



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
ELECTION PETITION NO. 3 OF 2017

THE ELECTION (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017

JOHN MUNUVE MATI.....PETITIONER

VERSUS

THE RETURNING OFFICER

MWINGI NORTH CONSTITUENCY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

PAUL MUSYIMI NZENGU.....3RD RESPONDENT

JUDGMENT

1. **John Munuve Mati**, the Petitioner, filed this Petition dated the **6th** day of **September, 2017** contesting the declaration of **Paul Musyimi Nzengu**, the 3rd Respondent, as the duly elected Member of National Assembly, Mwingi North Constituency in the Elections held on the **8th** day of **August, 2017**. Three (3) candidates participated in the Elections and as declared by the 1st Respondent, the results were as follows:

Paul Musyimi Nzengu - 23,582

John Munuve Mati - 15,702

Patrick Mwangangi - 7,738

2. The Petition is based on grounds that the 1st and 2nd Respondents conducted the elections contrary to and in violation of the Constitution and Electoral Laws; That they exhibited partiality and lacked neutrality in conducting the elections hence unaccountable; that there was widespread bribery, corruption, intimidation and improper influence during the campaign period on the part of the 3rd Respondent; There was lack of transparency and unfairness on the part of presiding officers; systematic propagation of hate speech, violence, stigmatization and insults ,acts that did not create an atmosphere for the Petitioner to campaign freely.

3. In a joint response the 1st and 2nd Respondents stated that the election for Member of the National Assembly, Mwingi North, was conducted strictly in compliance with the law. They alleged that the

election was conducted within the parameters of the law, fairly and impartially such that there were no issues of impropriety or illegalities.

4. The 3rd Respondent filed a response together with a replying affidavit where he opposed the Petition. He contended that the election was conducted in a free, fair and credible manner consistent with the provisions of the **Constitution** and **Elections Act**. He denied knowledge of alleged partiality, lack of accountability and transparency, unfairness, systematic propagation of hate speech, violence, stigmatization and insults.

5. Following an application by the Petitioner, partial scrutiny was done under the supervision of the **Deputy Registrar** and a report thereof duly filed.

6. Issues to be determined in the matter as agreed are:

(i) Whether the elections conducted on **8th August, 2017** for the position of Member of National Assembly for Mwingi North Constituency were free, fair, accountable, transparent and credible and conducted in accordance with the principles laid down in **Article 81** and **86** of the **Constitution**, electoral laws and regulations.

(ii) Whether there were substantial irregularities and commission of electoral offences during the election period and/or exercise that affected the credibility of the election and the result of elections.

(iii) Whether the 3rd Respondent was validly elected as Member of National Assembly Mwingi North Constituency.

(iv) What orders are to be made in the Petition in relation to costs of the Petition.

7. It is trite that the Petitioner bears the burden of proof. **Section 107** of the **Evidence Act** provides that:

“(1) Whoever desires any court to give Judgment as to any legal right or liability dependent on existence of any 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.”

In the case of **Raila Odinga and Another vs. I.E.B.C. and 3 others SCK Petition No. 5 of 2013 (2013) eKLR** the Supreme Court stated thus regarding the burden of proof:

“.....a Petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should be above the balance of probabilities, though not as high as beyond reasonable doubt. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non compliance with the law, but such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary.”

8. The 1st and 2nd Respondents have been faulted for conducting elections contrary to the laid down principles. Every individual has the right to free, fair, regular election based on universal suffrage. (**See Article 38 of the Constitution**). People who turned up to vote in Mwingi North were expected to vote without being influenced. It was the Petitioner’s contention that the 1st and 2nd Respondents planned and indeed coordinated the situation that prevailed to achieve a desired result. That their sequence of events resulted into the 3rd Respondent emerging the winner. It was alleged that one **Kitheka Muundu Mwiu** was involved in training Presiding Officers who were misled to assist voters to vote for a candidate representing the ‘Kamba Community/Party’ as opposed to the ‘Kikuyu Community/Party’. According to the Petitioner, the fact that the alleged individual was participating in training of Presiding Officers was

within his knowledge but he did not lodge any complaint. PW9 **Musili Mengi**, who stated that he was a Polling Agent at **Ngalange Primary School** alleged that the Presiding Officer at the station would tell voters to vote for the 3rd Respondent who had vied on a ticket of the party of the Kamba people and Hon. **Kalonzo Musyoka**. At the end of the voting exercise he duly signed the form 35A without registering any complaint. On cross examination, however, he stated that assisted voters would be told that for purposes of voting, **Munuve** belonged to the **Jubilee Party**, **Musyimi Nzengu** was in **Wiper Democratic Party** while **Mwangangi** was an Independent Candidate. PW13, **Simon Ngwele**, stated that he was the Petitioner's agent at **Kalwa Primary School Polling Station** where he heard the Presiding Officer telling people that the Petitioner was running on a Kikuyu Party whereas the 3rd Respondent was in a Kamba Party which was people's party. He testified that he scrutinized ballot papers at the point of counting votes but he declined to sign form 35A. That it was within his knowledge that he could refuse to sign the form. Indeed form 35A Serial No. **NA000037** for **Kalwa Primary School Polling Station** was not signed by the Jubilee Agent but no reason was given for refusal to sign. He admitted that per the document all agents who were present signed. If indeed he declined to sign, it was within his discretion. However, for this court to believe him, he should have given reasons for refusal to sign.

9. None of the witnesses who testified were at the training of Presiding Officers to testify as on what exactly they were trained on. They did not give specific identification of persons alleged to have misled assisted voters. There was no proof of such Presiding Officers. It was admitted by the 3rd Respondent that he employed **Kitheka Mundu Mwiu** thereafter but that per se, without requisite proof would not prove that he influenced people to vote in a particular manner. There is also evidence adduced of Form 35A for **Gatoroni Primary School Polling Station** where **Kitheka Mundu Mwiu** was the Presiding Officer. The agent for **Jubilee Party**, **Martin Kibaraara Munugu** signed the form. As per the remarks of the Presiding Officer, the voting was very peaceful. In that particular polling station the 3rd Respondent got 55 votes while the Petitioner got 213 votes. Such a person cannot be alleged to have been recruited for purposes of influencing people to vote for the 3rd Respondent.

10. It is pleaded that there was a family cartel of the 3rd Respondent that ran the 2nd Respondent's office at Kyuso. That an individual, **Collins Kamuti**, a Deputy Returning Officer, is married to **Ngunu Maliku's** daughter. **Ngunu** was said to be the Chairman of the 3rd Respondent's campaign team. That the wife of **Collins** was seen in the vicinity on 7th, obviously to assist the husband in deployment of Presiding Officers. In his testimony the Petitioner did not particularize what they did to make him believe they were influencing the exercise of deployment of Presiding Officers. The 3rd Respondent admitted knowing some of the people alleged but denied having any relationship with them. Whether the people may have been related to the 3rd Respondent or not, the Petitioner was duty bound to prove that they influenced the recruitment and ultimate voting. This was not done.

11. It is pleaded that the Returning Officer and her deputy were hosted at the home of **Hon. Stephen Kalonzo Musyoka**, the **Wiper Democratic Movement - Kenya Party** leader, on the day the Presiding Officers were trained. In his testimony, the Petitioner stated that he monitored and established that on **30th July, 2017** when Presiding Officers were being trained, neither the Returning Officer nor her deputy appeared at the venue because they were being hosted by **Hon. Kalonzo Musyoka**. On cross examination he could not give the registration number of the motor vehicle they were purportedly in and he could not tell whom they went to meet. The 1st Respondent told the court that she was the gazetted Returning Officer of Mwingi North Constituency and on the date Presiding Officers were being trained, she was at the venue training them. She was assisted by the Deputy Returning Officers who were the main trainers. This evidence was not controverted by the Petitioner therefore his testimony must be dismissed as speculative. The allegation of partiality on the part of the **I.E.B.C.** officers is not proved.

12. It is a principle of the electoral system that elections must be free and fair. This is provided for in **Article 81(e) of the Constitution** which stipulates thus:

“The electoral system shall comply with following principles-free and fair elections, which are-

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

13. The Petitioner made allegations of voter bribery and undue influence against the 3rd Respondent. It was alleged that he imported 500 bags of maize which was ‘treated’ by a sorcerer known as **Matei Musili** prior to being distributed by his wife, chief campaigner and brother. PW4, **Moses Mbuvi Manzi** stated that his wife was one of the beneficiaries of the maize. It was necessary for the Petitioner to prove that the maize was indeed imported, and/or existed. And that it was imported by the 3rd Respondent and subsequently distributed by the family of the 3rd Respondent to influence people to vote for him. This duty was not discharged.

14. It is pleaded and averred in the Petitioner’s affidavit that the 3rd Respondent openly gave money to one **Rhoda Nzioki** for distribution to voters. The Petitioner was not at **Gai Primary School Polling Station** therefore he did not witness the alleged act of bribery. The 3rd Respondent called a witness **Rhoda Kasyoka Muthusi** who voted at **Gai Primary School Polling Station**. She denied the allegations. The 3rd Respondent’s witnesses explained what transpired at **Gai Polling Station**. The Petitioner having not called direct evidence to establish the allegation, the evidence tendered by witnesses called by the 3rd Respondent was not controverted.

15. PW6 **Tavitha Kakunu Kimwele** stated that she was promised **Kshs. 250/=** by **Tabitha Kataa Kalinga** if she voted for the 3rd Respondent. Since voting was by secret ballot she voted for a candidate of her choice but she was given **Kshs. 500/=**. In a case of bribery both the giver and the taker would be responsible for the offence. Therefore, there was need of confirmation of her allegations by some other evidence that was lacking.

16. A cheque for a sum of **Kshs. 20,000/=** was issued and ultimately given to PW3 **Boniface Wambua Mutemi**, the Chairman of the Board of Management, **Kisuluni Primary School**. The cheque was alleged to have been given by the 3rd Respondent’s campaign team and his brother for purposes of assisting the community to purchase a piece of land for the local school. A casual perusal of the cheque shows that it was issued by the Youth at Risk Community Centre. It was viewed as a form of bribery and thereafter handed over to the Petitioner. The original cheque was adduced in evidence. No beneficiary (payee) of the cheque was indicated. It was a blank cheque. One of the signatures on the cheque had some resemblance of the 3rd Respondent’s surname but there was no proof that it was authored by the 3rd Respondent.

17. It has been alleged that there was intimidation and hate speech. The leader of the **Wiper Democratic Movement Party** allegedly branded the Petitioner an enemy of the Kamba people who had betrayed them by virtue of his party. Allegations were made in that regard but no evidence was adduced before the court to prove the assertion.

18. According to the principles of voting espoused in **Article 86** of the **Constitution**, the 2nd Respondent was required to ensure that the voting method used was simple, accurate, verifiable, secure, accountable and transparent. The 1st Respondent was supposed to accurately collate and announce the results promptly; and to ensure there were no electoral malpractices. The election materials were to be secured.

19. Another grievance of the Petitioner was that there were various election irregularities which affected the credibility of the elections and the results thereof.

20. In the case of **Gatirau Peter Munya -V- Dickson Mukenda Kithinji and 2 others, SCK Petition No. 23 of 2014 (2014) eKLR** it was stated that:

“...an election should be conducted substantially in accordance with the Principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, the Regulations thereunder constitute the substantive and procedural law for the conduct of elections. It should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such an election is not to be invalidated only on the grounds of irregularities. Where, however, it is shown that the irregularities were of such a magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election... By way of example if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election.”

21. The election was by secret ballot. It is contended that at **Tseikuru Primary School, Hon. Kalonzo Musyoka** campaigned and addressed voters at the polling station who had queued to vote undeterred by the Presiding Officer. PW12 **John Musyoki Musyimi** deposed an affidavit in court that the **Wiper Democratic Movement-Kenya** Party Leader arrived and loitered at the polling station for 30 minutes prior to voting. That he was accompanied by **Mutati Nzioka alias ‘Sonko’** and **Mwendwa Kaliki** who were not registered to vote at the polling station. That they gave money to people on the queue. It was also alleged that the **Hon. Kalonzo** asked people not to take him to State House without underpants which was interpreted by the witness to mean that he asked people to vote for the 3rd Respondent. On cross examination he contradicted himself by stating that the Party leader was with his bodyguard who was a registered voter at the polling station and he also voted. A perusal of form 35A for **Tseikuru Primary School, Station 2 of 2**, clearly shows that **John Musyoki Musyimi** was the agent for **Jubilee Party**. He duly signed the form. According to the remarks of the Presiding Officer the elections were concluded fairly. PW12 did not make any remark on the document concerning the conduct of the party leader at the Polling Station or the alleged bribery. Therefore his allegations must be disregarded.

22. It was alleged that there were pre-marked ballot papers at **Nyama-Nzei Primary School and Kisuluni Primary School Polling Stations**. The Jubilee agents who were present signed form 35A without making any comment. Per the remarks of the Presiding Officer, the election was free and fair. In fact, at **Kisuluni Primary School**, the Petitioner garnered 181 votes while the 3rd Respondent only had 66 votes.

23. Other alleged irregularities were in regard to forms having been carried by the Deputy Returning Officer in her motor vehicle who was allegedly reprimanded by the Returning Officer who in her testimony denied the allegations. It was not enough to come up with allegations. The Petitioner was duty bound to adduce evidence to prove the allegations. It was not stated who the alleged Deputy Returning Officer was and what kind of motor vehicle he or she had. Issues of persons who had not registered being allowed to vote, manual identification of voters and the existence of pre-marked ballot papers were looked into during scrutiny. It was established that there was no manual identification of voters. There was no evidence of alleged pre-marked ballot papers as well as stuffing of boxes with extra ballot papers.

24. It is submitted by Counsel for the Petitioner that no major irregularities were noted because the court excluded the scrutiny of **KIEMS Kit** which would have made it possible to compare the number of persons who voted against the number recorded in form 35A. This court granted orders sought.

25. In the case of **Jones Vs National Coal Board (1957) 2QB 55 Lord Denning** stated that:

“In the system of trial we have evolved in this country, the judge sits to hear and determine the issues raised by the parties not to conduct investigations or examination on behalf the society at

large...”

26. There was no specific prayer for scrutiny of **KIEMS Kits** therefore the court was not expected to imagine what would be supportive in the Petitioner’s case and grant it.

27. Evidence was adduced of forms 35A that were not signed by the Petitioner’s agents. It is important to point out that on perusal of all forms adduced in evidence, I found that agents of other parties had also not signed some of forms. **Regulation 79(6)(7) of the Elections (General) Regulations, 2012** provide that:

“(6) the refusal of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation 2(a)

(7) The absence of a candidate or an agent of the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.”

An omission by the party agent to sign the form 35A cannot be viewed as an irregularity that can invalidate results.

28. As correctly submitted by counsel for the Petitioner, there were three forms 35A that were not signed by Deputy Presiding Officers.

Form 35A Serial No. **NA002575** where the Petitioner garnered 110 votes and the 3rd Respondent got 22 votes was signed by the Presiding Officer but not his Deputy.

Form 35A Serial No. **NA002257** was signed by the Presiding Officer but not the Deputy. The Petitioner got 41 votes while the 3rd Respondent got 61 votes.

Form 35A Serial No. **NA000094** was signed by the Presiding Officer but not the Deputy. At the stated polling station, the Petitioner got 83 votes while the 3rd Respondent got 206 votes.

Some three (3) copies of Forms 35A were illegible. These were found at Pages 22, 70 and 147 of the 3rd Respondent’s response. This issue was addressed by the scrutiny of the original forms in the presence of all parties per the report filed by the **Deputy Registrar**. Nothing significant was noted and recorded in that respect.

29. Some other irregularities pointed out were that:- some votes obtained by each candidate did not correspond to the number of votes cast. Looking at Form 35A Serial No. **NA000247** votes cast were 181 but erroneously indicated as 186.

Form 35A Serial No. **NA000470** has an illegible inscription on it namely “Return envelope” but the results are intact.

30. Form 35A Serial No. **NA001075** does not have the number of voters registered. This is in respect of **Ngaaie Primary School Polling Station** 1 of 1 where the number of votes cast for each candidate were as follows:

Mati Munuve G. J. (Petitioner) – 089

Mwangangi Patrick Muthui – 078

Nzengu Paul Musyimi (3rd Respondent) – 264

31. On form 35A Serial No. **NA001381**, the number of registered voters is not indicated but the number

of votes cast in favour of each candidate were as follows:

Mati Munuve G. J. (Petitioner) – 24

Mwangangi Patrick Muthui – 33

Nzengu Paul Musyimi (3rd Respondent) – 33

32. Forms 35A Serial No. **NA001467** has the name of the polling station given as **Kisii Feeder Polling Station** 1 of 1; Serial No. **NA001723**, the name is **Muthwani Primary School**; Serial No. **NA002179**, the name of the polling station is **Kakungu Primary School** contrary to the Petitioner's allegations that names of the Polling Stations were not given.

33. Form 35A Serial No. **NA001916** was illegible.

34. Form 35A Serial No. **NA002653** is indeed not stamped. Stamping of form 35 is not an essential condition. In the case of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others (2014) eKLR** the Court of Appeal stated that the act of impressing a stamp on the form 35A was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation. It cannot make the court invalidate an election.

35. The Petitioner questioned the use of 'ECK' seals on the ballot boxes. It was his argument that the use of the seals meant that the boxes were tampered with. In her affidavit evidence and testimony the 1st Respondent stated that the seals used were for the 2nd Respondent. It was established that some of the seals used to secure ballot boxes were branded 'ECK'. On cross examination, the 1st Respondent clarified that the 'ECK' seals belong to **I.E.B.C.** I do take judicial notice of the fact that 'ECK' (**Electoral Commission of Kenya**) which is a defunct commission that was disbanded, was the predecessor of the **I.E.B.C.**, the 2nd Respondent.

36. It is admitted that there was malfunction of technology at **Twimyua polling station**. The **KIEMS Kit** failed at one point in time but the 2nd Respondent solved the problem and voting continued. PW8 **Jacob Mutia Kilonzi** stated that people who may have not been identified were called back to have their details confirmed then voting continued. After counting of votes cast it was established that the Petitioner got 142 votes while the 3rd Respondent got 82 votes. PW8 the agent of Jubilee Party duly signed form 35A and the scrutiny done established that results from the station were not tampered with.

37. PW10 **Victor Mulwa Iloli** was supposed to be an agent for the **Jubilee Party** at the **Kwa Katile Primary School Polling Station**. He was not an accredited agent therefore he voted and remained outside the polling station. He alleged in his testimony that people were allowed to vote having been identified manually. However, per the report filed by the Deputy Registrar there was no manual identification of voters as alleged.

38. A motor vehicle registration number **KCK 584L** was found at a petrol station being repaired according to PW3. Inside the motor vehicle was an empty ballot box. The police impounded the vehicle and recorded statements from those concerned. Per the explanation given by the 1st Respondent, the vehicle had been contracted by the 2nd Respondent to carry election materials to **Ngaani Nursery School**. It had inadvertently carried two ballot boxes for the position of National Assembly Representative therefore was returning one to the tallying centre following instructions given. No evidence was tendered to disapprove this allegation.

39. Evidence of stashing of ballot papers in a motor vehicle of an unnamed Deputy Returning Officer was not called and therefore must be disregarded.

40. The issue to be determined is therefore whether irregularities pointed out affected the election results as declared.

41. The irregularities that were alleged by the Petitioner like votes cast being indicated as 186 instead of 181, this was a matter of an error in adding the figures. It cannot be alleged to have been deliberate since none of the candidates benefitted from the additional figure. The illegible inscription was an error addressed during scrutiny. Regarding the issue of forms not signed by the Deputy Presiding Officer, this did not arise during scrutiny. That notwithstanding, if we were to consider the number of votes garnered, the 3rd Respondent had **23,582 votes** while the Petitioner **15,702 votes**. He defeated him by **7,880 votes**. If we subtracted the votes indicated on the form that were not signed by the Deputy Presiding Officer, namely **309 votes**, the figure would be **7,571**. The minor administrative irregularities noted did not affect the result of the election. These were results that expressed the will of the people of Mwingi North Constituency.

42. This is a case where the 1st Respondent did not delay in announcing results of elections. Her mode of collecting data that was submitted by Presiding Officers and the way she announced the results were not faulted. Therefore the Petitioner has not discharged the burden of proof bestowed upon him.

43. In the circumstances the election was verifiable and credible. The 3rd Respondent was validly elected. The Petition fails and is accordingly dismissed.

44. Costs follow the event. In the premises I make orders as follows:

(i) The Petition herein be and is hereby dismissed.

(ii) The Respondents are awarded costs thus:

(a) The 1st and 2nd Respondents shall have costs capped at Kshs. 1,000,000/=.

(b) The 3rd Respondent shall have costs capped at Kshs. 1,000,000/=.

(c) A certificate of determination of this Petition shall issue pursuant to the provisions of Section 86(1) of the Elections Act, 2011 to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly shall be notified forthwith.

45. It is so ordered.

Dated, Signed and Delivered at Kitui this 31st day of January, 2018.

L. N. MUTENDE

JUDGE