



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 209 of 2011

JAMES NYAMWEYA BUNDI APPELLANT

AND

JOSEPH IGNATIUS OTSIENO 1ST RESPONDENT

VINCENT ONYANDO 2ND RESPONDENT

INTERIM INDEPENDENT ELECTORAL COMMISSION3RD RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate's court at Kisii

Hon. Shinyada dated on 28th September 2011 in election Inquiry No.4 of 2008)

JUDGMENT

1. This is an appeal from the judgment of the Resident Magistrate's Court at Kisii (Hon. Shinyada) dated 28th day of September 2011.
2. A Civic Election was held on 27th December 2007 to elect a person to a seat in the Nyamira County Council, Bomwagamo Electoral Area. The Appellant was one of the candidates in the Civic Election together with the 2nd Respondent. The 1st Respondent was the returning officer for North Mugirango Borabu.
3. After the counting and tallying of votes cast at the said civic election, the 1st Respondent declared the 2nd Respondent the successful candidate.
4. Being dissatisfied with the election results, the Petitioner filed an inquiry No.4 of 2008 in the Magistrate's court at Kisii on 9th January 2008. After hearing of the petition in the absence of the respondents, the trial court declined to issue the orders sought by the petitioner hence the instant appeal against the trial magistrate's decision.
5. In his memorandum of appeal dated 5th October 2011 the appellant appeals against the whole of the above mentioned judgment dated 28th September 2011 on the following grounds as set out in the Memorandum of Appeal:-
 - 1) *The trial learned magistrate erred in law and fact that she pronounced the judgment against the applicant when there was no evidence contradicting the evidence on record.*

2) *The trial magistrate erred in law by stating that the applicant never proved his case on a balance of probabilities when in fact there was no evidence from the respondent to compare.*

3) *The trial learned magistrate's judgment was wrong as a fact as it was against the weight of the applicant's/appellant evidence that he was the winner of the elections of the 27th day of December 2007 and had garnered 767 votes and then followed by Vincent Onyando with 749 votes.*

4) *The trial learned magistrate erred in law by not acting firmly as the respondents failed to avail the ballot boxes for 2007 Bomwagamo ward to Kisii Law Courts for scrutiny, recount and reconciliation of all the ballot papers, counterfoils and registers of voters, field notebooks and all votes cast, hence the defendants/respondents had lost focus and had no evidence to contradict the evidence of the appellant which was too strong to controvert.*

5) *The learned trial magistrate erred and failed to declare the elections of Bomwagamo ward in the year 2007 null and void as it was marred by irregularities which was shown by the appellant in his evidence in court.*

6) *The trial magistrate's judgment was bad in law and oppressive to the appellant and amounted to aiding the respondents knowing that they never controverted the evidence adduced by the appellant and the witness.*

6. The appellant therefore prays that:-

a) *The appeal be allowed.*

b) *The judgment of the Resident magistrate given on the 28th September 2011 be set aside and in reverse the judgment be pronounced in favour of the appellant.*

c) *In the alternative the election inquiry number 4 of 2008 be sent back to a court of competent jurisdiction for retrial denovo.*

7. Before directions were taken in the appeal, the 3rd respondent filed a Notice of Preliminary Objection dated 6th June 2002. The Preliminary Objection was however withdrawn by consent of all parties on 10th December 2012. Thereafter parties agreed to canvass the appeal by way of written submissions. The submissions were duly filed by the parties on 9th January 2013 and 5th February 2013 respectively.

8. In his submissions the appellant contends that he proved that he garnered 18 votes more than the 2nd respondent who was declared the winner. Further that the appellant and all his witnesses adduced evidence in court to support the appellant's claim while the respondents failed to attend court and to adduce any evidence to contradict the appellant's evidence.

9. From the record, the 3rd respondent failed to avail the ballot boxes of all the 7 polling stations even after being served with a court order to do so. An application to punish the Respondents for contempt of court was disallowed on grounds that it had been filed before the subordinate court instead of being filed in the High Court. The appellant submitted that the trial magistrate did not act as an arbitrator and stand firm for the ballot boxes to be brought for scrutiny.

10. According to the appellant it was not his duty to avail the ballot boxes in court for scrutiny; that all that was required of him was to apply for an order and serve the respondents who had the custody of the said ballot boxes. The appellant also submitted that the trial magistrate erred by stating in her judgment that she could not act blindly by nullifying elections before scrutiny of the ballot boxes to verify if indeed there was any anomaly in the way the elections were conducted. It is the appellant's prayer from the arguments as set out above that the appeal be allowed and the prayers sought therein be granted.

11. On the part of the 1st and 3rd Respondents they confirm that the petition was heard ex parte because the appellants never served any documents upon the 3rd Respondent and therefore most applications filed by the appellant against the 3rd Respondent were heard without any representation from their side.
12. It is further submitted that though the appellant brought the petition on the grounds that he was duly elected representative of the area after civic elections were conducted in 2007, he did not adduce any evidence before the trial court to prove his claims. It was the position of the 1st and 3rd Respondents that the elections complained of by the appellant were conducted in a fair and free process leading up to the declaration of the 2nd Respondent herein as a winner.
13. The 1st and 3rd Respondents also submitted that the results of the election as computed by the appellant were conjured up to try and make the Honourable Court believe albeit unconvincingly, that the appellant won the civic election without evidence to support such a claim.
14. Further the 1st and 3rd Respondents maintain that the appellant has provided no proof whatsoever or at all that he actually won the civic election and that the results as stated by the appellant are not supported by evidence; that by giving the alleged winning figures, the appellant is simply turning the court process into a bickering contest.
15. It is further submitted by the 1st and 3rd Respondents that it is trite law that he who alleges must prove; that the only way that the appellant could prove his claims was if and only if all the ballot boxes from the 7 polling stations were availed to the court for scrutiny. In this regard, reliance was placed on **Nairobi HCC Petition No.157 of 2011 [2012] e KLR – Fredrick Gitau Kimani –vs- Attorney General & 2 others**. It was submitted that without the ballot boxes being availed for scrutiny, the appellant's claims were mere allegations without basis.
16. The 1st and 3rd respondents also submitted that the appellants chose to ignore the very evidence that would have helped in proving his case when, against the advice given by the trial court to serve the order afresh upon the Respondents for production of the ballot boxes and in case of disobedience, then he would pursue the issue of contempt with the High Court. It was the 1st and 3rd Respondent's submissions that the appellant has neither strictly nor on a balance of probability shown and proved his assertions through concrete evidence that the alleged election irregularities did actually occur. The 1st and 3rd Respondents submitted that all that the appellant has succeeded in doing is making malicious allegations for the sole purpose of discrediting and tarnishing the names and repute of the 1st and 3rd Respondents herein. They pray that the appeal be dismissed with costs to the 1st and 3rd Respondents and the judgment of the honourable court dated and delivered on 28th September 2011 dismissing the election inquiry with no orders as to costs be sustained.
17. This appeal is before me as a first appeal, and as per the principle enunciated in **Peters –vs- Sunday Post Ltd. [1958] EA 424** and **Selle & others –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123**, I am under a duty to evaluate the evidence afresh with a view to reaching my own conclusions in the matter. I have already done so by setting out the evidence and considering the submissions made by counsel both before the trial court and before me. I have also carefully considered and weighed the judgment of the trial court.
18. After doing all the above, I am of the considered view that there is no basis for this court to interfere with the conclusions reached by the learned trial magistrate vide her judgment dated 28th September 2011. The appellant's allegation was that he won the election by 767 votes against the 2nd Respondent's 749 votes. The appellant sought to rely on evidence of scrutiny of the ballot boxes from all the 7 polling stations to prove that he indeed won the election. The appellant applied to have the ballot boxes availed to court for scrutiny but the order was not obeyed. He filed contempt proceedings before the same court, but the application was dismissed by dint of the provisions of **section 5 (1) of the Judicature Act Chapter 8 of the Laws of Kenya** which provides as follows:-

“5 (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

19. In my humble view, the trial court rightly dismissed the application for contempt for want of jurisdiction for the power to punish for contempt lies with the superior courts. The court however gave the appellant a second chance to serve the 3rd Respondent afresh with the order requiring it to avail the ballot boxes for scrutiny before the trial court. For reasons that the appellant did not give, that chance was thrown away when counsel for the appellant sought a date for submissions after abruptly closing the appellant’s case. As rightly submitted on behalf of the 1st and 3rd appellants, neither themselves nor the trial court can be blamed for the appellant’s inability to adduce evidence to support his claims. Without the evidence of the scrutiny, the appellant had no case against the respondents. The claims made by the appellant that he won the elections were therefore mere allegations without proof. It is trite law that he who alleges must prove. It is not the responsibility of the party against whom allegations are made to prove his defence or innocence. The appellant in this case failed in this onerous task.

20. In the premises, I find that this appeal lacks merit. The same is accordingly dismissed but with no order as to costs.

21. It is so ordered.

Dated and delivered at Kisii this 18th day of April, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. Bosire Gichana for S.M. Sagwe for Appellant

Mr. Isaac Odhiambo - absent for 1st Respondent

Mr. Odhiambo Rodi for G.J.M. Masese for 2nd Respondent

Mr. Isaac Odhiambo (absent) for 3rd Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.