



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**BUSIA ELECTION PETITION NO. 2 OF 2017**

**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION FOR**

**TESO NORTH CONSTITUENCY**

**BETWEEN**

**HON. ODERA ARTHUR PAPA .....PETITIONER**

**AND**

**OKU EDWARD KAUNYA ..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....2<sup>ND</sup> RESPONDENT**

**JULIAN GOMITY, TESO NORTH**

**CONSTITUENCY RETURNING OFFICER .....3<sup>RD</sup> RESPONDENT**

**RULING NO. 4**

**Introduction**

1. This ruling is in respect of the petitioner's Notice of Motion dated 15<sup>th</sup> December 2017 seeking orders of recount and scrutiny as follows:

*(a) THAT this Honourable Court be pleased to grant an order for scrutiny and recount of all the votes cast in favour of all candidates who contested for the position of Member of National Assembly, Teso North Constituency, during the General Elections held on the 8<sup>th</sup> day of August, 2017 relating to all the polling stations thereto.*

*(b) THAT this Honourable court be pleased to order for scrutiny of copies of the marked voter registers used in all the polling stations in Teso North Constituency in the General Elections held on 8<sup>th</sup> August, 2017.*

*(c) THAT contemporaneous with the foregoing, this Honourable Court be pleased to order a scrutiny of all the Forms 32 and 32A's as filled by the Presiding officers with regard to unidentified and assisted voters in all the polling stations in Teso North Constituency in the*

*General Elections held on 8<sup>th</sup> August, 2018*

*(d) THAT this Honourable court be pleased to order for scrutiny of all the spoilt ballots, rejected ballots, stray ballots and counted ballots together with packets of the counterfoils thereto in all the polling stations of Teso North Constituency in the General Elections held on 8<sup>th</sup> August, 2017.*

*(e) THAT this Honourable court be pleased to order for scrutiny of the Polling Station Diaries prepared and obtained from all the Polling Stations and Tallying Centre in Teso North Constituency in the General Elections held on 8<sup>th</sup> August, 2018.*

*(f) THAT such further and/or other orders be made as the court may deem fit and expedient.*

*(g) Consequent to the prayers herein sought the results and/or outcome of the scrutiny exercise do form part of the record of the Petition and be admitted as part of the record by this Honourable court.*

*(h) THAT the costs of this application be in the Petition.*

2. The application is premised on the grounds set out on the face of the application and the petitioner's supporting affidavit sworn on 15<sup>th</sup> December 2017. The respondents opposed the application through the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' joint Replying Affidavit sworn by Julian Gomity Auma, the Constituency Returning Officer, on 19<sup>th</sup> December 2017 and 1<sup>st</sup> respondent's Grounds of Opposition dated 18<sup>th</sup> December 2017.

### **Petitioner's Case**

3. The petitioner's case is that the Teso North Constituency ("the Constituency") elections were conducted without regard to the laws relating to elections and the principles laid down in the Constitution and that this non-compliance affected the results of the election and that only a full scrutiny and recount of the vote would assist the court uncover the extent of these violations.

4. The petitioner submitted that from the evidence, voters' names were not crossed from the printed registers and that the Presiding Officers failed to record the names of assisted voters in the proper statutory forms. He further pointed out that assisted voters in polling stations in the Constituency were denied their right to vote and where they voted, they were assisted to vote in the absence of party agents. The petitioner claimed that the presiding officers in those polling stations were openly in breach of their statutory duties, partisan and biased against the petitioner.

5. The petitioner was aggrieved by what he termed as deliberate spoiling of votes by presiding officers and refusal to tally and collate results in the presence of all the agents in numerous polling stations. The petitioner pointed to the fact that in some polling stations the Presiding and Deputy Presiding Officers left the polling stations unmanned thus failing to safeguard against electoral malpractices.

6. The petitioner was also aggrieved by the fact that in some polling stations, agents did not sign the statutory forms and the respective Presiding officers did not make any comments on the failure to sign the forms. The petitioner contended that scrutiny of marked registers of voters, Forms 32As, polling station diaries and votes in the Constituency's polling stations would help discern which and how many assisted votes were assisted in the voting exercise and not only unearth but also confirm the irregularities and malpractices alleged. The petitioner urged that **Regulation 72(5)** of the ***Election (General) Regulations, 2012 ("Regulations")*** requires that Forms 32 be filled and the court should therefore ascertain whether these forms were filled as required and the names of identified persons marked in the manual register as is required under **Regulation 69(e)** of the ***Regulations***.

7. The petitioner submitted that there was sufficient basis founded on obvious alterations on Forms 35A and failure to indicate the number of assisted voters in numerous polling stations across the Constituency

to warrant scrutiny to enable the court appreciate the depth, nature, extent and impact of the alleged irregularities.

## **Respondents' Case**

8. The respondents submitted that the petitioner has not met the threshold for scrutiny set out in **Rule 29(2)** of the *Elections (Parliamentary and County Elections) Petition Rules ("the Rules")*, which requires the petitioner to establish "*sufficient reason*" before the court can order scrutiny and recount of the vote.

9. The 1<sup>st</sup> respondent contended that the application as drawn and filed is inconsistent with the petitioner's case as set out in the petition and it serves to expand the petition and introduce new material into the case. He stated that the application raised blanket accusations without any cogent evidence and the entire request for scrutiny and recount did not meet the goals for scrutiny. The 1<sup>st</sup> respondent argued that scrutiny should not be entertained in any polling station that was not cited in the petition as to allow the application would amount to a fishing expedition.

10. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's argued that the petitioner has not specifically disputed and or called into question the validity of the results in Forms 35A which expressed and recorded the will of the people in the Constituency.

11. On the issue of the voter assistance, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contended that the assistance accorded to voters was in accordance with the law and that the petitioner's agents present did not raise any complaints with the Presiding Officers. The respondents also submitted that failure by the agents to sign Forms 35A cannot invalidate the forms.

## **Legal Principles**

12. Before I deal with the grounds upon which scrutiny and recount is sought, it is important to recall the principles applicable. Both parties cited authorities in support of and in opposition to the application but I think the principles are now notorious and well settled and are indeed common cause. The election court has jurisdiction to order scrutiny of votes. **Section 82(1)** of the *Elections Act, 2011 ("the Act")* gives the court wide jurisdiction in this respect and it states that, "*An election court, may on its own motion or on application by any party to the petition, during the hearing of an election petition, order scrutiny of votes to be carried out in such a manner as the election court may determine.*"

13. **Rule 29** of the *Rules* sets out the mechanics and directions for scrutiny of the vote. It provides, in part, as follows:

*29(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*

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

*(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar or Magistrate shall be subject to the directions the election court gives.*

*(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of... [Emphasis mine]*

14. The Supreme Court, after reviewing previous decisions of the High Court and Court of Appeal, summarized the principles applicable before the court can grant an order for scrutiny or recount in *Gatirau Peter Munya v Dickson Mwendu Kithinji & 2 others, SCK Petition No. 2b of 2014 [2014]eKLR* as follows:

*(a) The right to scrutiny and recount of votes in an Election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Consequently, any party to an election petition is entitled to make a request for a recount and /or scrutiny of votes, at any stage after the 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 pleadings 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 requests to the satisfaction of the trial judge or magistrate. Such a 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 vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Election) Petition Rules.*

15. More recently, the Supreme Court in a ruling on an application for scrutiny in ***Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017***[2017]eKLR observed that:

*[62] Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3<sup>rd</sup> Respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.*

16. Another important point I wish to make it that although reference to scrutiny usually includes recount, there is a distinction between scrutiny and recount. The definition flows from the provisions of **section 82(2) and (3) of the Act** which states as follows;

*82(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—*

*(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;*

*(b) the vote of a person whose vote was procured by bribery, treating or undue influence;*

*(c) the vote of a person who committed or procured the commission of personation at the election;*

*(d) the vote of a person proved to have voted in more than one constituency;*

*(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or*

*(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was*

*disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.*

(3) *The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.*

17. In **Mohammed Mahat Kuno v Abdikadir Omar Aden & 2 others** NRB HC EP No. 7 of 2013 [2013] eKLR, Kamau J., explained that the objective of a scrutiny of votes is anchored on the premise that if votes are struck out as envisaged in **section 82(2)** of the **Act**, it would have the effect of varying the total number of votes cast for each candidate. In the absence of any evidence that a voter voted in the wrong station, a vote was procured by bribery or treating, a voter had committed or had been prosecuted for impersonation, a voter had voted in more than one constituency, a voter had been disqualified from voting or a vote had been cast for a disqualified candidate, the court would find that it served no useful purpose to undertake scrutiny.

18. As the regards recount, Ogola J., in **Justus Gesito Mugali M'mbaya v IEBC & 2 Others** [2013] eKLR, explained the distinction between scrutiny and recount after reviewing the **section 82** of the **Act** and the **Rules**. He observed that:

*From the foregoing provisions of the Election rules, it is discernible that there is a distinction between recount of votes and scrutiny of votes. The difference lies in the outcome from conducting the processes. A recount, in my view, determines the number of votes a candidate received in an election. Rule 32 is to the effect that if the issue in the petition is purely on numbers, that is, the counting or tallying process was erroneous, then a recount of the votes or examination of the tallying process will resolve the dispute. In such a case, the Petitioner is required to categorically state as such in his/her petition. The effect of electing Rule 32 is that there shall be no determination of allegations, if any, of election misconduct. Scrutiny of votes, on the other hand determines the validity of the votes cast in an election. Rule 33(2) requires that a Petitioner must lay sufficient basis for scrutiny. Herein, allegations of election misconduct will be considered by the Court in determining whether a Petitioner has given sufficient reason to warrant a scrutiny.*

## **Determination**

19. I now turn to consider the prayers in the application as against the case set out by the petitioner in his petition in light of the principles I have outlined above. In making this decision, I have had the advantage of hearing all the testimony and documentary evidence which has been tested by cross-examination and the submissions of the parties. In order to grant the order for scrutiny and recount, I am only required to be satisfied that there is sufficient reason established and since this is not the final judgment I am not required to make any definitive findings on any issue.

20. It is clear that prayer (a) of the application cannot be granted in so far as the petitioner seeks, “scrutiny and recount of all the votes cast in favour of all candidates who contested for the position of Member of National Assembly, Teso North Constituency, during the General Elections held on the 8<sup>th</sup> day of August, 2017 relating to all the polling stations thereto.” Although there is no rule that the court cannot grant an order for scrutiny and recount for each and every polling station in the entire Constituency, there is no basis laid in petition and evidence led to support such a prayer and it is therefore rejected.

21. I also reject prayer (d) which relates to scrutiny of all the spoilt, rejected, stray and counted ballots together with packets of counterfoils for all polling stations in the Constituency. The petitioner neither pleaded nor laid any evidential basis to enable the court examine all the ballots in the Constituency.

22. My decision is further fortified by the fact that before the hearing of the petition commenced, the parties agreed on access to all electronic information relating to the Constituency collected and stored through the Kenya Integrated Election Management System (KIEMS) through the KIEMS kit. An

examination of the information would have revealed information on the number of registered voters, the number of people who voted, the number of ballots; spoilt, stray, rejected and counted ballots and all relevant data on the vote. Any discrepancy would have emerged when compared with the statutory forms. Neither petitioner nor respondents commented on anything that emerged from examination of the electronic information and I doubt that an examination of the ballots would assist the court.

23. Prayer (b) and (c) of the application seeks an order for scrutiny of the marked register and Forms 32 and 32A's filled by Presiding Officers in regard to unidentified and unassisted voters. The basis of this prayer is to be found in Part F paragraph 27 of the petition where the petitioner alleged that in several instances the Presiding Officers failed to comply with **Regulation 72** of the ***Election (General) Regulations***. The petitioner's case is that the Presiding Officers were assisting voters in the absence of agents and in some instances assisted voters were coerced or forced to vote against a candidate of their choice.

24. On this issue, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case was that the marked register was not being used as directed by IEBC. Their counsel submitted that the use of a marked register was not required in accordance with the decision of the Court of Appeal in the case of ***National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 Others*** NRB CA Civil Appeal No. **258 of 2017 [2017]eKLR**. Since the 2<sup>nd</sup> and 3<sup>rd</sup> respondent conceded that the marked register was not used, what purpose would be served by ordering scrutiny of the register if the 2<sup>nd</sup> and 3<sup>rd</sup> respondents conceded that the physical register was not used?

25. Apart from the register, the petitioner contended that Forms 32As, polling station dairies and votes in these polling stations will help discern which and how many assisted voters were assisted in the voting, considering the high level of illiteracy in the Constituency and further discern the votes cast in the various polling stations presided over by partisan officers.

26. I have considered this allegation vis-à-vis what is pleaded in the petition particularly para. 27 of the petition and the evidence led on behalf of the petitioner. I am not satisfied that a sufficient basis had been laid to scrutinize all the Forms 32 and 32A's.

### **Disposition**

27. Following the reasons I have set out above, I have no option but to dismiss the Notice of Motion dated 15<sup>th</sup> December 2017. The costs of the motion shall abide by the petition.

**DATED and DELIVERED at KISUMU this 15<sup>th</sup> day of January 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Walukwe instructed by Okong'o Omogeni & Company Advocates for the petitioner.

Mr Odera instructed by Odera Obar & Company Advocates for the 1<sup>st</sup> respondent.

Mr Juma instructed by Mukele Moni & Company Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.