REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELECTION PETITION APPEAL NO. 1 OF 2018

BETWEEN

JOHN KENNEDY AGENGO.....APPELLANT/APPLICANT

VERSUS

JULIUS OCHIENG OMORO.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

THE RETURNING OFFICER

NYANDO CONSTITUENCY..... 3RD RESPONDENT

OKKY CAROL KANGALA OMOTO.....4TH RESPONDENT

JUDGMENT

1. The appeal before me was brought by **JOHN KENNEDY AGENGO**, whose election was nullified by the Election Court on 26th January 2018.

2. During the trial, the Appellant herein was the 4th Respondent, whilst the Petitioner was **JULIUS OCHIENG OMORO.**

3. Those two persons were both candidates in the election for the Member of County Assembly of East Kano/Wawidhi Ward.

4. Following the nullification of the results which had been declared by the **IEBC,** the Election Court directed that fresh elections should be conducted.

5. The Election Court also ordered the Appellant to pay to the 4th Respondent, the costs of the Election Petition.

6. The Appellant felt aggrieved and dissatisfied with the whole judgment and he preferred this appeal at the High Court.

7. In his Memorandum of Appeal he listed seven grounds of appeal, which can be summarized as follows;

> ***1. The petition was incompetent and was thus incapable of being the basis for making a finding in favour of the Petitioner.***
>
> ***2. The trial court lowered both the Standard and the Incidence of Proof which is applicable in Election Petitions.***
>
> ***3. The trial court ought to have appreciated that the Appellant was still leading in the total number of votes garnered even after the scrutiny and recount.***

Therefore his victory should have been upheld.

4. The trial court erred when it relied on complaints which were raised long after the results were declared.

5. The trial court failed to take into account the evidence tendered by the Respondents.

6. The evidence adduced by the Petitioner did not discharge the burden of proof.

7. The decision was against the weight of evidence.

8. This Appeal was canvassed together with the appeal which had been lodged by **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** together with **THE RETURNING OFFICER, NYANDO CONSTITUENCY.** The said Returning Officer is **Ms OKKY CAROL KANGALA OMOTO**, who had been sued both by name and by the office she was holding during the 2017 General Elections.

9. By and large, the second appeal contained grounds of appeal which mirrored those which were in the first appeal.

10. However**,** the Appellants in the second appeal further amplified one of the grounds of appeal, by asserting that the trial court failed to appreciate that when an Election Petition alleged that there had been election offences and/or malpractices, that assertion went beyond mere irregularities.

1. *INCOMPETENCE OF THE PETITION*

11. Pursuant to **Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, an election petition

shall state, inter alia; ***"(c) the results of the election, if any, and however declared."***

12. In this case, the Appellants stated that the petition did not state the results of the elections in issue. The said failure to state the results of the election is said to have rendered the petition incompetent.

13. In support of their position, the Appellants cited the decision of the Court of Appeal in **JOHN MUTUTHO Vs JAYNE KIHARA [2008] 1 KLR**, in which the petition was struck out because it did not disclose the results.

14. The Respondent's position was that the election results had been declared.

The said declaration is said to be contained at the introductory part of the petition, as read together with **paragraph 10** of the petition.

15. At the introductory part of the petition, the 1st Respondent had named all the candidates who participated in the elections in issue.

16. And in paragraph 10 of the petition, it was indicated that the;

> ***"……..1st, 2nd and 3rd Respondents declared the 4th Respondent a winner with 2317 against the Petitioner's 1921 on fake and fraudulent figures."***

17. It is obvious that the petitioner did not give the results for each and every candidate. He only mentioned the results for the Petitioner and for the candidate who had been declared the winner.

18. First, when a Petitioner has declared some results in his or her petition, that is distinguishable from a situation in which no results had been declared.

19. In the case of **HASSAN ALI JOHO & ANOTHER V. SULEIMAN SAID SHAHBAL & 2 OTHERS [2014] eKLR**, the Supreme Court expressed itself thus;

> ***"Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume,***

therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown be the key component in the cause. It must also be ascertainable who the winner, and the loser in an election are."

20. The Petitioner in this case had given the particulars of the votes declared for the winner and the results declared for the Petitioner.

21. Therefore, the results which he cited in the petition were not inclusive of the results of all the candidates.

22. The said results cannot therefore be described as being quantitative.

23. In the light of that omission, the Appellants have submitted that the learned trial magistrate ought to have struck out the petition, for being incompetent.

24. First, the question that arises is in regard to whether or not the court should move suo moto, or if the court has to be moved.

25. In my considered view, in situations such as this, when one party suggests that the petition was incompetent, for failure to comply with Rules, the court should be very reluctant to take any drastic action suo moto. Justice demands that the parties be accorded a hearing by the court before the court can determine whether or not to strike out an election petition on grounds of non-compliance with Election Rules.

26. As Kimondo J. held in **WILLIAM KINYANYI ONYANGO Vs INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS [2013] eKLR**

ELECTION PETITION NO. 2 OF 2013;

"In my considered opinion, the Petition Rules 2013 were meant to be handmaidens not mistresses of justice. Fundamentally, they remain subservient to the Elections Act and the Constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the Court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the Overriding Objective of the Court, to do substantive justice."

27. If the Court had struck out the petition suo moto, that could have constituted an unreasonable step of monumental ramifications, that were unredeemable. If the Respondents wanted to persuade the trial court to strike out the petition, they should have moved the court, and the court should then have given a hearing to the parties.

28. It would also have been expected that whichever Respondent wished to have the petition struck off, on the grounds of incompetence, should have moved the court at the earliest opportunity. If a petition was incompetent or not, the court ought to make a determination on that issue at the very beginning. There would be no need for the court to receive evidence and submissions on a petition which was incompetent.

29. A perusal of the record of proceedings in this case reveals that none of the Respondents to the petition had moved the court, with a view to having the petition struck out summarily.

30. I find no fault on the part of the learned trial court, for having not struck out the petition suo moto.

31. I also note that the 1st and 2nd Respondents Response to the Petition incorporated the details of the results declared in respect of all the candidates.

32. Therefore, any gap which the Petitioner had left, when he provided the results for only two candidates, was filled up by the Respondents, very early in the proceedings.

33. In construing the application of **Rule 8 (1)(c)** and **(d)**, the Court of Appeal had the following to say in **MARTHA WANGARI KARUA Vs IEBC & 3 OTHERS [2018] eKLR**;

> ***"…… For our part, the plain and ordinary construction of the rule, in view of the fact that all the materials required under that rule were before it, the plain ordinary construction of the rule ought to have been in favour of sustaining the petition and determining it on merit, unless the petition was irredeemably defective, which we think is in doubt when Parliament imposes a strict provision upon the courts, it would not have given the discretion to weigh the scales of justice."***

34. The Court emphasized the importance of giving due consideration to the reasonableness and implication of sustaining a petition, against an abrupt termination of the same.

35. The learned Judges of Appeal went on to specifically state as follows:

> ***"It should be noted that the failure to comply with the provisions of Rule 8(1) per se does not mean that the petition is invalid. The remedies provided by the Constitution and the Statute; the words under Article 159(2) are unambiguous and mean that, unless the results of the election and the date of the declaration cannot be ascertained or determined from the materials filed by the parties, the condition is satisfied."***

36. Therefore as the Respondents to the petition had provided the results for all the candidates, it follows that the condition stipulated in **Rule 8(1)** had been satisfied.

37. Once the required information was made available to the court, it would be taken into account by the said court when making its determination.

38. Even when it is the Respondent who provided information which the Petitioner should have furnished, the Respondent cannot turn around and ask the court to ignore the information simply because the information had not been provided by the Petitioner.

2. STANDARD AND INCIDENCE OF PROOF

39. It was common ground that electoral disputes are matters of great public importance and the public interest in their resolution cannot be over-emphasized.

40. Although Election Disputes are of a civil, (as opposed to criminal) nature, the standard of proof is higher than the balance of probabilities, but is lower than beyond reasonable doubt.

41. The onus or proof vests in the Petitioner to prove the allegations made out in the petition.

42. However, it is also further settled that the Election Court should not annul an election if the irregularities or the breaches which have been pleaded and proved, are not shown to have had an effect on the results of the election.

43. Of particular significance in that respect is **Section 83** of the **Elections Act**, which provides as follows:

> ***"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***

44. In this case, the election court was alive to the standard of proof, as the same were set out on pages 11and 12 of the Judgment.

45. The trial court also reiterated that;

> ***"It is trite law that whoever alleges must prove. It then means that in a petition like this, the burden is on the Petitioner to prove. It is therefore the duty of the Petitioner to prove that there was non-compliance with the Constitution and the Electoral Law and that it affected the outcome of the election."***

46. Clearly therefore, the learned trial magistrate cannot be faulted on his appreciation of the standard of proof applicable in election petitions.

47. What the Appellants were complaining about is that the trial court failed to give effect to its said appreciation of the law.

48. The Appellants reasoned that if the trial court had remained faithful to the law, it would have found that the alleged irregularities did not affect the outcome of the elections.

49. The said failure by the trial court is believed to have happened when the court did not take into account the fact that even after the recount and scrutiny were conducted, the results were still consistent with the results which had been declared.

50. In the Judgment, the learned trial magistrate noted that in most instances the results of the scrutiny and recount had yielded results that were largely consistent with the results which had been declared.

51. Nonetheless, he came to the conclusion that;

> ***"…… the above irregularities involving wrongful entry of votes and allocation during counting and tallying definitely affect the result."***

52. In arriving at that conclusion the trial court took into account the fact that scrutiny had shown a difference of over 60 votes. In the circumstances, considering that the difference in the results between the Petitioner and the 4th Respondent was about 395 votes, the trial court concluded that the the difference definitely affected the results.

53. In my considered opinion, the learned trial magistrate erred when he concluded that the exercise of recount and scrutiny was nothing more than one of sampling. I understand the trial court to be saying that the results of the scrutiny and recount ought to be enlarged, with a view to giving a picture of what impact would emerge if a more complete recount and scrutiny were to have been conducted.

54. In my considered opinion the process of scrutiny and recount ought not to be taken as constituting a sampling process, which can thereafter be replicated to the whole electoral area which is the subject matter of the election petition.

55. Scrutiny or recount can only be undertaken in the specific areas which the the Petitioner had lodged specified complaints, and in respect to which the Petitioner convinced the trial court that there was need for scrutiny or recount.

56. Where a Petitioner complains about the entire election process, and persuades the court that scrutiny or recount was necessary for the whole electoral area, the court would order for scrutiny or recount for the said whole electoral area.

57. The reason for that is simple; it is highly improbable that what happened in one polling station would be replicated in all the other polling stations.

58. Even in this case, there are instances where the trial court found, and rightly so, that there were no discrepancies between the declared results and the results of the scrutiny or the recount. Therefore, if no discrepancies were found in such areas as;

> ***a) Apondo 1; and***
>
> ***b) Apondo 2,***

there would be no justifiable reason for holding that the anomaly in results that was detected at Nyakongo should be replicated at Apondo.

59. For the record, the Petitioner's results at Nyakongo were reduced by 59 votes.

60. Nothing of the kind was found at Apondo, Olasi, Waradho and Kuth Wendo.

61. Another example is at Luora 2, where the Petitioner's votes were added to those of **OCHELE MOSES J. ODHIAMBO**. According to the trial court, the impact of that anomaly was to reduce the Petitioner's overall tally by 2 votes.

62. If one were to seek to replicate the results of either scrutiny or recount from one polling station to other polling stations, the question would be how to determine the particular results which should be so replicated.

63. I find no legal basis for choosing to replicate the results at Nyakongo, (where the Petitioner's votes were reduced by 59), or Luora (where the reduction was of 2 votes), or of the other polling stations where there were no discrepancies.

64. Where the gap between the winner and the Petitioner was 395 votes, as found by the trial court, it cannot be said that the said results would be significantly impacted if 60 votes were deducted from the winner and were added to the Petitioner.

65. On the question of bribery, the Petitioner led evidence, and named some of the supporters of the 4th Respondent, who had allegedly bribed voters.

66. As the trial court observed, those named by the Petitioner's witnesses, denied the allegations.

67. In the circumstances, the trial court observed that the allegations of bribery touch on criminal liability, and that therefore they must be proved beyond any reasonable doubt. The court went on to conclude thus;

> ***"This burden can only be discharged vide Criminal Proceedings pursuant to the Elections Act. If indeed this were proved, it would definitely have affected the outcome of the result as it would be a way of influencing the will of the voters."***

68. I find that the trial court's said conclusion was accurate.

69. However, it cannot be ignored that in the petition, there was no express assertion of bribery.

70. Similarly, there were no assertions in the petition about;

> ***i. Failure to sign Forms 36A by Agents, or the failure by Presiding Officers to indicate reasons for lack of Agents signatures; or***
>
> ***ii. That there were illiterate voters who were assisted, and that therefore there should have been Forms 32 produced by the Presiding Officers.***

71. The Respondents to the petition were only expected to respond to the issues raised in the petition.

72. The petition constitutes the Petitioner's case, whilst the Affidavits sworn by the witnesses constitute evidence which is intended to prove the case put forward.

73. If the Petitioner does not set out in the petition any particular assertion, he cannot expect the Respondents to respond to such non-pleaded matters.

74. When a Petitioner leads evidence which tends to show something which was not embodied in the petition, it would be wrong to fault the Respondents for not making available evidence to controvert such evidence.

75. It must be borne in mind that in Election Petitions evidence is tendered through Affidavits which are filed along with either the petition or the Responses to the said petition.

76. In the circumstances, the Respondents to the petition could not have been required or expected to bring witnesses to respond to issues which were not arising from the petition.

77. The failure to bring witnesses to controvert evidence which did not advance any particular assertions made in the petition cannot be construed to amount to proof by the Petitioner.

78. The trial court held that the failure to sign crucial documents, without any reason being assigned for such failure constituted a violation of the **Principles of the Constitution and Electoral Laws.**

79. First, it must be emphasized that pursuant to **Regulation 79(6)** of the **Elections (General) Regulations 2012;**

> ***"The refusal or failure by a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)(a)."***

80. Had the trial court taken into account that regulation, it would probably have come to a different conclusion.

81. The trial court also held that the issue of secrecy of the vote was also an issue in the petition, and that because the 1st, 2nd and 3rd Respondents had failed to act on the complaints raised by the Petitioner, the shortcomings affected the outcome of the elections substantially and materially.

82. First, I failed to trace any issue of secrecy being raised in the petition. Secondly, I find myself unable to appreciate how the failure by the 1st, 2nd and 3rd Respondents, to act on the complaints of the Petitioner constituted secrecy of the vote.

83. Thirdly, I am unable to understand how the alleged secrecy affected the outcome substantially, materially or at all.

84. In the final result I find merit in the appeal. I set aside the findings of the learned trial magistrate and substitute the same with a finding that the petition be dismissed.

85. The Petitioner will pay to the Respondents the costs of the Appeal together with the costs of the petition.

86. The costs shall be taxed but will not exceed Kshs.400,000/= for the Appellant; and Kshs.200,000/= in respect to the 1st, 2nd and 3rd Respondents.

DATED, SIGNED and DELIVERED at KISUMU this 27th day of June 2018

FRED A. OCHIENG

JUDGE