



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NO. 1 OF 2017

ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR WAJIR EAST CONSTITUENCY

IN THE MATTER OF ARTICLES 1, 2, 38, 81, 84, 87 AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3 AND 30(2) OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF SECTIONS 10, 11, 13 AND 20(2) OF THE ELECTIONS OFFENCE ACT 2016

AND

IN THE MATTER OF SECTIONS 4, 13 AND 27 OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL REGULATIONS) 2012

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS PETITION RULES, 2017

BETWEEN

MOHAMED MOHAMUD SHEIKH.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ABDIKADIR SHEIKH ABDI.....2ND RESPONDENT

HON. RASHID KASSIM AMIN.....3RD RESPONDENT

RULING

INTRODUCTION

1. This application arises out of a Petition filed on 4th September, 2017 as a result of the outcome of the election of Wajir East Member of the National Assembly which was won by HON. RASHID KASSIM AMIN and which was disputed by the Petitioner herein Mr. MUHAMED MOHAMUD SHEIKH a registered voter at Baraza Park polling station Wajir East Constituency.

2. In the said petition the petitioner as regards this application specifically pleaded that the Returning Officer was in violation of Regulation 76 of the Elections Regulations by erroneously tallying the votes in favour of the 3rd Respondent contrary to **Section 39(1A)** of the **Elections Act** and that the statutory documents and forms which the Presiding Officers and Returning Officers were supposed to keep were altered and number of votes changed without any countersigning by the Presiding Officers and the Returning officer.

3. It was specifically pleaded that there were many instances where the results were manipulated by altering entries in Form 35A and that neither were agents of his candidate of choice **ABBAS SHEIKH MOHAMED** nor the Returning Officers avail Form 35A for **RIBA DASHEGE EAST, WAJIR BOR, HODHAN PRIMARY SCHOOL** and **LIVESTOCK MARKET** at the time of the declaration of the results.

4. By a Notice of Motion dated 20th September, 2017 the Petitioner sought the following orders:-

“2) THAT pending the hearing and determination of this application the court be pleased to make an order for the preservation and safe keeping of all Kenya integrated Election management systems (KIEMS) kits used in all the polling stations and tallying centre with respect to the election of Member of National Assembly Wajir East Constituency held on 8th August, 2017.

3) THAT the 1st and 2nd Respondents be compelled to immediately and unconditionally supply the following to the Petitioner:-

i. The logs for all KIEMs kits used in the 8th August, 2017 Wajir East Constituency Member of National Assembly election.

ii. Total number of registered voters per polling station.

iii. Total number of voters who voted per polling station in Wajir East Constituency.

iv. Total votes cast per polling station in Wajir East Constituency.

v. Number of voters who were identified biometrically and by supervisor mode per polling station.

vi. Total number of voters who had been identified biometrically and by supervisor mode per polling station as at 9.00 hours, 1100 hours, 1300 hours, 1500 hours and 1700 hours.

vii. Total number of voters unidentified by KIEMs kit.

viii. Copies of all the polling station (sic) used in Wajir East Constituency.

4) THAT all the KIEMs kits used in the 8th August, 2017 election be produced in court for scrutinizing and verification of the information contained therein.

5) THAT the scrutiny and verification be conducted in the presence of the Deputy Registrar, parties to this petition and report to be prepared by the Deputy Registrar be supplied to the parties and the court.”

5. It was stated in support of the said application that the purpose of scrutiny and verification of the KIEMS kits was to enable the court to investigate if the allegations of irregularities and breaches of the law were valid, to better understand electoral process and to also enable the court to arrive at a just and fair determination of the petition.

6. On 9th October, 2017 the court granted the petition access to read and copy the data in the KIEMS kit used which order was subsequently amended to read that the 1st Respondent to deliver the SD cards in respect of the KIEMS kits and a reader to the Deputy Registrar of this court who was to supervise the reading of the data in the presence of the representatives of the parties to the petition with each party being at liberty to file their individual report on the outcome of the reading in court. It was further ordered that the petitioner in the presence of the 3rd Respondent be allowed to put/fix acceptable additional seals on the election material at their present location pending further orders or directions thereon by the court.

7. I have taken the liberty of setting out the above background as it is the basis upon which the application under consideration is founded.

APPLICATION FOR DETERMINATION

8. By a Notice of Motion under Articles 1.10 and 159 of the Constitution of Kenya, 2010 and Rules 4 and 15 of the Parliamentary County Election Petition 2017, dated 6th December, 2017, the Petitioner sought the following orders:-

1. Spent

2. THAT this Honourable Court be pleased to order for scrutiny, recount and re-tally for the votes cast and or in favour of all the candidates who contested for Wajir East Constituency seat of Member of National Assembly on 8th August, 2017.

3. THAT this Honourable Court be pleased to order and direct the transportation and delivery of all the election materials used

during the election of the Member of National Assembly, Wajir East Constituency to Nairobi for scrutiny and audit of the manual register, counterfoils of used ballot papers, ballot boxes and votes cast in the said election on 8th August, 2017 to wit 48 polling stations.

4. THAT any other or further orders that this Honourable court may deem fit, just and expedient.

9. The said application was supported by the annexed affidavit of the applicant in which he deponed that the court order in respect of the reading of the SD card was completed on 4th December, 2017 and that two SD cards for Qahira Centre and Jogbaru Primary School 02 were never produced for scrutiny by the 1st Respondent for unknown reasons and that a casual reading of the data revealed untold discrepancies. In some stations the number of votes cast during the election exceeded the number of voters identified by KIEMS kit while in other stations the total number of registered voters was less than the total number of votes cast. It was deponed further that the votes cast, the total number of voters identified by the KIEMS kit as was read by the 1st Respondent's I.T experts as compared to those itemized and recorded on the physical Form 35A produced in court revealed inexcusable anomalies.

10. It was further deponed that there was sufficient reasons and evidence to believe that the said election was rigged and was not conducted in a free, fair, transparent and verifiable manner and that there were 46 polling stations whose results were suspect and a total of 48 polling stations named as impugned.

11. The application was further supported by an affidavit sworn by BILDAD NAMAWA URANDU who described himself as a trained software Engineer Cyber Security Analyst and deponed that from the information obtained from SD Card used in the election he was convinced that the said election was done in a manner that grossly vitiated the Constitution and the election laws and to that affidavit he annexed what he termed his findings in which he identified two polling stations where the SD Cards were not produced, thirty seven (37) polling stations which recorded more number of votes cast compared to voters identified, seven (7) polling stations with more voters identified than the number of votes cast, fourteen (14) polling stations where voting period exceeded 12 hours, one (1) station where there were more votes than the total number of registered voters, one station where the election date was indicated as 02nd January, 2009 and further that there were no logs in the KIEMS kit for election transmission of results and that KIEMS kits used were in training mode.

12. It was further stated in the said report that the KIEMS kit could not read RTS data in SD Card as regards AL-FURQAN INTERGRATED and therefore the transmitted results could not be verified. As a result it was concluded that the election was not free, fair and verifiable.

13. In response to the said application, the 1st and 2nd Respondents filed a Replying Affidavit sworn by the 2nd Respondent, the Returning Officer ABDIKADIR SHEIKH ABDI and a further affidavit by MARTIN WACHIRA the regional ICT officer where it was deponed that since the Petitioner did not have agents in any polling station the same had no sound and real basis for questioning vote in any polling station and therefore the application is a mere fishing expedition.

14. It was further deponed that the application violates various provisions of the Elections Act and that the court lacks jurisdiction to grant the orders sought as it was not supported by the evidence on record. It was stated that the Petitioner was by the said application transforming the original petition to a new and distinctively different petition as no witness had made any allegation as regards irregularities in the polling stations where scrutiny was being sought by the Petitioner.

15. In response to the affidavit and report by the Petitioner's expert, **MR. MARTIN WACHIRA NYAGAH** swore affidavit in which he gave the historical and legal foundation upon which the KIEMS were deployed and stated that after closing of polling, the Presiding Officers were mandated to count the ballots, fill in the Form 35A and transmit the Forms to IEBC portal using KIEMS and that he carried out a numerical analysis of the possible variations against the results transmitted through the KIEMS kit and that no more than ten (10) votes were affected.

16. On behalf of the 3rd Respondent, it was deponed that the application by the Petitioner raised new issues which amounted to a completely new petition substantially different from the one before the court and that the court can only grant the order of scrutiny or recount if it is satisfied that there is sufficient reason to order for scrutiny and recount on disputed polling stations.

SUBMISSIONS

17. On behalf of the petition it was submitted by Mr. Omari that the Petitioner had identified 48 polling stations from the reading of SD Card which had glaring irregularities which forms the basis for the order sought and in particular Livestock Market polling station was mentioned in which it was alleged that the voters identified by KIEMS kit exceeded the votes cast thus confirming that the election was not conducted in a verifiable manner and therefore to cure that defect a scrutiny which will entail opening the boxes in the polling stations disputed is necessary and in support of the application reliance was placed on the cases of **WILLIAM MAINA KAMANDA v MARGARET WANJIRU & 2 OTHERS [2008] eKLR** and **NICHOLAS KIPTOO ARAP SALAT v IEBC & 7 OTHERS [2013] eKLR** and the case of **AHMED ABDULLAHI MOHAMMED and Another v HON. MOHAMMED ABDI MOHAMMED Election Petition No. 14 of 2017** Nairobi.

18. On behalf of the 1st and 2nd Respondents skeleton submissions were filed on 15th January, 2018 in which it was submitted that the application was res judicata in that the issues raised in the application under consideration were raised and finally determined in the previous application which allowed the reading of the SD cards and that any additional evidence must be done within 28 days of the declaration.

19. It was further submitted that **Section 39(1)A** of the **Election Act** require the commission to appoint Constituency Returning Officers who shall be responsible, inter alia, for tallying announcement and declaration in the prescribed from the final results from each polling station in a constituency for the election of a member of National Assembly and therefore the votes announced take prevalence over those on

the IEBC portal and that electronic transmission of results is only mandatory for Presidential election for which the case of **INDEPENDENT AND ELECTORAL BOUNDARIES COMMISSION v MAINA KIAI Court of Appeal Civil Appeal No. 105/2017** was submitted.

20. It was further submitted that the Petitioner had failed to lay down a basis for the orders sought from which the following High Court authorities were relied upon:-

a. LEDAMA OLE KINA v SAMUEL KUNTAI TUNAI & 10 Others Nakuru High Court Election Petition No. 3 of 2013.

b. MUSIKARI NAZI KOMBO v MOSES MASIKA WETANGULA

It was therefore submitted that the application herein should have been made before the close of the hearing since that should have allowed the parties to call witnesses on the report from the reading of the SD Cards and further that all the allegations herein should have been made in the application which sought the order for reading of SD cards.

21. The third Respondent also filed skeleton submissions in which he identified the issues for determination as to whether the Applicant had demonstrated sufficient grounds to warrant order for either scrutiny or recount of votes and whether the ICT expert report can be a basis for scrutiny or recount order. It was submitted that scrutiny does not lie as a matter of course but rather that the party seeking scrutiny must lay a basis for it to the satisfaction of the court. It was submitted that a case of scrutiny must have sufficient clarity and particularly so as to guard against fishing expedition.

22. It was submitted that the Petitioner had totally failed to establish the basis for grant of the order sought since there is no polling station the petitioner said the results were disputed. It was submitted that the Petitioner had failed to demonstrate that there was a genuine dispute regarding the accuracy of the results captured in Form 35A which would not be resolved on the basis of the evidence adduced at the hearing. It was submitted that the application before court offends Rule 29(A) of the Elections (Parliamentary and County Elections) Petition Rules. In support of these submissions the following cases were submitted:-

a. PETER GATIRAU MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS PETITION NO. 28 of 2014

b. ARIKMA NARASA REDDY v VENKATA RAM REDDY GARI & ANOTHER [2014] 2SCR CIVIL APPEAL NUMBERS 5710, 5711 OF 2012 INDIA.

c. PETER GATIRAU MUNYA v IEBC & 2 OTHERS [2017] eKLR.

d. JACKTON NYANUNGO RANGUMA v IEBC & 2 OTHERS [2017] eKLR.

23. The 3rd Respondent further distinguished **AHMED ABDULLAHI MOHAMAD & 2 OTHERS [2017] eKLR** where Mabeya J ordered scrutiny in 51 polling stations arising out of the election of Governor of Wajir County on the basis that the allegation against the said polling stations were presented both in the petition, affidavits and testimonies of witnesses wherein the said polling stations were specified contrary to the application herein which was a substantial deviation from the Petitioner's pleadings.

24. It was submitted that the report on the SD Card reading upon which the Petitioner's application is based had yet to be adduced as evidence in court and in support thereof the following cases were relied upon:-

a. RAILA AMOLO ODINGA & ANOTHER v IEBC and 4 OTHERS SUPREME COURT PETITION NO. 1 OF 2017.

b. PETER GICHOKI KINGARA v IEBC & 2 OTHERS (2012) eKLR.

ANALYSIS AND DETERMINATION

25. The law on scrutiny is founded on **Section 82(1)** of the **Elections Act** and **Rule 33** of the **Rules and Regulation** thereunder and was stated conclusively by the supreme Court of Kenya in the case of **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS PETITION NO. 23 of 2014** reported in [2014] eKLR as follows:-

“153. From the foregoing, review of the merging jurisprudence in other courts, on the right to scrutiny and recount of votes in an election Petition we would propose certain guiding principles as follows:-

a. The right of scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Election (Parliamentary and County Elections) Petition Rules 2013. Consequently any party to an election petition is entitled to make a request for recount and or scrutiny of votes at any stage after filing of petition and before the determination of the petition.

b. The trial court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleading or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request to the satisfaction of the trial court or magistrate. Such basis may be established by way of pleadings and affidavits or by way of evidence adduced during the hearing of the petition.

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted is to be conducted in specific polling stations in respect of which the results are disputed or where the validity of the votes is called into question in the terms of Rules 33(4) of the Election (Parliamentary and County Elections) Petition Rules” (Emphasis added)

26. This rule has been religiously followed by courts in this country and I see no reason of departure therefrom save to add that in **BUNGOMA HIGH COURT ELECTION PETITION NO. 5 of 2013 PHILLIP MUKWE WASIKE v JAMES LUSWETI MUKWE & 2 others** stated the purpose of scrutiny as follows:-

1. To assist the court in investigating if the allegations of irregularities and breaches of law complained of are valid.
2. To assist the court in determining the valid votes cast in favour of each candidate.
3. To assist the court to better understand the vital details of the electoral process and gain impression on the integrity of the elections.

27. The application and order for scrutiny can be made at any time before the conclusion or the determination of the petition but it must be noted that as regards scrutiny **Rule 33** of the **Rules** specifically provides as follows:-

“33(1) The parties to the proceedings may at any stage apply for scrutiny of the votes for the purposes of establishing the validity of votes cast.

(2) Upon an application under sub rule(1) the court may if it is satisfied that there is sufficient reason order for a scrutiny or recount of the votes.

(3)

(4) Scrutiny or recount of ballot shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of:-

- a. The written statement made by the Presiding officers under provisions of the Act.*
- b. The copy of the register used during the elections.*
- c. The copies of the results of each polling station in which the results of the elections are in dispute*
- d. The written complaints of the candidates and their representatives*
- e. The pockets of spoilt papers*
- f. The marked copy register*
- g. The packets of counterfoils of used ballot papers*
- h. The packet of counted ballot papers*
- i. The packets of rejected ballot papers and*
- j. The statements showing the number of rejected ballot papers.”*

28. It is therefore clear that the order of scrutiny can be made at any stage of the hearing before the final judgment whether on the court's own motion or if a basis laid requires so and if it is prayed for in the petition itself but must be limited to the disputed polling stations. See **WAVINYA NDETI v THE IEBC & 4 OTHERS EP. NO. 12 OF 2013**. This therefore means that the submissions by the 1st Respondent that the Application should have been filed earlier by the Petitioner has no legal basis at all and that the application herein is validly before the court.

29. The only issue now for determination is whether the Petitioner has laid a basis to the satisfaction of the court for grant of the orders sought? From the petition herein as pleaded by the Petitioner, main complaint is that the returning officers did not avail Forms 35A for RIBA, DASHEGE EAST, WAJIR BOR, HODHAM PRIMARY SCHOOL and LIVESTOCK MARKET at the time of the announcement of the results. This was the Petitioner's case at the time of trial and evidence has been lead thereon which will be analyzed in the final judgment.

30. In the course of the trial the Petitioner applied for and was granted an order by the court to read and copy the data on the SD Card

obtained out of the KIEMS kits used during the elections herein and before the court received the report of the outcome of the said reading having allowed each party to file their individual reports, the petition filed the following application wherein now the disputed polling stations were expanded to 48 and used the report of his ICT expert as a basis of the application herein. Since each party was to file its own report from the reading of the SD card, the considered view is that the said report should have been first received by court and direction thereon made but it is not fatal for the Petitioner to file the application herein based on the same as the end results is the same.

31. It is clear from the said report and affidavit in support thereof that the Petitioner has through the application herein expanded the scope of his petition and has further specifically failed to state what are the issues in dispute in regard to the stated 48 polling stations which are over above the named six polling stations where the dispute was and still is that results were announced without the requisite Form 35'A' thereby offending the scope set out by the Supreme Court in **PETER GATIRAU MUNYA (2) (Supra)** to the effect that:-

“Scrutiny can never be granted on a blanket prayer. As is deducible from the Rule 33(4) of the Election Petition Rules specifically is crucial. The prayer for scrutiny must specify the polling stations in which the results are disputed and the document which should be scrutinized. The party seeking scrutiny must therefore ensure that its petition and affidavit in support ‘contain concise statements of material facts’ upon which the prayer is grounded.

The Petitioner must identify the specific anomalies or inconsistencies that relate to the gubernatorial election. The Petition left no vivid impression or picture in the mind of the court on the real purport of the request for access to and scrutiny of all election materials, documents, systems and devices used in the election in dispute. Again a generalized request for scrutiny and access to all materials used in the election only succeeds in creating a feeling of gauntness and dreariness in the court.”

32. The Petitioner’s case and the application under review is based on the fact that there were many irregularities identified and detected as a result of the reading of the SD cards. The Respondents have responded to those allegations and since it is upon the Petitioner to show to the satisfaction of the court that those figures stated in the data obtained from the SD Cards are different from the votes in the ballot boxes and the documents therein which the court is being invited to scrutinize, upon perusal of the evidence tendered before the court, there is clearly no basis upon which this court can order scrutiny of votes as to do so would be an exercise of fishing expedition and to expand the Petitioner’s case over and above the irregularities already testified upon by all the parties.

33. The petition proceeded on the basis that all you need to do is to identify irregularities but it is not enough for the Petitioner to state that there is high probability that the total number of votes cast were exaggerated but demonstrate to the satisfaction of the court, the polling stations which are disputed and the purpose to be served by the order sought in each of the named polling stations and the specific order sought and in this I find support in the ruling by Odero J in **PHILIP MUNGU NDOLO v OOMAR MUNYI SUMBWA & 2 OTHERS MOMBASA ELECTION PETITION NUMBER 1 OF 2013** where the learned Judge stated:-

“It is not each and every claim of a malpractice that will merit a recount or scrutiny. It must be shown that such malpractices were so widespread, so pervasive as to affect the final tally of votes.”

34. This court can and will still arrive at a just determination of the issues in dispute without resorting to the scrutiny of the election materials. The merits of the petition is not based upon the scrutiny and recount of votes but as to whether in addition to other grounds thereon, the petitioner has established irregularities out of the SD Cards and the forms produced by the 1st and 2nd Respondent before court.

35. I therefore find and hold that the petition has failed to satisfy the court that a basis has been laid to enable it order for the scrutiny and recount of votes since the same has not specified what the exercise shall accomplish. In the final analysis the application herein dated 6th December, 2017 lacks merit and is hereby dismissed with costs in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of January, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Omari for the Petitioner

Mr. Kariuki/Ms Nakili for the 1st and 2nd Respondent

Mr. Gikonyo/ Miss Mureithi for the 3rd Respondent.