



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ELECTION PETITION NO. 5 OF 2017

MUGAMBI IMANYARA.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

MERU COUNTY RETURNING OFFICER.....2ND RESPONDENT

FRANKLIN MITHIKA LINTURI.....3RD RESPONDENT

RULING

On 22.11.2017 the parties herein and their counsels entered into a consent that was recorded by this court and signed on record by the party's counsels to the effect:-

- a. Counsels for parties agreed to reschedule hearing dates to 11th, 13th, 14th and 15th December 2017 starting at 8.00 a.m on each day.
- b. Each party to nominate an IT expert to attend the Deputy Registrar on Monday 27th November 2017 at 9.00 a.m for purposes of accessing, separating and storage of all information relevant to the impugned election in the SD card in Compaq Discs, which shall be supplied to each of the parties in the petition.
- c. Application dated 21st November 2017 by the 1st Respondent marked as spent

When the parties and/or their representative ICT officers and/or their advocates appeared before the DR a further consent of the information to be retrieved from the SD cards was agreed upon and process of simulation began. The DR reported that with one laptop the exercise could have taken 3 months but with 10 laptops the exercise could have taken one month. Since 22.11.2017 it is nearly one month and I believe that the entire Meru Court has more than 10 laptops in custody of its officers. The Dr reported that the advocate holding brief for 3rd Respondents counsel objected to the simulation exercise arguing it was amounting to scrutiny which was disallowed. Therefore the persons charged with the responsibility to execute the consent order resorted to burning the information into Compaq Discs and that the only information that can readily be accessed in the Discs supplied is only the log ins and outs. The rest of the information relevant to the petition it was expected would be used during the hearing of the petition could not be accessed as according to Deputy Registrar and the IEBC and court ICT officers, they are encrypted and a code has to be used to decode and access the relevant information.

The issue for courts determination is whether by supplying Compaq discs with encrypted information the

1st and 2nd Respondents have supplied the information related to the campaigned Senatorial election as agreed in the consent recorded on 22.11.2017 with tremendous respect this court thinks that the 1st and 2nd Respondents have not taken the proceedings and the orders of the court in this petition with the seriousness that is deserved.

The 1st Respondent is a public Commission entrusted with conducting elections in this country and therefore is answerable to not only the Petitioner and the 3rd Respondent but to the entire nation that the electoral process was in accordance with the constitution and the Elections Act and Regulations i.e that the process was transparent, accountable and verifiable if and when under Article 35 information in the custody of the 1st Respondent which should be information that can be freely accessed by the public is furnished in encrypted form then one is bound to question whether transparency and accountability is being exercised by the custodian of Electoral process. This kind of conduct is likely to attract an adverse inference by the court which may not be very pleasant to the offending party. The information that 1st Respondent was required to supply ought to have been used by the Petitioner during the presentation of his and his witnesses evidence in court whether or not the Petitioner and 3rd Respondent inquired about how to access the information burnt in the Compaq discs the 1st and 2nd Respondents had a duty to volunteer the information on how the encrypted information was to be decoded and using which device. This court insists that the information and the relevant device should be in court today as the Respondents case is in court so that in event that any of the parties want to refer during cross examination they may with help of the 1st and 2nd Respondent assist in accessing.

Orders accordingly.

HON. A.ONG'INJO

JUDGE

Ruling Signed Delivered and Dated this 15th Day of December 2017.

In the presence of:-

Petitioner:- Mr Oduol Advocate and Mr Gitonga for Petitioner

1st Respondent: Mrs Kinara Advocate for 1st and 2nd

2nd Respondent: Respondent

3rd Respondent: MS Awuor Advocate for 3rd Respondents

HON. A.ONG'INJO

JUDGE