



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ELECTION PETITION NO. 1 OF 2017**

**HON. MARY EMAASE OTUCHO.....PETITIONER**

**VERSUS**

**HON. GEOFFREY OMUSE.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION (IEBC).....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. On the 8th August 2017 the Republic of Kenya conducted general elections in the entire country for various elective positions. One of the positions was that of Member of Parliament in the National Assembly. The constituents of Teso South therefore went out to elect their representative.

2. In the said elections, there were four candidates for the position of Member of National Assembly for Teso South Constituency. At the conclusion of counting and tallying, each candidate garnered votes as follows:

<b>CANDIDATE</b>	<b>VOTES GARNERED</b>
1. Emurugata Alfred	1,420
2. Musumba Denzil Edung'ulot	2,286
3. Hon. Omuse Geoffrey	22,840
4. Otucho Mary Emaase	22,493
<b>Total</b>	<b>49,039</b>

3. The 1<sup>st</sup> respondent was therefore declared the winner by the 2<sup>nd</sup> respondent. He was subsequently gazetted as a duly elected Member of Parliament for Teso South Constituency. This aggrieved the petitioner and led to the filing of this petition.

4. The Petitioner, Mary Emaase Otucho, was a candidate sponsored by the Jubilee Party for the Teso South Constituency in Busia County in the said election held on 8<sup>th</sup> August 2017.

5. The 1<sup>st</sup> Respondent, Geoffrey Omuse, was a candidate sponsored by the Orange Democratic Movement in the said election. He was declared as the duly elected Member of National Assembly, Teso South Constituency in Busia County in the General election held on 8<sup>th</sup> August 2017. He was subsequently gazetted and sworn in in accordance with the law.

6. The 2<sup>nd</sup> Respondent is the Constitutional body established under Article 88 and Article 248(2) (c) of the Constitution with a mandate to conduct free, fair, transparent and verifiable elections among other functions.

7. The petitioners raised the following grounds of petition:

- (a) Violation of the principles of a free and fair election and electoral process;
- (b) Erroneous counting and tabulation of results;
- (c) Votes cast in favour of the petitioner were treated as rejected votes.
- (d) There were cancelations and alteration aimed at manipulating the results;
- (e) Obstruction and harassment of authorized party agents;
- (f) Improper influence, violence, threats and intimidation by the Governor Busia County.
- (g) Illegal practices and election offences and bias committed by electoral officials.

8. These allegations were denied by both respondents who maintained that the election was conducted in compliance with both the Constitution and the statutory laws and procedures.

9. From the pleadings and the issues that the parties filed the following issues for determination emerged:

- (a) Whether the election for the member of National Assembly for Teso South constituency was marred by violence and whether the same affected the results of the said election;
- (b) Whether there was erroneous counting and tabulation of votes and if so, whether it affected the final result;
- (c) Whether the votes that were declared rejected were cast in favour of the petitioner;
- (d) Whether there were cancelations and alteration aimed at manipulating the results;
- (e) Whether there were breaches and irregularities that can result in the annulment of the results declared in respect of elections held on 8th August 2017 for Member of Parliament for Teso South Constituency; and
- (f) Who is entitled to the costs of this petition?

10. In determining these issues, I will at all times bear in mind that the onus of proof is borne by the party who alleges a fact. In this case, the petitioner. The court in the case of **JOEL NYABUTO OMWEGA & 2 OTHERS vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER (2013) eKLR** stated as follows:

*The Burden of proof in election Petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court..... an Applicant who seeks to annul an election bears the burden of proof throughout.*

11. There are several decisions on the standard of proof. One such decision was in the case of **JOHO Vs NYANGE & ANOTHER (4) [2007] eKLR** where it was held:

*...the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.*

This issue was finally settled by the Supreme Court in the case of **RAILA ODINGA & OTHERS Vs. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS (2013) eKLR** when it stated at paragraph 195:

*There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.*

12. The petitioner pleaded two limbs of violence that she contended affected the results. This is what she said in her paragraph 18 of the petition:

*The Petitioner avers that the Respondents hired goons who disrupted the process of verification and validation of votes in Teso South Constituency. The police had to use tear-gas to chase away the goons.*

Whereas in paragraph 5(l) of her supporting affidavit she said:

*Voting was peaceful and democratic but things changed when tallying commenced and the 2nd Respondent started manipulating figures.*

And in paragraph 35 (g) (ii) of the petition she said:

*The Petitioner avers that cases of violence, threats and intimidation against her supporters which was reported at Kotur Patrol Base...*

It is therefore clear that the petitioner complained of violence on the eve of the election and after the election.

13. She also complained of intimidation during election at the time of her testimony. This is what she testified in respect of intimidation:

*At Kotengo market polling station the deputy presiding officer was arrested by persons who were not police officers but known to 1<sup>st</sup> respondent. The matter was reported at Nambale police station and still under investigations. The reasons given for his arrest was that he was advising voters to deliberately spoil votes.*

This contradicted her earlier position that this officer was arrested for interfering with the election. In her petition this is what she had stated at paragraph 35 C (e) (ii):

*The Petitioner avers that at Kotengo polling Centre Amukura East, the Deputy presiding officer Robert Oshara, was arrested for interfering with the electoral process influencing voters to spoil votes. This is supported with an O.B No. 5/8/8/17 at 0914 hours from Nambale Police Station.*

These two statements cannot be reconciled. The first alleges intimidation and interference by the first respondent while the second alleges actual interference with the electoral process by Robert Oshara.

14. In her testimony, **Roselyne Akinyi Onyango (RW1)** conceded that indeed Robert Oshara was arrested by the police. This was on allegations that he was misleading voters on how to mark the ballots.

In my opinion this cannot be a basis of a complaint. It was meant to promote a free and fair election. It can only be a basis if it was proved that the allegations against Robert Oshiara were false and aimed at achieving the opposite. This was not demonstrated and proved.

15. It was contended without prove that the clerk who replaced Robert Oshiara was not trained and had not taken the oath of office. A prudent Public Body such IEBC, must have contingency measures in place while conducting such an important exercise due to unforeseen circumstances such as illness. Without any prove that the person who replaced Robert Oshiara was not trained and had not taken oath of office, then this remains in the realm of mere allegations.

16. For any alleged act of violence to be said to have affected the results of an election, the effect must be seen in the voter turnout. This must be significant. It must be demonstrated through evidence that but for the violence, the turnout would have been higher. It must also be proved that the said violence was meted at the instigation of a party who was to benefit from the said mayhem.

17. The petitioner pleaded that her supporters were scared from voting and her vehicles damaged. This is what she deponed in paragraph 34 of her supporting affidavit:

***THAT the cases of violence, threats and intimidation against my supporters which was reported at Kotur Patrol Base and attained the hereunder O.B numbers;***

***6/07/08/17***

***9/10/08/17***

***18/07/08/17***

***02/12/08/17***

***03/13/08/17***

***2/07/08/17***

***the threats actually did scare some of the voters from voting and this affected the final results especially after a major attack on two of my vehicles at Kotur area on the 7<sup>th</sup> August 2017 (Eve of election) this violated Article 81(e) (i) of the Constitution as shown by the exhibit herein attached and marked "MEO 3"***

18. No copies of the police occurrence book abstracts were supplied to the court. It would have been prudent to supply the same for the court to verify that the reports were made and who the suspects were. Enumerating the police Occurrence Book numbers is not sufficient.

19. I have perused the attachments by the petitioner and which are marked as exhibit "MEO3" in the document containing the Petition and the supporting affidavit. This is my observation of the same:

(a) On page 194 there is a motor vehicle registration number **UAX 022X** and a lady standing next to it. This is a black and white photograph.

(b) On page 195 there is a photograph apparently of the same lady standing next to unidentified motor vehicle.

(c) On pages 196 and 197 are photographs of unidentified motor vehicle

(d) On page 198 is a photograph of a lady pointing at a broken side mirror of a motor cycle.

20. My finding on these photographs are as follows:

(a) There is nothing to show that they belong to the petitioner as she had pleaded. One of the vehicles bears Ugandan registration number.

(b) There is no evidence to link the said vehicles to the alleged violence and which was allegedly reported at Kotur Police station.

(c) There is no evidence to link the 1<sup>st</sup> respondent to the said violence if we assume there was violence, since she exonerated the 2<sup>nd</sup> respondent.

21. During cross examination, the petitioner said that Kotur polling station had 464 total registered voters. 365 voters cast their votes. This was a turnout of 78.6<sup>0</sup>/0. This cannot be described as a low turnout. Since the alleged violence occurred in Kotur area, it is evident that if it did occur, it never affected the turnout.

22. I accordingly find that the alleged violence before the election was not proved. If it occurred, there was no evidence adduced to connect the 1<sup>st</sup> respondent to it and it did not affect voter turnout.

23. The petitioner contended that at the time of tallying, there was violence at the tallying Centre. This, she said was occasioned by the entry of Governor Sospeter Odeke Ojaamong. This is what she testified to:

***The process was disrupted by the entry of Sospeter Ojaamong. I was present at the Centre. When Sospeter appeared, the crowd became rowdy, shouting and ululating acclaims. He came and called Oscar Ekirapa. He spoke to Oscar then went to where he was at the back. After about 5 to 10 minutes. He came with his computer.***

According to the petitioner, this disruption was so serious to an extent that the tallying Centre was re-located to unknown place where the exercise was completed. This was however denied by the respondents. It emerged from the evidence that when there were delays from announcing results from some polling stations, the parliamentary seat candidates became agitated. Tallying, according to the contention by the respondents was done and completed at the Amukura tallying Centre.

24. Agitation, is normal while candidates await the announcement of an election so long as it does not escalate to violence. Anxiety is a human reaction in expectation of a result whose outcome is veiled.

25. Sospeter Odeke Ojaamong was a candidate for the Busia County gubernatorial seat. Like any candidate he had a right to visit the tallying Centre as long as he did not act in a way that would negatively impact the results. What the petitioner herein attributed to him as the cause of disruption was the cheering he received from his supporters. There was no evidence that he encouraged them to do so. There was also no evidence that the cheering crowd entered into the tallying hall. It was not therefore demonstrated how this may have affected the tallying inside the hall. The evidence by the 2<sup>nd</sup> respondent is that the crowd was at the gate.

26. **Roselyne Akinyi Onyango (RW1)**, the returning officer at the tallying Centre conceded during cross examination that she asked the security officers at the Centre to quell the chaos. It was not demonstrated how the chaos interfered with the tallying process and more so to the disadvantage of the petitioner. I would agree with the sentiments in the decision of **SARAH MWANGUDZA KAI vs. MUSTAFA IDD & 2 OTHERS [2013] eKLR** where the court while addressing a similar issue said:

***If there were any pockets of insecurity, they affected all candidates equally. There is no evidence that the 1<sup>st</sup> respondent stood to gain any advantage by reason of any violence or rumours spreading insecurity in the constituency.***

27. Secondly and very important fact to note is that the petitioner has not claimed that due to the alleged disruption, the results that were announced at the tallying Centre were different from what was announced

at the polling stations. Later in my judgment I will address the issues she raised of overwriting and falsification of entries. This in my view is a distinct complaint from that of violence.

28. I accordingly find that the ground of violence has not been proved to have affected the election results in any way. I also find that there was no evidence to support the claim that tallying was moved to undisclosed un-gazetted place.

29. One of the complaints by the petitioner was overwriting in respect of Kamunoit Primary School polling Station 1. This only arose after the 2<sup>nd</sup> Respondent had filed a response. It was not pleaded in the petition. The petitioner cannot be allowed to bring this complaint late in the day. The legal position is that if a party wants to rely on a fact to advance own case, this fact must be pleaded. The rationale was articulated by Jessel MR in the case of **THORP V. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639**, as follows:

***The whole object of pleadings is to bring the parties to an issue and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.***

In the instant case to allow the petitioner to raise the issue of overwriting without having pleaded it is to allow her to enlarge the scope of her petition without giving the respondents a right to respond to it.

30. The petitioner averred that there was erroneous counting and tabulation of votes that affected the results to her disadvantage. The complaint in respect of Kamunoit Primary School polling Station 1 was that the 1<sup>st</sup> respondent was given an additional 100 votes. In Machakus polling station 1 the petitioner scored 138 votes but the entry in Form 35 B shows that she scored 86 votes. There was a deficit of 52 votes to her disadvantage. In the same station, the 1<sup>st</sup> respondent scored 147 votes but in Form 35 B it was indicated that he scored 140 votes. He had a deficit of 7 votes to his disadvantage. These errors were conceded. The effect of this would mean that the petitioner was denied 52 votes while the 1<sup>st</sup> respondent was added undeserved 93 votes. If these votes are factored in the new totals so far will be as follows:

Otucho Mary Emaase **22,545**

Omuse Geoffrey **22,747**

From the evidence, these errors applied to both the petitioner and the 1<sup>st</sup> respondent. There is nothing to suggest that they were intentional.

31. The contention by the Petitioner that there were 110 disputed votes in respect of Okisimo polling station was denied. There was no evidence to prove the allegation. She conceded during cross examination that she did not have a problem with this station. There was equally no prove that the 1<sup>st</sup> respondent benefitted from the alleged disputed votes. This complaint is therefore baseless.

32. In her petition, the petitioner contended that Form 35 A in respect of Busia Airstrip Primary School does not show any scores. There were 4 polling stations at the said Primary school. Upon my perusal of forms 35A of each of the polling stations, I have established that each one of them (exhibits **RAO1** on page 22-25 of the 2<sup>nd</sup> respondent's response to the petition) has entries of what each candidate scored. This information was accurately reflected in Form 35B which is an exhibit marked **RAO2** at page 159 of the 2<sup>nd</sup> respondent's response to the petition. This complaint has therefore no basis.

33. The difference between the petitioner and the 1<sup>st</sup> respondent was 347 votes. This was before factoring the errors that I have discussed hereinabove. This was also the number of rejected votes. According to the petitioner, this cannot be a coincidence. It was deliberate and that the so called rejected votes, were

indeed her votes. No evidence was adduced to prove this allegation. No reasonable tribunal can act on a mere allegation. This claim is accordingly dismissed for lack of merit.

34. One of the modes of ensuring there is free and fair election, is to allow each candidate or a party to have an agent at each polling station. Regulation 62 (2) & (3) of the Elections (General) Regulations, 2012 provides:

***(2) Notwithstanding sub regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.***

***(3) The absence of agents shall not invalidate the proceedings at a polling station.***

The import of this regulation is that where a candidate is sponsored by a party, the agent appointed by the party becomes the agent of each candidate who is sponsored by the party. The rationale is to avoid crowding in the polling hall.

35. In paragraph 33 of her supporting affidavit, the petitioner named several polling stations where she claimed her agents were denied entry into the said polling stations. However during cross examination, she said she could not be able to give names of the said agents. There was no evidence to support the allegation. This complaint was not proved.

36. I have addressed all the issues that were material in this case. Before I make my concluding remarks, I wish to make unusual remarks. This is dictated by the conduct of the petitioner's learned counsel, Mr. Ondieki on 30<sup>th</sup> November 2017 after I delivered a ruling. He heaped the blame on the court for shutting out the witnesses.

37. In the application the subject of the ruling, the counsel was seeking order that the court releases the affidavits of witnesses he had filed in a sealed envelope with instructions to the court registry staff not to open the same without a court order.

38. In my ruling I cited Rule 12(3) to Rule 12 (8) Of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which provide as follows:

***(3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.***

***(4) A petitioner shall, at the time of filing the petition, file the affidavits sworn under sub-rule (3).***

***(5) A response to the petition under rule 11 shall be supported by an affidavit sworn by the respondent.***

***(6) Each person who the respondent intends to call as a witness at the hearing, shall swear an affidavit.***

***(7) A respondent shall, at the time of filing the response to a petition, file the affidavits sworn under sub-rule (6).***

***(8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.***

39. It was a grave professional misconduct for the counsel to shift the blame from his non-compliance with the law to the court in a press interview that was given at the precincts of the court. It is such conduct that make the masses, not privileged to have legal education, to lose faith in the institution of the judiciary. This is a case where the court would not know the effect of the evidence of the witnesses who were shut out. I will not say more on this issue having set the record straight. I leave the same to the client

to deal with her counsel, if she deems it fit.

40. I have carefully analyzed the entire evidence on record, perused the submissions by each party, and the authorities cited and supplied. My finding is that the election of 8<sup>th</sup> August 2017 in respect of Teso South Constituency Member Of Parliament was conducted in accordance with the Constitution of Kenya and the electoral law and procedures as provided for under the Elections Act and the Elections (Parliamentary and County Elections) Petition rules, 2017. Nothing has been proved to the contrary. The 1<sup>st</sup> respondent was validly declared as the elected Member of Parliament for the said Teso South Constituency. The petition is accordingly dismissed.

41. On the issue of costs the law is clear. Costs usually follow the event. This can only be departed from or qualified under some special compelling circumstances.

Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides as follows:

***(1) The election court may, at the conclusion of a petition, make an order specifying—***

***(a) the total amount of costs payable;***

***(b) the maximum amount of costs payable;***

***(c) the person who shall pay the costs under paragraph (a) or (b); and***

***(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.***

***(2) When making an order under sub-rule (1), the election court may —***

***(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and***

***(b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.***

42. In this matter no reason to depart from this position or qualify the same has been advanced. The petitioner will pay the costs to the respondents as follows:

The petitioner will pay the 1<sup>st</sup> respondent costs not exceeding Kshs. 2,000,000 (two million Kenya shillings) and to the 2<sup>nd</sup> respondent costs not exceeding Kshs. 1,000,000 (one million Kenya shillings). This is informed by the fact that some errors committed by the servants of the 2<sup>nd</sup> respondent may have prompted the petitioner to file this petition. The costs will be subject to taxation by the Deputy Registrar. The sum that was deposited in court shall remain so deposited pending the taxation of the costs.

**DELIVERED and SIGNED at BUSIA this 31<sup>st</sup> day of January, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**