



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
ELECTION CAUSE NO. 32 OF 2019
IN THE MATTER OF SECTIONS 100 & 114 OF THE PARLIAMENTARY
AND PRESIDENTIAL ELECTIONS ACT
IN THE MATTER OF THE 21ST MAY 2019 PARLIAMENTARY
ELECTIONS FOR CHIKWAWA EAST; NSANJE NORTH; AND NSANJE
CENTRAL CONSTITUENCIES**

BETWEEN:

**FOSTER THIPIWA.....1ST PETITIONER
ENOCK CHIZUZU.....2ND PETITIONER
KAFANDIKHALE MANDEVANA.....3RD PETITIONER**

AND

**THE ELECTORAL COMMISSION.....1ST RESPONDENT
DR. ESTHER MCHEKA CHILENJE.....2ND RESPONDENT
RODRICK SAM KHUMBANYIWA.....3RD RESPONDENT
FRANCIS KUSAILA.....4TH RESPONDENT**

CORAM: THE HON. JUSTICE S.A. KALEMBERA

Mr Dzonzi, of Counsel for the Petitioners

Mr Kossam, of Counsel for the Petitioners

Mr Mataka, of Counsel for the 1st Respondent

Mr Maliwa, of Counsel for the 2nd and 3rd Respondent

Mr Lihoma, of Counsel for the 4th Respondent

Mr Ng'ambi, Court Clerk

Mrs Munthali, Court Reporter

JUDGMENT

Kalembera J

Introduction

The Petitioners, Foster Thiphiwa, Enock Chizuzu and Kafandikhale Mandevana, were parliamentary candidates on a Malawi Congress Party (MCP) ticket in the 21st May 2019 Parliamentary Elections for Chikwawa East, Nsanje North and Nsanje Central Constituencies, respectively. The Petitioners state that Rodrick Sam Khumbanyiwa, Esther Mcheka-Chilenje and Francis Kasaila stood on the Democratic Progressive Party (DPP) ticket in the said elections and were returned by the 1st Respondent as duly elected. The Petitioners are disputing the said Parliamentary results and brought this Petition against the Respondents seeking the following :

1.1A declaration that the non-compliance with, irregularities and improprieties in the said parliamentary elections were so substantial and significant that they affected the results thereof;

1.2A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and computation of the said parliamentary elections;

1.3A declaration that the said Parliamentary elections held on the 21st May 2019, were not conducted in accordance with the Constitution and the applicable law rendering the declared results invalid, null and void.

1.4A declaration that the DPP candidates who were declared winners were not validly declared as Members of Parliament elect and that the declarations were invalid, null and void;

1.5An Order directing the 1st Respondent to organize and conduct fresh parliamentary elections in the constituencies in strict conformity with the Constitution and the Parliamentary and Presidential Elections Act and the applicable law;

1.6A declaration that each and all the Respondents jointly and severally committed election irregularities;

1.7Costs of the petition;

1.9Any other orders the Court may deem just and fit to grant.

Pleadings

The Respondents have also raised an issue to do with pleadings, which I believe I must address from the outset. Pleadings determine the parameters of the case for the parties. Counsel for the 2nd and 3rd Respondents has strongly argued and submitted that it is a settled principle that cases must be decided only on pleadings (Now statement of case according to the new Civil Procedure Rules). In ***Malawi Railways Ltd v. Nyasulu*** 1998 MLR 195 (MSCA) the Supreme Court at page 200 to 201 cited with approval, the following passage by Sir Jack Jacob entitled “The present importance of pleadings” from the book (1960) current legal problems who said:

“-As the parties are adversaries it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it

other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any other Business' in the sense that points other than those specified may be raised without notice."

The Commercial Court in ***Shiraz Ferreira t/a SF International v. Malawi Savings Bank Limited and Mulli Brothers Limited (Third Party)***, commercial case number 59 of 2014 buttressed this principle by stating as follows on page 5 of the transcript of judgment:-

"The claimant's pleading in the instant case did not explicitly raise the legal issues of breach of contract such as payment without authority, fraud or negligence. The issues raised were merely factual as to whether the K170 million and the ancillary payments should be refunded or made. No underpinning legal basis was pleaded. It is only in submissions that references to fraud and negligence are made. Thus, in accordance with the principle that cases must be decided only on the pleadings, I am not entitled to base any judgment on fraud, negligence or other issue [emphasis by underlining supplied]"

And counsel for the 1st Respondent has further buttressed the point in relation to election matters. However, in an electoral matter of **Gondwe and Another –vs- Gotani Nyahara (Supra)**, the Malawi Supreme Court of Appeal stated the following with regards to pleadings at p. 132

"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 vs Attorney General MSCA Civil Appeal No. 32 of 1997**. In that case Banda CJ, observed.

*“in our judicial system it is the parties themselves who set out the issues for determination by the court through their pleadings and both of them must strictly adhere to the pleadings. In the present case although the Judge stated that he had invited Counsel to address him on the effect of the provision of section 88(3) of the Constitution the matter was not raised on the pleadings by either party. In our view it was perfectly open to him to express his opinion by way of **obiter**, on what he felt was the effect of the provision of section 88(3) of the constitution. It was therefore wrong for the Judge to decide on a matter which had not been raised by the parties or their pleadings and he should not have made it the definite basis of his decision.”*

The Petitioners in their Petition pleaded the following:

1, The Petition of **FOSTER THIPIWA** of P O Box 5, Makhwira, Chikwawa District, **ENOCK CHIZUZU** of P O Box 76, Muona, Chilomo, Nsanje; and **KAFANDIKHALE MANDEVANA** of P O Box 48, Tengani, Nsanje District showeth that:

2. The 1st, 2nd, and 3rd Petitioners were parliamentary candidates who all stood on a Malawi Congress Party Ticket in the 21st May 2019 Parliamentary Elections for Chikwawa East, Nsanje North and Nsanje Central Constituencies respectively.

3. The Petitioners state that the said election was held on the 21st day of May, 2019 and that **Messrs RODRICK SAM KHUMBANYIWA, ESTHER MCHEKA CHILENJE and FRANCIS KASAILA** who all stood on the Democratic Progressive Party (DPP) Ticket in the said Parliamentary Elections were returned by the 1st Respondent as duly elected.

And the Petitioners state that:

4.RODRICK SAM KHUMBANYIWA, ESTHER MCHEKA CHILENJE and FRANCIS KASAILA were not duly returned or elected as Members of Parliament for Chikwawa East, Nsanje North and Nsanje Central Constituencies respectively by reason of irregularities and/or bias in favour of the said named persons and their teams by the 1st Respondent's officers. Further, the 1st Respondent generally failed to comply with both the Constitution and the Parliamentary and Presidential Elections Act in the conduct of the said elections.

5.The spirit of the Constitution of the Republic of Malawi and Parliamentary & Presidential Elections Act is to ensure free and fair elections and to have an electoral process as set out in the Constitution, electoral laws and regulations.

6.The 1st Respondent however committed errors and irregularities in the voting process, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared the three persons named in paragraph 1 above as winners; failed in the entire process of relaying and transmitting election results as required by law; and generally committed contraventions and violations of the electoral process.

7.The 1st Respondent failed to keep and maintain a level playing field for all participating candidates and generally exhibited a bias in favour of the candidates for the DPP which eventually led to their "victory".

8.Some results sheets had their figures altered using correction fluid [tippex] unilaterally by the Respondent's officers to favour the said DPP candidates. Further, the Respondent's officers refused vehemently to give to the to the Petitioners' monitors the results sheets so altered by the said correction fluid.

9.In addition, figures on the results sheets coming from polling stations were being changed by the Respondent's officers unilaterally without consultation or verification by the Petitioner's monitors and even monitors of the other candidates except the DPP candidates' in order for the said figures to balance in the Respondent's system.

10. Some of the results sheets coming from polling stations were not signed for by the monitors at the polling stations and some people were being asked to sign for them in the Tally Centre.

11. Presiding Officers did not allow the Petitioners' monitors to get results sheets generally particularly those whose figures had been altered using correction fluid.

12. The Petitioners' monitors were restrained from performing their responsibility and were told that not all monitors were allowed yet the Respondent had earlier communicated that each candidate would be allowed 2 monitors per stream at a polling station.

13. In a significant number of cases, the Petitioners' monitors were not allowed to participate in vote-counting and were in some cases only called later to sign the results sheet on behalf of their candidate. This rendered the vote-counting exercise non-transparent.

14. Further, in the case of Nsanje Central Constituency, the Constituency Returning Officer was actually arrested for being caught in flagrante delicto marking ballot papers as votes of the DPP Candidate.

I must agree with the arguments and submissions from the Respondents that it is undisputed that the Petitioners herein did not plead for the following:

- (a) The 1st Respondent used Fake Record Log Books.
- (b) The 1st Respondent used Fake Result Sheets.
- (c) The 1st Respondent undersupplied voting materials in some polling centers.
- (d) The 1st Respondent oversupplied voting materials in some polling centers.
- (e) Ballot stuffing by the 1st Respondent's agents/servants.
- (f) Failure of the 1st Respondent to disclose Record Log Books.

I must further agree with the submissions by the Respondents that this court is bound by the pleadings herein. Anything outside the same, although alluded to it in evidence, should not, does not and will not concern the court. Thus the issues on suspicious polling centres in Chikwawa East constituency, issues on undisclosed materials and anything not pleaded for will not be considered by this court as the court has not been moved to determine on the same. I am further mindful that both the petitioners and their witnesses agreed in cross-examination that these issues were not raised in the petition.

The Evidence

In determining this Petition, just as the Petitioners and Respondents have done, I will analyse the testimony of some of the witnesses, while bearing in mind all the evidence before this court.

PW 1 was Foster Thompson Thipiwa, the 1st Petitioner, of Mpangowalimba Village, T/A Makhuwira, Chikwawa District. He adopted his sworn statement. In cross-examination by Counsel for the 1st Respondent he informed the court that where a mistake has been made, it must be corrected. He got information from his monitors that the results were being changed and that the changes were being made at the tally centre. He conceded that he did not have the unchanged results for his monitors were not given the results sheet, although they took part in the counting of the results. Only few of his monitors brought him results sheets. None of his monitors have challenged the unsigned results in court. It is possible that not signing cannot affect the results. He further reiterated that his monitors were not allowed to participate in vote counting.

That the monitors were given a duplicate to sign and his monitor did not sign. He did not know if the original was signed or not. They were shown results from headquarters and they were similar. And that his monitors had not come to court to challenge those results. When asked to indicate where the votes were added at Ngwenya polling centre, he failed so to do. He further testified that other voters were denied the chance to vote as fewer ballot papers were delivered than the number of registered voters. He conceded that there were a number of unused ballot papers. No one complained that they were not able to vote. He did not have any alternative results.

In cross-examination by Counsel for the 2nd and 3rd Respondents he reiterated that there were no sworn statements from his monitors. That he had monitors throughout the Constituency, and that he monitored every stream. His monitors could be better placed to explain what happened. They were the ones who were sending results to their parallel tally centre. That no witness from the tally centre would testify to that, and his monitors at the tally centre were required to compare what results had come and then confirm the same. His monitors did not sign Form 72B. He confirmed that Form 72B on page 33 of the 1st and 2nd Interested Parties Court Bundle is a Form 72B which had been signed by Constituency Returning Officer (CRO) and monitors

He also conceded that at no point in their Petition were they alleging that there were few ballot papers or more; nor were they raising issues of forging of monitors' signatures and that they didn't amend the Petition. And that in their Petition they are alleging that these irregularities affected the results.

In re-examination he reiterated that he did not witness the counting and tabulation of votes. In reference to the document on page 11 of Volume 1 he informed the court that the document looked fake because it was handwritten using a pen although it was uploaded from the MEC website. That this sheet was different from the one on page 32 of 1st Respondent's paginated bundle and the figures too differ from those on page 11. (the document on page 32 is the one 1st Respondent's Constituency Returning Officer (CRO) claims to be the correct one).

PW 2 was Enock Chizuzu, the 2nd Petitioner, of Dogo Village, T/A Mlolo, Nsanje. He adopted his sworn statement. It was his sworn testimony that he was the Malawi Congress Party (MCP) parliamentary candidate for the Nsanje North Constituency in the 21st May 2019 elections. That during the voting exercise together with his team they uncovered the following irregularities: At Fatima Tally Centre, the Presiding Officer sent the results to the main tally centre in Blantyre without being verified by the monitors and observers. The Presiding Officer denied them access to the results. The monitors and observers therefore did not see or verify the sent figures to the main tally centre; the three polling stations namely: Chigwamafumu, Namiyala and Namilembe had their results tampered with. Tippex was used to alter the figures on the result sheets. His monitors were denied copies

of the said results sheets as such they do not have copies to present for the court to appreciate the point.

The paperwork that was supposed to be done at the polling station was done at the tally centre. The figures from the polling stations did not tally with the figures sent to the main tally centre; since the figures did not tally, they noticed that the computer system was failing to remit the results to the main tally centre; the counting at Ng'ombe F.P. School was halted at night. They locked the results in the room. They did not understand why this had to be the case because the number of voters at the polling station was small, below one thousand. The counting was continued in the morning of the following day, 22nd May 2019; on 20th May 2019 around midnight, the Headmaster of Makhanga Primary School received a phone call from an Electoral Commission officer, Emily Mpheluka, who indicated that she was calling from Blantyre EC office. She told the Headmaster to go into the room where ballot papers were kept and open the ballot kit to check for the checklist. The Headmaster informed the MCP monitors, who opposed the opening of the room at night. They are not sure if the opening of the ballots did not take place since monitors did not sleep at the place.

Their party monitors in some polling stations such as Mpembamoyo were given blank forms by the polling station officers, and in other polling stations monitors were not given duplicate forms of results.

It was therefore his further testimony that these irregularities distorted the outcome of the election and therefore the election results do not reflect the choice of the people in the Constituency.

In cross-examination by Counsel for the 1st Respondent he told the court that his monitors made him aware of the irregularities which started from date of receiving ballot papers. In some cases there were more ballot papers and in other cases less ballot papers. A complaint was made orally to the CRO who promised to resolve or rectify them the next day. He conceded that complaints were supposed to be made in writing. Another irregularity was making corrections on the results. He was not present though when the ballot papers were being delivered at Makhanga where there was a shortage of ballot papers. He was aware that 2,434 registered to vote. No one complained to him that they failed to vote at Makhanga due to the

undersupply of ballot papers. At Namilembe his monitors signed for the results so too at Makhanga. There were no changes on the valid votes each candidate got. He did not have any different results. At Mchacha polling centre as the counting progressed, the PO stopped showing the ballot paper to the monitors but just mentioning that it belonged to candidate so and so. Hence his monitors did not sign the results at Mchacha. He did not have any different results. He further conceded that at different polling centres there was no tippex used on the candidates' votes and his monitors signed for the results. And he did not have different results.

In cross-examination by Counsel for the 2nd and 3rd Respondents he reiterated that he had monitors at every stream, polling centre and tally centre. He also conceded that in his Petition he was not raising issues of fake tally sheets or oversupply or undersupply of ballot papers. He did not bring the results which were recorded by his monitors. He was not at the tally centre. There were two different results, from the monitors in Areas where they got the results, plus the ones on the MEC website. He conceded that there was no monitor before the court to testify to that. He did not know how many null and void, cancelled or unused ballots he got. What he knows is that what was on MEC website and results in some instances were different. He does not know if a carbonated copy can lie, but it can't.

He heard that there were auditors engaged by MEC who were required to audit the results sheets, and if the results were wrong they needed to refer them back. Where there are errors they ought to correct. Results would only be entered in MEC system after auditors, but these alterations were done when monitors had already been given carbonated copies. Some of the results received by monitors and those at the tally centre differed. He further told the court that he was not confirming that alterations did not affect results; and that MEC had been correcting counting errors; no monitor had challenged stream, polling centre and tally centre results..

PW 3 was Muntian Kazembe. He adopted his sworn statement. In cross-examination by counsel for the 1st Respondent he reiterated that he was Assistant Presiding Officer (APO) and his Presiding Officer (PO) was Samuel Mizedya. He told the court that he was at Stream 3 at Nambele. He could not recall individual votes each candidate got. He confirmed that upon using a calculator in court what he found was exactly what the result sheet indicated that Mcheka-Chilenje got. He

further reiterated that there were no alterations. As regards Chizuzu at streams 3, 2 and 1, there were no alterations and no difference on the figures he got.

In cross-examination by counsel for the 2nd and 3rd Respondents he told the court that he was aware that none of Chizuzu's monitors are questioning the results at Namilembe. He further told the court that he was challenging the results at Namilembe but he did not bring to court a draft paper on which he was recording the results. Even his PO was asked by the Constituency Returning Officer (CRO) to be changing the result figures, and they were changing the figures at the Tally Centre. He did not report this to the Police nor his bosses at The Electoral Commission.

In re-examination he explained that the changes were made by the PO, Samuel Mizedya.

PW 4 was Kafandikhale Khumbanyiwa, the 3rd Petitioner. He confirmed to the court that the person seen on the video arrested by the police and in handcuffs was Fred Thomas, CRO for Nsanje Central Constituency. He was found with results from Nsanje Central when the Tally Centre was closed. In cross-examination by counsel for the 1st Respondent he told the court that Fred Thomas was making changes at Mpatsha Tally Centre. He however did not verify if the results he had were different from the ones he got from his monitors. His monitors did not have results from all polling centres though he had monitors at all the polling centres. Out of 26 polling centres he did not have results from 23 polling centres. Due to network issues it was difficult to communicate with his monitors.

That his monitors did explain to him what he had polled in the different centres. He did not put down the results which his monitors had communicated to him. He further told the court that he did raise his complaints with MEC but did not receive any response. He further reiterated that he did not have different results from those announced by MEC and that there was no tippex on votes each candidate got. That there were only general alterations. His monitors signed for the results. He conceded that he is not an expert on fake documents or forged signatures. He further informed the court that no registered voter complained to him that he failed to vote due to less ballots and that not every registered voter turned up to vote. And none of his monitors reported that no voter failed to vote.

He further told the court that he was only there when the District Commissioner (DC) and the Officer-in-Charge of Nsanje Police were questioning the CRO, Fred Thomas. It was difficult to conclude that he changed his results. He only saw the alterations. He participated in the disclosure of documents at MEC. He scrutinized the result sheets and there is none with his votes altered. As regards voting no voter approached him to complain that he had been told who to vote for. His monitors signed for the results but were not given a copy of the result sheets, others did not sign. He reiterated that there was no tippex used on the individual votes each candidate scored.

In cross-examination by counsel for the 4th Respondent he confirmed that he participated in the parliamentary elections in Nsanje Central Constituency. He has no information that Fred Thomas was prosecuted. He did not witness the closure of the tally centre at 9 pm but his monitors would testify to that. He only got results from three centres. Further, that he was not alleging use of any false tally sheets and that the petition was not amended after disclosure of all documents.

In re-examination he stated that when they checked Nsanje Central results from the MEC website, he realized that four centres had tippexed results. And about twelve results sheets are not signed by Presiding Officers and the thirteenth one is blank. Witness logged in into MEC website and the blank result sheet for Mpepe could be seen.

PW 4 was Francis Khembo. He adopted his sworn statement. In cross-examination by counsel for the 1st Respondent he confirmed that he was a monitor at Mpatsa Tally Centre for the 3rd Petitioner. His duty was to verify votes his candidate had polled at various centres. This was to be done before the results were entered into the system. He did not compare the results from the polling centres to those brought by the POs. He did not participate in result counting and did not tabulate results from polling centres. Monitors were supposed to get results at the polling centres and communicate the same to the monitor at the tally centre. Results from a stream are transferred on to Form 66B, which then is carried by the PO to the tally centre where it is given to the CRO. He was not supposed to be given the Form 66B. He was not aware that the 1st Respondent disclosed results from Nsanje Central to the Petitioners.

Tippex was used on the original results. No corrections on candidates' votes, other than at Mkango and Mthawira. He did not have different results. Station total for Kasaila was 508. He did not know why the last digit was changed. It might have been a figure between 1-9. He confirmed that Kasaila got more than 500 votes. He did not know Kafandikhale's results from the three centres where results did not come. Mr Fred Thomas changed the results of Mpatsa polling centre in his presence. When referred to document on p. 317 he confirmed that it had no alterations, and that the Malawi Congress Party (MCP) monitor signed.

In cross-examination by counsel for the 4th Respondent he reiterated that he had not listed the dubious issues that were taking place at polling centres. On 22nd May 2019 the CRO slept with the results at his house. CRO was advising POs to correct results.

PW 5 was Tione Malizani. He adopted his sworn statement. He told the court that results from three centres were not edited but those from Chigumukire. He observed them being edited. In cross-examination by counsel for the 1st Respondent he confirmed that he was a monitor at Mpatsa Tally Centre for the 3rd Petitioner. He told the court he did verify Mandevana's votes from Chitsa and Mpats. He later confirmed that at Chitsa Mandevana got 538 votes and not 528 votes as earlier indicated. At Mpatsa the votes he got at the polling centre were the same as those at the tally centre. He was aware that MEC disclosed documents and result sheets to the Petitioners. Some monitors said they did not get the announcements of the results clearly. He was disputing results from 24 of the 26 centres disclosed.

He was at the tally centre and he was told by the PO to amend the figures and then he signed. Whether there is a signature or not it does not mean you agree. He signed just to track that results were amended at the tally centre. He did not verify with the polling centre monitor on the results Mandevana got. He verified on the virtual Form 66B and the individual votes were the same. On various result sheets there were no alterations on individual votes polled but at some centre 100 votes seemed to have been removed from Kasaila. And several MCP monitors signed for these results. All polling centre results were brought to the tally centre.

In cross-examination by counsel for the 4th Respondent he reiterated that he did not see anyone alter the results. He conceded that he had not furnished the court with different results. Monitors signed the results for Chitsa polling centre. Votes for candidates were not tampered with.

In re-examination he informed the court that after the three centres, the rest of the result forms were being attended to and CRO was providing new fresh forms so that in the system it could not show that they were tampered with.

PW 8 was Peter Lackson. He adopted his sworn statements and attached documents. In cross-examination he informed the court that apart from being a trained accountant he is also a consultant dealing with tabulation and analysis. Upon being referred to the Petition he confirmed that he could not come across the words 'use of fake log books.' So too use of duplicate stream numbers. He was incorporated into MCP parallel tally centre in 2019. They were receiving results from monitors, tabulating them and making findings. They provided their findings to the party which he had not exhibited. He also has not exhibited any results from monitors. That Form 60B is result of count and Form 66B is not a tally sheet. He was not aware that MEC disclosed all original Form 66Bs. And he was not aware of any monitor challenging the disclosed Form 66Bs and that he was not bringing any different results.

He further informed the court that he had not depicted that the books disclosed and results they got are different. He was aware that Record Log Books were supposed to be printed in Dubai. He had read the contract but could not remember if it had specifications. Fake documents or Record Log Books were those not customized. He was not saying MEC used fake ballot papers. He conceded that he could not tell if PO whose name appears was real or not. He did not consult the monitors who worked at the stream. He conceded that as regards the contract between MEC and the printer there was issue of reserve Record Log Books. And that the printer would produce extra Record Log Books. You cannot tell at time of printing where extra Record Log Book will be needed and therefore you cannot include some details, meaning you cannot customize.

As regards the results, he was not saying they were different from those at the tally centre. Record Log Book will have stream numbers. A stream number at one

polling centre must not be duplicated. He did not consider the information contained inside and he was not saying the entries were different. He was not aware of any monitor challenging the results at Tsopa. On use of duplicates it was fair to say it was an assumption. For the issue of alteration to arise there was need to have two documents to compare. He had not attached different results and was not aware of any monitor who brought different results. He conceded that document Exhibit "PL 3" which he exhibited to prove alteration of results, and it contained documents from MEC, be expunged for it made no sense without a contrary document. (The court expunged it).

In cross-examination by counsel for the 1st Respondent, he told the court that he was aware that Chikwawa East had 18 polling stations. Tabulation of the Presidential results was the main task at the parallel tally centre. Chikwawa East and Nsanje North were not included in the analysis. His team was not involved with parliamentary results. He did not witness the counting of the results. He could by comparing result sheet and figures in the counterfoil determine irregularities in vote counting. There was improper counting, additional votes to some etc. He couldn't tell if the anomaly was deliberate vote stealing. He could not tell at what point alterations were made. He could not tell if Chizuzu or any candidate got the votes recorded or not.

In cross-examination by counsel for the 2nd and 3rd Respondent he conceded that he did not explain the Table at p.256 in his sworn statement. He was using it to explain manipulation of results in Nsanje North. The information in the table does not cover all the polling centres in Nsanje North. He further conceded that him and MEC were using different information. If one uses wrong information the output will also be wrong. He did not have number of valid votes in the table and did not explain why he did not have estimation of valid votes.

In re-examination he told the court that fake log books is part of irregularities. Reconciliation is the most important process. Once things have reconciled then counting begins. If total votes cast are different to total of candidates' votes then there is a problem and at the tally centre that would be rejected. Scores for individual candidates were not tampered with. Alterations from A-F are not necessarily innocent. They found two original documents for each polling centre when each polling centre was supposed to have one, and the two differ in

appearance e.g. at Chigwamafumu on p.668 and Chigwamafumu o p.669. On p.668 the figures are written clearly but on p.669 they are tampered with.

PW 9 was Anthony Bendulo. He adopted his sworn statement. In cross-examination by counsel for the 1st Respondent he told the court that he gave his sworn statement before the 3rd disclosures and that he was aware that disclosures were made for originals. He conceded that Form 66B was supposed to contain results from Form 66B. He confirmed that the results for Chigwamafumu as regards the candidate scores were the same. When referred to Form 66B with regards to Nsanje North he conceded that he could not show valid votes for he needed to compare. At Osiyana there were no alterations for Mr Chizuzu. The figures Mcheka-Chilenje and Chizuzu got are reflected on the tally sheet. He did not know the signatures of the MCP monitors at Namilembe and he did not ask any of the monitors who signed. He did not follow-up with Jennifer Dominic the one who signed.

He further conceded that he is not a handwriting expert. On candidates' scores there were no differences and he did not have alternative or different results. That it was presidential. Where a tally sheet is not balanced everybody is disadvantaged. When you tamper with null and void votes you are tampering with either candidate. There was nothing to demonstrate as the uploaded figure of null and void was the same. He conceded that he could demonstrate manipulation of the votes but it would be a challenge to demonstrate from whom the votes were taken. Without comparator documents he could not tell from whom the votes were taken. At Savala there were alterations from A-F on Khumbanyiwa. Possibly at this centre votes were taken from all candidates which is indirect rigging.

With reference to Exhibit "AB 12B" he informed the court that four votes were manipulated but can't tell from which candidate they were taken. With reference to Exhibit "AB 12A" he conceded that it was a duplicate tally sheet and no carbonated copy hence his argument could not hold water. As to the carbonated copy shown on p.1167 he conceded that it came from MCP monitor but its believability was questionable. The one in the system was only signed by NICE. He further conceded that he did not have all result sheets. He did not have alternatives votes for Mandevana. He further conceded that despite saying Exhibit

“AB 21A” was fake, he was not an expert in deciphering whether a document is fake or not. He was also not aware of any monitors challenging the results.

He further informed the court that not all disclosed result sheets, about 18 of them, were signed by monitors and POs. Not all representatives who are present are required to sign. If not available no rule for MEC to wait for such monitor. He further informed the court that he was not at Chikwawa East when electoral materials were being unpacked but he could say that the 1st Respondent delivered one customized logbook. Most of the centres had no alterations on candidates' votes.

In cross-examination by counsel for the 2nd and 3rd Respondents he confirmed that he was engaged by the Petitioners. Forged signatures were encompassed in irregularities though they were not specifically mentioned in the Petition. Undersupply is also under irregularities though not specifically mentioned; so too fake record log books and duplicate numbers, and POs not signing tally sheets. The monitors performed very well. He is maintaining the materials he used for his analysis, that is, presentation by NECOF, few documents given to monitors by MEC, and further materials like revised Electoral Procedure User Manual, Constitution, and PPEA. He conceded though that he did not exhibit documents given to the monitors, but that he had exhibited one Form 60B for Mpatasa F.P. School. For Nsanje North and Chikwawa East Constituencies he did not exhibit anything from MEC.

He further explained to the court that you cannot tell from counterfoils for ballot papers that the ballot was spoilt, cancelled or unused. He was aware that MEC disclosed Form 66Bs. His table showed total number of Form 66Bs expected as 18, and actually disclosed zero. He and Peter Lackson were at the tally centre and were receiving results and some information tracking on these Constituencies. They wrote a report to the MCP. Specifically for Parliamentary elections they did not have a report. And they have not exhibited the results they received from their monitors. He was not aware of any monitor challenging the results. He was unable, where information has been changed, to show the original information.

He reiterated that their allegation was that some Form 66Bs were not signed by POs and monitors. He conceded that Form 66B for Namilembe was signed PO nd

some monitors. On other centres he confirmed that the candidate scores were the same. He reiterated that he had not said what was announced by MEC was different from record logbooks. And that he was not saying some polling centres had no record logbooks. He further conceded that he had not said counterfoils can be used to show alterations were malicious or innocuous. In most respects he conceded that where he was talking about alterations he did not provide comparative figures. And that candidate scores were the same. He further stated that in his analysis he was disadvantaged due to absence of marked voter registers.

He further informed the court that you can have Form 66B balancing it contains wrong information. On Exhibits "AB 21A" and "AB 21B" which he got from the Petitioners, who said it came from their monitor, the candidate scores look to be the same. He conceded that candidate score for DEPECO candidate was indeed one, and there was no change. So too on "AB 21B." One can take out votes or add votes in order to rig.

In cross-examination by counsel Lihoma he reiterated that his analysis went beyond the documents disclosed. He also downloaded documents. He downloaded a blank result sheet for Mpepe. There were some centres where the results were not disclosed.

In re-examination he informed the court that his analysis was done at different instances and that his notes came from all the three disclosures. He further conceded that humans were prone to error and that a mistake must be corrected.

With this witness the Petitioners closed their case.

DW 1 was Grasten Chisale. It was his testimony that he was Returning Officer (RO) for Chikwawa East Constituency during the 2019 Tripartite Elections. He adopted his sworn statement and attached exhibits as part of his testimony. In cross-examination by Counsel Dzonzi he told the court that he had taken part in elections before the 2019 elections and that he had sufficient experience in conduct of elections. He underwent training before the 2019 elections. They were trained on how to use the Forms exhibited. He conceded that some documents attached were filled at a polling centre, and that he did not witness them being prepared. Neither did he sign on the same. The documents were brought by POs and he personally received each one of them. He would then pass them on to auditors.

He conceded that there were alterations on some of the documents but he did not effect those. He further confirmed that none of the documents had been altered with tippex. He did not authorize the alterations.

In cross-examination by Counsel for the 2nd and 3rd Respondents he confirmed that his duty station was Constituency Tally Centre and cannot really say what was happening at the polling centre. They had monitors for different parties and for Mr Thipiwa. He confirmed that the document on p.21 was a Form 72B and he signed as RO. The auditors were checking the results from the centres. Form 72B was only signed after everyone had signed. He did not receive any complaints about his performance, not even from MEC.

DW 2 was Yesaya Alfazema. He told the court that during the 2019 Tripartite Elections he was PO for Malota Mpembamoyo Centre. He adopted his sworn statement and attached exhibits. In cross-examination by counsel Dzonzi he told the court that he had participated in elections four times since 1994. He was familiar with Forms used to tabulate results. Form* 66B is used for recording results. Ballots were serially marked and there were 100 ballots in a booklet. There would be a counterfoil for each ballot paper removed. Unused ballots are those remaining in the booklet. Accounting of the ballots is done before counting the votes. Alteration under A & B were done at the Constituency Tally Centre. He did the alterations when the results were not balancing. The document he took to the tally centre was clean.

The monitors who signed at the polling centre were the witnesses and not when the changes were made at the tally centre. IT people were the ones who told him which and where to make the changes. In cross-examination by counsel for the 2nd and 3rd Respondents he reiterated that he was PO for Maloto Mpembamoyo where they had two streams. No monitor at the tally centre contested the results. The monitors at the tally centre were aware of the changes as they were done in their presence. The alterations did not affect the received ballots nor did they affect number of votes polled by each candidate. No monitor raised complaints about the manner of counting the votes.

DW 3 was Samuel Mizedya. He told the court that during the 2019 Tripartite Elections he was engaged by MEC as PO for Namilembe Polling Centre. He

adopted his sworn statement and attachments. In cross-examination by Counsel Dzonzi, the conceded that he was trained to be a PO. He was trained about tabulation of results. Form 66B was used for recording stream results. Form 66B was Polling Station Result Sheet. He effected changes on Form 66B, that is, unused ballot papers to 26. This was done at the tally centre where they were told to make changes for the Form to balance. The auditor is the one who noticed the problem. From the polling centre the document had not been altered. The monitors at the tally centre and not those from the polling centres were present when the alterations were made.

DW 4 was McMillan Maulana. He told the court that during the 2019 Tripartite Elections he was the PO for Mpatsa Centre. He adopted his sworn statement and the attached documents. In cross-examination by Counsel Kossam he told the court that he had some experience in elections. He underwent a two-day training before the elections. They used Form 60 to record candidate results at the centre. In Form 59B they would indicate the ballot papers received. All stream results from Form 60B would then be transferred on to Form 66B. He had no authority to change Form 66B at the polling centre. He admitted to making alterations under E & F at p.206. At Mpatsa they physically counted and recorded the results. He did not sign the Form 66B as he had given the same to the APO to have monitors sign and he did not bring it back. He conceded that he did not follow procedure.

In cross-examination by counsel for the 4th Respondent he reiterated that he was at Mpatsa Polling Centre and that there were monitors for various political parties and security. He confirmed that no tippex was used. MCP had four monitors but only two signed. He did not notice any bias and there were no irregularities and complaints.

DW 5 was Fred Thomas. He informed the court that during the 2019 Tripartite Elections he was the CRO for Nsanje Central Constituency. He adopted his sworn statement. In cross-examination by counsel Dzonzi he confirmed that he looked at each and every result sheet in Nsanje Central. He conceded after being shown some result sheet that indeed they had tippex, but he recalls that he never received result sheets with tippex. He never saw these. As CRO he had never seen these tippexed documents. As for Mkango Phanga result sheet he could see that under Kasaila Stream 2 the zero has been written over, and under Stream 1 -248 he could

see tippex, so too for Katole Stream 2. And at Mthawira under Kasaila he conceded that he could change in station total which they get after adding stream 1 and 2. He did not see any political representative signing the result sheets. He never knew the signatures of the monitors in the Constituency. He would therefore not know if the signatures were forged. For the entire process he received no complaints.

He further conceded that he was the one in the video on the back of the motorcycle.. He conceded that he was arrested. The tally centre opened at 6 am and it was only closed after they had finished everything. Early morning of 22nd May when they were closing the tally centre they did not display the results. It was because when they came to the auditors to display, the system showed it had already transmitted the results. He therefore found it difficult to complete his work for fear it might differ with what had been transmitted. He explained to all party monitors in the room that they could not get the final results as everything had already been transmitted to MEC Headquarters.

In the morning while waiting for the vehicle assigned to him at the tally centre, that is when the people depicted in the video clip came. He explained to them the hiccup they had faced that the tally centre had no results which they could have published or displayed on the Notice Board because they failed to reconcile what was in the system and his handwritten ones. Then the people started making phone calls saying they had found "Ozembetsa mavoti uja." He escaped but the people later apprehended him and took him to the police. He was interrogated, his bag was opened and the tally results booklets were removed. They were for the whole Constituency. He was then put in a cell.

In the afternoon he was taken to the District Tally Centre where he found the District Electoral Team, the District Commissioner (DC), O/C Nsanje Police, NICE Head and others. In the morning, the District Elections Team, MEC officials and all monitors from the tally centre met and discussed the issue in his absence. Afterwards he was called in and after discussions everyone confirmed that the results were genuine and they signed. He was then told to go. He conceded that the 3rd Petitioner was not the reason he did not complete his work, it was due to the MEC system. He never saw results that were transmitted by the system. It was his responsibility to also dispatch all electoral materials.

In cross-examination by counsel for the 4th Respondent he confirmed that he received results from all the 26 centres and they were sealed. He showed these to all the monitors. At the time he received the Form 66Bs they were not tippexed. He checked that the Form 66Bs were signed by monitors. According to him Kasaila won. The complain which led to his arrest was to do with Presidential elections.

In re-examination he reiterated that the disturbance was due to the system.

DW 7 was Henzily Munkhondia, the Director of Electoral Services at MEC. He told the court that he exhibited Form 60B –result of count for the three constituencies. He also exhibited Form 66B –aggregated results from polling stations, Forms 71B & 72B. He adopted his sworn statement and attachments.

In cross-examination by counsel Dzonzi he told the court that together with his colleagues he was responsible for organizing the elections. The rationale for streams was to speed up polling. And each stream has maximum of 800 votes, A polling centre with more than 1000 registered voters will have two streams. Undersupply of ballot papers would be recorded in Form 59, unused ballots in Form 61. POS are required to record all major events at a polling centre and they did not record some of these. After polling and counting is through, stream results will be recorded in Form 60B. Monitors at the stream are given copies and then go to PO for aggregation of results by PO into Form 66B. In Form 60 they do not record total number of ballots received. Use of Record Log Book is not optional.

In the Booklet for Form 60B the first page is the original which the PO takes to the CRO, the others are given to the monitors and part of it placed on the Notice Board. There is also a result sheet with a duplicate copy and watermark. At printing there were monitors of political parties. He did not agree that having many originals would result in not knowing the actual results. Monitors were to get the green copies. A mark on the original would also appear on the carbonated copies. Pre-printed results sheets have details of a centre where they will be used. Reserved sheets were the fall back plan. They were left with CROs. A centre which did not get pre-printed one would be allowed to use those. Non-receipt of the pre-printed result sheets would be recorded in the Record Log Book.

He further informed the court that there would be a problem if number of ballot papers received was not indicated. Under paragraph 8 of the Record Log Book you

have to declare number of ballot papers to be accounted for. If you receive more ballot papers than expected there is a problem. Polling centres can only use ballot papers received. All ballot papers received must be accounted for. There is a relationship between Part A-F and candidate scores. Total of all candidate scores must be equal to E. He conceded that credible elections would be ones that are believable that processes were followed. That ballots not sealed, use of notebook might affect credibility. If PO indicates a number of unused ballot papers and somebody changes that would amount to electoral fraud. When one changes the number indicated as unused ballots might be an example of fabrication.

Form 66B not signed by PO as required that might be an irregularity. Changes could be made at the constituency in the presence of monitors. In the Record Log Book he would not expect figures to change after polling but on the Form 66B. Under station totals it's mathematical so you would expect to find errors which can be corrected mathematically. If at the tally centre they are not balancing then the CRO must order a recount and the ballot box can be reopened. He did not agree though that if you changed unused ballot papers you affect the candidate votes.

He conceded that at Ngwengwe the tally sheet did not indicate stream scores for Thipiwa but station total is indicated. He could not explain how that happened. PO did not sign and it's not dated. However that Ngwengwe was affected by floods and there were satellite centres which might have affected what happened. He could also not explain the alterations including station total for Khumbanyiwa. He conceded that for Nsanje North he had only exhibited one Form 60 instead of 41, If he had Form 60 he could confirm the results the candidate had at stream level. He conceded that in Nsanje North there were alterations which led to tippexing. The changes could best be explained by POs. He also conceded that PO must sign Form 66B but he saw a few in Nsanje North that were not signed. At Mchacha too he could not explain the alterations.

At Namilembe he also conceded there were changes and candidate scores were less than under E. The POs should be able to explain the changes. He could also not explain why reserve tally sheets were used in some centres when the customized ones were available.

In cross-examination by counsel for the 2nd and 3rd Respondents he confirmed that ID 5 was a booklet of Form 66Bs which were all originals. The white copy on top is the original and the others are for the stakeholders. Use of duplicates does not mean it's not original, the information is the same. The security features are the same on the documents. Ngwengwe had four centres due to the creation of the satellite centres. A satellite centre has no Form 66B. The satellites were recording on Form 60. Thipiwa got aggregate of 174 votes from all centres. He conceded that results for Ngwengwe which captured all the centres were different from the others. For Chikwawa East and Nsanje North they never got any complaints.

In cross-examination by counsel for the 4th Respondent he confirmed that on 24th May there was a dispute in Nsanje Central. Stakeholders were present during the dispute resolution. Petitioners had monitors during that meeting. They went through each result sheet of Nsanje Central to verify. There were no centre whose results were falsified. Mr Thomas was exonerated. In re-examination he reiterated that changes in the statistical part of Form 66B do not affect candidates' results as these are obtained from the ballot box and not outside. The exhibited results from all the constituencies but none of the petitioners challenged them. None of the three sets of results are different from each other when it comes to candidate scores. Even at the National Tally Centre (NTC) the manual and computer generated results were the same.

He further informed the court that there might have been alterations but these were to correct errors where tippex was concerned. These were mostly on the statistical part and not the candidates' votes. As regards satellite centres, the same was communicated to the 1st Petitioner and his monitors were there.

Issue (s) for Determination

The main issues for the court's determination are:

- a. Whether or not the 1st Respondent correctly declared the 2nd, 3rd and 4th Respondents as the duly elected Members of Parliament for Nsanje North Constituency, Chikwawa East Constituency and Nsanje Central Constituency respectively?

Applicable law and Analysis

This being an election petition, it is, a civil case. In the case of **Simeon Harrisson vs The Electoral Commission and 2 Others, Election Petition Cause No. 10 of 2019**, this Court had this to say:

"I am thus mindful that this being an electoral petition, it is a civil matter and must be treated like one. I am also mindful that in a civil matter, the Petitioner as the one who alleges or asserts, bears the burden of proof. And the standard of proof in civil proceedings is proof on a balance of probabilities."

In the case of **Miller v Minister of Pensions [1947] ALL ER 372** at pages 373 and 374 Denning J had this to say:

"If the burden 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."

And in the case of **Mike Mlombwa t/a Countrywide Car Hire v Oxfam, Civil Cause No. 2343 of 2003**, Manyungwa J had this to say:

"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..."

I must agree with the submissions by Counsels for the Respondents that in an election matter like this one, the burden of proof on the Petitioners goes beyond just proving that there were irregularities in the Parliamentary Elections in the said three constituencies. The Petitioners must do more. They must go further and actually establish that the alleged irregularities affected the election results. In the case of **Laston Thawale v Malawi Electoral Commission and Phillipo Chinkhondo, Miscellaneous Civil Case No. 41 Of 2009** the Court held that:

"It would not be enough to establish that an irregularity might have affected an election result for the court to declare the election result a nullity. The irregularity must in fact have affected the election result for it to lead to an annulment of the election. The burden is on the Petitioner to establish that an alleged irregularity affected the result of an election."

Similarly in the case of **Loveness Gondwe and Malawi Electoral Commission v Catherine Gotani Nyahara [2005] MLR 121 at p.121** the Supreme Court of Appeal had this to say:

"The law in this country with regard to disputed elections is simple. It goes like this: An election will be invalidated if the irregularity, mistake or error complained of did not affect the result of election."

The learned Justices of Appeal went on at p. 131 as follows:

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

Thus, the Petitioners, in the matter at hand, bear the burden to establish and prove that there were irregularities, as they alleged, and that these irregularities affected the Parliamentary results in the said three constituencies. It is my considered view that further to the established principles on the burden of proof, in matters like this one, where especially the 1st Respondent has a major role to play in the conduct of elections, once the Petitioner has satisfied his burden, or has established a prima facie case, the burden shifts to, in this case, the 1st Respondent to establish that indeed the 2nd, 3rd and 4th Respondents were duly elected Members of Parliament for the said three constituencies respectively.

Section 114(3) of the Parliamentary and Presidential Elections Act (PPEA) stipulates as follows:

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

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

(b) that persons not entitled to them were improperly granted ballot papers; or (c) that persons entitled to them were improperly refused ballot papers:

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

involved could not have affected the result of the election;

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

Provided that, if the court is satisfied that any failure to comply with this Act did not affect the result of the election, it shall not declare the election void;

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

However the Supreme Court, in the case which I have heavily relied on for guidance, of **Professor Arthur Peter Mutharuka and The Electoral Commission v Dr Saulos Klaus Chilima and Dr Lazurus McCarthy Chakwera**, MSCA Constitutional Appeal No. 1 of 2020 (hereinafter referred to a **Presidential Elections Appeal Case**) at p. 89 had this to say:

*“As rightly observed by the Court below, in **Ulemu Msungama v The Electoral Commission**, Miscellaneous Case Number 8 of 2014 (unreported) (HC) the Court “takes the position that, on their own, glaring irregularities can affect the result of an election. Thus, a court may annul the results of an election on account of irregularities arising from non-compliance with provisions of an electoral law.”*

The Supreme Court went on at pp. 89 to 91 to state as follows:

*“This Court in the case of **Bentley Namasasu v Ulemu Msungama and The Electoral Commission** MSCA Civil Appeal 8 of 2016, said the following which is instructive:*

*“The second ground, cumulatively, which the appellant pleaded was that there was no irregularity or that the Court did not find that the irregularity could affect the results. 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 the reasons for filing a petition under section 100 of the PPEA. Further, we find that the appellant did not refer to the four reasons, among others, that the Court below found would not allow it to make a determination. The appellant only criticized the Court below for relying on the affidavit of the former Chairperson of the second respondent; late Justice Mbendera SC, than that of Mr*

Lellie Longwe. 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 results. The difference in the vote count and conclusion thereon were not material to the decision of the Court below. We would go further, that even if we take the argument of the appellant to its logical conclusion, we find that both he and second respondent only relied on vote count based on re-computation of the available documents. They did not, at all, refer to the votes that were allegedly wrongfully declared null and void. Their affidavits only averred that the ballot boxes were destroyed by fire. In their submissions both submitted that the onus was on the second respondent to prove or establish that the irregularity complained of affected the results. Their case was that the second respondent failed to establish that the irregularities affected the results..... “

The Supreme Court from pp. 91-92 went on to state as follows:

“This Court has thoroughly considered the process of conducting an election in Malawi. If what we have laid down as a process of conducting or managing an election has been largely compromised, as is suggested above, it will be hard for a court in Malawi to uphold such an election. This is more so when one considers that the resulting vote numbers might come about as a result of irregularities or the flouting of the electoral law. 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, whether to apply the qualitative or quantitative test will largely depend on the manner the petition has been framed. Accordingly, 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.”

And section 100 of the PPEA 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.
- (5) A declaration by the High Court under subsection (3) (b) shall not invalidate anything done by the President before that declaration. ”

The Supreme Court concluded and I fully agree, that the said section 100 of the Act, is largely about quality; but there will be situations where quantity will be for consideration under the part of the section talking about “**any other cause.**” It is therefore open to the court to employ either the qualitative or quantitative approach, meaning that the court can nullify an election if it is satisfied that there has been failure to comply with the Act or any other electoral laws; or where irregularities have affected the results of the election. The Supreme Court at page 78 had this to say:

“As we understand it, in literal sense, quantitative relates to or denotes measuring by the quantity or numbers whereas qualitative pertains to or concerns measuring or measured by the quality of something. 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."

In the matter at hand, it is therefore within this court's discretion to also annul the elections herein if it is satisfied that there was non-compliance with the relevant laws in that the irregularities and non-compliance with the law affected which have affected the election. An election must represent the will of the people and not otherwise.

In the Petition the Petitioners have pleaded that the 1st Respondent however committed errors and irregularities in the voting process, counting and tabulation of results; committed irregularities and improprieties that significantly affected the election result; illegally declared the three persons named in paragraph 1 above as winners; failed in the entire process of relaying and transmitting election results as required by law; and generally committed contraventions and violations of the electoral process. I note however that the Petitioners did not herein particularize the specific instances of what they are alleging herein. As already stated herein, he who alleges must prove. And to prove one's assertions in a court of law, one must adduce evidence.

Mr Henzily Munkhondia, the Director of Electoral Services at MEC confirmed the use of tippex but justified it as correcting mathematical errors. He went on to contend that alterations using tippex or otherwise on Part A-F of Form 66B did not affect candidate scores. He also informed the court that POs were supposed to record major incidences or events at the polling centre but some did not. He conceded that at Ngwengwe (Chikwawa East Constituency) the tally sheet did not indicate stream scores for Thipiwa but station total is indicated. He could not explain how that happened. PO did not sign and it's not dated. He could also not explain the alterations including station total for Khumbanyiwa. He conceded that for Nsanje North he had only exhibited one Form 60 instead of 41, If he had Form 60 he could confirm the results the candidates had at stream level. He further conceded that in Nsanje North there were alterations which led to tippexing. The

changes could best be explained by POs. He also conceded that the PO must sign Form 66B but he saw a few in Nsanje North that were not signed. At Mchacha too he could not explain the alterations.

At Namilembe (Nsanje North Constituency) he also conceded there were changes and candidate scores were less than under Part E of Form 66B. In re-examination he reiterated that changes in the statistical part of Form 66B do not affect candidates' results as these are obtained from the ballot box and not outside. The exhibited results from all the constituencies but none of the petitioners challenged them. None of the three sets of results are different from each other when it comes to candidate scores. Even at the National Tally Centre (NTC) the manual and computer generated results were the same. This witness, a senior officer at MEC sees no problems with tippex being used on Form 66B or alterations being made on the same as long as the candidates' scores or votes are not affected. And as long as these alterations were for correcting errors and tippex was used there was no problem.

Returning Officer for Chikwawa East Constituency was DW 1, Grasten Chisale, also conceded in his testimony that there were alterations on some of the documents but he did not effect those. He further confirmed that none of the documents had been altered with tippex. He did not authorize the alterations. It is also in the evidence of DW 2, Yesaya Alfazema, who was PO for Malota Mpembamoyo Centre (Nsanje North Constituency), that alterations under Part A & B of Form 66B were done at the Constituency Tally Centre. He admitted that he did the alterations when the results were not balancing but the document he took to the tally centre was clean. The monitors who signed at the polling centre were not present when he made the alterations. He further told the court that it was IT people who told him which and where to make the changes. In his view the alterations did not affect the received ballots nor did they affect number of votes polled by each candidate.

In his testimony, DW 3 Samuel Mizedy, PO for Namilembe Polling Centre, told the Court that he effected changes on Form 66B, that is, unused ballot papers to 26, and this was done at the tally centre where they were told to make changes for the Form to balance. The auditor is the one who noticed the problem. From the polling centre the document had not been altered. DW 4, McMillan Maulana, PO for

Mpatsa Centre. He told the court that he had no authority to change Form 66B at the polling centre. He admitted, though, to making alterations under E & F at p.206. He did not sign the Form 66B as he had given the same to the APO to have monitors sign and he did not bring it back. He conceded that he did not follow procedure.

In his testimony, DW 5, Fred Thomas, CRO for Nsanje Central Constituency. He confirmed to the Court that he looked at each and every result sheet in Nsanje Central. He conceded after being shown some result sheet that indeed they had tippex, but he recalls that he never received result sheets with tippex. He never saw these. As CRO he had never seen these tippexed documents. As for Mkango Phanga result sheet he could see that under Kasaila Stream 2 the zero had been written over, and under Stream 1 -248 he could see tippex, so too for Katole Stream 2. And at Mthawira under Kasaila he conceded that he could change in station total which they get after adding stream 1 and 2.

It was his further testimony that early morning of 22nd May when they were closing the tally centre they did not display the results. It was because when they came to the auditors to display, the system showed it had already transmitted the results. He therefore found it difficult to complete his work for fear it might differ with what had been transmitted. He explained to all party monitors in the room that they could not get the final results as everything had already been transmitted to MEC Headquarters. His evidence is clear testimony that by not displaying the results they did not comply with the law. His further justification that the tally centre had no results which they could have published or displayed on the Notice Board because they failed to reconcile what was in the system and his handwritten ones cannot hold water. Why did he not display what he had? He further conceded that he never saw the results that were transmitted by the system. And yet it was his responsibility to dispatch results and all electoral materials. And he still came to the conclusion that the 4th Respondent won.

I am satisfied and it is the finding of this court that the Petitioners has established and proved existence of irregularities and improprieties committed by the 1st Respondent's officers through non-compliance with the Act, and generally committed contraventions and violations of the electoral process. In all the constituencies, it has been demonstrated that there were alterations and use of

tippex on Form 66B. The Respondents admit existence of these irregularities but contend that they did not affect the results. In the ***Presidential Elections Appeal Case*** (supra) the Supreme Court at pp.56-57 stated as follows:

"The alteration of results at any stage is, therefore, unlawful. The use of tippex or alteration and overwriting on results sheets was a gross irregularity. As we have indicated above not even the Commission itself can alter the results under section 113 of the Act under the guise of correcting and resolving complaints. The Commission must instead keep the original documents as received and resolve any complaints on a separate record."

The Explanations given by various officers of the 1st Respondent as to why they made alterations or used tippex on the results, in particular, to correct mistakes, was against the dictates of the law. You cannot justify anything done in contravention of the law. It is clear that the Petitioners have proved, as found herein that, some results sheets had their figures altered using correction fluid [tippex] unilaterally by the Respondent's officers. This created a perception that these alterations were intended to favour the said DPP candidates. The use of tippex and the alterations on the result sheets affected the integrity and credibility of the elections in these three Constituencies. I also take judicial notice of the fact that the Supreme Court declared Constitutional Tally Centres unlawful, and it has transpired in evidence that it was at these centres that most of the changes to the result sheets were done. In other respects result sheets were transmitted without the signature of Presiding Officers as conceded even by Mr Munkhondia

It has also been established, and I reiterate, that some figures on the results sheets coming from polling stations were being changed by the Respondent's officers unilaterally without consultation or verification by the Petitioner's monitors and even monitors of the other candidates in order for the said figures to balance in the Respondent's system. Some of the results sheets coming from polling stations were not signed for by the monitors at the polling stations and some people were being asked to sign for them in the Tally Centre.

Although in Nsanje Central Constituency, the Constituency Returning Officer was actually arrested for being caught in flagrante delicto, some results, it was not established that he was marking ballot papers as votes of the DPP Candidate. In

fact during a dispute resolution meeting chaired by the DC for Nsanje he was exonerated. It was also discovered that whatever results he was found with related to the Presidential and not Parliamentary elections.

Findings

All in all, it is the finding of this court that that the non-compliance with the Act as evidenced by alterations of results using tippex or otherwise, transmitting results without signatures of some Presiding Officers, as borne out in the evidence of Mr Mukhondia and Mr Fred Thomas, a mandatory requirement for Presiding Officers to sign these result sheets, puts into serious question the credibility of the parliamentary elections in these constituencies. The Supreme Court in the ***Presidential Elections Appeal Case*** (supra) at p. 57 stated as follows:

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

It is also a finding of this court on the totality of the evidence before this. Some results sheets had their figures altered using correction fluid [tippex] unilaterally by the Respondent’s officers. In addition, figures on the results sheets coming from polling stations were being changed by the Respondent’s officers unilaterally without consultation or verification by the Petitioner’s monitors and even monitors of the other candidates. That in Nsanje Central Constituency the results were transmitted before verification by all stakeholders and without the knowledge of the Constituency Returning Officer.

On the evidence before this court, and on the observations herein I grant the Petitioners Petition as this court is satisfied that the parliamentary elections conducted or held on the 21st day of May 2019 in Chikwawa East Constituency, Nsanje North Constituency and Nsanje Central Constituency, respectively were affected or marred by irregularities as defined by section 3 of the Parliamentary and Presidential Elections Act.

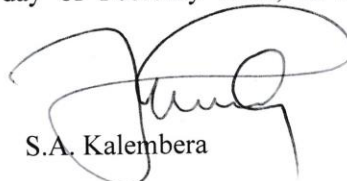
Declarations

Having granted the Petition herein, I am satisfied that the Petitioners have demonstrated, established and proved to the required standard, that due to the irregularities observed herein, the election and the the results ought to and were affected such that, the Parliamentary results declared and announced by the 1st Respondent do not reflect the will of the people and electorate who participated in that vote. Thus, the Petitioners, has proved that the 1st Respondent incorrectly declared the 2nd Respondent, 3rd Respondent and 4th Respondent as the duly elected Members of Parliament for Nsanje North Constituency, Chikwawa East Constituency, and Nsanje Central Constituency respectively. Consequently, I nullify the Parliamentary results of the said three Constituencies as declared and announced by the 1st Respondent.

Having so nullified the results of the said three Constituencies, I order and direct that the 1st Respondent must , according to law, hold fresh parliamentary elections in Nsanje North Constituency, Chikwawa East Constituency and Nsanje Central Constituency respectively, within 60 days from the date hereof.

Costs are for the Petitioners.

PRONOUNCED this 4th day of February 2021, at the Principal Registry, Blantyre.



S.A. Kalembera

JUDGE