



REPUBLIC OF KENYA



KENYA LAW
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Kidero & another v Independent Electoral & Boundaries Commission & 4 others (Election Petition E001 of 2022) [2022] KEHC 15799 (KLR) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
ELECTION PETITION E001 OF 2022
RE ABURILI, J
NOVEMBER 29, 2022**

BETWEEN

EVANS ODHIAMBO KIDERO 1ST PETITIONER

ELIJAH ODONDI KODOH 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

**COUNTY RETURNING OFFICER, HOMABAY COUNTY FREDRICK
APOPA 2ND RESPONDENT**

GLADYS ATIENO NYASUNA WANGA 3RD RESPONDENT

JOSEPH OYUGI MAGWANGA 4TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 5TH RESPONDENT

RULING

1. This ruling determines the oral application made by Mr Kanjama Senior Counsel, advocate for the 3rd and 4th respondents seeking that the sample signature given by PW10, John Okambo Kisiara in open court during cross examination be admitted in evidence as evidence for the 3rd and 4th respondents.
2. Mr Kanjama SC submitted that the signature of PW10 in his affidavits of September 7, 2022 and the further affidavit of October 14, 2022 were different. Senior Counsel therefore moved this court for PW10 to give samples of his signatures so that the same could be compared with those signatures appended to the two affidavits sworn on different dates and that the same admitted in evidence as exhibits for consideration by the court as to their authenticity.



3. The application was opposed by Mr Okweh Achiando, counsel for the petitioners on the grounds that allowing the said samples taken from PW10 as exhibits would amount to introducing new evidence and further that in any case, PW10 had sufficiently explained the disparity in the signatures.
4. I have considered the oral application by SC for the 3rd and 4th respondents and note that in election petitions, just as in civil matters, the legal burden of proof rests solely on the petitioner throughout the course of the trial. See the case of *John Harun Mwau & 2 others v IEBC & 2 others*, Supreme Court Petition 2 & 4 of 2017. This is codified in section 107(1) of the *Evidence Act*.
5. However, although initially resting on the petitioner (the party bearing the legal burden of proof), the evidential burden of proof may shift between the parties as the weight of evidence adduced during the trial varies. The evidential burden of proof shifts to the respondent once the petitioner adduces sufficient evidence to impugn an election, if uncontroverted. See the cases of *Raila Amolo Odinga & another v IEBC & 4 others & Attorney General & another*, Presidential Petition No 1 of 2017; and *John Harun Mwau supra*.
6. What then is the standard of proof? The standard of proof refers to the extent a petitioner is required to go, to succeed in his/her petition. The standard of proof in electoral disputes is an 'intermediate standard', one that is greater than a 'balance of probabilities' but lower than 'beyond reasonable doubt'. This was the holding of the court in the case of *Raila Amolo Odinga & another v IEBC & 4 others & Attorney General & another*, Presidential Petition No 1 of 2017.
7. In the instant case, PW10 took an oath in court and had his two affidavits one sworn on September 7, 2022 and the other being a further affidavit sworn on October 14, 2022 adopted as his evidence in chief. In his testimony in chief, he stated that the two signatures were made by him. He was then questioned on the two signatures in his affidavit of October 7, 2022 and his further affidavit sworn on the October 14, 2022 firstly by the advocate for the 1st and 2nd respondents and then by the Senior Counsel Mr Kanjama for the 3rd and 4th respondents.
8. In his reply to the intensive questioning by Senior Counsel Mr Kanjama, first on his educational background, he stated that he went to school up to class three. PW10 stated further that he had multiple signatures and that he easily forgot his signature. PW10 detailed in court how he even had problems at his bank, Equity Bank Kisii Branch, whenever he sought to withdraw money and gave differing signatures. He stated that it had got to a point where the bank branch manager was made aware of this issue and would intervene on his behalf. PW10 was firm and confident in his testimony on this fact.
9. PW 10 maintained that the signatures in the two affidavits were his. From the above, I find that PW10 discharged his burden of proving that both impugned signatures are his. The burden now shifted to the 3rd and 4th respondents who raised the issue of PW10's different signatures, in essence questioning their validity.
10. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

"107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

11. In the instant case, the 3rd and 4th respondents have been in possession of the impugned affidavits by PW10 since October and even up to the close of pleadings, they had the opportunity, at the time that they sought to strike out further affidavits, to attack the authenticity of the two signatures. The respondents never questioned the said signatures prior to close of pleadings and never sought leave from the court to contest the same.

12. It was upon the 3rd and 4th respondents to seek to take steps to impugn the signature of PW10, now that he has admitted that the two signatures are his. Having failed to do so, the only audit of PW10 and his signature can only be conducted in cross-examination, which has been done, quite intensively. This is so because for this court to find that the signatures in question do not belong to the witness at this stage calls in the question of who commissioned the said affidavits and whether it was the witness herein who signed the affidavits in the presence of the said Commissioner for oaths. Such Commissioner for oaths would also be required to swear an affidavit and even be cross examined on that affidavit as to whether he or she saw the deponent sign the affidavit in question before commissioning it.

13. I am in agreement with my brother Onesmus Makau J of the ELRC when the learned judge stated as follows concerning impugned affidavits on account of different signatures in the case of [*Kayum Khan v International Commercial Company \(K\) Limited*](#) [2018] eKLR:

“I have carefully considered the signature on the said verifying affidavit and the other signature known by the claimant. They obviously look different. However, that does not necessarily mean that the signature on the verifying affidavit was not done by the deponent Mr Farid Hamir. The burden of proving that the signature in dispute is not by Mr Farid Hamir is upon the claimant who is alleging that it does not belong to the deponent. This court finds that the said burden of proof has not been discharged on a balance of probability. Other than the mere allegations by the claimant that the signature is different from the signature he knows for Mr Farid Hamiri, there is no expert opinion to support the claimant’s allegation.”

15. Tuiyot J (as he then was) on the other hand had this to say on a similar issue in an election petition in [*Henry Okello Nadimo v Independent Electoral and Boundary Commission & 2 others*](#) [2013] eKLR, referring to the submission by counsel to the effect that he was, however, emphatic that it was not mandatory that a person sign all documents with the same signature and that in any event, the said counsel was not a handwriting expert so as to purport that the signature appearing in the said replying affidavit did not belong to the deponent therein.

“ 16. Having considered the said arguments, this court noted that as there were no sample signatures of the deponent of the 2nd defendant’s replying affidavit and a report from a handwriting expert, on the court record, indicating whether the said signature belonged to the said deponent or not and the issue was not one that had really been placed before court for determination, it was not persuaded that it could interrogate the 1st defendant’s counsel assertions and make a determination on the competence or otherwise of the said replying affidavit.



Each of the witnesses who testified before me were either sworn or affirmed before giving evidence. Each one of them adopted the contents of the statements in their evidence in chief. I take the view that by adopting the contents of their statements (the invalid affidavits) under oath or affirmation, the witnesses of the petitioner presented the contents therein as evidence under oath or affirmation and the same were properly received. Each witness was then cross-examined. I am swayed towards accepting as properly received the evidence of the petitioner's witness received. In the rest of this decision, I refer to the invalid affidavits as written statements.”

15. This court finds that unless a witness denies that the signature is theirs, whether on affidavits or any other documents, or unless the authenticity of those signatures are impugned by a handwriting expert, this court has no expertise in matters handwritings and signatures and it will not in the instant situation allow the 3rd and 4th respondents to adduce evidence using the signatures given in a court sitting as conclusive evidence for the 3rd and 4th respondents that the signatures imposed by the witness for the petitioner were not his.
16. I therefore find that the application by the 3rd and 4th respondent's counsel cannot stand. It is hereby declined and dismissed.

DATED, SIGNED AND DELIVERED AT HOMABAY THIS 29TH DAY OF NOVEMBER, 2022

R.E. ABURILI

JUDGE

