IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTY
CRIMINAL APPEAL NUMBER 48 OF 2006

BETWEEN:

LUCIUS CHICCO BANDA
(Also known as Lucius Chidampamba Banda) ……….. APPELLANT

and

THE REPUBLIC………………………………………..RESPONDENT

CORAM : **HON JUSTICE CHIMASULA PHIRI**
Chisanga of Counsel for the appellant
(Assited by Nyimba and Mwakhwawa both of Counsel
)
Steven Kayuni, Janet Kayuni and M. Chidzonde
(all Senior State Advocates representing the State).
Mrs. M. Pindani – Principal Court Reporter
Kamanga- Official Interpreter

(Being Criminal Case Number 636 of 2005 at the Chief Resident Magistrate's Court sitting at Zomba).

JUDGMENT

Chimasula Phiri J,

This is an appeal by Lucius Chicco Banda against his conviction and sentence.

In the lower court the appellant faced charges on two counts with an alternative count to the first. In essence he was charged with

three counts. On the first count the appellant was charged with uttering a false document contrary to Section 360 as read with Section 356 of the Penal Code. The particulars alleged that Lucius Chidampamba Banda in the month of 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. The second count which is alternate to the above count, the prosecution alleged that Lucius Chidampamba Banda procured the execution of a document by false pretences contrary to Section 362 as read with Section 356 of the Penal Code. The particulars of this alternate count allege that Lucius Chidampamba Banda in the month of February 2004 in the district of Balaka made false representations as to the nature of a Malawi School Certificate of Education bearing number 1951/91 thereby procured Atanazio Gabriel Chibwana, a Balaka Returning Officer to execute the said document.

Finally, the third count related to giving false information to a person employed in the public service contrary to Section 122 of the Penal Code. The particulars averred for this offence are that Lucius Chidampamba Banda 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. The appellant was convicted on the first count and sentenced to 21 months imprisonment with hard labour. Naturally the alternate count fell on the way side. Again the lower court convicted the appellant on the third count and sentenced him to 6 months imprisonment with hard labour. The sentences imposed by the learned Chief Resident Magistrate were ordered to run concurrently with effect from 31st August, 2006.

On 7th September 2006 the legal practitioners for the appellant filed notice of intention to appeal. The petition of appeal contains 10

grounds of appeal against conviction and 5 grounds of appeal against sentence. These grounds are set out in full in the judgment.

(a) **Appeal against conviction (Grounds)**

1. The learned trial Magistrate erred in admitting in evidence exhibits PEX8(a) and PEX8(b).

2. The learned Magistrate erred in finding that the Appellant/Accused wrote on the nomination forms when no handwriting expert confirmed his handwriting.

3. The learned Magistrate erred in finding that exhibit PEX8(b) was a false document.

4. The learned trial Magistrate erred in finding that the Appellant (Accused) knowingly uttered exhibits PEX8(a) and PEX8(b).

5. The learned Magistrate erred in holding that the documents tendered in court were the same documents given to P.W.5 by P.W. 4 when the said documents were not verified by P.W.4

6. The learned trial Magistrate erred in not according the Appellant (Accused) a fair trial.

7. The learned Magistrate erred in failing to appreciate the need by the State to call evidence of the Electoral Commission in support of the fact that the nomination forms and M.S.C.E. Certificate in issue were indeed those alleged to have been given by the accused and which the Electoral Commission actually based in their decision in allowing the appellant or to have the accused/appellant stand as Parliamentary

Candidate for the Elections.

8. The learned Magistrate erred in coming to a conclusion that the Appellant/Accused made a representation to P.W.4 that the Appellant had a minimum qualification of an M.S.C.E. when the nomination papers were not proven to have been written by the Appellant.

9. The learned Magistrate erred in finding that the state had proved all the elements of the offence under Section.122 of the penal code.

10. In all circumstances, the conviction on uttering a false document and giving false information to a person employed in the public service is against the weight of evidence requiring it to be quashed.

(b) **Appeal against sentence (Grounds)**

11. The learned Magistrate erred in meting out a custodial sentence to the Appellant/Accused when the Appellant/Accused was a first offender.

12. The learned Magistrate took into account and based his decision on an erroneous fact that the Appellant/Accused deserved an immediate custodial sentence owing to the nature of the document uttered.

13. The sentencing of the Appellant/Accused to 21 months I.H.L was wrong in law.

14. The learned Magistrate erred in imposing a custodial sentence when he convicted the Appellant/Accused on the offence under Section 122 of the Penal Code.

15. The learned Magistrate's sentence was wrong in principle And/or manifestly excessive and ought to be set aside.

The State strongly opposes this appeal arguing that there was sufficient evidence in the lower court to entitle the court to convict the appellant. Further, that the sentence passed by the lower court was appropriate. The State prays for dismissal of the appeal in its entirety.

Evidence of the Lower Court

The first prosecution witness (PW1) was Eustance Sam Kazembe, deputy headmaster of Mangochi Secondary School. He stated that in Mid- October 2005 some Police Officers came to the school to check on the records of Alfred Blessings Mandala who wrote his MSCE examinations at the school in 1991. He said that he checked the records and found duplicate notification of the results for Alfred Blessings Mandala and other names of candidates who sat for the examinations in that year. He stated that Mandala passed his MSCE Examination and that his certificate number was 1951/91. He also stated that the records at the school showed that Mandala collected his certificate on 21st April1992. In cross-examination the witness said that he joined Mangochi Secondary School in 2004 and that his evidence is based on the school records. He conceded that he did not know who documented these records. He also said that the record concerning certificate 1951/91 was prepared by MANEB. In Re-examination he stated that he assumed that Alfred Mandala collected his certificate.

The second prosecution witness (PW2) was Ruth Mankhambera, a teacher at Bilira Community Day Secondary School. On 24th October 2005 when both the headmaster and his deputy were out on other duties, there came a Police Officer to check on the records for 1991 MSCE examination and in particular for Lucius C. Banda. PW 2 testified that according to these records the said candidate failed. She tendered the record which was prepared by MANEB. In cross-examination she stated that she joined Bilira

CDSS in January 2003 and that the records in question are kept in the Headmaster's office. She said that it was her first time to see the document from MANEB. She stated that it was the document from MANEB that made her believe that Lucius Banda was at Bilira CDSS. She confessed that she could not say that Lucius Banda forged any document. In Re-examination the witness said the results came from MANEB.

The third prosecution witness (PW3) was Alfred Blessings Mandala. He testified that he sat for his MSCE examination in 1991 at Mangochi Secondary School and passed. He was awarded a certificate and its number is 1951/91 which he collected from the school on 21st April 1992.

In cross examination the witness said that he told the Police that he had his certificate which he was awarded by MANEB.

The fourth prosecution witness (PW4) was Atanazio Gabriel Chibwana. He testified that he was District Commissioner for Balaka for seven years and knew the appellant as Member of Parliament for Balaka North. As District Commissioner he was returning officer for the Malawi Electoral Commission (MEC) during the 2004 general elections. One of duties was to receive nomination papers for contesting candidates. He said that he received nomination papers from the appellant in 2004. He said that one of the requirements for the candidates was a minimum of an MSCE or its equivalent. He stated that those without minimum qualification were required to sit for a prescribed English proficiency test. He stated that the appellant was not among the list of candidates who sat for the English proficiency test. PW4 stated that the appellant attached to his nomination papers a copy of his MSCE. He tendered both nomination papers and copy of said MSCE Certificate as Exhibits PEX VIII(a) and PEX VIII(b) respectively. In cross-examination PW4 stated that MEC instructed the witness to use MSCE certification as qualification for candidates contesting to become members of parliament and in the absence of such qualification, conduct English proficiency test. PW4 said he received a copy of MSCE certificate

from the appellant. He stated that his duty was to check the documents for compliance. However, verification of the same was for MEC and other relevant bodies. PW4 said that confirmation of features on MSCE certificates was the domain of MANEB. PW4 stated that he could not say if Exhibit PEX VIII(b) is the same certificate he received from the appellant but his belief was that it was. He said candidates presented copies while retaining the original thereof. He said he kept the copy at the Office and when the Police came during investigations of this matter he pulled out the copy and gave it to the Police. In Re-examination he said that he was given a photocopy of the certificate and not the original. His belief is that Exhibit PEX VIII(b)is the copy he received from the appellant.

The fifth prosecution witness (PW5) was Robert Robins Lighton Harawa, director of security at MANEB. He has worked for MANEB for 11 years. His department does verification of certificates. He stated that a certificate number carries the year of qualification and is specific to the particular individual and neither two persons could have the same certificate number nor two centres could have the same number. He stated that where the contents of the certificate tally with the information in the database the certificate is genuine. If there is any variation between the certificate and the database information, the certificate is fake or false. He stated that in October 2005 the Police brought to the witness Exhibit PEX VIII(b) for vetting. The certificate bore the name of Lucius Chicco Banda. He stated that however the records showed that the rightful owner of the certificate number 1951/91 was Alfred Blessings Mandala from Mangochi Secondary School. He told the Court that examination number 11/015 which appears on Exhibit PEXVIII(b) was for some other girl at Chiradzulu Secondary School. He also told the Court that their database showed that Lucius C. Banda wrote his MSCE examination in 1991 at Bilira MCDE as candidate number 96/015 and failed the examination. Another unsuccessful attempt was made in 1992 at Charles Lwangwa. He stated that Lucius Chicco Banda or Lucius Chidampamba Banda did not qualify for an MSCE certificate. In cross-examination he stated that it was himself and Mr. Bandawe

who vetted exhibit PEX VIII(b). However, it was Mr.Bandawe who signed in the presence of PW5. The witness stated that he has knowledge that this exhibit PEX VIII(b) was the certificate which was given to the Returning Officer. In Re-examination, PW5 stated that Mr. Bandawe signed with knowledge of PW5.

The last prosecution witness (PW6) was Chipwiri, Regional Detective Inspector based at Eastern Region Police Headquarters. He testified that he was detailed to go to Balaka District Commissioner's Office to investigate a certificate that the appellant is alleged to have presented to the returning officer. He took the certificate to MANEB for verification and he was told that the certificate belonged to Alfred Blessings Mandala of Mangochi. He went to Mangochi and collected Mandala's certificate and took it to MANEB where it was confirmed to be genuine. PW6 then arrested the appellant, who exercised his right to remain silent.

After the prosecution closed its case, the court ruled that a prima facie case had been made against the appellant. The appellant elected to exercise his constitutional right to remain silent. He did not call any witnesses.

It is necessary that certain obvious statements of law be repeated and this has been so in almost all criminal cases. The first of such statements relates to the burden of proof in criminal cases. No judgment will pass the test if it does not allude to the fact that the burden to prove the guilt of the accused person is placed on the prosecution. This position has come to be accepted that it is not the duty of an accused person to prove his innocence. The Constitution of Malawi has even created a constitutional right for an accused person in a fair trial to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial – Vide: Section 42(2)(f)(iii). An accused person who elects to exercise his right to remain silent should not be taken to be fearing self incrimination. The presumption of innocence on the part of the accused cannot be taken away because of his election not to testify. The second statement which is obvious relates to the standard of

proof in criminal cases. A judgment will not pass the test if it omits to state that in criminal cases the standard of proof is beyond any reasonable doubt. Put simply the court must feel sure of the guilt of the accused. Where the Court has some doubts relating to the guilt of the accused on certain elements of the offence, it will not be open to such a court to proceed to convict the accused. Otherwise the impartiality and neutrality of the Court will be questioned. It is sufficient for now that the learned Chief Resident Magistrate remembered to make these statements in his judgment.

In this appeal Counsel for the appellant has attacked admissibility of certain documental evidence and has submitted that if the Court had not allowed that evidence, the prosecution could have failed in its duty to discharge the burden of proof up to the requisite standard. The State makes a concession but is quick to argue that the principle that substantial justice should be done without undue regard for technicality at all times – Vide: Section 3 of the Criminal Procedure and Evidence Code. (CP & EC).

The appellant opened his appeal in relation to conviction on count contrary to Section 122 of the Penal Code. This section reads 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."*

The appellant has submitted that the conviction on this count cannot stand because the particulars did not disclose any offence

known to the criminal law. The law provides in Section 128 of the CP & EC how charges should be framed. Part of the section reads as follows:-

"(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;"

Mr. Chisanga has submitted on behalf of the appellant that firstly the particulars of any offence charged must therefore allege the essential facts giving rise to the crime together with any mental element required by the charging section. Meaning as he understands the law that if the particulars fail to allege any of the elements of the offence charged, the charge will be incompetent as a basis of a criminal proceeding against the accused. Meaning further that if court proceeded to take an accused through a 'trial' based on such a charge it would have indulged in an exercise in futility. There would have been no charge on which to try and convict the accused for the simple reason that the charge, or specifically the particulars thereof would have failed to disclose any offence the basis of any trial. Secondly, and this is in keeping with our present constitutional dispensation and the consequent criminal jurisprudence, it must have the effect of informing the accused with

sufficient particularity at the commencement of the trial of the charges or charge against him.

Section 42 (2)(f)(ii) of the Constitution 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 be informed with sufficient particularity of the charge.

Counsel for the state has counter submitted that in addition to provisions of Section 3 of the CP& EC, Section 5 of the CP & EC provides that 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, irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the Code unless such error or irregularity has in fact occasioned a failure of justice, provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier state in the proceedings.

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 have been the appellant who wrote these words. The burden of proof was on the prosecution to prove that these words were written by the appellant. It was never the duty of the appellant to show that this was not his writing. The lower court erred in not resolving the benefit of doubt in favour of the appellant. 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.

Similar provision exists in Section 51 of the Constitution.

It may be a practice which MEC has developed to ensure that potential candidates are able to speak and read the English language well enough. The Malawi Supreme Court of Appeal articulated this position is MSCA Civil Appeal No. 17 of 2004 – ***The State and The Malawi Electoral Commission (appellant) and Ex-parte Rigtone E. Nzima (Respondent)*** when it was stated-

> *"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."

It will be seen from the position of the law here that the particulars of the offence are not supported by any statutory or constitutional provision. Counsel for the State has contended that the appellant should have objected to the charge when it was read to him. I do not, with respect, accept this argument. In the current constitutional order where an accused person is virtually allowed to seal his mouth, he can let the prosecution make a fool of itself. It is not the duty of the accused to be a mercenary to the prosecution to help it come up with proper charges. If the State, in a hurry to secure a conviction, omits to properly charge the accused, the state does so at the risk of losing the case. Sections 3 and 5 of the CP & EC do not in my view help the State either. The defect in the charge caused substantive failure of justice. The conviction under Section 122 was misguided, irregular and cannot stand.

Now turning to the first count relating to uttering a false document the appellant's counsel has argued that the prosecution failed to prove that the appellant uttered a false document. The argument is premised on the basis that documents relied upon by the state in the form of Exhibits PEXVIII (a) and PEX VIII(b) were improperly admitted in evidence. This was contrary to the Criminal Procedure and Evidence (Documentary Evidence) Rules.

The State has argued that these exhibits were properly admitted in evidence. Further, even if it turns out that these exhibits were not properly admitted, the appellant did not object to their production and inclusion in the evidence in the lower Court and should not be allowed to do so now. Furthermore, it was the duty of the appellant to produce his original certificate of MSCE to rebut the evidence which the prosecution had adduced in the court below.

Exhibits PEX VIII(a) and (b) are not original copies but photocopies. Exhibit PEX VIII (a) is a Nomination Form for a National Assembly Candidate. This particular exhibit is for Mr. Lucius Chicco Banda of Sosola Village, T.A. Nsamala, Balaka. On page 1 thereof it has both printed and written words. Among the printed words it is indicated that it was directed or addressed to the Returning Officer. In the written words it was inserted with words of Balaka North in the Balaka district. There is a column for official use only where time and date of receipt of nomination is indicated as 12:30 in the afternoon on 27th February 2004. Among other details it is also indicated that the nomination was accepted and the returning officer signed. There is a stamp of Balaka District Assembly duly embossed on the document. Original writings on page 1 are name of a legal practitioner, his address, signature and also words indicating that this is a certified true copy of original.

On Page 2 which is also a photocopy there are printed as well as handwritten words and figures. These are details of electors from Balaka North Constituency. The candidate's consent and contact details are captured. The name of the candidate is given as Lucius Chidampamba Banda and he appended his signature.

On Page 3 which is also a photocopy indicates candidates details and attachment. The pertinent details relate to the fact that the candidate was sponsored by U.D.F. political party and there is a political party endorsement of the UDF District Governor at the end foot of the page. In the middle part of the page under column V there are ticks that the candidate has evidence of his ability to speak and read the English Language and the alternative is also ticked to show statutory declaration attesting to his ability to speak and read the English language. As earlier on quoted this is also where the writing - *"Photocopy of my MSCE certificate*" appears.

The document continues up to page 7 with receipt attached in photocopy.

Exhibit PEX VIII(b) is a MANEB photocopy certificate certifying that Lucius Chicco Banda qualified for the award of an MSCE Certificate. It shows the grades, certificate number 1951/91 and Examination number 11/015 for MSCE Examination of June 1991. In the middle part of this photocopy are the following handwritten words

"FAKE.
Verified by M. Bandawe
12/10/05 Signature. "

Section 360 of Penal Code provides that –

> *"Any person who knowingly and fraudulently utters a false document shall be guilty of an offence of the same kind and shall be liable to the same punishment as if he had forged the thing in question."*

Section 356 provides for a maximum sentence of 3 years imprisonment for forgery.

Section 4 defines uttering to mean and include using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question. Knowingly used in connexion with any term denoting uttering or using implies knowledge of the character of the thing uttered or used.

Therefore the elements of the offence appear to have the ***mens rea*** of knowingly and fraudulently and ***actus reus*** of uttering a false document.

The Criminal Procedure and Evidence (Documentary Evidence) Rules which apply to documentary evidence in criminal proceedings in the High Court and all subordinate courts provides as follows:-

3-(1) The contents of documents may be proved either by primary or secondary evidence.

(2) In these Rules *"primary evidence"* means the document itself produced for the inspection of the court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it; where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest: but where they are all copies of a common original, they are not primary evidence of the contents of the original.

(3) In these Rules "*secondary evidence*" means –

(a) certified copies given under these Rules:

(b) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them; or

(e) oral accounts of the contents of a document given by some person who has himself seen it.

(4) Documents must be proved by primary evidence except in the cases hereinafter mentioned.

(5) 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, or any persons out of reach of, or not subject to, the process of the court or of any person legally bound to produce it, ***and when, after the notice mentioned in rule 4 such person does not produce it;***

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved in which case such written admission is admissible;

(c) when the original has been destroyed or lost or is in the power of a person not legally bound to produce it, and who refuses to or does not produce it after reasonable notice or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of rule 7:

(f) when the original is a document of which a certified copy is permitted by these Rules, or by any other law in force in Malawi, to be given in evidence;

(g) where the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection:

Provided however that evidence as to such general result may be given only by a person who has examined them and is skilled in the examination of such documents.

(6) Oral admissions as to the contents of a document are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under these Rules or unless the genuineness of a document is in question.

4. ***Secondary evidence of the contents of the documents referred to in rule 3(5)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his counsel, such notice to produce it as is prescribed by law, and if no notice is so prescribed, then, such notice as the court considers reasonable in the circumstances of the case:***

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the court thinks fit to dispense with it.

(a) when the document to be proved is itself a notice:

(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;

(d) when the adverse party or his counsel has the original in court;

(e) when the adverse party or his counsel has admitted loss of the document;

(f) when the person in possession of the document is out of reach of, or not subject to, the process of the court

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. Morever, 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.

There was an issue raised by the appellant that there was no fair trial. I do not intend to deal with this aspect as it would just be ***per incurium.***

Similarly the issue of sentence will not be dealt with in depth except to express an opinion that it was wrong in law and practice. The sentences imposed were manifestly excessive and shocking. If I had upheld the convictions I would either have ordered immediate release taking into account that for a first offender the court should not have passed more than 3 months I.H.L. A suspended sentence or a fine would have been appropriate. Until the maximum sentence for uttering a false document is revised upward, I would not support the sentence of 21 months I.H.L for a first offender.

Therefore the appeal is allowed in its entirety. The convictions

are hereby quashed and sentences set aside. The appellant should regain his liberty unless lawfully held for other cause.

PRONOUNCED in open court this 7th day of November, 2006 at Blantyre.

Chimasula Phiri
JUDGE