



Malawi Judiciary

**IN THE MALAWI SUPREME COURT OF APPEAL**

**AT BLANTYRE**

**ELECTION APPEAL CAUSE NO.14 OF 2020**

*(Being High Court Election Petition No.11 of 2019, Mzuzu District Registry)*

**BETWEEN**

**RAPHAEL JOSEPH MHONE ..... APPELLANT**

**AND**

**THE ELECTORAL COMMISSION ..... 1<sup>st</sup> RESPONDENT**

**SYMON VUWA KAUNDA ..... 2<sup>nd</sup> RESPONDENT**

**CORAM : THE HONOURABLE JUSTICE E. B. TWEA, SC JA  
THE HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA  
THE HONOURABLE JUSTICE A.C. CHIPETA SC, JA  
THE HONOURABLE JUSTICE L.P. CHIKOPA SC, JA  
THE HONOURABLE JUSTICE F.E. KAPANDA SC, JA  
THE HONOURABLE JUSTICE H.S.B. POTANI JA  
THE HONOURABLE JUSTICE I.C. KAMANGA JA**

P. Mpaka, Counsel for the Appellant

V. Gondwe/W. Chibwe, Counsel for the 1<sup>st</sup> Respondent

P. Ngwira, Counsel for the 2<sup>nd</sup> Respondent

Chimtande and Masiyano, Official Interpreter

## JUDGMENT

Twea SC, JA

The appellant in this case contested in the 2019 general election as a member of the National Assembly against the second respondent among others. The first respondent, after the polling, returned the second respondent winner and, therefore, the member elect of the National Assembly. The appellant filed a petition challenging the return of the second respondent as the member elect. The Court below held the petition and in its judgment, rendered on 16<sup>th</sup> September, 2019, confirmed the election of the second respondent. The appellant was aggrieved by the judgment and appealed to this Court.

When the case was called in this Court, we noted that only the appellant had filed skeleton arguments, chronology of events, list of authorities and bundle of authorities. The first respondent only filed skeleton arguments and list of authorities. The second respondent filed skeleton arguments, chronology of events and list of authorities only. We declined to hear the respondents to enlarge time to file the missing documents. It was our view, after previous adjournments to allow the parties to comply with the practice direction, that it was not justifiable to adjourn yet again, or, to allow the defaulting parties to be heard. We therefore, only heard the appellant's oral arguments.

We took time to consider the totality of evidence and submissions that were on record'. The appellant filed nine grounds of appeal. These can, conveniently, be divided into five:-

First, the issue of originating process. That the petition should have been treated as filed under section 114 (4) of the Parliamentary and

Presidential Election Act, (PPEA), than Section 100 thereof, as the Court found.

Secondly, that there were matters which were not regularly resolved in terms of the PPEA; non - resolutions of complaints' using quantitative approach in the face of non – compliance with the PPEA, lack of signatures of other polling station staff, lack of complaints in writing.

Third, using discretion to order costs against appellant wrongly,

Fourth, shifting the burden of proof on to the appellant, who was the petitioner than first respondent, as the duty bearer.

Fifth, that the decision of the court below was against the weight of evidence.

We do not intend to approach this appeal in the order of the grounds of appeal. However, we will start with the ground on the proper status of the originating process.

The Court below found that the petition, on the facts, was brought under section 100 of the PPEA, and not Section 114 (4) of the same. We do not find any fault with the finding of the Court below. Let us observe that the petition that the appellant filed in the Court below did not cite the law under which it was brought. The appellant, indicated, in the body of the sworn statement that the action was brought under section 114 (4) of the PPEA. It was not procedural to plead the law under which originating process is brought in the body of supporting documents. The law under which the originating process is brought must be pleaded right at the beginning of the process. The Court below went to great lengths to explain this, and even quoted the several modes of bringing electoral petitions as espoused by Honourable Justice Chipeta Sc in his paper "Modes of Commencing Election Matters" unpublished, at pages 4 - 6 of the judgment.



It was the appellant's evidence that the presiding officer of the polling stations were informed of the irregularities that they had noted. However, his party representatives were not allowed to log the complaints. It was the case of the appellant that the first respondent thus never formally responded to his complaints. The Court below however, noted at paragraph 11 of the judgment that the appellant acknowledged that the chairperson of the first respondent, then, announced that all complaints had been addressed. It is clear to us, as it was to the Court below, that this could not be basis for treating the petition as having been brought under Section 114 (4) of the PPEA. The appellant, in the petition, went on to challenge the return of the second respondent as duly elected. The Court below therefore, was entitled to find that the petition properly fell under Section 100 of the PPEA. This Court said in Ibrahim Yuda Mkumba t/a Kwendajenda Transport and Blantyre Lodge Limited vs Standard Bank Limited MSCA App. 69 of 2017 and Jean Malola vs Britam Insurance Company MSCA App. 1 of 2021 that Court can allow an application to proceed as if brought under a proper section of law. This is the spirit of Order 2 of the Court (High Court) (Civil Procedure) Rules.

*Finally on this point: had the petition been brought under section 114 (4) of the PPEA, it would have been subject to subsection (3) thereof which provides that:-*

*"At the conclusion of the trial of an election petition the Court shall determine whether the member whose nomination or election is complained of, or any other and what person was duly nominated or elected, or whether the election was void, and shall report such determination to the Commission. Upon such report being given such determination shall be final".*

The decision of the Court below therefore would not have been amenable to an appeal to this Court. The appellant has come to this Court because the determination that the Court below made was under section

100 of the PPEA which is appealable to this Court. This ground of appeal therefore is dismissed.

Going forward, let us acknowledge that this case was decided before this Court's decision in the case of Professor Arthur Peter Mutharika and Electoral Commission v Dr Saulos Klaus Chilima and Dr Lazarus McCarthy Chakwera MCSA Constitutional Appeal 1 of 2020, which put our law on elections in its proper perspective. To appreciate the decision of this Court, it is important that we put the decision of the Court below in its proper perspective. The Judge in the Court below said:-

*"39 To get this point the Supreme Court settled in Gondwe and another v Gotan- NyaHara [2005] MLR 121 at 126 following Gama v Omar and Malawi Electoral Commission MSCA Civil Appeal No 24 of 1999 that:-*

*"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 affect the result of the election."*

*"40 I will be applying these principles in this case. Let me turn to the legal framework underpinning the issues raised in the petition."*

We now know that the law on disputed elections is not simple. The petitioner has a duty to establish a prima facie case on the issues in dispute and the respondent has the duty to rebut the petitioner case on a balance of probabilities. We shall however, interrogate the appeal in the spirit of the decision of the Court below.

The Judge below carefully analysed the evidence and made findings of fact. We have very little to criticize the judgment for on the findings by the Judge, however, it would be remiss of us if we do not re-examine his conclusions on the findings.



The Judge in the Court below, found out that there was non-compliance with sections 89, 93 and 95. He also found that the documentation provided by the first respondent did not conform to the requirements of the PPEA at page 15 he said:

*"45 let me observe at this point that all the points the form MEC, POLL o66b the Electoral Commission provided, does not provide space for the other polling station officers to sign. This should have been provided. My view is that the requirement for the other polling station officer to sign is an internal safeguard against tampering and interfering with the result sheets by any individual, should there be no political party representative to sign."*

The first respondent is a duty bearer. It is its duty to run free, fair and credible elections. This default meant that the other officers at the polling station are not visible and hence there was undue reliance on party representatives when resolving disputes. Further he observed that:-

*"46... I also notice from the evidence given by witnesses in this case, that form MEC. POLL o66b was provided with carbon printed copies, meaning, the copy a representative of a political party would get was a carbon print of the original form".*

In respect of the disputes in issue the Court below therefore required the petitioner to have brought more evidence to prove his case. This was not the proper approach. The first petitioner was the duty bearer and custodian of all the documents that were generated at the polling stations and constituency tally centre, notwithstanding that such a centre is not provided for in the PPEA. The first respondent should have brought the relevant documents.

In respect of the dispute at Chisu Polling Station, Maggie Manda told the Court below that she refused to sign the result sheets because votes for second respondent were inflated. The presiding officer then refused to give

her a copy and that all copies were given to party representatives of the second respondent. She was only given a copy on 24<sup>th</sup> May, 2019 after the intervention of the constituency tally centre returning officer. She was given what was EX MBI, which was the same as EX RJM2 given to the appellant. The first respondent produce, EX SVK5 which purported to be a copy of the same original as EXss MBI and RJM2. All these documents came from Aticken Nyirongo, the presiding officer. This was not disputed. The Court below found as follows:-

*"83 Yes "RJM2" and "SVK5" are not copies of the same original but their contents is essentially the same.*

The Court below also said:-

*"76... RJM2 and SVK5 are copies of the polling station result sheet for the same station, Chisu. Although some content is similar, like the entries in figures, they are markedly different. The result in words for Symon Vuwa Kaunda is different. "RMJ2" is recorded in small letters while "SVK5" is in block letters. "RJM2" is signed by presiding officer and one monitor for UTM while SVK5 is also signed by the other monitors. It means these are not carbon printed copies of the same original. But but they both came from Aticken Nyirongo and he has not explained what happened for there to be two different copies. The original final result sheet for Chisu Polling Station which was used in determining results of the constituency has not been brought to the attention of the Court. Perhaps that is not a problem, because in the circumstances, it means it was the original for "SVK5"*

This conclusion is very troubling. The presiding officer Aticken Nyirongo was the one to explain the discrepancies and call evidence of the others who signed the result sheet. The judge's conclusion clearly is not supported by his findings.



We also had grave reservations with the Judge constituting himself as a handwriting expert in respect of the signatures of Maggie Manda and Welman Chirwa in paragraph 80, 81 and 82 of the judgment of the Court below. We specifically refer to paragraph 82:-

*"Welman Chirwa disputes the signature that looks like a "W" ..... he states that he either signs in his full name or "W. Chirwa". He admits in cross-examination however, to have signed in the record log book on pages 6, 7 and 8. His signature is actually "W" on these pages. And so is the signature on page 13. He would have to give more evidence than a mere assertion for anyone to believe he did not sign on page 13. He denies having signed for "SVK5" but the signature on it is also a "W" although looking slightly different from the record log book. Its signature in the record log book appears like a small "W" while on "GVKS" it appears like a capital "W" all the same, this would take us back to where he has to show that he refused to sign by way of written complaint under S.89".*

This was most irregular and dangerous. Considering the totality of the evidence they would have found that the appellant's evidence was more cogent; that Maggie Manda and Welman Chirwa did not sign the result sheet and were denied copies thereof until the constituency returning officer intervened. Further, he would have concluded, as he had found, that the original result sheet for Chisu was never brought to the court by the first respondent.

On the evidence for Msinjyiwi, it was not refuted that the presiding officer was leaving space at the beginning of the space provided which facilitated alteration. The Judge did find that "O" was altered to read "1" and so 30 votes become 130.

Let us conclude by examining the beating of the appellant's monitors at Sanje. This was not refuted. The Judge below however, concluded that



this happened after the polls and since it was reported to police, it should be left to them to conclude. We do not agree with this conclusion.

The evidence was that this happened on 25<sup>th</sup> of May, 2019. The monitors came looking for result sheets. This clearly shows that the party representatives were given result sheets of other party representatives which they kept at their homes. This corroborates the evidence of Maggie Manda that result sheets were given days after the polls. 24<sup>th</sup> and 25<sup>th</sup> May 2019 respectively which was very irregular. Regard being hard to the fact that the first respondent did not produce originals of the disputed.

The appellant told the Court below that there was tampering with the result sheets, keeping result sheets at the homes of party representatives or individuals militates against integrity of the results management. It is even worse that the first respondent brought to court photocopies of some of the documents:

*"61 In opposition to Maggie Manda's and Welman Chirwa's evidence, Aticken Nyirongo, the Presiding Officer for Chisu polling station, states that ..... no results were changed, and only the results as counted in the presence of monitors and signed, were sent to the tally centre for release. He exhibits a copy of the record log book for the station marked "AN1" and a colour photocopy of the polling station results sheet, marked "AN2".*

There is no explanation, as far as the judgment goes, for bringing, copies and coloured photocopy for that matter, of the documents which were in the respondents' custody.

Last but not least, we have considered the evidence that the ballot boxes from Sanje polling station were not secure. Mr Gaster Kamanga the Constituency Returning Officer admitted that ballot boxes were supposed to have padlocks and plastic seals – but the plastic seals were missing. There

was no explanation for this. This was contrary to section 94 of the PPEA, that the electoral materials must be secure and not tampered with.

We have considered the totality of the evidence in this case we are unable to affirm the conclusions made by the Court below on the facts. Consequently we find that the decision was against the weight of evidence. It is our judgment that this appeal succeeds. There shall be a fresh election in accordance with section 100 (4) of the PPEA.

We have considered the issue of costs, which was one of the grounds of appeal. Costs are at the discretion of the Court. It is our view that a successful petition restore the peoples right to choose their representative in a free, fair and credible election. We order that each party should bear its own costs, here and below.

Pronounced in open court this ..... day of .....2021 in Mzuzu.

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**THE HONOURABLE JUSTICE E. B. TWEA, SC JA**

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**THE HONOURABLE JUSTICE R.R. MZIKAMANDA SC, JA**

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