



REPUBLIC OF KENYA

High Court at Bungoma

Election Petition 4 of 2013

JOHN MURUMBA CHIKATI.....PETITIONER

versus

THE RETURNING OFFICER

TONGAREN CONSTITUENCY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

DAVIS ESELI SIMIYU.....3RD RESPONDENT

RULING

Objection to a witness – official of IEBC

[1] When Mr. Letole presented witnesses' No 3 and 7 namely Linet Swala and Ammon Wanyonyi, Mr. Mutubwa for the 1st and 2nd Respondent objected to their giving evidence in favour of the Petitioner. His reasons for the objection are:

- I) That the witnesses were employed as Polling Clerks by IEBC for Tongaren Constituency;
- II) That the witnesses, by virtue of that employment, were bound by the terms and Oath of office under IEBC Act;
- III) That under the Oath of secrecy which the witnesses ascribed to, they are precluded from giving evidence against IEBC;
- IV) That any information must be given on express permission by IEBC.

[2] Mr. Miller supported Mr. Mutabwa's application entirely and had nothing useful to add.

Mr. Letole opposes the objection

[3] Mr. Litole opposed the objection and submitted that nothing has been shown to show the witnesses were employees of IEBC. The court however reminded Mr. Litole that, that fact was not in issue, and had been confirmed by him and also by the deponents in their affidavits under contestation. The less I say about that issue the better.

[4] Mr. Letole continued to submit: that what these witnesses will speak to is information within public knowledge and there is nothing secret about it.

[5] The substantive Sections 9, 10 and 11 of IEBC Act quoted by Mr. Mutabwa relate to Oath of office, Secretary to the Commission and employees of the commission, respectively in a general manner. They do not deal with matters of confidentiality and management of information by the employees of the commission.

Perhaps the relevant substantive section should be section 27 of the IEBC Act which provides a confidentiality agreement to be signed by the members and all employees of the Commission thus:

“27 (5) - Every member and employee of the commission shall sign a confidentiality agreement.”

[6] Confidentiality agreement signed by employees of an enterprise or a state organ is a departure from the Oath of Secrecy within the Official Secrets Act that was perceived to represent nocturnal intentions of government officers to limit access to information by unauthorized personnel. Ordinarily, such restricted information was classified and marked as “secret”. The practice of confidentiality agreements was, therefore, developed to reinforce proper channels of dissemination of information held by the state to its citizen as opposed to absolute restriction or haphazard disclosures that would otherwise hurt the interests of the nation. This is what is reflected in section 27 and is a statutory limitation of Article 35 of the Constitution in the management of information held by the state.

[7] The question is, therefore, whether the evidence contained in the affidavits of Linnet Swala and Ammon Wanyonyi Lumatete is confidential information covered by section 27 of the IEBC Act?

[8] I have looked at Linet Swala's affidavit sworn on 4/3/2013. She is simply stating an allegedly factual situation at Lukhuna Fym Primary School Polling Centre No.089. It consists in personal observations on, and communication with a colleague on the state of affairs at polling station no.89 in Tongaren Constituency, which really is not a matter that is covered under the confidentiality agreement under the IEBC Act.

In any event the evidence in her affidavit is not a breach of confidential information as it is not information which can legally or realistically be said to be information held by IEBC. I agree with Mr. Letole that the evidence in her affidavit is information within the domain of those who were present at Lukhuna FYM Primary School Polling Station; such information is not confidential or privileged as to need the protection under the principle of “*privileged information and security of interests of the State*” served by confidentiality agreements.

[9] I have also looked at the evidence of Ammon Wanyonyi Lumatete and it is basically on the failure of BVR kits which is common place information now in the Republic of Kenya, and has been decided upon by the Supreme Court of Kenya.

The Forth Schedule

[10] The Forth Schedule provides a pointed solution to the issue at hand. It is grounded on section 16 of the IEBC Act: code of conduct of employees of the commission.

[11] Section 9 of the Fourth Schedule of IEBC Act applies to privileged information that comes into the possession of, which the employee should protect from improper or inadvertent disclosure. But the disclosure herein, as I have stated above, is not confidential, or privileged and the disclosure by way of evidence in a court of law is not improper disclosure.

[12] Further, Section 5 (c) of the Fourth Schedule of IEBC Act prohibits a member or employee of the commission from using information that is acquired during the course of their duties or connected to their duties for their benefit or benefit of others. The section is under the short title: Improper Enrichment. The information covered by this section is official information held by IEBC, and any employee or member of

the Commission should not peddle such information for personal gain or gain of another. That is the improper enrichment prohibited under the said section. The information subject of contestation; is evidence tendered before a court of law for the benefit of the due process of law. This would not, in any sense, be a personal gain to the witness or to the petitioner but to the course of justice which is a public venture. I hold this view within the nature of the election disputes as public-election disputes. See **BGM HC ELECTION PETITION No. 1 of 2013**.

DECISION

[13] The overall impression of all that have been said by counsels, and what the court has said on this matter, is that the evidence by Linet Swala and Ammon Wanyonyi Lumadete is not privileged information in the sense of the IEBC Act which should be protected under sections 9 and 5 of the Forth Schedule. Accordingly the two witnesses should testify in these proceedings. The Respondents will have a right to cross-examine them. It is so ordered.

Dated, signed and delivered in open court at Bungoma this 21st day of May, 2013

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutubwa for 1st and 2nd Respondents

Mr. Letole for the Petitioner

Miller for 3rd Respondent

Khisa: Court Assistant

F. GIKONYO

JUDGE