



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

ELECTION PETITION CAUSE NO. 39 OF 2019

IN THE MATTER OF PARLIAMENTARY AND PRESIDENTIAL ELECTIONS ACT
AND
IN THE MATTER OF THE 21ST MAY 2019 PARLIAMENTARY AND PRESIDENTIAL
ELECTIONS FOR MANGOCHI NORTH EAST CONSTITUENCY.

BETWEEN:

MARTIN CHIKATI SEKATI
AND
THE MALAWI ELECTORAL COMMISSION

PETITIONER
1ST RESPONDENT

IDI KALOSI

2ND RESPONDENT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR. CHIMWEMWE KALUA, OF COUNSEL FOR THE PETITIONER
MR. VICTOR JERE, OF COUNSEL FOR THE 1ST RESPONDENT
MR. NURU ALIDE, OF COUNSEL FOR THE 2ND RESPONDENT
MR. FELIX KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

JUDGMENT

The petitioner, Mr. Martin Chikati Sekati, an independent, was one of the eight parliamentary contestants in Mangochi North East Constituency during the 21st May 2019 tripartite elections. At the end of the voting process, the 1st respondent, a constitutional body mandated to run the tripartite

elections, declared the 2nd respondent, Idi Kalosi, duly elected as member of parliament for Mangochi North East Constituency.

THE PETITION

The Petitioner alleges in his petition that he was notified by his monitors of several problems and irregularities as follows:

- (a) At Mbaluku (market centre), where monitors for the Petitioner were denied the opportunity to cross check results as they were coming from the tally centers.
- (b) At Chipeleka centre, the number of registered voters was lower than the number of votes casted and the presiding officers and monitors never signed for such result sheets.
- (c) At Malindi Secondary School tally center, where the Respondent tabulated the results of the parliamentary elections without prior verification of all party and independent monitors.

The Petitioner was also notified the following problems:

- (a) Mr. Idi Kalosi, contesting under the UDF ticket sent his agents to be giving money to voters so that they vote for him;
- (b) Mr. Idi Kalosi, gave money to headmasters to influence voters on who to vote for;
- (c) Mr. Idi Kalosi took people from Mangochi central to vote for him in Mangochi North East Constituency.

In light of the foregoing, on 25th May, 2019, in the morning, the Petitioner emailed the Respondent to register his complaints. That the 1st respondent despite the complaint and without a resolution, proceeded to announce results in the evening of the same 25th May 2019 with a declaration that the 2nd respondent was the winner. The Petitioner therefore seeks an Order declaring the election of member of parliament for Mangochi North East Constituency null and void on the basis that:

- (a) Voters and presiding officers of several constituencies were corruptly influenced by agents of Idi Kalosi by being given money; and
- (b) There was non-compliance with the Parliamentary and Presidential Elections Act in the conduct of elections including but not limited to failure by the Electoral Commission to resolve complaints before announcing the results, voting at places other than the designated polling stations, use of results sheet containing discrepancies and unauthorized alterations.

Therefore, the Petitioner seeks the following reliefs:

1. A declaration that parliamentary elections in Mangochi North East constituency were not free and fair;
2. A declaration that the elections in the said constituency were unlawful;

3. A declaration that the results of the said constituency were null and void;
4. A declaration of a re run of parliamentary elections in Mangochi North East constituency; and
5. Disqualify Mr. Idi Kalosi from contesting in the rerun for breaching electoral laws.

THE PETITIONER'S EVIDENCE

The petitioner Martin Chikati Sekati confirmed that he contested for a parliamentary seat during the tripartite elections, on independent ticket, in Mangochi North East Constituency. He submitted that he wrote a letter complaining to the 1st respondent on several irregularities. He adopted his petition with **MCK 1** (purported letter to the 1st respondent) and all documents attached thereto as his evidence in chief.

In cross-examination by the 1st Respondent, he told the court that there were 8 contestants in this constituency and he was the only one complaining. The petitioner further informed the court that the instances referred to in the petition were some of the irregularities but not all, as there were many instances that were not included in the petition. The Petitioner further told this court that indeed most of the irregularities in his petition were reported to him by his monitors as he was not there when the incidents as articulated in the petition were taking place. He also stated that he did not know how many agents for Mr. Kalosi were involved in giving money to voters so that they vote for him. He was also of the view that the allegation was true as it was similar to the other allegation that Mr. Kalosi gave money to headmasters to influence voters on who to vote for. He stated that only two headmasters were not given money but the rest were given K25,000 with an expectation of K65,000 on the day of the election and a further K1,700,000.00 after the elections. The Petitioner then conceded that he did not know about the rest of the money but the K25,000 only. He told this court that he knew about this because one of his agents intercepted a WhatsApp message of the conversation. The Petitioner then conceded that this would be a very important piece of evidence but he did not bring that evidence as he was only mentioning it in passing. He told the court that the message only referred to two headmasters and not all and the author would not testify before the court.

The Petitioner further informed the court that it is true that Mr. Idi Kalosi took people from Mangochi central to Mangochi North East Constituency to vote for him. However, he was not sure of the number of people who were carried from Mangochi central but his monitor told him that he saw few strange faces who were not from their constituency. The Petitioner told the court that they are a small community and they know each other thus it was easy to know the strange faces. Then the Petitioner testified that he knew the rules governing an election of this nature. The Petitioner further informed the court that he emailed a complaint to the Respondent; namely Mr. David who had forgotten his surname and copied the Chairman of Electoral Commission, Mr. Mwafulirwa the Public Relations Officer and delivered the original letter to Mr. Kazembe representing Electoral Commission in Mangochi. However, he was not sure if Mr. Kazembe received the letter

but confirmed with him and he acknowledged receipt. Meanwhile, Petitioner told the court that he was not aware of the legal requirement that a complaint ought to be in writing and the officer should acknowledge receipt of the complaint. The Petitioner then informed the court that there was voting at places other than designated places, there was one centre which he said was in his diary which was in the court. The Petitioner then conceded that in the letter he emailed to the Respondent it only contained allegations without evidence to substantiate the allegations and that he did not register the complaints in all the polling centres.

In cross-examination by the 2nd Respondent, the Petitioner conceded that the complaint which he sent through email was indeed not signed but the original, though not exhibited in the petition was signed. The Petitioner further told the court that he would not remember the date the email was sent but it was within the 7 days within which complaints were to be lodged. The Petitioner also testified that he emailed the complaints on 25th May 2019 in the morning. He then changed his position to say the letter was dated 22nd May 2019 and he emailed it on 22nd May 2019 but the original document was delivered on 25th May 2019. The Petitioner then testified that the information from his monitor was that at Chipeleka centre, number of registered voters was lower than the number of votes cast and that the presiding officers and monitors never signed for such result sheets. When he was referred to the disclosures by Electoral Commission filed on 15th August 2019 for Mangochi North East Constituency, he said Chipeleka school total registered voters were 2061 while total votes cast was 1489 votes. The Petitioner, however, said he did not agree with the contents of the document. He told the court that the presiding officer and other monitors did sign for the result sheets but not his monitor. The Petitioner then told the court that the monitors that were denied the opportunity to crosscheck results would be paraded as witnesses in this case. Further, his monitors had their own figures for all the polling stations. Further, the petitioner revealed to the court that he is against the results of the elections due to irregularities. However, he did not know how many votes were counted in favour of Mr. Kalosi due to the irregularities and how many votes were taken away from him due to the irregularities and the same applies to the other contestants. The Petitioner also agreed that the irregularities did not affect the valid votes counted. He told the court that though he only mentioned three centres in his petition, other centres such as Ntengeza, Chimbende school and St. Augustine 2 had also irregularities. The petitioner told the court that he does not know how many voters were influenced to vote for Mr. Kalosi and that he did not know any voter who was corruptly influenced to vote for Mr. Kalosi. He also told the court that he was aware of presiding officers who were corruptly influenced by agents of Mr. Kalosi. He told the court that the 2nd respondent has no Malawi School Certificate of Education (MSCE) and that he breached the electoral law. He told the court that he was surprised that the 1st respondent did not act on the 2nd respondent. The petitioner told the court that he did not raise this issue of qualification with the 1st respondent when the final list was released.

RE-EXAMINATION

In re-examination the Petitioner told the court that he was not there at the centres where irregularities took place since the electoral laws could not allow him. He also told the court he was advised by one Electoral Commission official to leave the place. He said that his monitors were supposed to see if all was going on well and identify voters to be assisted accordingly. He submitted that a woman known as 'Abiti Mzee', parked her car 100 metres away from one of the centres, and that she was giving money to voters. He said this was confirmed by his agent who went to investigate. When he went to follow up, he told the court that they moved away when they saw his motor vehicle. The Petitioner also revealed that 'Abiti Mzee' was the mother to Mr. Kalosi. This was raised by his monitor as a complaint and in his email, this was also raised but nothing was done by the Electoral Commission. He also admitted that he failed to produce in court the WhatsApp message as he did not know the author of the message. It was just forwarded to him. He told the court that two headmasters refused to testify afraid of Kalosi killing them. However, the Petitioner also said he did not know the voters that were chased but one of his monitors called him to report that he chased a couple of people away and reported to the presiding officer who did nothing. He also told the court that original complaint was sent through a letter to Mr. Kazembe, the representative of Electoral Commission in Mangochi who acknowledged with an assurance that he would take the letter to the Electoral Commission. The Petitioner also informed the court that he expected a response to his letter but no response came from Electoral Commission. The Petitioner also told the court that on statistics from Chipeleka school in the document presented by Electoral Commission, he did not agree with contents of the document. His monitor told him that there were figures in the range of 5000 and when the monitor raised that he was disregarded. At Chipeleka school, he said 5 people signed. These were NICE, UDF, MCP, DPP and Independent, who he did not know but he was not his monitor. Finally, the Petitioner told the court that he did not know how many were valid votes, and how many valid votes went to Mr. Kalosi and other candidates.

The second witness, PW2, was Charles Chilomole who was a monitor for the Petitioner at St. Michaels Girls Secondary School Tally Centre. He adopted his sworn statement and supplementary sworn statement as his evidence in chief. In cross-examination, he told the court that he was not at Ntengeza centre and that St. Michaels Secondary School was the tally centre for Mangochi. He told the court that each of the 8 contestants had monitors at the tally center. He said that although he was stationed at the tally centre, he knew what was happening at Ntengeza polling centre. He told the court that votes transmitted from Mtengeza Center after counting were for one stream and those for three other streams were missing. He told the court that upon enquiry from the presiding officer who was the headmaster of Mtengeza, he explained that he forgot those results in his office. He said thereafter, him, the headmaster and a police officer went to check in his office only to discover that the said results were not there. He told the court they resolved to visit the house of one of UDF monitors to get the results, which he had recorded in his notebook. He told the court that while in the motor vehicle, the headmaster told the UDF monitor that his candidate

has already won and that it was only a matter of time to celebrate the occasion despite the fact that voting process had not finished. He told the court that he was not at Chimbende school and that that they did not contact the monitor of the petitioner for the results.

Mr. Chilomole also testified that one of the centres whose results could not be captured in the database was Chimbende school. He told the court that transmitted results of votes cast was 5,100 yet the registered voters were 1,615. As a result, the system was failing to record them into its data base. After the 5,100 figures could not be entered into the database, the headmaster at the tally centre said that they needed to correct the total figure by reducing it despite officials at the tally centre without mandate to alter results transmitted from the polling center. On the other hand, 2nd respondent officials said that they had removed some figures at the top so that the results were accepted in the database. He told the court that he challenged what was happening but he was not given satisfactory responses. At the Tally Centre, the witness was told to stay at the far end of the room and he was not given proper chance to monitor the electoral process especially the vote counting and the entering of the numbers. The witness was also not given chance to inspect and sign the results sheets.

In cross-examination by the 2nd Respondent, Mr. Chilomole told the court that he went through the petition of Mr. Chikati and in the petition, Ntengeza and Chimbende were mentioned as polling stations. Mbaluku market as well as Chipeleka were mentioned and Malindi. When he was referred to the petition by counsel for the 2nd Respondent, Mr. Chilomole confirmed that there was no mention of Ntengeza and Chimbende in the petition. He then confirmed that his evidence is from centres not mentioned in the petition. He told the court that he was at the tally centre and that he voted at St. Martins Primary School in the morning around 7am/8am. He told the court that out of four streams at Ntengeza only one stream had results and the other three streams were missing. He said that they went to check for the lost results on 22nd May 2019. When he was referred Ntengeza results he agreed it showed four streams down the page and signature of the presiding officer and a date of 21st May 2019. However, he insisted they went on 22nd May 2019 to check for the results. He did not see the document before and even if he had seen it before the court, he could have still indicated that four streams were missing. He said that he was not given the chance to verify and sign for the results. About the transmitted 5100 votes against a total registered number of 1615, Mr. Chilomole admitted he did not bring any evidence but he informed the returning officer. He admitted that votes cast shows 1233 but that at the tally centre 5100 votes were shown. He told the court that he did not bring the document bearing 5100 transmitted votes. Mr. Chilomole said he was challenging the results because what was brought in the court was different with what he witnessed at the tally centre. Further, if anything at the tally centre, he said that they were shown 5100 votes which refused to enter into the computer and the officials sat down and he on his part did not know how they resolved the matter. He told the court that the petitioner has three monitors at the tally centre. He told the court that he did not know the number

of votes taken away from the petitioner and that he did not have evidence that Mr. Kalosi got votes that were not meant for him.

In re-examination, Mr. Chilomole informed the court that while he was at Ntengeza he did not see any results on the board. The monitor that gave them the results was for UDF which he did not remember his name. The results were plucked from the notebook of the UDF monitor and were brought to the tally centre. He also told the court that after counting all the votes it was the final result sheet for the constituency that he did not sign. He also told the court that about the 5100 votes at Ntengeza, they explained to them that the presiding officer for Ntengeza got the calculation of the results wrong as multiplied by 3 in total confusion and that's the reason the figure refused to enter into the computer. However, he said a solution was found. But he was not shown any paper just told by word of mouth. Finally, Mr. Chilomole told the court that he did not agree with the results as there was corruption because when they were at Ntengeza, the headmaster could not find the results both in his office and classroom. This prompted them to contact the UDF monitor who provided results from his notebook.

The third witness, PW3, for the petitioner was disqualified as he disowned the signature on the sworn statement. He was the monitor for the Petitioner at Mbaluku polling centre in Mangochi North East Constituency during the 21st May 2019 elections. By disowning the signature on his purported sworn statement, it meant that he was not the one who authored it. All parties agreed to disqualify this witness and he was therefore disqualified.

The fourth witness, PW4, for the petitioner was Christopher Adams Labana, who was a monitor for the petitioner based at Chimbende School. He adopted his sworn statement as his evidence-in-chief. In cross-examination by the 1st Respondent, he told the court that he was the monitor at Chimbende polling centre for the petitioner. He said he and his fellow monitors were not trained but he was told by the Petitioner on what to do at the polling station. He said on 21st May 2019, he arrived at Chimbende polling centre by 4am. While at the polling center, he saw a car owned by Idi Kalosi driven by Willie Mbaluka and there were 2 other people by the name Sadik and Lungala in the said car. They called Chimula, the headmaster, who was also the presiding officer at Chimbende and offered him money. He did not know how much he was given but this was also witnessed by other monitors, including Chikwenga as well as some voters who were present at that time. He told the court that this incident was reported to police and army officers who were at this centre and the culprits were beaten and set free. He told the court that all monitors at this centre received money from their candidates and that he received food from the petitioner. He told the court that he was aware of the role of the presiding officer with regard to assisting the blind and the elderly. He told the court that he was not comfortable with this arrangement as the presiding officer may influence the voters as it was done in the absence of monitors. He told the court that he was not aware of any legal mandate on this arrangement but to them it was strange. He told the court that he did not enter into the polling booth with the presiding officer but that he had evidence

that the headmaster influenced these people. He said he did not bring the evidence as he was not asked to do so. He said he refused to sign for the results. When he was referred to the result sheet for the centre bearing his name, he denied it.

In cross examination by the 2nd Respondent he said he was the monitor at Chimbende. He told the court that he knew Mr. Chilomole through this case. They were told by the Petitioner that Mr. Chilomole was a tally centre monitor. He said at the tally centre, monitors for the Petitioner were present. He told the court that he had his mobile phone throughout the voting period and he did not receive any call from these monitors neither did he call them. He was not sure when the counting of votes started and finished as monitors were told to switch off their phones. He told the court that he was not sure of who got more votes at Chimbende as monitors were told to go out of the room. He told the court that he did not have any evidence of allegations at the centre and that he did not have any results contrary to the valid results as presented. However, he said, there was evidence that Sekati was robbed of votes. He said the 2nd respondent gave money to the presiding officer. He said he saw Idi Kalosi in a white car without number plate driven by his driver named Willie. He told the court that he saw policemen beating Sadik but he was not arrested. He said he saw the 2nd Respondent giving money to the presiding officer who is the headmaster. He told the court that the headmaster influenced people he was assisting to vote for Mr. Kalosi as confirmed by some voters. He told the court that two people who were involved informed him but that these people were not present.

In re-examination, he told the court that did not receive any training as a monitor but the presiding officer explained to all monitors of their roles and duties and all issues pertaining to voting materials and voting process. He said he saw Lungala having a black bag and he was taking out money and giving them out to the headmaster who received the money and pocketed it. He said this was reported to police officer at the centre and one man by the name Sadik was beaten up. He told the court that money and food was distributed outside the school fence. On the issue of assisting physically challenged people, he said monitors were told to sit on the table behind and the presiding officer was the one who was assisting these people. He said the physically challenged people complained that they were forced to vote for candidate not of their choice. At a certain point, he said, there was chaos as one box had 1000 votes and the other, 700 votes against registered votes of 1615. When he asked about this inconsistency, he was threatened and as a result he was told to leave the premises. He denied the signature on the result sheet and he said he left the premises before signing.

The fifth witness, PW5, for the petitioner was Imran Alick Mpache who told the court that he was based at St Augustine II. He adopted his witness statement as his evidence in chief. In cross-examination by the 1st Respondent, Mr. Mpache told the court that he was a monitor for the Petitioner at St Augustine II in Mangochi North East Constituency during the 21st May 2019

elections. As monitors, the Petitioner explained to them about their role at the polling station and he referred them to the presiding officer who explained to them about their duties. He told the court that during the voting process, he saw an official assigned by Electoral Commission to help the voters with the identification of the candidates who were contesting for various positions repeatedly pointing and explaining to the voters only the name and identity symbol of the 2nd Respondent and skipping the rest of the contestants. He did not know the name of this Electoral Commission official. He said he reported the incident to the headmaster who dismissed it without doing anything. He did not lodge a written complaint because he was not aware of this requirement since the presiding officer did not tell him about this. He also saw the Army officer who was assigned to the centre by 1st Respondent engaging in serious and suspicious discussions with one of the monitors of the 2nd Respondent, by the name Adam Kalosi, who happened to be the son of the 2nd Respondent. Following their discussion, the monitor for the 2nd respondent started making calls contrary to the conduct they were advised to follow during elections. He reported both cases to the presiding officer at the centre who promised to look into the matters but he did not take any action.

In cross-examination by the 2nd Respondent, he told the court that he saw Electoral Commission official pointing at name and symbol of Idi Kalosi but did not see who the voter voted for in the booth. He told the court that monitors are not required to speak with security officials and only allowed to assist voters in the presence of other monitors. To the contrary, the police officer was speaking with the monitor Adam Kalosi and he thought he was favoring the 2nd Respondent. He told the court that the police officer did not meet the voters after the discussions with Adam Kalosi. Although 2nd Respondent herein did not lodge a complaint on the same, he thought this affected the election results because the votes for Sekati were altered by this discussion although he did not know what they were discussing.

In re-examination Mr. Mpache told the court that no contestant has complained about this election apart from Sekati as per the petition. He told the court that various centres observed by monitors of the Petitioner had irregularities though complaints were lodged only from 3 centers. In reference to paragraph 3 of his sworn statement, he told the court that the malpractice went on for several times and in different places during the voting process. In reference to paragraph 5 of the sworn statement, he thought that they were discussing fraudulent issues contrary to the instructions given by the presiding officer on how to conduct themselves as monitors.

The sixth witness, PW6, of the petitioner was Stewart Mwase who adopted his sworn statement as his evidence-in-chief. He told the court that on behalf of the petitioner, he led a team of 8 people from the constituency to an inspection exercise of the election materials at the warehouse of the Clerk of Parliament at Maone in Limbe on 23 August 2019. In cross-examination by the 1st Respondent, Mr. Mwase told the court that he was not a monitor at any centre although he voted at St Augustine school. He told the court that he did not know why other monitors signed and

others failed to sign the result sheet. He told the court that he was not aware of the exact number of both signed and unsigned result sheets. He told the court that it is untrue that the Electoral Commission could not force people to sign the result sheet. He told the court that at Chipeleka school, 5 signed the results sheet, namely EAN, UDF, MCP, INDEPENDENT and DPP. He told the court that these five people were not forced to sign and this applies to all result sheets where signatures appear. He told the court that a logbook contains complaints of the voters, candidates and monitors. He told the court that missing of these logbooks was a sign that the voting process was full of irregularities. On eligibility of Idi Kalosi, he told the court that he knows that he is not qualified and that he has serious challenges with English language. He told the court that, by law, Electoral Commission is the responsible authority to scrutinize the eligibility of the candidate and he is not sure if it is possible to lodge a complaint against the eligibility of a candidate. He told the court that he knew of Idi Kalosi candidature in 2013 and he knew that he had no certificate. He told the court that he did not complain to Electoral Commission on Idi Kalosi candidature and he was not aware if the petitioner complained.

In cross-examination by the 2nd Respondent he told the court that he contested as an independent councilor and he lost the elections. He did his Form 4 at Mangochi secondary school. He told the court that he was at the same school with Idi Kalosi at St Augustine II in standard 4 and him in standard 7. He told the court that he dropped out of school in standard 7 and started his business. He told the court that he had never interacted with Idi Kalosi in English. He told the court that Idi Kalosi had never spoken in parliament during his first five-year term as a member of parliament and that instead Lilian Patel was the one who was speaking on his behalf. He told the court that someone confided in him that Idi Kalosi presented someone's certificate whom he did not know.

He told the court that some result sheets were not signed. About Chipeleka school polling center, he did not mention the monitors of parties who did not sign the sheets. About log books missing at the warehouse, he told the court that the Petitioner did not complain of the missing logbook in his petition. He told the court that he did not explain in his sworn statement about registered voters being more than those who voted. He told the court that the inspection was aimed at proving allegations on 3 missing streams at one of the polling centres. About academic qualification and communication in English, he told the court that the law does not mention academic certificate for one to qualify as a candidate. He told the court that in his opinion a candidate must be in possession of Malawi School Certificate of Education though, he said, one with Junior Certificate can speak English.

In re-examination, he told the court that logbooks for various centres out of 18 were missing at the warehouse. He told the court that a copy of the inspection results could not have errors as the information was being provided by Electoral Commission upon opening the boxes. On the issue of qualification of Idi Kalosi, he told the court that he has never spoken in parliament from

2014-2019 parliament sessions. He told the court that not all monitors signed result sheets in all centers.

The testimony of Stewart Mwase marked the end of the petitioner's case.

THE 1ST RESPONDENT'S CASE

The first witness, DW1, for the 1st respondent was Winstone Mdzinja, a teacher by profession based at St. Martin Community Day Secondary School in Mangochi. He adopted his sworn statement as part of his evidence-in-chief. In his sworn statement, he discloses that he was the Assistant Presiding Officer for the 1st Respondent stationed at Malindi Primary School during the 21st May 2019 elections. He told the court that all monitors were given a chance to observe what was going on until the closing of the polling centre and they did not receive any complaint from any of the monitors representing the candidates about the way the casting of votes or how the counting and tabulation of results was done. After closing the polling centre, he told the court that counting of votes was done in the presence of all monitors.

He depones that he did not receive any complaint after the counting of votes from any monitor. He states that some of the monitors seeing that their candidates were trailing left before tabulation of results was finished. He depones that the petitioner was a winner of the elections at their polling centre and he was surprised that the same Petitioner was complaining about the conduct of the elections at this centre. He denied that any of the petitioner's monitors approached him at any time alleging any irregularities such as the 2nd respondent or his agents giving out handouts or that people came from other constituencies to vote or that the petitioners monitors were refused access to a copy of the results.

In cross examination by the petitioner, he told the court that he was the assistant presiding officer at Malindi F.P. school and the presiding officer was late Boniface Chule who passed away soon after elections. He told the court that monitors were trained by him and the presiding officer on how to handle and channel grievances during the voting process. He said the presiding officers were also trained on the process and on how to handle electoral materials after voting and after counting of votes. He said they were to make sure that all monitors and observers sign on a paper to show their presence. He told the court that he handled the presidential form and not that of parliamentary. He was sure that the presiding officer for Malindi signed the form. He agreed that, Mr. Chule, the presiding officer was in charge of Malindi polling centre. He also agreed that monitors were there to ensure smooth running of the voting process. He told the court that monitors were not involved in actual counting of the ballots and the presiding officer was in charge in verifying the results. He told the court that results for Malindi centre had no signature of the presiding officer and nobody signed on behalf of the presiding officer. He told the court that the presiding officer and the assistant presiding officer did not verify this result sheet. He told the court

that all processes for Malindi school were recorded in a logbook. He told the court that inspection at the warehouse showed that no logbook for Malindi was discovered and he was not aware of the contents of those logbooks and what happened to these books for they were handed over to the presiding officer. He therefore, agreed that there are no official results for Malindi in the absence of the logbook.

In cross-examination by the 2nd Respondent, he told the court that results were verified since monitors and observers signed and that these were official results as they were verified. He told the court that the presiding officer just forgot his duty to sign the result sheet and that the results are genuine. He told the court that failure to sign for the results by the presiding officer did not affect the results. He told the court that the winner at Malindi was the petitioner Chikati Sekati.

In re-examination, he informed the court that the result sheet was signed by monitors after verification of results. About presiding officer not signing the result sheet, he told the court that the presiding officer just forgot to sign. As for the logbooks, he told the court that they were filled in by the assistant presiding officer who was assigned by the presiding officer to do so. He reiterated that at Malindi, the Petitioner won. He told the court that in his opinion, failure to sign by the presiding officer did not disadvantage the petitioner.

The second witness, DW2, for the 1st respondent was Grace Msowoya who was the presiding officer for the 2nd Respondent stationed at M'baluku Market Polling centre. She adopted her sworn statement as her evidence in chief. In cross-examination by the Petitioner, she told the court she was the presiding officer at M'baluku market and she was working hand in hand with the security personnel and there was no Mr. Matewere or any assistant presiding officer. She told the court that all monitors signed the result sheet although she did not remember their names and how many they were. She told the court that the monitors were from DPP, UDF, UTM and of Independent candidates. She was not in agreement with the statement that few monitors signed on behalf of their candidates and she told the court that if that is the case, she will not accept those results. She told the court that she would only accept the results for M'baluku if her signature appears on the sheet and if there was only her name without signature, then she would disown the results. After being referred to the result sheet, she agreed there were only four names appearing from two political parties; UDF and DPP without that of UTM, MCP and Independent. She did not have the documents where her and other political parties signed, therefore, it was a false document (then she changed her statement of the falsity of the results sheet as attached by Electoral Commission). She was aware that she had to fill the logbook at the polling station. She told the court that the assistant presiding officer filled the logbook but she was aware of the contents of the logbook and she checked them. Once the logbooks were filled, she delivered them to Electoral Commission. She told the court that there was no copy of logbook attached to her statement and she agreed that without logbook one cannot verify what happened at the centre and there was no brief summary of the results in the court. She told the court that she was the one who wrote on that

result sheet and the information therein was correct. She told the court that the sheet contained results for M'baluku market centre and nobody brought different results from the ones on the results sheet as attached by Electoral Commission. She lastly said that she did not deny monitors to crosscheck results at M'baluku.

In cross-examination by 2nd Respondent, she told the court that, the contents of the result sheet were what she prepared. She told the court that she could not sign any document she did not prepare. She told the court that she signed Form 66 which contained total number of streams by writing her name on the result sheet. She told the court that the information she wrote on the result sheet was correct and were official results for M'baluku market centre. She told the court that she did not deny any monitors to cross-check results coming from tally centres.

In re-examination, she said she would not recall how many monitors signed the result sheet. She denied the result sheet document as it appears on page 36 of the trial bundle as this did not belong to her. She said she could verify the results by using other means including logbooks. She told the court that there were no complaints raised by the monitors at M'baluku market centre.

The third witness, DW3, for the 1st respondent was Manasseh Mhango who was the presiding officer for the 1st Respondent stationed at Chipeleka Full Primary School polling centre. He told the court that he was present throughout the voting process. He told the court that he remembered one incident when a monitor reported that there were people giving handouts to voters who were coming to the centre. He said the security officer investigated the matter and found out that it was not true.

He told the court that a total of 2200 ballot papers and after voting, the petitioner amassed 305 while the 2nd Respondent got 918 votes from the centre. He also said it was not true that people from Mangochi central or other places voted at this centre except the 2 security officers and 2 presiding officers. He told the court that due to the fact that the voting process and counting was peaceful, all the monitors signed against the name of their candidate on the main result sheet but most of the monitors left without collecting their own copy of results. The time the poll was closing at Mpombe polling centre, he said the 2nd Respondent was the winner. During the conduct of elections and after the results were tallied, none of the monitors approached him or any clerk to lodge any complaint and therefore any allegations of any irregularities at the polling center were false. The petitioners claim lacked merit and has only been commenced by him solely as a loser in an otherwise fair process.

In cross-examination by the Petitioner, he told the court he was the presiding officer at Chipeleka polling centre assisted by 3 assistant presiding officers, Shahid Lambulira and 2 others who he had forgotten their names. He told the court that after vote counting, it was discovered that the 2nd Respondent was a winner with 918 votes. After counting, he personally took the results, which

were in three pieces of paper and materials to the tally centre and gave them to Constituency Returning Officer who was a lady. He said he worked with Electoral Commission officials stationed at the tally centre and he worked with them from 21st and 22nd May 2019 to collect, check and park materials used at polling stations. He told the court that he surrendered all logbooks to the Electoral Commission officials. He told the court that he was informed by one of the monitors about giving of handouts though he said it was not indicated where the money was being shared at the centre. He told the court that he also received a call from nearby polling centre, Sungusha polling centre that at his centre, there was somebody who was giving handouts. He informed the court that security officers were deployed around the polling centre to check if this was happening, only to discover that it was not true. He told the court that he took a special note of the complaint and recorded in the logbook but he was not aware that the Petitioner is challenging the results at his polling centre. On the issue of logbooks and voter register, he was not aware of their whereabouts as the same was handed over to Electoral Commission and he was not aware if monitors were given a copy of the logbooks. He admitted that if the logbooks were lost, court would not be able to know its contents. He said that there were about 30 monitors and about three independent observers who verified the results because during the training they were told that independent observers can sign for the results as well. He told the court that not all monitors signed the result sheet at Chipeleka polling centre but he could not remember the number of those who signed and who did not. He told the court that he did not know why they did not sign for the results and it was not true that it was because they were unhappy with the results. He told the court that no Electoral Commission official had visited him to investigate results at Chipeleka and nobody had told him of any complaint regarding results at Chipeleka.

In cross-examination by the 2nd Respondent, he told the court that it was not true that the number of votes cast was higher than registered voters and that nobody complained to him about this issue. He told the court that he did not receive any complaint that the presiding officer and monitors did not sign the result sheet. He informed the court that he signed results for Chipeleka polling centre and so did the monitors. He told the court that missing logbook does not have any effect on the results and that no one has brought any results different from the results as declared at Chipeleka Centre.

In re-examination, he said 2200 ballot papers were received and the cast ballots were 1489. After voting, all the results were brought into one room and they did calculations together with the monitors and came up with results for each candidate and the monitors signed on the logbooks. He said the results were a true reflection of what happened on the polling day. He told the court that all monitors were eligible to sign though others failed to do so and they were not forced to sign.

THE 2ND RESPONDENT'S CASE

The first witness for the 2nd respondent, DW4, was the 2nd respondent himself, Mr. Idi Kalosi, who contested as member of parliament for Mangochi North East Constituency on United Democratic Front ticket during 21st May 2019 elections. He denied the contents of paragraph 3[a] of the petition and he explains that because of limited space at the polling centres, it was impossible for all monitors to crosscheck the voting booths at the same time. As a result, the monitors were divided into groups. All monitors were given opportunity to cross-check results. In his sworn statement, he denied the contents of paragraph 3[b] of the petition that the number of registered voters at Chipeleka was lower than the number of votes cast. He was informed by his monitor that the number of votes cast was lower than the number of registered voters. He denied the contents of paragraph 3[c] of the petition by stating that the proper procedure was followed. He depones that monitors of the petitioner left when they realized that their candidate was losing and refused to sign and verify results. He depones that monitors for other contesting parties as well as NICE officials verified and signed for the results. He denied the contents of paragraph 4[a] and [b] of the petition that he sent anyone to give out money to influence voters to vote for him and that he gave money to headmasters to influence voters on who to vote for. He denied the contents of paragraph 4[c] of the petition because it was impossible to take people from Mangochi Central to vote for him in Mangochi North East. He depones that the allegations of the petitioner are not true but rather the Petitioner is finding it hard to accept defeat.

In cross-examination by the Petitioner, he told the court that he did not indicate his level of education on his nomination papers but that he went as far as form 4 and passed his examinations at Mangochi night school in 1983. He said he prepared an affidavit that he could speak English. He told the court that he was a Member of Parliament from 2014 to 2019 and he was speaking in parliament. He told the court that on 21st May, 2019, he went to cast his vote and he was not present at the polling centre during voting and counting processes. He informed the court that he did not visit any polling centre as he had monitors in all centres who were accredited by Electoral Commission and they were across the centres who were briefing him on what was happening in the polling centres. He told the court that his monitors did not inform him about allegations of handouts at Chipeleka and a fight at Chimbende. He said he was only informed of challenges at M'baluku market polling centre where they were using a tent as polling centre. This made it difficult to see what was happening because some people were inside while others were outside the tent. He was told that the same was resolved as all votes were made known to monitors and they all accepted the votes. He confirmed part of the sworn statement that monitors refused to sign for the results but his monitors signed for the results at the tally centre. He did not agree that the official results of the tally centre did not bear the petitioners monitors. He denied all the allegations of giving money to the headmaster as a way of bribing him. He informed the court that he knew Sadick and Lungala because they were his monitors but he did not know Willie M'baluka. He denied any knowledge of a fight between the security personnel and his monitors at Chimbende.

centre. He told the court that all monitors were given opportunity to check or verify results but he did not see them verifying results personally as he was not present as explained above.

There was no cross examination from the 1st respondent.

In re-examination, he told the court their lawyer through their party examined them on their proficiency in English. He informed the court that in 2001, they were examined by Electoral Commission and Malawi National Examinations Board (MANEB). He told the court that he passed and has a certificate to that effect. He told the court that to his knowledge, all parties and independent monitors verified the results. He said that independent monitors refused to sign for the results and one of them is for the Petitioner. He disagreed with Stewart Mwase's statement that all monitors refused to sign. He told the court that Charles Chilomole who was a monitor for the petitioner, for instance, signed for the results. As for the misunderstanding between the security personnel and Lungala/Sadik, he told the court that he was not aware of it and that counsel for the Petitioner was the one who brought the issue in court. In his opinion, he said the Petitioner was the one to bring the evidence in this court.

The second witness, DW5, for the 2nd respondent was Ali Chimwaza who was based as a monitor at Chipeleka school for the 2nd respondent. He adopted his sworn statement as part of his evidence-in-chief. In his sworn statement, he depones that every contesting party had monitors at every centre to assist and monitor the vote casting process and counting of votes. He depones that after vote counting, it was Honourable Idi Kalosi who had won the parliamentary elections for Malindi constituency. He avers that he was surprised to hear that Martin Chikati Sekati, an independent candidate who was contesting for the same seat has refused to accept the results with a claim that the results were rigged as he does not understand how he lost although during the voting process, his monitors were present throughout. He submits that during the voting and counting, no complaints were raised regarding the process and everything was successful and results were sent to the tally centre.

In cross-examination by the Petitioner, he said he was based at Chipeleka School as a monitor for the 2nd Respondent. He told the court that allegations of handouts at this centre were not true. He informed the court that he did not go to any polling centre except Chipeleka centre. He told the court that he did not go outside to verify and he could not know what was happening outside the centre. He informed the court that he was there during the counting of the votes till final results were tabulated for the centre. He said he was told that monitors were to sign but he did not sign as they instructed one monitor to sign on their party's behalf. He said as a monitor, he was given a batch as a monitor but was taken away after the voting process.

In cross-examination by the 1st Respondent, He told the court that Mr. Mhango was the presiding officer at the centre though he did not see any evidence in court to that effect. He also told the

court that he was present when Mr. Chilomole, a witness for the petitioner was testifying. He informed the court that Mr. Chilomole did not bring any evidence to show that he was a monitor.

In re-examination, he told the court that he did not bring evidence to support his assertion that he was a monitor since the batch he was given at the centre was taken away by Electoral Commission officials. He told the court that all witnesses including Mr. Mhango, his presiding officer, did not bring the evidence of their roles. He informed the court that voting ended at 6pm and not 8pm as indicated in his sworn statement. He said this was just a mistake.

The third witness, DW6, for the 2nd respondent was Hawa Mzee Chiwaya who adopted her sworn statement as part of her evidence in chief. She depones in his statement that she was one of the local observers at St. Martins Secondary School in Mangochi representing United Democratic Front for Honourable Idi Kalosi. She depones that names of monitors were given to Electoral Commission around April and every monitor was given a batch with their names on it. She indicates that every party had 2 monitors on elections day and that these monitors were to confirm results coming in from all the 18 polling centres. She told the court that after collecting results from all the polling centers, Honorable Idi Kalosi was declared winner for Mangochi North East Constituency. She observed that the other monitors did not have interest in confirming if the results announced by the presiding officer matched the results that were received by their monitors from different polling centres. She also observed that during the process some monitors from the other contesting parties were insisting that they change monitors which the army officers refused since they did not follow procedures. She depones that some of the monitors refused to sign for the results because they were upset by the fact that their candidate was losing.

In cross-examination by the Petitioner, she told the court that she is an aunt to Idi Kalosi. She said that she was an observer at St Michaels secondary school representing UDF and not St. Martins as reflected in paragraph 3 of her sworn statement. She told the court that voting commenced at 6am to 8pm but nobody cast their votes since it was a tally centre and not a polling station. She informed the court that as a monitor, her role was to check what was coming from the polling centres to make sure that all was in order. She told the court that there was no monitor representing UDF and other parties had observers too at the tally centre. She said this was proven by looking at the batches of the individuals. She said observers for Mr. Sekati were Sakina Saidi and Esnart Katsabola. She told the court that she and MCP observer signed for the results but was not sure whether Petitioner's observers signed too. She said the presiding officer and the police officer brought the result sheet to the tally centre. She said she was receiving results from monitors of other polling centres and verifying the same with the monitors. She told the court that the tally centre did not have monitors but rather observers. To her, therefore, it was not true that Chilomole was a monitor at the tally center. She told the court that Mr. Sekati got 7060 votes, Saidi got 5000 votes, Idi Kalosi got 8980 votes in the constituency and she was not sure of the number of votes other contestants got. She told the court that these were the results she signed for. She said she did not

see Chilomole going to Mtengeza centre or elsewhere. She told the court that she heard about 5100 votes from Chimbende centre being discussed. She said she was not aware of who brought these results to the tally centre. She said the figures were not balancing and at the end the headmaster was called from Chimbende school to come to correct the figures. After consultation with the main tally centre at COMESA in Blantyre, she told the court that they all agreed on the amended results and they were instructed to write a letter and attach it to the amended results for justification. When changes were being made, she did not see any monitor from Chimbende school. A form reflecting the valid votes was given and some people like journalists, pastors, NICE signed for the results. She told the court that her signature is not there possibly because there were too many documents to sign for and she was not sure of which ones did she sign or not. She insisted that she did not see Chilomole and she was sure that he was not at the tally centre. She also confirmed that the results were genuine since they were signed.

In cross-examination by 1st Respondent, she told the court she could not remember precisely how many votes each candidate got. As of Mwase's statement about results for the constituency signed by Returning Officer Chikhambi, she said Mr. Sekati and Mr. Kalosi got 7053 and 8980 votes respectively. She told the court that these were correct results. She told the court that monitors and observers do the same tasks although they had different names. She said her role was to receive results from UDF monitors.

In re-examination, she told the court that 5100 votes came because the presiding officer failed to add the figures and that this did not affect the results. With this testimony, the 2nd respondent closed his case.

Though not cross examined in this court, there are sworn statements in opposition on record from Lucy Jota and Katenga Masi. These are statements for the 2nd respondent. Lucy Jota depones that she was one of the monitors for the 2nd respondent based at Chikoma School. She depones that the voting process went on well and that the 2nd respondent was declared winner. She avers that some party representatives left the centre before counting due to the fact that their candidates were not fairing well. Katenga Masi based at M'baluku Market Centre was one of the monitors for the 2nd respondent. He depones that the 2nd respondent was declared winner at this centre after a fair and free voting process. He depones that some party representatives left the centre after noting that their candidates were losing.

BURDEN AND STANDARD OF PROOF IN ELECTORAL MATTERS

Electoral petitions are civil matters. In civil matters, the burden of proof lies on the party alleging a fact. In **MIKE MLOMBWA t/a COUNTRYWIDE CAR HIRE V OXFAM**¹, the court had the following to say:

¹ Civil Cause Number 2343 of 2003

“A well settled law of ancient application is ‘*ei incumbit probatio qui dicit non qui negat*.’ This essentially means that the burden of proof lies on the party alleging a fact of which correlative rule is that he who asserts a matter of fact must prove it but he who denies need not prove it.”

The legal position is that a petitioner has the requisite burden of proof in electoral matters. Commenting on the same issue, the Constitutional Court in **DR. SAULOSI KLAUS CHILIMA AND DR. LAZARUS MCCARTHY CHAKWERA V PROFESSOR ARTHUR PETER MUTHARIKA AND ELECTORAL COMMISSION**², had the following to say:

“...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.”

The Constitutional Court went further to say:

“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 petitioner’s allegations on a scale (balance) of probabilities.”

What this means is that while the petitioner in electoral matters bears the burden of proof, that burden shifts to the respondents. With regard to standard of proof, the petitioner needs only to establish a prima facie case. Once that is done, the burden shifts to the respondent to rebut the allegations on a balance of probabilities.

The Supreme Court of Appeal settled the position in **PROFESSOR ARTHUR PETER MUTHARIKA AND ELECTORAL COMMISSION V DR. SAULOS KLAUS CHILIMA AND DR. LAZARUS MACCARTHY CHAKWERA**³, as follows:

“Whereas other jurisdictions might advocate different levels of standard of proof, in our considered view, having particular regard to how our Constitution views and guards the human rights of the people (see: section 44 of the Constitution), and further bearing in mind the heavy duties both the Constitution and electoral statutes place on the Commission, we do not believe that it could have been scheme of the law to saddle a petitioner with an onerous burden of proof in the discharge of

² Constitutional Reference No 1. Of 2019

³ MSCA Constitutional Appeal N0. 1 of 2020

the initial burden of proof. In our view, to the extent that the three Supreme Court of Appeal cases, namely **Gondwe and Another v Gotani-Nyahara** (supra) and **Electoral Commission and Another v Mkandawire** (supra) and **Bentley Namasasu v Ulemu Msungama and the Electoral Commission** (supra) did not come out clear on the issue of the burden and standard of proof, our position is that the petitioner should discharge this initial burden of proof with a *prima facie* standard of proof, before the burden shifts to the Commission as a duty bearer. Once the burden so shifts, owing to the powers, functions, and duties the Constitution and the electoral statutes have conferred on the Commission, the Commission must discharge the burden of proof in rebuttal of the petitioner's allegations on a balance of probabilities."

Hence, as the law stands, the petitioner in electoral matters needs to prove a case with a *prima facie* standard of proof before the burden shifts to the Commission. Once the burden has shifted, the Commission on a balance of probabilities bears the burden of rebuttal. This is the law as it stands with regard to burden and standard of proof in electoral matters in our jurisdiction.

ISSUES FOR DETERMINATION

The issues for determination in this petition are:

- (a) Whether there were irregularities in the conduct of the parliamentary elections in Mangochi North East Constituency during the 21st May 2019 tripartite elections
- (b) If the answer in (a) is in the affirmative, whether those irregularities affected substantially the result as announced by the 1st respondent.

THE LAW AND ANALYSIS

It is clear to me that the within petition has been brought under Section 100 of the Parliamentary and Presidential Elections Act, which provides as follows:

(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.

As already alluded to above, the onus is on the petitioner to prove existence of irregularities based on *prima facie* standard of proof during the conduct of the parliamentary elections in Mangochi North East Constituency. Section 3 of the Parliamentary and Presidential Elections Act defines an irregularity as non-compliance with the Act. As stated in **PROFESSOR ARTHUR PETER MUTHARIKA AND ELECTORAL COMMISSION V DR. SAULOS KLAUS CHILIMA AND DR. LAZARUS CHAKWERA** (supra), the Electoral Commission is under a constitutional duty to conduct elections in strict compliance with the law. At this juncture, let me deal with the issues as raised in the within petition by the petitioner. I have to put it on record that during the hearing of the within petition, many live issues arose from hearing of the petition which in my considered view, require attention of this court. I am of the view that the respondents will not be prejudiced at all as they had an opportunity to respond to those live issues. Further, the petitioner through sworn statements of his witnesses raised some of the issues. For instance, the sworn statement of Charles Chilomole, PW2, raised the issue of missing of votes at one stream at Mtengeza Centre. In his supplementary sworn statement, he raised the issue of 5100 transmitted results for Chimbende School Centre. As for record log books, the order for disclosure dated 16th day of July 2020 is clear that the petitioner included log books in his application. I am inclined to conclude that the respondents were aware of all these issues as raised in the sworn statements and order for disclosure. The respondents cannot therefore feign ignorance of these issues. In the interest of justice, it is imperative that I deal with these issues. Let me now deal with specific issues as raised.

CHIPELEKA CENTER

The petition alleges that at this center, number of registered voters was lower than the number of votes cast and that presiding officers and party representatives (monitors) never signed for such result sheets. I have to mention that the petitioner did not come out clearly on this allegation in terms of numbers of those who registered and those who cast their votes for this court to appreciate his allegation. The presiding officer at this center was DW3, Mr. Manasseh Mhango. In his testimony, he told the court that the total ballot papers received at Chipeleka was 2200 and that the total number of votes cast was 1489. He told the court that the total number of registered voters was 1615. My perusal of the sworn statement by Stewart Mwase at page 7 shows that the total number of registered voters at Chipeleka was 2061 and total votes cast was 1489. The result sheet for Chipeleka school (Form 66 C) on page 58 of Stewart Mwase sworn statement shows that number of ballot papers received was 2200, number of cast ballot papers was 1489. The result sheet further shows that Ida Kalosi got 918 votes and the petitioner got 305 votes. Hence, from the evidence of Stewart Mwase, who is a witness of the petitioner, it is clear that the number of voters at this center was 2061 and that number of votes cast was 1489. Further, total number of ballot papers received was 2200. These figures are corroborated by DW3, Mr. Manasseh Mhango who was the Presiding Officer for Chipeleka School Center. Hence, it is not correct that the total number of registered voters was less than the votes cast at Chipeleka Center. The petitioner did not bring any evidence to counter these figures. It is therefore my finding that the petitioner has failed to prove this allegation to the satisfaction of this court and I dismiss it in its entirety.

The other realm of the allegation at Chipeleka school was that party representatives and presiding officer never signed for the results at Chipeleka School. DW3, Mr. Manasseh Mhango, who as alluded to above, was the presiding officer, told the court that he signed for the results. My perusal of the results on page 58 of Stewart Mwase's sworn statement shows that Mr. Manasseh Mhango signed as presiding officer. Hence, it is not true that presiding officer never signed for the results. Further on page 59 of Stewart Mwase's statement shows that some party representatives signed for the results. These include party representatives from UDF, MCP, DPP, Independent and EAM. This fact was even admitted by Stewart Mwase during cross examination by the 1st respondent. The witness told the court that those who signed were not even forced to do so. Hence, it is also my finding that this allegation has not been proved by the petitioner as evidence from his own witness shows the contrary.

MBALUKU MARKET CENTRE

The petitioner alleges that at Mbaluku Market Centre monitors were denied the opportunity to cross check results as they were coming from the tally centres. The petitioner's witness at Mbaluku was Patrick Kalino who was disqualified as he disowned the signature on his sworn statement. He

was disqualified since by disowning the signature on that statement, it meant that he was disputing authenticity of that statement. I am of the considered view that in the absence of evidence from the petitioner's representative, the allegation cannot hold water. Further, one wonders the authenticity of this allegation. Monitors of the petitioner based at Mbaluku market Centre being denied opportunity to cross check results from the tally centre sounds untrue. Results are supposed to move from polling centres to the tally centre and not vice versa. It is my finding therefore that there is no any iota of truth in this allegation. I dismiss it in its entirety.

Another issue that arose with regard to the same centre was to deal with signature of the presiding officer on the result sheet. There was evidence of Grace Msowoya, DW2, who was the presiding officer at Mbaluku Market. The result sheet for this centre on page 37 of Stewart Mwase's statement shows that she did not sign for the results despite writing her name. Initially, she emphatically told the court that a document that would show no signature of herself would be a false document and that she would not accept that document. She changed her statement when she was shown the result sheet showing her name only and not signature. She told the court that she was the one who wrote her name on the result sheet. I am of the considered view that the credibility of this witness is questionable as she changed her statement in the course of giving her testimony. However, the fact remains that the results for this centre are not signed for by the presiding officer. The Constitutional Court in **DR. SAULOS KLAUS CHILIMA AND DR. LAZARUS MACCARTHY CHAKWERA V PROFESSOR ARTHUR PETER MUTHARIKA AND ELECTORAL COMMISSION** (supra), stated the following on mandatory requirement for presiding officers to sign result sheets:

"The same approach on the signature of presiding officer on the result tally sheet being mandatory obtains other jurisdictions. In *Raila Odinga and Another V Independent Electoral and Boundaries Commission*, Electoral Commission 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. The 2nd 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 2nd respondent's case. 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."

I am of the considered view that the signature of a presiding officer on a final tabulated result sheet is solemn act of assurance that the results are correct. The absence of a signature on the tally sheet defeats this assurance and tarnishes the integrity of the elections notwithstanding that the presiding officer has signed other electoral documents. I am of the view therefor that presence of a name of

the presiding officer on a result sheet will not suffice as anyone can write the name of the presiding officer on the result sheet. The law stipulates that signature of a presiding officer is mandatory pursuant to Section 93(1)(b) of the Parliamentary and Presidential Elections Act.

MALINDI SECONDARY SCHOOL TALLY CENTRE

The allegation at this centre is that the respondent tabulated the results of the parliamentary elections without prior verification of all party and independent monitors. Unfortunately, no evidence was adduced by the petitioner. I am of the considered view that the petitioner was supposed legally to bring more meat to this allegation. The onus lies with him to do so. He failed to do so.

Another issue that arose with regard to Malindi school centre results was the absence of the signature of the presiding officer. DW1, Mr. Winstone Mdzinja, told the court in cross examination that he was Assistant Presiding Officer at Malindi School Centre. He told the court that the Presiding Officer was Boniface Chule, deceased (May His Soul Rest in Peace). He told the court that he noted that he, Boniface Chule, did not sign for the parliamentary result sheet though that party representatives signed. He told the court that his view was that the presiding officer just forgot to sign as he was handling several documents. He told the court that at Malindi, the petitioner won hence he thought that absence of signature of the presiding officer did not disadvantage the petitioner. I took the liberty to cross check the results for Malindi School Centre at page 31 of Stewart Mwase's statement. It is clear that there is no signature for a presiding officer on the result sheet contrary to Section 93(1)(b) of the Parliamentary and Presidential Elections Act. As already alluded to, it is mandatory that the presiding officer at a polling station signs the result sheet. It is an irregularity for a presiding officer not to sign. See **PROFESSOR ARTHUR PETER MUTHARIKA AND ELECTORAL COMMISSION V DR. SAULOS KLAUS CHILIMA AND DR. LAZARUS MACCARTHY CHAKWERA** (supra). It is an irregularity that cannot be cured by signatures of party representatives as DW1 would want this court to believe. I am of the considered view that there is no any excuse that the 1st respondent can advance for this irregularity. In the absence of the signature of the presiding officer, the results for Malindi Centre cannot stand. It is not an issue in my considered view that the winner at Malindi Centre was the petitioner. The law was breached.

ALLEGATIONS OF BRIBERY TO VOTERS BY 2ND RESPONDENT

The petitioner alleges that Mr. Idi Kalosi contesting under the UDF ticket sent his agents/servants to be giving money to voters so that they vote for him. I have to mention unequivocally that the evidence that was adduced in this court was inconsistent and unreliable. The petitioner told this court in cross examination that he was not aware of how many agents were involved. He said he was not even aware of how much was involved and how many voters were involved. The petitioner

ought to have done more to prove this allegation than what he did. The evidence that was adduced in this court on this allegation was that the 2nd respondent influenced people to vote for him. For instance, it is alleged that at St. Augustine School centre, a security officer was discussing with one of the monitors for the 2nd respondent. According to PW5, Mr. Imran Mpache, this was evidence of fraud or bribery. He told the court that he was not aware of what these two people were discussing. He said it was illegal for the security officer to be discussing with a monitor of the 2nd respondent. I find this allegation baseless as the witness, in his own testimony, told the court that he was not aware of what these two were discussing. As already alluded to, the evidence adduced in this court on this allegation is insufficient and unreliable. I therefore dismiss this allegation in its entirety.

ALLEGATIONS OF GIVING MONEY TO THE HEADMASTERS BY 2ND RESPONDENT

The petitioner alleges that the 2nd respondent, Mr. Idi Kalosi gave money to headmasters to influence voters on who to vote for. On this allegation, it was the testimony of the petitioner himself that Mr. Idi Kalosi gave money to headmasters to influence voters to vote for him. He told the court that only two headmasters were not given such money. He mentioned amounts in the range of MK25, 000 to MK1, 700, 000. He told the court that he had a WhatsApp message from one of the headmasters. He admitted that he did not bring that message as he was just mentioning this allegation in passing. In re-examination, he told the court that he did not produce the WhatsApp message since he was not aware of the author. He said it was just forwarded to him. I am at pains to believe what the petitioner is alleging in the absence of concrete evidence. As per his own admission, he did not bring the WhatsApp message as evidence in this court. Further, he said he was not aware of the author. He did not parade headmasters who said got the money from the 2nd respondent. In the circumstances, I am of the considered view that this allegation has no legs to stand. It is therefore dismissed.

On the same allegation of giving money to headmasters, there was an allegation that at Chimbende centre, the headmaster was offered money by agents of the 2nd respondent. In his testimony, PW4, Christopher Labana, told the court that Mr. Sadik and Mr. Lungala called the headmaster at Chimbende and offered him money. He told the court that the issue was reported to the security personnel at the centre, who beat up the two gentlemen and released them. In the first place, PW4 did not mention as to how much was given to the headmaster. Secondly, the security personnel who beat up the agents of the 2nd respondent were not paraded to substantiate the allegation. Thirdly, the witness told the court that the people who were influenced by the headmaster admitted to him though he did not parade even a witness to substantiate this allegation. I find this piece of evidence wanting. The least the petitioner could have done was to parade those who were involved in this malpractice to substantiate his allegation. It is hearsay evidence as he told the court that the voters told him what happened. I am at pains to accept this allegation. I dismiss it in its entirety.

PEOPLE FROM MANGOCHI CENTRAL CONSTITUENCY

The last allegation is that the 2nd respondent took people from Mangochi central to vote for him in Mangochi North East Constituency. In his testimony, the petitioner told the court that he did not know how many people were ferried. He told the court that his monitors just saw few unknown people. He told the court that his monitors know all people in the constituency as it is a small community. I have difficulties with the assertion by the petitioner. In the first place, he was not aware as to how many voters were ferried from Mangochi Central to Mangochi North East. It could have been better if the petitioner could have mentioned the number involved. Secondly, the petitioner did not bring evidence to show that those strangers voted for the 2nd respondent. Further, it is unknown if this allegation applies to all centres in the constituency or specific centres. It is unclear how this allegation affected the votes in the constituency as the evidence is scanty. Presence of unknown people at a polling centre does not mean that they are voters. During voting, all sorts of people are present just to observe/monitor the process. The petitioner did not even parade a voter who was from Mangochi Central who was ferried to vote for the 2nd respondent. Even the testimony from his witnesses, this allegation has not been proved at all. Hence, I dismiss it in its entirety.

QUALIFICATION OF 2ND RESPONDENT

The petitioner also alleges that the 2nd respondent, Idi Kalosi was not qualified to contest as a member of Parliament. The petitioner told the court that the 2nd respondent has no Malawi School Certificate of Education (MSCE), as such he breached electoral laws. The petitioner told the court that he is aware that the 1st respondent has the legal mandate to determine eligibility of a candidate and he told the court that he was surprised that the 2nd respondent was allowed to contest. He told the court that he did not raise this issue with the 1st respondent after the official list of contestants was released. In his testimony, PW6, Stewart Mwase, told the court that he has never interacted with the 2nd respondent in English. He told the court that he was with him at St. Augustine School. He informed the court that he dropped out of school while in Standard 7. He said the 2nd respondent during his last tenure (2014-2019), never contributed in parliament. Instead Lilian Patel spoke on his behalf. PW6 went further to insinuate that the 2nd respondent presented to 1st respondent somebody's certificate whom he did not name or know.

Section 38(b)(ii) of the Parliamentary and Presidential Act stipulates that a candidate or his election representative shall deliver to the returning officer evidence or a statutory declaration by the candidate made before a magistrate or a commissioner for oaths, that the candidate is able to speak and to read the English language well enough to take an active part in the proceedings of the National Assembly. It is therefore not correct that a candidate for a parliamentary seat must have

Malawi School Certificate of Education as this is not a legal requirement under the law. A candidate who is able to read and speak English language is eligible. That is the requirement. The petitioner told the court that he underwent an amplitude test with Malawi National Examinations Board (MANEB) and was certified eligible to contest as a candidate as he demonstrated that he is able to read and speak the English language. He told the court that he was awarded a certificate to that effect which he brought in court as evidence. He told the court that he swore an affidavit/sworn statement attesting to that fact when he presented his nomination papers and the 1st respondent did not raise any issues with his nomination. I find this allegation by the petitioner baseless. In the first place, the petitioner did not raise any issues with the candidature of the 2nd respondent when the 1st respondent released the nominations as required by law. He is raising this issue after release of official results of the 21st May tripartite elections. I am of the considered view that this allegation is brought in bad faith. There is no evidence that the 2nd respondent used somebody's certificate as Stewart Mwase failed to prove the same. The 2nd respondent was certified eligible by the 1st respondent as per the legal requirement. Hence, 1st respondent did not breach any law when they allowed the 2nd respondent to contest as a candidate. In fact, this court had an opportunity to observe the 2nd respondent speaking English during the proceedings. I therefore dismiss this allegation.

5100 VOTES AT CHIMBENDE CENTRE

There was also an allegation that at Chimbende Centre, that 5100 votes were brought to tally centre by the presiding officer. In his testimony, PW2, Charles Chilomole, he told the court that 5100 votes were brought by the presiding officer. He told the court that there was that result sheet at the tally centre for Chimbende School though he did not bring that result sheet. DW6, Hawa Mzee admitted of the existence of these votes. She told the court that the headmaster of Chimbende School was called to do calculations. She informed the court that changes were made in the absence of party representatives. She told the court that after consultation with 1st respondent at National Tally Centre, they were advised to write a letter attaching the results. It is clear therefore that the results for Chimbende School were changed at the tally centre which is a serious irregularity. As it was held in **DR. SAULOS KLAUS CHILIMA AND DR. LAZARUS MCCARTHY CHAKWERA V ELECTORAL COMMISSION AND PROFESSOR ARTHUR PETER MUTHARIKA** (supra), that officials of the 1st respondent have no legal authority to change polling centre results at the Tally Centre and that such a change is an illegality and undermines the integrity of an election. Definitely, what happened at the tally centre was illegal as nobody knows how the changes were done. I am of the considered view that the declared result for Chimbende Centre are illegal and cannot hold as they emanate from an illegal process.

RESULTS FOR MTENGEZA SCHOOL CENTRE

As for Mtengeza Centre, it was the testimony of PW2, Charles Chilomole, that results for certain streams were missing. He told the court that they had to refer to results of the missing streams from a representative of United Democratic Front who recorded the results in his notebook. The evidence was unchallenged as the respondent did not rebut it to the satisfaction of this court. Unfortunately, the presiding officer was not paraded as one of the witnesses for the 1st respondent. I agree with the petitioner that the presumption is that the evidence could have been adverse to the 1st respondent case. See **SABOT HAULIERS LTD V FREIGHT HANDLERS**⁴. The presiding officer was the representative of the 1st respondent at the centre. The whole issue centres on him. One would have reasoned that the 1st respondent could have paraded him or her as a witness. What this means is that results for Mtengeza cannot stand as they are a product of an illegal process. Results are those that are captured by the 1st respondent and not a party representative. This was an illegality.

LODGING OF A COMPLAINT BY THE PETITIONER TO THE ELECTORAL COMMISSION

The petitioner alleges that the 1st respondent announced results before resolution of his complaint. He told the court that **MCK 1**, a letter, was emailed to the 1st respondent on 25th May 2019. He informed the court that the original was delivered to Mr. Kazembe, a representative of the 1st respondent in Mangochi. In cross-examination, he confirmed that the letter is not signed but that the original was signed though he did not exhibit the same in court. **MCK 1** is not signed as admitted by the petitioner. He did not exhibit the copy of the email sent to the 1st respondent. The petitioner also admitted that he did not exhibit the original signed copy in this court. I am at pains to accept the assertion by the petitioner that he sent a letter of complaint to the 1st respondent. Assuming that was done, he was supposed to exhibit the original signed copy that was sent to the 1st respondent through its representative in Mangochi or a copy of the email sent to the 1st respondent for this court to believe his story. In the absence of this conclusive evidence, I hold that the 1st respondent did not breach any electoral laws when they announced parliamentary results of Mangochi North east Constituency.

MISSING OF RECORD LOG BOOKS

Section 119 of the Parliamentary and Presidential Elections Act provides as follows:

“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

⁴ [1993] 16 (2) MLR 760

preserve such documents in safe and secure custody without destruction for a period of twelve months.”

The Supreme Court in **BENTLEY NAMASASU V ULEMU MSUNGAMA AND THE ELECTORAL COMMISSION**⁵, explained the rationale of Section 119 of the Parliamentary and Presidential Elections Act as follows:

“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 clear from the evidence of Stewart Mwase, to be precise, **SW2** and **SW3**, that some record log books were missing at the warehouse during the inspection exercise as ordered by this court. Only few polling centres had record log books. I am of the considered view, in the absence of any explanation from the 1st respondent as a duty bearer, that the absence of these record log books affected the integrity of the elections in Mangochi North east Constituency. The Electoral Commission is under a legal obligation to make sure that all electoral materials are preserved as demanded by the law. It is clear to me that the Electoral Commission was careless in the way they discharged their legal mandate under Section 119 of the Parliamentary and Presidential Elections Act. In the absence of these record log books, definitely integrity of the parliamentary elections in Mangochi North East Constituency was affected.

CONCLUSION

The Supreme Court in **PROFESSOR ARTHUR PETER MUTHARIKA AND ELECTORAL COMMISSION V DR. SAULOS KLAUS CHILIMA AND DR. LAZARUS MACCARTHY CHAKWERA**, (supra) settled the law on qualitative and quantitative approaches as follows:

“Thus, the distinction between the two is that quantitative means looking at numbers of votes and qualitative deals with integrity of the electoral processes and compliance with the constitutional and statutory requirements. The number of votes (quantitative) involved are used in determining whether or not the election was affected when determining in final results. in qualitative test the court looks at the effect of irregularities, non-compliance with constitutional and statutory requirements and other complaints, then determines whether or not the election was affected.”

The Supreme Court went further as follows:

⁵ Civil Cause Number 8 of 2016

“However, it is well to note that this court does not advocate the idea that a court should completely ignore the result, but that where that result is from a largely flawed process it cannot be upheld. Further, where to apply the qualitative or quantitative test will largely depend on the manner the petition has been framed. Accordingly, where the petition is principally challenging figures then the quantitative approach may be used. Where the petition is challenging quality then the qualitative approach may be used. If the petition is raising issues of both quality and quantity, then the court should be able to use both. We so find and conclude”.

I am of the considered view that the within petition raised issues of both quality and quantity, thereby warranting application of both qualitative and quantitative approaches. Applying both approaches, I am of the considered view that the serious irregularities at Malindi Centre, Mbaluku Market Centre, Chimbende Centre and Mtengeza Centre affected both the quality and figures (quantity) of the election process in Mangochi North East Constituency. I am of the view that changing of results for Chimbende Centre at the Tally Centre was a serious irregularity. I am of the considered view that using results from a party representative of United Democratic Front to compute results for Mtengeza Centre was a serious irregularity. I am of the view that absence of signatures of presiding officers at Mbaluku Market Centre and Malindi Centre was serious breach of electoral laws as no-one can speak for those results. The missing of logbooks during the inspection exercise as ordered by the court was a serious breach of the electoral laws. I am of the considered view that these irregularities affected results of the parliamentary elections. I therefore nullify the parliamentary results for Mangochi North East Constituency as declared by the 1st respondent. In these circumstances, I order fresh elections.

Costs are for the petitioner.

**MADE IN OPEN COURT THIS 8TH DAY OF JUNE 2020 AT PRINCIPAL REGISTRY,
BLANTYRE.**


JOSEPH CHIGONA
JUDGE.