



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**ELECTION PETITION NO. 2 OF 2017**  
**IN THE MATTER OF ELECTIONS ACT, 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION)**  
**PETITIONS RULES, 2017**

**AND**

**IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR**  
**BONCHARI CONSTITUENCY (CODE 261)**

**ZEBEDEO JOHN OPORE ..... PETITIONER**

**VERSUS**

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

**DAVID K. CHEROP ..... 2ND RESPONDENT**

**JOHN OROO OYIOKA..... 3RD RESPONDENT**

**RULING**

1. By way of a notice of motion dated 3rd October 2017, Zebedeo John Opore (hereinafter the Petitioner) moved the Court for orders;

**1. THAT there be a scrutiny and recount of votes in respect of Bonchari Constituency's Member of the National Assembly elections conducted on the 8th August 2017.**

**2. THAT the cost of this application be provided for.**

2. The application is premised on the grounds that;

a) There were grave electoral irregularities and vote discrepancy in the just concluded elections particularly for the Bonchari Member of National Assembly seat.

b) The irregularities and vote discrepancy are outlined by various witnesses in their affidavits in support of the petition.

c) The particulars of the irregularities and vote discrepancy as per the affidavits include:

- i) Repeated voting.
  - ii) Stuffing of votes into the ballot box.
  - iii) Improper sorting of votes during the counting exercise.
  - iv) Agents being turned away from polling stations.
  - v) Agents not being allowed to sign form 35As and/or have the form 35As.
- d) The Petitioner further requested from the 1st Respondent records and documents in their custody pertaining to the elections of the Bonchari Member of National Assembly seat by a letter dated 23rd August 2017.
- e) The 1st Respondent failed to honour the request leading to filing of a Constitutional Petition in the High Court of Kenya, being Nairobi Petition No 418 of 2017.
- f) Justice Mativo issued orders dated 5th September 2017 compelling the 1st Respondent to furnish the documents requested for.
- g) Even then, the 1st Respondent delayed in complying with the order and has now partially complied and supplied Polling Station Diaries and Forms 32A documents.
- h) These official election documents show serious vote discrepancy and electoral irregularities including:
- i) Higher number of voter turnout than the registered voters at the polling station.
  - ii) The number of ballot papers issued being higher than the voter turnout.
  - iii) The entries made in the polling station diaries differ from those in forms 35A and 35B.
  - iv) Difference in number of voter turnout to the number of ballot papers issued.
  - v) Absence of party agents during sealing of packets as in they were advised to leave the room.
  - vi) Non affirmation of the closure of the ballot boxes before counting.
  - vii) No election observers at some polling stations.
  - viii) There are grave discrepancies in the declared results, which are compounded by polling day illegalities including stuffing of ballot boxes as set out in various affidavits in support of the petition.

3. The application is opposed and both the 1st and 2nd Respondents on the one hand, and the 3rd Respondent have filed grounds of opposition.

4. For the 1st and 2nd Respondents the grounds for opposition are;

1. That the Petitioner has not laid a basis for the grant of the order for recount and scrutiny.
2. The application is on the face of frivolous and the same ought to be dismissed.

5. For the 3rd Respondent, the grounds are;

1. THAT the Petitioner has not established sufficient reasons for the grant of the prayers sought.
2. THAT the Petitioner has not advanced any justification for the orders of recount and scrutiny.
3. THAT the application is incompetent for want of legal clarity of the prayers sought and lack of material particulars.
4. THAT the application is bad in law, lacks merit and an abuse of the court's process.

6. Directions were given that the application be disposed of by way of written submissions and all parties complied.

7. I have had the occasion to consider the application, the supporting affidavit and grounds, the grounds of opposition and the learned submissions by counsel.

8. It is worth noting that this application is coming at the tail end of the trial and as held in the case of **Rishad H. Amana vs. IEBC & 2 others [2013] eKLR**, the timing is perfect. In that case ***Kimaru J*** stated;

**“..... the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of votes before the commencement of the trial. The Petitioner may do so after his or her witness have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the Court after all witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the Court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny.”**

9. I summarize the issues for determination as follows;

1. What is the law applicable in an application for scrutiny and recount of votes.
2. Whether the applicant has laid a basis for a grant of an order for recount and scrutiny.
3. If 2 is in the affirmative, which polling stations would be subject to the order of the scrutiny and recount.
4. What would be the scope or parameters of the recount.
5. Who is to supervise the exercise and how many representatives of each party would be allowed to participate in the exercise.

10. On the law, the relevant statute and rules are very clear.

11. **Section 82(1)** of the **Elections Act** provides;

**“Section 82: An election court may, on its own motion or an application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election Court may determine.”**

12. **Rule 28** of the Elections (Parliamentary and County Elections) Petitions Rules provides;

**“Rule 28; A Petitioner may apply to an election court for an order to;**

- a) recount of votes; or**

**b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.”**

13. To that extent, the application before Court is apt and perfectly brought within the law.

14. Has the Petitioner laid a basis for the grant of an order for scrutiny and recount?

15. The Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** laid down the guiding principles of the operation of the right to scrutiny and recount. The Court at paragraph 153 stated;

*“[153] from the foregoing review of the emerging jurisprudence in our Court, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:*

*a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.*

*b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for order for scrutiny or recount.*

*c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an elections petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.*

*d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.”*

16. In the case of **Ledama Ole Kina vs. Samuel Tunai and 10 Others**, [2013] eKLR, the Court held that the Court has discretion to order scrutiny *suo moto* when the Court deems a reason for its exists and also on the basis of an application by a party. The Court emphasized that the polling stations affected must be specific.

17. The purpose of an order for scrutiny and recount is to assist the Court investigate the validity of allegations of irregularities and breaches of the Law that had been complained of and determine the valid votes that had been cast in favour of candidates. See **Kithinji Kiragu vs. Martin Nyaga Wambora & 2 Others** [2013] eKLR.

18. Flowing from the dictum in Kithinji Kiragu case above, an order for scrutiny and recount will become necessary and will be employed where conflicting evidence remains unresolved and the scrutiny and recount will come in handy to give the necessary answers.

19. The only requirement is that there be established sufficient cause or a basis for such a request or order which must be based on the pleadings and affidavits or where applicable (like in our instant case) on the evidence adduced during hearing of the petition.

20. I quote with approval the decision by *Onyancha J* in **Hassan Mohamed Hassan and Another vs. IEBC and 2 Others [2013] eKLR** where he opined that the decision to grant scrutiny or recount is clearly, not only discretionary but also judicious.

This means that the Court's reason to grant such an order must be based on sufficient ground and must be necessary for the purpose of enabling the court to arrive at a fair, just, proportionate and affordable resolution of the petition within the import and meaning of **Rule 4(1)** of the **Elections (Parliamentary and County Elections) Petitions Rules**.

21. The objective of a scrutiny of votes must have a specific target in terms of the outcome. If votes are struck out as envisaged in **Section 82(2)** of the **Elections Act**, it would have the effect of varying the total number of votes cast for each candidate.

22. Lastly, an application for scrutiny and recount should not be used as a means for fishing for new evidence and playing lottery with the hope of a favourable outcome. I agree with *Tuiyot J* in **Philip Osoore Ogutu vs. Michael Aringo [2013]eKLR** where the Judge stated;

**“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is need to guard against an abuse of the process. I would agree with Mr. K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.”**

23. So what obtains in our instant petition? Evidence has been adduced both from the Petitioner and the Respondent. My duty now is to examine the said evidence and make a finding whether the petitioner has laid a sufficient basis to warrant an order for scrutiny or recount in all or some of the polling stations sought.

It is noted in some instances the Petitioner has relied on the number of voters in the queue by 5.00 p.m. in various polling stations to deduce the actual number of voters who actually voted. This position cannot be entirely correct. There would be instances where some of the voters would leave the queue of their own motion or fail to be identified/qualified to vote for various reasons. To this extent, I have rejected request for scrutiny and recount where the grounds appear to me to be speculative.

25. It is worth noting that even where the polling station diary may have some discrepancy, a candidate who signs the form 35A declaring the results in my view is estopped from querying the counting and tallying at a future stage.

26. My analysis of the anomalies found in the polling station diaries vis a vis the declaration forms 35A, including instances where number of ballots issues is not stated and the evidence on record by agents necessitate the scrutiny and recount of the votes cast in the following polling stations:

1. Nyamerako Polling Station stream 2
2. Ekerubo Polling Station 1
3. Botoro stream 2
4. Nyangiti Primary School
5. Kenyorora Primary School

6. Kiabusura Primary Stream 1
7. Itierio Girls Boarding
8. Nyakungu Primary Stream 2
9. Isamwera Polling Station 2
10. Matongu Primary School
11. Mogumo
12. Nyamagundo Farmers Co-operative Polling Centre

27. The scrutiny and recount shall be restricted to the ascertainment of the number of the valid votes cast at each polling station and assigned to each candidate, any unaccounted for votes and cumulative votes of the candidates in the 12 polling stations.

28. The exercise shall be undertaken under the supervision of the Deputy Registrar of this Court.

29. Each party shall be represented by 3 agents during the exercise.

30. Any dispute arising in the exercise which may require resolution by the trial Judge shall be placed before the Judge as soon as practicable and where the Judge is not readily available, the dispute shall be reserved to a later date allowing the exercise to continue flawlessly in the interest of meeting timelines.

31. The Deputy Registrar of the Court shall file a report within 7 days of the completion of the exercise which report shall form part of the record of proceedings.

32. The exercise shall commence promptly on the 18/12/2017 at 9.00 a.m.

33. The Deputy Registrar of the Court shall deal with the administrative arrangements necessary in liaison with the Independent Electoral and Boundaries Commission and the parties herein.

34. There shall be a mention before the Deputy Registrar on 14/12/2017 at 9.00 a.m. for further necessary directions.

**Dated, Signed and Delivered in Kisii this 11th day of December, 2017.**

**A. K. NDUNG'U**

**JUDGE**