

GEORGE PAUL PHIRI v GEZANI B. PHIRI (1979) Z.R. 126 (H.C.)

HIGH
HADDEN,
17TH MAY, 1979
1979/HP/EP/10

COURT

J.

Flynote

Election petition - Recount of votes - When court may order recount.

Headnote

The petitioner polled 330 votes less than the respondent. The result of the count of the votes from two mixed ballot boxes were not announced until some time after the counting. After this the petitioner demanded a recount but his demand was refused.

Held:

- (i) The returning officer was right to refuse a request for a recount because as soon as he has declared someone elected, the election can only be questioned through an election petition.
- (ii) The court may make an interlocutory order for a recount in proceedings brought by way of an election petition if the evidence justifies the making of such an order.

Legislation referred to:

Electoral Act, Cap. 19, s. 19 (2).

Electoral (National Assembly Elections) Regulations, Cap.19, regs. 43, 44, 70 (1), (3)

For the petitioner: D.M. Lewanika, Shamwana & Co.

For the defendant: M.F. Sikatana, Veritas Chambers.

p127

Judgment

HADDEN, J.: Though the petitioner seeks an order for a scrutiny pursuant to the provision of s. 19 (2) of the Electoral Act, counsel for the petitioner in opening told the court that he in fact seeks a recount of the votes; as there is no provision in the Act for an order for a recount the only means whereby such an order could be sought, he submitted, was by proceedings under s. 19 (2).

The basis upon which the petitioner seeks the order is that after the votes from two ballot boxes had been mixed and counted he was able to form an opinion of the extent of the support each candidate had received from the electorate, and that in all cases except one his observations had proved to be substantially correct.

Mr J.T. Sikazwe, of the Electoral Office, produced the declaration of the result of the poll, the record of proceedings at the count and the statement of rejected ballot papers. The respondent polled 330 more votes than did the petitioner. The statement of rejected ballot papers discloses their number to be 483, while the record of proceedings at the count shows the total to be 482. The court

attaches no significance to this discrepancy.

Mr L.M. Sichalwe, the returning officer for the election in question, described how the counting of votes took place and admitted that the result of the count of the votes from each of the mixed ballot boxes were not announced although they were recorded. After the counting was completed he waited for about twenty minutes before declaring the result, no request for a recount was made until after the result had been declared, when the petitioner called on him at the rest house where he was staying. He denied that he had promised to arrange a recount either the following day or at any other time. The reason why he refused a recount was because the result had already been declared. The petitioner admitted that he had not requested a recount before the declaration of the result, but said that Sichalwe had promised to do so the following morning when the results were verified.

A candidate can demand a recount which could only be refused if the request, in the opinion of the returning officer, is unreasonable. Regulation 70 (1) and (3) of the Electoral (National Assembly Elections) Regulations provides:

"(1) A candidate, his election agent or his polling agent may, if present when the counting or any recounting of the votes is completed, require the returning officer to have the votes recounted or again recounted, or the returning officer may, on his own initiative, have the votes recounted or again recounted:

Provided that the returning officer may refuse the request if, in his opinion, it is unreasonable.

(3) No step shall be taken by the returning officer on the completion of the counting or of any recounting of the votes until the candidates, election agents and polling agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by this regulation."

p128

Mr Lewanika submits that the returning officer was wrong in refusing the petitioner's request for a recount and says that an order that this be done should therefore be made by the court. Mr. Sikatana, for the respondent, submits that there cannot be a recount after the result of the poll has been announced.

Regulations 43 and 44 read:

"43. When the counting of the votes has been completed and the result of the poll ascertained, the returning officer shall -

- (a) complete in duplicate a declaration of the result of the poll as in Form NAE 11 in the Schedule; and
- (b) declare to be elected the candidate to whom the majority of votes has been given by reading aloud public, at the place where such counting was conducted, such completed form; and
- (c) cause to be delivered to the Commission without delay the original of such completed form.

44. (1) The Commission shall, in respect of each candidate declared elected in accordance with the provisions of regulations 35 and 43, give notice in the Gazette of-

- (a) the full name of such person; and
- (b) the constituency in which such person was elected.

(2) Notwithstanding anything contained in regulation 35 or 43, a person declared elected under either of the said regulations shall be deemed to have been elected with effect from the date appointed for the taking of the poll at the final election in the constituency concerned."

As soon as the returning officer had declared the respondent to be elected the respondent was deemed to have been elected under reg. 44 (2) and the only method whereby such election could be questioned was by way of an election petition, not by way of a request for a recount by the returning officer under reg. 70 (1). The returning officer was correct in refusing the request for a recount after the declaration had been announced although it might have been more advantageous to the candidates, if they had been confidentially informed of the result before this was done.

The court has in the past made an interlocutory order for a recount in proceedings brought by way of election petition but the evidence must be such as to justify the making of such an order. The petitioner formed his opinion of the approximate number of votes cast for the respective candidates from his observations of the number of votes placed in each candidate's basket. The assessment of the degree of his success was described as either "very good", "good", "fair" or "bad". In only one case, that of Chadiza and Kalemba, could it be said to have been obviously wrong; the petitioner's classification of his result as being "good" could more accurately in this case be described as "fair" or even "bad" as he polled 256 votes while the respondent and the third candidate polled 522 and 267 respectively.

p129

Were it not for the fact that the petitioner and respondent have identical surnames and similar initials, and that the petitioner's assessment of the degree for his success was reliable in all cases except one, where the disparity between the result and his assessment of the situation was such that it is unlikely that the petitioner could have been mistaken, the court would be most hesitant to find that there was sufficient evidence upon which the court could make an order for a recount. The court is satisfied however that for these two reasons this is a proper case in which a recount should be ordered.

At the commencement of these proceedings the court ruled that it would not make an order for a scrutiny, as prayed, without evidence being led which would justify the making of such an order. Counsel had made it clear that he in fact sought an order for a recount and the court has found that on the evidence such an order is justified. The court is satisfied that it can make an interlocutory order for a recount without at this stage making a determination either in accordance with the prayer to the position or in accordance with any amendment to the prayer should an application for amendment be made at a later stage, and leave be granted.

The court orders that there be a recount but only of those votes cast in favour of the petitioner and

the respondent; that such recount be conducted by the Registrar of the High Court with the assistance of counting assistants to be nominated by the Director of Elections, in the presence of counsel for both the petitioner and the respondent, and their clients if so desired, within seven days from the date hereof, and that the Registrar do thereafter submit a report of the result of the recount to the court; both parties to be at liberty to apply in chambers.

Recount of votes ordered
