



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 46 of 2013

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FREEDOM
GRANTED UNDER ARTICLES 38,(3) (B) AND 55 (B) OF THE CONSTITUTION OF KENYA
(2010)**

AND

**IN THE MATTER OF ARTICLE 165 (6) (7) ARTICLE 258 (10) OF THE CONSTITUTION OF
KENYA 210**

AND

**IN THE MATTER OF THE PROVISION OF THE POLITICAL PARTIES ACT AND THE
ELECTION ACT**

AND

**IN THE MATTER OF THE ALLEGED BREACH OF PARAGRAPH 9B OF ELECTORAL
CODE OF CONDUCT**

AND

**IN THE MATTER OF NOMINATION OF THE NATIONAL ALLIANCE (TNA) PARTIES
CANDIDATE FOR PARLIAMENTARY SEAT KIPIPIRI CONSTITUENCY**

BETWEEN

**STANLEY KIHICO MUTUNGU
PETITIONER**

VERSUS

**THE NATIONAL ALLIANCE (TNA)..... 1ST
RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC).....2ND
RESPONDENT**

**MR. AMOS MUHINGA KIMUNYA 3RD
RESPONDENT**

REASONS FOR THE DECISION

1. The Petitioner herein, **Stanley Kihiko Mutungu**, vide his Petition dated 30th January 2013 sought the following orders:

- (i) **A declaration be issued to declare that the nominations conducted by the 2nd Respondent in Kipipiri constituency in respect of the parliamentary seat were not free and fair.**
- (ii) **A declaration be made that the 3rd respondent is guilty of electoral offences under sections 62, 63, 64, 65 and 66 of the Elections Act, Act No. 24 of 2011 and is therefore ineligible to contest for any elective post.**
- (iii) **A declaration be issued to declare that as a result of the cumulative violations of the petitioner's rights under Article 38 of the constitution, the 2nd respondent is enjoined to exclude the name of the 3rd respondent from the list of nominees present to it by The national Alliance Party.**
- (iv) **A declaration be issued to enjoin the 2nd Respondent to undertake a repeat of the nominations for Kipipiri Constituency The National Alliance (TNA) party parliamentary candidate.**
- (v) **Costs of this petition.**
- (vi) **Such other and/or further orders as the Honourable Court may deem fit and just.**

2. On 31st January, 2013, after hearing the parties, we dismissed the said Petition with no order as to costs. We now give our reasons for the said decision.

3. The grounds upon which the petition was based were captured in the following paragraphs of the supporting affidavit:

5. That Amos Kimunya was involved in blatant voter bribery in amounts ranging from Kshs. 100/= to Kshs. 1,000/= per person. There is photographic evidence of this bribery.

6. That my name appeared in the ballot papers for the country representative position at Kipipiri ward thus totally confusing voters as to the position I was contesting. I lost many votes cast in the ward nominations.

7. That the used ballot papers and boxes for two polling stations i.e. Rumwe and Ngatho were not availed to the returning officer, and thus, the only results he had were the SMS messages and in fact one of the polling presiding officer did not turn up for the tallying process.

8. That the used ballot boxes and papers for Marimu Primary School polling station were handled and in fact transported by one Francis Karuiru who was the Chief campaigner of Amos Kimunya in the absence of the presiding officer. When my agents chased the vehicle illegally carrying the ballot boxes, they were assaulted by Kimunya's bodyguards, arrested and locked up at Miharati Police station where they were held incommunicado. How the ballot boxes papers later reached the tallying centre is a mystery.

9. That the used ballot papers for both Rumwe Primary School polling station and Ngatho Primary School polling station were found abandoned and tampered with. They are currently held at Engineer Police Station under O.B. No. 2 of 19/01/2013.

10. That there was widespread voter bribery at Mihato Primary School polling station where Kimunya's campaigners moved door to door giving voters Kshs. 500/= each to vote for him.

11. That at Kagongo Primary School polling station Kimunya's campaigner by the name Githinji attempted to bribe my agent Anita Muthoni so that she could permit my votes to be marked as Kimunya's and also for the total tally to be illegally altered in favour of Kimunya.

12. That the presiding officer at Wanjohi Primary polling station locked out over five hundred voters waiting to vote who were still in the queue. This lot constituted the youth who were my main supporters and who had been directed by the presiding officer to let the elderly voters to vote first. Most of the votes that Kimunya validly got were from the elderly people and thus, the locking out of the young voters gave Kimunya an undue advantage. I understand the presiding officer was getting instructions from one Njoroge a Kimunya campaigner who had been illegally let into the voting room yet he was not a voter at that station.

13. That upon my lodging my petition to the Kipipiri returning officer, he announced in my presence and that of Kimunya among others that he was not legally capable of announcing the results or declaring the winner of the parliamentary nominations but he proceeded to declare the winners of the county representatives position.

14. That to date the returning officer has not tallied or declared the results for the nominations of the parliamentary candidate.

15. That as we speak, the used ballot materials for Rumwe, Ngatho and Marimu are being held at engineer Police Station after the local OCPD collected them from where they had been abandoned by the presiding officers. Some of the ballot boxes had been broken into and were in the custody of a mob.

16. That I have learnt that TNA has forwarded the name of Amos Kimunya to IEBC as its successful Parliamentary candidate yet as indicated above the results have not been declared by the returning officer as per the TNA nomination rules.

4. On behalf of the 2nd respondent (the Commission) it was argued that the Court must is not the venue for the trial of election offences. Further the Petitioner is not the party appealing before the Committee but was the said party's advocate hence what he is trying to do is to conduct an appeal

5. On behalf of the 1st respondent it was contended the Petition is an abuse of the court process since what the petitioner seeks to enforce are veiled interests.

6. The 3rd respondent on the other hand was of the view that the petition is frivolous since the facts are self-evident and the petitioner was a witness before the 1st respondent Tribunal and gave evidence. There is, according to it, no evidence that the petitioner is a member of the 1st respondent.

7. After considering the material placed before us we agreed that with respect to commission of offences, the same ought to be dealt by the criminal court. It is true that we are not in these proceedings sitting as a criminal court and such allegations are better ventilated in a different forum and if proved we are certain that the petitioner herein will have appropriate remedies.

8. Further there was no allegation of procedural improprieties on the part of the Commission which dealt with the matter.

9. We have also considered the fact that the allegation of abuse of the Court process by the Petitioner herein who was an advocate for the aggrieved party before the Tribunal was not seriously disputed.

10. On the basis of the foregoing we found the petition unmerited thus the orders made herein

Dated at Nairobi this 5th day of February 2013

D S MAJANJA

JUDGE

W KORIR

JUDGE

G V ODUNGA

JUDGE