



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
ELECTION PETITION NO. 4 OF 2017

PETER ODIMA KHASAMULE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C).....1st RESPONDENT

THE RETURNING OFFICER, BUSIA COUNTY,

FREDRICK APOPA.....2nd RESPONDENT

SOSPETER ODEKE OJAAMONG.....3rd RESPONDENT

JUDGMENT

1. Every five years, the Republic of Kenya conducts general elections in all elective positions, as provided for under the Constitution. This includes the gubernatorial one. On the 8th August 2017, like in the rest of the country, the people of Busia County went out to elect their governor, amongst other leaders. Article 180 (1) of the Constitution of Kenya provides:

The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.

2. There were seven candidates for the position of governor for Busia County. At the conclusion of counting and tallying, each candidate garnered votes as follows:

CANDIDATE	VOTES GARNERED
Sospeter Odeke Ojaamong	135,962
Otuoma Paul Nyongesa	125,165
Daniel Barasa Kidwoli	7,957
Michael Otieno Oloo	2949

Aloysius Okotch Mondoh	1539
Francis Lawrence Oyatsi	1171
Benjamin Onyango Okwara	910
Total	275,653

3. The 3rd 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 1st respondent. The 3rd respondent was subsequently gazetted as a duly elected governor for Busia County. This aggrieved the petitioner and led to the filing of this petition.

4. The petitioner is a registered voter within Busia County. He described himself as the County Campaign Manager for Dr. Paul Nyongesa Otuoma who was an independent candidate for the gubernatorial election in Busia County.

5. The 1st respondent, The Independent Electoral and Boundaries Commission, **IEBC**, is a constitutional commission created under Article 88 and Article 248(2) (c) of the Constitution of Kenya 2010 and mandated inter alia to conduct, and supervise general and other elections in Kenya.

6. The 2nd respondent was the County Returning Officer for Busia County in the election of 8th August 2017. He is an employee of the 1st respondent.

7. The 3rd respondent was a candidate for the gubernatorial position in Busia County. He was declared as the elected governor.

8. In his petition, the petitioner raised the following grounds:

- (a) Malpractices during the campaign period;
- (b) Malpractices during the voting process;
- (c) Campaigns in the Polling Stations on the voting day;
- (d) Use of County resources and County employees in the campaigns;
- (e) Malpractices at Teso South and Butula Constituency Tallying Centres;
- (f) Harassment and intimidation of the presiding officers and Returning Officers; and
- (g) Implication of the malpractices on the voting and final results.

9. These grounds were opposed by the respondents who maintained that contrary to the contention by the petitioner, the election was conducted within the legal parameters and that it represented the will of the people of Busia County.

10. The respondents filed their issues as well and from all the issues by the parties, I have crystallized the following as issues for determination:

- (a) Whether there were malpractices during the campaign period and if so what is the effect;
- (b) Whether there were malpractices during the voting process and if so what is the effect;
- (c) Whether there were malpractices during the tallying process at Teso South and Butula

Constituency Tallying Centres, and if so what is the effect;

(d) Whether there was harassment and intimidation of the presiding officers and Returning Officers and if so what is the effect;

(e) Whether the IEBC conducted the election substantially in compliance with the Constitution, the Elections Act and the Regulations made thereunder; and

(e) Who is liable to pay the costs?

11. In making a decision as to whether the election in respect of the governor, Busia County was in accordance with the law, I will address my mind to these issues.

12. While determining the 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.

13. 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.

14. The petitioner contended that there were numerous malpractices during the campaign period. He averred that the 3rd respondent and his supporters, agents and campaigners committed multiple election offences and malpractices, which deprived the election of the fundamental constitutional and statutory requirements of freeness and fairness, credibility and transparency. This ground had several limbs which I will endeavour to address.

15. In paragraph 18 of the petition, the petitioner deposed as follows:

The 3rd Respondent and his campaigners, agents and supporters and party officials violated the requirements of the Electoral Code of Conduct as to free and fair elections by engaging in a smear and dirty campaign by falsely, maliciously and abusively linking the Petitioner and his campaign team and candidate to the Jubilee Party with the intention of inciting voters against voting for other candidates.

This complaint falls under a broad category of malpractices during the campaign period.

16. It was contended that there was a smear campaign against Dr. Otuoma that led him to lose the election unfairly. In paragraphs 18 to 20 of the petition, the petitioner claimed that the 3rd respondent linked Dr. Paul Otuoma to Jubilee Party and its presidential candidate. Due to the unpopularity of Jubilee Party in Busia County, this denied Dr. Otuoma many votes and he eventually lost to the 3rd respondent. During cross examination, the petitioner conceded that he did not know who published the false information in respect of which he had attached newspaper cuttings to his affidavit.

17. There were claims of distribution of leaflets alleging that Dr. Otuoma had defected to Jubilee Party. **Lawrence Musibi Makanda (PW14)** in his affidavit deposed as follows:

28. That I further confirm that on the eve of the election day at night, leaflets were distributed all over the county and more particularly in Marachi West, Marachi East, Marachi North, Marachi Central and Kingandole depicting Dr. Paul Nyongesa Otuoma as a Jubilee candidate in the same poster with Ababu Namwamba, Uhuru Kenyatta and William Ruto, all packaged in jubilee colours. That together with the leaflets was a Nation Newspaper headline cutting dated 13th April 2017 reading “Otuoma defects to Jubilee Party.”

He attributed the distribution of the leaflets to Alex Kwena, John Oganga and Kaibe Eric. However, during cross-examination, he said that he did not witness the three distributing the leaflets and newspaper cuttings but suspected them. He also that he did not report the incident.

There was therefore no evidence to link any of the respondents to the said distribution.

18. In his affidavit **Francis Asoyong (PW4)**, deposed that when the 3rd respondent visited Simbachai in Teso for a campaign rally, he alleged that Dr. Otuoma was a Jubilee party candidate. **Evans Ekisa (PW12)** gave similar evidence when the 3rd respondent held a campaign rally at Chamasiri Market. **Dr. Paul Nyongesa Otuoma (PW18)** testified on these allegations. They were however denied by **Sospeter Odeke Ojaamong (RW1)**. Though Ekisa and Asoyong testified to have been present during the alleged utterances, I would have expected their evidence to be corroborated by some material evidence before acting on it. Legally speaking, a fact can be proved by one witness. However, knowing how emotive elections are and that these two were supporters of one candidate, it would not be prudent to act on their evidence especially where the alleged utterances were made in presence of many people. Why were there no other witnesses to corroborate what these two said?

19. In paragraphs 21 to 24 the petitioner deposed that the 3rd respondent alleged that Dr. Otuoma was against the Luo and the Teso communities. This, according to him was to ensure that Dr. Otuoma did not get any support from these two communities. This claim was supported by **Shem Isubah Papa (PW3)** and **Matthew Edejai (PW8)**. These are very serious allegations bordering on criminal incitement. Since there was no report made to the police for investigations to be carried out, these allegations were not proved.

20. There were several allegations of bribery during the campaign period attributed to the 3rd respondent. The petitioner, **Peter Odima Khasamule (PW1)** in his affidavit states that on 29.06.2017, the 3rd Respondent met the Abamenya clan and gave each member Kshs. 1,000 in exchange for a pledge to support his candidature as the governor. That further on 3rd August 2017, he received a phone call and was informed that 3rd Respondent’s campaigner Patrick Olasa was giving 1kg of beef, 1kg of sugar and Kshs. 500 to voters in exchange for pledges to vote for the 3rd Respondent at Poa Petrol Station.

21. The meeting with and bribing an entire Abamenya clan is very curious. Though the petitioner did not favour the court with approximate numbers, this in my view is an issue that could not have escaped notice. He did not call any witness to support his claim. Likewise, there was no attempt to prove the allegation against Patrick Olasa.

22. **Peter Odima Khasamule (PW1)**, further contended that one Wavidonge was dishing out bribes at Poa Petrol station on behalf of the 3rd respondent. When he visited the said petrol station, his paragraph 30 of the supporting affidavit talks of the utterances he heard made by Wavidonge against Dr. Otuoma. He did not adduce any evidence to support this claim.

23. **LEONARD OKELLO OLENDU (PW15)** deposed that he witnessed bribery at Bulemia by the 3rd respondent. He said after addressing the crowd, the 3rd respondent asked them to queue so as to receive bribes. There was no evidence that it was reported to any authority yet this could have been very strong

evidence where the agent issuing bribes would have been arrested in the act.

24. Other allegations of bribery were made by **Mary Achieng Asala (PW5) and Lawrence Musibi Makanda (PW14)**. **PW5** stated in her affidavit that towards the end of July 2017, the 3rd Respondent together with Mr. Obuogo, Member of County Assembly for Nangina Ward at Ojarii Primary School distributed basins, Vaseline petroleum Jelly branded with his image, maize flour and Kshs. 100. There was no evidence that was adduced to support this claim. It remains a mere allegation.

25. **PW14** in his affidavit stated that a few days to the elections, the 3rd respondent had a rally at Butula Polytechnic where 5 bulls were slaughtered and given to the people in attendance. Kshs. 200 was also given to these people so as to vote for the 3rd Respondent. Again there was no evidence that was adduced to support this claim.

26. During the campaign period, it was contended, there was violence perpetrated by the 3rd respondent and his supporters against Dr. Otuoma and his supporters. In his evidence **Timothy Omulepu (PW2)** said that Dr. Otuoma's campaign materials were damaged but this was not reported. Other alleged incidents of violence that were not reported were testified to by **Steve Paul Omuse (PW11)** and **Evans Ekisa Amai (PW12)**. The court has nothing to test the veracity of these allegations with.

27. Though **LEONARD OKELLO OLENDU (PW15)** said he was attacked by the supporters of the 3rd respondent at Bulemia Jua Kali Centre, he conceded during cross examination that he did not know the identity of the people who attacked him. There was therefore no link of his attackers to the 3rd respondent. The court ought to be careful in concluding who attacked this witness considering that there were seven candidates for the gubernatorial position.

28. **Shem Isubah Papa (PW3)** testified on violence against him. Though he claimed to have reported, there was nothing to support this claim. The same was in the case of **Okal Otunga (PW10)**. Even if they had evidence to show that they reported, there was need to adduce evidence that would connect any of the respondents to the said attacks. This was not done.

29. **Martin Shikuku Radido (PW16)** testified of how a motor vehicle **KBR 849 C** blocked them at Bulemia Jua Kali Centre. This could have been the best evidence against the perpetrators had the matter been reported to the police for investigations. A search at the Registrar of motor vehicles office would have unearthed the criminals. Unfortunately apparently no report was made.

30. There were claims of threats of violence allegedly made against **PW3, PW4, PW6, PW8, PW10, PW11 and PW12**. There was no evidence adduced in court to show that these threats which were very serious were reported to the police or any other authority.

31. **Lawrence Musibi Makanda (PW14)** in his affidavit stated that a few days to the elections, the 3rd respondent had a rally at Butula Polytechnic where old men posing as Marachi Elders were invited and oaths were taken. Later, a secretive swearing was conducted between 8am and 6:30pm. During cross examination this is what he said:

I do not know who conducted the oathing ceremony. The people who took oath were former Otuoma's supporters. I know none of them by appearance.

This allegation has no basis. The same is dismissed.

32. The allegations of bribery, violence and oath taking do not only violate electoral laws and regulations but are also criminal offences. 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.
[Emphasis added]

In the instant case, there is no proof of these allegations against the 3rd respondent.

33. Another pre- election complaint by the petitioner was that there was bias in training the 3rd respondent's agents. According to him they were given preferential treatment by being trained separately from the agents of the other candidates. This was however denied. There was no evidence which was called to support the claim.

34. It was argued that during the campaign period and during election, the Butula Constituency Returning Officer was staying at Western Ambience Hotel which is in Bumala. The owner of the hotel is Mr. Oyula who was an ODM Candidate for MP and who was supporting the 3rd Respondent. This was stated by **PW14** and by **PW18**.

35. The Butula Constituency Returning officer was **Jackson Mariach Limaris (RW7)**. He stated that he hailed from Baringo County. On arrival at Butula, he sought accommodation at Western Ambience Hotel since it was near his place of work. This was collaborated by **Fredrick Ochieng Apopa (RW8)** in his affidavit where he states that there was no other decent place that **RW7** could have put up in the initial days of his stay.

36. I have an issue with this complaint. A newly posted public servant would not have been expected to enquire ownership of a hotel where he was seeking accommodation. It would have made sense had he been a regular resident in the constituency. Since there was no evidence to show that his stay compromised his discharge of duty, this complaint is dismissed for lack of merits.

37. It was also contended that Dr. Otuoma's agent were denied badges to allow them to access polling stations. The evidence of the petitioner is that in Teso North they had 118 agents. **Ephraim Timothy Omulepu (PW2)** said he was the campaign coordinator and the Chief agent of Dr. Otuoma. In respect of the badges and accreditation letters he said the following:

I was given 35 badges for agents and one for the chief agents. I was given 83 letters allowing agents to go into polling station. I got 35 bags (sic) & 83 accreditation letters on 7/8/2017 at 9pm. We were to use them on 8/8/2017. I submitted my list of 118 agents at about 9am on 7/8/2017.

In simple arithmetic if you add 36 to 83 the total is 119.

In paragraph 17 of his affidavit **Ephraim Timothy Omulepu (PW2)** stated as follows:

That I gave the returning officer all the names of our agents and it was not until 7th August 2017 at 6 pm when I got the letters.

He contradicted his affidavit during cross examination when he alleged that he received the letters at about 9 pm. This was after he had submitted his list on the same day at about 9 am. The 1st respondent cannot be blamed for the late distribution of the badges and the accreditation letters. Since the accreditation letters were to serve as badges, this complaint lacks basis.

38. The petitioner raised complaints of malpractices during the voting day. These were campaigning at the polling stations, voter bribery, and issuance of marked ballot papers, presiding officers and clerks campaigning for the 3rd respondent, and locking of Dr Otuoma's agents out of the polling stations.

39. In paragraph 50 of the supporting affidavit, the petitioner contended that he witnessed voters being ferried in motor vehicle registration number **KAS 936 D** and each voter was given Kshs. 200/= with instructions to vote for the 3rd respondent. He said this was at Lwanya Primary School where he voted. This evidence does not convince for three reasons:

(a) During cross examination he testified that he voted at Lwanyange Primary School polling station. He conceded that there was a polling station called Lwanya Primary School polling station. Without any explanation as to why he confused Lwanya for Lwanyange then the only conclusion to make is that he is not a truthful witness;

(b) He never said who was issuing the bribes. A vehicle cannot do so; and

(c) This criminal activity was not reported raising doubts if indeed it took place or was just a figment of imagination aimed at attempting to strengthen this petition?

40. **Mary Achieng Asala (PW5)** was an agent of Dr. Otuoma. She testified that she saw **Charles Wesonga Mbingi** giving bribes to voters who were in the queues. She said she reported to the presiding officer who dismissed the issue casually and did nothing. This was denied by **Mbingi (RW6)** He gave an alibi of his movements after voting. She did not report elsewhere. Agents were supposed to be inside the polling stations to monitor voting. The unanswered question is how she could be able to see what was going on outside. This allegation by this witness cannot be believed.

41. **Martin Adung'o Adungosi (PW7)** said he was at Aturet polling station where he witnessed One Emuret bribing voters and directing them on how to vote. He said that police officers who were present witnessed the bribery but did not take any action. He did not report for what he said was not his business. Is this evidence believable? I do not think so for the following reasons:

(a) It is inconceivable that police officers would witness a crime being perpetrated and stand by watching without any intervention;

(b) If at the time of the alleged commission it was not his business, when did it dawn on him that it was his business? Without any evidence as to what prompted him to volunteer the information and make it his business to testify, we can only assume that his evidence and motivation are questionable; and

(c) When an alleged crime is not reported promptly when there is nothing to hinder one from doing so, it becomes doubtful whether indeed there was a crime.

42. **Lawrence Musibi Makanda (PW14)** described himself as the Organizing secretary of Marachi Council of Elders. He voted at Butula Boys High School polling station and thereafter moved from one polling station to another. He however conceded that he had not been authorized by IEBC to do so. He allegedly witnessed several malpractices but did not bother to report to any authority. This is baffling. He can only be described as a busybody.

One is left wondering, if indeed he moved from one polling station to another as he testified to, what was the purpose of such movement. This is because he said that at his polling station he witnessed Janet Odembo giving out bribes but made no efforts to report to any authority. This contention was not supported by any evidence. It remains a mere allegation.

43. It was contended in the petition that the 3rd respondent campaigned at the polling stations on the Election Day and the 1st and the 2nd respondents did nothing about it. In paragraphs 51 and 55 the petitioner has named some people who were campaigning on the queues during the Election Day. Though during cross examination he said he reported to the police, there was no evidence to support his claim of campaigning and the fact that he reported to the police.

44. The petitioner testified that **Patrick Olasa Wavidonge (RW5)** transported voters to various polling

stations in motor vehicles with concealed number plates. He did this on behalf of the third respondent. There was no evidence whether it was reported to police for action nor was there any evidence as to why he linked these vehicles to Wavidonge. His evidence did not link the 3rd respondent to these mysterious motor vehicles. The same argument can be advanced in the contention that one Malula was bribing voters on behalf of the 3rd respondent.

45. In paragraph 56 of his petition, **Peter Odima Khasamule (PW1)**, testified that after he was informed by a voter that one Pascalia Mukonjio was bribing voters, he went and complained and she was ordered to leave the polling station. When he reported to the police, nothing was done. There was no evidence that he made the report as claimed nor did he identify his informant. This informant was not called to testify on the issue. This is unproven allegation.

46. The petitioner contended that several presiding officers and clerks campaigned for the 3rd respondent. He made this allegation in paragraph 59 of his supporting affidavit. He however did not name any official. This is a blanket condemnation and no reasonable tribunal will make a finding based on such an allegation.

47. Closely related to the abovementioned allegation was what was deponed to on paragraph 63 of the petitioner's supporting affidavit. He alleged that a good number of the 1st respondent's officials, polling clerks and presiding officers were known associates of the 3rd respondent. He said even after considering it a serious issue, he did nothing about it.

48. **Ephraim Timothy Omulepu (PW2)** on a similar issue testified that the presiding officer at Rwatama polling station was a staunch supporter of the 3rd respondent. He said that this officer kept on telling voters not to bring in **Nyang'au**. During cross examination he conceded that he was not present when the said words were uttered.

49. Another witness who claimed close relationship between the 3rd respondent and a presiding officer is **Francis Karani Obasa (PW6)**. He said in paragraph 10 of his affidavit that the presiding officer at Aloeta Primary school polling station was a lady well known to him as a staunch supporter of the 3rd respondent. This is a very curious statement. In spite of this averment, he did not give any name. He cannot be taken seriously.

50. The allegation of close association between the 3rd respondent and the 1st respondent's employees was not proved. No evidence was adduced to support the allegation.

51. It is a grave malpractice and also a crime to issue a voter with an already marked ballot paper. This contradicts the principle of free and fair elections. It also disenfranchises such a voter. The petitioner in paragraph 49 says he witnessed a voter being given a marked ballot at Lwanya Primary School polling station but he did nothing about it. **Julian Auma Gority (RW6)** was the Returning Officer for Teso North Constituency. She testified that she received a report that some ballot papers contained faint hyphenated mark from the printer. This was an issue of alleged pre-marked ballot papers. It was addressed and settled at the polling stations with agents and officials agreeing to only consider the voters marks. The petitioner did not vote at Lwanya Primary School polling station. How could he have witnessed the anomaly? This coupled with the explanation by RW6, I make a finding that there were no pre-marked ballot papers issued to voters.

It is also unbelievable that this witness saw this malpractice and did nothing about it. This coupled with my earlier observation that we are not sure where he voted at, this contention lacks evidential value.

52. Another major complaint during election was that Dr. Otuoma's agents were locked out during election. Some were only allowed in after some interventions. One reason that was advanced was that the badges and accreditation letters were issued late by the IEBC. In paragraph 37 of my judgment I have already addressed this issue and made a conclusion that the IEBC cannot be blamed for any late distribution of the said badges and letters of accreditation.

53. **Matthew Edejai (PW8)** testified that he was initially locked out for lack of documents but when they were availed, he was allowed to access the polling station. Can any reasonable person complain about such an action? It was only after the production of proper documentation that anybody was to be allowed to access a polling station as an agent.

54. In support of this allegation of locking agents of Dr. Otuoma out, **George Okal Otunga (PW10)** testified that **Paul Omuse (PW11)** and **Evans Ekisa (PW12)** had been denied access to polling stations. However, when Ekisa testified, he said he was ejected when he wanted to assist a voter. This was a malpractice on his part. Agents were only required to witness when such a voter was being assisted. Had he been allowed to assist a voter, this would have contravened Regulation 72(1) of the **Elections (General) Regulations, 2012**, which provides as follows:

On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

Omuse on his part testified that he was denied on allegation that his letter was not in order. He did not attach it to his affidavit for the court to make a finding as to whether he was denied access unfairly or not.

55. There was no evidence at all to show that the malpractices complained of during election were reported. Failure to report can only draw one conclusion; they never occurred. I wish to reiterate the decision in the case of **WILSON MBITHI MUNGUTI KABUTI & 5 OTHERS vs. PATRICK MAKAU KING'OLA AND ANOTHER (2013) eKLR** (supra), on the issue of failure to report a crime. I make a finding that none of these complaints have been proved.

56. Though the petitioner raised the issue of use of County resources and personnel in campaigns, when he was framing his issues, this was not pleaded. A party cannot be allowed to frame an issue that was not pleaded nor can he be allowed to bring it up during evidence. This is tantamount to widening the scope of the petition. Rules 8 and 12 of the **Election (Parliamentary and County Elections) Petition Rules, 2017** require that the Petition be supported by an affidavit setting out the grounds and facts relied on by the petitioner for the relief sought. The witnesses affidavits filed pursuant to Rule 12 of the Petition Rules ought to contain the evidence in support of the facts and grounds set out by the petitioner. The rationale was articulated by Jessel MR in the case of **THORP vs. 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.

There are very many local decisions on this issue and it will suffice to quote Justice Luka Kimaru in the case of **MAHAMUD MUHUMED SIRAT vs. ALI HASSAN ABDIRAHMAN AND 2 OTHERS NAIROBI EP NO. 15 of 2008 [2010] eKLR** where he held:

From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.

Though in the instant case there was no evidence adduced on the issue and although only **Lawrence Musibi Makanda (PW14)** attempted to testify on the second limb of the issue, I will not render any opinion or finding on the same.

57. On 9th August 2017, the petitioner contended, the 3rd respondent visited Teso South tallying Centre which was at St. Joseph's Amukura and left with the Returning Officer. She remained away for the next 24 hours. She returned on 10th August 2017 with police officers who beat up members of public and in the midst of the confusion the 3rd respondent was declared the winner. This was however denied by the respondents.

58. **Francis Asoyong (PW4)** was the chief agent for Dr. Otuoma at the tallying Centre. His evidence was that on 9th August 2017 the 3rd respondent walked into the tallying Centre where he talked to the ICT officer and the returning officer. He was at the Centre for about 30 minutes. As he was leaving, there were chaos. He conceded during cross examination that he was not at the Centre throughout. He said he was there for about 30 minutes. He left for his home temporarily at 3 pm on 9th August 2017.

59. This evidence was materially different from his averment in Paragraph 17 of his affidavit where he stated:

That at the tallying Centre the returning officer did disappear for 24 hours after the 3rd respondent approached and talked to her and she only reappeared the following day to announce the results.

It is noteworthy that in his affidavit he did not talk of chaos either on the 9th or 10th August 2017. One is persuaded to accept the version of the returning officer, **Roselyne Akinyi Onyango (RW5)**. She testified that on 9th August 2017, there were slight disturbances occasioned by anxiety of the candidates for the Member of Parliament seat. She said that police officers contained the same. Her evidence was that she only left the tallying Centre for a health break, lunch and for a change of clothes which was not more than one hour. In her absence, her deputy took charge of the Centre.

60. The other witness who testified over this issue was **Simon Ekwaro (PW13)**. In court he testified of a male returning officer at Amukura tallying Centre. This is contrary to the evidence on record. The returning officer was **Roselyne Akinyi Onyango (RW5)**. He further said that chaos erupted at the tallying Centre at about 4 pm. This contradicted the evidence of **Francis Asoyong (PW4)**, from whose testimony we can deduce that the chaos were at about 2.30 pm or thereabouts.

61. It is also interesting to note that **Simon Ekwaro (PW13)** testified differently from what he had deponed in his affidavit. He had averred in paragraph 10:

That on 9th August 2017 at Amukura tallying Centre I witnessed the 3rd respondent came (sic) in and he later started saying "SIX PIECE" during the announcement of the results.

Just like **Francis Asoyong (PW4)** he (**Ekwaro**) did not depon that there was any violence. His averment of what the 3rd respondent is alleged to have said contradicted the evidence of Asoyong.

62. I make a finding that **Francis Asoyong (PW4)** and **Simon Ekwaro (PW13)** fall in the category of the witness who was described by the Court of Appeal in the case of **NDUNGU KIMANYI vs. REPUBLIC [1976-80] 1 KLR 1442** in the following terms:

The witness upon whose evidence it is proposed to rely should not create an impression that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.

My finding is that transactions at the St. Joseph's Amukura were in accordance with the law. The threat of eruption of chaos was minor and did not have any negative effect to the results that were later announced.

63. According to the petitioner, there were malpractices at Butula tallying Centre. These malpractices relate to transmission of results and which compromised the verifiability, integrity and impartiality of the tallying process and the results declared. These were:

- (a) Unauthorized and illegal access to the 1st Respondent's servers.
- (b) Use of 10 different IP addresses contrary to the static IP address allocation for the KIEMS Kits and the access control policy of the 1st Respondent.

64. This complaint was abandoned for no evidence was adduced in support thereof. The much he said on the same was during cross examination. This is what he stated:

According to the report I read, he accessed the server with different IPs. I did not attach the document. I don't know what an IP address is. I have not itemized the IP addresses.

I have no basis of making a finding on it. A pleading which is not supported by any evidence is of no value in a case. It only serves as an embroidery for the petition. I agree with the observation in the case of **JUSTUS MONGUMBU OMITI vs. WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS (2011) eKLR** where the Court held:

...so that the allegations by the Petitioner that the 1st Respondent's supporters openly campaigned in and within the precincts of the polling stations contrary to the regulations and also made false, deceptive and misleading allegations against ODM party are unsupported by evidence on record and do not fall for consideration. [Emphasis added]

65. In paragraph 58 of the petition, the petitioner complained as follows:

The arbitrary, opaque and confusing manner in which the identified Presiding officers enforced the law and regulations regarding voter assistance decidedly affected the final results of the election.

Regulation 72 of the **Elections (General) Regulations, 2012** provides as follows:

72. (1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.

(3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.

(4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.

(5) The following shall apply with respect to a person who assists a voter under this regulation—

Method of voting.

Spoilt ballot papers.

Assisted voters.

(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;

(b) a person who breaches his or her declaration commits an offence under the Act;

(c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.

(6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.

(7) No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this sub regulation commits an offence.

In the course of the hearing, it emerged that the various presiding officers reached a consensus with the agents in their respective stations as to the number of agents to be called upon to witness when voters who required assistance were being assisted. This, it was explained, was to avoid crowding. A consensus cannot be said to be opaque.

66. Secondly, no single presiding officer was identified to have conducted this exercise in a manner that was contrary to the law and procedure.

67. Thirdly and finally, no witness was called who testified that his right was breached.

68. This complaint is therefore dismissed.

69. Very serious allegations were made against the 3rd respondent in the petition. This is what the petitioner stated from paragraph 55 to 57:

The 3rd Respondent harassed and intimidated the Presiding Officers

55. The 3rd Respondent harassed and intimidated the Presiding Officers and the Returning Officers in Teso North and Teso South constituencies by painting anyone who did not support his candidature as traitors, ‘madoadoa’ and ‘wasaliti wa Wateso’.

56. in the polling stations to allow six piece voting and to mark all six piece votes in favour of the 3rd Respondent without reading out the names of the candidates

57. The 3rd Respondent harassed, assaulted and insulted the Presiding Officers and the Returning Officer at the Tallying Centre to declare him as the winner well aware the tallying and verification process had not yet been completed.

70. In his supporting affidavit the petitioner did not depone on these averments. There was also no witness who was called to support the same. These allegations therefore do not call for my consideration. They remain in the realm of mere allegations.

71. 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 8th August 2017 in respect of the governor Busia County 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 3rd respondent was validly declared as the elected governor of Busia County. The petition is accordingly dismissed.

72. The last issue for determination is that of costs. Costs usually follow the event unless there are 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.

73. In this matters no reason to depart from this position or qualify the same has been advanced. The petitioner will pay the costs to each respondent costs not exceeding Kshs.4,000,000 (four million Kenya shillings). 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 12th day of February, 2018

KIARIE WAWERU KIARIE

JUDGE