



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 20 OF 2017**

**GABRIEL IDEWA IMWENE.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPUBLIC**

*(From the original conviction and sentence in ECR case No. 1 of 2017 of the Chief Magistrate's Court at Busia by Hon. J.N Maragia-  
Resident Magistrate)*

**JUDGMENT**

1. The appellant, **GABRIEL IDEWA IMWENE**, was convicted in two counts of the offence of disseminating marked ballot papers with the intention of otherwise unlawfully influencing outcome of elections contrary to section 13 (k) (iii) of the Elections Offences Act No.37 of 2016.
2. The particulars of the offence in count one were that on the 13<sup>th</sup> April 2017 in **KOCHOLIA** polling station, Malaba South Ward, Teso North Constituency of **BUSIA** County, unlawfully disseminated information in respect of Orange Democratic (ODM) Party through marked printed ballot papers for Governor 2017 Busia County primaries serial number 21451-21477 which were purported to be valid cast votes in favour of gubernatorial candidate Sospeter Odeke Ojaamong with the intention of aiding the commission of the offence of otherwise unlawfully influencing the outcome of the said Busia County gubernatorial elections for 2017 election period.
3. The particulars in count two were that on the same day and place, he unlawfully disseminated information in respect of Orange Democratic (ODM) Party through marked printed ballot papers for woman representative Busia County primaries serial number 2866231 which were purported to be valid cast votes in favour of woman representative candidate Florence Mwikali Mutua with the intention of aiding the commission of the offence of otherwise unlawfully influencing the outcome of the said Busia County gubernatorial elections for 2017 election period.
4. He was sentenced to pay a fine of Kshs.200, 000/= on each count or in default to serve 12 months imprisonment.
5. The appellant was represented by Mr. J.P Makokha, learned counsel. He raised four grounds of appeal as follows:
  - a) That the learned trial magistrate erred in law by convicting the appellant for charges that were not properly before the court.
  - b) That the learned trial magistrate erred in law by relying on immaterial and assumed issues of fact and not the entire evidence on record.
  - c) That the learned trial magistrate erred in law and in fact by in failing to appreciate that the appellant was prejudiced in as much as handling of the incriminating exhibits was done particularly the missing link of the arresting officer.
  - d) That the learned trial magistrate erred in law by not specifying how the sentences were to run.
6. The state opposed the appeal through Mr. Owiti, the learned counsel
7. The facts of the prosecution case were briefly as follows:

When the Orange Democratic (ODM) Party was conducting its primaries, the appellant was arrested with extra pre-marked ballot papers. He was charged with the offences.

8. The appellant in his defence denied the offence. He testified that when he went to vote in the primaries, it was alleged that he wanted to spoil elections by beginning to cast the ballot for the MCA's position instead of the governor's position.

9. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

10. It was contended by the appellant that party primaries do not fall under the ambit of the Election Offences Act. It cannot be gainsaid that the electoral process start in the party primaries. If the party primaries are flawed, the entire electoral process will lack the requisite credibility. It is simplicity therefore to argue that an illegal activities emanating from party primaries divests courts the jurisdiction to hear such disputes. In **MUGAMBI IMANYARA & ANOTHER vs. ATTORNEY GENERAL & 5 OTHERS [2017] eKLR**, Judge Mativo observed as follows:

*Thus, the constitution mandates IEBC to conduct party primaries. The same constitution mandates IEBC to resolve disputes arising from party primaries.*

This is a very important National undertaking that cannot be left to be conducted in whichever manner without sanctions to those who may want to derail the process. I therefore find that the court had jurisdiction to entertain the criminal proceedings before it.

11. What was the evidence adduced against the appellant? According to the evidence of **Martin Situma (PW1)**, he saw the appellant trying to stuff many ballot papers into a ballot box. He arrested him and handed him to a female police officer who was present. This was **PC Beatrice Cheron (PW3)** who testified that the appellant was taken to her with 28 ballot papers.

12. The other witnesses who testified that they witnessed the appellant being arrested with extra ballot papers were **Peter Ekapolon (PW2)** and **Obwaka David (PW5)**. These two were officials at the primaries.

13. From the evidence on record, I find that there was overwhelming evidence against the appellant.

14. Though the defence raised an issue with the manner in which the exhibits were handled, this ground cannot stand for two reasons:

- a) The appellant was represented by counsel in the trial but this was not raised at all. It is clearly an afterthought.
- b) My perusal of the record does not disclose any handling of the exhibits that was prejudicial to the appellant.

15. When an accused has been given an option of a fine and where there are several counts, the court cannot make an order whether the sentences in default of the fine imposed ought to run concurrently or consecutively. Doing so may prejudice such an accused person or cause confusion where the accused is not able to pay the fine or be able to pay only part of the fine imposed. In cases such as the one facing the appellant, the default order is usually for the sentences to run consecutively. The learned trial magistrate cannot be faulted for failure to pronounce the manner in which the sentences were to run.

The upshot of the foregoing analysis of the evidence on record is that the appeal is bereft of merits and it is accordingly dismissed.

**DELIVERED and SIGNED at BUSIA this 19<sup>th</sup> day of April, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**