The Hon Justice Kalaile SC, JA

THE REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL
AT BLANTYRE

CRIMINAL APPEAL NO. 1 OF 2007
(Being High Court Criminal Appeal No. 48 of 2006)

BETWEEN

THE REPUBLIC.....APPELLANT

AND

LUCIUS CHICCO BANDA..... RESPONDENT

BEFORE: **HONOURABLE JUSTICE** MTEGHA SC., JA
HONOURABLE JUSTICE KALAILE SC., JA
HONOURABLE JUSTICE TEMBO SC., JA
S. Kayuni, J. Kayuni, M. Chizonde and Ng'ong'ola Counsel for the Appellant
Chisanga and Mwankhwawa, Counsel for the Respondent.

MTEGHA, JA.

This is an appeal by the State against the decision of the High Court in acquitting the appellant.

The Respondent was charged before the Chief Resident Magistrate sitting at Zomba with three counts under the Penal Code. He was charged, on the first count, with uttering a false document contrary to s. 360 as read with s. 356 of the Penal Code. It was alleged that the Respondent, in February 2004, in the District of Balaka, knowingly and fraudulently uttered a false document

namely a Malawi School Certificate of Education number 1951/91 to the Balaka Returning Officer Atanazio Gabriel Chibwana. In the second count, which was in the alternative to the first count, the Respondent was charged with the offence of procuring the execution of documents by false pretences contrary to s. 362 as read with s.356 of the Penal Code. Finally on the third count, he was charged with the offence of giving false information to a person employed in the Public Service contrary to s.122 of the Penal Code. The Particulars of this offence alleged that the Respondent in the month of February 2004, in the District of Balaka knowingly and fraudulently gave false information to the Balaka Returning Officer Atanazio Gabriel Chibwana causing him to omit to conduct prescribed English Proficiency Test for Members of Parliament which he would have done if the true state of facts respecting which information is given were known to him as required by a person employed in the Public Service.

The facts leading to these charges are briefly as follows: In 2004 there were to be Presidential and Parliamentary General Elections. Candidates requiring to contest in these elections as Members of Parliament were required by the Malawi Electoral Commission to sit for the English Proficiency Test if they did not have a Malawi School Certificate of Education (MSCE) or its equivalent or any certificate above MSCE. Mr. Chibwana, testified to the effect that he was the Returning Officer for the Malawi Electoral Commission during the 2004 General Elections and he was mandated to receive nomination papers from candidates wishing to stand as candidates for election as Members of Parliament. One of those candidates was the Respondent. He said that the Respondent did not sit for the English proficiency test because he attached, to his nomination papers, a copy of MSCE certificate issued by The Malawi National Examination Board (MANEB) indicating that he had the required qualifications. The certificate number was 1951/91. He produced the certificate as Ex VIII b and the other documents as Ex VIII a. After the elections were conducted, the Respondent emerged as a successful candidate and was elected as a Member of Parliament.

The other witnesses that testified during the trial was Ruth Mankhambera, a teacher at Bilira Community Day Secondary School, Alfred Blessings Mandala, a student at Mangochi Secondary School in 1991, and Mr Harawa, Director of Security at MANEB.

The evidence of Ruth Mankhambera was that police went to Bilira Community Day Secondary School and requested to examine school records regarding the 1991 MSCE examinations, in particular, the results regarding

the Respondent. In the absence of both the Headmaster and his deputy, who were out, she produced the records. They showed that the Respondent failed MSCE and she tendered the documents from MANEB showing that the Respondent failed the examination that year.

As far as the evidence of Blessings Mandala is concerned, he testified to the effect that he sat for MSCE examinations at Mangochi Secondary School and passed the examination and was awarded certificate number 1951/91.

Finally, the other witness who testified before the Court was Mr. Harawa. His evidence was to the effect that he was the Director of Security at MANEB, as we have mentioned earlier. He told the Court that each certificate issued by MANEB carries the name of the candidate and the year of qualification and is specific to that particular individual and no two persons could have the same certificate number, neither could two centres have the same number. He went on to say that his department verifies certificates for their authenticity and if a certificate does not tally with the information in MANEB'S data base then it is not genuine. He went on to say that in October 2005 Police brought to him Ex. VIII b for verification. It was a certificate bearing the name of Lucius Chicco Banda. When verified with the information from the Data Base, the information showed that the rightful owner of the certificate number 1951/91 was Alfred Blessings Mandala of Mangochi Secondary School, whose examination number was 34/044. When he further checked Ex VIII b, it was found that the examination number for this certificate belonged to a girl by the name of Zione Precious Mangwiro of Chiradzulu Secondary School who did not sit for the examination. Copies of all these documents were tendered in Court.

At the close of the Prosecutions case, and after submissions of no case to answer, the learned Chief Resident Magistrate found that there was a case for the Respondent to answer under s. 254 of the Criminal Procedure and Evidence Code (CP&EC). When the Respondent was called upon by the court to give evidence in his defence, his counsel, Mr. Makhwawa said:

> ***"The accused person will exercise his right to remain silent. In this respect it is the intention of the defence to supplement its submissions. He will therefore request that we supplement the submission to address specific issues relating to standard of proof requiring entering a conviction."***

A few weeks later, after receiving and considering submissions from both counsel, and without hearing both counsel *viva voce,* the Court delivered its verdict. The accused was found guilty on counts one and three. The second

count fell off. He was sentenced to 21 and 6 months respectively. The sentences were made to run concurrently.

Being dissatisfied with both the conviction and sentence, the Respondent appealed to the High Court where he was acquitted on both counts and the sentences were set aside.

The State now appeals to this Court against that acquittal and praying to the Court to uphold the conviction by the Chief Resident Magistrate and in the alternative, to order a retrial.

A preliminary issue that was taken up before us was the issue of jurisdiction of this Court to hear an appeal against an acquittal. The answer lies in s.11 (3) of the Supreme Court of Appeal Act which provides as follows:

> ***"The Director of Public Prosecutions may appeal to the Court against any judgment, including a finding if acquittal, of the High Court, if and only if, he is dissatisfied with such judgment on a point of law. Subject as aforesaid, no appeal shall lie against a finding of acquittal made by the High Court."***

The position which this court has taken in this regard is stated in the case of **Price v Republic** 1971-72 ALR 65. In that case, Skinner CJ, after reviewing cases from the Federal Court of Appeal and the East African cases said this in delivering the judgment of the Court:

> ***"It is necessary for us to consider whether in view of s.11 the appeal lies. We are satisfied that it does.***
>
> ***It was said in East African case, Pandya v R. (9) by Bacon, J.A., after he had reviewed the authorities dealing with the approach to be applied by an appellate court to an appeal on fact ([1957)] E.A. at 338):***
>
> ***'In our view the principles declared in those passages are basic and apply with equal force to a first appeal from a conviction by a judge or magistrate sitting without a jury in any of the territories within the jurisdiction of this court. On a second appeal to court (where, as in the present case, the trial was before a magistrate) it becomes a question of law as to whether the first appellate court, on approaching its task, applied or failed to apply those basic principles.'***
>
> ***The East African Court of Appeal in that case held that the first appellate court erred in law in that it had not treated the evidence as a whole to a fresh and exhaustive scrutiny and on the appeal to the second appellate court it became a question of law. The court held that the first appellate court erred in law and, as a result of its error, affirmed a***

conviction resting on evidence which, had it been duly reviewed and weighed, must have seemed to be so defective as to render the conviction manifestly unsafe.

In the Malawi case of John v R (5), it was held by the Federal Supreme Court that as the High Court on appeal did not properly consider whether or not the irregularity which was present was such as to result in a reversal of verdict, this was a matter of law upon which the appellant was entitled to be heard on a second appeal. The irregularity in that case was a failure of the first appellate court to apply to the proper test where the magistrate's judgment was inadequate.

We are not of course bound by the decision of the East African Court of Appeal, but in our view the principles declared in Pandya v. R. (9) are correct and apply with equal force to a second appeal to be heard by this court. We are reinforced in this opinion by the decision in John v. R. (5) where the irregularity was different to that in the present case, but the principle upon which the irregularity was remedied is equally applicable.

We are satisfied that a failure by first appellate court to appreciate its duty in law when hearing an appeal on facts constitutes a matter of law appellable to this court in terms of s.11 of the Supreme Court of Appeal Act."

Nine grounds of appeal were filed. These were:

1. *The Learned Judge erred in law in holding that the state had to prove that the words "photocopy of my MSCE certificate" were written by the accused in order to prove the offence of giving false information to a person employed in the public service under section 122 of the Penal Code.*

2. *The Learned Judge erred in law in disregarding provisions of Sections 3 and 5 of the Criminal Procedure and Evidence Code with regard to whether the objections to the charge under Section 122 of the Penal Code being deficient could have been made in the trial court.*

3. *The Learned Judge erred in law in holding that the defect in the charge under section 122 of the Penal Code occasioned failure of justice.*

4. *The Learned Judge erred in law in holding that the conviction be quashed due to the admission of exhibits PEX viii (a) and PEX viii (b) when the appellant or counsel for the appellant never objected to them being so admitted in the trial court.*

5. *The Learned Judge erred in law in failing to distinguish the effect of the right to remain silent where the accused is represented by*

counsel who is equally objecting and cross-examining during prosecution's case and where the accused is not represented.

6. ***The Learned Judge erred in law in allowing new issues on appeal pertaining to admissibility of documentary evidence when such issues should have arisen in the trial court.***

7. ***The Learned Judge erred in law in holding that the prosecution should have furnished a notice to produce the original of Exhibit PEX viii (b) to the accused person during trial when such notice was not required.***

8. ***The Learned Judge erred in law in failing to appreciate its duty in law when hearing an appeal on facts for not considering issues in contention.***

9. ***The Learned Judge erred in law in acquitting the appellant when the evidence disclosed a case against the accused in respect of the offences charged.***

Looking at the grounds of Appeal, we are satisfied that they raise important points of law and therefore we can entertain the appeal.

Counsel for the Appellants has argued grounds one to four of the grounds of appeal together. We shall consider them in the like manner. Learned counsel for the Appellant has submitted that in terms of s. 3 of the CP&EC the principle that substantial justice should be done without undue regard to technicality shall at all times be adhered to in applying the CP&EC. He went on to say that s. 5 of the same Code provides that subject to s. 3 and to other provisions of the Code, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or review on account of an error, omission or irregularity in the complaint, summons warrant, charge, proclamation order judgment or other proceedings under this Code unless such error omission or irregularity has in fact occasioned a failure of justice, provided that in determining whether any such error omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether such objection could and should have been raised at an earlier stage in the proceedings. He therefore submitted that failure by the Court to apply these provisions of the CP&EC as argued in the in the High Court was wrong, for example, the refusal to invoke ss.3 and 5 of the CP&EC.

One such point that was taken up in the Court below was the propriety of the framing of the charges. It was argued in the Court below that the charges were defective and that they did not disclose any offence as required by s

128 of the CP&EC. Therefore s. 5 of the CP&EC has no application. Section 128 of the CP&EC stipulates as follows:

> ***"The following provisions shall apply to all charges and notwithstanding any rule of law or practice, a charge shall, subject this code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this code: -***
>
> ***(a) (i) a count of a charge shall commence with a statement of the offence charged, called the statement of offence;***
>
> ***(ii) the statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by written law, shall contain a reference to the section, regulation, by-law or rule of the written law creating the offence;***
>
> ***(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:***
>
> ***Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge, nothing in this paragraph shall require any more particulars to be given than those so required."***

The offence under s.122 of the Penal Code is framed as follows:

> ***"Whoever gives to any person employed in the public service any information which he knows or believes to be false intending thereby to cause, or knowing it to be likely that he will thereby cause such person employed in the public service –***
>
> ***(a) to do or omit anything which such person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or***
>
> ***(b) to use the lawful power of such person employed in the public service to the injury or annoyance of any person, shall be guilty of a misdemeanour and shall be liable to a fine of K300 and to imprisonment for three years."***

As we have said earlier on, the particulars of the offence averred that the Respondent ***in the month of February 2004 in the District of Balaka knowingly and fraudulently gave false information to the Balaka***

Returning Officer, Atanazio Gabriel Chibwana causing him to omit to conduct the prescribed English proficiency test for Members of Parliament which he would have done if the true state of facts respecting which information was given were known to him as required by a person employed in the Public Service.

In his judgment the learned Judge said:

> ***"The essence of the arguments of Mr Chisanga is that this charge did not disclose any offence at all. If at all any offence was disclosed the same was the creation of the prosecution and not parliament. The words used in Section 122 appear to be plain and unambiguous. The actus reus of the offence consists in the giving to a person employed in the public service any information. The mens rea consists of knowledge of the giver of that information or belief that the information is false. Further the giver of that information must have intended to cause or have knowledge that the false information will likely cause such public servant to do or omit to do what he should have done or do what he should not have done had the true state of facts been known to that public servant. The prosecution relied on the alleged fact that the appellant gave the returning officer at Balaka information that he had an MSCE certificate. As a result of this information the returning officer exempted the appellant from sitting for an English proficiency test.***
>
> ***Did the appellant give this information? The prosecution relied on Exhibit VIII(a) which is the Nomination Form for a National Assembly candidate. At page 3 of that form it is indicated in writing the following words:***
>
> ***Photocopy of my MSCE Certificate***
>
> ***This is in column V. The evidence in the lower court does not show conclusively as to who wrote this. No evidence was called to prove that it was the appellant who wrote these words. The assumption that operated on the minds of the prosecution and the court was that since the nomination form was for the appellant, then it must be the appellant who wrote these words.***

As a result the judge held that the charge was defective and that it was not proved beyond reasonable doubt that the itemised words were written by the Respondent and consequently there was no *nexus*.

With due respect to the learned Judge we do not agree with his interpretation of the evidence on this point. The issue before the learned Chief Resident Magistrate was not who wrote or the words "*Photo copy of my MSCE*

Certificate" on the nomination form, but the uttering of the alleged forged Certificate to the Returning Officer which, upon reading it, conveyed to the Returning Officer that the Respondent had an MSCE Certificate which entitled the Respondent to forego the sitting of the English Proficiency Test. Even if the italicised words were omitted, the question before the Court was whether the certificate was genuine or not. From the evidence before the magistrate's court, the certificate tendered to the Returning Officer, showed that it was not genuine, as we shall show later on in this judgment. This is what the evidence disclosed.

Section 126 (a) (ii) of the CP&EC simply states that every charge shall contain, and shall be sufficient if it contains, a statement of a specific offence with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. In our view, the particulars were sufficient. We hold that the Respondent clearly understood the charges and also understood what he was answering for. In the case of **Chunara v Republic, 1968-70 ALR Mal 315** it was held that a charge based on the wrong section of the law, which was not the case in the present case, but having sufficient particulars which revealed an offence of making a false document and the accused understood what he was answering, was a proper case to invoke s. 5 of the CP&EC. Looking at the charges and particulars of the offences, and the totality of the proceedings in the Chief Resident Magistrates Court, it is quite clear that the Respondent and his counsel understood what they were answering. In our view, this is a proper case to apply s. 5 of the CP&EC. There was no miscarriage of justice or indeed did it occasion a failure of justice. Section 5 is clearly applicable. The defects in the charges, if any, were cured by the particulars thereof. This ground of appeal succeeds.

Furthermore, s. 151 (1) of the CP&EC clearly states that every objection to any charge for any formal defect on the face of the charge shall be taken immediately after the charge has been read over to the accused. In the present case, no such objection was taken up until the case came up on appeal in the High Court. In our view, it was wrong for the Judge to allow the Respondent to raise and argue such issues of the defectiveness of the charges on appeal without the Respondent having raised them at the trial. This ground of appeal succeeds.

It was also argued, on behalf of the Respondent in the Court below and before us in this Court, that the requirement for one to have MSCE Certificate in order to be exempt from sitting English Proficiency Test is not

a requirement of electoral laws under s. 38 Parliamentary and Presidential Elections Act 1993.

In his judgment, the learned judge said:

> ***"Even assuming that these words were written by the appellant, were the words false? Again for a moment, the prosecution will be given the benefit of doubt that it had proved falsity of the document, what was the mens rea? The particulars of the offence quoted above indicate that the appellant did so knowingly and fraudulently to induce the returning officer not to conduct an English proficiency test. The prosecution provided a list of candidates who were to sit for English proficiency test because such candidates did not have MSCE Certificates or equivalent qualification. The State counsel argued that had the appellant not indicated that he had an MSCE Certificate he would have been required to sit for English proficiency test. Mr Chisanga has argued and rightly so in my view that the requirement for one to have an MSCE Certificate in order to be exempt from English proficiency test is not a requirement of the electoral law under Section 38 of the Parliamentary and Presidential Elections Act, 1993. Section 38(1) (b) (ii) provides –***
>
> ***Every candidate or election representative shall at the time of his nomination deliver to the returning officer-***
>
> ***(a) a nomination paper completed and executed in the prescribed form;***
>
> ***(b) evidence, or a statutory declaration by the candidate made before a Magistrate or a Commissioner for Oaths, that the candidate –***
>
> ***(i).....;***
>
> ***(ii) 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 will be seen from the reading of this Section that production of an MSCE Certificate is not a legal requirement for one to become a candidate or to be exempt from English proficiency test.***

The learned judge then cited the case of **The State and the Malawi Electoral Commission (Appellant) and Ex-parte Rigtone E. Nzima (Respondent)** MSCA Civil Appeal No. 17 of 2004.

> ***"Our position on the matter does not change, in the least, when section 51 (1) (b) of the Constitution is read together with section 38 (1) (b) (ii) of the P.P.E. Act. We hold the view that upon applying the ordinary rules of statutory interpretation, and against the background of section 51 (1) (b) of the Constitution, section 38 (1) (b) (ii) of the P.P.E. Act***

means the following: a candidate for Parliamentary elections is under a duty to proffer evidence, whatsoever and howsoever, or to make a statutory declaration, that he or she is able to read and speak the English language well enough to take an active part in the proceedings of the National Assembly. Evidence to be adduced or proffered is any evidence whatsoever, which in any given case is available to the candidate. Where one does not have any means of proof by way of any particular form of evidence, a candidate may, thus in the alternative, present a statutory declaration made by the candidate before a magistrate or a commissioner for oaths. Both the evidence and the statutory declaration, in the alternative, are means prescribed by the Legislature by which in any particular case a prospective candidate may show that she or he is able to read and speak the English language well enough in order for her or him to actively take part in Parliamentary proceedings. Thus, in any given case, either a submission of evidence or presentation of a statutory declaration would suffice. A candidate who adduces evidence besides presenting a statutory declaration is undoubtedly more than merely being suitably qualified for nomination.

There is no delegated power to the appellant for the prescription of any particular forms or levels of academic qualifications for the purpose, under section 38 (1) (b) (ii) of the P. P. E. Act. Besides, there is no power delegated to the appellant for the administration of the English language test, as a form of evidence in addition to the form of evidence or statutory declaration required under section 38 (1) (b) (ii) of the P.P.E. Act or section 51 (1) (b) of the Constitution. Be that as it may, we hold the view that a certificate issued upon the taking of such oral examinations would be part of the evidence, to be received under the relevant provisions of the Constitution or the P.P.E. Act, of the fact that a candidate has the required ability to read and speak the English language."

The learned Judge Chimasula Phiri went on to say:

"It will be noted that PW4 did not produce the original nomination form submitted by the appellant. A finding has already been made that he was not affirmative of the fact that the photocopies he saw in the lower court were indeed the copies of the documents which the appellant executed. At most he asserted his belief that these were the same documents he received. No basis for such belief was given to the court. There is no evidence in the lower court to show that the documents which the appellant had executed could not be found. It is common knowledge that MEC could have been authoritative on the whereabouts of the original nomination form. No reason was given for not calling a MEC official. The nomination form is not properly authenticated as required by law. The commissioner for oath does not show when he did the authentication and where. He does not indicate if the original documents were produced before him. He acted like a brief case lawyer and paid no regard to the legal requirement of authentication of

documents. The impression one gets is that the lawyer was in such a hurry that all he could afford was to put his signature on the photocopies. I have always stressed on ethical practice by lawyers because of the nobility of this profession. It was indeed proper for the prosecution as they did, to produce the original certificate of Alfred Blessings Mandala to prove that certificate number 1951/91 was issued to Mandala. No notice was given to the appellant to produce his original certificate. The evidence of Mr. Harawa too leaves a lot to be desired. He states in his evidence that he worked together with Mr. Bandawe yet it is only Mr. Bandawe who signed on the alleged fake certificate. Mr. Bandawe was not called as prosecution witness to confirm that Exhibit PEX VIII(b) is a fake certificate. It was equally a dangerous assumption by Mr. Harawa that PEX VIII(b) is a certificate which the appellant gave to the returning officer PW4 because even if it be accepted that the appellant tendered a certificate to PW4, Mr. Harawa was not present there and then. Even if it be accepted that the appellant tendered a certificate together with his nomination form, in the absence of authentication of such photocopy, it cannot be said with certainty that Exhibit PEX VIII(b) is the very document which the appellant tendered. The chances of the document being manipulated are in my view very high. I have further fears in my judgment that even if the appellant tendered a certificate, no details of such certificate are indicated on the nomination form. It could indeed be that the certificate so tendered indicated certificate number 1951/91 or some other number. It cannot conclusively be gathered from the evidence in the lower court that the appellant tendered certificate 1951/91. It should be observed that the returning officer was so laxed in the execution of his duties. Clear examples of this observation include the fact that the appellant was allowed to use in his nomination form names Lucius Chicco Banda and Lucius Chidampamba Banda interchangeably. In the same form at page 2 no date is indicated when the candidate gave his consent to the nomination. On page 3 under column IV where the appellant was supposed to tick in the alternative, both boxes were ticked. Finally on page 4 the statutory declaration is not completed. The returning officer should have meticulously checked the nomination form and ensured that it was correctly filled. With his experience he should have known that electoral issues are usually contentious and that the fall back position would be reference to the nomination form.

I would like to stress once again in this judgment that there is no legal obligation on the part of an accused person to prove his innocence. The legal and constitutional presumption is that the accused person is innocent. The duty to prove the guilt of accused person lies on the prosecution and the standard of that duty is extremely very high. The Court must not be left in doubt on the guilt of an accused person if a conviction is to be recorded.

In the present matter the state ably proved beyond any reasonable doubt that MSCE certificate number 1951/91 was awarded to Alfred Blessings

Mandala and that Examination Number 11/015 was for Zione Precious Mangwiro a female student of Chiradzulu Secondary School. However, the State failed to prove that Exhibit PEX VIII (b) which is a photocopy of an MSCE certificate in the name of Lucius Chicco Banda is a certificate which was tendered together with the nomination form by the appellant. This certificate was neither authenticated nor notice given to the accused/appellant to produce its original. Such an irregularity cannot be cured by sections 3 and 5 of the CP & EC. Moreover, courts have to exercise caution in the manner they apply these Sections in the light of the Constitutional right to remain silent. I am not satisfied myself that the prosecution had proved the charge of uttering a false document contrary to section 360 as read with section 356 of the Penal Code and I quash the conviction thereon."

He then concluded that the particulars of the offence were not supported by *any* statutory or Constitutional provisions and therefore the charges could not be cured with the provisions of sections 3 and 5 of the CP&EC and quashed the convictions.

With respect to the learned judge, the particulars of the offence, as was rightly pointed out by Counsel for the Appellant, could not and should not have been supported by the provisions of the Constitution or those of the Parliamentary and Presidential Elections Act because the Respondent was not charged with the offences under other statutes apart from the Penal Code.

In addition to what we have said earlier on the propriety of the charges, it appears to us that the learned judge was under a misconception of the law under which the charges were framed. The question before the learned Chief Resident Magistrate and indeed before the Judge in the High Court was not the **legality** of sitting for the English Proficiency Test, but **the uttering of a false document, and thereby giving false information to a person employed in the public service.** The documents referred to are EX VIII (a) and EX VIII (b) but in particular, Ex VIII (b). In view of what we have said, the documents which compromise EXVIII (a) are not relevant for purposes of proving the two offences that the Respondent was charged with. We ignore them. The case of **Nzima** is therefore not helpful in these circumstances. It is not helpful in this case.

Another point that was raised by counsel for the Appellant in this appeal was the refusal to admit, and therefore the exclusion of these documents by the Court below because they were secondary evidence.

It was submitted in the Court below and indeed in this court, that these documents should not have been admitted in evidence by the learned Chief Resident Magistrate because they were not originals but copies, and therefore they were secondary evidence and inadmissible under the provisions of Rules 3 and Rule 4 of the Criminal Procedure and Evidence (Documentary Evidence) Rules. The learned Judge accepted this submission. Counsel for the Appellant has submitted before us in this Court that the learned Judge was wrong to accept this submission.

It would be proper, in our view that we quote in extenso the relevant passage of the judgement which deals with this aspect of appeal. The relevant passage reads as follows:

> ***"It will be noted that PW4 did not produce the original nomination form submitted by the appellant. A finding has already been made that he was not affirmative of the fact that the photocopies he saw in the lower court were indeed the copies of the documents which the appellant executed. At most he asserted his belief that these were the same documents he received. No basis for such belief was given to the court. There is no evidence in the lower court to show that the documents which the appellant had executed could not be found. It is common knowledge that MEC could have been authoritative on the whereabouts of the original nomination form. No reason was given for not calling a MEC official. The nomination form is not properly authenticated as required by law. The commissioner for oath does not show when he did the authentication and where. He does not indicate if the original documents were produced before him. He acted like a brief case lawyer and paid no regard to the legal requirement of authentication of documents. The impression one gets is that the lawyer was in such a hurry that all he could afford was to put his signature on the photocopies. I have always stressed on ethical practice by lawyers because of the nobility of this profession. It was indeed proper for the prosecution as they did, to produce the original certificate of Alfred Blessings Mandala to prove that certificate number 1951/91 was issued to Mandala. No notice was given to the appellant to produce his original certificate. The evidence of Mr. Harawa too leaves a lot to be desired. He states in his evidence that he worked together with Mr. Bandawe yet it is only Mr. Bandawe who signed on the alleged fake certificate. Mr. Bandawe was not called as prosecution witness to confirm that Exhibit PEX VIII(b) is a fake certificate. It was equally a dangerous assumption by Mr. Harawa that PEX VIII(b) is a certificate which the appellant gave to the returning officer PW4 because even if it be accepted that the appellant tendered a certificate to PW4, Mr. Harawa was not present there and then. Even if it be accepted that the appellant tendered a certificate together with his nomination form, in the absence of authentication of such photocopy, it cannot be said with certainty that Exhibit PEX VIII(b) is the very document which the appellant tendered.***

The chances of the document being manipulated are in my view very high. I have further fears in my judgment that even if the appellant tendered a certificate, no details of such certificate are indicated on the nomination form. It could indeed be that the certificate so tendered indicated certificate number 1951/91 or some other number. It cannot conclusively be gathered from the evidence in the lower court that the appellant tendered certificate 1951/91. It should be observed that the returning officer was so laxed in the execution of his duties. Clear examples of this observation include the fact that the appellant was allowed to use in his nomination form names Lucius Chicco Banda and Lucius Chidampamba Banda interchangeably. In the same form at page 2 no date is indicated when the candidate gave his consent to the nomination. On page 3 under column IV where the appellant was supposed to tick in the alternative, both boxes were ticked. Finally on page 4 the statutory declaration is not completed. The returning officer should have meticulously checked the nomination form and ensured that it was correctly filled. With his experience he should have known that electoral issues are usually contentious and that the fall back position would be reference to the nomination form.

I would like to stress once again in this judgment that there is no legal obligation on the part of an accused person to prove his innocence. The legal and constitutional presumption is that the accused person is innocent. The duty to prove the guilt of accused person lies on the prosecution and the standard of that duty is extremely very high. The Court must not be left in doubt on the guilt of an accused person if a conviction is to be recorded.

In the present matter the state ably proved beyond any reasonable doubt that MSCE certificate number 1951/91 was awarded to Alfred Blessings Mandala and that Examination Number 11/015 was for Zione Precious Mangwiro a female student of Chiradzulu Secondary School. However, the State failed to prove that Exhibit PEX VIII (b) which is a photocopy of an MSCE certificate in the name of Lucius Chicco Banda is a certificate which was tendered together with the nomination form by the appellant. This certificate was neither authenticated nor notice given to the accused/appellant to produce its original. Such an irregularity cannot be cured by sections 3 and 5 of the CP & EC. Moreover, courts have to exercise caution in the manner they apply these Sections in the light of the Constitutional right to remain silent. I am not satisfied myself that the prosecution had proved the charge of uttering a false document contrary to section 360 as read with section 356 of the Penal Code and I quash the conviction thereon."

We have pointed out earlier on that documents comprising EXVIII (a) are irrelevant for purposes of proving the offences charged, so that although the learned Judge dwelt on them at length in his judgment, he was under a

misconception. We shall therefore only examine the admissibility of EXVIII (b) which we think is relevant to the case.

Rule 3 (5) of the Criminal Procedure and Evidence Code (Documentary Evidence) Rules stipulates that "secondary evidence may be given of the existence, condition, or contents of a document in the following cases - (a) "when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when after notice mentioned in rule 4 such person does not produce it; ..." Rule 4 prohibits the tendering of secondary evidence of the contents of documents referred to in rule 3 (5) unless the party proposing to give such secondary evidence has previously given notice to produce to the party in whose possession or power the document is, or to his counsel. There is however a proviso which states that *"such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or any other case in which the court thinks fit to dispense with it –*

> ***"(a) ...***
>
> ***(b) when, from the nature of the case, the adverse party must know that he will be required to produce it;***
>
> ***(c) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force:..."***

The evidence before the lower court was that EXVIII (b) was given to the Returning Officer by the Respondent purporting to be a copy of his, the Respondent's, certificate. That document purported to say that the Respondent had an MSCE certificate, and on the authority of what that document said, the Returning Officer, who was a public servant, did not administer the English Proficiency test as would have been the case had that document not been produced. There must have been the original certificate from which the copy presented to the Retuning Officer had been made or it was manufactured by the Respondent. Who gave the copy of the certificate to the Returning Officer? It is the Respondent. He must have had the original certificate or indeed he knew where it was or how he made it. The evidence showed that the gist of the charges was in relation to that certificate the original of which must have been in the possession of the Respondent. From the nature of the case, the Respondent must have known that he would be required to produce the original certificate. Further, it is our view, that looking at the evidence of Mr. Harawa, the copy of the certificate produced to the Returning Officer by the Respondent was not a genuine certificate; therefore the original must have been obtained or made by fraud. In either of

these situations, the proviso to Rule 4 of the Rules cited above applies. This was a case where notice to produce was not mandatory. The document was, in our view, properly admitted in evidence by the learned Chief Resident Magistrate. The learned Judge was wrong to exclude this evidence.

It was further submitted before us that the proviso to Rule 4 (b) violets the rights of an accused under s. 42 of the Constitution in that it requires him to produce evidence thereby imposing the burden of proof on him. We do not think so. The copy of the certificate that the returning officer produced in court was the same that was given to him by the Respondent when the Respondent was presenting his nomination papers. He was free to produce or not to produce the original in Court. He himself must have had it in his possession if it was genuine. He decided to exercise his Constitutional right to remain silent. If he desired not to produce it to disprove what the prosecution alleged, then the provisions of the proviso as to the admission of secondary evidence would operate. This does not mean that the burden of proof has shifted to the accused.

The learned judge also dwelt at length on the question of knowledge, i.e. *mens rea*. When presenting the certificate to the Returning Officer the Respondent must have known that it was forged, or at least, that it was not genuine; and must have believed that it would mislead the Returning Officer by not requesting him to take the prescribed test. In our view the Respondent had adequate *mens rea*. In view of what we have said above, these grounds of appeal succeed.

We now turn to ground five which states that the Learned Judge erred in law in failing to distinguish the effect of the right to remain silent where an accused is represented by counsel who is participating fully in the proceedings by objecting and cross-examining during prosecutions case and where the accused is not represented.

The position in a situation like the one raised by this ground of appeal was properly explained in the case of **Dennis Kambalame v. Rep. MSCA 15 of 2004** where the case of **R. v Brian Turner and Others (1975) 61 Cr. App. R. 67** was cited. **In Turner's** case Lord Justice Lawton said:

> ***"Whenever a barrister comes into court in robes and in the presence of his client tells the judge that he appears for that client, the court is entitled to assume, and always does assume, that he has his client's authority to conduct the case and to say on the client's behalf whatever in his professional discretion he thinks is in his client's interest to say.***

If the court could not make this assumption, the administration of justice would be very difficult indeed..."

We hold the view that although the Respondent did not personally object to some evidence being admitted, and he did not personally cross-examine witnesses, his counsel did this on his behalf. What counsel did in those proceedings did bind the Respondent. It cannot therefore be said that the Respondent's rights have been infringed.

Another point raised by the Respondent was the question of the exercise of the right to remain silent by an accused person after the close of the prosecution's case and a finding of a prima facie case requiring an accused person to enter upon his defence. The Appellant has submitted that where the state has established a prima facie case against an accused person and the accused fails to testify or adduce any evidence, the Court is required to base its decision on the uncontroverted evidence of the state. And, although he has a right under the Constitution to remain silent, where the evidence for the state is such that it calls for an answer, and the answer is not forthcoming, the State's case will be found proved beyond reasonable doubt. The case of **Henzen Wilsnach De Kok-v-The State (Case No. 244/04 of the Supreme Court of Appeal of South Africa)** was cited.

The position is not quite like that. The Court can only convict where an accused remains silent only if it is satisfied that the case has been proved beyond reasonable doubt. It is not automatic that a verdict of guilty should be entered if the accused has exercised his Constitutional right to remain silent. We think the position was properly put by Madala J in the case of **Osman v. Attorney General, Transvaal 1998 (2) SACR 493(CC)** at para 22 when he said:

".... Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove the case beyond reasonable doubt. An accused, however, always runs the risk that in the absence of any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

In another South African case of S **v. Boesak** 2001 (!) SACR 1 (CC) 493 Langa, DJP stated:

"…. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence."

We are of the view that the position expressed by these two South African cases obtains in this country. The question we have to answer is whether, on the available evidence, and taking into account what we have said earlier, the learned Magistrate was entitled to convict. In our view, the answer is in the affirmative.

Finally there is a cross appeal by the Respondent. In his cross appeal the respondent has raised some questions relating to violation the Respondent's rights under the provisions of s. 42 of the Constitution. These rights were argued before the learned Judge below, but were not argued before the learned Chief Resident Magistrate. However, the Learned Judge did not make any determination on them.

Mr.Nyimba has submitted that Section 42 (2) (f) (i) provides that every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right, as an accused person, to a fair trial, which shall include the right to public hearing before an independent and impartial Court of law within reasonable time after having been charged. He submitted that this right is understood to mean that the judge or magistrate is expected to orally hear submissions from both parties in a criminal trial; and further, the accused is also expected to hear those submissions and has a right to clarify any point raised in the submissions. Therefore written submissions deny the accused person that fundamental right. He went on to say that the right to a fair trial also entails that the accused should be provided with full information as to the state's case including written submissions that have been submitted to the Court. This was not done in the Chief Magistrate's Court. He cited to us the Kenyan case of **Henry Odhiambo Otieno V. The Republic, Criminal Appeal No. 83 of 2005.** In that case it was held that where written submissions were tendered without the accused's express consent, the provisions were null and void. Mr. Nyimba further submitted that in the present case, the record shows that at no point was there written consent to file written submissions on behalf of the accused and at no point was the accused given an opportunity to answer submissions by the state.

The European Human Rights Court cases of **Laukkanen and Manninen v. Finland No. 50230/99 and Kamasinski v. Austria 13 EHRR36** were also cited to us. These cases are authorities for the proposition that where there has been no disclosure of the prosecutions case such as submissions to the Court, the Court will find that there has been a violation of the right to a fair trial. The case of **Republic v. Macdonald Saimon and Abubakar Mbaya Criminal Case No. 6 of 2006** decided by Justice **Twea** is to the effect that although the parties may wish to submit written submissions only, the Court may request the parties to supplement those submissions by oral arguments.

We agree with the **ratio decidendi** in those cases. But this is not what transpired at the trial in the instant case. The present case can be distinguished on the facts. At the close of the prosecutions case, and soon after the Court found out that there was a prima facie case, the parties requested to supplement **their oral submissions** by some further submissions, and it was agreed that they would do so by the 24th August. However written submissions were sent to the Court by both parties. It cannot be said that the Respondent did not agree to such an arrangement. Following the case of **R. v. Turner and others (1975) 61 Crim. App.** 67 Counsel for the Respondent had full authority to speak or deal with the case as he found it fit. Both he and Counsel for the State agreed to have written submissions to supplement what they had submitted. They cannot now say that they should have been heard orally. It cannot be said that the Respondent did not consent to the written submissions, especially that he was legally represented. Similar arguments could be said about the right to a public hearing. The hearing of this case was in an open Court until the parties requested for written submissions.

In view of what we have said, this appeal succeeds in its entirety. The acquittal is hereby set aside and conviction by the learned Chief Resident Magistrate reinstated. It is now not necessary to consider the question of retrial.

The question of sentence has exercised our minds. In the Chief Resident Magistrates Court the Respondent was sentenced to 21 months IHL for the offence of uttering a false document and 6 months IHL for the offence of giving false information to a person employed in the public service. The sentences were made to run concurrently. The Appellant served about six months of this sentence. The sentence of 21 months imposed by the trial court was on the higher side. The maximum sentence for the offence of uttering is three years imprisonment, and that of giving false information is

punishable by a fine or imprisonment for three years. We therefore set aside that sentence and substitute therefor a sentence of 9 months IHL on the uttering offence and confirm the sentence of 6 months IHL on the offence of giving false information to a public officer. The sentences are to run concurrently.

This effectively means that the Respondent, with remission, has served his sentence and that he should be set free unless detained on other matters.

DELIVERED in Open Court this 11th Day of May 2007, at Blantyre.

SGD .....
H.M. MTEGHA, SC., J.A.

SGD .....
J.B. KALAILE, SC., J.A.

SGD .....
A.K. TEMBO, SC., J.A.