

# Jefred Brown Mchali v Collins J.F. Kajawa and Electoral Commission

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Dorothy nyaKaunda Kamanga.
<b>Cause Number:</b>	Electoral Case Number 15 of 2014
<b>Date of Judgment:</b>	August 29, 2018
<b>Bar:</b>	Mr. Chipeta, counsel for the appellant Mr. Mpombeza, counsel for the 1st Respondent Mr. Mkwamba, counsel for the 2nd Respondent

## Head Notes

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**Electoral Law** – Electoral disputes – High Court – Appellate Jurisdiction – The High Court is only confined to appeals from Electoral Commission's determinations.

**Electoral Law** – Electoral Commission – Duties – Obligation to examine and determine complaints lodged before parties seek courts' interventions.

## Summary

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The Appellant, an independent parliamentary candidate, appealed to the High Court, Civil Division, by way of a petition under section 114 of the Parliamentary and

Presidential Elections Act (PPEA), challenging the declaration of the 1st Respondent as the winner of the parliamentary seat for Lilongwe Mpenu Nkhoma constituency during the 2014 tripartite general elections, which was made by the 2nd Respondent, the Electoral Commission. The Appellant, who finished second, alleged irregularities in the poll results, claiming that the tallies from the 18 centres showed he had won with 5,909 votes against the 1st Respondent's 5,896 votes. The Appellant lodged a complaint with the 2nd Respondent, alleging counting irregularity, but the 2nd Respondent, via a letter, advised him to lodge an appeal with the High Court. Consequently, the Appellant filed the petition herein seeking an order for a re-tally, a re-count, or a re-run, and ultimately an order declaring him the winner. The 1st Respondent and the 2nd Respondent opposed the petition, primarily raising a preliminary objection that the petition was premature and irregular, because of lack of any decision that could be appealed against under section 114 of the PPEA.

The principal legal questions for the Court were: (1) Whether the petition was properly brought under section 114 of the PPEA; (2) Whether there were irregularities in the election; and (3) Whether the Appellant was entitled to the declarations sought.

The Court found that the Constitution and the PPEA establish a procedure where electoral issues are first determined by the Electoral Commission, with the High Court having only appellate jurisdiction over the Commission's decisions. The Court held that the Second Respondent's letter, which simply declined to examine the alleged irregularities and advised the Appellant to go to the High Court, did not constitute a "determination" by an electoral tribunal. The Court found that the Second Respondent had been in "blunt dereliction of their duty" by refusing to examine and correct the defect. The petition was dismissed for want of jurisdiction, as it was brought prematurely before the Electoral Commission had made a final decision on the

complaint. The Court, exercising its discretion, ordered the Second Respondent to bear the costs of the petition, to be awarded to both the Appellant and the First Respondent.

## **Legislation Construed**

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### **Statutes**

Constitution of the Republic of Malawi (Ss 76(2)(c) & 76(3))

Parliamentary and Presidential Elections Act (Ss 113 & 114)

## **Judgment**

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The appellant, Mr. Mchali, and the first respondent, Mr. Kajawa, contested as independent parliamentary candidates in Lilongwe Mpenu Nkhoma constituency in Lilongwe district during the 2014 tripartite general elections. After tallying the results the second respondent, as the electoral body, declared the first respondent as the winner of the parliamentary elections in the said constituency, out of the seven candidates who contested, while the appellant came second in the parliamentary race. On 6 June 2014, the appellant being dissatisfied with the return, filed a notice of appeal in the High Court by way of petition, under section 114 of the Parliamentary and Presidential Elections Act, hereinafter the PPEA, alleging irregularities in the poll results and claiming for various declaratory reliefs in the event of the irregularities being established by the court.

The grounds of appeal in the petition showeth that in the summary of the tallies of the results from all the 18 centres of the constituency the appellant was ahead of every candidate as verified by exhibits marked JBM 1 and JBM 2. The appellant lodged with the 2nd respondent a complaint form, exhibit marked JBM 3, alleging irregularity in counting when the 2nd respondent pronounced that the 1st respondent was the winner after the tallied results by the appellant showed that the 1st respondent only polled 5,896 votes against the higher figure of 5,909 of the appellant. The appellant states that he was advised by the 2nd respondent through a letter dated 3rd June 2014 to lodge an appeal with the High Court hence this petition with this court.

The appellant seeks the following relief:

1. an order for re-tallying of the total parliamentary votes cast in the constituency in issue
2. An order for re-count of the parliamentary votes in the said constituency and in the alternative an order for a re-run.
3. In the event of an irregularity being established, an order declaring the appellant the winner

Not only did this petition suffer several adjournments at the instance of the parties but there were also several preliminary applications which resulted in almost four rulings and orders being delivered by the High Court before this final judgment. The High Court proceedings were stayed by the 1st respondent as he appealed against one of the rulings to the Malawi Supreme Court of Appeal, which is the subject matter in *Kajawa v Mchali and Electoral Commission*, MSCA Civil Appeal no. 20 of 2015. The Malawi Supreme Court of Appeal reversed the preliminary ruling of 6th March 2015 and ordered the High Court to pronounce a final determination on the petition.

Accordingly, this is the judgment of the court after reading the documents that were filed in support of and in opposition to the petition as well as hearing all the parties.

In his skeleton arguments and oral address the appellant submits that on the facts and circumstances of this case, the 2nd respondent's decision was erroneous as they declared the 1st respondent winner of the election when, according to him, the documents in their possession showed that the appellant was winner and that secondly, the 1st respondent refused to rectify their error and nullify the results when the appellant lodged a complaint with them. The appellant contends that under section 113 of the PPEA the 2nd respondent is under a duty, where any complaint alleging any irregularity at any stage has been submitted to it, to examine the alleged irregularity and take necessary action to correct the irregularity and the effects thereof. The appellant makes a pertinent observation that the 2nd respondent did not examine the relevant documents when the appellant lodged a complaint and that if the 2nd respondent had examined the documents properly, they would have noted the anomalies and they could have taken necessary action to correct the irregularity and the effects thereof. The appellant states that "in blunt dereliction of their duty to do so, the 2nd respondent refused to examine and correct the defect and advised the appellant to appeal against their decision to the High Court." However, the counsel for the appellant when responding to the 1st respondent on the procedure followed, had a change of tune and argued that the 2nd respondent made a decision in the form of a letter which appears as exhibit marked WK2. The appellant relies on the case of *Chisi v Electoral Commission*, HC/PR Electoral Case no 1 of 2014, to argue that he did not commence the petition under section 100 of the PPEA it is not in conformity with provisions in the Constitution. The appellant submits that he was duly elected winner of the parliamentary seat in the constituency in issue and not the 1st respondent and that the court should find so under section 114(5) of the PPEA. The appellant prays

that the 2nd respondent be ordered to pay costs for the appeal as the whole of the appeal could be avoided had the 2nd respondent properly examined and addressed the appellant's complaint.

The 1st respondent filed an affidavit in response in which among other issues he is challenging the legal existence of the 2nd respondent and he states that the complaint lodged by the appellant, exhibit marked JBM 2, did not specify the irregularities complained of or the evidence to support the same. The 1st respondent contends that he is the winner according to the duly published result of the elections as well as according to the appellant's evidence. The view of the 1st respondent is that the decision of the 2nd respondent was correct and should be upheld by the court and that the appeal should be dismissed with costs.

The 1st respondent also filed a notice of preliminary objection to the notice of appeal and petition stating that it is premature and irregular the appeal having been brought under section 114 of the PPEA when the 2nd respondent did not make any decision from which an appeal under the said provision could arise. The 1st respondent contends that the appellant is wrong in commencing this action under s 114 of the PPEA, the Electoral Commission having not made any decision from which he could appeal against.

The 1st respondent rely on the case of *Peter Chagaga Mandevu and another v Electoral Commission*, Civil Cause no. 336 of 2009 to argue that an appeal under section 114 of the PPEA can only be sustained if there was a decision made by the Commission. That in this case the Commission did not make any decision on the

merits since the same was summarily dismissed.

The 2nd respondent filed an affidavit in response to the petition, which was sworn by Lelli Longwe, the Deputy Chief Elections Officer of the 2nd respondent, praying for the dismissal of the petition. The 2nd respondent's views as contained in paragraph 12 of the said affidavit, are that the petition was based unofficial results collected by the appellant and that the irregularities if any, are not so extensive as to overturn the final results of the election in the constituency in issue. In paragraph 6 of Mr. Longwe's affidavit it is deponed that the official tallied constituency results of count on form MEC 77, exhibit marked LL1, reveal that the appellant had 5,209 votes while the 1st respondent had 5,846 votes and was duly elected winner. The deponent states that exhibit marked JBM 3 was not an official document; that the records from some named polling stations were not official as they were not recorded on official polling station result sheet and that there were no official results or any tally sheet for one of the polling stations. The deponent produces a copy of the letter dated 3rd June 2014 which appears as exhibit marked WK2, which the 2nd respondent wrote to the appellant.

The 2nd respondent in their skeleton arguments and oral address were of the view that lodging the petition under s 114 of the PPEA was misconceived and the petition should be dismissed. The 2nd respondent is of the view that 'the appellant is on a fishing expedition as to why he came second in the race' when there were no irregularities and there is no basis on which the appellant holds the view that he was the winner. The 2nd respondent submits that the allegations contained in the petition and the affidavits are highly speculative and unsubstantiated. The 2nd respondent rely on the following case authorities in support of the position that they were advancing: the local case of *Gotani NyaHara v Gondwe and Malawi Electoral Commission*, Misc

Civil Cause no. 82 of 2004; the English case of *Gunn v Sharpe* (1974) 2 ALL ER 1068; the South African cases of *Gerdener v Returning Office and Others* (I 976) 2 SALR 663 and *Mtoba and others v Sebe and Others* (1975) 45 SALR413 as well as several other foreign cases.

The 2nd respondent whilst in the written skeleton arguments concluded that the appellant has failed to make out a case for any of the declarations he is seeking and that the petition must be dismissed with costs. However, in the oral address during the hearing of the final submissions the counsel for the 2nd respondent, without either amending the affidavit or skeleton arguments, expressed a change of tune on the matter. The legal practitioner attempted to adduce evidence or somewhat make a confession of some sort to show that there were errors in some of the results in some polling stations and that there was an error on the part of the 2nd respondent in tallying the results. Obviously the manner in which the information was being put across by the legal practitioner irregular and therefore inadmissible.

The issues which this court has to determine are as follows:

1. Whether this petition has been properly brought under section 114 of the Parliamentary and Presidential Elections Act
2. Whether there were irregularities in the parliamentary elections in the constituency in issue.
3. Whether the appellant is entitled to the declarations he is seeking in the petition.

Under section 76(2)(c) of the Constitution one of the duties of the Electoral Commission, the 2nd respondent herein, is 'to determine electoral petitions and complaints related to the conduct of any elections.' Section 76(3) of the Constitution gives the High Court appellate jurisdiction over decisions made by the Electoral Commission. The case of *Chisi v Electoral Commission*, HCIPR Electoral Case no 1 of 2014, which was also referred to by the counsel for the appellant, emphasises that electoral issues are in the domain of the Electoral Commission and only come to the courts by way of appeal, after the 2nd respondent has made a determination of the complaints that have been lodged with the institution.

The appeal power and procedure are set out under section 114(1) of the PPEA. Section 114 of the PPEA is compliant with the constitutional procedure for dealing with electoral disputes which requires that aggrieved parties lodge complaints with the 2nd respondent so that it can arbitrate on them before the contestants have recourse to the courts. The case of *Chisi v Electoral Commission* provides guidance on the procedure that is to be followed when handling election disputes. In determining whether or not the present proceedings were properly commenced under section 114 of the PPEA the court has assessed the steps that were taken by the parties, especially the appellant, before filing the present petition. In brief the process of lodging a complaint which has not been satisfactorily resolved at a lower level of authority begins with the matter being examined and decided by the 2nd respondent before the contestant dissatisfied with the decision made by the 2nd respondent has recourse to the courts. The court is satisfied that the appellant did lodge a complaint with the 2nd respondent.

The appellant having elected to commence the proceedings under section 114 of the PPEA it implies that there was a determination of the 2nd respondent which his was dissatisfied with and from which he was appealing. The evidence and arguments before this court show that the 2nd respondent did not conduct a hearing let alone make a determination on the irregularities that were complained of by the appellant. The 2nd respondent merely advised the appellant, through a letter which appears as exhibit marked WK2, to bring an action in the High Court. An objective examination of the 2nd respondent's letter dated 3 June 2014 shows that the 2nd respondent clearly declined to examine and decide on the alleged irregularities and rectify the problem raised by the appellant, citing that 'there was no evidence' and advised the appellant to appeal to the High Court. Exhibit marked WK2 cannot by any reasonable imagination be considered to be a determination from an electoral tribunal. This finding is fortified by the arguments of the appellants himself when he states that "in blunt dereliction of their duty to do so, the 2nd respondent refused to examine and correct the defect and advised the appellant to appeal against their decision to the High Court." Consequently, this court finds that there was no decision made by the 2nd respondent on the electoral issues raised by the appellant that could be appealed against. In as much as the appellant complied with requisite procedure by lodging a complaint with the 2nd respondent, the Electoral Commission did not handle the complaint in accordance with the law. The petition of appeal is therefore incompetent for being brought to court prematurely before a tribunal of the 2nd respondent had made a determination which would have been the basis of an appeal under section 114 of the PPEA. The law is clear that the High Court can only be seized of the appellant's matter by way of appeal from the 2nd respondent's decision, if the appellant is dissatisfied with the decision of the 2nd respondent.

The petition is dismissed for want of jurisdiction and it is ordered that the Electoral Commission arbitrate on the complaint that the appellant lodged with them.

This court exercises its discretion and orders that the costs occasioned by this petition be awarded to the appellant and the 1st respondent, to borne by the 2nd respondent.

Delivered in open court this 29th day of August 2018 at Chichiri, Blantyre.