

Summary of the ConCourt 03.02.20

by

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09 10. Judgement starts.

Potani, J: Welcomes everyone.

The judgement is 500 pages long.

There will be a summary this morning.

E-copies. Ready tomorrow. 4pm.

Chakuamba and others v AG and others (1999).
Focused on s80(2), Constitution

Importance of ss6, 12, Constitution

Transparent, free and fair elections are the foundation
of our democracy

Bush v Gore. Elections based on people's will.

s10, Constitution. Interpretation of Constitution and all
laws is the preserve of the Judiciary.

s9, Constitution. The nature of the Judiciary in Malawi.

Electoral Management System is onerous and resource heavy.

Constitutional framework of MEC. Sections 76, 77, Constitution and s8, ECA

PPEA is the gravamen of elections in Malawi.

MEC must apply its obligations under the PPEA in consideration of MEC constitutional duty.

The Petitions are s100, PPEA Petitions.

s100, PPEA allows the declaration of fresh elections

The Petitions were consolidated under O.6 r.9, CPR, 2017. The Petitions are now one claim.

MCC Mkandawire, J. The claim raised 3 constitutional questions:

1. Whether MEC breached their duty under sec 76, Constitution
2. Whether MEC breached their duty under sec 77, Constitution
3. Whether MEC breached their duty under sec 40, Constitution

The Issues:

1. Deal with matters pleaded
2. Should the Respondents have filed Responses beyond the sworn statements
3. Standard of Proof
4. Whether in determining s100, PPEA Petitions are based on quantitative or qualitative test or both
5. Undue election, undue return, any other cause
6. 21 May, 2019 presidential elections: count, audit and announcement of the elections
 - a) intimidation
 - b) bribes
 - c) tampering
 - d) unauthorised persons being found with ballot boxes
 - e) failure to deliver ballot papers under strict security
 - f) plethora of irregularity

7. MEC breached Constitution and electoral laws

- a) duplicate tally sheets
- b) tippexed tally sheets
- c) fake tally sheets
- d) manually altered sheets
- e) altered results in RMS
- f) failure to account for null and void votes
- g) stream results counted as centre results
- h) registered voters varying with votes cast
- i) votes cast lower than votes issued
- j) delay in transfer of results (SA, MC and LLW)
- k) prematurely announced presidential results
- l) breached statutory processes
- m) failure to provide summaries of the results

8. Whether MEC acted unjustly

- a) Mpatsa polling centre incident (Presiding officer found with premarked ballot papers)
- b) Nsanje central constituency (Fred Tomasi tampered with ballot papers)
- c) Failure to provide copies of tally sheets
- d) Contaminated results
- e) Failure to conduct thorough audit in disregard of complaints from MCP

9. MEC committed the following wrongs in breach of s76, Constitution, PPEA and ECA

- a) Failure to conduct accurate electronic transmission of results
- b) Failure to use original result tally sheets
- c) Massive tampering during recording, counting and transmission of votes
- d) Breached ss40, 76, Constitution
- e) Announcement of results before attending to complaints from MCP
- f) Bias in breach of ss76, 77, Constitution
- g) Bias towards APM and failed to be impartial

10. Whether from an announcement of results the irregularities affected 1.45m votes

11. Whether LC was not getting his due votes

12. Whether APM shouldn't have been declared winner if MEC acted with due diligence

13. Whether MEC was party to rigging

14. Whether MEC unduly and unlawfully declared APM Prez

The reliefs sought

1. Declaration that the presidential elections is null and void an initio

2. MEC failure to remedy the irregularities breached ss,

76, 77 and 40, Constitution

3. APM wasn't duly elected as Prez

4. Order fresh elections

5. Other order that is just

6. Costs

The electoral process under PPEA: Supply of polling materials to determination of results

Part VI, PPEA (on polling stations) is very important especially s68, PPEA

s70, PPEA outlines the materials at polling stations

Political parties/candidates have the right to monitors: s72, PPEA. This is not mandatory.

s73, PPEA outlines the rights and duties of monitors

s73(a)(iv), PPEA is critical

Part VII, PPEA (on voting process) - one person; one vote (s74)

s75, PPEA the right of a registered voter to vote

s85,PPEA is also critical

s88, PPEA (null and void votes)

- Difference between definition of null and void ballot papers under the PPEA and MEC Polling Procedures Manual

MEC should have strictly applied the statutory meaning of "null and void" votes

s90, PPEA (on close of polling)

- s70, PPEA (start of polling e.g. Form VI)

Forms are important. See reg. 2(1) ,PPE (Forms) Regulations

s91, PPEA (on classification of votes)

Form VI provides for steps on closing of poll

s93, PPEA (POs are under a duty to record the process at a station, provision of summary of election results, public display of summary of election results)

MEC departed from the procedure under the PPEA

Record sheets under s93, PPEA are based on s70(f), PPEA and log books are under s70(h), PPEA: see *Ralph Mhone v Simon Vuwa Kaunda* (2019)

s94, PPEA (POs required to deliver of the "election materials" under absolute security to the DC).

This is critical for preparation of the district record
s95, PPEA (Form IX)

s95(5), PPEA requires DC to deliver to the CEO, MEC the district record under conditions of absolute security

MEC is mandated to use all these records in determination of results

s96, PPEA (on determination of national result)

A national result must be based on the records from the districts (s95) and polling stations (s93)

s97, PPEA (what must happen at the beginning of the national result - Have complaints been dealt with, etc)

MEC is obliged to deal with complaints, and examine all votes that are deemed null and void

In the absence of full records under ss 03 and 95, MEC can't make determinations on complaints

s98, PPEA (summary of determination of complaints). This is a mandatory and peremptory requirement.

MEC must have complied with s98, PPEA before publishing the national result under s99, PPEA

The 8-day period to announcement of the national result is inadequate

Part IX, PPEA deals with election petitions:
s100, PPEA Petitions.

"undue return", "undue election"; are not defined under the PPEA

"undue return" is the proper declaration of a winner

"undue election" is one that complies with all electoral processes at law

See Black's Law Dictionary on undue return and undue election

See also Banks v Johnson; Scales (??); Irwing v McGregor

Petitions under s100, PPEA must be based on IRREGULARITY and ANY OTHER CAUSE WHATSOEVER

"Irregularity" under the PPEA means non-compliance with the Act

"Any other cause whatsoever" is self explanatory

See Bentry Namasasu v Ulemu Msungama (SCA)

Part XI, PPEA (on complaints and appeals) -
ss113 and 114,PPEA

Procedure on ss113,114 and s100, PPEA were
fully dealt with in Namasasu Case ; and the
procedure is different

s119, PPEA (on depositing election materials with
Clerk of Parliament): Namasasu Case emphasised
the importance of s119

On the evidence and the law

Witnesses for P1: SKC, MG, DN & BK

Witnesses for P1: LC, RC, AB, EM, DS

Witnesses for R1: Ben Phiri, and BC + 40 witnesses
via statements

Witnesses for R2: SA, HM and MC + over 600
witnesses via statements

1. On matters not pleaded

A petition is not a pleading/statement of case
(Ruling of 21 June, 2019)

Respondents argue that these issues were not pleaded: duplicates, tippex, fake tally sheets; POs not signing; Failure to provide results; IT issues; Vote numbers disparity

Respondents relied on *Gondwe v NyaHara* (SCA)

Petitioners argued that the 3 questions on the Constitution broaden the matters on which the Court must look at. And that the Respondents had a chance to respond

O.1 r.5, CPR, 2017 ("dealing with matters justly")

See *Flatter v Buckingham County Council*

Petitioners argued that there is no Response

In *Gondwe*, the SCA observed that grounds may be in petition or sworn statement

The Court agrees with the Petitioners on the basis of O.1 r.5, CPR, 2017

P2 states most of the issues in his petition anyway

Alfandika and Munkhondia answer the questions raised anyway

Regarding the filing of Responses: The Court notes that the 25 June, 2019 Ruling ordered the filing of Responses

The Respondents never filed Responses. They filed comprehensive sworn statements.

Petitioners filed sworn statements in Reply

O.2 r.4, CPR, 2017 (An application based on failure to comply must be made timeously and before a fresh step)

The issue of Responses cannot arise now

*Burden and Standard of Proof

Election Petitions are a different breed. CPR, 2017 doesn't specify who bears the legal burden and standard

See Beatrice NyaKumwenda v NyaHara (2019)

See also Raila Odinga Case (2017)

Burden: He who alleges must prove. Make a prima facie case. Then evidential burden shifts.

Standard: Balance of probabilities. This puts the people at centre of governance under a human

rights approach.

You cannot have a higher standard of proof on constitutional rights

*Qualitative v Quantitative Test

Adjourned 13 30 hours

Resumed 14 35hours

Kamanga, J:

*Qualitative v Quantitative Test

Phoso v MEC

Kanyinji

Gondwe v NyaHara

These cases represent the quantitative approach

Namasasu. This is a s100, PPEA petition. HCM & SCA based their decision on irregularity.

Besigye Case (Uganda). The Court advocated a dual process of qualitative and quantitative approaches. Numbers are not the only determining a petition.

Raila Odinga Case. Quantity is as good as quality.

The Court will apply both the qualitative and

quantitative approaches in deciding the 21 May, 2019.

*Failure to Call Material Witnesses

This relates to Commissioners and Monitors.

The competence of Commissioners must be considered in light of MEC as a constitutional body.

Commission as tribunal. ss75, 76, PPEA. See Namasasu Case

MEC had to apply s43, Constitution

s9, ECA on the power to delegate. The function to be delegated must undergo a "importance" test. A judicial function must rarely be delegated. In elections, this has constitutional implications. The election of a President cannot be delegated.

See ss12, 13, 40, 75, 76, PPEA

The Commission couldn't afford to delegate its quasi-judicial power to the CEO, MEC

Commission as an administrative body. Administrative powers can be delegated.

However, MEC is governed by ss8, 11 and Part IV, ECA. MEC makes decisions at meetings of

Commissioners via simple majority. Minutes must be kept. This is a record.

CEO, MEC was incompetent to testify on behalf of the Commission

s9, ECA grants Commissioners very wide discretionary powers. The purported delegation would amount to abdication of duty. It is absurd, unreasonable and unconstitutional.

s99, 100, PPEA (on the power to delegate)

The failure to call Commissioners leads the Court to infer adverse effect

Monitors:

Available at stream, constituency tally centre and national tally centre

Monitors are important in light of allegations made (duplicates, fake sheets, etc)

Respondents argue that the allegations can't be sustained in the absence of monitors

On the use of tippex/alterations. The documents speak for themselves. Besides there is evidence of over 200 POs and Munkhondia that result sheets were

altered. Alfandika confirmed that the defaced sheets were used in determining the national result.

Monitors must be looked at three evidence: a) Instances of hearsay b) Documents spoke for themselves and c) The Respondents corroborated allegations

Subramanian Case must be analysed further.

Petitioners witnesses were not at polling stations. Maotcha Case is authority for inadmissibility of hearsay evidence.

Monitors had to attend Court relating to allegations that they didnt get copies

Atiku Abubaker Case (Nigeria). The importance of both witnesses and documents.

In Malawi, either oral evidence or documentary evidence constitute sufficient evidence.

In a majority of queries, monitors didn't have to attend court.

On allegations of rigging: Monitors had to testify. MG testified of an incident at BSS. The allegations were not proven.

Atiku Abubaker Case (distd.) on account of dumping evidence relating to the lawfulness of the vote. The witnesses were competent (e.g. MG)

s119, PPEA recognises election results sheets are public documents: see Bauleni Case.

The role of monitors is defined under the PPEA. Monitors' presence is voluntary. The duty of monitors is to their party. MEC cannot rely on acquiescence of monitors: Mhone Case.

Emphasis on monitors is significant, it is also overrated.

THE ISSUES

1. Intimidation, Bribery, POs interference, MEC tampered with ballot papers, Unauthorised people, Arrests, Failure to provide absolute security

Intimidation not proven

Bribery not proven

POs interference not proven (SKC & MG - Hearsay.)

Tampering with result tally sheets

(Evidence on court record; especially MG)

Cf Raila Odinga Case: a sample of the evidence was persuasive. The Court endorses the sampling approach in the present case.

SKC4 and HM2, POs confirm the tampering. The Court finds massive use of tippex to alter results

Respondents argue that the tippex didn't affect the valid vote count. MEC failed to ignore the tampered results sheets. SKC4 corroborates MG on the commitment of MEC to discard defaced results. See Kamkwatira Case on integrity of an election.

Widespread use of tippex greatly undermined the integrity of the election. There can't be a valid vote count in the circumstances

No evidence on unauthorised persons.

Arrests. MEC Chair. Para 13, SKC Supplementary Sworn Statement. MG11 (UTM monitors at Nchalo and Mulanje arrested). No evidence.

Failure to provide absolute security. No evidence. MEC actually provided security and asked all parties to provide monitors. MDF & MPS provided the security.

2. Plethora of irregularity

Respondents argue that this lacks particularity. HM (paras 8 and 9) disagreed with the allegation of irregularity.

R2 (pp400-420) addresses the point.

*POs didn't sign. Gondwe v NyaHara. POs signing is a statutory requirement: s93, PPEA. Gondwe v NyaHara (distd.). Mhone Case is the correct position. Cf. Raila Odinga Case.

Absence of the signatures amounts to an irregularity that undermines the integrity of the election

*Mzuzu City and Rumphu West

MG15 and MG15B

Rebecca Chirwa signed in two constituencies

Respondents argue that valid vote count is intact

The Court finds that this affects the integrity of the election

MEC failed to provide any explanation. RC is not in the list of witnesses

*Machinga South East

No evidence

*Forged signatures

Peter Lackson makes the allegation. No evidence.
The Court has its suspicions. But the owners of the signatures had to testify; handwriting expert evidence

*Log books

Evidence of MG, BK and PL

ss77, 89, 93, PPEA were breached. See Mhone Case.

The Court concludes that this breach undermined the integrity of the election

*Unjust conduct (premarked ballot papers)

No evidence

*NE PO Tampering with ballot papers

No evidence

*Refusal to provide tally sheets

No evidence

*Failure to detect alterations

P2 states the allegation. Evidence available.

BDO report: MEC authorised the auditors to use

altered sheets. HM confirmed this

This is an irregularity

BDO report confirms that results were not being verified by Commissioners. HM confirmed this

NTC; Used altered/tampered sheets. HM tried to provide the basis

s87, PPEA

*Announcing result without thorough audit

MEC contradicted DS evidence that auditors and Commissioners verified results manually and not in the RMS

BDO report (p2)

3367 Form 66Cs were approved without auditors verifying.

*Contaminated results

Evidence available.

ss91, PPEA breached.

MEC abdicated its duty

*Failure to deal with complaints

s98, PPEA

EM shows that some complaints were dealt with and others weren't

CEO, MEC was the one who dealt with complaints

This breaches the PPEA

Importance of record of complaints. Namasasu Case

*Duplicates

RC testified on the point. SA admitted to the use of duplicates.

HM2 confirms that duplicates were used as the official record

The Court finds this an irregularity: s93, PPEA

MEC POs used duplicates on instructions

The Court finds that the figures were altered without physical verification and this affects the valid vote count

This failure was a significant irregularity

Null and void votes are so significant that s97,PPEA was developed

Again, Namasasu Case applies. The use of duplicates is a violation.

*Alterations

No need to amend Form 66Cs

This is an irregularity

*Tippex

Form 66Cs are a statutory requirement under s93,PPEA

The forms are public documents

Petitioners show the alterations and a clear unlawful motive

The Court finds that the use of tippex was to hide votes. Respondents didn't cross exam on this aspect

Tippex sheets were discovered during inspection under court order

ss91, 95, PPEA breached. This is an irregularity

s95(5), PPEA should have used DC record. The Form 66Cs were unlawfully altered at CTC which was unlawfully constituted

BDO report confirms use of tippex sheets

Use of tippex ain't recognised under international accounting standards

*Fake sheets

Four types:

1. Non-customized
2. Details crossed out and replaced
3. Wrong election centre

The printing contract disputes the fact that there was extra ballot papers

Use of ordinary paper: s71, PPEA (security and inviolability of election materials)

This is an irregularity.

Monitors need not sign.

*Altered sheets

Evidence available

HM and POs concede this irregularity

This breached ss 95, 96, PPEA. Alterations are not sanctioned by the law. Any discrepancies must be noted: s91, PPEA.

Adjourned 17 30 hours

Resumed 17 58 hours

Majority of electorate

P2 seeks this relief under s9, CA

The issue was decided by SCA in Chakuamba Case.

The Court distd. Chakuamba Case.

a)The SCA didnt consider MCP v AG

b).The SCA didnt consider any authoritative dictionary. While the Court considered OED for other terms. They didn't for "majority of the electorate"

Black's Law Dictionary defines the term "majority" and "plurality"

If the SCA had looked at the definition they would have arrived at a different conclusion

In Chakuamba Case on the point per incuriam

s80(2), Constitution. Chakuamba Case is correct.

Hence, majority under s80(2), Constitution means 50+1

The Court finds that APM wasn't properly elected

The legislature must give effect to the constitutional provisions through amendments to the PPEA

ANSWERING THE 3 CONSTITUTIONAL QUESTIONS:

1. Whether MEC breached their duty under sec 76, Constitution

2. Whether MEC breached their duty under sec 77, Constitution

3. Whether MEC breached their duty under sec 40, Constitution

Evidence of Peter Lackson points to vote count discrepancy. This flouts the one person one vote rule and breaches secs 76, 77, Constitution.

MEC breached sec 40, Constitution on account of

multiple breaches of the PPEA

Alterations can happen at determination of the national result under secs 96, 97, 98, PPEA

...

HM2 Analysis revealed massive irregularity:

1. Altered sheets - 1.3m
2. Unsigned sheets - 1.1m
3. Tippex sheets - 524, 340

HM2 evidence from MEC. The numbers weren't challenged. These are pervasive numbers and cast doubt on the integrity of the election

CTC; This aint supported by the law. CTC would have required an amendment to the PPEA. This flouts sec 76, Constitution and a usurpation of legislative powers

The alterations happened at CTC and these were illegal centres. The alterations were a nullity.

MEC failed to comply with s119, PPEA. Record log books weren't handed over. SA conceded to this. Makwete perjured himself in the process.

Preservation of election materials is important to demonstrate integrity of the process. See Namasasu Case.

s91,PPEA classifies null and void votes

ss93, 94,PPEA breached.

ss, 95, 96, PPEA breached.

Monitors didn't observe the vote count stage. This breached sec 97, PPEA

MEC failed to comply with the gazetting requirement of the national result: sec 99, PPEA. The gazetting occurred on 9 August, 2019 and even then sec 99, Constitution wasn't fully complied with.

These multiple statutory breaches flout sec 76, Constitution

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Sec 77(5), Constitution has been breached.

Sec 40, Constitution - esp. 40(1)(d) and 40(3)

Wesley v Sanders (US SupCt)
Prof DM Chirwa, Human Rights under the
Malawian Constitution

So; sec 40, Constitution has been breached as read with ss 6,7, Constitution

Sec 8, ECA is critical

MEC has a duty under sec 76, Constitution to run a free and fair elections

Tembo v Kainja on limitation of sec 40 right

ON THE PETITIONS

Every election has irregularities.

In the present elections, the irregularities are so widespread and systematic. The results announced cannot be trusted.

The undue return and undue election has been made out both qualitatively and quantitatively.

The findings is based on balance of probabilities

Even if we were to apply a higher standard, the case would have been made.

Under s100, PPEA,

- a) APM wasn't duly elected
- b) Election nullified
- c) Fresh elections
- d) MEC breached secs 40, 76, 77, Constitution

MEC was grossly incompetent.

Sec 80(2), Constitution means a candidate must get 50+

Consequential orders in terms of sec 41, Constitution and sec 46, Constitution

- a) SKC remains the State Vice President
- b) s100(5), PPEA applies
- c) s80(1), Constitution on concurrence of prez election and parliamentary election. The concurrence should be preserved. Legislative reforms must ensue.
- d) Fresh elections be held within 150 days
- e) Public Appointments Committee should under sec 75, Constitution are conducted competently and inquire into competence of current Commission
- f) Legislature should amend sec 75, Constitution to mention the appointing authority
- g) The 50+1 finding means that Legislature must within 21 days amend the law to accommodate run offs

Costs

APM bears his own costs.

MEC is a duty bearer. MEC should pay costs of the Petitioners. Costs to be assessed by the Registrar within 14 days if not agreed.

Kamanga, Madise, Tembo, Kapindu, JJ all concur

Court Riae.

19 40 hours

