



No.784

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO.2 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

**IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ACT NO.9 OF 2011**

AND

IN THE MATTER OF ELECTION FOR BONCHARI CONSTITUENCY (NO.261)

BETWEEN

JOHN OROO OYIOKA PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

PETER RESA, RETURNING OFFICER 2ND RESPONDENT

ZEBEDEO JOHN OPORE 3RD RESPONDENT

CONSOLIDATED WITH

ELECTION PETITION NO. 4 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ACT NO.9 OF 2011

AND

IN THE MATTER OF ELECTION FOR BONCHARI CONSTITUENCY (NO.261)

BETWEEN

NYABARO ONDITI PETITIONER

AND

ZEBEDEO JOHN OPORE 1ST RESPONDENT

PETER RESA, RETURNING OFFICER 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

EP NO.2 OF 2013 AND NO. 4 OF 2013 (CONSOLIDATED) (RULING)

RULING

1. At the close of the session yesterday, 24th June 2013, the court was informed by Mr. Nyaundi, counsel for the 3rd Respondent that one Atandi Machuka, a witness for the Petitioner in Petition No. 4 of 2013 had been in court during the taking of evidence of the Petitioner in EP No.2 of 2013. The witness had admittedly been in court during the afternoon session. Mr. Nyaundi asked the court to expunge the affidavit sworn by Mr. Atandi Machuka from the record. Mr. Nyaundi was supported by Mr. Nyaenda who appears together with him. He was also supported by Mr. Rigoro for the 1st and 2nd Respondents in EP No.2 of 2013.
2. The application was opposed by Mr. Omwenga, counsel for the Petitioner in EP No.4 of 2013. Counsel argued that the best course of action regarding the said witness was to allow his evidence to be taken but the court has to treat such evidence with caution. Counsel urged the court not to expunge the affidavit evidence by Atandi Machuka.
3. After hearing the competing submissions, the issue that arises for determination is whether or not the evidence of a witness who sits in court when other witnesses are testifying should be rejected. In my considered view, the answer is no.
4. In **Waithaka & another –vs- Republic [1972] EA 184** the trial court refused to hear the evidence of one witness for the appellants who was present in court throughout the hearing. As a result of not admitting the evidence of that witness by the trial court the appellants were convicted of robbery with violence.

EP NO.2 OF 2013 AND NO. 4 OF 2013 (CONSOLIDATED) (RULING)

5. On appeal, to the High Court at Nairobi, it was held that refusal by the trial court to hear the appellants' witness who was available and ready to give evidence was a violation of their mandatory right to put their defence and fatal to their convictions. The court held that the evidence of such witness should be taken and the fact of his or her presence in court would then go to the weight to be attached to such evidence. I entirely agree with the view held by the Court in the **Waithaka case** and hold that the presence of Atandi Machuka in court during the hearing of the evidence of the Petitioner in EP No.2 of 2013 shall only affect the weight to be placed on that

- evidence by this court.
6. The application by the Respondents' counsel is accordingly dismissed. Costs shall abide the outcome of the petition.
 7. It is so ordered.

Dated and delivered at Kisii this 25th day of June 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of

Mr. Nyamweya for Petitioner in EP No.2/2013

Mr. Omwenga for Petitioner in EP No.4/2013

Mr. Rigoro for 1st and 2nd Respondents in EP 2/2013 and 2nd and 3rd Respondents in EP NO.4/2013

M/s Nyaundi and Nyaencha for 3rd Respondent in EP No.2/2013 and 1st Respondent in EP No.4/2013

M/s Bibu and Kasera - Court Clerks

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