



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

1. MERCY ACHIENG MOLA

2. JOHN NDAGWA.....PETITIONERS

VERSUS

1. RAPHAEL BITTA SAUTI WANJALA.....1ST RESPONDENT

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C).....2ND RESPONDENT

3. RETURNING OFFICER, BUDALANGI

CONSTITUENCY.....3RD RESPONDENT

JUDGMENT

1. On the 8th August 2017 the people of Budalangi, like any other Kenyans, woke up early so as to participate in the elections of the President of the Republic of Kenya, the County Government leaders, National representatives among them their National Assembly representative.

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

CANDIDATE

VOTES GARNERED

- | | |
|-----------------------------------|---------|
| 1. Adundoh Deogracious Bwire..... | 123 |
| 2. Buluma Patrick Namangare..... | 57 |
| 3. Nakitare Andrew Mwakira..... | 3, 170 |
| 4. Namwamba Pius Ababu..... | 11, 515 |
| 5. Obara Vincent David..... | 404 |
| 6. Wangira Mediatrice..... | 1, 571 |

7. Wanjala Raphael Bitta Sauti.....13, 547

TOTAL.....30,387

3. The 1st respondent was therefore declared the winner by virtue of the total numbers he garnered. This declaration was made by the 2nd respondent who was a duly appointed agent of the 3rd respondent. The 1st respondent was subsequently gazetted as a duly elected Member of Parliament for Budalangi Constituency. This aggrieved the petitioners and led to the filing of this petition.

4. Both petitioners are residents of Budalangi Constituency and were also registered voters in the same Constituency. They however did not have any other role in the election in issue.

5. The first petitioner is a fourth year student at Masinde Muliro University of Science and Technology. She is pursuing a course in education. Her education is funded by Ababu Namwamba Foundation and she belongs to an outfit known as **ABABU BEBZ**. On the other hand, the second petitioner is a retired Inspector of Police. Previously he has participated in other election petitions in respect of Budalangi Constituency, but as a witness.

6. The 1st Respondent is the Member of National Assembly for Budalangi constituency as declared by the Returning Officer on 09.08.2017.

7. The 2nd Respondent is the Independent Electoral and Boundaries Commission (**IEBC**), a constitutional commission established under Articles 88 and 248 (2) (c) of the Constitution of Kenya, 2010. It has the exclusive constitutional and statutory mandate and obligations, inter alia, to conduct and supervise General and other Elections in Kenya.

8. The petitioners raised the following grounds of petition:

(i) Violence and intimidation.

(ii) Mishandling and destruction of election materials.

(iii) Illegal alien/non-resident voters imported to distort vote.

(iv) Disenfranchisement of voters.

(v) Malpractices on the part of election officials.

(vi) Negligence on the part of election officials and abdication of constitutional duties.

(vii) Voter bribery and improper influences.

(viii) Numerical inconsistencies.

9. All these grounds were opposed by the respondents who maintained that contrary to the contention by the petitioners, the election was peaceful and that it was conducted within the legal parameters and that it represented the will of the people of Budalangi Constituency.

10. From the pleadings and the issues that the parties filed the following key issues emerged:

(a) Whether the election for the member of National Assembly for Budalangi constituency was marred by violence and whether the same affected the results of the said election;

(b) Whether the election for the member of National Assembly for Budalangi Constituency was marred by bribery and whether the same affected the results of the said election;

(c) Whether foreigners were allowed to vote in the election of 8th August 2017 for Member of Parliament for Budalangi constituency and whether the same affected the results of the said election;

(d) Whether the first respondent was validly elected and declared Member of Parliament for Budalangi Constituency in election held on 8th August 2017;

(e) Whether there were breaches and irregularities that can result in the annulment of the results declared in respect of the election held on 8th August 2017 for Member of Parliament for Budalangi Constituency; and

(f) Who is entitled to the costs of this petition?

11. 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.

12. There are several decisions on the standard of proof and it 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.

13. In their petition, the petitioners alleged that there were (to use their own words) multiple, deliberate, systematic and well-coordinated instances of violence prior to, during and after the election of 08.08.2017 at various points across Budalangi Constituency. They contended that this was meant to intimidate, scare, alarm, discourage, dissuade, relocate and disenfranchise known supporters of rival candidates to the advantage of Wanjala Raphael Bitta Sauti. The petition enumerated the areas that were affected by the violence as follows:

(a) Omena Beach (Sinyenye),

(b) Rukala,

(c) Port Victoria,

(d) Mukhobola,

(e) Lunyofu,

(f) St. Benedict's Budalangi High School Constituency tallying Center; and (g) other polling stations within Budalangi Constituency.

14. In her evidence, **Mary Achieng Mola** the 1st petitioner herein and who testified as PW2, said that she voted at Mudembi Primary School polling station. She said that though in the petition she did not complain, all did not go well at the polling station. During cross examination, she said she did not complain about this polling station for whatever she said did not go well was not "strong". However her

co-petitioner and who voted in the same polling station, said there was no hitch at that polling Station. His evidence was that he stayed there until the votes were counted and the results announced. She never witnessed any violence anywhere else. Though she enumerated several polling stations where violence was witnessed, she never gave an account as to how she came by the information and did not bother to call any witness to support her contention. This is unproven allegation.

15. The 2nd petitioner, **John Ndagwa (PW1)** testified that after voting he remained at Mudembi Primary School polling station until when the results were announced. This therefore means that the violence he said took place at Lunyofu and Mundere Primary Schools polling stations was hearsay. No eye witness was called to testify.

16. St. Benedict's Budalangi High school was the tallying Centre for Budalangi constituency. It was alleged that there was violence. This was testified to by **Rai Ababu Namwamba (PW9)**, **John Ndagwa (PW1)**, **Stephen Osogo Ochieng (PW 11)** and **Scolastica Demtulla Ajiambo (PW14)**. According to **Stephen Osogo Ochieng (PW 11)** the violence at the tallying centre was triggered by a letter that was brought by the Labour Party of Kenya officials. He therefore contradicted **Rai Ababu Namwamba (PW9)** who said he was the one who delivered the letter. He is a student at JKUAT and a nephew of Ababu Namwamba, who was a candidate. He never testified to have been with anybody else. He also did not testify to have held any position in the Labour Party of Kenya. If it were so, he would have testified to the same effect. These witnesses did not give the same account of what took place, if indeed there was such an incident.

17. The account of **John Ndagwa (PW1)** is that a crowd outside the hall where tallying was taking place viciously and violently attacked an IEBC official on claims that he was transporting fake ballot papers. The ballot boxes he was carrying were snatched from him and the ballot papers from therein were torn to pieces.

18. **Rai Ababu Namwamba's (PW9)** evidence was that chaos started from inside the tallying hall after the letter he had taken there was delivered. When it spread out, his testimony in his affidavit was to the effect that it was one ballot box that was involved together with its contents.

19. The account of **Stephen Osogo Ochieno (PW11)** who was the chief agent for the Labour Party of Kenya was that at about 9a.m he was inside the tallying Centre. He heard shouts from outside. These were pro- Raphael Wanjala ODM/NASA songs. They were alleging that Ababu Namwamba was trying to rig the election. He went out of the hall and saw an IEBC official who was carrying ballot boxes being attacked. The boxes he was carrying were damaged and the contents were strewn all over. He said police had to lob tear gas canisters to contain the situation.

20. **Scolastica Ajiambo (PW14)** like PW11 talked of the tear gas canisters being lobbed and according to her evidence the incident was outside the tallying hall.

21. The evidence of these witnesses in their affidavits, was contradictory in material aspects and it cannot be reconciled. This gives an impression that probably the incident did not take place or if it did, it was extravagantly exaggerated. The court cannot be able to establish what may have happened.

22. If we can give them the benefit of doubts and assume there were chaos (though no evidence supports the same) still this will not affect the outcome. The petitioners said they had no issue with the results announced at the polling stations.

23. The evidence of **Richard Oyoo Dete (PW4)** was that he was beaten on 7th August 2017 by some assailants. This made his wife and daughter fearful and caused them not to vote on the following day. He however did not connect this attack to the 1st respondent. **Professor Nanyingi Namwamba (PW6)** who was attacked on 6th, 7th and 15th august 2017 equally said that he did not link his attacks to the 1st respondent. Though he said that this violence denied some people the right to vote, this is only speculative for he who was a victim voted. No evidence was adduced to show the number of people who failed to vote due to these incidents if any. The high voter turnout however suggest that these incidents

could have been ordinary thuggery.

24. The alleged violence at the St. Benedict's Budalangi High School tallying Center though not proved, could not have affected the voting. The alleged violence is said to have taken place on 9th August 2017. This was a day after the voting. Even if it could have been proved to have occurred during the election, the voter turnout would not be in favour of annulment of the results. The turnout was 77.91⁰/₀. In the case of the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION vs. MAINA KIAI & OTHERS (2017) eKLR**, it was held that:

Voter turnout determines the outcome of any electoral contest. Numbers are not only unimpeachable but are everything in an election contest.

25. From the foregoing analysis of evidence, I find that the petitioners have failed to prove to the required standards that there was violence which could have affected the conduct of free and fair election in Budalangi constituency on 8th August 2017. I make a finding that even if we momentarily assume that there was some form of violence it was very minimal and the voter turnout of 30,387 out of 39,000 registered voters confirms this finding. I would therefore say as the court in the case of **SARAH MWANGUDZA KAI vs. MUSTAFA IDD & 2 OTHERS [2013] eKLR** said, while addressing a similar issue:

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

The ground on violence and intimidation is therefore baseless.

26. In their petition, the petitioners contended that before and during the elections of 08.08.2017 the 1st Respondent in person and or with connivance and blessings of the 2nd and 3rd Respondents' employees engaged in giving out of cash and gifts to voters with a view of influencing the outcome of the election and therefore compromised the integrity of the said polls against the expectation of the Constitution and Electoral laws.

27. The affidavit of **Stephen Osogo (PW11)** mentioned incidents of bribery but during cross examination he said that he did not identify the places where bribery was taking place, in his affidavit. Whoever was his informant was not called as a witness. This claim in paragraph 6 of his affidavit, together with his allegation during cross examination that he witnessed such five incidents was not buttressed by any evidence.

28. **Dennis Odongo Omondi (PW15)** was called by the petitioners to produce a photograph allegedly taken while the first respondent was dishing out some bribes. His affidavit was expunged from the record of the court for it had not complied with the law on elections. Rule 12 of The Elections (Parliamentary and County Elections) Petitions Rules, 2017 Provides 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).

Failure to comply with this rule is fatal. The rationale is obvious; it is to give notice to the respondents of the allegation and respond if need be. The evidence by this witness has no value.

29. I was urged to make a finding based on the evidence of **Hasede Moses (PW3)** and **Masa Victor Wanyama (PW7)** who made allegations that there were many Ugandan Nationals who voted in Kenya after they were promised some money. In his testimony PW3 testified that his Kenyan National identity

card was issued on 11th October 2010 while PW7 testified that he acquired his in the year 2012. Both claimed that this was in anticipation of the election of 2013. Though both alleged to have been facilitated by the first respondent to acquire the Kenyan identity cards for the purposes of election, it would be naïve to rely on their evidence without some other corroborating evidence. These are tainted witnesses and who are willing participants in crimes. They are guns for hire so to speak. The two are confessed accomplices. The issue of accomplice witnesses is settled law in criminal law. In **REPUBLIC vs. NDARA S/O KARIUKI & 6 OTHERS (1945) 12 EACA 84**, at Page 86 the Court prescribed the correct approach in dealing with accomplice evidence as follows:

A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.

30. Though the Court in this decision was addressing a witness in a criminal trial, this position applies in the instant case for two reasons:

(a) The allegations made herein are of criminal nature and;

(b) A witness is a witness whether in civil proceedings or in criminal cases. In both instances he is required to create an impression that he is a truthful witness on whom the court can rely upon.

31. The first instance where **Hasede Moses (PW3)** casts a shadow of doubt in respect of his credibility is when he alleged that over 7 000 Ugandans voted in Budalangi in 2017 election. This is not a small number by any standards. It could not have escaped the notice of the residents, the other candidates and their agents. Though there could be a scintilla of truth, I consider the number he gave as hyperbole. It should not be lost that this is a “mercenary” witness who was motivated by money. Another reason that make me doubt this witness is the conduct of the petitioners’ supporters when I made an order that he be arrested for investigations on the criminal confessions he had very comfortably made. They risked their life and limb and snatched him from the hands of police officers. This was meant to conceal the truth from coming out. I cannot therefore believe his evidence for he has not portrayed himself as a credible witness.

32. In the course of testifying in cross examination by the first respondent’s counsel, **Masa Victor Wanyama (PW7)** told the court that he was illiterate. However shortly after it was noted that he was actually reading from his identity card. He again contradicted himself during cross examination by Mr. Kenei counsel for the 2nd and 3rd respondents. He first denied that his village was Mabolo before conceding the same after being pressed further. It should not be lost that he had earlier told the court that according to his Ugandan identity card, his village was Siemba “A”. Without an explanation why the glaring contradictions existed, I am justified to conclude that this witness lied even on the most basic aspect of his evidence. It is also interesting to note that in Kenya (according to his Kenyan identity card) he is called Victor Odwori Wanyama. Do we really know the true identity of this witness? His testimony was that over 5,000 Ugandans voted in Budalangi in 2017 election. My finding on this evidence of numbers will be the same as I did in respect of the evidence of **Hasede Moses (PW3)**.

33. If indeed these two witnesses were paid by the first respondent to vote for him, which according to them was mission accomplished, this court was not given any reason why they decided to testify against him. Why kill the milk cow? Since this was not explained, I make a finding that these two are not only witnesses who lack credibility but are also very dangerous ones for any reasonable tribunal to rely upon.

34. An allegation of bribery is not only an election offence but it is also a criminal offence. The law enjoins every citizen who observes the same to report to the authorities for an appropriate action to be taken. In the case of **WILSON MBITHI MUNGUTI KABUTI & 5 OTHERS vs. PATRICK MAKAU KING'OLA AND ANOTHER (2013) eKLR** the court observed:

The second schedule of the Elections Act specifically provides that any misconduct can and should be reported by any person to the Electoral Code of Conduct Enforcement Committee, which committee will liaise with government security agencies in the constituency and report suspected malpractices. Failure therefore to report the campaigning out of time, alleged bribery and vote buying cannot be remedied by this court unless there is concrete proof.

The petitioners' allegation of bribery remains a mere allegation.

35. It was the contention of the petitioners that more than 12,000 foreign voters participated in the election for the member for parliament, Budalangi constituency. This came from the evidence of **Hasede Moses (PW3)** and **Masa Victor Wanyama (PW7)**. I have already addressed this issue while analyzing the evidence on the issue of their credibility. Though my finding was that there was exaggeration on the issue of numbers, this is not an issue that can be wished away. No foreigner has any right to participate in our elections. This is the reason why I called for the investigations in the allegations before the conclusion of this matter. I was aware that once the self-confessed witnesses (if their contention was true) crossed the border after their testimonies it would be difficult to trace them for investigations to be conclusively conducted.

36. If these witnesses confession of being aliens is true, then we must acknowledge that some foreigners voted in the 2017 elections. We also have to acknowledge that the plot was hatched before 2013 elections. This is a dangerous trend. It cannot be allowed to stand. I however make a finding that the number of the foreigners who may have voted in the 2017 general elections must have been grossly exaggerated. The 7,000 added to 8,000 voters allegedly imported from Mageta Island in Siaya County would mean that only about 24,000 voters were true residents of Budalangi. The about 15, 000 imported voters would not have failed to be noticed by government agencies even if we assume they were dozing on the job. The residents would have equally noted the same.

37. I acknowledge that there is a possibility some foreigners voted. However the Petitioners did not demonstrate their numbers and if they could have significantly affected the results. It was not proved that the 1st respondent had a hand in their importation. What was made was unproven allegation.

38. If we assume that indeed the two self-confessed foreigners were indeed foreigners, the 2nd and the 3rd respondents cannot be blamed. All they required at the time of voter registration was a Kenyan National identity card or a passport. These documents are issued by other government agencies. Since the two had Kenyan National identity cards, they did what was expected of them.

39. I am making an order for thorough and proper inter-agencies investigations on this issue to be coordinated by the Busia County Commissioner. A report of the outcome to be filed in court within six months of this judgment.

40. The petitioners urged the court to make a finding that due to numerous malpractices, the 1st respondent was not validly elected. These malpractices were listed as follows:

(a) Failing to secure and or cause to be secured ballot boxes, ballot papers, forms and other essential election records and documents at the close of polling stations and while transporting the same to the tallying center, which resulted in ballot boxes and ballot papers being destroyed and thereby undermining and compromising the verifiability and accountability of the results of the election in Budalangi. Furthermore, ballot papers were found in the possession of unauthorized persons with neither explanation nor excuse thereby calling into question the integrity, capacity and credibility in the conduct of such elections by the 1st and the 2nd Respondents;

(b) Recruiting Clerks, Presiding Officers and other undesignated officials who were openly biased and or inclined to a specific candidate, namely Wanjala Raphael Bitta Sauti;

(c) Allowing voters to take more than one ballot paper and casting multiple votes for one elective post during the elections at known polling stations;

(d) Illegally allowing unstamped ballot papers to be cast in favour of the 1st Respondent;

(e) Counting and tallying and or allowing the counting and tallying of spoilt ballot papers in favour of the 1st Respondent;

(f) Declaring results of candidates before the requisite forms were signed by all party agents as procedure demanded, and the Petitioner plead conspiracy and complicity on the part of the 2nd and 3rd Respondents in returning the election of the 1st Respondent as member of National Assembly for Budalangi Constituency despite the glaring flaws in the process adopted during and after the elections of 08.08.2017;

(g) Refusing a recount of all ballot papers cast for all candidates to verify the same before the declaration of results on 09.08.2017 at St. Benedict's Budalangi High School tallying center and at other polling stations across Budalangi Constituency;

(h) Ejecting accredited agents for known candidates from counting halls of various polling stations in Budalangi constituency at the conclusion of the elections;

(i) Condoning and permitting the use of known public servants and public properties to campaign for candidate Wanjala Raphael Bitta Sauti contrary to law and regulations. This was in violation of the Constitution and the Leadership and Integrity Act.

41. It was contended that the 1st respondent was validly elected for there has been no impeachment on his qualifications of his candidature. It was further argued that he was declared a winner on the strength of the numbers he garnered and which the petitioners have no issue with.

42. Though it appears that there was some commotion at the St. Benedict's Budalangi High School tallying Centre, it was not demonstrated by evidence that this affected the results in respect of Member of Parliament seat for Budalangi constituency. In **DICKSON MWENDA KITHINJI vs. GATIRAU PETER MUNYA & 2 OTHERS [2013] eKLR** the court stated as follows:

It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election against his interest. The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices.

In the instant case, the court cannot speculate. None of the other issues raised and which I have captured in paragraph 30 above were proved. In my view, they remained mere allegations.

43. From the foregoing analysis of the evidence on record, I find that the election of 8th August 2017 in respect of Budalangi 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 warrant for a declaration that will annul the results declared by the second respondent. The petition is accordingly dismissed.

44. It is trite law that 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.

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

The petitioner will pay each respondent costs not exceeding Kshs. 3,000,000(three million Kenya shillings). This 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 30th day of JANUARY, 2018

KIARIE WAWERU KIARIE

JUDGE