



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 17 OF 2017

BETWEEN

HEZBON OMONDI.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

FRIDAH CHEBET

(THE RETURNING OFFICER

EMBAKASI CENTRAL CONSTITUENCY)....2ND RESPONDENT

BENJAMIN GATHIRU MWANGI.....3RD RESPONDENT

RULING

(No 2-on scrutiny)

1. Since the conclusion of the evidentiary hearing, I have reflected on the evidence adduced and the pleadings filed in this matter.

2. One of the reliefs sought in the petition is for the scrutiny and audit of all the returns of Embakasi Central Constituency, Member of National Assembly elections including but not limited to forms 35A, 35B and 35C. The Petitioner also seeks an order for the scrutiny and audit “*of the system and technology used by the 1st Respondent in the Embakasi Central Constituency Member of National Assembly elections including but not limited to the KIEMS Kits, the servers and the [sic] website portal.*”

3. The basis for seeking the orders for scrutiny is the alleged irregularity and impropriety in the voting, counting, tallying and tabulation of the electoral votes cast on 8th August, 2017 in Embakasi Central Constituency. The Petitioner had indeed made an intermediary application for scrutiny. The application was in general terms. I made a finding that the application was, then, not merited. This was on 3 November 2017. I also made it clear that the court on its own motion as allowed under s. 82(1) of the Elections Act, 2011 could revisit the issue of scrutiny once the evidence had been tendered by the parties. The rationale was, and still is, that it is not enough to simply look at the pleadings and the affidavit evidence then determine that scrutiny is warranted. The evidence ought to be tested by cross-examination to allay any fears that any scrutiny exercise is a fishing expedition.

4. It is however not enough to make the allegations in the pleadings and have testimony led in the same line. The party seeking scrutiny must satisfy the court that there is indeed need for the scrutiny with a view to assisting the court in determining the valid votes cast in favour each candidate.

5. I am aware that the process of scrutiny goes beyond the simple question of the number of votes cast and garnered by the candidates. It may extend to the validity of such votes as well. I am aware that an order for scrutiny may be made at any time or stage of the petition before the final determination: see **Gatirau Peter Munya v Dickson Mwenda Kithninja & 2 others [2014]eKLR**.

6. Having heard the parties' witnesses and having perused all the documents presented to the court both by way of affidavit evidence and during evidentiary evidence, I now hold and form the following view.

7. The Petitioner's witnesses attacked and questioned various Forms 35A filed in court. Form 35A is the polling station result form for the Member of National Assembly. During cross examination of the Respondents' witnesses, various questions emerged on the forms though not on all of them. It emerged that some of the forms were either unsigned by the Petitioner's agents or were allegedly signed by persons unknown to either party. It also emerged that some of the forms contained omissions and alterations which were not countersigned.

8. I had occasion to glean through the 193 Forms 35A re-filed in court by the 1st Respondent on 5 December 2017. Some are not signed by even the Presiding Officer or the Deputy Presiding Officer. I appreciate though that the mere non-signing of a form especially by a candidate or their agent may not invalidate the result: see s.79 of the Elections Act, 2011.

9. I must however not close my eyes to the fact that scrutiny assists the court to investigate all the allegations of irregularities and breaches of the electoral process with some depth. Consequently where the results lodged in court by the Independent Electoral and Boundaries Commission as well as the evidence of the parties talk of unsigned forms, defective ballots reported on the forms, instances of alterations not countersigned, then in my view and judgment it would be inappropriate to ignore such instances. Turning a blind eye to such instances would be an affront to and might negate our constitutional principle of a free and fair electoral process. Scrutiny may help clear the air with some certainty.

10. I am convinced that the totality of the evidence would lead to a need for scrutiny of some, not all, the electoral material in this case. The scrutiny is to be limited. It will none the less still assist in ascertaining the number of votes cast in favour of the candidates. On the other hand, I am not satisfied that the evidence as well as the pleadings have helped make out any case for the scrutiny and audit of the electoral electronic system. Put differently, no foundation has been laid for the scrutiny of the KIEMS Kits, the servers and the public portal.

11. In consequence, I direct and order scrutiny of the electoral material that is to say the polling station registers, polling stations diaries, the original forms 35As and the ballots for the following polling stations:

- i. Kayole 1 Primary School- Polling Station No 11
- ii. Kayole 1 Primary School- Polling Station No 12
- iii. Kayole 1 Primary School- Polling Station No 13
- iv. Kayole 1 Primary School- Polling Station No 23
- v. Kayole 1 Primary School- Polling Station No 31
- vi. Imara Primary School - Polling Station No 11

vii. Imara Primary School - Polling station No 25

viii. Thawabu Primary School-Polling Station No 10

ix. Thawabu Primary School- Polling Station No 25

x. Mwangaza Primary School- Polling Station No 6

xi. Komarock Primary School -Polling Station No 2

12. The 1st and 2nd Respondents will avail the electoral material including the data in respect of the said polling stations as stored in the SD Card to the Deputy Registrar at the time of scrutiny. The SD Card is however to be forthwith deposited with the Deputy Registrar for safe keeping. All disputes which may arise during the scrutiny process are to be clearly recorded for determination by the court. The Deputy Registrar is to make a report to the court within the next 10 days.

Dated, signed and delivered at Nairobi this 11th day of December 2017

J. L. ONGUTO

JUDGE