



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION APPEAL NO. 2 OF 2018

GEORGE NYAUCHO OMAITA.....APPELLANT

-VERSUS-

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

NGENY K. ROBERT.....2ND RESPONDENT

NYACHAE MORARA GEORGE.....3RD RESPONDENT

(Being an appeal from the Judgment and decree of Hon. B. M. Kimtai SRM in Keroka PMCC ELECTION PETITION NO. 2 OF 2017)

JUDGMENT

On the 30th day of January 2018 learned magistrate Kimtai SRM dismissed the Election Petition challenging the Election of the 3rd Respondent Nyachae Morara George as a member of the County Assembly for Kemera Ward.

The appellant being dissatisfied and aggrieved by the decision of the learned magistrate has lodged this appeal which in the main is premised on the following grounds.

1. That the learned magistrate erred in law in finding that the appellant had not tendered sufficient evidence to prove the election malpractices.
2. That the learned magistrate failed to render a determination as to the credibility and impact of the evidence tendered by the appellant and his witnesses.
3. That he erred in finding that the appellant had not led evidence as to any voter who had changed their mind due to undue influence.
4. That the learned magistrate erred in law by finding that the offence of bribery was not proved as alleged or at all and in so doing misapprehended the meaning of S.91 of the Elections Act.
5. That the learned trial magistrate failed to consider the evidence tendered in regard to the offence of bribery.
6. That the learned magistrate failed to take into account the illegalities unearthed in the scrutiny report.

The reliefs sought are:-

- (a) That the Judgment and decree of the learned trial magistrate dated 30th January 2018 be set aside and or quashed and it be substituted with an order allowing the petition vide Kericho PMCC Election petition No. 2 of 2017 and nullifying the election of the 3rd Respondent as the duly elected member of the County Assembly Kemera Ward.
- (b) The Honourable Court be pleased to declare that the 3rd Respondent was not validly elected as the member of the County Assembly, Kemera Ward.
- (c) The Honourable court be pleased to order and or decree that a fresh and compliant election be carried out and or conducted in

respect of County Assembly Kemera Ward.

(d) Costs of the appeal, together with costs of the proceedings before the Election Court, be borne by the Respondents jointly and severally.

(e) Such further and other orders be granted as the court may deem fit and expedient.

Background

The 3rd Respondent garnered 4,665 votes on elections held on 8th August 2017 conducted by the 1st and 2nd Respondents and was subsequently declared the winner in respect of Member of County Assembly for Kemira Ward.

Herein below is a table showing the candidate and votes garnered.

<u>CANDIDATE</u>	<u>VOTES GARNERED</u>
ANGWENYI MARAGA	104
AMWATA NEMWEL	539
JOSEPHAT MIRERA MOMANYI	282
MATATA MOSETI ALLOYS	4,401
NYACHAE MORARA GEORGE	4,665
NYACHARI JAMES MATINGA	1,069
NYAKUNDI PETER ONDIEKI	296
OBIYE THOAS MOKAYA	247
OMAO VINCENT MARITA	41
ONSONGO EUNICE KWAMBOKA	59
SOMONI JOSHUA OSONGO	374

The petitioner being dissatisfied with the conduct and the results of the said election filed a petition dated 1st September 2017 before the principal magistrate's court in Keroka being Election Petition No. 2 of 2017 seeking to nullify the 3rd Respondent's election. The petitioner made allegations inter alia of alterations, manipulations and irregularities on the results of the election, procuring of voters by undue influence voter bribery and campaigning outside the stipulated period.

The appellant was a duly registered voter at Kerubo DOK Primary School polling station and had also been appointed as a chief agent one of the candidates who had contested for the seat of member of County Assembly for Kemera County Assembly Ward – Alloys Mataya Moseti.

On 30th January 2018 the Election Court dismissed the Election petition and upheld the Election of the 3rd Respondent as the duly elected member of County Assembly for Kemera Ward.

Being aggrieved by this decision the appellant now seeks reliefs as herein above.

This court on the 8th June 2018 gave directions that the appeal herein be canvassed by way of written submissions.

The appellant's case

Mr. Ogutu counsel for the appellants in his submissions faulted the learned magistrate's finding on the ground of undue influence to the effect that it had not been proved to the courts satisfaction. It is contended that the court applied a slanted approach and arrived at a conclusion that ignored the credible and uncontroverted evidence tendered by and on behalf of the appellant.

It is submitted that when the learned magistrate was called upon to interpret the provisions of S.10 of the Elections Offences Act 2016, he

failed to consider the import and tenor of the said provision. That he applied an erroneous legal principle unknown in law by finding that no evidence had been tendered to show that any voter changed his mind.

On the issue of contradictions and in particular on the issue of which hand of the 3rd Respondent had been bandaged, it is submitted that the contradiction was minor and inconsequential and it should have been considered against the totality of evidence adduced.

Reliance was placed on the case of Moses Masika Wetangula –vs- Musikari Kombo & 2 others 2014 eKLR – On the issue of minor contradictions.

On grounds 5, 6 and 7 Mr. Ogotu submitted that the magistrate did not appreciate the weighty and uncontroverted evidence touching on bribery and instead took a selective view of the evidence.

He relies on the case of Karanja Kabage –vs- Joseph Kiuna Kariambegu Nganga and two others (2014) eKLR where it was held that “**a single act of bribery by or with knowledge and consent of the candidates or by its agents, however, insignificant, the act, may be sufficient to invalidate an election**”.

Reliance is also placed on the case of Moses Masika Wengatula -vs- Musikari Nazi Kombo & 2 others where it was held, “**where a party has been adjudicated guilty of commission of the offence of bribery and treating, it is not necessary that the bribery should be shown to have actually influenced a substantial proportion of the voters to vote the way they did or substantially affected the outcome of the election**”.

It is counsel’s submission that the evidence tendered in court in respect to bribery was cogent and credible and to arrive at a contrary finding the court must have been influenced by other extraneous factors unrelated to the evidence on record.

The submissions by the counsel for the appellant is that the 3rd Respondent and his agents had no 7th August, 2017 at Nyambarambe and Nyachichi areas paid various persons including PW4 the sum of Kshs100/= with a view to inducing voters to vote in a certain way. Further this incidence of voter bribery was reported at Manga Divisional Criminal Investigation Department Officers and booked as OB No. 15/14/8/2017.

It was reported again for further investigation as OB No. 15/14/8/2017.

It is submitted that the court should not have disbelieved PW2 who was a credible witness.

It is further submitted that the court did not give much weight to the evidence of PW2, PW4 and PW5 and more so when that evidence was not controverted by the 3rd Respondent.

The appellant relies on the case of Cornel Rasanga –vs- William Adhiambo Oduol & others 2014 eKLR where it was held:- “**Where a party does not call evidence to rebut allegations, that evidence remains uncontroverted and the burden shifts to the other party who by remaining silent fails to discharge the evidential burden to their detriment**”.

As regards ground 8, it is submitted that the learned magistrate casually treated the evidence adduced before him and arrived at findings that no reasonable court or tribunal could have made.

Counsel for the appellant relies on the case of Fredrick Otieno Outa -vs- Jared Odoyo Okello & 4 others 2014 eKLR.

In respect of grounds No. 11 and 12. It is submitted that the learned trial magistrate did not bother to peruse and conceptualize the submission filed in support of the appellants case, failure to which he arrived at a wrong decision.

Further that had the learned trial magistrate considered all the aspects of the evidence adduced he would have found that the election of the 3rd Respondent was not free and fair and was in contravention of article 86 of the Constitution of Kenya 2010.

Counsel relies on the case of Moses Masika Wetangula -vs- Musikari Kombo & 2 others (2014) eKLR wherein the court considered the factors that would impune the expression of the free will of the electorate.

It is counsel’s submissions that the appellant accomplished his mandate of tendering sufficient evidence to prove that the election of the 3rd Respondent was not free and fair.

2nd Respondent’s Submissions

Mr. Orina learned counsel for the 2nd Respondent submits that the burden of proof rested with the appellant to prove the allegations in his petition.

It is submitted that the learned magistrate did deal with the issue of undue influence at page 7 of his judgment.

It is contended that the court did note material contradictions as to the time the 3rd Respondent arrived at Kerongo Primary School and evidence by PW3 was contradictions in nature, further that the court rendered its decision based on the evidence adduced, carried out its mandate as required in law and arrived at a reasonable decision.

Counsel relies on the decision in the case of John Kiarie Waweru –vs- Beth Mugo & 2 others (2008) eKLR; where it was held;- **“It is not enough for a petitioner to establish that irregularities or electoral malpractices did occur; he must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process”**.

On the issue of undue influence electoral offences and misapprehension of S.9 (1) of the Election Offences Act. It is submitted that the court addressed its mind on the issue of undue influence at page 7-8 of the judgment and also casts doubt on the credibility of the appellants witnesses on the issue of 3rd Respondents bandaged hand.

That the court gave a detailed analysis of the evidence tendered in court and reached the conclusion that no electoral malpractices were proved against any of the Respondents.

Counsel relies on the case of Mercy Kirito Mutegi –VS- Beatrice Nkatha Nyaga & 2 others where it was held **“Where criminal charges linked to an election are in question, the party bearing the legal burden of proof must discharge it beyond reasonable doubt”**.

On issues regarding the unearthing of illegalities during voter scrutiny. It is submitted that at page 546 (Vol.2) of the record of appeal the scrutiny of votes report was considered in the judgment which gave the election of Member of County Assembly for Kemera Ward, a clean bill of health.

Reliance is placed on the case of Joast Wamangoli –vs- The Independent and Boundaries Commission and 3 others where it was held:- **“certain errors will be allowed to pass of found during scrutiny”**.

On the issue of failure on the part of the learned magistrate to appreciate the crux and or the substratum of evidence adduced and submissions by the appellant, it is submitted that the court heard the evidence by all the parties, considered the submissions,. Drew up the issues for determination and made findings on each and every one of these issues.

As regards the contradiction as to which hand was bandaged, with the intention of swaying voters, it is submitted that the issue cannot be treated as immaterial.

The burden was upon the appellant to demonstrate to the court how any acts of omission or commission by any of the Respondents determined the outcome of the election.

On the allegation that the court did not consider the submissions by the appellant. It is contended that the appellant’s suggestion is that the court should have been guided only by the submissions and that framing of issues was not important. Further, it is submitted that it has not been shown what particular and specific decisions and or authorities the trial court did not follow.

Ground 9 of the appeal was abandoned. It is contended that that abandonment is an admission that the 9 polling stations where voter scrutiny was carried out had no irregularities and in essence a demonstration that the 1st and 2nd Respondents conducted a free and fair election.

3rd Respondent’s submissions

Learned counsel Mr. Ochoki in his submissions cites S.75 of the Election Act which provides that the right of appeal to the High Court is only on matters of law. He also relies on the case of Peter Munya -VS- Dickson Mwenda Kithinji & others (2014) eKLR where matters of law were interpreted to have the following characteristics.

- i. The technical element involving the interpretation of a constitutional or statutory provision.
- ii. The practical element involving the application of the constitution and the law to a set of facts or evidence on record.
- iii. The evidentiary element involving the evaluation of the conclusions of a trial court on the basis of the evidence on record.

It is submitted that if the petitioners witness did not change his mind as to who to vote for how, then can it be said, other voters changed theirs, more so, when no witness was called to give evidence to the effect that he had been influenced and indeed changed his mind.

It is contended that the appellants evidence, demeanour and response to various questions put to him, was full of contradictions which went to the roof of his case an account of credibility of his evidence.

In particular, counsel points out the evidence of one Samuel Abuga Onsogo who testified that on the voting day at 10.00 a.m, the 3rd Respondent went to the queue of waiting voters and told them that the petitioner was responsible for his injuries to this bandaged arm. That this evidence contradicted his averments in his sworn affidavit. He had deponed that at paragraph of his affidavit that he 3rd Respondent had a bandage on his left hand while to his evidence he testified that the bandage was on the right hand.

It is submitted that the witness recounted some of his averments in his sworn affidavit and kept on changing his evidence

and that this cast doubt and the veracity of his evidence. Reliance is placed on the appeal court case of ***Ndungu Kimani –vs- R 1976 KLR 1444*** where it was observed, “***the witness upon whom evidence it is proposed to be relied on should not create an impression in the mind of the court, that he is not a straight forward person or raise a suspicion about his trust worthiness 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***”.

It is further submitted that the court addressed its mind to the burden and standard of proof on the allegations of undue influence which is similar to that in criminal cases and that the burden of proof is always on the petitioner to prove that there were acts which amounted to undue influence.

As regards the issue of bribery. It is submitted that bribery is an election offence which is criminal in nature. The appellant was to prove the offence by clear and unequivocal evidence which must be beyond reasonable doubt. Mere suspicion was not enough. It is submitted that the witnesses who alleged that the 3rd Respondents engaged in bribery are the petitioners candidates one Alloys Mataya Mosei, PW4 Victor Mosei Atambo and PW5 Bernard Mogaka Nyagaka. It was submitted that the witnesses were partisan and their interest was to win the position of the County Representative, Kemera ward. That the court did not believe the evidence adduced by the appellant and his witnesses, on bribery and properly applied the law and found that the offence was not proved as required.

Further that no single witness testified that the 3rd Respondent was involved in dishing out money to influence voters. That PW4 had testified that an agent of 3rd Respondent had attempted to bribe him with Kshs.100/- so as to vote for 3rd Respondent. The said agent denied the allegation. It is submitted that there was no evidence of widespread voter bribery which could have led to the influence of voters so as to compromise the integrity of the elections.

As regards the issue of illegalities and irregularities, it is submitted the scrutiny and recount exercise confirmed the integrity and sanctity of the results as indicated in form 36A and 36B by the 1st and 2nd Respondents. The petitioners allegations were confirmed be wild, baseless and full of falsehoods.

It is further submitted that the petitioner had hatched a plan where he manipulated and doctored the correct forms 36A’s availed to him by the presiding officers and inserted wrong figures so as to influence the mind of the court. That the forms that were provided by the 1st and 2nd Respondent tallied with the scrutiny and recount exercise.

On the issue of submissions having not been considered by the magistrate. It is submitted that the court, took its time, evaluated and analysed the evidence adduced by all parties, before arriving at its decision. Counsel relies on the case of ***William Odhiambo Oduol –VS- IEBC & Others Kisumu E.P No. 2 of 2013 (unreported)***

He also relies on the Supreme Court of India case of ***Rahim Khan –vs- Khurshid Ahmed AIR 1975 S.C 290*** where it was held, “***Once an election is held, it is not to be treated in a light hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantiated grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate***”.

It is contended that the appellant did not discharge the burden of proof to establish that the election was not carried out in accordance with the law.

The following issues arise for determination by this court.

1. Whether there was adequate evidence to prove undue influence.
2. Whether the offence of bribery was proved.
3. Whether illegalities unearthed in the scrutiny report were taken into account.
4. Whether submissions by the appellant were taken into consideration by the court in arriving in its decision.

Analysis and conclusions

Section 75(4) of the Elections Act provides:-

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –

- (a) Filed within thirty days of the decision of the magistrates court; and
- (b) Heard and determined within six months from the date of filing the appeal”.

Undue Influence

Evidence on undue influence was tendered by PW3 one Samuel Abuga Onsongo who had testified that he saw the 3rd Respondent on the queue with a bandage on his left hand.

At paragraph 5 of his sworn affidavit the same witness had deponed that he saw the 3rd Respondent on 8/8/2017 at Kerongo Primary School with a bandage on the right arm and was alleging to have been assaulted by the appellants agent.

PW3 had testified that the 3rd Respondent had uttered the following words- **“he said *Alloys Mataya was responsible for injuries to his bandaged arm*”**.

RW3 one Juser Mose Mose Nyakundi testified that he was an agent at Kerongo polling station No. 2 and did not see the 3rd Respondent with a bandage on his arm. That the 3rd had voted in stream I and had arrived t 2.00 p.m and did not speak to anyone while inside the polling station but his was not aware that he talked to people outside the polling station.

While under cross-examination PW3 stated that he voted secretly and did not change his mind.

Article 81(e) of the Constitution provides:- for free and fair elections, which are

- (i) by secret ballot.
- (ii) free from violence, intimidations improper influence or corruption.
- (iii) Conducted by an independent body.
- (iv) transparent, and
- (v) administered in an impartial neutral, efficient, accurate and accountable manner.

The offence of undue influence is provided for in S.10 of the Elections Offences Act thus:-

(1) “A person who directly, or indirectly in person or through another person on his behalf uses or threatens to use any force violence, including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or an account of

(a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election.

(b) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate or

(c) Impeding or preventing a person from being nominated as a candidate or from being registered as a voter commits the offence of undue influence.

(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence”.

The appellant’s contention is that the magistrate did not appreciate the uncontroverted evidence tendered in respect to the offence of undue influence.

The evidence of undue influence relied on by the appellant is that of Samuel Abuga Onsongo (PW3) which is said to have been contradictory in nature. The contradiction as to which hand of the 3rd Respondent was bandaged was admitted by the appellant but it is submitted that same was a minor contradiction which did not go to the root of the case and that RW3 who is said to have controverted PW 3’s evidence was inside the polling station and could not have heard the words uttered by the 3rd Respondent while outside.

In evaluating the evidence on undue influence the learned trial magistrate had this to say- **“The question therefore that this court must grapple with, is whether the evidence tendered by the appellants witnesses was riddled with inconsistencies so grave as to sway the opinion of the court as far as the offences of undue influence is concerned. It cannot be again said that the offences spelt out under the Election Offences Act are criminal in nature and therefore the court has to be satisfied of the guilt of the accused beyond reasonable doubt. The evidence tendered must be cogent, credible and trustworthy.”**

The learned magistrate observation cannot be said to be a slanted approach to the petition which was before him. Unlike this court he had the opportunity to observe the demeanor of the witnesses. He observed that PW3 had recanted some of his averments in his own affidavit and constantly kept changing positions.

The offence of undue influence, is a kin to a criminal offence and the burden of proof is that beyond reasonable doubt. This burden of proof lies on the appellant. I find no good reason to fault the learned magistrate on his finding on the failure of the petitioner to have proved undue influence.

Bribery and Campaigning outside the period

PW4 had testified that on the night of 7th August 2017, the 3rd Respondent and his chief against one Nyakundi RW7 were engaged in bribery whereby they dished out moneys to voters at Nyachichi and Nyamarambe areas. He further testified that at around 11.00 p.m he met a group of people running to Nyachichi shopping centre and that he was given Kshs.100/- with a view of inducing him to vote for 3rd Respondent.

That he called PW5 by phone who corroborated his evidence.

PW2 who was himself a candidate testified to have been in the company of PW5 when they found the 3rd Respondent seated in a car near Riamituga tea buying centre offering money to prospective voters.

RW7 testified that he may have passed by Nyachichi area giving out letters of appointment to the agents. The appellants contention is that neither the 3rd Respondent nor the chief agent PW7 produced any agent before the court to testify that he had been issued with a letter of appointment as an agent that night.

During cross-examination, PW2 testified that he saw the 3rd Respondent give out money. He further stated that it was dark and there was no security lights at Nyachichi area but he was told that the 3rd Respondent was in the car that he proceeded to Kisii police station where he reported the incident.

PW4 testified that one of the aspirants bribed voters but he did not report this to the IEBC officials. He testified to have received Kshs.100/- from one Sheba.

PW5 testified that at around 11.00 p.m. he was at Nyamarambe at night and that he was able to recognize the 3rd Respondent and Sheba. He further testified that he could not tell what he was doing.

In his affidavit sworn on 1st September 2017 PW2 depones to have reported the incidents of voter bribery at Kisii police station which report was booked as OB No. 6/08/2017. He depones that the report was transferred to Manga Criminal Investigations Department offices where it was rebooked vide OB No. 15/14/08/2017.

A perusal of the OB dated 8th August 2017 Annexure MM3. One Alloys Mosei at 0155 hrs made a report that some people were going around giving people money and taking their identity cards. These people were identified as Sheba Musomi and Ntabo who were supporters of his opponent.

OB No. 15/14/2017 dated 14th August 2017 gives the names of the informants of PW2 as George Morara Chae and Bernard Mauya.

It is further shown that Alloys Mosei drove his car to Nyachichi and upon seeing him the aspirant and his team drove away and vanished to unknown destination whereas in his affidavit he deponed that the 3rd Respondent and his agents drove to the police station and later went away.

A perusal of the reports and the affidavit of Alloys Mosei shows various inconsistencies and variations.

At paragraph 11 of the affidavit he depones. "That upon receipt of the information (details in terms of paragraph 8, 9 and 10) I requested Bernard Maoya to come and pick me from my house at Kisii Town and indeed Bernard Maoya came and picked me at about 11.30 p.m. and then after Bernard Maoya and myself commenced our journey to Nyachichi village were the 3rd Respondent was reported to be campaigning and giving out money.

Paragraph 13- That immediately upon receipt of the telephone call (details in terms of paragraph 12), Bernard Maoya informed me of the obtaining position and advised that, we should change direction and head to Nyamarambe village instead of Nyachichi area.

According to the affidavit of Alloys Mosei, he did not find the 3rd Respondent dishing out money to prospective voters but had received information to that effect. In his evidence in court he testified that while in the company of PW5 they found the 3rd Respondent seated in a car and offering money to prospective voters. During cross examination PW2 stated that he saw the 3rd Respondent give out money. He further conceded that it was dark and there were no security lights at Nyachichi area but he was informed that the 3rd Respondent was in his car.

Alloys Mosei (PW2) who was himself a candidate in the election and who was petitioner's star witness in the case for bribery was to my mind not a truthful and reliable witness. The learned trial magistrate was of that view and I find no reason to fault his finding .

The offence of bribery is criminal in nature and the standard of proof is beyond reasonable doubt.

The burden of proof lies with the petitioner.

Illegality evident and unearthed in the Scrutiny report

Upon perusal of the scrutiny report and the courts reaction to it, I am satisfied that the learned magistrate interpreted the results correctly.

Submissions by the appellant not taken into account by the magistrate

Having perused the judgment of the learned trial magistrate, I am satisfied that he properly evaluated the evidence and submissions placed before him.

Conclusion

Having carefully evaluated the evidence on record, grounds of appeal and submissions by all the parties I am satisfied that the election was conducted substantially in accordance with the constitution and all other relevant laws. The appeal has no merit and its dismissed with costs to the Respondents which are assessed as Kshs.300,00/= as instruction fees.

Judgment delivered dated and signed this 31st day of July 2018 in the presence of learned counsel Mr. Ochwangi for appellant learned counsel Ochoki for the Respondent Mr. Rotich.

Court

Judgment to be typed and copies to be furnished to the parties.

M. MUYA

JUDGE

31/7/18

Mr. Ochoki – We appreciate court’s work and strict timelines.

M. MUYA

JUDGE

31/7/18