



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 76 OF 2013

TADEYI MUKUDI MULIRO.....APPELLANT

VERSUS

PAUL CHERUIYOT KONES.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

FRED MUSIRIMBA.....3RD RESPONDENT

[Being an appeal from the judgment and decision of the Chief Magistrate Hon. T. Wanjiku in Busia High Court Election Petition No.1 of 2013]

J U D G M E N T

In the general election held on 4-3-2013 the people in Bunyala North ward of Busia County were electing their county representative. They chose Fred Musirimba (the 3rd respondent) who got 2,520 votes. The election was conducted by the Independent Electoral and Boundaries Commission (2nd respondent) whose Returning Officer was Paul Cheruiyot Kones (1st respondent). The appellant Tadeyi Mukudi Muliro got 2,075, or so, votes and was number three overall. The contestants were seven. The appellant filed a petition at the Chief Magistrate's court at Busia to challenge the result. In the petition he claimed that he had unfairly lost, and the electorate denied the opportunity to elect a candidate of their choice, because his name had been misspelt on the ballot paper. Indeed his name had been indicated as Mukdudi T. Muliro instead of Mukudi T. Muliro. Evidence was rendered , and submissions made by counsel, on the issue. The trial court found that, despite this anomaly, the election had been free, fair and credible, and that the result had reflected the wishes of the electorate.

The other ground in the petition was that there had been information in the internet on 3-3-2013 that the Chairman of the 2nd respondent had postponed the election for the Ward. This claim was denied by the respondents. The trial court considered the issue and found it not proved. In all, the petition was dismissed with costs. This is what led to this appeal.

Counsel agreed to have the appeal heard through the filing of written submissions, which they filed. I have considered them.

The trial court was alive to the provisions of section 83 of the Elections Act (No. 24 of 2011) which states as follows:

“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

The general principles in regard to free and fair elections are contained in Article 81 (e) of the Constitution of Kenya 2010. The elections should be:

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

These principles are in addition to those contained in Article 38 which ensured that the appellant had the right to not only participate in the election in question but also seek to be elected as a county representative.

Under regulation 68 (4) and (b) of the Elections (General) Regulations, 2012 made under the Elections Act, every ballot paper for use at the election shall contain the name, party symbol and photograph of the person validly nominated.

The grievance by the appellant was that the ballot paper used in the election had his name, party symbol and photograph, but that one of his names had an error. It had been indicated as Mukdudi T. Muliro instead of Mukudi T. Muliro. This error was discovered by both the appellant and the 1st respondent on 3-3-2010 when the election was going to be on the following day. The 1st respondent undertook to call the 2nd respondent and inform them. The election, nevertheless proceeded. The appellant testified that as a result of the anomaly he did not vote for the ward representative. He did not vote for himself. He wanted the anomaly corrected before the election but that was not done. He stated that his voters did not vote for him but voted for the other candidates, and that was why he lost. The record shows that he called Mbaga Tuzinde Gero (PW2) (his party chief agent in the constituency), Patrick Khaema Okotch (PW3) (his party agent in a polling station), Francis Muyoti Omondi (PW4) (an agent at a polling station) and Agnes Tabu Apinde (a voter at a polling station).

PW5 stated that when he went to vote at Sirimba primary school polling station he found the appellant's name misspelt. He decided not to vote for the county representative. However, he was referred to his affidavit in which he had not indicated that he did not vote for the county representative when he noted the anomaly. PW4 stated that he did not vote for a county representative when he noted the anomaly. Both him and PW3 stated that voters complained that they could not identify the appellant's name on the ballot paper. PW2 was the party chief agent to whom these reports were being made. He stated that the appellant had lost as a result of the anomaly; that their opponents spread the rumour that because of the anomaly any vote given to the appellant would not count.

The appellant and his witnesses agree that the ballot papers had his photograph, the party name and party symbol. He was the UDF candidate in the election. The name Mukdudi T. Muliro was against his photograph and the UDF party symbol. He was the only candidate running on the party ticket in the election. He had certainly campaigned on the ticket. It is certain that civic education had been done and therefore voters knew how to identify those they wanted to elect. The 1st respondent testified, and the regulations required, that any voter could seek the assistance of the presiding officer to help identify a candidate.

The unchallenged evidence was that whereas the national voter turnout was 86%, the Budalangi constituency in which the Ward falls had a turnout of 92%. Secondly, about 80% of the voters in the constituency were illiterate in the sense that they could neither read nor write. Such voters were only relying on party colours and symbol and the coloured photograph of the candidate to identify the candidate to vote for.

Thirdly, the unchallenged evidence was that whereas the 3rd respondent won the election, the appellant beat him and the other candidates at Nabuchwi primary school, Bulagu nursery school, Kenya Ganze primary school, Budubasi primary school and Sisenye primary school polling stations. It would appear that the appellant was not prejudiced by the anomaly given that result.

Lastly, neither the petitioner nor his candidates formally complained to the 1st respondent that any of their voters could not vote, or identify his candidate, as a result of the anomaly. He testified that he went to various polling stations on the day of voting and did not receive any complaint that any voter had not been assisted, or that a voter had failed to vote because he had been unable to identify the appellant's name on the ballot paper.

It is for these reasons that I agree with the judgment by the trial court that the misspelling of the name of the appellant did not in any way affect the voting. The voters were able to identify him, and vote or not vote, for him. There was enough information on the ballot paper to identify the appellant. I agree that the anomaly offended Regulation 68 (4) of the Election (General) Regulations, 2012 but that did not affect the substance of the election, which was otherwise conducted in accordance with the Constitution and the Elections Act. I find that the voters in Bunyala North Ward elected the candidate of their choice. That candidate was the 3rd respondent.

In reaching this decision, I am aided by the decision of the Supreme Court of India in **Mahadeo - VS- Babu Udai Pratap Singh & Others 1966 AIR 824, 1966 SCR (2) 564**. In the case the 1st respondent was the defeated candidate whose name had not been accurately printed on the ballot papers. The respondent had challenged the election of the appellant alleging that the incorrect printing of his name had materially prejudiced his prospects of securing the votes of all his supporters. The Election Tribunal and the High Court came to the conclusion that the appellant's election had been rendered void by reason of the fact of the misprinting of the 1st respondent's name on the ballot papers. The Supreme Court allowed the appeal by the appellant and held that, although the misprinting of the 1st respondent was an irregularity there was no proof that such irregularity had any material effect on the election, and therefore his challenge to the validity of the appellant's election could not be sustained.

Indeed in **Raila Odinga -VS- I.E.B.C & Others, Petition No. 5 of 2013** the Supreme Court of Kenya held that:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election”.

There was no proof by the appellant that the misspelling of the appellant's name, which was an irregularity, did have any material effect on the election in which the 3rd respondent was declared the winner.

There was the complaint by the appellant that was contained in a copy of the press briefing (Exhibit TMMI) from the internet saying that the election of 4-3-2013 for the Ward had been postponed. The appellant and his witnesses testified about this and said that it had affected not only the turnout but had also kept his would be voters away. The evidence of the 1st and 3rd respondents was that there no such notice issued by the 2nd respondent. The 1st respondent testified that an election can only be stopped by a gazette notice issued by the 2nd respondent or by a court order. No such notice had been issued. He disowned the notice produced by the appellant which he blamed on hackers, if at all it existed. He testified, and that was not challenged, that neither the appellant nor his witnesses raised the issues of the notice with him. It is also material that he did not establish the source of that internet material. He could not therefore say it came from the 2nd respondent. But more important, the petition did not contain the allegation that election had been postponed by the 2nd respondent. The claim was contained in his affidavit sworn to support the petition. It is basic that he was not allowed to testify on matters not pleaded in the petition. The allegation, therefore, should not have been allowed to tax the mind by the trial court.

On the question of costs, the usual consideration is that they follow the event. Now that the

appellant failed to prove his petition he was asked to pay costs of the same. However, the contention by his advocate was that the 2nd respondent was charged with the responsibility of getting all nominees and their correct details on the ballot papers. By misspelling the names of the appellant, it was argued, the respondent had not discharged that mandate and therefore should not be given the costs of the petition but instead pay the costs, or at least each party be made to pay his own costs. Counsel referred to the case of **Re K.A. Thabiti [1967] EA 772** in which on the successful nomination the petitioner was given the symbol of a house and the successful candidate was given the symbol of a hoe. Both parties carried out the election campaigns using the symbols allowed, but on polling day, two hours after the polling had begun, it was discovered that the symbols had been reversed in printing the ballot papers. The petitioner lost the seat by a vote of 31 for and 267 against. Seventy five per cent of the voters in this Rufiji District in which the ward was were illiterate. It was held that it was difficult to say that the results would have been the same had the ballot papers been properly printed. Any voter who was illiterate and wanted to vote for the petitioner on the strength of the symbol house would have cast the vote for the wrong candidate. On the question of costs the Judge held:

“I feel that neither candidate is responsible for the misprint of the election symbols, this matter might be accidental misprint by the government printer, for which he is not to blame. I will, in the circumstances, order that each party bears his own costs.”

I consider that the responsibility of the 1st and 2nd respondents was to carry out a free and fair election that was transparent and accurate, and which complied with the Constitution and the Elections Act. I have found that, except for the misspelling of the appellant's name on the ballot papers, the respondents discharged their mandate. Infact, the question to be asked is whether the appellant believed that his petition had any realistic chance of success when the election was according to his own admission, properly conducted. I find that he will pay the costs of the petition, but which costs will reflect the fact that the 1st and 2nd respondent's committed an irregularity as indicated in the foregoing. The appellant will pay Kshs. 250,000/= to the 1st and 2nd respondents jointly and Kshs. 500,000/= to the 3rd respondent.

In the appeal, the appellant shall pay Kshs. 100,000/= to the 1st and 2nd respondents jointly and Kshs. 200,000/= to the 3rd respondent. The appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 27th day of January, 2014.

**A.O.
JUDGE**

MUCHELULE