefumbo	Lwakhozi School	Mzimba Hora	Mistook the duplicate for the original

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
151	Stewart Jere	Zukuma School	Mzimba Hora	Submitted both original and duplicate
152	Martin Nyirenda	Kabowozga School	Mzimba Hora	Original was spoilt
153	Bentry Phiri	Endindeni School	Mzimba Hora	Mistook the duplicate for the original
154	Alston Munyenembe	Chindindindi	Mzimba Hora	Mistook the duplicate for the original
155	Hilda Baloyi	Kampala School	Mzimba Luwerezi	Did not send a duplicate
156	Lloyd Bwanali	Chivukuti School	Mzimba Luwerezi	Submitted both original and duplicate
157	Samuel Shumba	Masuku School	Mzimba Sosola	Submitted both original and duplicate
158	Patrick Mkandawire	Mtethe School	Mzimba Solola	Submitted both original and duplicate
159	Donita Gondwe	6327	Mzimba Sosola	Submitted both original and duplicate
160	Chandiwira Shawa	Emthuzini	Mzimba Sosola	Submitted both original and duplicate
161	Freeman Phiri	Milala School	Mzimba Sosola	Submitted both original and duplicate
162	Norman Chirambo	Chinungu School	Mzimba Sosola	Submitted both original and duplicate
163	Petros Tembo	Kilowatt School	Mzimba Sosola	Submitted both original and duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
164	Steven Mwandira	Chizimia School	Mzimba South West	Mistook the duplicate for the original
165	Kedd Saka	Kamunthenja School	Mzimba South West	Mistook the duplicate for the original
166	Howard Mutegha	Engalaweni School	Mzimba South West	Submitted both original and duplicate
167	Teddie Chenjerani Banda	Kaka School	Mzimba South West	Original was spoilt by ballot reconciliation
168	Malumbo Nkwanazi	Mhlahfuta School	Mzimba South West	Mistook the duplicate for the original
169	Lazarus Zgambo	Mzoma School	Mzimba South West	Mistook the duplicate for the original
170	Motso Kamanga	Mjinge School	Mzimba South West	Mistook the duplicate for original
171	Christopher Nkambule	Nthumba School	Mzimba Hora	Submitted both original and duplicate
172	Kingsley Tembo	Sasha School	Mzimba Hora	Submitted both original and duplicate
173	Peter Kayira	Chasimba School	Mzimba Hora	Original was spoilt
174	Brave Jere	Ndaba School	Mzimba South	Original was spoilt
175	Mole Moyo	Champhumphi School	Mzimba School	Original was spoilt
176	Regina Phiri	Mtuzuzu	Mzimba South West	Submitted both original and duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
178	Timothy Kamkota	Mwawi School	Mzimba Hora	Submitted both original and duplicate
179	Christopher Namanya	Chivalric School	Nsanje School	Submitted both original and duplicate
180	Iwell Nyamithambo	Thunye School	Nsanje South West	Submitted both original and duplicate
181	Physon Thuchira	Chigwamafumu School	Nsanje North	Submitted both original and duplicate
182	Francis Banda	Mchacha School	Nsanje North	Submitted both original and duplicate
183	Greigoire Sandalamu	Dinde School	Nsanje South West	Original was spoilt
184	Ketrina Benard	Mtshakatha School	Dowa East	Mistook the duplicate for the original
185	Jolex Kafuzira	Mvera Court House	Dowa East	Submitted both original and duplicate
186	Brighton Chikolosa	Mtsukamakoza	Dowa North	Submitted both original and duplicate
187	Goodwin Chibwana	Chiwindo	Dowa North East	Submitted both original and duplicate
188	Barbra Thawe	Natola	Dowa Ngala	Original was spoilt
189	Paul Soko	Chikhwawa School	Dowa Ngala	Submitted both original and duplicate
190	Henry Talungire	Namiwawa School	Mchinji North	Did not realize that there was a difference



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
				between original and duplicate
191	Tobias Jaulino	Kamphata School	Mchinji North	He was given a duplicate to fill
192	Helemon Tambalika	Kamwanya School	Mchinji South	Original was spoilt
193	Lexly Chikafa	Mnchinji Secondary	Mchinji Central	Submitted both original and duplicate
194	Steven Malijani	Zulu Primary	Mchinji Central	Submitted both original and duplicate
195	Abina Kumema	Chilowa School	Mchinji North East	Submitted both original and duplicate
196	Lukas Tembo	Chankhanga School	Mchinji North East	Submitted both original and duplicate
197	Happy Masina	Ngulukira School	Mchinji North	Submitted both original and duplicate
198	Dennis Mbeta	Mombo School	Chiradzulu South	Submitted both original and duplicate
199	Dennis Thebulo	Dete	Ntchisi North	Mistakenly presented the duplicate for the original
200	Neema Buwa	Kawaza	Ntchisi South	Original too spoilt and was advised to use duplicate
201	Gibson Shumba	Msumba School	Ntchisi North East	Run out of original tally sheets

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
202	McDonald Kaulindo	Madanjala School	Ntchisi South	Original was spoilt
203	Tsilizani Chibwana	Kandawe School	Ntchisi South	Mistakenly presented the duplicate for the original
204	Zakeyo Mphumulo	Chansembe School	Ntchisi North East	Original was spoilt
205	Dickson Chagwanjira	Makanda School	Ntchisi South	Mistakenly presented the duplicate for the original
206	Kambani Kansengwa	Kayoyo School	Ntchisi North East	Mistakenly presented the duplicate for the original
207	Pearson Dayisoni	Kamsonga	Ntchisi South	Mistakenly presented the duplicate for the original
208	Marget Kalenganya	Kanolo School	Ntchisi North	Unintentionally submitted duplicate
209	Robert Balakasi	Ligowe School	Thyolo North	Mistakenly gave the original to a monitor
210	Steven Chisi	Chikhuli School	Salima North	Submitted both original and duplicate
211	Douglas Chikadza	Joni School	Salima North West	Original was spoilt
212	Mc Connex Mwale	Chitala	Sa;Lima North West	Mistook the duplicate for the original
213	Naphtali Kapalasa	Kabvunguti School	Salima Central	Submitted both original and duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
214	Ralpheon Njovu	Nsalura School	Salima Central	Original was spoilt
215	Ezra Gomani	Community Hall	Salima Central	Mistakenly presented the duplicate for the original
216	Issac Zatha	Chapita School	Salima South East	Submitted both original and duplicate
217	Maputo Mtenje	Lungumadzi School	Salima South East	Submitted both original and duplicate
218	Gilbert Mwasiya	Karonga School	Mnchinji Central	Submitted both original and duplicate
219	Ruth Mkupha	Thungulu Primary	Salima South	Submitted both original and duplicate
220	Elijah Tsakalaka	Dzoole	Ntcheu West	Original was spoilt
221	Conrad Sosola	Kabekere Court	Ntcheu North East	Did not know the difference between original and duplicate
222	John Nyanja	Chauta School	Lilongwe North East	Original was spoilt
223	Anne Chikanya	Bwanje School	Ntcheu North	Original was spoilt
224	Ida Mandowa	Sinhala	Lilongwe South	Was told to submit white copy
225	Marcel	Dzenza	Lilongwe City North	Mistakenly thought every white was an original
226	Akimu Luhanga	Kamswachenje School	Kasungu West	Submitted both original and duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
227	Bizeck Saka	Chawinga School	Kasungu North East	Submitted both original and duplicate
228	Naomi Sitole	United Apostolic of God	Kasungu Central	Mistakenly thought every white was original
229	Leah Chipeta	Chilanga School	Kasungu Central	Original was spoilt
230	Rose Mlumbe	Chiphaso School	Kasungu Central	Original was spoilt
231	Jacob Chagunda	Katchereza	Kasungu West	Mistook the duplicate for the original
232	Olive Panyanja	Kasungu RDP Office	Kasungu Central	He used original
233	Christopher Mapulanga	Zyalamba School	Kasungu North East	Original was spoilt
234	Tionge Manda	Kalimazitche School	Kasungu West	Mistook the duplicate for the original
235	Oscar Ndiwo	Ntanda Primary	Kasungu North East	Submitted both original and duplicate
236	Wyson Nkhoma	Chikoko School	Kasungu North East	Mistook the duplicate for the original
237	Julius Chilawo	Phanga School	Kasungu Central	Original was spoilt
238	Elizabeth Chanda	Khola School	Kasungu South	Original was spoilt
239	Kingsley Zintambira	Kamuzu Primary	Kasungu North East	Did not know the difference between original and duplicate
240	Austin Kumwembe	Thaandaza School	Kasungu East	Did not know the difference between the

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
				original and the duplicate
241	Boris Msumali	Chibwe School	Kasungu West	Posted the original on the wall for display
242	Thandie Chipungu	Kalimanyungu School	Kasungu North East	Original was spoilt
243	Wellington Mmora	Linga Headquarters	Kasungu Central	Submitted both original and duplicate
244	Emmanuel Chilemba	Kadweya School	Kasungu North East	Did not know the difference between the original and the duplicate
245	Patrick Kamende	Kanolo School	Kasungu North West	Did not know the difference between the original and the duplicate
246	Laurent Mwale	Chasomba School	Kasungu West	Submitted both original and duplicate
247	Sylvester Phiri	Chimwa	Kasungu North	Exhibited the original at his polling station
248	Magodi Nkunika	Kasasanya	Kasungu North West	Submitted both original and duplicate
249	Ernest Zimema	Mgumila School	Kasungu South	Did not know the difference between the original and the duplicate

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
250	Constantine Kadzakumanja	Nkakama School	Kasungu North	Original was spoilt
251	Petroleum Chikafalimani	Kachembwe School	Kasungu South	Original was spoilt
252	Nicholas Nyirongo	Lwangwa School	Kasungu North East	Did not appreciate the difference between the original and the duplicate
253	Laurent Machezo	Kanjoka School	Kasungu South East	Did not appreciate the difference between original and duplicate
254	Victor Phiri	Chankhokwe School	Kasungu East	Submitted both original and duplicate
255	Flora Bulaimu	Manyani School	Kasungu South East	Submitted both original and duplicate
256	Richard Chitakwala	Chimwang'ombe School	Kasungu East	Did not appreciate the difference between the original and the duplicate
257	Moses Jere	Mkanakhoti School	Kasungu North North East	Did not appreciate the difference between the original and the duplicate
258	Cosmas Chunga	Dwankhwali School	Kasungu East	Did not appreciate the difference between the

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
				original and the duplicate
259	Monica Chipwala	Chipanga School	Nkhotakota North	Submitted both original and duplicate
260	Abraham Lungu	Lisasadzi School	Kasungu Central	Submitted both original and duplicate
261	Odala Galantia	Damba School	Kasungu North East	Submitted both original and duplicate
262	Brea Khokwe	Kimono School	Kasungu Central	Did not differentiate between the original and the duplicate
263	Juliana Mkandawire	Kapirinyanga School	Kasungu North	Did not appreciate the difference between the original and the duplicate
264	Benam Makonokaya	Chivwamila School	Kasungu North East	Did not appreciate the difference between the original and the duplicate
265	Pearson Kapota	Nthagwanika School	Kasungu North East	Did not appreciate the difference between the original and the duplicate
266	Mangani Banda	Kankhumbi Primary School	Kasungu North West	Mistakenly presented the duplicate for the original

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
267	Moffat Mphongolo	Chi don go School	Kasungu West	Submitted both original and duplicate
268	Charles Zimba	Mneni School	Kasungu North	Did not appreciate the difference between the original and the duplicate
269	Chiheni Mhango	Lisandwa School	Kasungu West	Did not know the difference between the original and the duplicate
270	Edson Aaron	Jiti School	Kasungu North East	Submitted both original and duplicate
271	Edward Mtonga	Chalizya School	Kasungu East	Mistook the duplicate for the original
272	Brown Kasitomu	Mwalawamalem ba School	Kasungu North East	Submitted both original and duplicate
273	Denis Nashala	Ntulira School	Machinga Central	Submitted both original and duplicate
274	Brenard Mtalimanja	Joho School	Machinga Central	Submitted both original and duplicate
275	BOSCO KANYENDA	Lukali School	Rumphi Central	Original was spoilt
276	John Msiska	Mulyezi School	Rumphi Central	Submitted both original and duplicate



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
277	Stanley Limbani	Bulunji School	Rumphu West	Found that two voters had cast Presidential votes in Parliamentary boxes so when he discovered this he decided to cancel the original and recorded on fresh duplicate
278	Malawi Munthali	Lusani School	Rumphu West	Did not know the difference between the original and the duplicate
279	Peter Nyirongo	Kamphenda School	Rumphu West	Did not know the difference between the original and the duplicate
280	Stephano Ngwira	Kamphenda School	Rumphu West	Did not appreciate the difference between the original and the duplicate
281	Allan Chilongo	Mantchedwe School	Rumphu West	Did not know the difference between the original and the duplicate as both were white
282	Silvester Msiska	Mweyeye	Rumphu North	Original was spoilt
283	Mac win Munthali	Mhuju School	Rumphu North	Original was spoilt at CTC

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
284	Hendrina Msiska	Phwaphwa	Rumphi North	Original was spoilt
285	Happy Nkhoma	St Augustine Community Day Secondary School	Likoma Island	Submitted both original and duplicate
286	Vincent Horwaniya	Community Hall	Likoma Island	Mistakenly presented the duplicate for the original
287	Jones Ngwira	Kalambwe School	Nkhatabay North	Spoilt original
288	Yohane Kamanga	Bwelero School	Nkhatabay North	Original was spoilt
289	Bernard Simbeye	St Lukes Primary School	Nkhatabay west	Original was spoilt
290	Jotoli Nyirenda	Champhoyo Forest Camp	Nkhatabay West	Original was spoilt
291	McDwellings Nkhoma	Kauvi School	Nkhatabay West	Original was spoilt
292	Mackson Chilenga	Champhoyo Forest Camp	Nkhatabay West	Original was spoilt
293	Bentry Soko	Kang'oma	Nkhatabay West	Original was spoilt
294	Christopher Chirwa	Kabunduli Court	Nkhatabay North West	Original was spoilt
295	Elida Banda	Luwazi School	Nkhatabay North West	Original was spoilt

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
296	Aaron Banda	Chadongo School	Nkhatabay North West	Original was spoilt
297	Tenson Mhone	Manolo School	Nkhatabay North West	Original was spoilt
298	James Kamanga	Lisale School	Nkhatabay South East	Original was spoilt
299	Francis Gondwe	Sanga School	Nkhatabay	Original was spoilt
300	Reuben Singongo	CHINTHECHE CDSS	Nkhatabay South	Original was spoilt
301	Edward Mphande	Chifira School	Nkhatabay South East	Original was spoilt
302	Aubrey Katontha	Kachino School	Lilongwe Msozi	Original was spoilt
303	Mirrica Kaliyeka	Maluwa Clinic	Lilongwe Msozi	Original was spoilt
304	Leviton Makunje	Tsekwere School	Lilongwe Nsinja North	Original was spoilt

*Nonstandard Forms or Fake Tally Sheets*

1004 The presiding officers stated that they obtained the reserve tally sheets from the Constituency Tally Centres. They had messed up all prescribed results sheets for their stations.

1005 One presiding officer used an improvised form upon spoiling all of the duplicates.

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
1	Liviness Chimbayo	Chinsapo School	Lilongwe City West	Had run out of the prescribed forms for her station
2.	Irene Banda	Luluzi School	Nkhotakota North Constituency	This was at the Constituency Tally Centre. Upon doing alterations on the Result Tally Sheets, it was messy. She could not use her duplicates from her station as she had already sealed them. So the CRO/PEO advised her to just use Form 60
3	Benson Kaphuka	Linga School	Nkhotakota South	Used reserve sheet because the original had been altered
4	Reward Manda	Linga CDSS	Nkhotakota Central	Denied having used fake tally sheet
5	Maison Maloya	Chimbeta School	Zomba Thondwe	Denied having used fake result sheet
6	Victoria Likwangulo	Katamba School	Zomba Msondole	Used reserve because the original one had errors
7	Duncan Chingoli	Msambaisa School	Zomba Malosa	Used reserve because the original was spoilt
8	Laura Nkhata	Nkanda	Zomba Changalume	Denied having used fake tally sheets

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
9	Brighton Mbetewa	Thuchila EPA	Mulanje West	Denied having used fake tally sheets
10	Eliet Sandifolo	Mtenthera School	Lilongwe South East	Used reserve form because the original was spoilt with alterations
11	David Sambani	Padzuwa Primary	Lilongwe West	Original was spoilt
12	Lawrence Msaleni	Nasonjo School	Blantyre North East	Original was spoilt
13	Jolex Maseko	Malangazi School	Mzimba Hora	Original was spoilt
14	Charles Kalaya	Buzz	Ntchisi South	Had run out of originals
15	Huggins Lambulira	Kaulatsatsi	Ntchisi South	Given at the CTC out of tally sheets
16	Sungeni Maliseni	St Hellen School	Kasungu Central	Messed the originals and decided to improvise
17	Ida Chirwa	Gonthi Open Ground	Kasungu Central	Had altered both originals and duplicates hence originals were used
18	Clara Thombozi	Chilamba	Dedza Central	Messed all forms for her centre
19	Zacs Njiroma	Chauteka	Karonga Nyungwe	Messed all forms from his polling station

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
20	Diversions Muwanga	Mwasiya	Lilongwe City North	He used reserve tally sheet that was provided by the Commission

***Borrowed Result Forms***

1006 The presiding officers filed sworn statements to justify why they used altered forms in that they used forms from other polling stations to record the data for their polling station.

1007 It appears that use of the result sheets from other centres was done at the constituency tally centre during the reconciliation so that the sheets could be transmitted in the RMS system. This explains why they could not record in the record log books since at this particular time, the record logbooks were locked in the boxes.

	Presiding Officer	Polling Station	Constituency	Remarks
1	Goliath Nthala	Msambang'ombe School	Lilongwe North East	The Centre's forms were spoilt
2	Manifesto Maferano	Kambwenbwe School	Chikhwawa West	Did not have enough forms
3	Reuben Wanda	Tupwenge School	Mzimba South	All result sheets for their polling station were messed up when they were making corrections and they had locked all duplicates in the ballot box. The CRO gave him

	Presiding Officer	Polling Station	Constituency	Remarks
				duplicate form for Zulanga School
4	Johnstone Banda	Matembe School	Mzimba South West	Messed the original so was given a result sheet for Zwangendaba
5	Iwell Nyamithambo	Thunye School	Nsanje South West	Original was spoilt
6	Jonasi Nyakadza	Kapalanje School	Nsanje South West	Messed the original at the CTC in capturing satellite results. Was given a duplicate for Nyamadzere by the CRO

***Lack of Monitors' Signatures or Forged Signatures***

1008 Presiding officers filed their sworn statements in response to the Petitioners' allegations that some result sheets (Form 66C) had forged monitors' signatures while others had no monitors' signatures at all.

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
1	Daniel Kaonga	Zubachulu	Mzimba South	Forgot to sign
2	Lloyd Ndlozi	Chi pata School	Mzimba south	Monitors signed other forms
3	Stewart Jere	Zukuma School	Mzimba Hora	Some monitors got tired and did not sign on the forms
4	Martin Nyirenda	Kabowozga School	Mzimba Hora	Monitors were rotating in signing forms
5	Donita Gondwe	Kamulamba School	Mzimba Hora	Monitors left, others were sleeping and refused to wake up
6	Freeman Phiri	Milala School	Mzimba Sosola	Monitors were rotating the signing of forms
7	February Kampiyawo	Chitsa Nyamithuthu	Nsanje Central	Monitors wrote their names in the signatures' column
8	Gregorio Sandalamu	Dinde School	Nsanje South West	Monitors were not present at the CTC where the duplicates were being filled
9	Ketrina Benard	Mtchkhatha????	Dowa North East	Denied that the signatures were forged
10	Oscar Ndiwo	Ntanda School	Kasungu North East	All monitors signed for themselves
11	Abraham Lungu	Lisasadzi School	Kasungu Central	All monitors signed for themselves



No	Name of Presiding Officer	Polling Station	Constituency	Remarks
12	Raphael Mulenga	Msamala School	Nkhotakota North	No signatures were forged
13	John Yakwaniya	Kasiya School	Nkhotakota South East	No signatures were forged
14	Oswald Chikoti	Chombo School	Nkhotakota School	No signatures were forged

*Missing Ballot Papers and Candidate Votes*

1009 Presiding Officers also commented on the missing ballot papers in their sworn statements. Here, the presiding officers were making arithmetical calculations on the result sheets instead of counting the spoilt ballot papers.

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
1	Grem Phiri	Senjere	Nkhotakota North East	He said he had no case of missing votes
2	Wyson Phiri	Phakwe School	Nkhotakota South East	He stated that he had no missing vote in his calculations
3	Happiness Hamilton	Matiki Shool	Nkhotakota North	She stated that he had no missing votes
4	Ethel Mwase	Nkhotakota Community Hall 1	Nkhotakota Central	She had no missing votes in her calculations and counting

No	Name of Presiding Officer	Polling Station	Constituency	Remarks
5	Naphtali Luba	Chitedze School	Lilongwesouth West	He stated that he had no missing votes
6	Joseph Thaulowoyera	Nyama Primary	Lilongwe Mpenu	He had the same because of failure to reconcile ballots on the standard part
7	Peterson Kaipa	Mphetsankhuli	Lilongwe North	He stated that he had no missing votes
8	Innocent Mazoni	Mdzobwe School	Lilongwe Mapuyu South	He stated that he had no missing votes
9	James Nsanyama	Nkhukwa Primary	Lilongwe Central	This was mere miscalculation
10	Rodrick Salambula	Bango School	Lilongwe Mpenu	There were no missing ballots.
11	Anne Jana	Ngumbe Primary	Blantyre North East	Ballots reconciled. There were no missing/extra ballots
12	Enoch Kambazuma	Kaundama Primary	Lilongwe Mpenu	No missing ballots
13	Barbra Mtepuka	Malawian	Lilongwe South	No missing ballots
14	Elias I Fuyani	Dandauleni	Lilongwe South	No missing votes
15	Felix Chibwato	Dowera	Dedza South	No missing ballots
16	Gloria Mwale	Dedza Muslim Jamal	Dedza South	Forgot to add spoiled/cancelled ballots

No	Name of Persiding Officer	Polling Station	Constituency	Remarks
17	Nathan Phokoso	Msozi Village Outreach	Dedza South	Forgot to include spoilt/cancelled ballot papers
18	Joseph Kapetuka	Mphunzi	Dedza South west	Forgot to add one spoilt vote
19	Samuel Chapita	Mchenkhula	Dedza West	No missing vote
20	Love ness Kalande	Chimwankhuku	Dedza South West	Forgot to add one spoiled vote
21	James Nyanda	Mhango	DedzaSouth	No missing votes
22	Jack Tchulu	Kasupe	Dedza West	No missing votes
23	Gaudencia Kasiya	Ndakunyala	Dedza Central	No missing Votes
24	Mathias Matemba	Mlambe	Dedza East	No missing votes
25	Felix Mbaka	Dedza Community Hall	Dedza South	No missing Votes
26	Meds on Chbwazi	Liabunya	Dedza West	No missing votes
27	Esinta Selemani	Kalinyeke	Dedza Central	No missing votes
28	Clifford Saidi	Mkwinda	Dedza Central	No missing vote
29	Millard Kadzakumanja	Ntulira	Lilongwe Central	No missing vote

No	Name of Persiding Officer	Polling Station	Constituency	Remarks
30	Posiano Maduka	Chagogo	Lilongwe Central	No missing votes
31	Judith Chimimba	Mangwangwa	Lilongwe North	No missing vote
32	Steria Backson	Kamange	Lilongwe North West	No missing vote
33	Wellington Moyo	Nambuma	Lilongwe North	No missing votes
34	Norman Chirambo	Chinungu School	Mzimba Sosola	Made a mistake in recording the figures in words
35	Jolex Kafuzira	Mvera Court House	Dowa East	Had problems in reconciling figures
36	Goodwin Chibwana	Chiwindo	Dowa North East	Made mathematical errors because of fatigue, resulting in one unaccounted for vote
37	Jamison Kanyoza	Sungeni School	Dowa North	No missing votes
38	Gerald Chithyola	Chimbuli School	Dowa North	No missing votes
39	Wilbes Chithonje	Chiwichiwi School	Dowa North	Mathematical error in adding up the figures
40	Barbra Thawe	Natola	Dowa Ngala	Miscalculation
41	Paul Soko	Chikhwawa School	Dowa Ngala	Admitted problems in adding up the figures

No	Name of Persiding Officer	Polling Station	Constituency	Remarks
42	Geoffrey Mthiko	Simbi School	Dowa Ngala	Admitted that problems with calculations may have created problems of extra votes
43	Abina Kumema	Chilowa School	Mnchinji North East	No missing votes
44	Happy Masina	Ngulukira School	Mnchinji North	Errors in reconciling figures
45	Dotia Chiondadala	Nkhweza Primary School	Lilongwe North East	No missing votes
46	Enoch Chagogoda	Mitundu School	Lilongwe Nsinja North	No missing votes
47	Florence Lumba	St Peters Dickson	Lilongwe North West	Honest mathematical error when balancing figures but results not affected
48	Blackson Chimfuti	Kandiyani School	Lilongwe Kumachenga	No missing votes
49	Stewart Jere	Zukuma School	Mzimba Hora	Wrong additions
50	Benson Kanyani	Mphedza	Ntchisi North East	Mistakenly recorded 751 instead of 761- missing 10 votes
51	Henry Theza	Chibweya School	Ntchisi East	Had difficulties reconciling figures

No	Name of Persiding Officer	Polling Station	Constituency	Remarks
52	Erick Makombe	S Chikopa School	Salima South	No missing votes
53	Naphtali Kaphasa	Kabvunguti School	Salima South	No missing votes
54	Maxwell Kantondo	Kalani School	Salima South	No missing votes
55	Ezra Gomani	Community Hall	Salima Central	No missing votes
56	Cosmas Chikwanda	Mehoka School	Salima South	No missing votes
57	Isaac Zatha	Chapita School	Salima South West	No missing votes
58	Christopher Jamu	Mphiya School	Salima South East	No missing votes
59	Edson Aaron	Jitl School	Kasungu North East	Mistake arose out of miscalculation. There were no missing votes as the problem was rectified
60	Patricia Shaba	Kauai School	Kasungu Central	No missing Votes
61	Elizabeth Chavula	Junju School	Rumphhi North	She was correcting genuine mistake without affecting the results of candidates

No	Name of Persiding Officer	Polling Station	Constituency	Remarks
62	Alick Mpeyani	Vyaka Scool	Kasungu East	He forgot to add 2 on the cancelled/spoilt ballot papers
63	Gerald Phiri	Lodjiwa School	Kasungu North	He forgot to add 03 spoilt ballot papers on the administrative part
64	Monica chipwala	Chipanga School	Nkhotakota North	No missing votes
65	Odala Galantia	Damba School	Kasungu North East	No missing Votes
66	Moffat Mphongolo	Chidongo School	Kasungu West	No missing votes
67	Rodrick Nthuluzi	Chilowa School	Kasungu West	No missing votes
68	Clifford Chifunika	Muwalo	Ntcheu North East	No missing or extra vote
69	Saidi Govati	Chikowa School	Ntcheu South	No missing votes
70	Jeromy Ntchita	Gaya School	Ntcheu North East	No missing ballots
71	Webster Kasamba	Mtumba School	Ntcheu North East	No missing ballots
72	Edward Chabwera	Mphambano School	Lilongwe North	No missing votes
73	Mateyu Matchona	Chidula School	Msinja North	No missing votes

No	Name of Persiding Officer	Polling Station	Constituency	Remarks
74	Anna Chiwona	Banda School	Lilongwe Nsonz i South	No missing votes
75	Akimu Luhanga	Kamswachenje	Kasungu West	No missing votes
76	Eric Dzundi	Chitipi School	Salima South	No missing votes
77	Vincent Maonda	Chimbwita School	Salima South	No missing votes/ballots
78	Davie Jana	Kaphatenga School	Salima South	No missing votes/ballots
79	Thomas Muyande	Makande School	Ntcheu North East	There were no extra ballots
80	Ethel Kanjirawaya	Chigodi	Ntcheu North East	There were no missing votes or extra ballots

## PART FIVE

### ANALYSIS OF EVIDENCE AND THE LAW

#### PRELIMINARY ISSUES

##### *Alleged Unstated Grounds of the Petition*

1010 In the course of the hearing of the evidence on the consolidated petition, the Respondents asked this Court to curtail certain questions to deponents on certain issues and also not to consider those issues, in its determination of the petition and the constitutional questions, on the basis that those issues were not properly before this Court because those issues were not stated by the Petitioners as grounds for the petition. These issues were and are, for lack of better expression, referred to as “unpleaded issues”. This Court points this out because it is clear that this Court



already found definitively that a petition is not a pleading as was previously known under the relevant old rules of procedure and is not a statement of case as a pleading is now known under the current rules of procedure. See the ruling of this Court in this matter dated 21<sup>st</sup> of June, 2019.<sup>9</sup>

1011 This Court considered the objections by the Respondents on the alleged unpleaded issues and determined, as a matter of active case management under Order 1 rule 5 (5) (d) of the CPR, 2017, that such issues must properly be dealt with during the final submissions by the parties so that this Court could have a proper view on the said issues in this matter. This Court now deals with whether the matters objected to as being unpleaded indeed merit to be treated as such and to be excluded from this Court's determination.

1012 The Respondents, in their final submissions, accordingly identified a number of issues as unpleaded. This Court now deals with those issues.

1013 The Respondents pointed out that the attempt to bring evidence on the following issues by the Petitioners was in vain since such issues were not pleaded, namely: issues to do with duplicates; fake tally sheets; tippexed tally sheets; altered tally sheets; undated tally sheets; lack of presiding officers' signatures; lack of monitors' signatures; logbook issues; fraud; whether the 1<sup>st</sup> Petitioner received formal results from the 2<sup>nd</sup> Respondent; forged signatures; accountability and transparency; exceeding polling stream limit of 800 voters; the IT system issues raised by Mr. Daudi Suleman; and polling streams receiving ballots that were not in exact batch of 100s.

1014 The Respondents submitted essentially that there was a very good reason why the Petitioners specified and listed the alleged irregularities and other reasons being the grounds why they petitioned this Court. They submitted further that the specified and listed irregularities and causes for the petition were to inform the Respondents of the case to be met at the hearing of the petition. And that, therefore, general unspecified and unlisted allegations of irregularities or other causes for nullifying the past presidential election must not be accepted in this modern litigation.

1015 The Respondents submitted that it was settled that cases must be decided only on pleadings or the statement of the case as it is now known. They referred to the case of *Gondwe and another v. Gotani-Nyahara* [2005] MLR 121, 132 (SCA) and state that the Supreme Court of Appeal re-affirmed the strict adherence to the pleadings before the Court as follows:

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<sup>9</sup> See para. 51

“The issue of irregularity affecting the determination of results was not raised by any of the parties to the petition. The respondent did not dispute, in her petition, the manner in which the election result was determined. She did not fault the result of count forms in her petition. She did not dispute either in the petition or any affidavit the figure of 7478 which was the total number of votes she polled during the elections. Therefore the issue as to the determination of election results was raised by the learned Judge himself; and eventually decided in favour of the respondent. We do not think that was proper; see the case of *Nseula v. Attorney General* MSCA Civil Appeal No. 32 of 1997.”

1016 The Respondents referred to a number of other cases on this point, namely: *Malawi Railways Ltd v. Nyasulu* [1998] MLR 195; *Ferreira t/a SF International v. Malawi Savings Bank Limited and Mulli Brothers Limited (Third Party)* Commercial Case Number 59 of 2014; *Malawi Telecommunications Limited v. SR Nicholas Limited* [2014] MLR 218; *Nseula v. Attorney General and Another* MSCA Civil Appeal No. 32 of 1997; *Omar t/a Cotton Centre v Securicor* [2011] MLR 253 (SCA) and *Kamwendo v. Reunion Insurance* [2011] MLR 128. The Respondents noted that in the case of *Sumana v. Hara* [1993] 16 (2) MLR 843 it was held that evidence of unpleaded facts will be allowed if it falls within the general ambit of pleadings and if not objected to at trial.

1017 The Petitioners submitted to the contrary. Essentially, the Petitioners submitted that indeed the starting point is that the petition must be decided on the basis of the grounds stated in the petition itself.

1018 The Petitioners submitted that considering the constitutional questions to be determined in this matter, the Respondents’ insistence on the straight jacket language of the petitions as consolidated is misleading and contrary to the overriding objective of the CPR, 2017 on the conduct of proceedings. The Petitioners contended that this Court must determine the three constitutional questions in their full scope as long as any relevant fact or complaint was raised in substance and the Respondents had a chance to respond to the issue. The Petitioners advanced several reasons for their position.

1019 They observed that the overriding objective of the proceedings is to deal with matters justly in terms of Order 1 rule 5 (1) CPR 2017. They observed that unlike under the old regime, under which most of the cases cited by the Respondents were decided, dealing with matters justly under the current and modern procedure regime includes dealing with issues raised in substance and on which all parties have had a fair chance to respond or test the evidence in respect to such issues.

1020 The Petitioners submitted that this is the position taken on what should be regarded as *persuasive interpretation of the English CPR 1998* which bears a stark resemblance to our CPR, 2017. They cited the case of *Slater v. Buckinghamshire County Council* [2004] EWCA Civ 1478 in which it was held that if a factual issue had been adequately dealt with at trial and was clearly regarded by all parties as a live issue which was crucial to the case, the court was entitled to make a finding of fact, even if the issue was not raised in the statement of case, which could have been amended during the trial. They also referred to the English cases of *Strover v. Strover* [2005] EWHC 860 (Ch), *JN Dairies Ltd v Johal Dairies Ltd* [2010] EWHC Civ 348, *Investec Bank (UK) Ltd v Zulman* [2010] EWHC Civ 675 and *Whitecap Leisure Ltd v. John H Rundle Ltd* [2008] EWHC Civ 429.

1021 The Petitioners contended that in the circumstances of this case, this Court must determine the constitutional questions and the issues on the relevant electoral laws without being inhibited by the grounds in the petitions as consolidated. And that the Court must not be misled into thinking that its primary duty is to determine the petitions and then the constitutional questions as a consequence. They contended that, crucially, the proposed approach suits the determination of the constitutional questions as certified. For example, that the Court has to determine whether the 2<sup>nd</sup> Respondent breached its duty to ensure compliance with the Constitution and any Act of Parliament in its conduct of the past presidential election. And that upon that question there is no limit stipulated in the formulation of the question and none was introduced at the hearing.

1022 Further, that even when the petitions and the supporting sworn statements are considered it is quite clear that the issues raised in the petitions and supporting sworn statements have been considered as live and engaged with by all parties in the matter. For instance, that the 2<sup>nd</sup> Respondent went around the country and obtained numerous sworn statements to deal with the issue of duplicate tally sheets, tippexed tally sheets and other issues showing that the

Respondents adequately dealt with the issues as raised in the petitions as consolidated and as they arose in the sworn statements.

1023 The petitioners contended further that there was no point at which the Respondents sought better particulars of the constitutional questions interrogating compliance by the 2<sup>nd</sup> Respondent with the Constitution and Acts of Parliament and that the Respondents went ahead to file sworn statements without any response being filed to answer the petition. They contended that if they had equally insisted on strict adherence to a response then judgment would have been entered in default of filing responses by the Respondents.

1024 This Court observes that indeed most of the cases cited by the Respondents on the issue of pleadings are pre-CPR 2017 and therefore must be read in that context. The rationale behind the rules on setting out grounds of the petition just like with the statement of case previously known as pleadings was to let the opposing party to be aware of the case to be met on the petition. This is meant to achieve justice in the matter and avoid surprise on the part of the parties to the case.

1025 The overriding objective of the CPR, 2017 includes to ensure that matters are dealt with justly. One element of dealing with matters justly is to ensure that the parties are not prejudiced by surprise at the hearing of a matter.

1026 This Court observes that in *Gondwe and another v. Gotani-Nyahara* [2005] MLR 121, 132 (SCA), decided under the old rules of procedure, it was stated that a petition must state the grounds of the petition. It appears to this Court that in that matter the Court considered that the grounds would appear either in the petition or in the sworn statement in support of the petition. The Supreme Court observed as follows:

She did not fault the result of count forms in her petition. She did not dispute either in the *petition or any affidavit* the figure of 7478 which was the total number of votes she polled during the elections.  
[Emphasis supplied]

1027 But more crucially, this Court agrees with the Petitioners that the overriding objective of the CPR 2017 to deal with proceedings justly would be defeated if the old civil procedure rules

mentality of strict adherence to pleadings or grounds of the petition was implemented in cases where the opposing parties were not surprised and had a chance to deal with all the issues as raised in the petition and sworn statements. That is the case in the present matter.

1028 With respect to the issues that the Respondents allege were not mentioned as grounds of the petition this Court finds that the Respondents dealt with such issues as live issues at the hearing and they were not surprised. These are matters to do with the use of tally sheets with tippex; alterations; lack of signatures of presiding officers or monitors; duplicates etc. The 2<sup>nd</sup> Respondent indeed went around and obtained sworn statements from its presiding officers country wide to answer such issues as raised in the consolidated petition. The 1<sup>st</sup> Respondent equally got sworn statements from his monitors. It is therefore misleading for the Respondents to feign lack of knowledge of the grounds of the petitions and that they did not fairly meet the case as presented in the petitions. In any event, this Court observes that most of the alleged unpleaded issues related to the 1<sup>st</sup> Petitioner's petition. However, it is to be recalled that the two petitions herein were consolidated into one proceeding as already found above, and most of such issues were in fact stated (pleaded) by the 2<sup>nd</sup> Petitioner.

1029 The 2<sup>nd</sup> Respondent's sworn statements as filed by both Mr Alfandika and Mr Munkhondya are very categorical in answering the case of the Petitioners and stating that the presidential election in issue in this matter was conducted in full compliance with all constitutional and statutory dictates under the Constitution, the ECA and the PPEA. This is stated in paragraphs 11 and 9 of the sworn statements of Mr Alfandika and Mr Munkhondya respectively.

1030 These sworn statements make clear that the 2<sup>nd</sup> Respondent was answering and engaging the consolidated petition in full view of what was specified therein and what was generalised therein and specified in the supporting sworn statements. Further, there was full appreciation that there were issues to do with compliance with the constitutional and statutory dictates to be interrogated in the matter. There cannot be room for surprise on the issues at stake in the circumstances as sought to be feigned by the Respondents.

1031 In the foregoing circumstances, this Court is of the view that, to further the overriding objective to deal with matters justly, it should deal with the issues pertaining to irregularities as raised in the consolidated petitions and the sworn statements by the Petitioners and the constitutional questions as those issues are answered, or responded to, by the Respondents. The

Court therefore rejects the contention of the Respondents that it should not determine the issues that the Respondents enumerated in that regard.

1032 With regard to the issue of stating grounds of the consolidated petition, a related issue arose with regard to responses not having been filed by either of the Respondents. The Petitioners allege that the Respondents should not insist on strict adherence to pleadings since they themselves did not file responses and that this would have entitled the Petitioners to a default judgment.

1033 This Court observes that, in its order dated 27<sup>th</sup> of June, 2019 in this matter, it directed the Respondents to file their responses within 21 days from 1<sup>st</sup> of July, 2019 when the Petitioners would have filed all their case papers with the Court on the petitions as consolidated. The Respondents never filed their responses to the grounds raised in the petitions as consolidated. What the Respondents filed were however comprehensive sworn statements representing the evidence in response to the evidence in support of the consolidated petition. And this matter was proceeded with in that fashion with the Petitioners subsequently filing sworn statements in reply.

1034 This Court is mindful that Order 2 rule 4 CPR 2017 provides that an application alleging a failure to comply with an order of the court shall be made within a reasonable time and before the party making the application takes a fresh step in the proceeding after becoming aware of the failure to comply with the order of the court.

1035 The Petitioners now allege that the Respondents failed to file responses pursuant to this Court's Order. However, the Petitioners filed sworn statements in reply to the Respondents' sworn statements thereby taking a fresh step in the proceeding. That meant the Petitioners lost the right to allege the failure to comply, in terms on Order 2 rule 4 CPR 2017. The issue of failure to comply with the Order of this Court on responses cannot therefore arise at this point. In any event, this is a non-issue since this Court has already determined that it shall determine those issues that the Respondents alleged were not stated in the grounds of the petition as consolidated.

#### ***Burden and Standard of proof***

1036 The common law concept of burden of proof (*onus probandi*) is a question of law which can be described as the duty which lies on one or the other party to establish a case upon a particular

issue. The burden and standard of proof are formulated by the state of pleadings at the beginning of the trial and remain unchanged throughout the case. Electoral petitions are a special breed of claims which are governed by the CPR, 2017. Unfortunately, the entire CPR and the electoral law does not stipulate who bears the legal burden of proof and the standard of proof thereof in a petition. The legal burden of proof rests upon the claimant or petitioner as the case might be, and ordinarily it does not shift throughout the trial, remaining exactly where the pleadings place it, and never shifting in any circumstances whatsoever. When all the evidence is in, and the party who bears the burden fails to discharge it, his or her claim thereby fails. See *Pickup vs. Thames Ins. Co*, 3 Q.B.D. 594.

1037 It is trite law, therefore, that the legal burden rests on the party making an assertion that certain facts exist. He who alleges must prove as in the nature of things a positive is easier to prove than a negative. In *Dr Beatrice Nyamwenda v. Electoral Commission and Jacob Hara*, Election Petition Case Number 23 of 2019, High Court, Civil Division, Mzuzu Registry (unreported), it was stated that:

“it is therefore imperative that the Petitioner herein who is alleging undue return of the 2<sup>nd</sup> Respondent as a [M]ember of Parliament due to irregularities to bring evidence to prove the allegations. The Petitioner must also prove that the alleged irregularities occurred due to the 1<sup>st</sup> Respondent’s negligence in the conduct, control and administration of the elections. The burden of proof lies fully with the Petitioner. In the within matter there is no dispute that the legal burden of proof lies on the petitioners.”

1038 The Petitioners have argued that all they are required to do is to raise a prima facie case and thereafter the evidential burden shifts to the Respondents to rebut that evidence. The Respondents have opposed this line of argument and have asserted that the burden, even though evidential, does not shift. Both the Petitioners and the Respondents have cited the *Raila Odinga v. The Independent Electoral and Boundaries Commission*, Petition No 5 of 2013, the Supreme Court of Kenya which stated that:

“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

1039 In this regard where the court is answering questions in a petition the position does not change just like in all civil matters. Once a prima facie case has been made out, the evidential burden shifts to the respondent to disprove or rebut it. However, the petitioner still bears the legal burden of proof.

1040 The same applies where there is violation of the rights enshrined in the Constitution. All that the victim must do is raise a prima facie case on a balance of probabilities that the respondent, a duty bearer, violated her rights. The evidential burden then shifts to the respondent to disprove that fact otherwise it would be a tall order for the poor and uneducated citizens to prove their rights and access justice in our courts.

1041 According to *Phipson on Evidence* 11<sup>th</sup> Ed, Sweet & Maxwell, 1982:

“[I]n civil cases the evidential burden may be satisfied by any species of evidence sufficient to raise a prima facie case. So, in ejectment for underletting without a licence proof of the underletting is on the lessor, but if he shows that someone other than the lessee is in possession, apparently as tenant, the onus is shifted to the lessee to show that the occupier is not such.”

1042 Again, in an action of negligence against a solicitor for letting judgment go by default, proof of the default casts the burden of justification on the defendant (solicitor).

1043 If for example a voter alleged that there were irregularities in the registration of voters, and she leads evidence sufficient to raise a prima facie case, the respondent will be called upon to disprove this fact by leading evidence to the contrary on a scale of probabilities that the assertion was not true otherwise failure to do could be fatal. The duty to adduce satisfactory evidence rests with the party who wants the court to believe that certain facts do exist. In whichever case the petitioner must adduce cogent and credible evidence. Cogent is described in the *Odinga case* as



clear, logical and convincing evidence. In conclusion we form the considered opinion that the evidential burden does shift to the respondents on a particular issue.

1044 The standard of proof in electoral petitions has been an issue in this matter. The Petitioners argued that the standard of proof is simply on a balance of probabilities just like in all civil cases.

1045 The approach adopted by the petitioners on both the burden and standard of proof, was shared by both amici curiae.

1046 By contrast, the Respondents are of the view that being an electoral matter, the standard should be raised upwards (intermediate) but not beyond a reasonable doubt like in criminal cases.

1047 The petitioners based their argument on Lord Denning, MR's statement in *Miller v. Minister of Pension* [1947] 2 All ER 372:

“If the evidence is such that the tribunal can say “we think it is more probable than not” the burden is discharged, but if the probabilities are equal it is not”.

1048 The Petitioners argued that as stated in *Director of Public Prosecutions v. Jugnauth*, from the Supreme Court of Mauritius, 25<sup>th</sup> of February, 2019, the Privy Council stated that:

“[T]he legislature [...] deliberately chose to approach the matter as one in which the court should adopt the civil standard of proof. There was no question of the court applying anything other than the civil standard of proof and that in particular no question of the application of an intermediate standard. It followed that the issue for the election court was whether the petitioner had established on a balance of probabilities that the election was affected by the bribery in the manner specified in the petition. In practice as a matter of common sense rather than law, the court was unlikely to be satisfied on a balance of probabilities that there has been bribery without cogent evidence to that effect. In the instant matter, the Supreme Court was correct to reach its factual conclusion on the balance of probabilities.”

1049 The Respondents on the other hand argued that in an electoral petition where the rights of voters are concerned and allegations of fraud are made, a court should demand a higher standard which has emerged in jurisprudence in recent times called the intermediate standard of proof. This standard lies between balance of probabilities and beyond a reasonable doubt. They cited several authorities in support of their argument, including the *Odinga* case where it was held that in electoral petitions the threshold of proof should in principle be above the balance of probabilities though not as high as beyond a reasonable doubt.

1050 In *Emmanuel O Achayo vs. Orange Democratic Movement and Others*, Election Petition Number 46 of 2017, the Kenyan High Court observed that:

“in election petitions or nominations disputes the burden of proof rests with the party making the allegations at challenging the outcome or alleging, misconduct or the other. The standard of proof in election cycle cases has been held to be higher than the proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractice like for instance bribery require higher proof. It seems clear to this court, therefore that a petition as compared to other matters of a civil nature has to be proved on much higher standard of proof.”

1051 The same position was adopted by the *Zambian Supreme Court* in *Lewanika and Others v. Fredrick Chiluba* (1999) 1 LRC 138.

1052 However, we are not persuaded by the reasoning in the *Lewanika case* and other cases with similar reasoning that were cited by the Respondents. To demand a higher standard of proof than a balance of probabilities just because the petition was brought under constitutional provisions which would impact upon the governance of the nation and deployment of constitutional powers and authority misses the point. The reasoning focuses more, if not exclusively, on the rights of those wielding the powers of State instead of taking a human rights-based approach that puts the rights and will of the people at the centre of democratic rights. This would have a chilling effect on the capacity of citizens, especially the vulnerable groups in society, such as women, persons

with disabilities and those who are less privileged in society, to ably vindicate their democratic rights.

1053 Such higher standard was also expressed in Uganda in the case of *Amama Mbabazi v. Yoweri Kaguta Museveni & 2 others* [2011] MLR 47 (SCA). Here at home in the much-cited case of *Gondwe and another v. Gotani nyaHara*, the Court opined that our statutory law is deficient on the requisite standard of proof when determining petitions under section 100 of the PPEA. Therefore, it is important to have recourse to other devices such as the applicable common law and comparable jurisprudence.

1054 The court did not come up with one position on the standard of proof but rather called upon courts in this country to search widely on the appropriate standard to be adopted.

1055 The Respondents argued that the more serious the allegation, the higher the degree of probability that is required. See *Hornal vs. Neuberger Products Limited* [1957] 1 QB 247. Surprisingly in India the Supreme Court raised the standard to beyond a reasonable doubt in *Shri Kirpal Singh vs. Shri V.V. Giri* (1970) AIR 2097. The court concluded that the same standard applicable in criminal proceedings must apply where allegations of undue influence or corrupt practices are made in an election. However, the Indian Supreme Court did not cite any authority for its unprecedented departure from the widely accepted standard of proof.

1056 We have carefully examined the law in the CPR, 2017 and the PPEA and the relevant cases that have been cited. It is our finding that in electoral matters courts must demand a standard of proof that is commensurate with the occasion. Petitions just like any other civil matter must be proved by the petitioner on a balance of probabilities and nothing else. If another standard was required, the legislature could have expressly said so.

1057 It will be a sad day for justice if courts in this Republic were to impose a higher standard of proof on the constitutional rights as to do so would stifle the people's right to access justice through the courts. To demand a petitioner to discharge a higher standard would be closing the door to future litigation.

1058 In conclusion, the legal burden of proof in respect of the allegations in the petitions herein lies on the Petitioners. However, whilst the evidential burden primarily lies with the Petitioners, it

shifts to the Respondents whenever the Petitioners have made out a prima facie case on any issue in the within matter. The evidential burden then shifts to the Respondents to rebut the Petitioners' allegations on a scale (balance) of probabilities.

*Quantitative and Qualitative Tests*

1059 Two theories in relation to the proof of claims in petitions filed under section 100 of the PPEA have emerged in this case. These are the qualitative approach as advanced by the Petitioners and the quantitative approach as advanced by the Respondents.

1060 The courts in Malawi have in recent years adopted a quantitative test when annulling an election result. The number of votes involved, are used in determining whether the election was affected when determining the final results. In *Phoso v. Malawi Electoral Commission* [1997] 1 MLR 201, Chimasula, J (as he then was) stated that:

“The argument of the plaintiff is that the defendant should have nullified the by-election and ordered a re-run. I would have agreed if the number of votes affected by irregularities could have also affected the results of the by election. Otherwise nullifying those affected votes would not change the position of the candidates at all.”

1061 Similarly, in *Kanyinji v Malawi Electoral Commission*, Miscellaneous Civil Cause Number 21 of 2004 (unreported) the petitioner's complaint was that the symbol which was changed by the Electoral Commission at the eleventh hour affected the result of the election. The court acknowledged the anomaly but it formed the view that if the confusion existed due to the alteration to the petitioner's symbol that did not affect the number of votes of the petitioner. The court declined to nullify the result of the election. The court said as follows:

“The petitioner's argument, I find has not been fully substantiated to convince the court that some, if any at all, confusion was created by alteration of the symbol of such a nature that it could account for the failure by the petitioner to sweep all the votes to enable him take top position.”

1062 In *Gondwe and another v. Gotani-Nyahara (supra)*, the petitioner brought the petition before the High Court seeking a re-run of the election on the ground that it was not free and fair. The High Court in its determination rejected some forms which had questionable authenticity and those which were not signed by presiding officers and political party representatives. Unfortunately, the issue of the forms affecting the result of the election was not specifically pleaded by the parties to the petition. On appeal the Supreme Court considered the votes in the rejected forms and formed the opinion that the votes in the rejected forms did not affect the result of the election. In overturning the lower Court's decision, the Court above had this to say:

“The learned judge concluded that these forms should be rejected. When that is done the result is as follows: On the 10 rejected forms the 1<sup>st</sup> appellant polled a total of 2063 while the respondent polled a total of 2208 votes. It's the respondent who obtained more votes than the 1<sup>st</sup> appellant on the forms which the learned judge decided to reject. The result is that not only will the 1<sup>st</sup> appellant remain the successful candidate, but she will end up beating the respondent with more votes than would be the case if the forms are not tampered with.”

1063 The preceding authorities represent the quantitative approach as to proof of the claims in petitions under section 100 of the PPEA.

1064 However, where the difference in votes is not established at the trial, but the irregularities or other causes are such that any reasonable tribunal would question the result, the court may, using a qualitative test, order nullification of the election result. In *Ulemu Msungama v The Electoral Commission* Miscellaneous Case Number 64 of 2014(unreported) the petitioner brought the matter before the High Court under section 100 of PPEA on the ground that the one who was declared winner in the elections was not duly elected as Member of Parliament in that some votes were not accounted for. The court ordered a recount but the recount was frustrated when the warehouse for Electoral Commission caught fire.

1065 The court formed the view that although the difference in votes between the parties was unascertainable due to the fire, there were glaring irregularities and the court had no other option than to order a re-run. In its reasoned opinion the court stated as follows:

“While this court has not established the certainty of the difference in the votes between the two parties what is clear is that the petitioner has established that there were irregularities and such irregularities could affect the election result...the irregularities are so glaring that any reasonable person would question the result thereof.”

1066 The Supreme Court of Appeal in the *Bentley Namasasu* case confirmed the High Court’s position and stated as follows:

“We therefore find that although the court below did not establish the differences in votes between the parties it found that there were glaring irregularities that could have affected the result.”

1067 The Supreme Court of Uganda in the election petition of *Dr. Kiiza Besigye vs. Y. K Museveni and Another (supra)* considered the election as a process and Tsekooko, JSC, stated as follows:

“ In assessing the effect of such noncompliance, the trial court must evaluate the whole process of the election by using both the qualitative and quantitative approaches with quantitative approach taking the numerical approach to determine whether the non-compliance significantly affected the results and the qualitative approach looking at the overall process of the election especially the transparency of registration, chaos at polling stations, voter information, the process of counting and tallying and declaring results and the ability of each voter to cast their vote.”

1068 Tsekooko, JSC, went further to state that in determining the noncompliance with provisions and principles of the Act, numbers are not the only determining factor. He went on to state that:

“... arithmetical numbers or figures are not the only determining factors in deciding whether non-compliance with the provisions and principles of the Act did not affect the result in a substantial manner ...Numbers or figures of course are terribly important, but to me, they are not the only yardstick for assessing the quality and purity of an

election. Whether or not compliance with the provisions and principles of an Act, in the instant case, affected the result of the election in a substantial manner, is in my considered opinion a value judgment. Figures cannot tell the whole story... In my considered opinion an accumulated or sum total of the non-compliance with the provisions and principles of the Act, is the yardstick for measuring the effect of non-compliance with the provisions and principles laid down in the Act.”

1069 In *Amama Mbabazi v. Yoweri Kaguta Museveni & 2 Ors. Presidential Election Petition No. 01 of 2016* the Supreme Court formed the view that it was not every violation that could be evaluated quantitatively. The Court said that:

“we must however emphasize that although the mathematical impact of noncompliance is often critical in determining whether or not to annul an election, the Court’s evaluation of evidence and resulting decision is not exclusively based on the quantitative test. Courts must also consider the nature of the alleged noncompliance. It is not every violation that can be evaluated in quantitative terms.”

1070 In the *Railla Odinga case (2017)*, the Supreme Court stated that in determining whether to overturn the election, quantity is as good as quality. The court had this to say:

“Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave the election? It is true that where the quantitative difference in numbers is negligible, the court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of many unanswered questions with which we are faced. In such a critical process as the election of the President, isn’t quality as important as quantity.”

1071 In this regard the Court will apply both the qualitative and quantitative tests in coming to its conclusion. Whether the numbers, and or the processes as managed by the 2<sup>nd</sup> Respondent affected the final outcome of the May 21 2019 election.

*Undue Election, Undue Return, Irregularity and Any Other Cause Whatsoever*

1072 Section 100 (1) of the PPEA 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 seven days of the declaration of the result.

1073 It must be noted that in terms of the finding that this Court can make on a petition under section 100 of the PPEA, the same is restricted to a finding of either a due election or an undue election of a person as President under section 100 (3) (a) and (b) respectively.

1074 The petition can therefore allege an undue return or an undue election of a person as President. It is important to understand what these two terms entail. This Court observes that the two terms are not defined in the PPEA. This Court must therefore define the two terms.

1075 With regard to a due return of a person, upon an election, the view of this Court is that a due return is the proper declaration of the winner of an election. And therefore an undue return is an improper declaration of a person as a winner of an election.

1076 With regard to a due election, the view of this Court is that this entails the proper conduct of the entire process of the election commencing with the registration of voters throughout the polling process up to the declaration of the election result or return of the winner. An undue election is therefore one that does not comply with the set processes for the election.

1077 The foregoing views of the Court are supported by the persuasive authoritative authors on legal terms as indicated in Black's Law Dictionary 6<sup>th</sup> Edition (1990) at 519 who define an election return as the report made to the election board of the number of votes cast for each candidate by those charged by law with the duty of counting or tallying the votes for or against the respective candidates. In our context, a return will therefore be made at the polling station level, constituency and district levels both at the District Commissioner's office, and national



level. The same authors define an election contest as involving matters going behind election returns and inquiring into qualifications of electors, counting of ballots, and other matters affecting validity of ballots. They cite the American case of *Vance v. Johnson*, 238 Ark. 1009, 386 S.W.2d 240, 242.

1078 This Court has also considered that the court of Common Pleas in the State of Pennsylvania in in the USA, in the case of *Skerrett's case* reported in *A.V. Parsons, "Select Cases in Equity Argued and Determined in the Court of Common Pleas of the 1<sup>st</sup> Judicial District of Pennsylvania from 1841 – 1851"*, (Hardpress Publishing, 2019), at p.509, indicated that *undue election* or *undue return* are the expressions which constitute an election. The court said as follows:

“Undue election occurs where certain processes have not been followed such as the election not held on the date fixed by the law, the officers or indeed the candidates not having the necessary qualifications and the candidates not properly chosen. On other hand, undue return relates to falsifying the aggregation of votes, arithmetical error, someone chosen when the documents show that it should have been another to be chosen.”

1079 This Court also looked at the case of *Irwin and Macgregor, Petitioners (Renfrewshire Election)* [1874] SLR 11 where the Scottish Court decided a case in which the terms *undue return* and *undue election* were similarly not defined in the relevant statute and the court stated that election law distinguished two things: complaints against *undue return* and complaints against *undue election*. The court observed that there is plain distinction, that a candidate is elected when he/she has a majority of votes in his/her favour, and if he/she be elected or voted for by a majority of voters, and if the returning officer returns another candidate who has a minority, that is an *undue return*.

1080 The foregoing authorities persuasively support the view of this Court on the definition of an *undue return* and an *undue election*.

1081 A petition alleging an *undue return* or an *undue election* must be based on irregularity or any other cause whatsoever. These two terms must also be defined.

1082 The term irregularity has been defined in the PPEA. Section 3 states that irregularity in relation to the conduct of an election, means noncompliance with the requirements of the Act.

1083 Any other cause whatsoever means exactly that. A petition may allege an undue return or an undue election for any other reason. The foregoing position was confirmed by the Supreme Court of Appeal. In *Bentley Namasasu v Ulemu Msungama and Electoral Commission*, MSCA Civil Appeal Number 8 of 2016 (unreported), it was argued that irregularities as provided in the Act were not proved by the petitioner so as to show that there was non-compliance with the Act. But the Supreme Court held that under section 100 of the PPEA, the grounds for a petition were not limited to noncompliance with the Act. The Court said:

“The appellant in his submission sought to impress on this court that “irregularity” should be read to mean “non-compliance with the Act” as defined in section 3 of the PPEA. Despite our invitation that he should address us on the full import of...section 100 of PPEA; that is, that a complaint could be filed “by reason of irregularity or any other cause whatsoever”, counsel declined to do so. We therefore, do not find any justification for limiting reasons for filing a petition under section 100 of the PPEA.”

1084 The petitions as consolidated in this matter are alleging undue return and undue election based on alleged irregularities and other causes. They also raise matters of violation of the Constitution.

***Failure to call material witnesses: Commissioners and Monitors***

1085 A party who fails to call a material witness runs the risk of reducing the weight of his evidence. Failure to call a crucial and material witness works against that party. The court will assume that the only reason why such a witness is not called is that the evidence is adverse to the party who should have called him. See *Sabot Hauliers Ltd v. Freight Handlers* [1993] 16(2) MLR 760 (HC).

### *Absence of Commissioners*

1086 A decision maker has an obligation to clarify his reasons for a decision. This is to ensure detection of decisions that are made for improper purposes. The absence of Commissioners in this matter was blatantly obvious. No Commissioner filed a sworn statement. The Chief Elections Officer Mr Sammy Alfandika responded to all issues on which the 2<sup>nd</sup> Respondent made decisions. Counsel for both Petitioners indicated that Mr. Alfandika was not a competent witness on matters that dealt with the duty of the Commission to make decisions.

1087 Counsel for the Respondents submitted that Mr. Alfandika was a competent witness to testify on behalf of the Commission as he was empowered by law to do so.

1088 The competence of Mr. Alfandika and the other witnesses for the 2<sup>nd</sup> Respondent has to be considered in light of the Commission as a constitutional body.

1089 The Commission is recognised as both an administrative body and a tribunal. The Commission engaged in decision making on those two fronts, as an administrative body and as a tribunal in relation to the conduct of the elections herein.

### *The Commission as a Tribunal*

1090 The Commission is a constitutional body. It is created under section 75 (1) of the Constitution. Its powers and functions are defined in section 76. Section 76 (2) (c) is the basis of the quasi-judicial function of the Commission. It mandates the Commission to "*determine electoral petitions related to the conduct of any election*". As the Commission so functions, it operates as a tribunal and becomes distinguishable from any other body. This provision empowers the Commission to exercise quasi-judicial functions. See the *Namasasu case*.

1091 When the Commission exercises this function, it is required to ensure that the hearings are made in accordance with the principles of natural justice. It has to also correctly apply and interpret the electoral laws.

1092 In the matter at hand, there is no occasion where the complainants herein are said to have been accorded audience with the Commissioners. The evidence shows that all complaints were

presented to Mr Alfandika as Chief Elections Officer. It was his evidence in Court that he forwarded the complaints to the Commissioners with recommendations.

1093 According to O. Hood Phillips, *Constitutional and Administrative Law*, at page 644:

“[t]he process of hearing complaints before tribunals is supposed to be one that is subject to special procedures as outlined [in the law]. [T]he general characteristic that should mark these special procedures are “openness, fairness and impartiality”.

1094 The handling and determinations of the Commission with regard to the complaints of both Petitioners in the matter at hand lacked openness. A resolution of the Commission was written by Mr Alfandika and communicated to the complainants by Mr Alfandika. It is actually questionable whether it was the Commissioners and not Mr Alfandika that made the decisions.

1095 Whenever the Commission makes a decision as an electoral tribunal, it is required to give reasons for the same.

“Where a tribunal ... gives a decision, it is the duty of the tribunal to furnish a written or oral statement of the reason for the decision *if requested to do so* by the person concerned. The statement may be refused, or the specification of the reasons restricted, on the grounds of national security. Such a statement forms part of the decision and must be incorporated in the record, so that the order will be a “speaking order” for purposes of [enforcement]...[T]he reasons given must be “proper, adequate reasons” which must be intelligible and deal with the substantial points which had been raised. [O. Hood Phillips at page 648].”

1096 We must state here that although the general administrative law position in England seems to suggest that the tribunal has a duty to furnish reasons for its decision *if the tribunal is requested to do so* by the person concerned, this is not the position in Malawi. Section 43 of the Constitution specifically imposes a duty on the part of the administrative tribunal to ensure that *its processes are lawful and procedurally fair, and to furnish reasons in writing for any of the*

decisions it takes where the decision has the effect of affecting the rights, interests or legitimate expectations of the person concerned. It does not matter that such reasons were not requested for.

1097 It was actually incumbent upon the 2<sup>nd</sup> Respondent to accord the Petitioners a hearing on their complaints because their decisions on the complaints raised affected the candidates' rights as well as the rights of the voters. The issue of security concerns did not arise in the matter at hand.

*The power to delegate*

1098 The power to delegate herein was provided for by statute itself. Section 9 of the ECA provides as follows:

“The Commission may delegate to any of its committees, the Chief Elections Officer or other employee of the Commission all or any of its powers and functions.”

1099 Looking at the statutory context herein, section 9 of the ECA is worded in a manner that allows wide discretionary powers to the Commission. In order to decide whether the Commission can delegate any of its functions, the type of power which is to be delegated will be of importance, though not conclusive. In *Barnard v. National Dock Labour Board* [1953] 2QB at 18, the court stressed that a judicial function could rarely be delegated.<sup>10</sup>

1100 In *Vine v. National Dock Labour Board*, [1957] AC 488 HL, it was observed that, this rule is not overly sacred. It was stated that much as a judicial function is rarely delegated, this is not an absolute rule that judicial or quasi-judicial functions could never be delegated. The golden rule was to consider the entire statutory context.<sup>11</sup>

1101 The statutory context also includes that the issue of election is an issue which has its origins in the Constitution. It is a function that deals with the legitimacy of a person that is elected to

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<sup>10</sup> The National Dock Board had lawfully delegated powers including, those over discipline, to the local Boards. The local Boards purported to delegate these to the port manager who suspended the plaintiff from work. The suspension was held to be unlawful.

<sup>11</sup> 1957 AC 488 HL.

govern the citizens for a period of time. Election of a president is a safeguard that is meant to ensure democracy. The PPEA is a tool that contains the procedures for the application of the safeguard. Again, the PPEA is a tool that contains the rights of the voters as well as the candidates. A power or function that not only deals with the rights of the voters and candidates, but a function that is at the helm of the legitimacy of the candidate who would end up being the one that is given the power to govern cannot be delegated. When section 9 of the ECA is considered in light of sections 12 (a), (b) and (c), section 13(o), section 40 section 76 as well as section 78 of the Constitution, the Commissioners could not afford to delegate its quasi-judicial powers and functions, which result in making legally binding and appealable decisions, to the Chief Elections Officer. Again when one considers that the ECA and PPEA are transformational instruments intended to achieve democracy, the powers of the Commission, to make decisions on the information that is contained on documents whose ultimate end will affect candidates' rights as well as voters' rights, cannot be delegated.

#### *The Commission as an Administrative Body*

1102 The Commission is empowered by the Constitution, the ECA as well as the PPEA to exercise administrative powers in the discharge of its duties. Administrative law recognises delegation of administrative powers and functions. The Constitution provides that the Commission's functions in relation to elections include the determination of constituency boundaries as well as reviewing existing constituency boundaries from time to time<sup>12</sup>.

1103 The administrative functions are also provided for in section 8(1) of the ECA where the Commission is required to *exercise general direction and supervision over the conduct of every election*.<sup>13</sup> This obviously involves decision making. According to the Commission's organisational structure, the power to give general directions or guide the Commission are vested in the Commissioners. Again, supervisory powers are vested in the Commissioners. And the provisions for this decision-making process are contained in the ECA itself in Part IV that deals with meetings of the Commission. The significance of this decision-making role is highlighted in the decision-making process as prescribed by statute. Under section 11(5) of the ECA, the decision of the Commission at any meeting is supposed to be by majority of the members present and voting.

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<sup>12</sup> section 76 (2) (a) and (b).

<sup>13</sup> section 8 (1) of the Electoral Commission Act.

1104 During the time of the elections any Commission decision on the conduct of the election or resolution of issues that affected the election process was supposed to be through Commission meetings at which the Commissioners were supposed to take a position. The decision of the majority was to be upheld. In the event of equality of votes, the Chairperson was supposed to cast a deliberative vote, under section 11(5) of the ECA.

1105 The significance of this decision-making process is highlighted by the requirement on the part of the Commission to keep a record in the form of minutes for each meeting. Section 8 (8) of the ECA provides that:

“Minutes of each meeting of the Commission or a committee of the Commission shall be kept by the secretary...”

1106 This provision is couched in mandatory terms. Minutes of anybody are the official and true reflection of whatever transpired at such meeting. In the case of the Commission, they act as evidence of the proceedings, decisions or resolutions arrived at during the meeting. They document the Commission’s discussions and they are legally presumed to accurately reflect the actions and intentions of its Commissioners. Meeting minutes are presumed to be correct and can be used as legal evidence of the facts that they report.

1107 As a Commission’s decision, it was supposed to be reflected in the minutes. The answer to inquiries about the Commission’s conduct of the 2019 election were to be found in the minutes. The answer for any inquirers about the Commission’s operations as implemented by the secretariat, presiding officers, the Polling Equipment Operator (PEO) or the Constituency Returning Officers (CRO), based on the Commissions’ instructions, or any was to be found in the minutes.

1108 The Chief Elections Officer’s role in a meeting of the Commission is reflected in section 7 of the ECA. It is to be the secretary of the meeting. In so far as decision making is concerned, the Chief Elections Officer does not form part of the decision-making process. His role is relegated to the one of secretary and nothing more.

- 1109 As a secretary to the meeting the Chief Elections Officer is not competent to narrate what transpired at Commission meeting even though he was in attendance in person at such meeting.
- 1110 Still there is section 5 (3) of the Electoral Commission (Amendment) Act [No 32 of 2018] which defines the other functions of the Chief Elections Officer. These are:
- (i) he/she is the Chief Executive Officer and Controlling Officer of the Commission,
  - (ii) he/she is subject to the general and specific directions of the Commission and
  - (iii) he/she is responsible for the day to day management of the Commission.
- 1111 This section 5(3) of the Electoral Commission (Amendment) Act does not acknowledge the Chief Elections Officer as a decision maker for the Commission. It is the Commission that is mandated to give him both general and specific directions in the management of this institution.
- 1112 The Chief Elections Officer's powers and functions as Chief Executive Officer are limited. He/she can only operate within the parameters that are defined by the Commissioners. He/she does not have decision making powers on issues or matters where such powers are vested in the Commissioners.
- 1113 Section 9 of the ECA provides for delegation of powers and functions of the Commission as already set out above.
- 1114 The 2<sup>nd</sup> Respondent indicated that this is the section that was invoked by its Commission. The 2<sup>nd</sup> Respondent's Counsel indicated to Court that this section empowers the Commission to delegate to its Chief Elections Officer '*all or any* of its powers and functions.'
- 1115 Considering the accommodative language which the legislature used in this provision, it can be construed to mean that the legislature intended to provide the Commission with the discretion to grant the Chief Elections Officer unlimited powers. Discretion, however, has to be contained within necessary bounds. And it also had to be structured, that is, the discretionary power must be exercised within designated boundaries.<sup>14</sup>

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<sup>14</sup> P.P. Craig, *Administrative Law*, (Sweet & Maxwell, 1983) at page 382.



1116 The provision grants the Commission very wide discretionary powers. Discretion exists where there is a power to make choices between courses of action, or where, though the end is specified, a choice exists as to how it should be reached. When taken to its extreme, section 9 of the ECA provides for the Commission to delegate to the Chief Elections Officer all or any of the powers and functions of the Commissioners. It could also delegate all or any of its powers and functions to any other employee of the Commission. In such an extreme scenario, the overly wide discretion, as envisaged in section 9 of the ECA would have the effect of allowing the Chief Elections Officer or any other employee of the Commission, when so delegated, to render the role of the Commissioners under the ECA ineffectual. Worse still, such delegation would amount to a blatant abdication and abrogation of functions and powers that are specifically vested in Commissioners under the Constitution. Delegation as envisaged in section 9 is therefore unreasonable, absurd and unconstitutional to that extent.

1117 Discretion has to be exercised according to reason and law.<sup>15</sup> A decision can be attacked if it is so unreasonable that no reasonable public body would have made it. At the same time, intervening in an institution's exercise of discretion has to be applied with caution. And courts cannot intervene merely because they believe that a different way of exercising the discretionary power would be more reasonable than the one chosen by the public body.<sup>16</sup> The question in the matter at hand that seeks for enlightenment is whether a reasonable administrative body in similar circumstances would have delegated powers to its Chief Executive Officer. The answer is an obvious negative.

1118 With regard to delegation, the general starting point is that if discretion is vested in a certain person, it must be exercised by that person. Whether a person other than the one that is named in the empowering statute is allowed to act will be dependent upon the entire statutory context; taking into account the nature of the subject matter; the degree of control retained by the person delegating; and the type of person or body by whom the power is delegated.<sup>17</sup> The type of power to be delegated is also of importance though not conclusive. During the period of the election, the power that was in issue was the power to determine the election of a candidate to the office of President. This was a power that could not be delegated.

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<sup>15</sup> Craig, *Administrative Law*, *ibid.*

<sup>16</sup> Craig, *Administrative Law*, *ibid.*

<sup>17</sup> Craig at 372

1119 There are other Constitutional provisions that recognise delegation. These include Section 100 of the Constitution. This however has to be read together with section 99 (3) and section 99 (1) (b) and (c) of the same.

1120 Section 100 provides that:

“Save as provided in section 99 (3), such powers as are vested in the office of the Director of Public Prosecutions may be exercised by the person appointed to that office or, subject to his or her general or special instructions or to an Act of Parliament, by-

(a) person in the public service acting as his or her subordinate;

(b) such other legally qualified persons on instructions from the Director of Public Prosecutions.”

1121 Section 99 (3) of the Constitution limits the Director’s powers to delegate. He/she cannot delegate her power to take over and continue any criminal proceedings. Again, she cannot delegate her power to discontinue criminal proceedings. Her discretion is also curtailed under section 99 (2) in that while she has the powers to delegate and has wide discretionary powers to prosecute or not to prosecute, her powers to prosecute are curtailed in so far as the person’s right to appeal is concerned. Further, the DPP cannot discontinue proceedings to any case stated or question of law reserved at the instance of such appellant.

1122 Again, the DPP can only delegate and exercise her powers within the boundaries of her subservience to the Attorney General. There is therefore limitation to the exercise of discretion and delegation of powers even in other similar bodies.

1123 Section 156 of the Constitution also grants the Police Service Commission with the power to delegate. The power to delegate under this section is equally curtailed. Again, there has to be evidence of delegation to the body or person that exercises the functions of the Police Service Commission. The delegated powers must be evidenced in writing. The body or person to whom the power is delegated must furnish reports to the Police Service Commission. The Police Service Commission may prescribe the manner in which the report is to be articulated.

1124 Even delegation of any function or duty on the part of the President has to be evidenced in writing under sections 89(1)(f) and 89(6) of the Constitution.

1125 The Court has considered the lack of evidence in the form of minutes that the Commissioners had delegated the particular functions to the Chief Elections Officer. No letter from the Commission evidencing such delegation was produced. Considering the fact that the Chief Elections Officer as Chief Executive Officer is not vested with decision making powers, the decision-makers for the Commission were the only competent persons that could have explained to the Court the path that they took to arrive at decisions that affected the voters' and candidates' rights. The Commissioners were the only persons that could have explained to the Court their reasons for arriving at particular decisions when the Commission, in its quasi-judicial role, was moved by the Petitioners as complainants.

1126 The appearance of the Commissioners in these proceedings could therefore not be dispensed with. Appearance of the Chief Elections Officer as Chief Executive of the Commission on behalf of the Commissioners was supposed to be evidenced in writing. Again, reporting on the part of the Commissioners on the manner of the exercise of their decision-making powers and process could not be delegated to the Chief Elections Officer. The 2<sup>nd</sup> Respondent could therefore not rely on section 9 of the ECA for Commissioners to abdicate and abrogate their constitutional and statutory duties and functions.

1127 In the circumstances, failure on the part of the 2<sup>nd</sup> Respondent to call Commissioners who were material witnesses in so far as their quasi-judicial functions and administrative functions are concerned can only be adversely inferred against them.<sup>18</sup>

#### *Absence of Monitors*

1128 Party representatives played a very crucial role in the 2019 elections. And they are in fact statutorily recognised in the PPEA.

1129 The monitors were present and in attendance at different levels of the election process. They were present at the polling stations, starting at the stream level. They were also present at the

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<sup>18</sup> *Mpungulira Trading Limited vs Marketing Authority and Attorney General* [1993] 16(1) MLR 346

constituency tally centre level and finally they were also present at the National Tally Centre. Again, there were other monitors who were the roving monitors.

1130 The functions, rights and duties of these monitors were provided for in both the laws as well as *the Polling Station Procedure Manual*.

1131 The statutory provision that stipulates the rights and duties of the monitors is section 73 of the PPEA. The section starts by looking at the rights of the monitors. These include: *the right to be present at the polling station ... so as to be able to monitor all operations relating to the casting and counting of votes; to verify and inspect, before and at the beginning of the casting of votes, the ballot boxes and the polling booths; to request and obtain from the polling officers any information which they consider necessary relating to the voting process and the counting of the votes; to be consulted about any question raised on the operation of the polling station whether during the casting or the counting of the votes; to consult the voters at any time.*

1132 Their duties are provided for in section 73 (b) of the PPEA. They include: *to act conscientiously and objectively in the exercise of the right under this section; to co-operate with polling officers in the operations relating to the casting and counting of votes; to refrain from interfering unjustifiably and in bad faith with the duties of the polling station officers so as not to disturb the process of casting and counting the votes and to maintain the secrecy of the ballot.*

1133 The monitors are expected by law to witness all activities that happen at all levels which activities impact on the determination of results of the elections.

1134 At the polling station level, the person in charge is the presiding officer. He is mandated to cause the polling officers to prepare a record of the entire polling process and a brief summary of the final result.<sup>19</sup> The political party representatives are also entitled to a copy of the duly signed summary of the final result sheet of the poll at the polling station.<sup>20</sup>

1135 At district level, the Returning Officer or an officer of the Commission is required to compile the result of the elections in his district. Monitors are entitled to observe the entire procedure followed at the District Commissioner in compiling such record.<sup>21</sup>

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<sup>19</sup> section 93(1) of the PPEA

<sup>20</sup> section 93 (2) of the PPEA

<sup>21</sup> section 95 (2) of the PPEA.

1136 The importance of the presence of political party representatives comes into play in the matter at hand as the Petitioners' allegations against the 2<sup>nd</sup> Respondent include that the Commission did not follow or comply with the PPEA, as well as the Polling Procedure Manual at all levels.

1137 Among other allegations, the Petitioners alleged that a large number of unused ballot papers were not properly recorded. They lamented that the 2<sup>nd</sup> Respondent used duplicates instead of originals at some polling centres. Again, they stated that other presiding officers altered result tally sheets and used tippex to deface the result tally sheets.

1138 The 2<sup>nd</sup> Respondent argued that this ought not to be contested before the Court as it was done in the presence of monitors. The 2<sup>nd</sup> Respondent also contended that the argument cannot be sustainable as no monitor presented himself to court to substantiate the allegation.

1139 On the other hand, the Petitioners stated that there was no need for them to call witnesses on this position because the documents speak for themselves. There were a lot of documents which were altered by manual overwriting and through defacement using tippex. On the use of tippex on this matter the documents do speak for themselves. The face of these documents announce to all and sundry who visit their eyes on them that they were tippexed, again they speak for themselves that they suffered alterations.

1140 There is therefore no need for monitors to testify to that fact. In fact, even if witnesses were required to prove the fact that the Form 66Cs were defaced or altered, there is the evidence of more than two hundred presiding officers on record who have testified to that fact. Even Mr Mukhondya admitted that Form 66Cs that he presented as his evidence in HM2 were defaced and altered documents. Again, Mr. Sammy Alfandika testified that he took these duplicate, defaced, tippexed and altered documents to the Commissioners who in turn accepted and used them to determine the final result. Evidence of an adverse party can be used in court proceedings to support a position. And the evidence of the 2<sup>nd</sup> Respondent's presiding officers, Mr. Alfandika and Mr. Munkhondya did support this position.

1141 The issue of the monitors' evidence in the matter at hand has to be considered on three levels. There were instances where there was need for the Petitioners to present monitors as witnesses as whatever was stated in court constituted hearsay evidence. There are other instances where

the documents spoke for themselves as primary evidence. Thirdly there were instances where the evidence of the 2<sup>nd</sup> Respondent's witnesses who were on the ground supported the Petitioners' allegations.

1142 The starting point is the case of *Subramaniam v Public Prosecutor* [1956] WLR 965, that the Attorney General referred to in the matter at hand where it was said in that:

“Evidence of a statement made to a witness by a person who is not, himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”

1143 In the matter at hand, the Petitioners presented their witnesses who made various assertions to support the Petitioners' positions.

1144 Ms. Gwalidi in her testimony stated that the 1<sup>st</sup> Petitioner's monitors were denied monitors' copies of result tally sheets by the presiding officers. Again, Mr Bendulo, Mr Lackson and Mr Chapweteka stated in their evidence that many monitors were denied copies of the result tally sheets and that they obtained information from their monitors on phones which information the monitors had recorded on other documents other than a copy that the monitors were entitled to obtain from the presiding officers. All these witnesses were not present at the polling stations. No evidence was given by the monitors themselves that they were denied result tally sheets. These statements with regard to the truthfulness of the allegation that monitors were denied result tally sheets at the polling station cannot be verified through lack of monitor's copies.

1145 We observe as did the case of *Ellock Maotcha Banda vs Malawi Electoral Commission*, Elections Case No. 13 of 2019, High Court, Zomba, that hearsay evidence, meaning evidence tendered by a person other than the party that made the statement or was present when it was made or witnessed the incident in question first hand, is inadmissible as to the truth of the matters contained in the item of evidence.

- 1146 Equally, the statements from these witnesses that the Petitioners' monitors were denied copies of the result tally sheets (Form 66C) constitutes hearsay evidence and is inadmissible. The Petitioners in the matter at hand failed to establish that indeed, the 2<sup>nd</sup> Respondent denied their monitors copies of the result tally sheets.
- 1147 The lack of monitors copies does not testify to the fact that they were denied copies. There was need for the monitors to present themselves before court in order to attest to that fact. A person who was not present at the polling station but was only present at the National Tally Centre could not attest to the allegation that monitors were denied copies. All statements that were made in court that the monitors were denied monitors' copies therefore constitute hearsay evidence. It does not matter that so many witnesses made the same statement that monitors were denied monitors' copies. The monitors themselves were supposed to testify in Court to that allegation. The Court recalls the argument advanced by both Petitioners that given the large number of political party representatives, which was over 20,000 for each petitioner, it would have been impractical to bring all of them to Court as witnesses. However, the Court would have expected the Petitioners to present a limited number of political party representatives as first-hand witnesses who would have provided a representative sample of the areas where political party representatives were denied result tally sheets. None of them did this.
- 1148 Ms Gwalidi testified that her examination of the result tally sheets moved her to observe that some monitor signatures had been forged. The best evidence of the forgery of signatures would have been that of a witness alleging that his or her signature had been forged.
- 1149 Mr Kawaga for the 1<sup>st</sup> Petitioner, was cross-examined on allegations of bribing of monitors, presiding officers and other polling staff influencing voters; arrest of persons and failure to deliver ballot papers under conditions of absolute security. He also testified that he was based at the National Tally Centre. It is the finding of this Court that in the absence of eyewitnesses to these averments, Mr Kawaga's statements constitute hearsay.
- 1150 The Attorney General made an all-encompassing submission based on the sweeping observations that were made in the case of *Atiku Abubakar v Independent National Electoral Commission* Petition No. CA/PEPC/002/2019, Court of Appeal, Abuja; that in order to prove assertions of irregularities, the Petitioners are obliged to call oral and documentary evidence

through eyewitnesses who can give cogent and direct evidence and demonstrate to the court any misapplication of votes polled by the parties at the election.

1151 The Attorney General also made reference to the case of *Alhaji Atiku Abubakar vs Alhaji Musa Yar' Adua* (2008) 19 NWLR (Part 1120) 1 at 173 E-G per Niki Tobi, J who said that:

“Petitioner who contests the legality or lawfulness of votes cast in an election and subsequent result must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify that the illegality or unlawfulness substantially affected the result of the election. The documents are among those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of election.”

1152 Again, the Attorney General referred to the observation in the cases cited that both forms and witnesses are vital for contesting the legality or lawfulness of votes and the subsequent result of the election. And that one cannot be substituted for the other. That it is not enough for the petitioner to tender only the documents. It is incumbent on the petitioner to lead evidence in respect of the wrongdoings or irregularities both in the conduct of the election and recording of the votes; wrongdoings and irregularities which affected substantially the result of the election.

1153 These cases need commentary in that the courts therein were suggesting that a petitioner in an election case must provide both oral evidence as well as documentary evidence. It was being suggested that oral evidence by itself cannot be conclusive evidence that can establish an irregularity. It was also being suggested that documentary evidence cannot speak for itself in an election matter. Whilst perhaps these propositions might represent the law in the jurisdictions where they were made, they do not represent the position in Malawi. Oral evidence in itself can constitute sufficient evidence. Likewise, documentary evidence can also speak on its own without having recourse to oral testimony where the document speaks for itself. This applies even in election matters.

1154 The questions that arise from the propositions as advanced by the Attorney General include the following: Were monitors' eyewitness accounts necessary at all costs? How about



documentary evidence? Was there need for monitors to appear before court to testify that the presiding officers had altered the result sheets? Did the court need monitors to establish that there was tippex on the face of the result sheets? Were monitors required to prove that there were no presiding officers' signatures on some of the tally sheets? Did the court need monitors to testify to the fact that some of the monitors did not append their signatures on some of the result tally sheets? Did the court require monitors to testify that on some documents the information in the logbook differed from the information/data on Form 66C? Did the Court require evidence from monitors to testify that the logbooks that were presented before it had no data while the Form 66Cs whose data was supposed to derive from the logbook's Form 60C were not filled? Were duplicate result tally sheets used in determining the results?

1155 The Court does not agree with the Respondents' submissions that there was need for monitors to come to testify to the veracity of these claims. The Court forms the view that these documents were self-explanatory as official records of the electoral process. In the case of the alteration of result tally sheets, the 2<sup>nd</sup> Respondent brought over 600 sworn statements from presiding officers who admitted that they were the ones who made the alterations to the said tally sheets.

1156 The Petitioners alleged that the 2<sup>nd</sup> Respondent connived with the 1<sup>st</sup> Respondent to rig the elections for the 1<sup>st</sup> Respondents' benefit. There was need on the part of the Petitioners to establish the mental element of the 2<sup>nd</sup> Respondents' agents who in this case were the presiding officers. Monitors would have provided the best evidence on this position. Ms. Gwalidi testified that in the course of her roving, she visited Blantyre Secondary School twice. When she got to the place the second time, she found the presiding officer and a monitor who introduced himself as a monitor for the 1<sup>st</sup> Respondent doing some calculations and working on Form 66C. The monitors for other parties including her monitor was not at the place, the presiding officer and the 1<sup>st</sup> Respondent's monitor failed to give her an explanation on what they were doing with the Form. Ms. Gwalidi did not push for clarity, she left the place without establishing that the presiding officer and the 1<sup>st</sup> Respondent's monitor were altering results for the advantage of the the 1<sup>st</sup> Respondent. The allegation that the 2<sup>nd</sup> Respondent was altering results for the 1<sup>st</sup> Respondent at Blantyre Secondary School was therefore not proved on a balance of probabilities by Ms. Gwalidi. This was an isolated incident. No other monitors are on record with allegations that similar incidents happened at their polling stations.

1157 In contrast, Ms. Gwalidi presented 14 (fourteen) logbooks as exhibits MG53A to MG53N which were not signed by monitors or presiding officers. These however spoke for themselves and needed no monitor to testify that they had not been signed.

1158 The Attorney General made some observations on the effect of any irregularity on votes which should have been proved using people that witnesses the voting, vote counting and vote recording - (the monitors). He referred to the case of *Atiku Abubakar vs Independent National Electoral Commission*<sup>22</sup>, where the court said:

“No eye witness account was called by the Petitioners to prove the scathing allegations of crime and misconduct in electoral process...The Petitioners in effect dumped their exhibits on this all important issue of unlawfulness of votes on the Court without calling their makers or those with knowledge of the documents to testify. This Court is not in a position to use or accord them any weight or probative value. It is the bounden duty of the Petitioners to tie their documents/ exhibits to this aspect of their case and to lead their witnesses to demonstrate the misapplication of votes complained of in their pleadings and other evidence of alteration, inflation or deflation of votes, racking up of figures in favour of the parties by the Electoral Officials.”

1159 This case needs to be distinguished from the one at hand because in that matter it was the legal practitioners who presented the forms before court. The judge noted that the petitioner dumped their exhibits on the all-important issue of unlawfulness of votes on the court without calling makers or those with knowledge of the documents to testify. It was the learned senior counsel from the bar who was presenting the documents before that court.

1160 In the matter at hand, Ms. Gwalidi, a witness for the 1st Petitioner who had undergone training that was provided by the 2nd Respondent on the election process in general and content and filling of various electoral documents, was the one that presented the documents. She stated that based on the training that the 2<sup>nd</sup> Respondent had vested in her, she realized that these particular exhibits had irregularities. Ms. Gwalidi therefore had knowledge of the electoral process. This was knowledge that she obtained from the 2<sup>nd</sup> Respondent. She was therefore competent to speak

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<sup>22</sup> Court of Appeal at Abuja, Petition Number CA/PEPC/002/2019

in court about these documents. Ms. Gwalidi was indeed not at the polling stations where the irregularities occurred, but she was competent to testify on the irregularities. There was no need for monitors. This Court therefore accords the documents that Ms. Gwalidi presented before it as her exhibits the requisite probative value.

1161 It should also be mentioned that these forms that Ms. Gwalidi presented form part of the 2<sup>nd</sup> Respondents' evidence through the evidence of Munkhondya who presented them as his exhibits in MH2. Again, these Form 66Cs are part of the 2<sup>nd</sup> Respondent's evidence through the sworn statements of presiding officers who were the 2<sup>nd</sup> Respondent's witnesses. There was therefore no point for the Petitioners to call upon monitors on facts that were admitted by Mr. Munkhondya and the presiding officers.

1162 Further, these forms speak for themselves and they are public documents. Section 119 of the PPEA states that at the end of its functions, the Commission is expected to deposit all documents forming the official record of an election (including voters' registers, ballot papers, records from districts and polling stations and summaries thereof and the record and summary of the national result) with the Clerk of Parliament who shall retain and preserve such documents in safe and secure custody without destruction for a period of twelve months. The documents that Ms Gwalidi exhibited are what were termed records from polling stations (record logbooks), and polling station summaries (Form 66CS or result sheets).

1163 It was held in the case of *Bauleni & Others v. Siku Transport & Another*, Personal Injury Cause No. 299 of 2014, (HC, PR), that a public document is only admissible as evidence of the truth of its contents if (a) it concerns a public matter, (b) it was made by a public officer acting under a duty to inquire and record the results of such inquiry, and (c) it was intended to be retained for public reference or inspection.

1164 The result tally sheets herein were intended to record the ballot papers that were used at the polling stations as well as the candidate votes which candidate votes were to be used to determine the winning candidate of the 21<sup>st</sup> of May, 2019 presidential race; the record logbook was used by the 2<sup>nd</sup> Respondent as a record of the entire polling process. The record logbook therefore assumed the role of the official record of the polling process as prescribed under section 93 of the PPEA. The presiding officers and polling station officers who authored these documents were under a duty to inquire and record the results of the inquiry as is provided under section 93 of the

PPEA; and the log books and the result sheets were intended to be retained for public inspection for a period of twelve months as provided under section 119 of the PPEA. Once more the result sheets and logbooks that were presented by Ms. Gwalidi are admissible evidence in this Court.

1165 The intention of the presiding officers to misinform or misrepresent information can be perceived when the documents are put side by side and they fail to put a complete story. The information in Form 66C, the result tally sheet was supposed to originate from Form 60c and other documents in the record logbook. There were instances that Mr. Bendulo isolated documents which were contested by the 2<sup>nd</sup> Respondent in which the information in the Form 66Cs, when put against the information in the record logbook, was clear that the information did not originate from the record logbooks' Form 60C. Again, there were instances that Ms. Gwalidi identified where the Form 66C was filled with figures in the candidates' votes whilst the Form 60C which was meant to be the source of that information had no information. In this case there was no reason for the monitors to testify to that fact. The burden was on the 2<sup>nd</sup> Respondent to show the court the origins of the data and information that the presiding officers filled on the Form 66C.

1166 It is also important to note that the role of monitors in the Malawian context must be appreciated against the provisions of the PPEA. The PPEA distinguishes the need for presence of presiding officers and polling staff against the availability of monitors. Sections 92 and 93 of the PPEA provide for the presence of presiding officers in mandatory terms while the monitors are at liberty to attend or leave the polling station. The duty of the monitor is mainly to his/her candidate or his/her party while a presiding officer is a representative of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent cannot, therefore, rely on the acquiescence of monitors where the PPEA had expressly assigned the presiding officer duties. The High Court of Malawi, in the case of *Raphael Joseph Mhone v. The Electoral Commission and Symon Vinva Kaunda* Election Case No. 11 of 2019 (Unreported), in interpreting section 93 of the PPEA, stated that unlike a political party monitor whose signing depends on his availability, the presiding officer's signing is mandatory. The court, per Ligowe J, proceeded to state as follows:

“This means that where no party representatives are present, the record of polling process and the summary of final result are still in order without signatures of party representatives. But they cannot go without the signatures of the presiding officer and other polling station officers.

Polling station officers are under section 68, officers appointed by Electoral Commission to administer the proceedings at a polling station, including more particularly the casting of votes and [to count the votes] at the polling station.”

1167 In light of the foregoing, the importance and emphasis on monitors' presence in the present matter by the Attorney General, whilst significant in certain respects, was on the whole highly overrated.

### *ISSUES IN PETITIONS*

1168 The 1<sup>st</sup> Petitioner, in paragraph 7 of his petition, complained that the count, audit, transmission of the results from polling stations to tallying centres, and the tallying of the aggregated vote at the 2<sup>nd</sup> Respondent's main tally centre was replete with intimidation of election monitors; bribing of election monitors; presiding officers and other staff of the 2<sup>nd</sup> Respondent influencing voters on the choice of candidates; presiding officers and other staff of the 2<sup>nd</sup> Respondent tampering with tally sheets in order to alter the result of the vote at a particular polling station or tally centre; unauthorized persons being found with ballot papers and ballot boxes; arrests of persons, at various places for offences relating to breach of country's electoral law and failure to deliver the ballot papers under conditions of absolute security.

### *Intimidation*

1169 The Court has also considered the evidence of the other remaining three witness if at all would help in proving the allegation of intimidation. Mr. Ndasuaka who was at the National Tally Centre never gave evidence of not even a single incident of intimidation. As for Ms. Gvalidi, who was a roving monitor for Blantyre and also worked at the National Tally Centre, her evidence was mainly on what happened in Ndirande. She gave evidence of what she observed and saw in Ndirande, including at Blantyre Secondary School, like alleged alterations on result sheets but she never testified on any alleged intimidation. Even the evidence of Mr. Kawaga was far from attesting to any act of intimidation. In the end result the allegation of intimidation has not been made out.

*Bribing of election monitors*

1170 The position of the Court on the alleged bribing of party monitors is largely the same as the one on intimidation. According to the 1st Petitioner he had filed sworn statements of his monitors as evidence. There was no evidence of intimidation in the sworn statements of Mr. Ndasauka, Ms. Gwalidi and Mr. Kawaga. The end result is that this allegation is not supported by any evidence at all.

*Presiding officers and other staff of the Respondent influencing voters on the choice of candidates*

1171 Looking at all the evidence that came from the 1st Petitioner's side it was Dr. Chilima and Ms Gwalidi who gave evidence on this allegation. It will be recalled that, in particular the allegation centred on Chitipa North Constituency where it was alleged that the 2<sup>nd</sup> Respondent's Presiding Officer accompanied voters into the polling booths and directed them on who to vote for.

1172 This allegation would also obviously require direct evidence of a person who saw the alleged acts taking place. It is clear from the evidence in totality that both Dr. Chilima and Ms Gwalidi were not at the place where the alleged malpractice occurred. As in the case of the allegations of intimidation and bribery there is no evidence of anyone who witnessed the alleged malpractice. It accordingly found unsubstantiated and therefore cannot stand.

*Presiding Officers and Other Staff of the 2<sup>nd</sup> Respondent Tampering with Tally Sheets in Order to Alter the Result of the Vote at a Particular Polling Station or Tally Centre*

1173 There is no dispute on the totality of the evidence that presiding officers and other staff of the 2<sup>nd</sup> Respondent tampered with tally sheets. Tampering in this instance should be understood to mean making changes on what was initially recorded. The evidence shows that the tampering or changes were done either by use of correction fluid also known as tippex or manually, that is, by overwriting. Ms Gwalidi tendered in evidence as exhibit MG3, some 54 tally sheets in which results were tampered with using tippex. She said this was just a sample she got during the inspection exercise. She also tendered MG4, which were 10 manually overwritten tally sheets.

1174 The line of argument taken by the 2<sup>nd</sup> Respondent which was evident from the questions put to Ms Gwalidi in cross examination was that the use of tippex alterations did not affect the ultimate candidate valid vote count. Endeavours were also made to show that the sample tendered in evidence might not be adequate enough to reflect what happened in real terms.

1175 The sampling approach was considered in determining an election dispute in *Railla Odinga case*. In that case, the court looked at the samples of the result sheets that had anomalies and formed the view that the random samples provided gave the picture as to the degree of the discrepancies in the election. It is the considered view of this Court that considering the enormity of the electoral process and the massive paperwork involved, the sampling approach becomes handy as it may be practically very taxing for a disgruntled party to comb through all the relevant paperwork.

1176 With regard to the present case, it should be recalled that there was in evidence a recording of a statement by the Chairperson of the 2<sup>nd</sup> Responding admitting that the use of tippex was all over the country. Further, in HM2, exhibited by the 2<sup>nd</sup> Respondent, there was a large number of altered result tally sheets (Form 66Cs). In addition, there were also numerous sworn statements by presiding officers from across the country, filed by the 2<sup>nd</sup> Respondent, conceding use of tippex and overwriting to alter results. The Court therefore finds that there was massive use of tippex to alter results on the tally sheets.

1177 This leads to the other point of contention by the 2<sup>nd</sup> Respondents that the changes by tippex or otherwise did not affect the candidate valid vote count more so as there is no evidence from political party representatives challenging the candidate valid vote count reflected in the tippexed or altered tally sheets.

1178 For starters it was the evidence of Ms. Gwalidi that on the 22<sup>nd</sup> of May, 2019, the 2<sup>nd</sup> Respondent's Chairperson assured representatives of political parties that results records with tippex or manual changes would not be used and that in the event of a mistake, a new sheet would be used so that the result sheet should be neat and clean of alterations. When this assertion is considered in light of what the Chairperson said in the audio recording tendered as SKC 4, that the 2<sup>nd</sup> Respondent did not provide tippex to its polling staff, it lends credence to what Ms. Gwalidi said about the Chairperson's remarks on the 22<sup>nd</sup> of May, 2019. One would suppose that

the Chairperson took the stand not to accept records defaced with tippex or manually overwritten in order not to compromise the integrity of the election.

1179 It was stated in the case of *Patrick Kwamkwatira v Electoral Commission and Another* [2014] MLR 249, that haphazard changes or alterations on result sheets tend to undermine the integrity of an election. The court considered the security of tally sheets against tampering with the results. The petitioner made allegations of tampering with the figures on the tally sheets in favour of a particular candidate. It was argued by the petitioner that the alterations were made after the monitors had signed while the 1<sup>st</sup> respondent argued that alterations were made to correct genuine mistakes and that monitors signed for those alterations. The court observed that the alterations were made in the front while signing against the alterations was done at the back of the tally sheets. The court formed the view that for purposes of integrity and security of tally sheet transmission, the Electoral Commission should propose to Parliament to provide clear and detailed regulations on how to deal with alterations on tally sheets. The court stated as follows:

“This court has a word for the 1<sup>st</sup> respondent concerning transmission of records with utmost security vis-à-vis the alterations of tally sheets. Utmost security of tally sheets is critical. This court would suggest that proposals be made by 1<sup>st</sup> respondent for parliament to provide clear and detailed regulations on how to deal with alterations on election tally sheets in particular. Such proposals should include a provision that any alteration should be countersigned by one making the alteration and all monitors to signify that they agree and witnessed the alteration. Further a record kept by the 1<sup>st</sup> respondent also signed for by the one making the alteration and by the monitors. The record must indicate in words the initial figure of votes and the new figure after alteration to avoid opportunity for further alterations. Such simple but effective provisions will ensure integrity and security of the tally sheets transmission process in sharp contrast to the shocking copies of tally sheets that this court has seen in evidence which are only signed for at the back and a host of alterations are on the front of the same. Such tally sheets can easily attract accusations of tampering post signing by the monitors as was alleged in this petition. Such records attract a lot of doubt with



regard to the election result and all effort must be undertaken to ensure integrity of such election records.”

1180 The position of this Court is that the widespread use of tippex and other manual alterations on the result tally sheets greatly undermined the integrity of the elections so much so that applying the qualitative approach, the arguments by the 2<sup>nd</sup> Respondent, that the actual candidate valid vote count was not affected, which is a quantitative argument, and that no monitors for the Petitioners testified to challenge the same, do not help matters.

*Unauthorised persons being found with ballot papers and ballot boxes*

1181 No single witness gave evidence on this allegation. What the Court has is the bare assertion by Dr. Chilima in his supplementary sworn statement. Much as he claimed in cross-examination that there were filed six sworn statements from monitors to support this allegation, the 1<sup>st</sup> Petitioner having withdrawn the witness statements, there is no evidence to prove the allegation. It is thrown away.

*Arrests of Persons, at Various Places for Offences Relating to Breach of Country's Electoral Law*

1182 This allegation is featured in paragraph 13.7 of the supplementary sworn statement of Dr. Chilima. According him the 2<sup>nd</sup> Respondent's Chairperson made a public statement that some people had been arrested at various places for offences relating to breach of the electoral law. Admittedly he did not witness any arrest himself.

1183 Ms. Mirriam Gwalidi exhibited MG 11 which was a response to a complaint about their monitors being detained at Nchalo and Mulanje. She alleged that upon detention, they could no longer monitor the process. Apparently she made this assertion in a bid to show that the alleged arrest and detention negatively impacted on the 1<sup>st</sup> Petitioner's monitoring right. But looking at MG 11, it is revealed that those detained at Mulanje and Nchalo were roving monitors.

1184 It came out from the evidence of Mr. Alfandika that when the 2nd Respondent were briefed on the real cause of the arrests of the roving monitors who allegedly invaded the polling stations, he directed the Police to release them and they were duly released without charge.

1185 Overall the Court fails to find any evidence of an arrest that was prejudicial to the 1st Petitioner's rights or interests in relation to the elections. Most significantly, no single arrested person gave evidence. Needless to say that the law allows the arrest of persons for breach of electoral or indeed any other laws. It was therefore a lawful curtailment of the right to monitor the election process.

1186 *Failure to Deliver the Ballot Papers Under Conditions of Absolute Security*

1187 The Court would outright say that it is at pains to appreciate the basis of this allegation as from the totality of the evidence, the contrary seems to have been the case. The evidence in totality shows that right from the printing of the ballot papers, the 2<sup>nd</sup> Respondent ensured that all political parties taking part in the election should have monitors. This was in Dubai and Mr. Kawaga represented the 1<sup>st</sup> Petitioner. He did not, in his evidence raise any security lapses he noticed.

1188 The evidence also abundantly shows that when the ballot papers were being brought to Malawi, monitors of various political parties including the 1<sup>st</sup> Petitioner's party were in attendance at the port of entry. Upon arrival, the ballot papers were transported under the watch of personnel of the Malawi Defence Force (MDF) and Malawi Police Service (MPS) as well as political party monitors to districts, constituencies and polling stations.

1189 Again, no evidence was proffered suggesting any lapses in the delivery of ballot papers from the polling centres, to the constituency tally centres, district tally centres all the way to the National Tally Centre.

1190 Then there are the allegations the 1<sup>st</sup> Petitioner couched in broad and general terms in paragraphs 6 and 8 of the Petition that elections were marred by a plethora of irregularities and that there had been blatant cases of irregularity in all the twenty-eight (28) districts. Both Respondents implored the Court not to deal with these allegations on the ground that they lacked particulars. This Court has earlier in this judgement considered whether or not the

allegations should be dealt with in these proceedings. The Court would hasten to state that a party against whom allegations are being made is entitled to know the exact nature of the allegations against it so that a proper and informed response can be made. The manner in which the 1<sup>st</sup> Petitioner presented his complaints in paragraphs 6 and 8 of the petition is not satisfactory. He could have done better. Be that as it may, the position taken by the Court is that where evidence was led on some irregularities not specifically stated in the petition, it will still consider them in the determination of the matter in view of the response the 2<sup>nd</sup> Respondent made in the sworn statement of Mr. Henzily Munkhondia in paragraphs 8 and 9 in which he stated that having read all the sworn statements filed in support of the petitions the alleged irregularities did not occur and that the elections were conducted in full compliance with the Constitution, ECA and PPEA.

1191 In the written submissions of the 2<sup>nd</sup> Respondent, from paragraph 400 to 427, the so called unpleaded issues have been singled out and argued on under the following five heads: result sheets not signed by presiding officers; results for Rumphu West, Mzuzu City, Machinga South East and Dedza West; incompletely filled Form 66C and unsigned Form 66C; forged signatures and logbook issues.

*Result Sheets Not Signed for by Presiding Officers*

1192 From the evidence in totality it is not in dispute that indeed there were result sheets not signed for by presiding officers. The Respondents argued that the 1<sup>st</sup> Petitioners witnesses having admitted in cross examination that his monitors signed for the result sheets in question and that there being no evidence to challenge the valid vote count, the absence of signatures of presiding officers was inconsequential. It cannot be a ground for nullification of the results. The case of *Gondwe and another v. Gotani-Nyahara* [2005] MLR 121 was cited in aid of the proposition. The Supreme Court of Appeal held that it would be unfair and unreasonable to reject an entire result because one signature is missing. The court said:

“The result of count forms must have been completed and signed at the end of the entire electoral process at a polling centre; that would be sometime late into the night, after the persons taking part in the process were tired. Then we do not know the state of lighting in the rural polling centres.”

1193 The requirement for signatures in result sheets is provided for in section 93(10)(b) of the PPEA the relevant part as follows:

“(1) The presiding officer shall cause to be prepared by the polling station officers—

(b) a brief summary of the final result, and such record and summary 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.”

1194 A reading of the above provision reveals that in so far as the signing by the presiding officer and other polling staff is concerned, the requirement is mandatory unlike in the case of political party representatives whose signing, according to the provision is dependent on their availability. What this says therefore, with the greatest respect to the Supreme Court of Appeal whose decisions bind this Court, is that the decision was made *per incuriam*. The proper reading and application of the section in the considered view of this Court is the one taken in the recent case of *Raphael Joseph Mhone v. The Electoral Commission and Symon Vuwa Kaunda Election Case No. 11 of 2019 (Unreported)*, where the court in applying section 93(1)(b) held that that unlike a political party monitor whose signing depends on his availability, the presiding officer’s signing is mandatory. The court stated as follows:

“This means that where no party representatives are present, the record of polling process and the summary of final result are still in order without signatures of party representatives. But they cannot go without the signatures of the presiding officer and other polling station officers. Polling station officers are under section 68, officers appointed by Electoral Commission to administer the proceedings at a polling station, including more particularly the casting of votes and to count at the polling station.”

1195 The same approach on the signature of presiding officer on the result tally sheet being mandatory obtains in other jurisdictions. In *Raila Odinga and Another v. Independent Electoral and Boundaries Commission* Electoral Petition No. 1 of 2017, the court held that

the appending of a signature by a presiding officer to a form bearing the tabulated result is the last solemn act of assurance to the voter that he stands by the numbers on that form.

1196 The 2<sup>nd</sup> Respondent, through sworn statements of its presiding officers sought to explain some of the reasons for their failure to sign on the result sheet some of which were also alluded to in the *Gondwe and another v. Gotani- Nyahara* case. The failure being a breach of a mandatory provision of the law those explanations do not at all help the 2<sup>nd</sup> Respondent's case.

1197 This court in the end finds and holds that the absence of signatures of presiding officers amounted to an irregularity which undermines the integrity of the elections.

*Constituency results for Rumphu West, Mzuzu City, Machinga South East and Dedza West*

1198 The centre of controversy relating to Rumphu West and Mzuzu City constituencies centres around exhibits MG 15A and MG 15B. The main complaint was that the two result tally sheets for two different constituencies were signed for by one presiding officer, Rebecca Chirwa and they also had identical figures.

1199 It was argued for the Respondents that at the end of the day, none of the Petitioners had adduced any evidential material to challenge the valid vote count per candidate that the 2<sup>nd</sup> Respondent had put in its system. It was observed that the evidence showed that all the 1<sup>st</sup> Petitioner did was to just make a visual analysis or inspection of the exhibited result sheets (Form 72C) without comparing the results thereon and those on polling station result sheets (Form 66Cs). It was submitted that such a comparison was crucial since as admitted by the 1<sup>st</sup> Petitioner, the results in Form 72C are a product of aggregation of polling station results sheets (Form 66C's) in the constituency and in the absence of such a comparison, one cannot tell if the results in question as contained in Form 72C were wrong. They implored the Court to throw away the complaint.

1200 In the estimation of the Court, the signing of result sheets for two constituencies by one same presiding officer when each constituency had its own presiding officer smacks of a lot of suspicion on the integrity of the electoral process. We agree that the comparison of the figures on Forms 66C and Forms 72 was important. Equally important was some explanation from the 2<sup>nd</sup> Respondent as to how the same person signed for the results of two different

constituencies. No such explanation came forth. The Court, from the evidence, finds that the petitioners had made out a prima facie case on the irregularity of the activities of the said Rebecca Chirwa. We went through the list of sworn statements of presiding officers as provided by the 2<sup>nd</sup> Respondent and there was no explanation on this by Rebecca Chirwa. Therefore, the alleged irregularity was proved.

- 1201 As for Machinga South East, there was no Form 66C's exhibited to prove that the result entered by MEC in its system was wrong. Significantly, when the 1<sup>st</sup> Petitioner was taken to the MEC official results for the constituency as exhibited in the sworn statement of Bob Chimkango, the 1<sup>st</sup> Petitioner confirmed the results as being the correct ones and not the ones on the sheet that had been exhibited by Ms. Gwalidi.

*Incompletely Filled Form 66Cs and unsigned Form 66Cs*

- 1202 The Honourable the Attorney General in his submissions, noted that this featured in the sworn statement of Mr. Lackson Chimangeni in paragraphs 18 (e) and (f) and went on again to rely on the *Gondwe and another v Gotani-Nyahara* case submitting that the omissions were inconsequential as they did not affect the valid vote count which no political party representative contradicted with any evidence. The Court would hasten to say that the *Gondwe and another v Gotani- Nyahara case* would not come to the aid of the 2<sup>nd</sup> Respondent for reasons earlier stated in so far as forms unsigned for by presiding officers are concerned.

*Forged Signatures*

- 1203 This alleged irregularity featured in the sworn statement of Lackson Chimangeni in paragraph 18 (g). The Court would quickly agree with the argument put forward by the Honourable the Attorney General that the evidence required to prove this allegation needed to be that of the persons whose signatures were alleged to have been forged. None of these persons gave evidence by way of sworn statement or otherwise.
- 1204 The Court must however note that there were quite a number of instances where it had some suspicions that some signatures might indeed have been forged. However, in the absence of the persons whose signatures were alleged to have been forged coming to testify, or alternatively in the absence of handwriting experts to provide expert evidence through

comparison, the Court has no basis to find this allegation proved. In the circumstances, the allegation cannot stand.

### *Logbook Issues*

1205 According to the evidence of Ms. Gwalidi, a logbook was a booklet devised by the 2<sup>nd</sup> Respondent to record various aspects of the polling process including the results. It had pages on which information was recorded. Such information would be number of ballot papers received; number of ballot papers used; number of spoilt ballots; number of votes obtained by each candidate in each category – that, is Local Government, Parliamentary and Presidential Elections; and details of all polling staff and monitors. In addition, it had a part for reconciliation of ballot papers at the close of the polling and recording of complaints made to polling staff by monitors, voters and other stakeholders. It was her assertion that all the details to be recorded had a separate page specifically provided for that purpose and that after all was recorded, presiding officers and monitors were supposed to sign therein.

1206 The complaints relating to logbooks featured in the sworn statements of Ms Gwalidi, Mr. Kawaga and Mr. Lackson Chimangeni. They included discrepancies in presidential elections results; columns and pages not completely filled; absence of signatures of presiding officers and political party representatives; some logbooks signed for by only one person; streams with two logbooks and no logbook at all among others.

1207 With due respect, the Honourable the Attorney General in his submission seemed to have taken these allegations lightly. He submitted that issues on logbooks were adequately challenged as it was shown in the cross- examination of the witnesses that the valid vote counts in the Form 60C in the logbooks matched that on Form 66C. He went on to say that:

“where there were blank Form 60Cs or other statistical data parts in the logbooks, monitors would have signed the Form 66C and the Form 66C would contain all the logbook missing data and would have been signed by monitors. At the end of the day, with an election having taken place in the affected centres, one would have expected monitors who had first-hand evidence at the centres and on the affected streams to come to court to give evidence. None was called. The failure to call

them is fatal as it is a failure to challenge the valid vote count recorded for the affected stream at the affected polling station.”

1208 Section 70(h) of the PPEA enjoins the 2<sup>nd</sup> Respondent to ensure that at each polling station there is a logbook for recording complaints under section 89 (1) of the PPEA. Observably, the logbook designed by the 2<sup>nd</sup> Respondent, as can be seen from exhibit MG14A and MG14B, apart from being a record of complaints under section 89 (1) also serves as a record of the entire voting process as provided for in section 93 of the PPEA which is as follows:

The presiding officer shall cause to be prepared by the polling station officers—

(a) a record of the entire polling process at his polling station containing—

(i) the full particulars of the polling station officers and representatives of political parties;

(ii) the total number of voters;

(iii) the total number of votes for or under each classification of votes;

(iv) the number of unused ballot papers;

(v) the number of ballot papers which have been the subject of complaints, if any;

(vi) the discrepancies, if any, between votes counted and the number of voters;

(vii) the number of complaints and responses thereto and decisions taken thereon by the polling station officers;

(viii) any other occurrence which the polling station officers consider to be important to record; and

(b) a brief summary of the final result, and such record and summary 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.

(2) Representatives of political parties at a polling station shall be entitled to a copy of the duly signed summary of the final result of the poll at that polling station.



(3) The presiding officer shall post at the polling station a copy of the duly signed summary of the final result of the poll at that polling station.

1209 Evidently, from the contents of the record logbook it is a very vital tool that serves as a record of the voting process including critical information on reconciliation of ballots and the actual candidate vote count as well as null and void votes. This was acknowledged in the case of *Raphael Joseph Mhone v. The Electoral Commission and Symon Vuwa Kaunda* cited earlier, where Ligowe J held that:

The record logbook is for recording complaints under s.89. It turns out that the record log book the Electoral Commission provided in the elections this year as exhibited by Aticken Nyirongo, the Presiding Officer at Chisu polling station, was meant to record a lot more of information than complaints under s.89 including a record of the entire process at the polling station as required under s. 93(1)(a).”

1210 It appears is for the very reason that the logbook does not contain only complaints under section 89(1) but also a record of all the processes under section 93 that the 2<sup>nd</sup> Respondent appropriately called it a “Record Logbook and not just ‘Logbook’”. It would therefore be naive to dismiss the complaints made herein in relation to the logbooks sampled during the inspection by simply saying that since the valid vote counts in the Form 60C in the logbooks matched that on Form 66C, then all was well. In the end result the Court comes to the conclusion that the shortfalls and omissions in the logbooks complained of herein undermined the integrity of the election.

*Unjust and Unconscionable Conduct of the 2<sup>nd</sup> Respondent*

1211 The 2<sup>nd</sup> Petitioner in his petition in paragraph 26 made a number of allegations of what he called unconscionable conduct of the 2<sup>nd</sup> Respondent.

*Presiding officer at Mpatsa found with pre-marked ballot papers*

1212 From the totality of the evidence there is no piece of evidence at all to prove this allegation. It should go without saying that the 2<sup>nd</sup> Petitioner needed to bring cogent evidence of a person who witnessed the alleged malpractice. Hon. Mkaka mentioned this issue in his evidence but his evidence on the point was inadmissible hearsay. Witnesses of both respondents who were present when the alleged incident occurred filed sworn statements evidence deposing that the issue was settled at the police station where all parties including the 2<sup>nd</sup> Petitioner's representatives were present, and that it was found that there was no irregularity. There was no sworn statement whatsoever of any of the petitioners' witnesses with direct evidence on the point. The allegation is therefore unsustainable.

*Nsanje Chief Returning Officer Found Tampering with Result Sheets Within the Period for Transmission of Results*

1213 Again, on this allegation, no eyewitness of the Petitioners gave evidence by way of a sworn statement or otherwise. Surely the Court cannot be expected to condemn the 2<sup>nd</sup> Respondent on mere unsubstantiated allegations. The allegation is ill founded and accordingly falls off.

*Refusal to Furnish Monitors with Tally Sheets as Provided for in Procedure Manual and the RMS*

1214 This allegation also lacks cogent evidence. In *Dr Beatrice NyaKumwenda v. Electoral Commission and Jacob Hara* (supra), the court held that where there are allegations of political party representatives being denied access to the tally sheets, the petitioner is required to lead clear evidence on the names of monitors concerned and places where the alleged conduct took place. The court stated as follows:

“The petitioner alleges that monitors were denied access to the process but does not mention which monitors and which polling stations this occurred...If at all any accredited monitor was denied access, the 1<sup>st</sup> 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.”

1215 The holding and remarks in the above cited case apply with full force to the present case. There being no evidence of allegation, it cannot stand.

*Failure to Detect Alterations and Variations*

1216 The 2<sup>nd</sup> Petitioner alleged that the 2<sup>nd</sup> Respondent failed to detect alterations before the final determination of the results. These alterations according to the Petitioners were in ink and some effected using tippex. From the evidence it is clear that the 2<sup>nd</sup> Respondent received tally sheets from constituency tally centres across the country which were altered with ink and defaced with tippex. The query was that the 2<sup>nd</sup> Respondent failed to detect these anomalies before announcing the final results.

1217 The Respondents told the Court that monitors who witnessed the alleged alterations did not come to Court to explain what had really happened. In this regard it was up to the Petitioners to show that the said alterations were meant to falsify results and they had to further show the cumulative effect of such alterations on the total votes. The 2<sup>nd</sup> Respondent stated that they had displayed the results at the National Tally Centre and on their website and that the 2<sup>nd</sup> Petitioner did not raise issue with such information. They argued that the discrepant votes entries could not be attributed to an intention to defraud anyone of votes; and that the mistakes came about due to human error.

1218 According to the BDO report the auditors brought to the attention of the 2<sup>nd</sup> Respondent the issue of amendments. The report showed that the auditors were instructed with written authorisation from the 2<sup>nd</sup> Respondent to proceed to approve any manual amendments on the tally sheets and forms that were used at the constituency tally centres. See Paragraph 13 BDO Termination Report. We find that this was a serious malpractice and a grave irregularity in the conduct of the elections.

1219 Mr. Munkhondya for the 2<sup>nd</sup> Respondent stated that his team verified with presiding officers whenever there were alterations and the use of tippex. On a different note, the BDO report clearly stated that results were being uploaded on the screen before verification by auditors and MEC treated those as final results. Mr. Munkhondya however failed to disclose how many tally sheets were altered which meant the 2<sup>nd</sup> Respondent never looked at these altered tally sheets as alleged by Mr. Munkhondya. Hon. Mkaka told the Court that he had filed a

complaint on behalf of MCP on the 23<sup>rd</sup> and 27<sup>th</sup> of May, 2019 with the 2<sup>nd</sup> Respondent over these alterations, and the letters he wrote were exhibited in LMC Vol 10. However, he stated that the responses he got were unsatisfactory.

1220 This demonstrated that the 2<sup>nd</sup> Respondent knew about these anomalies before the final determination. The 2<sup>nd</sup> Respondent did not deny the presence of altered results tally sheets. Their defence was that they had verified with presiding officers on the ground and that the alterations were made to correct genuine errors and mistakes made during the reconciliation of the data and at times on the candidates' votes. However, in the BDO report in paragraph 13, the auditors stated that the 2<sup>nd</sup> Respondent was unable to specify what was verified and what was not. We therefore find that it is highly unlikely that this verification exercise ever took place.

1221 The 2<sup>nd</sup> Petitioner accused the 2<sup>nd</sup> Respondent of failure to detect these alterations before the determination of the final results. We, in our considered opinion, find that so many tally sheets that were used at the National Tally Centre were altered with ink and tippex. Looking at the evidence, we find that the 2<sup>nd</sup> Respondent failed to detect these altered and tippexed tally sheets and take appropriate action. Mr. Alfandika admitted during cross examination that the Commission did investigate the issue of alterations and the use of tippex after the determination of the final results and not before.

1222 This meant that the complaint on the alterations was not resolved before the determination as is required by the PPEA in the conduct of any election. Similarly, the *Director of Elections* Mr. Munkhondiya also admitted that investigations were not conducted before announcing the final results. Section 97 of the PPEA provides that the Commission should take decisions on all matters which had been the subject of complaints and irregularities at the beginning of the process of national determination of the results, and in any event before announcing the final results.

#### *Failure to Account for Missing Votes and Extra Votes*

1223 The 2<sup>nd</sup> Petitioner alleged that the 21<sup>st</sup> of May 2019 Presidential election was characterised by failure on the part of the 2<sup>nd</sup> Respondent to account for either missing votes or extra votes. According to the evidence of Mr. Peter Lackson, in his Amended sworn statement in support

of the 2<sup>nd</sup> Petitioner's petition, he stated that mathematical summations on the result sheets (Form 66Cs) at the polling stations showed so many cases where there were either missing votes or extra votes which were not accounted for by the 2<sup>nd</sup> Respondent. See pages 4755 to 4767 of the 2<sup>nd</sup> Petitioner's trial bundle. The Hon. the Attorney General sought to demonstrate that there were numerous anomalies in the tables in Mr. Lackson's sworn statement and that these did not bear out the allegation, using his own [the Attorney General's] calculation system. He intensely cross-examined Mr. Lackson, in particular with the Tables in his amended sworn statement in support of the 2<sup>nd</sup> Petitioner's petition, which tables sought to show the existence of the said missing votes or extra votes.

1224 However, the Court's own calculation of a sample of the figures in those tables shows that the alleged anomalies are actually borne out. We are therefore satisfied that this allegation in the petition is made out. Illustratively, during re-examination, the following ensued:

**“SENIOR COUNSEL MSISHA:** What about extra votes?

**MR. LACKSON:** I can demonstrate, let us go to LMC 19 and let us go to the first page. There is 5248. This is the copy from the monitor. I will beam the excel and if Counsel will help me to beam the carbon copy from the monitor for the verification of the data.

**HON JUSTICE I KAMANGA:** Before you go on your excel can we establish the figures and establish that they are the same?

**MR. LACKSON:** Yes, so I will start with stream 1 it is 1,000, 400, 6, 3, 592, 595, 131, 225, 1, 0, 0, 12, 223.

Stream 2 - 600, 16, 0, 2, 401, 403, 122, 251, 0, 0, 0, 9,199. And as station total it is 1,600, and there is 416, 6, 5, 993, 998, 253,476, 1, 0, 0, 21, 422.

I will start the exercise, if I do the summation for stream 1, the presidential scores,

**HON JUSTICE DR KAPINDU:** Is it possible to make it a little bigger, the excel?

**MR LACKSON:** If I add the presidential scores for stream 1, the total is 592 and the presiding officer there indicated 592 which is correct, if I go to stream 2 if I add the scores they are coming to 581 the presiding officer indicated 401, mathematically it was wrong there but I will

correct it then I will put 581 which is the correct figure. Now let us compare the total number of presidential scores for stream 1 which is 592, the total valid votes plus the null and void [is] 3 and it is coming to 595 which exactly equals to the total number of ballots cast, 595.

Let us go to stream 2 we will do the same, if I add the total presidential score which is 581 plus the null and void of 2 it is coming to 583 and yet the total ballots cast at that particular stream, it is 403. If I subtract the 403 of total ballots cast minus total presidential scores, it is showing that 180 votes were just given to someone on stream 1. So let us see how this problem was solved by the 2<sup>nd</sup> Respondent...

**HON ATTORNEY GENERAL:** My Lords I will be forgiven for this but I wonder how some sums in stream 2 are being transposed into stream 1, maybe that can be taken care of or was it an error mentioning stream 1 or votes being given to someone in stream 1? Thank you.

**SENIOR COUNSEL MSISHA:** Recheck the figures on the stream and please make sure the figures are correct.

**MR. LACKSON:** I said the stream 1 is fine on the presidential, if I add the presidential scores plus null and void it is coming exactly to the total number of ballot cast, if I go to stream 2, the total number for presidential candidates plus the null and void, it is coming to 583 and against total ballot[s] cast of stream 2 of 403, so from stream 2, one hundred and eighty (180) votes have been added of which I cannot tell who benefited but let us see how this problem was solved. The corresponding page for this document should be available in LMC 8 there is 25 b, can you beam the MEC copy?

**HON JUSTICE I KAMANGA:** The page again in LMC 8.

**MR. LACKSON:** I would like to get the specific page. Yes I got it, this is what actually happened.

**HON JUSTICE I KAMANGA:** What is the page?

**MR. LACKSON:** It is LMC 8, 25b page 2325 and there you will see that the document which has been used is a duplicate document with very minimal alterations on null and void votes on steam 1 but have changed the total ballots cast for stream 2 to 584 against recording of 403 and that has taken care of 180 votes missing and good to go. In the

absence of record logbook we cannot tell who benefited with this, thank you.

**SENIOR COUNSEL MSISHA:** Was this an isolated situation?

**MR. LACKSON:** No, if you look at the exhibits on PL25A of extra votes and PL25C of missing votes that is the story behind all those documents.”

1225 As pointed out above, we have carefully gone through these exhibits, including PL21B, and confirmed that the evidence indeed does bear out Mr. Lackson’s testimony.

*Announcing Results Without Conducting a Thorough Audit and Verification*

1226 The Court notes that throughout the process, the 2<sup>nd</sup> Respondent assured all stakeholders and the nation that the results would be verified by auditors at the Constituency Tally Centres, District Centres and at the National Tally Centre. They firmly indicated that before Commissioners could approve the results, the same would be approved by auditors first.

1227 During the hearing, it was the 2<sup>nd</sup> Respondent’s case that contrary to Mr. Daud Suleiman’s testimony on behalf of the 2<sup>nd</sup> Petitioner, that all the results ought to have been approved by the Commissioners electronically in the RMS, Commissioners approved all the results manually. It was the 2<sup>nd</sup> Respondent’s case that auditors verified these results manually before Commissioners also approved them manually.

1228 In this regard the BDO Termination Report is also telling. At page 2 of the Report in the Executive Summary, the Auditors stated that:

A summary of the audit findings from all the forms MEC presented to BDO at the National Tally Centre is presented in the table below:

Tippexed (corrected with the white	273
Manually amended forms	65
Forms with missing signatures	45

Forms with missing political parties	66
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1229 They proceeded to indicate the following:

Tippexed (corrected with the white corrector):	24%
Manually amended forms:	6%
Forms with missing signatures:	4%
Forms with missing political parties signatures:	6%
Verified Tally Sheets (Presidential):	60%

1230 What is telling from this analysis is that the auditors state that these figures represent “all the forms MEC presented to BDO at the National Tally Centre.” We can therefore easily algebraically calculate how many Forms the 2<sup>nd</sup> Respondent presented to BDO for verification at the National Tally Centre:

- If 273 Form 66Cs presented to BDO = 24% of X (X being the unknown figure); then
- $24/100 * X = 273$
- $X = 1137.5$

1231 We conclude, therefore, that BDO must have received a maximum of 1138 Form 66Cs at the National Tally Centre.

Since the total number of Form 66Cs was 5002, then:

$$5002 \text{ Form 66Cs} - 1138 \text{ Form 66Cs} = 3,864 \text{ Form 66Cs.}$$

1232 The inescapable conclusion from this analysis, with the accuracy of mathematics, is that 3,864 Result sheets were approved without auditor verification, contrary to the 2<sup>nd</sup> Respondent’s set procedure for verification of results.

1233 The Court also recalls, what we have already pointed out earlier in the Judgment, that when Mr. Munkhondya was referred to the BDO report, he stated that the auditors verified one hundred percent of the results. However, upon being taken to different parts of the report, in particular paragraph 13 of the BDO Termination Report at page 34, where the report indicated



that the auditors' National Tally Centre findings were that in the review of the transmitted results at the National Tally Centre, with regard to controlling and reconciliation of the transmitted results, the 2<sup>nd</sup> Respondent was unable to specify what was verified and what was not verified by auditors. In response, Mr. Munkhondya conceded that according to that paragraph, the verification rate by the auditors was indeed not 100%. He also stated that he was aware that after the draft BDO report was shared with the management of the 2<sup>nd</sup> Respondent, management raised comments. He added that he was however not aware of BDO's response to the management comments that were raised by the 2<sup>nd</sup> Respondent. He was then referred to Exhibit SA10 which was BDO's response to the management comments. In the comment, Mr. Alfandika, the Chief Elections Officer, asked BDO to revisit some of the comments that BDO had made on the basis that they were unfounded and that the finding was not a true reflection of how the result management process was jointly conducted by the 2<sup>nd</sup> Respondent and BDO at the National Tally Centre in Blantyre. In particular, he referred to factual finding number 13 in the BDO report referred to above. He proposed that this paragraph should be removed from the BDO report. BDO refused to remove their observation as per Mr. Alfandika's request. They gave their reasons for the refusal in SA 10. They stated that BDO auditors indeed verified and stamped the received results of the elections, but later, they noted that they were signing and stamping the same papers. Upon such realization, BDO stopped all processes of verification and requested the 2<sup>nd</sup> Respondent to provide BDO with a reconciliation of the signed result sheets. The 2<sup>nd</sup> Respondent was not able to provide BDO with the same. BDO advised the 2<sup>nd</sup> Respondent that there was need for this reconciliation since not all result papers that were displayed on the screens at the National Tally Centre were approved by auditors. BDO prepared their reconciliation sheet and gave instructions to the 2<sup>nd</sup> Respondent's employees on how to reconcile the received forms with instructions to work overnight so that they would be ready the following day, but the 2<sup>nd</sup> Respondent's employees did not do the reconciliation as instructed. With this response, BDO refused to change its findings.

1234 All in all, we conclude that the 2<sup>nd</sup> Respondent indeed announced the final results of the 21<sup>st</sup> of May, 2019 presidential elections without conducting a thorough audit and verification of the same.

*Announcing Contaminated Results Without Appreciating the Genuineness and Validity of the Said Results*

1235 This complaint has been dealt with exhaustively above, in the parts of this decision dealing with failure to detect alterations and not minding the same, and also announcing the final results without conducting a thorough audit and verification of the results as alleged by the 2<sup>nd</sup> Petitioner. In a nutshell, the evidence shows that the 2<sup>nd</sup> Respondent determined the final result by using or referring only to result tally sheets better known as Form 66C without regard to the strict requirements of section 96(1) as read with section 95(5) of the PPEA. The 2<sup>nd</sup> Respondent did not have the records from the polling stations at the National Tally Centre but only used Form 66Cs. In so doing, the 2<sup>nd</sup> Respondent abdicated in its duty.

*Announcing Results in Disregard of Complaints Lodged*

1236 Section 98 (b) of the PPEA provides that:

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

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. .  
.

(b) the complaints and responses thereto and the decisions taken on them,

1237 The provision obliges the Chairperson to explain how complains have been dealt with and resolved. The evidence shows that some complaints were addressed but not others.

1238 In his sworn statement Hon. Mkaka exhibited EM 3 to EM 39 in relation to the complaints he made to the 2<sup>nd</sup> Respondent. Apparently, he got only one response as contained in EM 37 which he said was not satisfactory prompting him to write EM38 pointing out the areas the response was lacking in. He alleged that no response came forth. In EM 39, the complaint was that the 2<sup>nd</sup> Petitioner having obtained a court order staying the declaration and announcement of the presidential election result and ordering a recount of the votes, the 2<sup>nd</sup> Respondent only complied one limb of the order but not the other being the recount. He stated that there was

no response to this letter. In the end result the court takes the position that in announcing the results, the 2<sup>nd</sup> Respondent failed to deal with and resolve or satisfactorily deal with and resolve complaints duly made by the 2<sup>nd</sup> Petitioner thereby abdicating from duties imposed by section 98 (b) of the PPEA.

1239 This Court also notes that, curiously, the complaints that were responded to were under the hand of the Chief Elections Officer. There was no evidence that he had been specifically mandated to convey such communication and that he was only communicating what the Commissioners had decided and not his own decisions. Considering that in dealing with complaints the 2<sup>nd</sup> Respondent acts as a tribunal, it is the considered opinion of the Court that, as elaborated earlier, principle and best practice would dictate that the Chairperson or some other Commissioner should be the one communicating such decisions in writing. The other acceptable way would be that the decision be in writing under the hand of the Chairperson or any other Commissioner and the Chief Elections Officer in conveying the decision to the concerned parties should attach the decision.

1240 We wish to reiterate the remarks of the Supreme Court of Appeal in the *Namasasu case* that:

“[P]roper documentation of complaints, their resolution and record keeping is essential. The Electoral Commission must embrace its Constitutional mandate, as the tribunal. It is not an administrative body in respect of election complaints.”

1241 This is the message that we wish the 2<sup>nd</sup> Respondent to take home and act accordingly in the conduct of all elections.

#### *Use of Duplicate Tally Sheets*

1242 It was alleged in paragraph 25.1 of the 2<sup>nd</sup> Petitioner’s petition, that is now consolidated, that the 2<sup>nd</sup> Respondent did not conduct the electoral process in accordance with the Constitution and electoral laws in that it accepted and used duplicate results tally sheets as the primary record of the votes polled in place of the original results tally sheets, without any plausible justification whatsoever and in clear disregard of its own procedure and acceptable international standards.

1243 According to the evidence of Mr Chapweteka and other witnesses of the Petitioners, which is agreed to by Mr Alfandika, the original Form 66C was the official record of the results that the 2<sup>nd</sup> Respondent undertook to use in results transmission to the National Tally Centre. This is clear from the evidence of the two which indicates how that was proposed and adopted in Dubai at the time the Form 66Cs were to be printed. The rationale behind using originals was to preserve the integrity of the Form 66C against multiple forms being used to transmit results. This aspect was corroborated by the 2<sup>nd</sup> Respondent's presiding officers who indicated that they used duplicate results sheets instead of originals to transmit results for different reasons, among them, being the soiling of the original Form 66Cs. This Court is therefore satisfied that the procedure of the 2<sup>nd</sup> Respondent was that it would use the original Form 66Cs to transmit results from polling centres to the National Tally Centre to determine the national presidential result.

1244 There is overwhelming evidence that duplicate results tally sheets were used by the 2<sup>nd</sup> Respondent in the transmission of results on Form 66Cs from polling centres to the National Tally Centre. Mr. Lackson exhibited duplicate Form 66Cs used in transmitting results in his PL1 to PL13 and these totalled over 370 for the 13 districts that he had sampled. An examination of HM2 which was an exhibit of Form 66Cs used by the 2<sup>nd</sup> Respondent in vote tallying, shows that the 2<sup>nd</sup> Respondent used about 1,408 duplicate Form 66Cs as an official record of votes polled and the votes carried on those duplicates were in excess of 1, 625, 000 and were used in the determination of the national result.

1245 The 2<sup>nd</sup> Respondent therefore, did not dispute the fact that duplicate tally sheets were used as an official record of votes. Mr. Munkhondya, the Director of Elections, who appeared to be very conversant with the electoral procedures, did not dispute the fact that duplicate Form 66Cs were used as an official record in the determination of the presidential results. However, the 2<sup>nd</sup> Respondent's Chief Elections Officer, Mr. Alfandika, stated in paragraph 79 of his sworn statement that use of original Form 66Cs was simply an administrative arrangement not sanctioned by the law and therefore the use of duplicate Form 66Cs or any other form on which the results were recorded was not an irregularity under the PPEA.

1246 The 2<sup>nd</sup> Respondent's presiding officers stated that they used duplicate Form 66Cs for various reasons such as soiling of originals largely during reconciliation of the Form 66Cs at the constituency tally centres.

1247 The view of this Court is that use of duplicate result sheets was an irregularity. This Court looked at the provisions of section 93 (2) of the PPEA which is in the following terms:

“Representatives of political parties shall be entitled to a copy of the duly signed summary of the final result of the poll at that polling station.”

1248 It can be noted that in terms of section 93 (2) of the PPEA, the law requires that monitors get a copy of the duly signed summary, a Form 66C, of the final result at a polling station. The original as signed is the one that will remain as the official record of the summary of the result at a polling station. That original is the one that was to be used to determine the result of the election by the 2<sup>nd</sup> Respondent. By failing to comply with the dictates of section 93 (2) of the PPEA by not using the original form 66Cs in the determination of results at the National Tally Centre the 2<sup>nd</sup> Respondent clearly occasioned noncompliance with the PPEA and therefore occasioned an irregularity.

1249 Even if one were to read section 93 (2) of the PPEA as not proscribing use of duplicates, in the circumstances of this matter the use of duplicate Form 66Cs qualify as a cause for alleging an undue return of the presidential result. This falls under the “any other cause” category of grounds of a section 100 PPEA petition.

1250 The making of an administrative undertaking to use original form 66Cs in determination of results, as conceded by the 2<sup>nd</sup> Respondent's Chief Elections Officer, created a legitimate expectation to use originals and for good reason. Departure from such an undertaking was a breach of the legitimate expectation created and relied on by the Petitioners. The 2<sup>nd</sup> Petitioner correctly submitted that the 2<sup>nd</sup> Respondent should not renege from the position it had indicated and should be estopped from doing so. The 2<sup>nd</sup> Petitioner cited a number of cases explaining that a person will be estopped from renegeing from a position that was communicated and taken as settled. see *Leasing and Finance Company Limited v Katundu Haulage Limited* [2001-2001] MLR 232 (SCA); *Adam v Stanbic Bank Limited Commercial*

Case number 27 of 2007; *Maotcha-Banda v. Electoral Commission and another* Election case number 13 of 2019 (*Zomba*) and *Moorgate Merchantile Co. Ltd v Twitchings* [1975] 3 ALL ER 314. An elaboration of this point is necessary in this matter.

- 1251 The evidence of the 2<sup>nd</sup> Respondent's presiding officers painted a picture whereby they mostly used duplicates upon being instructed by the 2<sup>nd</sup> Respondent to reconcile part A-F on the Form 66Cs at the constituency tally centres which centres were not sanctioned by the law.
- 1252 One needs to properly examine what happened at constituency tally centres. As pointed out by the 2<sup>nd</sup> Petitioner's witnesses as well as the 2<sup>nd</sup> Respondent's presiding officers in their sworn statements, once the presiding officers reached the constituency tally centres, they were instructed by the PEOs and CROs that figures in parts A-F of Form 66C were not balancing. Part A was the number of ballot papers received which were received in batches of 100 each – once used, these would leave a counterfoil for purposes of accounting; B, the number of unused ballot papers; C the number of cancelled/spoilt ballot papers; D the number of null and void ballot papers. (The Court must point out here that the characterisation of null and void ballot papers was unlawful as the PPEA only envisages null and void votes and not null and void ballot papers. See for instance sections 91, 99 and Form VI under the PPEA); E the number of valid votes cast; and F, the number of cast ballot papers (D+E). Parts 1-7 contained the candidate vote count.
- 1253 The presiding officers were instructed to make changes on parts A-F so that the figures there would reconcile. They were told never to touch the candidate vote count part. It is the finding of this Court that they changed the figures to make sure that the figures in part A-F reconciled amongst themselves and also with the candidate vote count. The presiding officers did not state that they did a physical count of items that were reflected in part A-F on the Form 66Cs. It must be remembered that items in parts A-F were to be physically counted. The counting related to both items found outside the ballot box, namely, unused ballots, spoilt ballots and ballots received and items found inside the ballot box namely null and void votes and candidate votes. This procedure is a requirement of the law and is indicated under Form VI to the Schedule made in terms of section 93 of the PPEA as well as in the Polling Procedures Manual. The failure by many presiding officers to reconcile parts A-F by re-counting the items in A-F was therefore a significant irregularity. In reconciling the parts A-F with candidate votes count at constituency tally centres and soiling the original Form 66Cs what eventually

resulted is that you have untrustworthy duplicate Form 66Cs sent to the National Tally Centre and used for determination of the national presidential result.

1254 The preceding scenario takes the sting out of the misleading thesis of the Respondents that what the 2<sup>nd</sup> Petitioner's main witness Mr Lackson focused on were ballots and that therefore votes were never affected by alterations that finally resulted in the alleged soiling of originals, as per presiding officers, and eventually generated duplicate Form 66Cs. Mr. Lackson stated that the irregularities he found were dealt with by transferring data from the original Form 66Cs to the duplicate Form 66Cs. A large number of the duplicate forms bore altered data as compared to the copies of the corresponding Form 66Cs that he got from the 2<sup>nd</sup> Petitioner's monitors. He demonstrated a clear link between candidate votes and alteration of parts A-F on Form 66C which contained null and void votes that actually affect the final vote. This is evident from exhibits PL 25B and PL 25C. We note that null and void votes, which in the election herein were recorded within parts A-F, are so important that Parliament decided to provide that at the beginning of the determination of the national result, the 2<sup>nd</sup> Respondent is required by law to examine them. Section 97 of the PPEA and the Supreme Court decision on the same in *Bentley Namasasu v Ulemu Msungama and Electoral Commission*, buttress this point.

1255 The Respondents insisted that the Petitioners' monitors ought to have brought evidence to dispute the results carried on the duplicate form 66Cs. Regrettably, it is clear from the evidence of many of the presiding officers of the 2<sup>nd</sup> Respondent themselves that when the reconciliation was being done at the constituency tally centres the monitors who witnessed counting and signed the initial form 66Cs at the polling stations were mostly not present. It is therefore untenable for the Respondents to insist on monitors to come and testify on changes that were clearly made in their absence bearing the fruit that are the duplicate Form 66Cs. In any event, as submitted by the Petitioners, it is the legal duty of the 2<sup>nd</sup> Respondent and not monitors to conduct the election properly. Under section 68(1) of the PPEA, it is provided that:

“The Commission shall appoint polling station officers in its service whose duty shall be to administer the proceedings at polling stations, including more particularly the casting of votes, and to count the votes cast at polling stations.”

- 1256 This section makes it clear that it is the duty of the 2<sup>nd</sup> Respondent's officers at the polling station to administer proceedings at the station in accordance with the law. It is not the duty of political party representatives although they have a significant monitoring role to play.
- 1257 The Chief Elections Officer, Mr. Alfandika, was taken to task to explain how polling station monitors, who were stated by the presiding officers not to be present at constituency tally centres at the time originals were reconciled to the point of soiling, could be said to have monitored the reconciliation. He could not give a satisfactory explanation on that aspect whilst alleging that monitoring could be done by the absent monitors using the paper trail being a copy of Form 66C given to the polling station monitors. Suffice to state that Mr Alfandika was a very evasive witness. During cross-examination, he completely failed either deliberately or otherwise to explain the procedure for counting of votes as sanctioned by the law. This procedure requires ballot reconciliation by counting items outside the box before the counting of items found in the ballot box namely, null and void votes and candidate votes. These must be physically counted and ascertained. It was very strange that, despite the clearly laid out procedure at law, he kept saying that once a ballot box is opened the presiding officer goes in and gets the valid votes. By this, the Court understood him to say that the presiding officer must immediately open the ballot box and go straight count the candidate votes without much ado. This is farthest from the truth. It appeared he was bent on hiding something.
- 1258 The insistence by the 2<sup>nd</sup> Respondent to elicit responses from witnesses of the Petitioners that monitors are agents of the Petitioners and therefore that having signed the form 66Cs they bound the Petitioners to the results in question and cannot resile from the duplicate form 66Cs is also untenable. Firstly, as rightly submitted by the Petitioners, the effect of signing of Form 66Cs by monitors of the Petitioners was for this Court and not the Petitioner's witnesses to determine. As pointed out by the Petitioners, this Court does not take testimony on what the law is. See *Gleeson v J Wippel & Co Ltd* [1977] 3 ALLER 54, 63. So the repetitive asking of the witnesses by the Honourable the Attorney General for the witnesses to explain the legal effect of monitors signing the Form 66Cs which are now being impugned, was of no consequence since it is only this Court that has the power to determine that issue. This Court will consider the significance of monitors signing the impugned Form 66Cs especially whether the same are open to challenge by the Petitioners for reasons as found in the preceding paragraphs.



1259 In *Bentley Namasasu v Ulemu Msungama and Electoral Commission*, the Supreme Court of Appeal considered the point and had the following to say in relation to the effect of signing of results tally sheets by monitors

“The affidavit of Mr Willie Kalonga, the Chief Elections Officer of the 2<sup>nd</sup> Respondent, averred that there was no complaint lodged. He opined that since the election monitors for the first respondent signed the results sheets they should have been in agreement with the results. This was pure conjecture on his part.”

1260 It is clear from the foregoing decision of the Supreme Court of Appeal that the signing of the results sheets by election monitors does not, per se, entail that they agree with the result and that the same cannot be challenged by the party for whom the monitors signed. As we will discuss below, we take the view that the decision in *the Namasasu case* on this point is good law, although it departed, *per incuriam*, from the case of *Electoral Commission and Another v Mkandawire case* [2011] MLR 47 which had earlier decided on the same point differently. There is actually nothing in section 73 of the PPEA about a monitor being an agent who binds the party for whom he/she monitors the election and signs the result sheet.

1261 The duplicate Form 66Cs are a statutory record of the election compiled under section 93 of the PPEA and speak for themselves as correctly submitted by the Petitioners citing *Irish Society v Bishop of Derry* (1846) 12 Cl & Fin 641 HL on public records being an exception to the rule against hearsay regardless of who tenders them.

1262 There is another fundamental issue implicated by the issue of the use of duplicates. The Supreme Court ruled in the case of *Bentley Namasasu v Ulemu Msungama and Electoral Commission*, that it is important to safeguard the integrity of the elections that records of polling are kept to be used in the event of a dispute as is the case herein. The 2<sup>nd</sup> Respondent's Director of Electoral Services failed to explain as to the whereabouts of the originals that were altered to the extent that they allegedly got soiled necessitating their abandonment and the use of duplicates. Those should have been preserved, in terms of section 119 of the PPEA to settle the matters that are in dispute at this moment. As it is, the 2<sup>nd</sup> Respondent has not explained

as to where the original Form 66Cs which were signed by monitors and later allegedly soiled by presiding officers are actually kept settling the dust on duplicates.

- 1263 During cross-examination, Mr. Bendulo stated, correctly, that according to the instructions given to the presiding officers during the time of training and pursuant to the 2<sup>nd</sup> Respondent's formal presentation which was made available to all key election stakeholders, alterations were not to be done on Form 66C because the 2<sup>nd</sup> Respondent's system had an autocorrect function on entry of data on transmission kit at constituency tally centre. The presiding officer was only required note appropriate messages on where the errors were.
- 1264 The Court must also observe that according to Appendix 6 under the Polling Procedures Manual, the procedure prescribed by the 2<sup>nd</sup> Respondent was such that there should have been no need at all for any alterations to be made to Form 66C. At page 52 of the Manual, it was provided that the presiding officer was to enter into the record logbook "only final complete information." Appendix 6 went further to state that the presiding officer was to "use additional loose copies as drafts previous to writing on the Record logbook for the following forms." The Appendix then proceeded to outline, among other forms in the record logbook, "MEC POLL 059C (additional 2 copies); "MEC POLL 60C (additional 2 copies and 10 copies for monitors); and "MEC POLL 061C (additional 2 copies)". It is clear that if the procedure of only entering final information after using previous loose copies as drafts was adopted as per the prescribed procedure, the only information to be entered in the logbook should have been final and error free. Further, the Form 60Cs which were used to record the presidential vote count and copies thereof given to monitors; and the Form 61C which was the ballot paper reconciliation for the presidential elections, should all have been recorded after prior drafts and should have been error free. Considering that the information entered on Form 66C was derived from the record logbook forms, there should have been no errors meriting any alterations on Form 66Cs.
- 1265 This shows that reconciliation of parts A-F was to be done in the record logbook on forms 59C and 61C and the final draft of data was only to be transferred to form 66C thereby averting the soiling of form 66Cs and the generation of the so many duplicates.

1266 The evidence of Mr. Bendulo on this aspect was not impeached at all. Therefore, it is irregular and surprising that many duplicate Form 66Cs were generated and then used as the original record of results.

1267 The duplicate Form 66Cs that are before this Court therefore speak for themselves as an irregular record of the presidential poll and cannot be trusted in the circumstances outlined herein. It was therefore not necessary to bring monitors to prove this issue.

1268 The use of duplicate form 66Cs by the 2<sup>nd</sup> Respondent in determining the national result is an irregularity and had no plausible justification. It also constitutes a cause for alleging an undue return. This is considering that the information on duplicate Form 66Cs is not trustworthy for the reasons indicated in the preceding paragraphs. Such duplicate forms concerned and could have affected a large number of ballots and votes in the instant matter.

1269 With regard to the allegation that the use of duplicate results sheets as an official record of election results was in contravention of international accounting standards, this Court did not receive any evidence from the Petitioners as to which international accounting standards were relevant and applicable to the presidential election. That aspect was therefore not proved.

#### *Use of Tippex Without Plausible Justification*

1270 It was alleged in paragraph 25.2 of the 2<sup>nd</sup> Petitioner's petition, that the 2<sup>nd</sup> Respondent did not conduct the electoral process in accordance with the Constitution and electoral laws in that it accepted and used result tally sheets defaced with tippex as a record of the polled votes, in place of original results tally sheets with no tippex on them, without any plausible justification whatsoever and in disregard of the acceptable set standards and international accounting standards.

1271 The 2<sup>nd</sup> Petitioner showed that the 2<sup>nd</sup> Respondent used form 66Cs which had been altered using tippex. Tippex was widely used across the country on Form 66Cs which were used by the 2<sup>nd</sup> Respondent to determine the national presidential result. The effect of the use of tippex is that original figures concerning ballots and votes on the form 66Cs were completely concealed by the tippex and new figures were written on top of the tippex.

- 1272 Both the 2<sup>nd</sup> Petitioner and the 2<sup>nd</sup> Respondent brought evidence showing that manually altered results sheets had been accepted and used by the 2<sup>nd</sup> Respondent to determine the national presidential result.
- 1273 The 2<sup>nd</sup> Petitioner brought two witnesses, namely, Mr Lackson and Mr Bendulo who showed that the 2<sup>nd</sup> Respondent accepted and used tippexed and manually altered Form 66Cs in determining the national presidential result. The tippexed results sheets were exhibited as PL20 to the sworn statement of Mr. Peter Lackson. Manually altered Form 66Cs were exhibited as PL22 to the sworn statement of Mr. Peter Lackson. As submitted by the 2<sup>nd</sup> Petitioner, an examination of exhibit HM2 of the 2<sup>nd</sup> Respondent being Form 66Cs shows that a large number of Form 66Cs were tippexed and manually altered. These Form 66Cs concerned and could affect a large number of ballots and votes.
- 1274 The 2<sup>nd</sup> Respondent acknowledged this issue of use of tippex on Form 66Cs which it used to *determine the presidential national result*. It however indicated that it did not supply the tippex. Further, that it did not sanction the use of the said tippex. During his cross examination, the Chief Elections Officer, Mr Alfandika, attempted to show that the 2<sup>nd</sup> Respondent sent a team of its officers to investigate the issue of tippex as it had emerged when the 2<sup>nd</sup> Respondent received the initial results on Form 66Cs bearing tippex. He indicated that the team went to investigate the issue and reported back to the 2<sup>nd</sup> Respondent. There was however no evidence that indeed this happened. In the first place, there was nothing to show that the 2<sup>nd</sup> Respondent formally discussed and took a position to resolve the glaring problem of use of tippex. There were no minutes of the 2<sup>nd</sup> Respondent's meeting on the matter. Further, contrary to Mr Alfandika's assertion that use of tippex had been investigated, the Chairperson of the 2<sup>nd</sup> Respondent categorically stated, in a video clip interview broadcasted on Zodiak Television station that was played in Court, that the 2<sup>nd</sup> Respondent never investigated the issue of use of tippex but went ahead to use results on tippexed Form 66Cs in determining the presidential poll. Again, the Chief Elections Officer came across as unreliable.
- 1275 The 2<sup>nd</sup> Respondent also acknowledged use of manually altered form 66Cs. The Chief Elections Officer and some of the presiding officers contended that the alterations by tippex and overwriting were meant to correct arithmetic errors. This is far from the truth. To start with, it was clear the Chief Elections Officer was not a reliable witness. Further, it was

admitted by the 2<sup>nd</sup> Respondent's Director of Electoral Services that, contrary to law as provided in section 95 (5) of the PPEA the records from the polling station, in this case record logbooks that had Form 60Cs, were never sent to the National Tally Centre. In such circumstances it was farfetched for the Chief Elections Officer sitting at the National Tally Centre to state truthfully that alterations were made to correct arithmetic errors on Form 66Cs. This becomes more apparent when the other evidence pointing in the opposite direction to correction of arithmetic errors is considered in the subsequent paragraphs. That evidence shows that the presiding officers' sworn statements that alterations were merely to correct arithmetic errors on Form 66Cs does not present the full picture.

1276 It was very clear from the evidence of Mr Bendulo that alterations in part A-F of the Form 66C although represented as benign by the 2<sup>nd</sup> Respondent were far from being that. The narrative of the 2<sup>nd</sup> Respondent was that alterations using tippex and manual overwriting were meant to correct errors in the reconciliation part of Form 66Cs and did not touch on the part 1-7 being the candidate vote part. That the candidate votes were sacrosanct. This false narrative was exposed by an examination of some logbooks that contained the stream result on Form 60C for some Form 66Cs that were altered by the 2<sup>nd</sup> Respondent's presiding officers only in part A-F without touching part 1-7. The result of the examination and comparison revealed that the alterations masked a scheme to take away votes from the 2<sup>nd</sup> Petitioner on the polling stations in question. This was illustrated by an examination of the results on Form 60C in the logbook and Form 66Cs which showed that the 2<sup>nd</sup> Respondent's presiding officers deliberately reduced the votes of the 2<sup>nd</sup> Petitioner. The results examined and exhibited in TB23A and TB23B, TB24A and TB24B and TB25A and TB25B for Ulongwe, Kazganthundulu and Chizoli polling stations respectively clearly showed that alterations on part A-F of Form 66Cs without any alteration of part 1-7 were used to hide the unlawful manipulation of votes. As earlier indicated these documents are self-explanatory records of the election that mean that it is not necessary to call monitors as incessantly insisted upon by the 2<sup>nd</sup> Respondent.

1277 The altered Form 66Cs were meant to be a statutory record of the election compiled under section 93 of the PPEA and speak for themselves. We have already observed above that the Form 66Cs herein were public records. The case of *Irish Society v. Bishop of Derry* cited above is authority for this proposition. One does not to call monitors to explain what happened here as disclosed by the 2<sup>nd</sup> Respondent's own official record.

- 1278 The Respondents did not engage with the more implicating evidence of the Petitioners such as that of Mr. Bendulo and others. Instead they superficially focused only on the testimony of the witnesses which confirmed that presiding officers could make errors and quickly went on to conclude and submit that alterations were aimed at correcting such honest errors. It is however noted that these same witnesses, such as Mr. Bendulo, having accepted that some errors are genuine and properly amenable to correction by alteration, went on to expose that the supposed errors that were being corrected were in reality largely a mere masquerade by which unlawful manipulation of results was sought to be hidden. To be clear, and contrary to the Respondents' contention, the Petitioners did not simply show that there were alterations by tippexing and manual overwriting, they also showed the clear unlawful motive behind the said alterations.
- 1279 The Respondents cited cases from Kenya such as *Ndolo v Shimbwa and others* Election Petition No. 1 of 2013 (High Court) (Mombasa) and *Omwera v Kang'ara and others* Election Petition No. 4 of 2013 where the court observed that alterations on a part of result tally sheet as similarly done in the present case were of no negative consequence given that the sacrosanct part of the tally sheet containing candidate votes was not altered. There is no indication as to the statutory provisions that were construed in these cases. There is also clearly a difference in the circumstances of those cases and the present one in terms of the whole of the evidence, in that in the present matter there is evidence that the alterations were not benign. Those Kenyan cases and others cited by the Respondents in that regard are therefore not helpful.
- 1280 As submitted by the 2<sup>nd</sup> Petitioner, a word must be said here on how the 2<sup>nd</sup> Respondent played hide and seek in this matter with regard to record logbooks in which results at stream level are recorded before transfer to Form 66C. The 2<sup>nd</sup> Respondent's unbecoming behaviour as a constitutional body is well documented in relation to record logbooks and this culminated in the finding of this Court that the 2<sup>nd</sup> Respondent failed to disclose a large number of the record logbooks that contained stream results on Form 60C. These logbooks were said to be with the Clerk of Parliament. This was stated under oath. Later upon the logbooks not being found at the Clerk of Parliament's warehouses, the 2<sup>nd</sup> Respondent indicated that its IT Department had collected the same in preparation for this case and it appears that clearly the Legal Services Department which oversaw the preparation of the false sworn statement on the

availability of the logbooks at the Clerk of Parliament was not aware of this alleged fact. It is highly likely that the 2<sup>nd</sup> Respondent intended to hide the unfavourable findings that are buried deep in the logbooks as discovered by Mr Bendulo.

1281 It must also be noted that unimpeached evidence of Mr Bendulo during his cross-examination showed that the procedure was that reconciliation of parts A-F was to be done in the record logbook on Form 59C and 61C. Drafts were to be done on reconciliation and once final draft was done the data would be transferred to form 66C. Despite such instruction, it is surprising that there were so many alterations and these were not random but in a pattern as observed by Mr. Lackson.

1282 On the basis of Mr Bendulo's and Mr Lackson's evidence, this Court finds that it is clear that the alterations by tippex or manual overwriting, of Parts A-F of Form 66C was the very means which the 2<sup>nd</sup> Respondent's presiding officers employed in hiding votes unlawfully added to or subtracted from the candidates such as the 2<sup>nd</sup> Petitioner and that this evidence directly contradicts the assertions made by the Respondents, through the presiding officers, concerning the benign nature of alterations in Part A-F. It is not surprising that there was no vigorous cross-examination by the Respondents on this part of Mr. Bendulo's evidence which remained unimpeached.

1283 The 2<sup>nd</sup> Respondent cannot be heard to say that these instances should have been brought to the 2<sup>nd</sup> Respondent's attention considering that, as stated by Mr. Bendulo, these matters were only discovered after the 2<sup>nd</sup> Petitioner was availed record logbooks under an order of disclosure of this Court and while the present matter was underway after the final presidential result was announced.

1284 The tippexing and alterations were unjustifiable and an irregularity given that the procedure of the law is very clear in terms of how the discrepancies on Form 66C are to be dealt with. Mr Munkhondya, who appeared very conversant with the electoral procedures and was generally a witness of truth, admitted that the discrepancies noted on the reconciliation of figures in parts A-F should not have led to alterations. He conceded that the same ought to have been noted and escalated to the National Tally Centre. However, this contrasts sharply with the instructions given to presiding officers to alter in order to reconcile the figures on Form 66Cs to balance the same without regard to recount of the items represented by the

figures on Form 66Cs in part A-F. Some of alterations made to those parts would have an impact on the candidate votes, for example alteration of the null and void votes.

1285 Section 93 (1) (vi) of the PPEA provides that a presiding officer shall cause to be prepared a record of the polling process which shall include the discrepancy if any between votes counted and the number of voters. Section 95 (1) (e) of the PPEA mandates the Returning Officer or Officer of the 2<sup>nd</sup> Respondent at the office of the District Commissioner to detail a similar discrepancy in relation to constituency and district results. There is nothing in these provisions mandating the alteration of Form 66Cs as a way of reconciliation of ballots and votes by presiding officers. This is also confirmed by the procedure that Mr. Munkhondya testified about and as evidenced by the 2<sup>nd</sup> Respondent's own Polling Station Procedure Manual which clearly stated that discrepancies in parts A-F be left and be flagged for consideration by the 2<sup>nd</sup> Respondent at the National Tally Centre.

1286 The alterations were therefore not in line with the law and were an irregularity. The consequences of alterations by tippex or manual overwriting were not benign as shown by the evidence of Mr. Bendulo. The records as prepared at the District Commissioner's office and transmitting with them all the polling station records under section 95 (5) of the PPEA were to be used at the National Tally Centre to determine the national result instead of the altered Form 66Cs only, which forms were unlawfully altered at the unlawfully constituted constituency tally centres.

1287 Even if it was the case that the alterations by tippex and overwriting were not an irregularity, the alterations would constitute a reason for questioning the return of the results because the alterations and tippexing also raise the same problems of having been done at the unlawful constituency tally centres in the absence of monitors as was the case with alterations that were similarly done to reconcile data on Form 66Cs but ended up resulting in the generation of duplicate form 66Cs after soiling the originals. Again, the alterations rendered the Form 66Cs in issue not trustworthy without the necessity to call monitors as similarly found in relation to the questionable duplicate Form 66Cs.

1288 With regard to the allegation that the use of tippexed results sheets as a record of the election results was in contravention of international accounting standards, the Court noted that at page 4 of the BDO Termination Report, under the heading "Standards and Ethics", the auditors



explained the international standards under which they carried out their engagement with the 2<sup>nd</sup> Respondent. They stated that:

“Our engagement was undertaken in accordance with International Standard on Related Services (‘ISRS’) 4400 Engagements to perform agreed-upon procedures as promulgated by the International Federation of Accountants (‘IFAC’), and The Code of Ethics for Professional Accountants issued by the IFAC. Although ISRS 4400 provides that independence is not a requirement for agreed-upon procedures engagements, the UNDP requires that the auditor also complies with the independence requirements of the Code of Ethics of Professional Accountants.

1289 Considering that the BDO auditors faulted the use of tippexed Form 66Cs as an official record of the polling, and that they were guided by the above-mentioned international accounting standards in arriving at their conclusions, we hold the view that the use of tippexed results sheets as an official record of the election results, and using the same for the determination of the final election results, was indeed in contravention of international accounting standards.

*Alleged Use of Fake Tally Sheets*

1290 It was alleged in paragraph 25.3 of the 2<sup>nd</sup> Petitioner’s petition, that the 2<sup>nd</sup> Respondent did not conduct the electoral process in accordance with the Constitution and electoral laws in that it accepted and used results recorded on fake result tally sheets without paying particular regard to such anomalies like signatures of election monitors, barcode and centre numbers.

1291 The Petitioners point out that the 2<sup>nd</sup> Respondent undertook to only accept and use result tally sheets that were customised in that the *district, constituency and centre numbers* were pre-printed for each polling station. The Petitioners showed that the 2<sup>nd</sup> Respondent accepted and used results tally sheets that did not have such customisation.

1292 The fake result tally sheets are categorised into four, namely, those with no customised pre-printed details; those with proper customisation but on which the details are crossed out and new details indicated instead; those properly customised but for a different election and the details are cancelled and new details are imposed on them; and those improvised tally sheets

drawn up by presiding officers using ordinary paper and used in lieu of the original customised. All these were exhibited by Mr. Lackson as PL21 and about 279 of these are available in exhibit HM2.

1293 With regard to the first category of the alleged fake tally sheets, the non-customised ones, the Respondents insisted that these were reserve tally sheets that were printed in Dubai by the 2<sup>nd</sup> Respondent with a view to be used whenever the presiding officers ran out of such tally sheets. The Petitioners vigorously contested that the reserves were printed in Dubai. This Court was presented with the printing contract and the packing list of the polling materials sent to Malawi from Dubai. From the evidence of witnesses of all parties it was clear that there was no description of 'reserves' indicated in the contract or the packing list. The only thing that was clear is that the 2<sup>nd</sup> Respondent printed an excess of the result tally sheets beyond the number of streams and polling stations. The Court recalls that the 2<sup>nd</sup> Respondent produced a document which was over 400 pages long and which this Court found unreliable. By that document, the 2<sup>nd</sup> Respondent sought to demonstrate that the reserves were part of the documents printed in Dubai.

1294 There is no evidence anywhere to show that reserves were part of the polling materials to be printed. The 2<sup>nd</sup> Respondent asserted that it printed these. The complaint of the Petitioners was that this position detracted from the undertaking by the 2<sup>nd</sup> Respondent that only customized tally sheets would be used to determine the results.

1295 The Respondents saw no issue given that monitors signed on the non-customised result sheets and none of the monitors came to assail the results on the reserves and other alleged fake result tally sheets.

1296 On the issue of the use of non-customised result sheets, which in some cases included use of mere ordinary paper, the Court finds that at a minimum the 2<sup>nd</sup> Respondent was under an obligation to ensure that it used result tally sheets and other essential polling materials that had necessary security features. According to section 71 of the PPEA:

“Presiding officers at polling stations and, in general, the Commission shall be responsible for creating and guaranteeing all necessary and indispensable conditions for the custody, conservation, security and

inviolability of the items specified in section 70, including more particularly the ballot papers and ballot boxes.”

1297 We find that the duty of the Commission to ensure the security and inviolability of the items specified in section 70 of the PPEA, which includes record sheets for the record required under section 93 of the PPEA, of which Form 66C is part, must have necessary security features to ensure inviolability. It is a gross irregularity to simply use any kind of non-customised paper as a result tally sheet as the 2<sup>nd</sup> Respondent purported to do in some instances.

1298 The point is that the 2<sup>nd</sup> Respondent should not have departed from using the customised result tally sheets. The presiding officers had indicated in their sworn statements that they had used the result tally sheets that they were given from constituency tally centres because they had run out of original tally sheets which had been soiled. Similar problems as discussed earlier that relate to how duplicate tally sheets were generated come into play here and so too the position that the 2<sup>nd</sup> Respondent cannot renege from a clear position that it took to use only customized result tally sheets. In any event, from what we have already discussed above, had the 2<sup>nd</sup> Respondent’s presiding officers followed the procedure that was clearly prescribed by the 2<sup>nd</sup> Respondent itself, there should have been no errors recorded on the original result sheets. The soiling of the originals was the result of another blatant irregularity.

1299 With regard to result tally sheets that are not signed by monitors being labelled as fake, contrary to assertions by the Petitioners, it is not mandatory that monitors sign result tally sheets. Monitors only sign result tally sheets when they are available. See section 93 (1) (b) of the PPEA. Therefore, as rightly submitted by the Respondents, the categorisation of a result tally sheet as fake merely because it is not signed by a monitor, without more, is not correct.

*Altered, Varied, and Transmitted Submitted Results Without Regard to the Original Figures*

1300 In paragraph 25.4 of the 2<sup>nd</sup> Petitioner’s petition, it was alleged that the 2<sup>nd</sup> Respondent did not conduct the electoral process in accordance with the Constitution and electoral laws in that it altered, varied and transmitted submitted results in clear disregard of the altered figures recorded on the results tally sheets.

- 1301 It is evident that alterations were done mostly at constituency tally centres and have been found to be very problematic as earlier discussed in this decision in relation to alterations. There appears to be no clear response on this aspect that such altered result sheets were transmitted to the 2<sup>nd</sup> Respondent's National Tally Centre. Clearly, the altered results were transmitted from constituency tally centres to the National Tally Centre where the same were used to determine the national presidential result. There is no evidence that the 2<sup>nd</sup> Respondent had regard to the original figures that were altered by either tippex or overwriting. This is not surprising.
- 1302 As observed above, the Director of Electoral Services stated during cross-examination that at constituency tally centres, the presiding officers were not to alter the figures on Form 66C if the same were not reconciling. He added that as per the Polling Procedure Manual the discrepancy was only supposed to be noted and escalated upwards to the Commission.
- 1303 This Court also observes that from the evidence of some presiding officers, that some of the alterations that were done at the constituency tally centres were done whilst the necessary records that should have informed the alterations, for example the record logbooks, were securely locked in the ballot boxes.
- 1304 Section 97 of the PPEA provides that at the beginning of the determination of the national result, the 2<sup>nd</sup> Respondent shall determine complaints and then shall examine the null and void votes and may affirm or correct the determination of the same as made at the Polling Station or at the District Commissioner's office. The Supreme Court also recognised this procedure in the case of *Bentley Namasasu v. Ulemu Msungama and Electoral Commission*.
- 1305 The 2<sup>nd</sup> Respondent was required to use the polling station records transmitted to it from the District Commissioner's offices under section 96 (1) of the PPEA. The records are specified in section 95 (5) of the PPEA to include all items received from the polling stations. Only the Commission was mandated to correct the original figures for discrepancies.
- 1306 What happened in the present matter is that 2<sup>nd</sup> Respondent's presiding officers simply altered Form 66Cs at the constituency tally centres, which centres are not provided by law, without regard to the records that held the original figures being the Form 60Cs and others in the

record logbook. A typical example is the result exhibited as TB23A and TB23B which are a Form 60C in the logbook and an altered Form 66C. The sworn statements from many presiding officers clearly showed that the alterations were done on the Form 66Cs at constituency tally centres to reconcile not only ballots but importantly also valid votes without any mention of the crucial aspect of re-counting the items in question.

1307 It must also be noted that even at the District Commissioner's office, alterations are not sanctioned by law. What the law allows to be done at the District Commissioner's office, in terms of section 95 (1) of the PPEA, is to compile the results based on records from the polling station noting discrepancies between votes counted and number of voters.

1308 This Court therefore finds that the 2<sup>nd</sup> Respondent's presiding officers indeed did not have regard to the original figures in relation to the altered figures that eventually appeared on Form 66Cs when varying, altering and transmitting the same. This was an irregularity as it was a failure to comply with the Act which required only the compilation of constituency results at the District Commissioner's Office.

#### *Negligence in Conduct of Elections*

##### *Failing to Electronically Collate, Tally and Transmit Results Accurately as Required by Law*

1309 It was further alleged by the 2<sup>nd</sup> Petitioner in paragraph 25.4 of his petition, that the 2<sup>nd</sup> Respondent had 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 of the Constitution to ensure that the elections were carried out in accordance with the provisions of the Constitution, the ECA and the PPEA in that the 2<sup>nd</sup> Respondent was generally negligent in its control and administration of the elections by failing to electronically collate, tally, and transmit results accurately as required by law.

1310 This Court wishes to agree with the Respondents that in terms of transmission of the results to the National Tally Centre clearly there is no evidence to show that in the course of the transmission using the kits, the results were not accurately transmitted. None of the Petitioners' witnesses produced any evidence to support such assertion.

- 1311 The only matter that remains contentious and on which evidence exists has to do with the electronic collating and tallying of results which is stated not to have been done accurately using the eRMS. An analysis of the evidence of Mr Suleman and Mr Chisi is relevant on this aspect.
- 1312 Mr Suleman did a computer simulation of the eRMS. He made several claims with regard to the unreliability of the eRMS. He claimed that kits behaved contrary to what was indicated by the 2<sup>nd</sup> Respondent; that some data had been deleted from the eRMS; that the eRMS was not as secure in terms of the laxity of database security protocols below industry standards implemented in relation to the same such as lack of segregation of user roles and use of private emails as log-in user id. He also claimed that results were not approved in the eRMS by the Commissioners; that there were no records or audit trail of deletion of data done in the eRMS or user logins and that all results were approved by a ghost user except for results from 156 polling centres. He conceded that he did not show that results were affected but that the eRMS was heavily compromised and that it would not be wise to rely on whatever was processed in that eRMS.
- 1313 Mr Chisi also did a computer simulation showing that kits behaved properly as set; that results were amenable to approval by batching them; that no results were deleted from the eRMS; that the eRMS was set to industry standards and that activities in the eRMS were traceable together with who did what. He explained that the ghost user was traceable although the name was not indicated.
- 1314 The 2<sup>nd</sup> Petitioner submitted that the eRMS had deleted data. Further, that the results therein were approved by batch using a script that was put in through the backdoor thereby rendering the results invalid. Further that the Commissioners and auditors, contrary to eRMS workflow in exhibit MCI, did not approve any result at all except for a few that were shown to have been manually approved.
- 1315 The Petitioners also objected to Mr Chisi's simulation for offending the order of this Court that it be restricted to his sworn statement and not traverse the sworn statement of Mr Suleman. On this point this Court wishes to state that it is mindful of its order but at the same time it could not rule out the fact that Mr Chisi would inevitably in some cases traverse Mr Suleman's sworn statement and simulation as a natural consequence of his own simulation.

And that such a consequence would not be offensive in the context of this Court's order in question.

1316 The Respondents submitted that there were no results deleted in the eRMS. Further that Mr Suleman was not a forensic expert and his evidence must be disregarded. The case of *R v. Ross Warwick Porter* [2006] EWCA 560 was cited which involved retrieval of certain online information by specialist forensic techniques. This Court observes that indeed that English case clearly involved specialist forensic techniques. It has not been demonstrated that the same is required in the present case. Mr Suleman was not before this Court as an expert witness. All he did was to look at the state of the data base and with his knowledge and experience in the field of Information and Communication Technology, was able to tell what the database said.

1317 The Respondents submitted further, that Mr Suleman could not at all prove that whatever lapses he observed in the eRMS actually compromised a single result.

1318 This Court took time to consider this evidence which was of a technical nature and the submissions of the parties on the matter and made the following conclusions:

1319 Mr Suleman showed that he had sufficient experience to comment on the matters that he commented on despite not holding formal qualifications as a specialist forensic ICT auditor as suggested by the Respondents. As such this Court would consider his evidence alongside that of the 2<sup>nd</sup> Respondent's Mr Chisi.

1320 This Court found that the eRMS played a critical role at the National Tally Centre in doing final tabulation and calculation of results to determine the national vote to inform who was the winner. The Commissioners played no supervisory role over the functioning of the eRMS. They fully delegated that function to their ICT personnel and, in particular, to Mr. Muhabi Chisi, the 2<sup>nd</sup> Respondent's Director of IT Services. The Commissioners did not even have log-in accounts in the eRMS which this Court finds rather unfortunate.

1321 The kits that Mr Suleman claimed behaved differently from the set workflow, did not in fact behave in any manner as suggested. They were in fact kits for wards under the Local Government elections and were set to two wards hence the appearance of a kit being in two

places at once. This only happened in specific areas clearly explained by the 2<sup>nd</sup> Respondent such Luchenza.

1322 There was failure to follow some industry level standards in the use of default user accounts on production servers such as 'administrator' on the database by several users who all knew and used the default account password. Further, there was similar use of a default Microsoft SQL Server account called 'sa'. This would open the eRMS to abuse since anyone with access to those passwords could use the default accounts with no accountability as the passwords were shared.

1323 The workflow on exhibit MC 1 of Mr Chisi shows, at page 176 of the 2<sup>nd</sup> Respondent's volume 3 (SA MC HM), that once the results came to the National Tally Centre, the results would be printed and be manually checked by auditors and later approved by the Commissioners. And only then would results status be updated in the eRMS. This is as correctly submitted by the Respondents. It was therefore not correct that the workflow indicated that Commissioners and auditors would approve results in the eRMS. The results were to be manually approved. The national presidential result has since been Gazetted albeit much later than provided for by the law. The results were gazetted on the 9<sup>th</sup> of August, 2019 instead of within 48 hours from the conclusion of the determination of the national result, in terms of section 99 of the PPEA.

1324 There was no evidence that data was deleted in the eRMS since the Respondents were able to retrieve records of all 5002 polling stations. Mr Suleman was not sure about what the auto-approval table was and it was explained that this was a counter for auto-approved results.

1325 There was also an audit trail of events that took place in the database showing who did such and when. This is why Mr Suleman was able to show who did approval of what on the database and with time stamps. Userlogs for external logins were empty as they were not in use.

1326 Mr Suleman agreed that what really matters is whether a script is good or bad and not the use of a script in itself. The ghost user narrative therefore appears to have been exaggerated. Mr Chisi admitted use of batch processing of results in the eRMS using a script. Upon careful analysis of the evidence, the Court has come to the conclusion that it was Mr. Chisi himself



as the overall system administrator, or someone designated by him, who was the unknown user in the system, referred to as the “ghost user” by Mr. Suleman.

1327 In the final analysis, this Court finds that, as admitted by Mr Suleman, he did not show that any result in the eRMS was affected by the matters he raised but he did show that the eRMS was compromised due to the use of default accounts ‘sa’ and ‘administrator’ with passwords known by several personnel of the 2<sup>nd</sup> Respondent on the servers in production. This opened the eRMS to the risk of internal abuse without accountability.

1328 Consequently, we find that the default user accounts presented a risk to the integrity of the eRMS. This detracted from the quality and reliability of the eRMS and qualified as a cause for questioning the final national election result which result was electronically collated and tallied by the system. This is so as the eRMS performed the final calculation and tallying of the election results. Regrettably, such final calculation was made and approved in the system without the supervision of the Commissioners in the eRMS who had no user accounts in the system.

*Whether 2<sup>nd</sup> Respondent was a Party to Rigging and Tampering with Results*

1329 It was alleged in paragraph 25.4 of the 2<sup>nd</sup> Petitioner’s petition, that the 2<sup>nd</sup> Respondent was in fact party to the rigging or tampering with the results of the election in that it acquiesced in the acts of its employees, servants or agents of altering and tippexing results recorded on tally sheets by accepting them as official results.

1330 The 2<sup>nd</sup> Petitioner appears to equate rigging to tampering by using the two terms interchangeably. None of the parties has defined what rigging is in their submissions. The understanding of this Court is that according to the ordinary dictionary meaning of the word, as defined in Collins Dictionary, rigging is the dishonest arrangement of an election to get a particular result. Tampering, by contrast, is defined in the Oxford Dictionary to mean *interfering with something in order to make unauthorized alterations.*

1331 The 2<sup>nd</sup> Petitioner enumerated a number of areas at which the 2<sup>nd</sup> Respondent is alleged to have rigged the vote. The 2<sup>nd</sup> Petitioner contended that the first rigging was at the stream level where two types of rigging happened. He contended that there was arbitrary addition or

subtraction of candidate scores termed as missing votes and extra votes respectively as exemplified in exhibit PL25C and 25A where tampering with results resulted in the said missing and extra votes. The 2<sup>nd</sup> Petitioner contended that this tampering with result tally sheets caused the tally sheets not to reconcile at the constituency tally centres and triggered the massive arbitrary alterations in parts A- F seen in 2851 tally sheets in the 2<sup>nd</sup> Respondent's exhibit HM2. The 2<sup>nd</sup> Petitioner then argued that the second type of rigging at stream level involved failure to record candidate scores in the record logbook yet the Form 66Cs were filled with results.

1332 The 2<sup>nd</sup> Petitioner next contended that there was rigging at polling station level in two ways if one looks at his evidence and that of the 2<sup>nd</sup> Respondent in exhibit HM2. He submitted that the first one was that there were different scores on the Form 66C and corresponding Form 60C in the record logbook. A quintessential example being the type of rigging at Ulongwe as in exhibit TB23A to TB25A compared to TB23B to TB25C respectively; and also in exhibit PL35. The second type of rigging at polling station is said to be the entry of different figures on the monitors' carbonated copies of Form 66C and on the presiding officers' Form 66C. On this one, the 2<sup>nd</sup> Petitioner observed that the presiding officers changed candidate votes enroute to the constituency tally centres. A list of such changes was pointed out in HM2 by the 2<sup>nd</sup> Petitioner.

1333 The 2<sup>nd</sup> Petitioner then alleged rigging at constituency tally centres whereby different candidate votes were entered on the kits than appeared on Form 66Cs. An example was given of Sankhani School in Volume 14 HM2 on which the Director of Electoral Services is said to have failed to explain himself. A list of similar instances was pointed out from HM2.

1334 The 2<sup>nd</sup> Petitioner then stated that there was rigging at the National Tally Centre as indicated in Mr Daudi Suleman's evidence whereby an unknown person approved results for 4, 846 polling centres and that the Commission only approved results from 156 polling centres. Further, that the irregularities arose from one source only, that is, to mask the fact that the 2<sup>nd</sup> Respondent had wilfully and knowingly manipulated or rigged the presidential election results in favour of the 1<sup>st</sup> Respondent. And that the farce of correcting errors using tools that the 2<sup>nd</sup> Respondent neither purchased nor distributed is sufficient testimony that the 2<sup>nd</sup> Respondent had sufficient knowledge of all that went on.

- 1335 On their part, the Respondents contended that there was no evidence of rigging because no monitor came to challenge the use of duplicates or show that these were used for rigging. This is a matter that has already been dealt with earlier, on why the use of duplicates was problematic.
- 1336 This Court has carefully examined the evidence on the 2<sup>nd</sup> Petitioner's allegation of rigging. This Court observes that the evidence on record points to very questionable conduct on the part of the 2<sup>nd</sup> Respondent as pointed out by the Petitioners. The alteration of result tally sheets using tippex not supplied by the 2<sup>nd</sup> Respondent and acceptance of such results without any investigation is one such kind of conduct. There is the BDO report which shows that when results were being verified by them they had to stop the verification exercise because the 2<sup>nd</sup> Respondent kept sending the same results for verification and the clear suggestion to take a stock of what was verified by auditors and what was not verified was resisted by the 2<sup>nd</sup> Respondent.
- 1337 On the other hand, there was evidence which would tend to discount the issue of rigging. For instance, in cases where it was found that there were missing or extra votes, the evidence could not show who was the victim or beneficiary of the anomalies. Further, the alleged rigging at the National Tally Centre using the eRMS by a ghost user has not been proved.
- 1338 However, the 2<sup>nd</sup> Respondent indicated in its Polling Procedures Manual that discrepancies on the Form 66C in parts A-F be noted and not be dealt with by amendment yet widespread alterations were made, across the country, in what clearly appeared to be a systematic pattern, to deal with discrepancies in parts A-F and accepted by the 2<sup>nd</sup> Respondent. Further, these systematic alterations were being made upon instructions from the 2<sup>nd</sup> Respondent's CROs and PEOs, which instructions most of the presiding officers did not even understand.
- 1339 In addition, the BDO auditors report also clearly shows that the 2<sup>nd</sup> Respondent sidestepped the auditors in the process of verification of results without any explanation whatsoever to the contesting candidates. It has been demonstrated above that only 1,138 Form 66Cs were subjected to verification by the auditors, leaving a whopping 3, 864 Form 66Cs unverified by the auditors at the National Tally Centre. Yet, the 2<sup>nd</sup> Respondent kept claiming that all the results were to be and that they in fact were verified by the auditors. Such height of dishonesty

in our view could only be characterised as a suspicious enterprise which was very close to electoral rigging.

1340 However, this Court upon considering the foregoing evidence and the parties' submissions is convinced that indeed the 2<sup>nd</sup> Respondent was party to tampering with results having acquiesced in this tampering by accepting such tampered results and using them in determining the national presidential result without any inquiry whatsoever. There is abundant evidence of interfering with Form 66Cs in order to make unauthorized alterations to votes and all the data on the said Form 66Cs. A typical example is the misrepresentation of Form 60C candidate votes on Form 66C which was itself only tampered with in parts A-F as in exhibit TB23A to TB25A compared to TB23B to TB25C respectively. The relevant tampered Form 66Cs here were used by the 2<sup>nd</sup> Respondent in determining the national presidential result without any verification.

*Bias on the part of 2<sup>nd</sup> Respondent for 1<sup>st</sup> Respondent.*

1341 The 2<sup>nd</sup> Petitioner, in paragraph 27.6 of the petition alleged that the conduct of the 2<sup>nd</sup> Respondent in the management and processing of the election amounted to bias. In paragraph 27.7 the 2<sup>nd</sup> Petitioner was more particular in that he alleged that the 2<sup>nd</sup> Respondent showed great bias for the 1<sup>st</sup> Respondent and against the 2<sup>nd</sup> Petitioner thereby failing in its duty to act impartially considering that its position requires it to in the administration and management of an election. There was no evidence that addressed this point. The 2<sup>nd</sup> Petitioner therefore failed to prove this point.

*Failing to Indicate Reasons for Monitors' Refusal to Sign for Result Sheets*

1342 The whole electoral process is premised on the expectation that there are monitors present. And there are various sections in the PPEA which provide for monitors' signatures. In essence the monitors play a vital role in the electoral process. Their monitoring goes towards legitimising the whole process to ensure credibility, and integrity of the process. They therefore serve an important. It was thus observed in *Dr Beatrice NyaKumwenda v. Electoral Commission and Jacob Hara*, Election Petition Case No. 23 of 2019 (unreported) that:

“The role of monitors for political parties and independent candidates during an election is very important and crucial to the process as it provides realtime checks and balances, allowing the participating stakeholders to raise concerns, issues and audit the system as the process is ongoing...”

- 1343 The legal provisions expect that monitors shall be available from polling station level. In the 2019 election, the voting process at the polling station level was decentralised at places where the registered voters exceeded 800. The polling station was broken down into streams. Each stream was to have a maximum of 800 registered voters. Each stream had its own presiding officer (called an assistant presiding officer), polling staff, and monitors. The strata for the monitor therefore started at stream level. From the stream level, the 2<sup>nd</sup> Respondent recognised the presence of monitors at the polling station level. The presence of monitors at this polling station level is recognised by law under sections 92 and 93 of the PPEA. From the polling station level, there were monitors at the constituency level. This level was again created by the Commission in the May 2019 election. It was not a level that was created by statute. It was therefore a stranger in the PPEA. There were also monitors at this level. The PPEA also recognises monitors at the District Commissioner’s office. Finally, the PPEA takes cognizance of monitors at the National Tally Centre. In the May 2019 election the political parties also had roving monitors. These monitors were moving around from one place to another following up on ground monitors and establishing that all was well.
- 1344 The presence, attendance as well as witnessing of monitors to the events that were happening at the polling station was to be evidenced by signatures.
- 1345 The presence of monitors signatures or lack thereof has to be isolated in the PPEA as there are instances where the PPEA commands the presence of these signatures in mandatory terms while at the same time the monitors are given an option to leave the polling station at will thereby creating room for the monitors not to sign or not to append their signatures.
- 1346 The 2<sup>nd</sup> Respondent relied on the presence of monitors’ signatures on the result tally sheets and put up a case that the availability of the signatures redeemed the 2<sup>nd</sup> Respondent from whatever mischief the Petitioners laid at the 2<sup>nd</sup> Respondent’s door.

1347 On the other hand, the Petitioners took issue on the lack of their monitors' signatures on the result tally sheets and argued that this presented a serious irregularity on the part of the 2<sup>nd</sup> Respondent.

1348 In Part VIII of the PPEA that deals with the determination of results of the election the monitors presence and signatures is recognised from section 92 which provides that:

“After the close of the poll at any polling station, and only thereafter, the presiding officer shall, in the presence of other polling station officers and representatives of political parties if any be present, open the ballot box and order the counting of the votes to proceed separately according to a procedure entailing the polling station officers-

(a) picking out of the ballot box one paper and displaying the ballot to all present and announcing aloud the classification of the vote as specified in section 91;

(b) recording on a sheet of paper provided to the polling station officers for the purpose, showing the classification of votes, the votes cast for each classification;

(c) displaying the already announced ballot papers and separating them into lots corresponding to each classification; and

(d) announcing, through the presiding officer, the number of votes cast at the polling station under each classification.”

1349 The wording of this section needs a pause for consideration. It should be noted that the opening of the ballot box in the presence of the polling station officers and monitors is mandatory on the part of the presiding officer. He cannot open the box in the absence other polling station staff and monitors. This is for purposes of credibility and transparency.

1350 It is also noteworthy that the opening of the ballot boxes in the presence of the monitors is subject to their availability. The phrase “... *and representatives of political parties if any be present...*” suggests that it is possible to be in a situation where monitors could be absent at the time of opening the ballot boxes.

1351 As the opening of the ballot boxes in the presence of the monitors is couched in mandatory terms and it is at the same time possible for the monitors to be absent, there is need to balance up *this mandatory requirement and the voluntary absence of monitors*. The balancing of this mandatory part and the liberty of the monitor is solved by section 93 (1) (viii). The absence of the monitors becomes an occurrence.

1352 Wherefore it has to be recorded by the presiding officer. Absence of monitors may mean that the monitors could not sign due to non-availability. This however can only be inferred if the *presiding officer recorded the absence of the particular monitor in his record*. In the absence of a record, it cannot be imputed that the monitor was absent. And section 93 (1) (a) of the PPEA states as follows:

“The presiding officer shall cause to be prepared by the polling station officers-

(a) a record of the entire polling station at his polling station containing-

(i) the full particulars of the polling station officers and representatives of political parties;

(ii) the total number of voters;

(iii) the total number of votes for or under each classification of votes;

(iv) the number of unused ballot papers;

(v) the number of ballot papers which have been the subject of complaints, if any

(vi) the discrepancies, if any, between votes counted and the number of voters;

(vii) the number of complaints and responses thereto and decisions taken there on by the polling station officers;

(viii) any other occurrence which the polling station officers consider to be important to record.”

1353 It is worth noting that although section 93 (1) puts an obligation on the presiding officer to prepare a detailed record of incidents that are listed from (i) to (vii), the wording in (viii) is different. Section 93 (1) (viii) is couched in subjective terms: “...*any other occurrence which the polling station officers consider to be important to record*.” It suggests that there could

be instances where other parties might consider an occurrence important whereas the polling station officers might consider the occurrence trivial and therefore not worth recording. One might argue that this therefore gives the polling station officers the discretion to decide what occurrence to put on record. Much as the provision grants the polling station officer discretionary powers on what to record as an occurrence, he cannot trivialise the absence of a monitor and fail to record it in the record book because this monitor's absence as observed in section 92 in which it is mandatory for the presiding officer to open the ballot box in the presence of monitors. The discretion herein therefore has to be exercised in the the whole scheme of the PPEA. The discretion also has to be invoked in line with the ultimate purpose that the PPEA is intended to achieve, which is credibility and transparency. And in light of the transparency requirement, a polling station officer cannot afford to fail to record in his record, the absence of monitors. We should recall that these monitors are actually accredited by the 2<sup>nd</sup> Respondent under section 72 of the PPEA, after political parties submit the names of the monitors and the polling stations where they intend to monitor.

1354 Consequently, the presiding officer cannot avoid giving an explanation for absence of monitors' signatures; and recording the monitors failure to append signatures under sections 92 and 93 of the PPEA. Again, the concluding paragraph of section 93 (1) states that once a record is prepared, the presiding officer and each of the polling station officers and, if any be present, at least one representative of each political party must sign the record. This buttresses the requirement for the presiding officer to ensure that all monitors that are present should sign the record. And where the monitors fail to sign the record for whatever reason, whether it is because their candidate did not do well at the station or out of premature excitement that their candidate had won as alleged by the 2<sup>nd</sup> Respondent's presiding officers, it was the duty of the presiding officer to record the failure on the part of the monitor to sign as an incident. It is therefore not envisaged that a monitor's signature may be absent on any form and no explanation for it being given by the presiding officer.

1355 Section 93(2) (b) of the PPEA mandates the presiding officer to prepare a brief summary of the final result. This brief summary is what is termed Form 66C in the matter at hand. There is a requirement for the presiding officer to ensure that the record must be legibly signed by the presiding officer and each of the other polling station officers and monitors if they are present.



- 1356 The importance of monitors' signatures on Form 66C was mentioned in *Dr Beatrice NyaKumwenda v. Electoral Commission and Jacob Hara*, where it was observed that the appendage of a signature was a legal indication that a political party had agreed with the results at a particular polling station. This position however, was at variance with the decision of the Supreme Court of Appeal in the *Namasasu case* where the Supreme Court held that it was mere conjecture for the 2<sup>nd</sup> Respondent in an election to suggest that since election monitors for a candidate signed the result sheets, a court should conclude that they must have been in agreement with the results. The learned Judge in the *nyaKumwenda case* did not consider this Supreme Court decision which was binding on the Court. We hold that the position at law is as was stated in the *Namasasu case* that it is mere conjecture to suggest that the signature of result tally sheets by monitors meant that the monitors agreed to all contents therein.
- 1357 We note that the High Court in the *NyaKumwenda case* follows the position taken in the Supreme Court of Appeal case of *Electoral Commission and Another v Mkandawire case* although it did not refer to it. The *Mkandawire case* is an earlier decision of the Supreme Court of Appeal than the *Namasasu case*. What this means is that we have a latter decision of the Supreme Court that pronounces that signing of a result tally sheet by a monitor does not per se mean that the monitor agreed with the results on the tally sheet. This latter decision of *Namasasu* contradicts the *Mkandawire case* but it did not cite or discuss it. Therefore, the *Namasasu case* was decided per incuriam the *Mkandawire case*.
- 1358 The English Court of Appeal in *Morelle Ltd v Wakeling* [1955] 2 QB 379 stated that as a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. In *Huddersfield Police Authority v Watson* [1947] 2 ALL ER 193 it was observed that
- “Where a case or statute had not been brought to the court’s attention and the court gave the decision in forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam*”.

1359 This Court has also observed that in another persuasive English case of *Young v Bristol* [1944] 2 ALL ER 293 the English Court of Appeal stated the following on the subject of *per incuriam* decisions:

“Two classes of decisions *per incuriam* fall outside the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the same case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of the House of Lords decision which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords.”

1360 This Court has considered that both decisions in *Namasasu and Mkandawire* did not discuss the relevant provisions of the PPEA on political party representatives. They were therefore decided *per incuriam*. As such, this Court is free to look at the PPEA and decide which of the two Supreme Court of Appeal decisions is representative of the law.

1361 This Court is of the view that the decision in the later decision of *Namasasu* represents good law, namely, that by signing a result tally sheet it does not mean that a monitor agrees with the results and that this should therefore bar the monitor or her political party from questioning the result. According to the PPEA, political party representatives have rights and duties. The Act does not state that once the monitor signs a result tally sheet then the monitor agrees with what is contained on the said tally sheet and that the monitor or monitor’s party cannot challenge the same result later for other reasons. For example, in this matter, we have a situation where Mr. Bendulo who testified on behalf of the 2<sup>nd</sup> Petitioner, showed that at Chizoli polling station in Rumphu Central Constituency, on stream 1 on Form 60C, from the logbook, it was shown that the 2<sup>nd</sup> Petitioner got 144 votes. However, on the same stream as represented by Form 66C which was signed for by monitors for the 2<sup>nd</sup> Petitioner, the votes for the 2<sup>nd</sup> Petitioner were indicated as 67. Thus, although the monitor for the 2<sup>nd</sup> Petitioner signed the result on Form 66C, the result recorded was shown to be wrong when one considers the Form 60C that was disclosed by the 2<sup>nd</sup> Respondent and produced in evidence by Mr. Bendulo. To state that under such circumstances, the 2<sup>nd</sup> Petitioner would not be entitled to

complain because his monitor signed for the result sheet would amount to a travesty of justice and would be incompatible with his right of access to justice.

1362 In any event, in the matter at hand, there is evidence that alterations were made to the documents away from the polling stations and in the absence of polling station monitors. Therefore, the signatures on the disputed Form 66Cs or result tally sheets do not attest that the monitors endorsed the altered results since the alterations were done after the monitors had already signed.

1363 During cross examination, Dr. Chilima conceded that the monitoring arrangements were meant to ensure that the 2<sup>nd</sup> Respondent should act in a transparent and accountable manner with no room for secrecy. He told the court that there was no evidence from any of his monitors that the 2<sup>nd</sup> Respondent operated in secrecy at any polling centre. Dr. Chilima further conceded that the stream result was the primary result and monitors did witness the stream polling and vote counting and recording and further agreed that the monitor at the stream level or polling station level would have first-hand information about the correctness of the records pertaining to the polling, vote counting and recording than the one at the National Tally Centre.

1364 The witness agreed with the suggestion that where it is alleged a signature of a monitor has been forged, the best witness to that fact is the monitor. He went on to state that where the monitors have not disowned the result, it can safely be assumed that the result is impeccable.

1365 On further cross examination Dr. Chilima conceded that the fact that the petition is not supported by any evidence from any of their monitors challenging any of the results at any of the polling stations means they have no problems with the vote count at any polling station but they have other issues unrelated to the vote count. This was the position that the court in the case of *Electoral Commission and Another v. Mkandawire case* [2011] MLR 47, the court held that the signing by political party representatives was an indication that the election was conducted in a free and fair manner. Again the court put emphasis on the presence of monitors' signatures on the result tally sheets (Form 66C). It was thus stated:

“If the alleged irregularities were indeed committed at Bowe, why did the respondent’s representatives freely and readily sign for the results.

By signing in that manner they were representing that the poll was conducted lawfully and it was free and fair.”

1366 The issue on the part of irregularities also ought to be distinguished as the alterations in the matter at hand were done after the monitors had endorsed their signatures and the same were done in the monitors' absence. Otherwise the importance of the monitors' signatures, that the signature is a representation that the election was held in a free and fair manner remains true. It is therefore obligatory on the part of the presiding officer to ensure that monitors sign the result sheet Form 66C and where monitors fail to do so, the same has to be recorded by the presiding officer.

1367 It should be noted that Dr Chilima's response in the matter at hand was against a background where the Attorney General was referring to the importance of the presence of monitors at polling station level without referring to the fact that alterations and tippex on most of the result sheets (Form 66C) were done at the constituency tally centres and not at the polling centres. Again according to the evidence of the presiding officers who gave evidence in the matter at hand in form of sworn statements, the alterations to the result tally sheets were done in the absence of polling station or stream monitors. The evidence of Ms. Gwalidi and Mr. Bendulo was that the absence of the monitors' signatures imputed either the fact that the documents were not prepared in their presence or that the document was prepared in their presence but that the monitors had refused to sign because they did not ascribe to its being a true representation of whatever happened at the stream or polling station. As observed above, these allegations by Ms Gwalidi and Mr Bendulo were hearsay as no monitor attested to that fact.

1368 The 2<sup>nd</sup> Respondent produced the sworn statements of the presiding officers from various polling stations in order to rebut the Petitioners' allegations on the lack of signatures on the result tally sheets. The reasons for the monitors' refusal to sign were diverse. Some presiding officers indicated that monitor did not sign because at the end of the count, they realized that their candidate had lost, so the monitors refused to sign. In other instances, on completion of counting and upon realization that their candidate had lost, some monitors for the losing candidates left the polling stations before the time for appendage of signatures. At other times the monitors were actually sleeping. And when the presiding officers woke them up, they refused to wake up and opted to continue enjoying their sleep.

- 1369 In all these instances, the monitors departed from their terms of reference from their principals which were the political parties, as well as their statutory duties to the Commission, which did not entail that they would only append their signatures in instances where their candidate carried the day at a particular polling station. According to section 73 (b) (i) of the PPEA, monitors have a duty to act conscientiously and objectively in the exercise of their rights under the section. Hence failure on the part of the monitors to sign on such flimsy and baseless grounds as sleeping or claiming to be tired was irresponsible and amounted to an abdication of duty on their part.
- 1370 This, however, did not absolve the presiding officers from their duty to indicate in the record log books that the monitors had abdicated their duties. The refusal on the part of the monitors to sign for the results was a very serious incident and anomaly which ought to have been recorded in the record log book. Failure on the part of the presiding officers to record these incidents as occurrences in the record book were all serious irregularities. There was no justification for non-compliance on the part of the presiding officers and they could not transfer the responsibility to the monitors as the duty to record occurrences at the polling station was on the presiding officers and not the monitors.
- 1371 Again the law had anticipated that there could be incidences where monitors would leave the polling stations, but it still put it as an obligation on the part of the presiding officers to expect signatures from the absentees. As discussed, the absence of the signature was to be recorded and explained in the record book by the presiding officer.
- 1372 The presiding officers also explained that some of the monitors did not sign though they were present because there were many documents and the appending of signatures was being done in a rotational manner where, upon one monitor signing, he would pass the document to another for his signature. In the process some monitors did not sign on some of the result tally sheets.
- 1373 It is our observation that at the end of these rotations, the presiding officer was still obliged to check the documents and verify that all monitors appended their signatures.

- 1374 Other presiding officers stated that they were too tired, exhausted, fatigued or overwhelmed with work. It would appear that the courts have allowed the explanation on exhaustion on the part of the presiding officers to justify serious omissions on their part. The Attorney General cited authorities from Canada, Nigeria, Ghana and Uganda where the courts relented and sympathised with Electoral Commissions on account of presiding officers and the polling staff being overwhelmed with work and being tired. In *Gondwe and another v. Gotani-nyaHara*, the Supreme Court took into consideration the long hours that the officers work during this time and even poor lighting and condoned the failure on the part of the polling station officers and presiding officers to comply with statutory provisions.
- 1375 It should be appreciated that after the 2014 election, the Commission according to the evidence of Mr Munkhondya, conducted a post-mortem examination of the management and process of the election. It is against the post-mortem findings that stream polling was introduced in May 2019 election. Herein, assistant presiding officers were introduced to manage small numbers of people as each stream was not to exceed 800 registered voters. There were at least five polling staff against each stream according to Mr Munkhondya. Hence while exhaustion and being overwhelmed was appreciated in the previous elections, it has no place in the 2019 election because the polling station, from Mr Munkhondya's evidence had engaged more polling staff than before and had put measures in place to ensure that the polling staff officers including the presiding officers would not suffer exhaustion.
- 1376 It should be noted that there were still other instances where there was no statement of exhaustion on the part of the presiding officers and abdication on the part of the presiding officers yet there were no signatures on the result tally sheets. No explanation for the same was offered.
- 1377 Most importantly failures on the part of the presiding officers to indicate reasons for monitors' refusal to sign result sheets was a serious breach of section 93 of the PPEA. The failure to indicate reasons for the monitors' refusal to sign result sheets amounted to irregularities.

*Delay in Transmission of Results in Particular Districts*

- 1378 Section 96 (2) of the PPEA provides that:

“The determination of the national result of a general election shall begin immediately after the Commission has received records from all districts and shall, subject only to subsection (3), continue uninterrupted until concluded.” [Emphasis supplied]

1379 The 2<sup>nd</sup> Petitioner alleged in this Court that the 2<sup>nd</sup> Respondent delayed in the transmission of results from Salima, Dowa, Mchinji and Lilongwe in the Central Region and that these results were not taken into account in the final determination.

1380 Mr. Alfandika disputed this fact in his sworn statement in opposition. The 2<sup>nd</sup> Petitioner further alleged that during the upgrading of national results at the National Tally Centre at 25% and 75%, the 2<sup>nd</sup> Respondent had omitted to include certain results from some areas in the central region and in Ndirande Matope in Blantyre.

1381 In its defence, the 2<sup>nd</sup> Respondent cited the case of *Atiku Abubakar v. Independent National Election Commission*, Court of Appeal Abuja, Petition Number CA/PEPC/002/2019, where, whilst emphasising the need for polling unit evidence containing irregularities to be proved by direct and not hearsay evidence, the Court of Appeal cited the case of *Markus Gundiri vs. Nyako*, (2014) 2 NWLR (Part 1391) 211 at 245-H to 246 A-F where Ogunbiyi, JSC said:

“The significance of the polling units agents cannot therefore be underestimated in the case at hand if the appellants must have the facts to prove their case. The best evidence the appellants could have had was that of the agents at the polling units who were physically on the ground and in true position to testify as to what transpired at the election. The consequence of shutting them out for whatever reason is very detrimental to the appellant’s case”.

1382 See also the case of *Hashidu vs. Goje* (2003) 15 NWLR (Part 843) 352 and *Buhari vs. Obasanjo* (2005) All FWLR (Part 273) 1 at 164-165. (2005) 13 NWLR (Part 941) 1 at 248, paras B-C wherein Ejiwunni, JSC said among others:

“The evidence required to establish a crime must be evidence of a witness who saw or heard or took part in the transaction upon which he

was giving evidence. It is written law that hearsay evidence is not admissible for the purposes of establishing a crime...”

1383 As earlier discussed, these propositions do not necessarily accurately reflect the legal position in Malawi. For instance, the proposition above seems to suggest that the hearsay rule is cast in stone. In Malawi however, the rule is subject to various exceptions and qualifications including the qualification and exception on the use of public documents as previously discussed.

1384 The 2<sup>nd</sup> Respondent stated that there was no evidence to support the assertion that there was delay in transmission of results from certain districts and that these were not taken into account in the final determination of the results. We have looked at the evidence presented before this Court and we find that there was indeed a delay in transmitting results from certain polling stations in the Central Region. We note that the 2<sup>nd</sup> Respondent was obliged by section 96(2) of the PPEA to only begin the determination of the results after receiving the results from all districts. The Court notes that this is a legal requirement and therefore mandatory on the part of the 2<sup>nd</sup> Respondent, although it also questions the practicality of implementing this law. However, as a Court of law, our position is that the law must be followed.

1385 But we further find that the 2<sup>nd</sup> Petitioner has not proved that the said results, although delayed, were not eventually tallied in the final determination.

1386 Section 99 of the PPEA requires that the 2<sup>nd</sup> Respondent must publish in the Gazette and by radio broadcast and in at least one issue of a newspaper in general circulation in Malawi the national results of an election within 8 days from the last polling day and not later than 48 hours from the conclusion of the determination.

1387 Much as we find that there was delay in the transmission of results and that the publication of the Gazette in August was outside the time allowable by law, we find that this in itself is no proof that the delay in transmission affected the final outcome of the Presidential Elections. In our very considered opinion we find that the Petitioners have failed to prove this allegation to the satisfaction of the Court on a balance of probabilities. In that regard this prayer must fail.



*Uploading Delayed Results After Alterations*

1388 The 2<sup>nd</sup> Petitioner in this matter alleged that the 2<sup>nd</sup> Respondent uploaded delayed results after altering them. What the Petitioners were alleging was that the 2<sup>nd</sup> Respondent deliberately delayed the uploading of results with the view to alter them before uploading. We agree with the Petitioners that alterations were made and that results were delayed. As earlier discussed, we are not satisfied that the alterations herein were made simply with the view to balance up figures. These were made irregularly, in the absence of monitors. We have noted above that most of the uploaded results were altered at constituency tally centre level and the 2<sup>nd</sup> Respondent failed in its duty to detect these alterations and correct them before the final determination of the results.

*Announcing Final Results Before Results from Some Polling Centres from Central Region Were Uploaded*

1389 Hon. Dr. Chakwera, the 2<sup>nd</sup> Petitioner, alleged that the 2<sup>nd</sup> Respondent announced the final results of the elections before results from some polling centre in the Central Region were uploaded namely results from Salima, Dowa, Mchinji and Lilongwe. However, he admitted that he had not demonstrated that some results were not factored in the final tally. He admitted that he had not studied the Gazette to check if the results therein were different from those announced by the Chair of the 2<sup>nd</sup> Respondent. Additionally, Mr. Suleman failed to show that the final tallied results did not include results from the alleged districts.

1390 The 2<sup>nd</sup> Respondent argued that the failure to bring results from the Petitioners' parallel tally centre resulted in this wild allegation that some figures were not keyed in. The 2<sup>nd</sup> Respondent concluded that the Petitioners had failed to prove this point and invited the Court to dismiss this ground in the petition. We have checked the entire evidence and we find that the assertion did not stand on solid ground as the petitioners failed to demonstrate in evidence that the figures that appeared in the Gazette of 9<sup>th</sup> of August, 2019 were different from those announced by the 2<sup>nd</sup> Respondent's Chairperson. This prayer must therefore fall.

*Using Stream Results as Polling Station Results*

- 1391 The Petitioners led evidence that at two centres, namely, Kazganthundulu Polling Centre and Chozoli School Polling Centre, stream results were used as Polling Centre results. These logbook entries are in Anthony Bendulo's sworn statement in reply which was in Volume LMC 17 pages 4743 and they were exhibited as TB24A and TB24B and TB25A and TB25B. The narrative in this regard is in paragraph 4.2.113 of the sworn statement in reply on page 4735 of the 2<sup>nd</sup> Petitioners Trial Bundle.
- 1392 In this matter before us it is evident that, upon examination of Form 60C logbook entry for stream 1 at Kazganthundulu, Code 03059 exhibited as TB24A, and upon comparing it with the Form 66C exhibited as TB24B, what exhibit TB24A shows as the stream result is actually the whole polling station result comprising results from two streams. The same is the case with exhibit TB25A, the stream logbook for Chozoli School Code 03032, which, when compared with the Form 66C on page 4743 of Volume LMC 17 clearly shows that the logbook entry had put the entire 2 stream polling station results for one stream. The Form 66C that captured the result for both streams spoke for itself and was exhibited.
- 1393 For Kazganthundulu, the narrative from the 2<sup>nd</sup> Respondent was misplaced in that they ended up disputing that Hon. Dr. Chakwera's votes were reduced by 80 votes and yet there were no alterations on the Form exhibited as TB25B except in entries in parts A - F. The 2<sup>nd</sup> Respondent did not challenge the allegation that stream results at the two centres were used as station results. The 2<sup>nd</sup> Respondent however insisted that no monitors who were present at the polling centres and had signed the Forms 60C and 66C were in Court to substantiate the claims made by the Petitioners. The 2<sup>nd</sup> Respondent wondered how the Court could regard that evidence to have satisfied the standard of proving that it is more probable than not that at those polling stations, what were the stream results were taken as the entire polling station results. The 2<sup>nd</sup> Respondent stated that the allegation could not be proven without calling monitors that witnessed the vote counting process at the streams at these Polling Stations.
- 1394 In this matter and at this stage the evidential burden of proof had shifted to the 2<sup>nd</sup> Respondent to show the Court that the allegations as levelled by the Petitioners were in fact false. The only other two centres that the 2<sup>nd</sup> Respondent challenged were at Luluzi School Polling Centre in Nkhotakota North Constituency and St Hellen School Polling Station in Kasungu

Central Constituency. At these two centres the Presiding Officers who were Irene Banda and Sungeni Maliseni deponed that they used Form 60C because Form 66Cs and the duplicates had been messed up. They were then advised by the Constituency Returning Officers to improvise and use Form 60Cs instead.

- 1395 In our very considered view in as far as Kazganthundulu and Chozoli Polling Stations are concerned, the 2<sup>nd</sup> Respondent did not lead evidence in rebuttal challenging the narrative at these two polling stations. In this regard we find that the Petitioners have proven this point in as far as the two named polling centres are concerned. We find that these were illustrations of irregularities that demonstrated that the integrity of the electoral process was seriously compromised.

*Using result tally sheets with actual voters exceeding registered voters/ Using Tally Sheets Where the Total Sum of Used and Unused Ballots is Higher than Ballot Papers Issued/Received*

- 1396 The Court has analysed the evidence of Mr. Lackson on this issue. He stated that he also found that on 32 Form 66Cs (5% of sampled forms), with 4419 votes, the total number of ballots cast plus unused and cancelled/spoilt ballots exceeded the number of ballots provided by the 2<sup>nd</sup> Respondent. This entailed that the number of actual voters exceeded the number of registered voters. According to Mr. Lackson, this meant that some people brought in what he called extra ballots at the polling station. He exhibited these as PL 26.
- 1397 His evidence was not successfully challenged during cross-examination. The monitor copies of Form 66C which he exhibited show that what has been alleged on this aspect is borne out when these forms are contrasted with the corresponding scanned Form 66Cs which were altered to correct the anomaly, especially on the null and void ballots. See, for example, pages 2690 and 2691 in PL 26 illustrate this point.
- 1398 We therefore find that the allegation herein has been proved.

*The Meaning of Majority of the Electorate*

1399 One of the reliefs that the 2<sup>nd</sup> Petitioner prayed for in his Petition, which we are required to dispose of in terms of section 9(2) of the Courts Act, is that we should make: "*An order that the 1<sup>st</sup> Respondent was not duly elected as President of the Republic of Malawi as he did not truly obtain a majority of the votes polled.*" [Court's emphasis]

1400 The relief sought by the 2<sup>nd</sup> Petitioner herein directly requires of us to make a decision on what constitutes "a majority of the votes polled." This is a paramount question that goes to the very heart of our political system and yet, regrettably, very scanty attention was given to the issue by all the parties in the instant matter during argument. Even for the scant attention that the matter received in argument, it was upon being reminded by the Court that a pertinent issue for determination as raised in the 2<sup>nd</sup> Petitioner's Petition had not been properly canvassed. Not only did the parties seemingly treat the matter as negligible or ancillary, although it was a fully set out relief being sought, amici curiae likewise never addressed the issue. They largely focused on addressing matters already addressed by the parties to the case such as standard and burden of proof, the issue of failure to call material witnesses and the like. We need to point out that one of the critical roles that amici curiae play in public interest litigation such as in the present matter, is to seek to highlight some of the important considerations necessary for the determination of the Court which the other parties might have neglected to address or to properly address, such as the question as to what would have constituted a majority of the votes polled during the Presidential election herein. We must of course acknowledge that very briefly, Senior Counsel Msisha tackled this issue but again he sounded less than fully committal on his position, suggesting that majority could connote 50% plus 1 but at the same time stating that under the First Past the Post situation, whoever is the highest gets the majority.

1401 Be that as it may, it is still our duty to determine the issue. The central issue for determination here is a question of law. Clearly the starting point is to acknowledge that this is a point which was addressed by the Supreme Court of Appeal in the case of *Chakuamba and others v Attorney-General and others*. In that case, by way of petition, the petitioners had commenced action alleging various irregularities and seeking a number of remedies. They claimed that there was an undue return or an undue election of President Bakili Muluzi to the office of President of the Republic of Malawi in the election which was held in June, 1999. The main

question that the Supreme Court was called upon to determine, upon appeal from a decision of the High Court, concerned the interpretation of the provisions of section 80 (2) of the Constitution. That provision provided, and it still provides that:

*“The President shall be elected by a majority of the electorate through direct, universal and equal suffrage.”*

1402 At the heart of the dispute was the question: what did the Constitution mean by the term “a majority of the electorate” as expressed in that section?

1403 The appellants contended that the requirement for electing the President of the Republic by a majority of the electorate could only be satisfied by a candidate who had obtained more than fifty per cent plus one vote of the registered voters and not merely by a majority of the votes cast at the poll.

1404 The Supreme Court of Appeal also looked at the provisions of section 96 (5) of the PPEA which provides that:

*“The candidate who has obtained a majority of the votes at the poll shall be declared by the Commission to have been duly elected.”*

1405 All parties, including the Supreme Court of Appeal, agreed that section 96 (5) of PPEA provides for the first-past-the-post system. The divergence of opinion related to the interpretation of section 80 (2) of the Constitution.

1406 Since the dispute before the Court is narrowed down to the presidency, and the Constitution is the supreme law of the country, we find that once we establish the true meaning of section 80 (2) of the Constitution, there is no need to take a further look at section 96 (5) of the PPEA. The latter will be of no consequence in as far as the election to the office of President is concerned.

1407 Pointedly, the Supreme Court of Appeal stated at the outset of its analysis of the issue, that:

“This is a matter of great constitutional importance for this country because the interpretation we give to the section will determine the correct procedure that must be followed in future presidential elections. And in the determination of that issue we will have regard only to the law and to the relevant facts. Section 10 of the Constitution provides that it is the Constitution which is the supreme arbiter and ultimate authority in the interpretation of all laws and in the resolution of political disputes. And our concern here is strictly the interpretation of the law.”

1408 We posit that this remains the role for this Court to play as we examine essentially the same question today.

1409 The Supreme Court of Appeal easily provided the definition of the term “electorate” as used in section 80 (2) of the Constitution. The Court said:

“It is our considered view that the word “electorate” as used in section 80 (2) can only mean those electors who have directly taken part in the process of an election... The word “electorate” as used in section 80 (2) means, and in our judgment can only mean, the electors who actually take part in the election. We cannot see how that finding can be wrong both in principle and law. The practice in democracies is that only votes which have been cast and are not void are counted in democratic elections.”

1410 We cannot agree more and indeed, even if we disagreed, we would have no basis for departing from the position of the Supreme Court of Appeal on this point as we are bound.

1411 It is on the approach that the Supreme Court of Appeal took in arriving at the meaning of the word “majority” that we take issue. As we do so, we must emphasise that we are fully alive to the fact that the case of *Chakuamba et al vs Attorney General* was a decision of the Supreme Court of Appeal and this Court will be the last to sound or be seen as being irreverent to

decisions of the apex Court. At the same time, however, we have an even higher duty to ensure fidelity to the law. Fidelity to the law includes being true to the various legal interpretive and application instruments that include how to deal with the decisions of superior courts in a system of stare decisis. It is in this context that, for the reasons that we advance below, we form the firm view that there were a number of cardinal considerations which the panel of the Supreme Court of Appeal which decided this matter in 1999 did not consider in the *Chakumba case* and which, collectively, lead us to the conclusion that the decision was made *per incuriam* on the question of the meaning of the word “majority” under section 80 (2) of the Constitution.

1412 To put it in context, this is how the Supreme Court of Appeal in that case reasoned, at pages 40 and 42, that:

“We have particularly considered the sections of the Constitution in which the word “majority” is used in order for us to ensure that the meaning we ascribe to section 80 (2) effectuates the general purpose of the Constitution. The manner in which the word majority is used in section 80 (2) is not different from the way it is used in the other sections in the Constitution. In section 49 (2) (1) it is used in the following way: “...passed by a majority of the National Assembly”; or “passed by a majority of the Senate” section 49 (2) (iii). In section 53(1) it is used in the following way: “The Speaker of the National Assembly, or the Speaker of the Senate “shall be elected by the majority vote”. In section 73 (3) it is used in the following manner. “If the Bill is debated again and passed by a majority of the National Assembly”. We have looked at other sections in the Constitution where the word “majority” is used and in particular we have looked at sections 49 (1), (2); 53 (1), and 73 (3). The appellants did not contend that the use of the word “majority” in these sections means fifty percent plus one. If that is their position why should the word “majority” in section 80 (2) mean something different. We have already observed that provisions in the Constitution must be interpreted in a manner which sustain rather than destroy each other. We find that the word “majority” as used in the

Constitution means “the greater number or part” and that is the general sense in which the word is used in the Constitution.

1413 The Court proceeded at pages 42-43 to say that:

“The provision that requires a Presidential candidate to obtain fifty percent plus one before he is duly elected is a major constitutional provision which cannot be left to be implied. It is a provision which must be expressly provided for in unequivocal terms. And the *Constitution must make the further provision on what will happen if the expressed majority is not achieved. In other words, the Constitution should make express provision for second ballots and how they are to be conducted. The fact that the framers of the Constitution did not provide for second ballots shows that they were satisfied that any presidential elections conducted in pursuant to section 80 (2) will always produce a successful candidate.*”

1414 The Court then concluded the point by stating, at paragraph 43, that:

“The appellants appear to concede that their interpretation is liable to result in inconclusive elections but they suggest that such results could be remedied by pushing in legislation to provide for second ballots soon after the General Elections. It must be remembered that a new Parliament will have just been elected when such inconclusive Presidential result would have occurred. The difficulties of summoning a new Parliament and the difficulty of predicting how the new Parliament would vote on the proposed legislation make the suggestion clearly unrealistic. It is our judgment that the meaning to be ascribed to section 80 (2) as presently stated and the context in which that word is used in other parts of the Constitution and having regard to the general purpose of the Constitution can only mean that the word “majority” means “a number greater than” a number achieved by any other candidate. And it can only further mean the greater number of those electors who actually voted in the elections.”



- 1415 From what the Court observed at page 40, an interpretation of section 80 (2) had to be guided by the Court's consideration of other provisions of the Constitution where the same word was used. It is clear from the language of the Court that the Court said it was bound to follow the meaning of the word majority as used in other constitutional provisions. Then, without in our view clearly explaining, the Court concluded that in sections 49 (1), (2); 53 (1), and 73 (3) the use of the word "majority" did not mean fifty percent plus one, and fortified itself in this position by stating that the appellants themselves did not argue for an alternative interpretation.
- 1416 We observe that it is axiomatic that the word majority as used in Parliamentary votes, unless the majority is expressly stated to be different, such as a two thirds majority, entails fifty percent plus one vote. Different constitutional provisions might entail that the vote is fifty percent plus one vote of those present and voting or those entitled to vote. But the fact remains that it is well known that this is how those provisions are understood. Parliament applies the fifty percent plus one vote during its voting processes.
- 1417 But then we have no power to overrule the Supreme Court of Appeal decision. We are bound as this Court is subordinate to the Supreme Court of Appeal. What we are entitled to do, however, is to depart from the position of the Supreme Court of Appeal if we can demonstrate that the decision was made *per incuriam*. As we stated earlier, we believe it was.
- 1418 As we have pointed out, the Court arrived at the conclusion that the various provisions it cited on the issue of majority during voting in the National Assembly never entailed that the majority should reach the fifty percent plus one vote threshold.
- 1419 In arriving at this conclusion, the Supreme Court did not consider at all its own earlier decision in *Attorney-General v Malawi Congress Party and others* [1997] 2 MLR 181 (SCA). In that case, the Supreme Court of Appeal made it clear that having a plurality of votes, that is, the biggest number of votes compared to other contestants, is not enough to pass legislation through Parliament. Although the Court did not expressly mention the term "fifty percent plus one", it is clearly implied. At page 187, the Supreme Court of Appeal said:

“The United Democratic Front (UDF) has the largest number of members of Parliament, followed by the Malawi Congress Party (MCP) and the Alliance for Democracy (AFORD). The party in Government, that is the UDF, does not command an absolute majority to enable it pass legislation with a simple majority. An alliance was, therefore, formed with AFORD to redress this situation. However, even with this alliance, the UDF and AFORD could not constitute two thirds of the members entitled to vote as required by certain provisions of the Constitution and Standing Orders, except that the alliance created a numerical advantage to pass legislation by a simple majority.”

1420 In this passage, the Court makes reference to two majorities: simple majority and two thirds majority. Although the UDF had the largest number of members of Parliament, they were not enough to pass legislation by simple majority. Simple majority, it was clear, was fifty percent plus one. So they needed an alliance. This finding was not considered by the Supreme Court of Appeal in the *Chakuamba case*. The Court went on to say at page 222, that:

“So far as promoting values which underlie a democratic society in Malawi is concerned, it should be noted that by section 48 (1), (2) and (3) of the Constitution, it is provided that all legislative powers in Malawi are vested in the legislature; secondly, an Act of Parliament shall have primacy over other forms of law, subject to the Constitution; and finally, any question to be decided by the National Assembly shall be decided by a majority of the votes of members present and voting, unless the Constitution or any Act of Parliament provides otherwise.”

1421 It was the majority referred to by the Court in this passage which the Court said the UDF did not have although it had the largest number of Members of Parliament. We are therefore of the opinion that in so far as the Supreme Court of Appeal in the *Chakuamba case* arrived at its conclusions on the question of majority without having regard to its relevant earlier decision in *Attorney-General v Malawi Congress Party and others*, the decision on the issue of majority in that case (*the Chakuamba case*) was made *per incuriam* the case of *Attorney-General v Malawi Congress Party and others*).

1422 Secondly, we notice that on the definition of majority as understood under section 80 (2) of the Constitution, the Supreme Court of Appeal did not consult any authoritative dictionary. Whilst the Court consulted the ordinary Oxford Advanced Learners Dictionary in respect of some terms, *this was not the case with the definition of “majority vote”*. *Black’s Law Dictionary*, 6<sup>th</sup> Edition, defines the term “Majority vote.” Majority vote is defined as:

“Vote by more than half of voters for candidate or other matter on ballot. When there are only two candidates, he who receives the greater number of the votes cast is said to have a majority; when there are more than two competitors for the same office, the person who receives the greatest number of votes has a plurality, but he has not a majority unless he receives a greater number of votes than those cast for all his competitors combined.”

1423 *Black’s Law Dictionary*, 6th Edition, defines “Plurality” as:

“The excess of the votes cast for one candidate over those cast for any other. Where there are only two candidates, he who receives the greater number of the votes cast is said to have a majority; when there are more than two competitors for the same office, the person who receives the greatest number of votes has a plurality, but he has not a majority unless he receives a greater number of votes than those cast for all his competitors combined, or, in other words, more than one-half of the total number of votes cast. A plurality normally refers to the state of being numerous; a large number or quantity.”

1424 From this definition, it is clear that the Supreme Court of Appeal did not consider that there is a difference in the legal definition of “majority” as opposed to “plurality”. Had the Supreme Court of Appeal considered this, we are persuaded that it could have arrived at a different conclusion. *On that account, we also find that the Supreme Court of Appeal decision was made per incuriam* for not considering legal meanings in authoritative dictionaries.

1425 We are of the firm view that the meaning of electorate under section 80 (2) is as clear as the Supreme Court of Appeal stated it to be in the *Chakuamba case* above. Thus, “electorate” as

used in section 80 (2) means those electors who directly take part in the process of an election. In other words, the word electorate under section 80 (2) of the Constitution means those registered voters who have actually cast their votes in the election in question.

1426 The word majority, in turn, is as aptly defined in *Black's Law Dictionary* above. Thus, where, in a presidential election in Malawi there are only two candidates, the candidate who receives the greater number of the votes cast will have attained the majority of the vote in terms of section 80 (2) of the Constitution. Where, however, there are more than two candidates for the office of President of the Republic, the candidate who receives the greatest number of votes would only have a plurality and not a majority unless such candidate receives a greater number of votes than those cast for all his or her candidate competitors combined. Put differently and for the avoidance of doubt, majority of the electorate under section 80 (2) of the Constitution means fifty percent plus one vote of the electorate. We do not see any ambiguity at all in the language used in section 80 (2) of the Constitution. An alternative interpretation, such as that adopted in the *Chakuamba case*, would lead to an absurd result. It could entail that a person could be elected even with as little as 10% or less of all the valid votes cast in the election. This is clearly inconsistent with the principle that the authority to govern in a democracy derives from the majority of eligible voters who take part in the election by actually casting their votes. We do not believe that this is what was intended by the framers of the Constitution.

1427 Thus, in answer to the question put by the 2<sup>nd</sup> Petitioner as to whether the 1<sup>st</sup> Respondent was truly elected by a majority of the electorate, our answer is in the negative. Even if we had found that the conduct of the 2<sup>nd</sup> Respondent in managing the 21<sup>st</sup> of May, 2019 elections was above board and that the final results announced were trustworthy, it is our finding that the final figures that the 2<sup>nd</sup> Respondent announced on the 27<sup>th</sup> of May, 2019 suggested that none of the candidates in that election was truly elected by a majority of the electorate.

1428 It is the duty of Parliament to pass legislation that gives effect to the provisions of section 80 (2) of the Constitution through necessary reform to electoral legislation including appropriate amendments to the PPEA that provide for what is to happen in the event that no candidate secures a majority of the electorate as provided for under section 80 (2) of the Constitution.

## PART SIX

### CONSTITUTIONAL ISSUES

1429 The Court has been called upon by the original Court and the Honourable the Chief Justice to, on top of disposing of the entire matter, specifically determine the following Constitutional issues in the present matter:

- (a) Whether the [2<sup>nd</sup>] Respondent breached its duty under Section 76 of the Constitution of the Republic of Malawi;*
- (b) Whether the [2<sup>nd</sup>] Respondent breached its duty under Section 77 of the Constitution of the Republic of Malawi; and,*
- (c) Whether the [2<sup>nd</sup>] Respondent infringed on the Petitioners' and the citizen's political rights under Section 40 of the Constitution of the Republic of Malawi.*

1430 We need to clarify some issues in advance as we address these constitutional questions. We are mindful that a constitutional referral such as the instant one is made under section 9(2) of the Courts Act which provides that:

“(2) Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.”

1431 The process of referral of a constitutional matter by a Judge in the original Court to the Chief Justice for purposes of certification as a matter raising or concerning the interpretation or application of the provisions of the Constitution has been provided for under Order 19, rules 3 and 7 of the CPR, 2017. Order 19, rule 7 of the CPR, 2017 requires the referring Judge to submit the referral in Form 20 to the Chief Justice for certification under rule 2. Form 20 requires the referring Judge to outline the constitutional issues which he or she is of the view that they ought to be determined in the matter.

1432 It is this Court's view that once a referral Judge identifies constitutional issues for determination, the court in determining those issues, is not confined to specific “pleaded”

issues or grounds specifically stated in originating processes such as the petitions in the present matter. It is our view that a reading of section 9(2) of the Courts Act shows that there are two limbs to that provision. In the first limb, an original court may refer the matter to the Chief Justice for certification where the Judge forms the view that the issues raised in the originating process, such as the petitions in the instant matter, expressly and substantively “relate to” the interpretation or application of the provisions of the Constitution. Under this limb, it would indeed be appropriate for the referral panel of the High Court (referral court) to ensure that it only deals with specific issues that expressly raised those questions. However, the second limb of section 9 (2) only requires the Judge in the original Court to be satisfied that the issues substantively “concern” the interpretation or application of the provisions of the Constitution. The key word here is “concern”. We form the view that a matter may expressly and substantively concern the interpretation or application of the provisions of the Constitution even where constitutional provisions have not been explicitly stated.

- 1433 For example, a holder of a Constitutional office may be unceremoniously removed from office. The Constitution might have provided specific grounds upon which such a person may be removed from office. It is possible that such a person might then go ahead to challenge his or her removal in court arguing in the originating court process, as the sole ground of challenge, that his or her removal was done in breach of his or her general right to natural justice. A Judge in an original court, may note that the issue of removal of the office holder concerns the interpretation or application of the provisions of the Constitution since the matter concerns removal from a constitutional office. The Judge in the original court may thus still form the view that the matter expressly and substantively concerns the interpretation or application of the Constitution, and lay out the constitutional provisions in issue, even though such provisions had not been expressly “pleaded” or stated in the originating process. In such a case, in addressing the issues of the removal process under the applicable constitutional provisions, the referral court would not be tied to only consider the issue of breach of the rules of natural justice as originally pleaded. It will be the duty of the referral court to examine the facts in their totality in so far as they relate to the interpretation or application of the constitutional provisions regarding the removal of the office holder under the Constitution as stated by the referring Judge and duly certified by the Chief Justice.

- 1434 Once the constitutional issues are certified, the referral Court is confined to deal with those constitutional issues, along with a determination of all other issues raised in the matter for final disposal. The referral court is not entitled to bring its own new constitutional issues.
- 1435 In addition, under section 9 (3) of the Courts Act, the certification by the Chief Justice is conclusive evidence of the fact that the issues so certified are indeed necessary for the court's determination.
- 1436 We state this in view of the fact that the Respondents in the present matter argued that that the 1<sup>st</sup> Petitioner did not raise constitutional issues in his petition. We are of the opinion that the issues raised by the 1<sup>st</sup> Petitioner in his petition expressly and substantively concerned the application of the various constitutional provisions that the referring Judge has stated to us.
- 1437 In any event, even if we were wrong in our position above, it is clear that the 2<sup>nd</sup> Petitioner raised those issues in his petition and we have already found that the two petitions, as consolidated, now form one proceeding and are no longer being dealt with severally.

#### *Interpretation*

- 1438 The starting point in an enterprise of constitutional interpretation is section 11 of the Constitution which was specifically prescribed to guide courts on the critical considerations they should bear in mind when interpreting the Constitution. Section 11 of the Constitution provides that:

“(1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.

(2) In interpreting the provisions of this Constitution a court of law shall—

(a) promote the values which underlie an open and democratic society;

(b) take full account of the provisions of Chapter III and Chapter IV; and

(c) where applicable, have regard to current norms of public international law and comparable foreign case law.

(3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.

(4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.”

1439 Section 11 of the Constitution therefore makes it clear that our Constitution is not merely a supreme instrument that regulates the exercise of public power, but that it also embodies an objective, normative value system. The provisions of the Constitution should be interpreted in a teleological fashion, that is, with the aim of ensuring that any interpretive positions that we adopt should not only ascribe the true meaning intended by the framers of the Constitution on a given constitutional provision, but that they should give effect to the object and purpose of the Constitution.

1440 In the overall scheme of things, whatever shade of constitutional interpretation is adopted by the Court, it must foster the flourishing of our democracy. The Court bears in mind that the Constitution is a living document. It does not look at the context of its provisions as a snapshot of history frozen in time. It envisages that the values that underlie our society as an open and democratic one reflect an ongoing societal process, “a moving picture which continues into and beyond the present.”<sup>23</sup>

1441 In our scheme of constitutional interpretation, we have in mind, and wherever appropriate we give effect to various canons of constitutional interpretation. These include *textualism* (or *literalism*) where we seek to ascribe literal meaning to the words used; *originalism* where we try to look at the original meaning of the words used; *doctrinalism* where we seek to locate particular interpretation of certain words within the technical (doctrinal) context of such words as generally understood in the legal profession; *developmentalism* where we seek to effectuate and further the constitutional mandate to develop appropriate principles of constitutional interpretation under section 11 of the Constitution; *purposivism* where we seek

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<sup>23</sup> See WF Murphy, JE Fleming & SA Barber, *American Constitutional Interpretation* (2<sup>nd</sup> Edition, 1995) 394. See also Lourens du Plessis, “Interpretation”, in Stu Woolman, Theunis Roux & Michael Bishop, *Constitutional Law of South Africa* (2<sup>nd</sup> Edition, 2008) page. [32-61].



to unpack the object and purpose of the particular provisions within the overall constitutional context; and *balancing* which seeks to mediate between opposing claims of what is just and necessary in society.<sup>24</sup>

- 1442 In engaging in constitutional interpretation, we fortunately have the benefit of standing on the shoulders of other courts that have preceded us on this subject. Section 11 of the Constitution, and generally other provisions that engender the values and ethos of the Constitution have been the subject of consideration by superior courts in interpreting the Constitution during the three decades that the Constitution has been in force. In this regard, we start by reminding ourselves of the luminary statement of the Supreme Court of Appeal in the case of *Fred Nyeula v The Attorney-General and Malawi Congress Party*, [1999] MLR 313 (MSC), at page 323 where the Court stated that:

“A Constitution is a special document which requires special rules for its interpretation. It calls for principles of interpretation suitable to its nature and character. The rules and presumptions which are applicable to the interpretation of other pieces of legislation are not necessarily applicable to the interpretation of a Constitution. Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a Constitution must be construed not in narrow legalistic and pedantic way but broadly and purposively. The interpretation should be aimed at fulfilling the intentions of Parliament. It is an elementary rule of Constitutional interpretation that one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the great purpose of the Constitution.”

- 1443 Citing with approval the Indian case of *Galapan v State of Madras* (1950) SCR 88 at 109, the Supreme Court of Appeal went on to say that:

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<sup>24</sup> Ibid, [32-61] – [32-63].

“The Constitution is a logical whole” and that each provision of the Constitution “is an integral part thereof and it is therefore logically proper and indeed imperative to construe one part in the light of the other parts.”

1444 Further guidance on the subject of constitutional interpretation in Malawi was provided by the Supreme Court of Appeal in the case of *Chakuamba and others v Attorney-General and others* [2000–2001] MLR 26 (SCA), where, at page 29, Banda, CJ enunciated that:

“Section 11 of the Constitution expressly empowers this Court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop must promote the values which underlie an open and democratic society, we must take full account of the provisions of the fundamental constitutional principles and the provision on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the Constitution intended to effectuate the general purpose of the Constitution. There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society.”

1445 The Supreme Court went on to state, at pages 36 to 37, that:

“[i]n the case of *Fred Nseula v Attorney-General and the Malawi Congress Party* MSCA Civil Appeal No. 32 of 1997... We held...that the present Republican Constitution is an amalgam of the parliamentary and presidential systems of government and that we must take care in interpreting it so that a careful balance between these systems of government is achieved. We have to consider the traditions and usages which have been given to the meanings of the language used in parliamentary and presidential systems of government. We, further, held in the *Nseula case* that the traditions usages and conventions which are a common feature in a parliamentary system of government are given greater prominence in our Constitution than those of a presidential system of Government. As we said in Nseula’s case one provision of the Constitution cannot be isolated from all others. All the provisions bearing upon a particular subject must be brought to bear and to be so interpreted as to effectuate the general purpose of the Constitution. A Constitution is a single document and every part of it must be considered as far as it is relevant to get the true meaning and intent of any part of the Constitution.”

1446 This Court is also cognisant of the position adopted by the High Court in *Malawi Human Rights Commission v. The Attorney General* [2000–2001] MLR 246 (HC), where Nyirenda. J (as he then was), eruditely stated that in constitutional interpretation:

“even a clear word could have a wider meaning, especially in the context of a constitution which is a compilation of people’s wishes. As pointed out by Justice Holmes elsewhere, a word is not a crystal, transparent and unchanged, it is the skein of a living thought and may vary greatly in colour and context according to the circumstances and the time in which it is used. The principles urge us to give the words that wider meaning to provide for the wider demands of society and to stop where the meaning might turn to absurdity. It is in this regard that Ag Judge Kentridge in *S v Zuma and others* 1995 (2) SA 642 (CC)

cautions that we must take heed of Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to values, the result is not interpretation but divination."

1447 The Court, in interpreting the constitutional provisions in issue, consistent with the provisions of section 11(2)(c) of the Constitution, has also considered various international law instruments that were invoked by the parties herein in the course of argument. These include article 21(3) of the Universal Declaration of Human Rights, 1948, which states that:

"The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure."

1448 They also include article 13(1) of the African Charter on Human and Peoples Rights, 1981 which provides that:

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

1449 We also, wherever appropriate and applicable, have recourse to comparable foreign case law.

#### *Standard and Burden of Proof on Constitutional Rights*

1450 Courts have adopted an approach that is liberal and generous when it comes to the vindication of constitutional rights. This is clear from the various decisions that we have outlined on the issue of interpretation of the Constitution above. In terms of the standard and burden of proof in constitutional rights matters, we draw inspiration from the Canadian case of *Regina v W M Drup, Matt* [1984] 5 C.C.R. 281, where Stevenson Prov. J., said:

"In interpreting this section it seems clear that one who is asserting a

right or freedom needs only put forth a prima facie case of infringement. The burden of proof then shifts to the state to show that the limit on that right or freedom is reasonable, is prescribed by law, and can be demonstrably justified in a free and democratic society. I am satisfied that the burden on the state involves showing, on a balance of probabilities, that the limits are reasonable in the pursuit of a legitimate state object, that such limits are not more excessive than is necessary in reaching that object, and that the limit "is not inspired by arbitrary or capricious reasons."

1451 This position was affirmed in the case of *R. V. Oakes* [1986] 1.9 CRR. 308,333:

"Separating the analysis into two components is consistent with the approach this court has taken to the Charter to date: (see *R. v Big M Drug Mart Ltd, supra; Hunter et al, v. Southan Inc.,* (1984) 2 S.C.R. 145, 9 355,14 C.C.C. (3d) 97; *Law Society of Upper Canada v. Skapinker.* (1984) 1. S.C.R.357, 8 C.R.R. 193, 11 C.C.C. (3d) 481)."

1452 This approach was adopted by Mwaungulu J (as he then was) in *Nelson Jasi v. Republic*, Criminal Case No. 64 of 1997 (unreported) where he stated that:

"The Constitution in section 42(2)(c) creates a right for an individual not to be compelled to make a confession which may be later used against him in a court of law. Legislation that allows such evidence to be used against the defendant violates individual fundamental rights. The applicant has just to raise a prima facie case of violation. The onus then shifts to the State to justify the legislation as a reasonable limitation recognised by human rights standards and necessary in an open democratic society."

1453 This Court takes the view that this is the right approach to adopt in cases where human rights guaranteed under the Constitution are implicated and sought to be vindicated.

1454 We now proceed to deal with the various constitutional questions that have been stated to us.

*Whether the Electoral Commission, in the Manner in Which it Administered and Managed the 21<sup>st</sup> of May 2019 Presidential Elections, Breached its Duties Under Section 76 of the Constitution*

1455 We start by setting out the relevant provisions of section 76 that implicate these proceedings, as follows:

“(1) The Electoral Commission shall exercise such functions in relation to elections as are conferred upon it by this Constitution or by an Act of Parliament.

(2) The duties and functions of the Electoral Commission shall include—

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. .  
.

(c) to determine electoral petitions and complaints related to the conduct of any elections;

(d) to ensure compliance with the provisions of this Constitution and any Act of Parliament; and

(e) to perform such other functions as may be prescribed by this Constitution or an Act of Parliament.

(4) The Electoral Commission shall exercise its powers, functions and duties under this section independent of any direction or interference by other authority or any person.”

1456 It appears to us that the critical question that we have to ask ourselves is whether the 2<sup>nd</sup> Respondent properly exercised its functions in relation to elections as are conferred upon it by the Constitution or under the ECA and the PPEA.

1457 We find it important to highlight that in terms of the Constitution, the 2<sup>nd</sup> Respondent is mandated to:

- (i) ensure compliance with the provisions of the Constitution and any Act of Parliament;
- (ii) determine electoral petitions and complaints related to the conduct of the elections.

1458 In terms of ensuring compliance with the Constitution, under the Constitution, the Commission was supposed to ensure compliance with section 77 of the Constitution which provides, under subsection 5, that no person shall exercise more than one vote in any one of the constituencies.

1459 We note that substantial evidence was adduced by Mr. Lackson which showed that changes to the result tally sheets in certain instances masked the fact that there were more ballots counted at the close of polling at particular polling stations than those that were accounted for at the start of the polling (ballots received). This, in our view, could either mean that some people voted more than once, the second vote being an extraneous ballot acquired from sources outside the 2<sup>nd</sup> Respondent, or literally that there was somehow some form of ballot stuffing of the ballot boxes. In either case, the fundamental principle that the outcome of the election should be determined on the basis of one person one vote would have been flouted.

1460 This position therefore also answers the question as to whether Section 77 of the Constitution was breached. Section 77 of the Constitution was violated under the circumstances.

1461 The Commission also failed to ensure compliance with the provisions of Section 40 of the Constitution, in particular, section 40(1)(d) and 40(3) but this will be discussed separately below. In terms of failure to comply with an Act of Parliament, there were multiple breaches:

(a) The evidence, as analysed above clearly shows that presiding officers and other staff of the 2<sup>nd</sup> Respondent unlawfully tampered or altered result sheets, particularly Form 66Cs, and that this largely happened at the constituency tally centres. The evidence of multiple presiding officers whose sworn statements the 2<sup>nd</sup> Respondent brought to Court, as analysed above, bears clear testimony to this fact.

(b) When the electoral process under the PPEA is understood in its proper context, such alterations at the constituency tally centres should not have taken place. Once the

results tally sheets had left the polling station, no one else was entitled to make any corrections to the result sheets until the stage of determination of the national result pursuant to sections 96, 97 and 98 of the PPEA. We have already set out the electoral process as laid down under the Act in the introductory part of this judgement. For clarity however, we wish to restate that the following is our understanding of what should happen at a polling station once polling has closed:

- (i) The polling station officers must ensure that all unused ballot papers have been collected and sealed away in a separate envelope provided for the purpose. The number of unused ballots is then recorded in Part D of Form VI (we shall abbreviate this as Form VI(D)) as prescribed in the Schedule to the PPEA;
- (ii) According to Form VI(D), the presiding officer together with other polling station officers must then deduct the number of unused ballots from the number of ballots received as recorded at the opening of the poll under in Part A of Form VI (we shall abbreviate this as Form VI(A)) at the opening of the polling station and record the Sub-total;
- (iii) The presiding officer and other polling officers must then proceed to also deduct the number of spoilt ballots from the sub-total recorded under (ii) above. The sub-total will also be recorded. Until this stage, the ballot box has not yet been opened;
- (iv) Then, pursuant to section 92 of the PPEA, the presiding officer opens the ballot box;
- (v) According to Form VI(D), before starting to pick out ballot papers from the ballot box and displaying them according to the classification under section 91 of the PPEA, namely null and void votes and votes per candidate, the presiding officer together with the polling officers must count the total votes cast in the ballot box. The total number of votes cast in the ballot box is marked as “D\*1” according to the prescribed Form VI(D);



- (vi) Part E of Form VI (we shall abbreviate this as Form VI(E)) then requires that the total number of votes counted per candidate must reflect the number of votes as counted under “D\*1” above. If there is a discrepancy, section 93(1)(vi) requires that such discrepancy must be recorded in the record prepared under that section of which Form VI is part;
  - (vii) It is at this stage that the counting of votes per candidate and ultimately the announcement of the results at the polling station is made in terms of section 92 of the PPEA;
  - (viii) To emphasise, Form VI has been prescribed for purposes of being part of the record prepared under section 93(1) of the PPEA but it does not represent the full record. It does not have space for the recording of ballot papers which have been the subject of complaints as envisaged under section 93 (1) (a) (v); and it also does not have space for the recording of discrepancies as envisaged under section 93 (1) (a) (vi). It is the duty of the 2<sup>nd</sup> Respondent under section 8 (1) (m) of the ECA to ensure that the full record as envisaged under section 93 (1) (a) is comprehensively prepared.
- (c) What emerges from this process, is that it is a step by step process which, if followed, should not lead to the kind of careless alterations that characterised the result sheet forms in the 21<sup>st</sup> May 2019 presidential elections. Any discrepancies are supposed to be noted as part of the record and not corrected at another location other than at the national level when the 2<sup>nd</sup> Respondent embarks on the process of final determination of the national result. The genius behind this arrangement is evident. It lessens the number of persons who should be allowed to tamper with the original documents and leaves this to the highest level of scrutiny at the national level. It is a process that was designed to enhance the integrity of the electoral process.
- (d) Regrettably, as it happened in the instant case, the result sheet forms (Form 66Cs) were pervasively altered, under cloudy circumstances where the majority of the polling station officers and political party representatives would not be available to witness the changes. Whatever resulted out of the process cannot be trusted at all.

There is just no basis, whether factual or legal, for an electoral management body to be satisfied and to trust such altered results.

- (e) To buttress this point, even the auditors, BDO, that the 2<sup>nd</sup> Respondent had hired with the support of the UNDP, seriously questioned the 2<sup>nd</sup> Respondent's wisdom to accepted such altered results. At paragraph 13 of the Factual Findings part of the BDO Termination Report, the auditors stated that:

“Many of the tally sheets were rejected because of manual amendments. Later, MEC provided us with an official letter to approve any manual amendments on the tally sheets and forms that were used at constituency centres.”

- (f) The BDO Termination Report makes it clear that even according to the auditors, the fact that vote tabulation and tallying exercise was replete with manual alterations effected either using tippex or crossing out by pen and replacing figures, was deeply problematic to the integrity of the process.
- (g) During his cross examination, figures representing the total number of alterations to tally sheets were presented to Mr. Munkhondya by Counsel Soko for the 1<sup>st</sup> Petitioner. It was put to him that his own (Mr. Munkhondya's) evidence showed that a substantial number of ballots or votes recorded were altered either through cancellations by pen or through defacement by the use of tippex. We hereunder outline part of Counsel Soko's cross-examination:

**“COUNSEL SOKO:** “Sir...Go to page 48, are you there?

**MR. MUNKHONDYA:** Yes.

**JUSTICE KAMANGA -** So this is page 48 of the cross examination bundle.

**COUNSEL SOKO -** Yes my Lady.

**COUNSEL SOKO:** What were recorded there as the number of *total valid votes* that were contained in forms that were altered?

**MR. MUNKHONDYA:** My Lady my Lords it's one million three hundred and thirty thousand four hundred and eighty-six (1,330,486).

**COUNSEL SOKO:** That is my number do you have a different one?

**MR. MUNKHONDYA:** My Lady my Lords no.

**COUNSEL SOKO:** *Let's go to forms that were not signed by any officer of Malawi Electoral Commission can you go to page 74 sir?*

**JUSTICE KAMANGA -** The record will capture that, that is page 74 of what?

**COUNSEL SOKO –** My lady of the 1<sup>st</sup> petitioner's cross examination bundle.

**MR. MUNKHONDYA:** My Lady my Lord I am there.

**COUNSEL SOKO:** *Can you tell the court what the figure says the total of valid votes that were contained in forms that were not signed by anyone who works for Malawi Electoral Commission?*

**MR. MUNKHONDYA:** One million one hundred and twenty thousand one hundred and four (1,120,104).

**COUNSEL SOKO:** Mr. Munkhondya that is my number *can I have yours?*

**MR. MUNKHONDYA:** No I don't have.

**COUNSEL SOKO:** Then can you go to page 85 of the 1<sup>st</sup> petitioner's cross examination bundle, are you there?

**MR. MUNKHONDYA:** I have found it.

**COUNSEL SOKO:** Now those are my figures for tippexed results sheets, can you [read] the total number for *total valid votes cast contained in those forms?*

**MR. MUNKHONDYA:** My Lady my Lords, it is five hundred and twenty-four thousand three hundred and forty (524,340).

**COUNSEL SOKO:** Mr. Munkhondya do you have an alternative figure?

**MR. MUNKHONDYA:** My Lady my Lord no I don't."

(h) It must be stated that the information upon which Counsel Soko was cross-examining Mr. Munkhondya was based on Mr. Munkhondya's own evidence under exhibit HM2 which contained copies of all the Form 66Cs, from the 5002 polling stations, that were used during the elections. Counsel Soko's assertions to Mr. Munkhondya in this regard went unchallenged. We must state that as a Court, we proceeded to examine all the scanned Form 66Cs which were referred to by Counsel Soko during his cross-examination of Mr. Munkhondya in order to verify that they were indeed altered as alleged. We have found as a fact that they were altered as alleged. What we remain unsure about is whether these are the only Form 66Cs that were altered either by way of manual alterations or defacement through the use of tippex. Based on what we know, however, the numbers as put to Mr. Munkhondya and as verified by the Court, are very substantial. As we have already found above, such pervasive alterations should not happen in an election that is free and fair. They introduce too much suspicion and doubt on the integrity of the election, going down to the very validity of the whole process of determination of the national result.

(i) We must emphasise at this stage that the Court finds no provision anywhere in the law establishing constituency tally centres. Section 96 of the PPEA does not state anywhere that the 2<sup>nd</sup> Respondent will determine the national result based on records from constituency tally centres. The 2<sup>nd</sup> Respondent is required by law, in the determination of the national result (at the National Tally Centre) to look at the full records from the polling stations and the district centres. The constituency tally centre is unknown to the law. The Court was told by both the Respondents as well as the Petitioners that stakeholders agreed that the constituency tally centre was a necessary step, apparently to address some concerns that arose out of the 2014 general elections. If the 2<sup>nd</sup> Respondent and the stakeholders thought that it was imperative to introduce the constituency tally centre as a step in the process of determination of the elections

under Chapter VIII of the PPEA, they should have moved Parliament to amend the law and introduce that step. This was such a major introduction in the electoral process that could not even be introduced under subsidiary legislation, let alone by stakeholder resolution.

- (j) The 2<sup>nd</sup> Respondent was the body that was under a constitutional duty under Section 76 (2) (d) of the Constitution to ensure compliance with the provisions of Chapter VIII of the PPEA. The unlawful introduction of the constituency tally centre was such a flagrant and blatant breach of the 2<sup>nd</sup> Respondent's duty under Section 76 (2) (d) of the Constitution. It was also an ultra vires act and an unconstitutional usurpation of the powers of the legislature.
- (k) What is worse is that the pervasive irregular alterations that were made to the results sheets were done at these unlawful constituency tally centres.
- (l) It is this Court's finding that any changes that were effected at the constituency tally centres were a nullity.
- (m) Again, as earlier observed, throughout the electoral process, it is evident that the 2<sup>nd</sup> Respondent assured all stakeholders and the nation that the results would be verified by auditors at the constituency tally centres, district centres and at the National Tally Centre. They firmly indicated that before Commissioners can approve the results, the same would be approved by auditors first.
- (n) During the hearing, it was the 2<sup>nd</sup> Respondent's case that contrary to Mr. Daud Suleman's testimony on behalf of the 2<sup>nd</sup> Respondent that all the results ought to have been approved by the Commissioner's electronically in the RMS, Commissioner's approved all the results manually. It was the 2<sup>nd</sup> Respondent's case that auditors verified these results manually before Commissioners also approved them manually.
- (o) In this regard the BDO Termination Report is also telling. At page 2 of the Report in the Executive Summary, the Auditors stated that:

“A summary of the audit findings from all the forms MEC presented to BDO at the National Tally Centre is presented in the table below.”

Tippexed (corrected)	273
Manually amended	65
Forms with missing	45
Forms with missing	66

(p) They proceeded to indicate the following:

Tippexed (corrected with the white corrector): 24%  
 Manually amended forms: 6%  
 Forms with missing signatures: 4%  
 Forms with missing political parties signatures: 6%  
 Verified Tally Sheets (Presidential): 60%

(q) What is telling from this analysis is that the auditors state that these figures represent “all the forms MEC presented to BDO at the National Tally Centre.” We can therefore easily algebraically calculate how many Forms the 2<sup>nd</sup> Respondent presented to BDO for verification at the National Tally Centre:

- If 273 Form 66Cs presented to BDO = 24% of X (X being the unknown figure); then
- $24/100 * X = 273$
- $X = 1137.5$

(r) We conclude, therefore, that BDO must have received a maximum of 1138 Form 66Cs at the National Tally Centre.

(s) Since the total number of Form 66Cs was 5002, then:

5002 Form 66Cs - 1138 Form 66Cs = 3, 864 Form 66Cs.

- (t) The inescapable conclusion here, with the accuracy of mathematics, is that 3, 864 Result sheets were approved without auditor verification, contrary to the 2<sup>nd</sup> Respondent's set procedure for verification of results, which process was meant to ensure that the process of vote counting, tabulation and tallying would be transparent, free and fair. This was therefore in conflict with the 2<sup>nd</sup> Respondent's duty under section 8(m) of the ECA to take all necessary measures to ensure a free and fair elections.

*Failure to Comply with the Provisions of Section 119 of the PPEA*

- (a) Evidence was led before the Court which demonstrated that the 2<sup>nd</sup> Respondent failed in its duty to ensure compliance with the provisions of section 119 of the PPEA. The duty under that section is that the 2<sup>nd</sup> Respondent was under a duty to deposit all documents forming the official record of the elections with the Clerk of Parliament for preservation.
- (b) The Supreme Court of Appeal has previously emphasised the significance of the 2<sup>nd</sup> Respondent's duty under this section. As indicated above, in the *Namasasu Case*, the Supreme Court of Appeal stated that:

“The statutory requirement for the preservation of the ballot boxes and electoral materials, is to ensure fairness to the parties in the event of a dispute over election results. This is fundamental to safeguard the integrity of the vote and the electoral system.”

- (c) The present case was characterised by blatant failures of the 2<sup>nd</sup> Respondent to demonstrate compliance with this provision. For example, it is on record that the 2<sup>nd</sup> Respondent failed to account for the vast majority of record logbooks which were the primary record of the entire polling process. During the period of disclosure, most of the logbooks were not found. The Chief Elections Officer wrote an otherwise irregular letter to the Court, stating this fact. Mr. Diverson Makwete, the 2<sup>nd</sup> Respondent's Warehouse Manager after initially informing this Court in a sworn statement, that all the polling materials had been deposited with the Clerk of Parliament in compliance with the law, dramatically turned around and made another sworn statement stating that in fact not all the documents as alleged in his earlier sworn statement

had been deposited with the Clerk of Parliament. The Court in fact opined that Mr. Makwete perjured himself in this regard and referred the matter to the Director of Public Prosecutions (DPP) to consider prosecution. The Court takes notice that the office of the DPP has officially informed the Court that she formed the view that Mr. Makwete's conduct revealed a prima facie case of perjury and that she has directed his prosecution. We state all this to demonstrate the extent to which the 2<sup>nd</sup> Respondent failed in its duty to ensure compliance with section 119 of the PPEA.

(d) It also came to the attention of the Court, through the second sworn statement of Mr. Makwete, that there had been some clandestine movement of results sheets and logbooks from the warehouses to the 2<sup>nd</sup> Respondent's headquarters in Blantyre on request of the 2<sup>nd</sup> Respondent's IT department. This was done without alerting any of the Petitioners or other electoral stakeholders, and, according to Mr. Makwete's sworn statement, even the 2<sup>nd</sup> Respondent's Legal Services Department was unaware of the conduct of the 2<sup>nd</sup> Respondent's IT Department. This, we find, was clear exemplification that these materials were not handled in compliance with the provisions of section 119, more so in view of the lack of accountability in respect thereof, and further that they were not dealt with under conditions of absolute security. The fact that to date the 2<sup>nd</sup> Respondent has failed to account for all the materials, including the logbooks, and failing to do so in a very substantial way, clearly illustrates failure to discharge its function of ensuring compliance with section 119 of the PPEA. Keeping such materials, as the Supreme Court observed the *Namasasu case*, is essential to demonstrate credibility of the electoral process, more so in cases where there is an electoral challenge such as in the present matter.

(e) The Court has also noted that section 88 (1) of the PPEA defines a null and void vote as a vote cast but where the ballot paper has been torn into two or more parts or has been classified as such upon adjournment of voting under section 83 (2) (c) of the PPEA. However, as earlier found, the 2<sup>nd</sup> Respondent has a classification of null and void votes in the Polling Station Procedures Manual that is wider than the one specified in section 88 (1) of the PPEA which is a contravention of section 88 (1) of the PPEA. The widening of the classification has no statutory basis.

(f) This Court then found that section 91 of the PPEA classifies votes cast at a polling station into "null and void votes" as well as 'votes for each candidate' for election as members of



Parliament and for election to the office of the President. In contravention of this provision, the 2<sup>nd</sup> Respondent introduced what it called “valid votes cast” in part E. of Form 66C. The PPEA terms these as “votes for candidates”. This Court also observed that in further contravention of section 91 of the PPEA, the 2<sup>nd</sup> Respondent classified “null and void votes” as “null and void ballots” in part D. of the Form 66C. The PPEA does not provide for “null and void ballots”. The illegal classification of null and void votes as “null and void ballots” by the 2<sup>nd</sup> Respondent is misleading. It gives the wrong impression that these “null and void ballots” are irrelevant to the determination of the candidate votes. Yet, the null and void votes are so important to the extent that they must be examined by the 2<sup>nd</sup> Respondent at the beginning of the determination of the national result in terms of section 97 of the PPEA. According to the Gazette of the 9<sup>th</sup> of August, 2019, after summing up all the null and void votes, this Court found that there were about 75, 000 null and void votes throughout the country. The wrong classification of null and void votes and alterations thereof clearly affected the candidate votes contrary to the case incessantly put by the 2<sup>nd</sup> Respondent during the hearing of this matter that “null and void ballots” in part D. of Form 66C are not used in the determination of candidate votes.

- (g) This Court has also found that, on the evidence, the 2<sup>nd</sup> Respondent also contravened the PPEA in that it failed to have important occurrences at polling stations recorded in logbooks as required under section 93 (1) (a) (viii) of the PPEA.
- (h) This Court further found, on the evidence, that the 2<sup>nd</sup> Respondent contravened the PPEA in that it dispatched records of the election from the polling stations to the illegal constituency tally centres instead of delivering those records to the District Commissioner’s Office as required under section 94 of the PPEA. The District Commissioners were to dispatch these to the National Tally Centre.
- (i) This Court further found, on the evidence, that the 2<sup>nd</sup> Respondent contravened the PPEA in that it proceeded to determine the national result without all the records from polling stations and districts that were required to be dispatched to the Chief Elections Officer from the office of District Commissioners as provided under sections 95 (5) (a) and 96 (1) of the PPEA. These records are specified in section 94 to be a record prepared under section 93 of the PPEA. These are essentially the record logbooks. Parliament, in its wisdom, required these records to be available to the 2<sup>nd</sup> Respondent at the time it begins determination of national results

because these records are necessary to the 2<sup>nd</sup> Respondent's crucial function as a tribunal when it comes to handling electoral disputes. The 2<sup>nd</sup> Respondent only based its decision on Form 66Cs as scanned and received from constituency tally centres. The 2<sup>nd</sup> Respondent was required to begin determination of the national result immediately after receiving records from all districts. This is not what happened. Mr Munkhondya verified that indeed the 2<sup>nd</sup> Respondent himself and the auditors relied on the records at the illegal constituency tally centres to verify any issues on Form 66Cs at the National Tally and not the records that were required to be dispatched to the Commission's Chief Elections Officer from the Districts.

- (j) This Court found that there was no evidence that the political party representatives observed the determination of the national result of the election at the National Tally Centre as is required under section 96 (4) of the PPEA. The evidence shows that what happened at the National Tally Centre is that Commissioners sat in their own room to determine the national result without the party representatives observing the same. At the polling station level monitors observed the vote counting. Yet at the most critical level of determination of the national result such observation was not there.
- (k) This Court then found that the 2<sup>nd</sup> Respondent did not examine the null and void votes at the beginning of the determination of the national result. This is contrary to section 97 of the PPEA. This is not surprising given that the 2<sup>nd</sup> Respondent never received records from all districts before beginning the determination of the national result as earlier found.
- (l) The evidence showed, and this Court found, that the 2<sup>nd</sup> Respondent failed to Gazette the national result within 48 hours from the conclusion of the determination of the national result. The Gazette was to indicate the total number of voters registered for the election; the total number of voters who voted; the total number of null and void votes; and the total number of valid votes cast for each classification of votes as specified in section 91 of the PPEA. This is provided in section 99 of the PPEA and was never complied with by the 2<sup>nd</sup> Respondent and detracts from the transparency requirements. The Gazette of the results was made on 9<sup>th</sup> of August 2019, that is months after the determination, and even then, not all the details required by section 99 of the PPEA were specified.
- (m) The forms designed by the 2<sup>nd</sup> Respondent, including the record logbook which purported to also be the record and summary as provided for under Section 93 of the PPEA, did not have

space for signatures of other polling officers apart from the presiding officer or assistant presiding officer. This was a serious anomaly. As Ligowe J observed in *Raphael Joseph Mhone v. The Electoral Commission and Symon Vwa Kaunda*,

“Let me observe at this point that the form MEC.POLL.060b the Electoral Commission provided, does not provide space for the other polling station officers to sign. This should have been provided. My view is that the requirement for the other polling station officers to sign is an internal safeguard against tampering and interfering with the result sheets by an individual, should there be no political party representative to sign.”

(n) It will also be observed that on Part A of Form VI, it clearly appears that it was imperative that the form distinctly identifies (a) “Political Party Representatives”, (b) “Local Monitors [and their affiliation]”, and (c) “International Observers” and not just lump them into one category. The duties, rights and responsibilities of these various actors are fundamentally different under the PPEA.

1462 All these demonstrated failures on the part of the 2<sup>nd</sup> Respondent to ensure compliance with legislative provisions tend to show that the 2<sup>nd</sup> Respondent breached its duty to ensure compliance with the provisions of any Act of Parliament during the 21<sup>st</sup> of May, 2019 presidential elections.

*Whether the 2<sup>nd</sup> Respondent Breached its Duties Under Section 77 of the Constitution of the Republic of Malawi*

1463 This issue has been adequately covered and determined above under the discussion on section 76 where we have found that section 76 of the Constitution was breached because the 2<sup>nd</sup> Respondent breached section 77(5) of the same. The Court has not dealt with the other subsections to section 77 of the Constitution as they are clearly inapplicable in respect of the present electoral dispute.

*Whether the 2<sup>nd</sup> Respondent Infringed on the Petitioners' and the Citizens' Political Rights Under Section 40 of the Constitution of Malawi*

1464 Section 40 of the Constitution is the premier provision, as it were, that speaks to the strong commitment of Malawi's constitutional project to ensure that representative multiparty democracy in the country flourishes and progresses. It is this section that, among other things, guarantees the right of every person in the country to form, to join, to and participate in the activities of a political party, as well as to recruit members for a political party.<sup>25</sup> The provision does not stop there. It proceeds to guarantee a wide panoply of other rights including the right to campaign for a political cause,<sup>26</sup> the right to take part in peaceful political activities that are intended to influence both the composition as well as the policies of Government,<sup>27</sup> and to make free political choices.<sup>28</sup>

1465 Section 40 (2) of the Constitution obliges Government to fund political parties that have secured more than one tenth of the national vote to elections to Parliament in order to ensure that such a political party continues to represent its constituency. It is an interesting provision that seems to infuse a salient aspect of the political party proportional representation system of democracy into our constitutional project. When a political party has members of Parliament elected, in order for such party to receive party funding, Parliament is to look at the proportion of the national vote in elections to that Parliament that the political party secured, rather than looking at the number of Members of Parliament to that office. The reasons for this scheme are very clear: to ensure that the party continues to represent its "constituency" and not "constituencies". Once again this speaks to how strongly section 40 of the Constitution was designed to generally preserve and further multiparty democracy and in essence, these proceedings are also a test on how Malawi as a country is able to hold up to its acclaimed system of multiparty democracy through elections that are credible, free and fair. We also comment on this provision as we have been broadly invited to determine whether there was a breach of the entirety of section 40 of the Constitution. With regard to section 40(2) of the Constitution, other than what we have just said, we form the view that that subsection is rather peripheral to the issues in dispute that fall for determination in the present matter. The same applies to sections 40 (1) (a), (b) and (c) of the Constitution.

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<sup>25</sup> Section 40(1)(a)  
<sup>26</sup> Section 40(1)(b)  
<sup>27</sup> Section 40(1)(c).  
<sup>28</sup> Section 40(1)(d).

1466 Thus our focus as we proceed is on sections 40 (1) (d) and 40 (3) of the Constitution. Section 40 (3) of the Constitution is in our estimation a paramount provision in the overall scheme of section 40. It guarantees two correlative rights, namely: (a) the right to vote and to do so in secret, and (b) the right to stand for election for any elective office.

1467 The Court agrees with the observations of the Supreme Court of the United States of America in the case of *Wesberry v. Sanders*, 376 U.S. 1 (1964), that arguably no right is more precious in a free country than that of having a voice in the election of those who govern the citizens, and that other rights, even the most basic, are illusory if the right to vote is undermined. The Supreme Court of Canada in *Haig v. Canada* 105 DLR (4<sup>th</sup>) 577 (SCC), per Cory J, also stressed on the centrality of the right to vote in a democracy, stating at page 613 that:

“All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it.”

1468 In Malawi, unlike in Canada, the right to vote is not guaranteed under mere ordinary statute. It is guaranteed and entrenched in the Bill of Rights under the Constitution. The significance of the right to vote in multiparty elections in Malawi is rooted in our history of the not too distant past. It was a right that was achieved after so much struggle and sacrifice.

1469 The Court pauses here to affirm the observations of Professor Danwood Chirwa in his book *Human Rights Under the Malawian Constitution*, at pages 389- 390, where he states that the right of everyone “freely to make political choices” as guaranteed under section 40 (1) (d) of the Constitution, is the “umbrella right from which all other political rights discussed” under the Bill of rights flow (p. 389). He states that:

“freedom to make political choices cannot be secured simply by non-interference with individual choices. The state has a further obligation to provide an enabling environment that ensures that people are

empowered to make informed political decisions. This obligation includes...an obligation to establish and maintain a credible electoral system and procedures which will guarantee free and fair elections.” (p. 390).

1470 He proceeds on the same page to state that:

“although the Constitution does not expressly recognise the right to free and fair elections, it is clear that this right is implicit in the right freely to make political choices as well as the right to vote under section 40 (3), read with ss. 6 and 77 of the Constitution.”

1471 In the South African case of *New National Party v. Government of the Republic of South Africa and Others* 1999 (3) SA 191, Yacoob, J observed that:

“The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised. Two of these implications are material for this case: each citizen entitled to do so must not vote more than once in any election; any person not entitled to vote must not be permitted to do so. The extent to which these deviations occur will have an impact on the fairness of the election. This means that the regulation of the exercise of the right to vote is necessary so that these deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.”

1472 It is this Court’s view that in every instance where there were deviations from the number of total ballots that were expected to have been accounted for at any given polling station, there was substantial compromise and therefore a breach of section 77 (5) of the Constitution which prescribes the principle that no person shall exercise more than one vote. Further, similar to the statement of Yacoob J in the *New National Party case* above, we find that this also amounted to a compromise and therefore a breach of the right to free and fair elections which is implicit under sections 40 (3) when the section is read together with sections 6 and 7 of the

Constitution.<sup>29</sup> In any event, section 8 (1) (m) of the ECA expressly confers a duty on the 2<sup>nd</sup> Respondent to do all things “as are necessary for conducting free and fair elections.” There is, therefore, a clear correlative right of voters in Malawi in terms of this provision to vote in elections that are free and fair.

1473 The 2<sup>nd</sup> Respondent, even if it were not for section 40 (3) of the Constitution, still has a constitutional duty under section 76 (1) (d) of the Constitution to ensure that its duty to ensure free and fair elections under section 8 (1) (m) of the ECA is satisfactorily discharged. Either way, the 2<sup>nd</sup> Respondent was under a clear constitutional duty to ensure that voters vote in an election that is free and fair. An election is not fair if the body managing the electoral process fails to account for missing or excess votes. It is not free and fair where the result sheets are replete with alterations made in the absence of political party representatives who were supposed to witness, first-hand, the recording of important information on such sheets at the polling stations. It is not free and fair if the electoral management body fails to preserve critical electoral material that is essential for the resolution of electoral disputes. There cannot be a fair electoral process if the process of reconciliation of ballots and votes is thoroughly compromised as was the case with the 21<sup>st</sup> of May 2019 presidential elections.

1474 Again, the right to stand for election and elective office under section 40(3) of the Constitution likewise entails the right to do so in a free and fair election.

1475 We must mention that we are mindful, just like Chikopa J (as he then was) stated in *Tembo and Kainja v Attorney-General* [2002–2003] MLR 229 (HC), that the rights bestowed under section 40 of the Constitution are subject to limitation under section 44 (1) of the Constitution where the limitations are “prescribed by law; are reasonable, are recognised by international human rights standards and are necessary in an open and democratic society”.

1476 We have carefully considered the deviations from electoral process that we have enumerated above. We find no basis for stating that any of them is prescribed by law, or reasonable, or recognised by international human rights standards, and certainly they were unnecessary in an open and democratic society as they fundamentally departed from the principle of openness.

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<sup>29</sup> Danwood M Chirwa, *Human Rights Under the Malawian Constitution*, 390.

1477 All in all, we find that there was a violation of section 40 of the Constitution in this regard.

## **PART SEVEN**

### **DETERMINATION**

1478 First and foremost, the Court wishes to note that the petitions herein were founded on allegations of irregularities and anomalies. We acknowledge that considering the enormity of the activities involved in the electoral process, it is almost impossible to have an election that is completely free of any irregularities or anomalies. However, in the present matter, it has been our finding that the irregularities and anomalies have been so widespread, systematic and grave such that the integrity of the results has been seriously compromised. The results declared by the 2<sup>nd</sup> Respondent cannot be trusted as a true reflection of the will of the voters as expressed through their votes duly cast during the 21<sup>st</sup> of May, 2019 elections.

1479 In view of the findings that we have made above, we are satisfied that the Petitioner's complaints in their Petitions, alleging an undue return and undue election during the said elections, have been made out both qualitatively and quantitatively. It is the Court's determination that, based on the evidence led, even taking the qualitative and quantitative irregularities and anomalies severally, each of them provides sufficient warrant for this Court to find that there was an undue return and undue election during the said elections. This in our finding, is based on a balance of probabilities which is the appropriate standard of proof to apply in electoral petitions brought under section 100 of the PPEA. Even if the higher intermediate standard were applicable, the magnitude of the irregularities and anomalies are such that the complaints would still have been made out.

1480 Consequently, in terms of section 100 (4) of the PPEA, we hold that the 1<sup>st</sup> Respondent was not duly elected as President of the Republic of Malawi during the 21<sup>st</sup> of May, 2019 elections. In the result, we hereby order the nullification of the said presidential elections. We further order that a fresh election to the office of the President be held in accordance with the PPEA and pursuant to the consequential directions that we make hereunder.

1481 Further, we have also found that the 2<sup>nd</sup> Respondent violated sections 40 (3), 76 (2) (d) and 77 (5) of the Constitution. In view of the gravity of the said violations and breaches, it is our



view that the conduct of the 2<sup>nd</sup> Respondent in managing the said elections clearly demonstrated incompetence for failing, in multiple dimensions, to follow clearly laid out legal processes for the conduct of such elections.

1482 The true meaning to be ascribed to section 80 (2) of the Constitution on the meaning of the term “shall be elected by a majority of the electorate” is that for any candidate to be declared to be duly elected to the office of President of the Republic, such person must secure a minimum of fifty percent (50%) plus one vote of the total valid votes cast during the presidential election.

## PART EIGHT

### CONSEQUENTIAL DIRECTIONS

1483 As a necessary consequence of the determinations herein, and having in mind section 41(3) of the Constitution which grants all persons in our jurisdiction the right to an effective remedy by a court of law; as well as section 46 (3) of the Constitution which gives the Court the power to make any orders that are necessary and appropriate to secure the enjoyment of the rights and freedoms which the Court finds to have been violated; we order the following:

- (a) For the avoidance of doubt, the declaration that we have made that the 1<sup>st</sup> Respondent was not duly elected during the 21<sup>st</sup> of May, 2019 presidential elections, and therefore that the said elections were invalid, it consequentially follows that the status in the presidency, including the status of the office of the Vice President, reverts to what it was prior to the declaration of the presidential results on the 27<sup>th</sup> of May, 2019. As per section 100 (5) of the PPEA, the declaration herein does not invalidate anything done by the President [or Vice President] before the declaration of invalidity herein.
- (b) We are also mindful that under section 80 (1) of the Constitution, a Presidential election has to take place concurrently with the general election for members of the National Assembly as prescribed by section 67 (1) of the Constitution. The Court appreciates the significance of the certainty in our democratic process which is brought about by the fixing of the date of the general election under section 67 (1) of the Constitution. In view of this position, we are of the view that it is appropriate that

such certainty be preserved. In the circumstances, we hold the view that Parliament should take appropriate legislative measures to ensure that such certainty is preserved whilst at the same time ensuring that whoever is elected President of the Republic during the fresh elections herein is allowed to serve the constitutionally prescribed five-year term. One of the options that Parliament might consider is to extend the term of the incumbent members of Parliament and shift the election date from May to July in order to ensure the preservation of such electoral concurrency.

- (c) The fresh elections herein shall be held within one hundred and fifty (150) days – including Sundays, Saturdays and public holidays, from the date hereof;
- (d) The Public Appointments Committee of the National Assembly, in view of our finding concerning the conduct and competence of the 2<sup>nd</sup> Respondent, should, in terms of section 75 (4) of the Constitution, and in order to ensure that the fresh elections herein are conducted smoothly and competently, inquire into the capacity and competence of the 2<sup>nd</sup> Respondent’s current Commissioners to oversee the conduct of the said fresh elections;
- (e) Parliament should also, in connection with what we have stated in paragraph (d) above, take necessary amendment action in respect of section 75 (1) of the Constitution so that the said provision, which does not mention the appointing authority of the 2<sup>nd</sup> Respondent’s Chairperson – only mentioning the nominating authority, is clear on the appointing authority thereunder.
- (f) In view of our determination that the majority to be attained by a candidate to the office of President is a minimum of fifty percent (50%) plus one vote of the total valid votes cast during the presidential election; for purposes of the fresh elections to be held herein and all future presidential elections, Parliament must, within 21 days from the date hereof, including Sundays, Saturdays and Public holidays, make appropriate provision for the holding of presidential run-off elections in the event that no single candidate secures the constitutional majority under section 80 (2) of the Constitution.

*The role of the Attorney General in the proceedings*

1484 As a final word, the Court wishes to state its definitive position on what ought to have been the role of the Honourable the Attorney General in the present proceedings.

1485 In the early stages of these proceedings, Counsel for the Petitioners, Senior Counsel Msisha, Mr. Chilenga and Dr. Silungwe, raised issue with the Honourable the Attorney General appearing as Counsel on behalf of the 2<sup>nd</sup> Respondent, the Electoral Commission. According to Counsel for the Petitioners, in a constitutional matter of great public interest such as the present one, which was also societally polarising in its character, the Attorney General ought not to have taken a partisan position. He should have taken a neutral position as a defender of the public interest. Counsel Dr. Silungwe argued that under the procedure rules, when a matter has been referred to the referral Court, the Attorney General is supposed to be served with the process. He argued that the reason for this was so that he may make his own representations to the referral Court as a custodian of the Constitution and not taking a partisan position. Senior Counsel Msisha concurred with Dr. Silungwe.

1486 The Court, with a view to making progress in the matter, stated at the time that:

“We have consulted and we think that for the sake of progress, let us proceed with the Attorney General making his arguments. We will make a particular determination on the issue that has risen as we go along.”

1487 We believe now is the appropriate time for us to state our position on the matter for the sake of guidance in future constitutional litigation.

1488 The Attorney General, under section 98 (1) of the Constitution, is the principal legal adviser to the Government. This is a very high position that imposes a huge responsibility on the Attorney General to provide impartial legal advice to all the three principal branches of the Government. The fact that the Attorney General is expected to provide impartial legal advice to Government emerges very clearly from section 98 (6) of the Constitution which provides that one of the grounds upon which the Attorney General may be removed from office, is that his or her ability to give impartial legal advice is seriously in question.

1489 The Court has examined the constitutional provisions, alongside Order 19, rule 8 of the CPR, 2017 which states that:

“Every process under this Part [Order 19, Part 1] shall be served on the Attorney General, whether or not the Attorney General is a party to the proceeding.”

1490 We hold the view that the import of that provision is that indeed, wherever a constitutional matter emerges and his office is not a party to those proceedings, he must still take a position as defender of the Constitution. It is only where he is cited as a party that *he should take a partisan role in the proceedings*. We hold that this interpretation brings life to the spirit behind the Attorney General’s impartiality as envisaged under section 98 of the Constitution.

1491 We acknowledge that section 20 of the ECA provides that:

“The Commission may instruct the Attorney General or any legal practitioner to provide legal representation to the Commission in any court proceedings, including proceedings concerning appeals against its decisions on complaints about any aspect of the electoral process, or to provide general legal advice to the Commission.”

1492 The Attorney General, in his response, relied on this provision and stated that he had, pursuant to this section, been engaged by the 2<sup>nd</sup> Respondent to represent it in the present proceedings. He also contended that the CPR, 2017 was subservient to section 20 of the ECA which was a *provision in principal legislation*.

1493 Whilst we acknowledge this position, we are of the opinion that in so far as section 20 of the ECA would entail that the Attorney General may end up taking a partisan role in constitutional proceedings, even where his office is not a party to such proceedings, the same is inconsistent with *section 98 of the Constitution*. In the present matter, in terms of section 20 of the ECA, his role should have been limited to providing general legal advice to the 2<sup>nd</sup> Respondent, which advice the Constitution envisages should have been impartial.

1494 In any event, the 2<sup>nd</sup> Respondent, as a body corporate under the ECA, was at liberty to engage its own legal practitioners other than the Attorney General. That is in fact clearly stated in the same section 20 of the ECA. We observe that indeed, the 2<sup>nd</sup> Respondent engaged Counsel Chokotho in this regard. The present proceedings bear out even more strongly on why the Attorney General, in retrospect, should not have taken a partisan role in the present constitutional proceedings. We have, in our determination and consequential directions, required various public bodies such as the Public Appointments Committee of the National Assembly, and Parliament as a whole to take specific measures in order to give effect to the present decision. Ideally, the Attorney General should be providing legal advice to these bodies on how they ought to give effect to the Court's judgment. However, with the partisan role he assumed, the role of the office of the Attorney General in this regard is conflicted, thus compromising the discharge of his constitutional mandate under section 98.

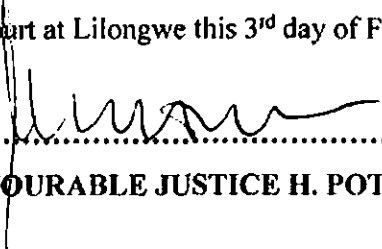
1495 The office of the Honourable the Attorney General is therefore accordingly directed for purposes of future proceedings.

#### **COSTS**


1496 Costs are the exclusive preserve of the Court and are awarded at the discretion of the Court. Earlier on, we held that this is public interest litigation and that costs should not be used to hinder litigants from accessing justice in such cases. We therefore order that the 1<sup>st</sup> Respondent bears his own costs. We however reckon that in the circumstances of the present matter, the 2<sup>nd</sup> Respondent is a duty bearer and not a holder of rights seeking to vindicate legal rights. We therefore order the 2<sup>nd</sup> Respondent to pay the Petitioners costs for this litigation. Costs are to be assessed by the Registrar if not agreed upon by the parties within 14 days from the date of this Order.

1497 It is so ordered.

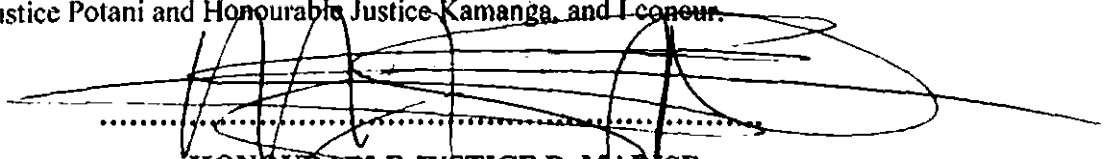
Made in open Court at Lilongwe this 3<sup>rd</sup> day of February, 2020

  
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**HONOURABLE JUSTICE H. POTANI**

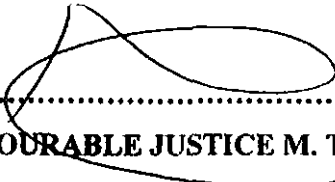
**KAMANGA, J:** My Lords, I have read the Judgment delivered by Honourable Justice Potani. I concur.

  
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**HONOURABLE JUSTICE I. KAMANGA**

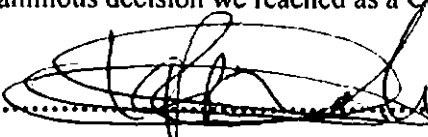
**MADISE, J:** My Lady and my Lords, I have read the judgement of the Court as delivered by Honourable Justice Potani and Honourable Justice Kamanga, and I concur.

  
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**HONOURABLE JUSTICE D. MADISE**

**HONOURABLE JUSTICE M. TEMBO:** My Lady and my Lords, having considered the evidence produced before the Court, and having considered the relevant law, I concur with the judgment as expressed by Honourable Justice Potani and Honourable Justice Kamanga.

  
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**HONOURABLE JUSTICE M. TEMBO**

**KAPINDU, J:** My Lady and my Lords, I have had the opportunity of reading in draft, the decision which has been ably and eloquently articulated and delivered by His Lordship Honourable Justice Potani and Her Ladyship Honourable Justice Kamanga. The said judgment was collectively deliberated and it reflects the unanimous decision we reached as a Court. I concur.

  
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**HONOURABLE JUSTICE R. KAPINDU**