

Year
1974

The Hon the Chief Justice

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO 3 OF 2005

(Being High Court Civil Cause No. 82 of 2004)



BETWEEN

LOVENESS GONDWE.....1ST APPELLANT

**MALAWI ELECTORAL
COMMISSION.....2ND APPELLANT**

-AND-

CATHERINE GOTANI NYAHARA....RESPONDENT

**BEFORE: THE HON. THE CHIEF JUSTICE
THE HON. JUSTICE MTEGHA, SC, JA
THE HON. JUSTICE TAMBALA, SC, JA**
Chilenga/Mumba, Counsel for the 1st Appellant
Kaphale, Counsel for the 2nd Appellant
Ngwira, Counsel for the Respondent
Kachimanga/Daudi (Mrs), Official Interpreter



TAMBALA, JA

JUDGEMENT

The present appeal is against the decision of Chikopa, J., in which the learned Judge vitiated the result of Parliamentary election which was held in Mzimba West Constituency on 20th May, 2004. Loveness Gondwe, the 1st appellant was one of the six contestants during the election in Mzimba West Constituency. She was declared winner of the election by the Malawi Electoral Commission, the 2nd appellants in this appeal. The respondent is Catherine Gotani Nyahara, another contestant during the election in Mzimba West. The result of the election showed that she secured a second position after the 1st appellant. She was not satisfied with the result of the poll. She brought an action by way of petition in the High Court at Mzuzu and sought a declaration that the election in Mzimba West was not free and fair. The respondent also sought an order from the Court for a re-run.

In the Court below, the respondent's petition alleged a number of irregularities which included:

- a. That there were threats, intimidation, illegal campaigning and acts of violence committed by the supporters and husband of the 1st appellant.

- b. That the ballot paper was irregular; the respondent's picture was too dark to be recognisable and her party's colour did not appear on the ballot paper.
- c. That there was absence of verification of the voters' roll.
- d. That voter registration cards were not stamped before and after voting.
- e. That there was use of Government resources during the campaign.
- f. That there was electoral fraud committed by officials of the 2nd appellant; they were directing voters, who required assistance, to vote for the 1st appellant.

Evidence in support of the irregularities alleged in the respondent's petition was essentially by affidavits. Over twenty deponents swore affidavits on behalf of the respondent in support of the petition. Most of these persons were called before the Court below to be cross-examined. After examining the evidence and hearing Counsel's submissions the learned Judge came to the conclusion that only four irregularities were established, namely:-

- (i) Existence of threats, violence, intimidation and illegal campaigning;

- (ii) Lack of verification of voters' roll;
- (iii) Use of Government resources;
- (iv) Irregular determination of results.

The learned Judge finally came to the conclusion that the threats, intimidation, violence and illegal campaign were not of such nature and extent as to warrant the nullification of election result in Mzimba West Constituency. However, he found that the remaining three irregularities were of such nature and extent that they warranted, either standing separately or collectively, the nullification of the poll result. He consequently made an order vitiating result of Parliamentary election in Mzimba West Constituency.

We shall first deal with issues of a procedural nature raised by the 1st appellant in her appeal. In ground 3.1 of the 1st appellant's appeal it is contended that the learned Judge erred in entertaining the respondent's petition which was filed out of time. It is submitted by Counsel for the 1st appellant that election results were announced on 23rd May, 2004. According to section 100 (1) of Parliamentary and Presidential Elections Act (PPEA) a petition challenging the result of Parliamentary election must be presented to the High Court within forty eight hours of the declaration of the result of the election. Counsel for the 1st appellant states that the respondent's petition was filed in the Court below on 26th May, 2004, outside the statutory period limited for the purpose. Counsel contends that statutory time limits in electoral petition cases are strictly

enforced by courts and that applications for enlargement of time are always refused. The English case of **Habib Ullah -vs- Pajel** 2002 EWCA 1793 was cited as the relevant authority.

Counsel for the respondent submits that the election result for Mzimba West Constituency was declared on 26th May 2004 and the petition was filed on 27th May, well within the required statutory period. The affidavit of Mr. Harris Potani, head of Electoral Services at the Malawi Electoral Commission fully supports the fact that the election result in Mzimba West Constituency was declared on 26th May, 2004: See Mr. Potani's affidavit at Page 104 of Vol. 1 of record of appeal. Clearly, the respondent's petition was presented in the Court below within the period limited by statute. Counsel for the 1st appellant argued that the petition was required to be presented together with the supporting affidavit. We do not agree. Section 100 of PPEA does not provide for such requirement. It is Section 114 (1) relating to appeals to the High Court which requires that the petition must be supported by affidavits of evidence. We take the view that the relevant statutory provision was adequately complied with when the respondent presented the notice of petition in the Court below.

Counsel for the 1st appellant further submits that there was need to submit a complaint to the Electoral Commission before petitioning the High Court. We do not also agree. Section 100 is abundantly clear. It provides that "*a petition*

alleging an undue return or an undue election of a person as a member of the National Assembly..... shall be presented by way of a petition directly to the High Court" (Emphasis supplied). Section 113 which provides for the submission of complaints to the Electoral Commission for resolution by that body commences with the words **save as otherwise provided in this Act** (emphasis supplied). We hold the view that Section 100 otherwise provides direct access to the High Court in the case of petitions alleging an undue return or an undue election of a person as a member of National Assembly by reason of irregularity or any cause whatsoever. We find no merit in ground 3.1 of the 1st appellant's appeal. We reject it.

It would be pertinent at this stage to consider the law governing disputed elections. Section 100 of PPEA under which the respondent's petition was brought does not provide the legal standard which a court may use when considering a petition to nullify election results duly declared by the Malawi Electoral Commission. To that extent our statutory law governing elections is deficient. In his judgment the learned Judge in the court below used the standard expressed by Lord Denning MR, as he then was, in the case of **Morgan -vs- Simpson** (1974)3 ALL ER 722. That standard is correctly stated at page 23 of the learned Judge's judgment. It goes like this:

- a. An election will be nullified, if it is conducted so badly that it was not substantially in accordance with the

law as to elections; in that event, it would be immaterial whether the alleged irregularities affected the results of the elections or not.

- b. An election will be nullified upon proof of irregularities which affect the result of the elections; in that event it is immaterial whether or not the elections were conducted in a manner that was substantially in accordance with the law relating to elections.

It may be helpful to observe two things about the case of ***Morgan -vs- Simpson***. First, the case was about the election of a Councillor for the Greater London Council. It was about Municipal elections. Secondly and more importantly the decision turned on a construction of a local statute. Lord Denning at page 725 [1974] 3 ALL states:

Such being the facts, I turn to the law. It depends on S.37(1) of the Representation of the People Act 1949 which says:

“No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognisance of the question that the election was so

conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result."

Lord Denning was not expressing the position of the Common law relating to disputed elections. The Representation of the People Act 1949 which his Lordship was interpreting does not clearly apply to this country. It would appear to us that the learned Judge misdirected himself when he based his decision on the case of ***Morgan -vs- Simpson***.

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: See the case of ***Gama -vs- Omar and Malawi Electoral Commission*** MSCA Civil Appeal No. 24 of 1999. The case concerned Parliamentary Election for Lilongwe City South West Constituency which was held on 15th June, 1999. A whole ballot papers box missed after the votes were properly counted at Livimbo Polling Centre. The box was later found at the premises of Lilongwe District Commissioner. Mr. Gama was declared winner of the election after excluding the votes in the missing box. When the votes in the missing box were included in the vote count Mr. Omar won. The Court found no justification for excluding the votes which were in the missing box since the box missed after the voting and counting were conducted and the votes for each candidate

were properly recorded in the relevant documents. Clearly the irregularity in ***Gama -vs- Omar and Another*** did affect the result of the election. A declaration was granted nullifying the result of the election and declaring Mr. Omar winner of election in Lilongwe City South West Constituency.

In the case of ***Phoso -vs- Malawi Electoral Commission***, Civil Cause No. 1271 of 1996 Chimasula Phiri, J., is quoted as saying:

“The argument of the plaintiff is that the defendant should have nullified the by election and ordered a re-run. I would have agreed if the number of votes affected by the irregularities could have also affected the results of the by election. Otherwise nullifying those affected votes would not change the position of the candidates at all.”

In the case of ***Kanyinji -vs- Malawi Electoral Commission***, Miscellaneous Cause No. 21 of 2004 the petitioner stood as an independent candidate in Parliamentary Elections for Mchinji North Constituency. His election symbol consisted of a plant of tobacco with leaves on one side of the ballot paper and a hand holding three cobs of maize on the other. At the eleventh hour the Malawi Electoral Commission changed the petitioner's election symbol. They completely deleted the hand and the three cobs of maize from the ballot paper. They did not communicate to the petitioner about what they had done to the symbol.

The petitioner discovered the change on the polling day. Despite what the Malawi Electoral Commission had done the petitioner secured a second position polling 26% of the total valid votes cast while the winner polled 37% of such votes.

In her judgment in which she refused to nullify the result of the election Chombo, J., said at page 7 of her judgment:

“The petitioner’s argument, I find has not been fully substantiated to convince the Court that some, if any at all, confusion was created by the alteration of the symbol of such a nature that it could account for the failure by the petitioner to sweep all the votes to enable him take top position.”

The learned Judge added at page 9 of the judgement.

“However, I find little evidence on record that the mere alteration of the symbol could indeed have been the sole cause for the petitioner losing the elections. So many other circumstances could have contributed to this state of affairs.”

The position of the law on elections in Malawi is supported by some cases from other countries in our region which stress the importance of irregularities or errors affecting electoral results before the outcome of the election is invalidated: See the South African case of ***Mtoba and Other*** ----

-vs- Sebe and Others (1975) 4 SALR 413 and the Zambian case of **Lewanika -vs- Chiluba** CZ No. 14 of 1998. The position in the United States of America is to similar effect. In the case of **George -vs- Municipal Elections Commission Shearouse Adv. Sh No. 16 E.E 2nd**, there is this statement on the law of elections:

“The Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful.”

In Australia there is case law to the same effect. In the case of **Bridge -vs- Bowen** (1916) 21 LR 582 there is a statement of the law on elections in the following terms:

“It is not every irregularity that will lead to an election being declared void. It must be an irregularity such that the result of the election is thereby uncertain.”

It is safe to state that the law on elections in this country is developing and therefore other rules and principles guiding courts when considering election disputes are likely to emerge in future.

One of the irregularities which the learned Judge found on the evidence and which influenced him in nullifying the election result was the use of public resources, by the 1st appellant, for campaign purposes. The 1st appellant and her husband readily admitted in the court below that an official

vehicle registration number PAR 2 was indeed used during campaign. However, the 1st appellant claimed that she was entitled to the use of her official vehicle as 1st Deputy Speaker of the National Assembly.

Counsel for the 1st appellant submits that after the dissolution of parliament preceding the general elections the 1st appellant was entitled to all her remuneration and other benefits as member of the National Assembly. We agree. She was entitled to these by virtue of Section 67(5) of the Constitution, which states:

“Notwithstanding the dissolution of the National Assembly on the date specified in Sub Section (1), every person who immediately before the dissolution of the National Assembly in accordance with Sub Section (1), is a member of the National Assembly shall be entitled to receive his or her remuneration and other benefits up to and including the last day preceding the general elections.”

Counsel for the 1st appellant further submits that the 1st appellant in her capacity as 1st Deputy Speaker of the National Assembly remained a member of a Parliamentary Services Committee and could chair that Committee during that time that Parliament stood dissolved. The suggestion here is that, the 1st appellant was entitled to the benefits she enjoyed by virtue of her position as 1st Deputy Speaker of the National assembly. We also agree. We are satisfied that Counsel's submission

is well supported by Section 10 of Parliamentary Services Act which states:

“(1)On the expiration of the term of the National Assembly, the Committee shall, until the first meeting of the National Assembly after the general election of its members consists of:-

(a)the person holding the office of Speaker or Deputy Speaker at the time of the expiration or, if there was at that time a vacancy in the office of Speaker or Deputy Speaker or if the person holding that office at that time dies, the person elected from among members of the Committee who held such office immediately before the expiration of the term of the National Assembly;

(b)all other members of the Committee who held such office immediately before the expiration of the term of the National Assembly.

(2) On the expiration of the term of the National Assembly and until the first meeting of the National Assembly after the general election, the Chairman of the Committee shall be the person holding office as a member of the Commission under subsection(1)(a).”

Our clear view is therefore that the 1st appellant who was 1st Deputy Speaker of the National Assembly prior to its dissolution in anticipation of the general elections, was entitled to use her official vehicle registration No. PAR 2, during the relevant period. She was entitled to the use of the official vehicle both by virtue of the Constitution and Statute. We also hold the view that the 1st appellant was entitled to the use of that vehicle both for official business as well as private business.

The learned Judge in the court below came to the conclusion that the 1st appellant enjoyed a 20% advantage over the respondent by virtue of the use of her official vehicle during the campaign period. There was no evidence, in our view to support that conclusion. All the 1st appellant said was that she had four other personal vehicles which she used during the campaign. Now, the extent of the use of the official vehicle during the campaign was not established. Suppose the appellant only used the official vehicle for 3 afternoons for a total period of five hours during the entire period and used her other vehicles for the rest of the campaign period. Would that still translate into a 20% advantage? Then, we do not know how many vehicles were at the disposal of the other five contestants in the election. Is it not possible that she could have the official vehicle only at her disposal, use it extensively for campaign purposes, and still lose the elections if she were not popular with the electorate? We take the view that the

learned Judge's conclusion with regard to the 20% advantage was speculative and arbitrarily reached.

We also observe that it was not proved by evidence what effect the use of the vehicle had on the election result. Could it be said that but for the use of the official vehicle, the 1st appellant would have lost the election in Mzimba West? We are unable to accept that.

It would appear to us that the learned Judge, in the Court below, was influenced by the **Republican Party case** in coming to the conclusion that 1st appellant's use of her official vehicle constituted a substantial irregularity. It may be necessary to say a few words about the Republican Party case, **Malawi Electoral Commission and others -vs- The Republican Party MSCA Civil Appeal No. 14 of 2004**. Firstly that case was essentially about failure by the electoral body to deal with complaints relating to use of public resources for campaign purposes. What was in issue was the failure by the electoral body to address such complaints submitted to it. Secondly both the Constitution and the PPEA are silent on the use of public resources for campaign purposes. Therefore any judicial pronouncements to the effect that use of public resources for campaigning is unconstitutional as well as an offence under the PPEA are not entirely correct and are capable creating a misconception of the legal position on the matter. It is probable that they misled the learned Judge in the court below. Thirdly the kind of public resources with which the

Republican Party case was concerned were not official vehicles assigned to the President or government Ministers, but vehicles from public corporations and government ministries or departments.

Therefore, we are unable to find an irregularity committed by the 1st appellant in the present appeal, or such irregularity as would affect the result of the elections in Mzimba West Constituency. The appellants' appeal with regard to the issue of the use of public resources for campaign purposes is successful.

The learned Judge in the court below came to the conclusion that the voters' roll in Mzimba West was not verified and formed the view that that was sufficient justification for nullifying the election result in that constituency. We are unable to find sufficient evidence, adduced by either the respondent or any one of her numerous witnesses who appeared in the court below, which supports the learned judge's finding that the voters' roll in Mzimba West was not verified. One of the orders which were made by this court in the **Republican Party** case was the postponement of the polling day by two days specifically to enable voters and all other interested parties to inspect the voters' roll. That order and especially the need to inspect the voter's roll received extensive publicity in both the print and electronic media. Interested voters and other stakeholders were given a chance to inspect the voters' roll if they cared to do so.

The learned Judge relied on a statement made by Mr. Potani in arriving at the conclusion that the voters' roll was not verified. In his affidavit Mr. Potani said at paragraph 7:

"Due to some problems with some voters' rolls, Presiding Officers were informed that so long as a voter presented a valid voter registration certificate for a particular centre, they ought to be allowed to vote."

This paragraph does not specifically mention Mzimba West Constituency. It does not state that there were problems at Mzimba West Constituency relating to the voters' roll. The respondent did not testify that she experienced any problem with verifying the voters' roll in her constituency. She did not tell the court below that she failed to find her name or that of her supporters in the voters' roll at Mzimba West. It is probable that the respondent duly inspected the voters' roll at the relevant centre in her constituency and that she was able to find her name, and those of her supporters in that roll.

In paragraph 13.3 of the respondent's petition dated 24th June, 2004, it is stated that there was created an opportunity for persons not registered in the constituency to vote. This statement contradicts one of the respondent's complaints relating to voter apathy due to intimidation, threats and violence. If people not registered in the constituency came to vote one would expect that the voter turn up would be high. The respondent complained that there was a very low turn out of

voters in her constituency. Again the statement made in paragraph 13.3 is not supported by evidence. The respondent failed to give names of those persons who were not supposed to vote at particular centres but who nevertheless voted at those centres.

There was no evidence either from the respondent or any other witness giving names of persons who appeared in the voters' roll, at any centre in Mzimba West, who should not have been in that roll or of persons, who should have been in the voters' roll, but who were found missing from that roll. We would agree with learned Counsel for the second appellant that in the absence of such evidence any assertion that the voters' roll in Mzimba West Constituency had any problem having to do with verification can only be speculative.

Finally, even assuming that there was some irregularity relating to the verification of the voters' roll it has not been shown how that affected the result in Mzimba West Constituency. The burden would be on the respondent as petitioner to establish that the alleged irregularity affected the election result, especially, as happened in this case, the irregularity could not be blamed on the 1st appellant. That burden has not been discharged by the respondent

Ultimately we are unable to uphold the learned Judge's decision that there was established in this case an irregularity relating to verification of the

voters' roll, of such a nature as necessitated the nullification of the election result, in Mzimba West Constituency. The appellants' appeal on the issue of failure to verify the voters' roll succeeds.

Then the learned Judge found that there were irregularities affecting the determination of results. The irregularities here concerned failure to sign some documents called result of count forms by the Presiding officers, the Monitors, Party representatives or representatives of observer institutions. The learned Judge discovered that some result of count forms in the possession of the 1st appellant were not duly signed. He therefore, came to the conclusion that constituted an irregularity of such nature that justified the invalidation of the election result in Mzimba West.

The learned Judge found that result of count form exhibit LG 3 d did not show a code name and a centre name; result of count forms exhibits Nos. LG 3 h, L G 3 r, L G 3 s, L G 3 t, L G 3 u and L G 3v, were not signed by a presiding officer. There were one or two other similar forms which were not signed by UDF Monitors.

The issue of irregularity affecting the determination of results was not raised by any of the parties to the petition. The respondent did not dispute, in her petition, the manner in which the election result was determined. She did not fault the result of count forms in her petition. She did not dispute either in the petition or any affidavit the figure of 7478 which was the total number of

votes she polled during the elections. Therefore the issue as to the determination of election results was raised by the learned Judge himself; and eventually decided in favour of the respondent. We do not think that was proper; see the case of ***Nseula -vs- Attorney General, MSCA Civil Appeal No. 32 of 1997***. In that case Banda, C.J., observed –

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

The final result of the election was clearly determined from the original copies of the result of count forms. If the signing of such documents was a matter of great importance to the learned Judge, he should have called for the original copies from the Electoral Commission so that he could base his decision on the primary evidence rather than relying on secondary evidence which was in the possession of the contestants of the election.

The result of count forms must have been completed and signed at the end of the entire electoral process at a polling centre; that would be sometime late into the night, after the persons taking part in the process were tired. Then we do not know the state of lighting in the rural polling centres. Errors relating to completion of the relevant documents in those circumstances must be expected. It would, therefore, not be fair or reasonable to reject an entire result of count form just because one signature is missing from a mere copy of such document.

The learned Judge was at liberty to call the Presiding officers and Party monitors who did not sign the documents, before his court, and conduct an inquiry as to the reasons why these officials did not append their signatures to the relevant documents. That way he could have obtained better evidence to resolve an issue which he found to be relevant, although the parties themselves thought otherwise.

At page 113 of the judgement the learned Judge states that the irregular forms total 9. However, from page 112 to 113 the learned Judge lists the affected forms as L G 3 (d), (e) (h) (n) (q) (r) (s) (t) (u) (v). They total 10 in number. The learned Judge concluded that these forms should be rejected. When that is done the result is as follows: On the 10 rejected forms the 1st appellant polled a total of 2063 while the respondent polled a total of 2208 votes. It's the respondent who obtained more

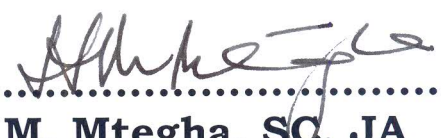
votes than the 1st appellant on the forms which the learned Judge decided to reject. The result is that not only will the 1st appellant remain the successful candidate, but she will end up beating the respondent with more votes than would be the case if the forms are not tampered with. Therefore, the rejection of the forms will not change the result of the election since the 1st appellant will remain the winner of the elections in Mzimba West. On the basis of the legal position in this country, it would not be lawful to nullify the election result of Mzimba West. The appellants' appeal with regard to the issue of the determination of the results of an election also succeeds.

The appeal is allowed in its entirety. The learned Judge's decision vitiating the result of Parliamentary Elections in Mzimba West Constituency is set aside. Ultimately we uphold the result of Parliamentary Election in Mzimba West Constituency as declared by the Malawi Electoral Commission.

The respondent shall pay the costs of the proceedings both here and below.

Delivered in Open Court this 11th day of April,
2005 at Blantyre.

Sgd.....
L.E. Unyolo, C.J.

Sgd.....
H.M. Mtegha, SC, JA

Sgd.....
D.G. Tambala, SC, JA