



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ELECTION PETITION NO. 5 OF 2017**

MILTON MUGAMBI IMANYARA.....PETITIONER

VERSUS

I.E.B.C.....1<sup>ST</sup> RESPONDENT

MERU COUNTY RETURNING OFFICER..2<sup>ND</sup> RESPONDENT

FRANKLIN MITHIKA LINTURI.....3<sup>RD</sup> RESPONDENT

**RULING**

The petitioner in application dated 6<sup>th</sup> September 2017 brought pursuant to Articles 19, 20, 22,23(3), 35,81,86,159 and 258 of the constitution; section 39 of the Elections Act, section 27 of IEBC Act No, 9 of 2011, Access to Information Act and all enabling provisions of the law, Rule 17 of the Elections Petition Rules 2017 sought orders for scrutiny of election materials used in the impugned Senatorial Elections for Meru Country held on 8.8.2017. The prayer for scrutiny was also one of the reliefs sought in the petition dated 6<sup>th</sup> September 2017.

This application was supported by the affidavit of the petitioner and grounds on the face of the application. The application for scrutiny was opposed by the Respondents wherein Mr Gichihi Macharia Samuel the Returning Officer for Meru County swore a Replying Affidavit and the 3<sup>rd</sup> Respondent also opposed the application. This application for scrutiny was canvassed by way of written submissions being filed and the court in its ruling delivered on 9<sup>th</sup> November 2017 agreed with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents counsel and the 3<sup>rd</sup> Respondent's Counsel (from pages 29 to 34 ) that sufficient ground had not been laid to warrant an order of scrutiny and that it was necessary for evidence to be led and tested before the court on its own motion or the petitioner could renew the application for scrutiny and/or recount.

The Petitioner testified and called four other witnesses to support his petition. On the other hand the 1<sup>st</sup> and 2<sup>nd</sup> Respondents tendered the evidence of Abdi Sheikh Mohammed the Returning Officer of Imenti North Constituency; Esther Kaario Mbirithu also testified as the Presiding Officer for Maua Primary School Polling Station 1 in Igembe South Constituency. The 2<sup>nd</sup> Respondent Samuel Gichihi Macharia also gave his testimony opposing the Petition. Shadrack Gitonga Githure Deputy Presiding Officer Nguthuki Polling station Akirang'onde Ward also testified denying that he received Kshs. 3000/- from the 3<sup>rd</sup> Respondent Agent as a bribe. The 3<sup>rd</sup> Respondent finally testified but did not call any witnesses. The taking of the evidence in the entire petition was concluded on 15<sup>th</sup> December 2017 when the Petitioner's counsel Mr Oduol renewed the application for scrutiny. Among the issues that the petitioner sought to clarify that would go along way in establishing the basis for an order for scrutiny and/or recount

were:-

- Irregularities in forms 38As, 38 Bs and 38 C and the fact that they were not in the prescribed form and neither were they genuine.
- Failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to keep election materials secure especially votes cast in favour of the petitioner and the tamper proof envelopes. The partly burnt ballot paper allegedly picked by petitioners witness No. 5- Stephen Kabuthi M'Ibaya .
- Alteration of votes by 2<sup>nd</sup> Respondent without authority.
- Scrutiny of original forms 38 As which the 2<sup>nd</sup> Respondent in an affidavit swore were kept and sealed in ballot boxes by sheer oversight of the Constituency Returning Officer.

Mr Oduol submitted that there is need to scrutinize all election materials in light of the glaring irregularities and allegations in regard to the process of voting.

Mr Oduol said that to remedy failure by IEBC to allow access to information in KIEMS and especially register a simple analysis will suffice to clear suspicion.

It was also submitted that the petitioner requires verifiability in respect of votes found outside the ballot box and the serial number of the partly burnt ballot paper will identify polling station to which the series in which ballot falls was issued.

The renewed application for scrutiny by the Petitioner was opposed by the Respondents.

Mrs Kinara Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed application for scrutiny to be carried out in sample polling stations. She denied that an order was issued to access the KIEMS kit. She invited the court to look at the petition and affidavits and consider whether scrutiny should be ordered. She said they had objected to adduction of more evidence. She argued that scrutiny should be limited to polling stations in the petition and supporting affidavits. She argued didn't prove that the Number of votes in Tira Polling station exceeded number of Registered voters it was also argued that Petitioner was not able to place the agent at the polling station at Nkubu County Social hall. Petitioner witness number 3 – Charles Gichunge who had not annexed his Letter of Appointment and Oath of Secrecy to his affidavit in support of the petition.

In regard to allegations in respect to Maua Primary School polling station 1 it was argued the petitioners witness PW2 was not even able to identify the presiding officer. It was further argued that Petitioner was not able to place the alleged burnt ballot paper in any polling station in any constituency and the witness who allegedly picked it could not say where he voted. That PW5 didn't identify the people he alleged set the ballot papers on fire.

Mrs Kinara said the information in SD cards can be deposited in court as they had nothing to hide. It was submitted that a basis for scrutiny which should be as per polling station has not been laid. Regarding Rule 69 of Elections (Parliamentary and county Elections) Petition Rules 2017 it was argued by Mrs Kinara that the KIEMS kit contained electronic register which is primary tool of identification and that in presidential election petition number 2 of 2017 Supreme Court held that Register in KIEMS kit is a register for purposes of elections. That it was not proved the KIEMS kits failed in any polling stations.

Ms Awuor Advocate for the 3<sup>rd</sup> Respondent opposed the renewed application for scrutiny. She argued that scrutiny can only be done in specific polling stations where votes are disputed and that if the petitioner is attacking the entire process he can't concurrently ask for scrutiny in sample polling stations. Ms Awuor said Petitioner witness number 2 Peter Kaberia could not identify the presiding officer at Maua Primary school polling station and testified on Gubernatorial results and not senatorial results and his evidence can't be used to issue an order for scrutiny of results in senatorial elections.

It was further argued that Charles Gichunge PW3 had, nothing to identify him as agent at Nkubu Social Hall Polling Station 1 and therefore burden to prove that he was at the polling station and witnessed what

he alleged to have witnessed had not shifted to the Respondent. Ms Awuor argued further that PW4 disowned his own affidavit and said he didn't understand what had been deponed. She said PW4 didn't specify from which polling station he got the ballot paper whose authenticity was questioned. She argued that petitioners witnesses didn't support allegations raised by petitioner and the petitioner admitted he didn't specify polling stations he was talking about.

She argued further the petitioner didn't give alternative results apart from the ones declared in forms 38 As. She said if process is questioned an order for scrutiny can't issue. Ms Awuor referred to the Elections Petition Number 1 of 2017 – Hassan Noor Hassan vs IEBC & 2 others in which she claimed that Justice Ochieng had held that where one claims that process of election was flawed they can't ask for scrutiny. This is misleading because there is no such holding in the authority referred to in fact to the best of my knowledge Justice Ochieng has made an order of partial scrutiny in the said election petition.

Reference was also made to the authority of Phillip Osore Ogutu vs Micheal Aringo and 2 others where it was held that a party must not be allowed to use scrutiny for fishing expedition. Ms Awuor said it was upon the petitioner to bring witnesses whose names were not crossed from the printed Register . She said it can't be a basis for scrutiny that information in KIEMS kit was not provided because the petitioner and his counsel didn't ask for them during cross examination of the Respondents and Respondents witnesses.

Mr Oduol in response submitted that it was held in Presidential Elections Petition No. 1 of 2017 that if a copy of Printed Registers is not used as per Rule 69 of Elections (Parliamentary and County Elections) Petitions Rules the whole process is invalidated. He argued that electronic Register cannot be same as printed Register. He said issue of printed Register is provided for under Rule 29(4) and (5). Mr Oduol further said that the County Returning Officer testified and said that he could not answer to anything from polling station. He argued that it was not petitioner to request for information in SD cards but to be supplied as ordered by the court. He said it was fatal mistake to fail to cross the petitioners name from the Register when he was identified to vote and he voted.

In consideration of the application for scrutiny dated 6.9.2017 and renewed on 15<sup>th</sup> December 2017 and in consideration of the evidence adduced in this petition; and without going deeply into the reasons for this court's finding because they will be included in the detailed judgment I do find that a prima facie case has been made for partial and limited scrutiny as follows:-

1. Establishing the existence of the Printed Voters Registers and whether the names of the voters who voted were crossed in the following polling stations

a) Maua Primary school Polling station No. 1

b) Polling station where petitioner voted

c) Polling station where the 3<sup>rd</sup> Respondent voted.

d) Nkubu social hall polling station 1 – where PW 3 alleges to have been expelled during counting because he complained that petitioners votes were being bundled together with those of 3<sup>rd</sup> Respondent.

e) Examine votes and recount and identify number of votes garnered for each candidate including petitioner and 3<sup>rd</sup> Respondent.\*\*\*

f) All the Polling Stations in Imenti Central Constituency

2 (a) Scrutiny all forms 38 A in all the polling stations in Imenti Central Constituency where the County Returning Officer claimed he corrected an error in form 38 B, let the forms 38 As be examined and results collated to form 38 B and to form 38 C confirmed.

**(b) Scrutiny and Recount of ballot papers at Nkubu Social Hall polling station 1.**

3 **(a)** In regard to the partly burnt ballot papers produced by PW 5 – the boda boda rider and in consideration of the Report by the Deputy Registrar on the state of the ballot boxes during the exercise to affix additional seals in which three boxes did not have apertures; five IEBC seals had no serial numbers; one ballot box had a total of three seals missing; the ballot box of Mabuurwa Primary School Polling Station 2 of 2 at page 26 number 10 the ballot box was partly broken; Igembe South ballot box serial number 329525 page 28 item number 15 contents of ballot box soaked in moist and Tigania East at page 6 No. 31 Amugaa Primary School Polling station 1 of 3-Women Rep ballot box serial number 139910 is covered with Senators lid and the Senators ballot box covered with the Women Rep ballot box lid. The County Returning Officer having confirmed the partly burnt ballot paper had a serial number it will be prudent to establish how the materials were preserved and whether the partly burnt ballot paper produced by the petitioner witness is genuine. From the averments of Imaculate Kassait Director of IEBC in her affidavit in Raila Petition 2017 it can be construed that elections materials were printed with the security features which can make them identifiable to IEBC. It is hereby ordered that the County Returning Officer together with the nine Constituency Returning Officers under the supervision of the Deputy Registrar do establish from which Polling station, the partly burnt ballot paper emanated and how it got out of the sealed ballot box from where it ought to have been preserved. IEBC to provide a device to establish whether the partly burnt ballot paper is authentic.

- The contents of the ballot box which is reported to have been affected by moist and which polling station is not identifiable should also be scrutinized and a report given. The partly broken ballot box from Mabuurwa Primary School 2 of 2 should also be scrutinized and a report made to that effect.

-In Tigania East the Senators ballot box with the Women Rep. Ballot box lid as well as the Women Representative ballot box with the Senators ballot box lid should also be scrutinized to establish that the ballot papers relate either to the Women Representatives results or the Senators results and the results to be confirmed to have been awarded accordingly in the respective forms 38 As within that particular Polling Station and collated by the Constituency Returning Officer into respective form 38 B.

**(b)** In consideration of averments by the second Respondent in his affidavit sworn on 20<sup>th</sup> September 2017 to the effect that some original forms 38 As were inadvertently sealed in the ballot boxes by the Presiding officers and therefore results entered into form 38 B by the Constituency Returning officers were sourced from carbonated copies of form 38 As it is hereby ordered that scrutiny be done to establish the number of forms 38As that were sealed in the ballot boxes; and also to establish whether the results in the identified original forms 38 As that were in the sealed ballot boxes tally with the results collated in the form 38 Bs by the Constituency Returning Officers.

The exercise should be carried out in the presence of at least two representatives for each of the parties and/or with their counsels or representatives of the counsels if they wish.

4. The Deputy Registrar in the exercise of supervising of the scrutiny and/recount in 1-3 above shall be assisted by such number of court clerks as shall be necessary to ensure efficiency and expediency.

5. The scrutiny shall be conducted from 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> of January 2018.

6. The venue of the exercise shall be at IEBC warehouse at Meru and Maua.

7. The DR at the end of the exercise shall make a detailed report on the findings which report shall form part of the proceedings in this petition. Mention on 22<sup>nd</sup> January 2018 to confirm filing of the report by the DR.

8. Security of the Deputy Registrar, court staff, IEBC staff and the agents shall be provided for by the County Police Commander Meru County.

9. The costs of the application shall await the outcome of the Petition but the Petitioner will bear the costs

of hiring tent(s) and chairs for the exercise during the entire period of scrutiny and recount. Orders accordingly.

**Dated, Delivered and Signed at Meru this 11<sup>th</sup> day of January 2018.**

**HON. ANNE ONG'INJO**

**JUDGE**

In the presence of:-

Mr Oduol Advocate for Petitioner with Mr Gitonga Advocate.

Mrs Kinara Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Ms Awour Advocate for 3<sup>rd</sup> Respondent.

**HON. ANNE ONG'INJO**

**JUDGE**