



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION NO. 2 OF 2017

FRANCIS MWANGANGI KILONZO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER

YATTA CONSTITUENCY2ND RESPONDENT

CHARLES MUTAVI KILONZO.....3RD RESPONDENT

RULING

1. This petition was filed by the petitioner Francis Mwangangi Kilonzo on 7th September 2017 to contest the election of Charles Mutavi Kilonzo (3rd respondent) as the Member of the National Assembly for Yatta Constituency in the election held on 8th August 2017. On 27th September 2017 the petitioner filed the present application in which he sought the scrutiny of the following materials distributed to the presiding officers at all polling stations for Yatta constituency:

- a. the inventory of the results declaration forms (with serialization);
- b. printed copy of the register of the voters used during the election;
- c. the marked copy of the register;
- d. the polling day diaries;
- e. the inventory of all the ballot boxes serial numbers and the ballot box seals' serial numbers;
- f. all the packets of rejected ballot papers and statements made thereto;
- g. all the packets of spoilt ballot papers and
- h. all the packets of counterfoils of used papers (or certified copies thereof) with respect to the member of National Assembly and County Assembly elections.

2. It should be pointed out that in the petition filed on 7th September 2017 the prayers for scrutiny and recount were made. In the instant application there was no prayer for recount.

3. The grounds upon which the present application was brought were that:

- a. the petitioner was aggrieved by the results that declared the 3rd respondent the winner in the election;
- b. the petitioner had been denied access to the election documents and materials that formed the basis of the election and declaration;
- c. there was election results inflation/manipulation at various polling stations;
- d. the petitioner's agents were denied access to the polling stations, and were denied the right to confirm the results in Forms 35A and to sign the results therein;
- e. certain results declaration forms were endorsed by the Returning Officer which was irregular;
- f. there was voter turn-out disparities across the 6 elections conducted on the same day;
- g. most of the Forms 35A were not completed by the respective Presiding Officers and instead were completed by the Returning officers who doctored the results therein;
- h. there is Form No. NA 000373 on which the total number of registered voters was 463 and rejected votes were 460 and yet the total votes cast were 395; and
- i. some results declaration forms had been backdated and forged.

The petitioner filed a supporting affidavit on 27th September 2017.

4. The 2nd respondent swore a replying affidavit dated 4th October 2017 to deny the averments contained in the petitioner's affidavit. His case was that the election had been conducted in a fair and transparent manner, the declaration of the results had been done in the presence of candidates and/or their agents, the results declaration forms were always available (and that in fact the petitioner's chief agent Samuel Mulei had sworn an affidavit on 7th September 2017 to say that he had been supplied with 163 forms out of 169 forms, the results pleaded in paragraph 5 of the petition were not authentic, there were no incidents of irregularities or anomalies, it was not irregular for the Returning Officer to comment on the results declaration forms, there was no polling station with more votes cast than the registered voters, no documents were backdated, and that no agent who had the required authorization was denied the opportunity to participate in the election.

5. The 3rd respondent swore an affidavit dated 3rd October 2017 denying the contents of the motion and supporting affidavit.

6. Counsel for the parties filed written submissions which I shall refer to in the course of this ruling.

7. An application for scrutiny is usually made under **section 82** of the **Elections Act, No. 24 of 2011**. Under **section 82(1)** –

“An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the election court may determine.”

Under **section 82(2)**, where the votes are scrutinised, only the following votes shall be struck off:-

- a. the vote of a person whose name was not on the register for the polling station;
- b. the vote of a person whose vote was procured by bribery, treating or induce influence;
- c. the vote of a person proved to have voted in more than one constituency;
- d. the vote of a person, who by reason of conviction of an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
- e. the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

8. It is material to note that there was no allegation, either in the petition or the motion, which brings this application under any of the provisions under **section 82(2)**.

9. Under **rule 29 of Elections (Parliamentary and County Elections) Petitions Rules, 2017**, made under the **Act**, parties to the election proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast. The election court has to be satisfied that there is sufficient reason to order either scrutiny or recount of the votes. Under **rule 29(4)** the scrutiny or recount of votes shall be confined to the polling stations in which the results are disputed.

10. All counsel made reference during their written and oral submissions, to the decision in **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2018]eKLR**. The petitioner’s counsel and the 1st and 2nd respondent’s counsel referred to **Raila Odinga –v- IEBC & Others [2013]eKLR**. The law on scrutiny or recount of votes is not settled. The right to scrutiny or recount does not lie as a matter on course. The party seeking scrutiny or recount of votes has to establish the basis for seeking to invoke the right. Such basis must be pleaded in the petition and evidence tendered, either through affidavit or orally on oath, to show that it is necessary to call for scrutiny or recount. The scrutiny or recount is called to confirm the truth of that particular evidence. It is also now clear that the scrutiny or recount must relate to a specific polling station whose results are in dispute, and the evidence called has to be specific in that regard.

11. As was observed by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat –v-s IEBC & 7 Others [2015]eKLR** that the petitioner must specify the polling stations in respect of which he seeks scrutiny and the materials and documents that he wishes the court to scrutinise. Similarly, reasons should be given why the materials and documents in question should be scrutinised. Scrutiny and recount allow the court to determine the contested facts, and the court should not be turned into another tallying centre. The process is intended to deal with disputed results and/or the impugned electoral process.

12. In **Ledama Ole Kina v- Samwel Kuntai Tunai & 10 Others [2013]eKLR**, the High Court was dealing with an application for scrutiny for the whole of Narok South Constituency. The Judge held as follows:-

“An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done in. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station.....”

13. In dealing with this application, the court has borne in mind that the finality of the results at the polling station, as was emphasized by the Court of Appeal in **IEBC –v- Maina Kiai & 5 Others [2017]eKLR** in the following terms:

“It is clear beyond peradventure that the polling station is the true locus for the exercise of the voter’s will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the

primary material, means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.”

14. In **Raila Amolo Odinga & Another –v- IEBC & 2 Others [2017]eKLR**, the Supreme Court cited with approval the Supreme Court of India decision in **Arikala Narasa Reddy –v- Ventaka Ram Neddy Reddygari & Another, Civil Appeals Nos. 5710 -5711 of 2012** in which the court observed as follows:

“In the absence of pleadings, evidence, if any produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballot just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.”

The Supreme Court observed that although the Supreme Court of India was dealing with recount of votes, the principles highlighted were relevant in determining an application for scrutiny.

15. The question to be answered is whether the petitioner has laid a basis for an order of scrutiny. I have noted in the foregoing that the application made no reference to recount, and indeed this was one of the reasons why the 1st and 2nd respondents opposed the application. According to Mr. Nthiwa, who was holding brief for Mr. Okuta for the respondents, there was no reason to order scrutiny if ultimately there will be no recount.

16. In the submissions by Mr. Makundi and Mr. Kituku for the petitioner, a basis had been laid for scrutiny and recount. This was because evidence had been led that the petitioner’s agents had been denied access to polling stations, had been denied opportunity to confirm the results by signing Forms 35A, some of the Forms 35A had not been signed by the presiding officers, some had not been signed by their agents, and that the evidence had shown many irregularities and malpractices; that, in some of the cases the Forms had alterations which had not been countersigned. The petitioner sought to access the Kiems kits in which was contained evidence of the registered voters and in which was contained evidence of results transmission, including evidence as to what time that was done. This issue of time was related to the date when the results were declared, the petitioner saying it was on 10th August 2017 and the respondents saying it was on 9th August 2017.

17. According to the respondents, the petitioner had failed to lay sufficient basis for scrutiny.

18. I consider that the Forms 35A which were not signed by the respective presiding officers and the Forms 35A that were not signed by the agents for the petitioner were all identified in the course of the cross-examination of the 2nd respondent. Counsel will, during concluding submissions, address the court on the validity of these Forms and whether the results contained therein ought to have formed part of the tally. Scrutiny cannot therefore be based on the Forms.

19. There was an allegation of election results inflation and manipulation in various polling stations. The stations were, however, not specified and when the petitioner and his witnesses testified they led no evidence in that regard. Further the issue was not pleaded in the petition.

20. There was claim that several Forms 35A were filled and signed by one hand, but the issue was not pursued during evidence, and, in any case, the particular Forms 35A were not specified.

21. The issue of the number of the people who voted having exceeded the number of registered voters was not pleaded in the petition. This is material because the petitioner sought to access Kiems kits to verify the number of registered voters and those who had voted.

22. It was alleged in the motion that some Forms 35A had been forged and backdated. This allegation lacked specificity, and was not pleaded in the petition.

23. There was allegation in the petition that agents were asked to sign blank Forms 35A which made it possible for the presiding officers to make changes to the votes each candidate received. No evidence was called on this issue, and the relevant Forms 35A and the respective polling stations were not particularized, as a basis for scrutiny or recount.

24. The petitioner alleged that results from six (6) polling stations were not included in the final count and declaration. During oral evidence this issue was not pursued, and this exclusion was not pleaded in the petition.

25. Finally, under **section 39(1)(c)** of the **Act** electronic transmission and the publication of results in a public portal is only required for presidential elections. This is material because in paragraph 6 of the prayers in the motion the petitioner was asking for access to the Kiems kits devices results transmission logs with respect to Yatta National Assembly election.

26. I hope I have said enough to show that the petitioner has failed to show sufficient reasons why either scrutiny or recount of the votes should be ordered.

27. In conclusion, I dismiss the motion dated 27th September 2017. Costs shall abide the petition.

DATED and DELIVERED at MACHAKOS on the 21ST day of DECEMBER 2017.

A.O. MUCHELULE

JUDGE