



REPUBLIC OF KENYA
 IN THE HIGH COURT OF KENYA AT KERICHO
 THE ELECTIONS ACT, 2011
 PETITION NO.1 OF 2013

AND

ELECTION FOR THE SENATOR FOR BOMET COUNTY

NICHOLAS KIPTOO ARAP KORIR SALAT.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WILFRED ROTICH LESAN2ND RESPONDENT

ROBERT SHUNET

(COUNTY RETURNING OFFICER, BOMET COUNTY).....3RD RESPONDENT

KENNEDY ONCHAYO.....4TH RESPONDENT

WILFRED WAINAINA.....5TH RESPONDENT

PATRICK WANYAMA.....6TH RESPONDENT

MARK MANKO.....7TH RESPONDENT

ABDIKADIR SHEIKH.....8TH RESPONDENT

R U L I N G

Following the senatorial election for Bomet County that was held on 4th March 2013 the 2nd Respondent was declared the winner after having got 115,931 votes. The Petitioner was one of the six (6) candidates in the contest and was declared to be the runner-up with 98,036 votes. He filed this petition to challenge the conduct of the election and the declaration of the result. He sought a declaration that the 2nd Respondent had not been validly elected as the senator for the County. The other prayers included the

one for the scrutiny and recount of all the votes cast in the election of the senate seat for the County. The petition was based on alleged electoral malpractices, irregularities, fraud, intimidation, bribery and coercion by the 2nd Respondent and the officials of the Independent Electoral and Boundaries Commission (1st and 3rd to 8th Respondents).

The Respondents filed responses denying the allegations and sought the dismissal of the petition with costs. Their contention was that the 2nd Respondent had been validly elected in an election that was conducted fairly and freely and whose result reflected the will of the electorate in Bomet County.

The court received oral evidence from the Petitioner and his witnesses and from the Respondents and their witnesses. The Petitioner then filed an application for the:-

- a. recount of all votes cast in all the polling stations, or, in the alternative, a partial recount in respect of some of the polling stations in Bomet Central, Sotik, Konoin, Chepalungu and Bomet East Constituencies; and
- b. scrutiny of the votes in all the polling stations indicated in (a).

The scrutiny was indicated to be limited to the items in Rule 33(4) of the Elections (*Parliamentary and County Elections*) Petition Rules, 2013 (*hereinafter referred to as "the Rules"*).

The application was based on the grounds that:-

- a. the voter turnout in the election was exaggerated with a view to inflating the figures in favour of some of the candidates especially the 2nd Respondent;
- b. the Respondents had fraudulently manipulated documents to conceal irregularities and electoral malpractices;
- c. the election was not free, fair or transparent;
- d. the Commission did not conduct the election in an impartial, neutral, efficient, accurate and accountable manner;
- e. there were manifest variations in the results announced and declared in terms of documentation and records; and
- f. unless the orders were granted the Petitioner would suffer irreparable loss and damage.

The application was also based on the sworn affidavit of the Petitioner.

The 2nd and 3rd Respondents each swore a replying affidavit to oppose the application.

Mr. Orina for the Petitioner, Mr. Yego for the 1st and 3rd to 8th Respondents and Mr. Lilan for the 2nd Respondent filed written submissions in which various authorities were referred to. I am grateful to them for this.

The jurisdiction to order the scrutiny of votes is conferred by Section 82(1) of the Elections Act, 2011 (*hereinafter referred to as the "the Act"*) in the following terms:

"82(1) An election court may on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine."

Rule 33(1) of the Rules reiterates the existence of such jurisdiction but goes further to indicate the

objective of scrutiny. It provides as follows:

“33(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.”

The question to be asked is, when is a vote valid? In other words, what is a valid vote? The Concise Oxford English Dictionary (10th Edition) defines “valid” as

“executed in compliance with the law; legally or officially acceptable.”

Black’s Law Dictionary (8th Edition) at page 1586 defines “valid” as

“Legally sufficient.”

At page 1607 the Dictionary deals with what is an “illegal vote” and what is a “legal vote” as follows:

“Illegal vote: A vote that does not count because it was cast by someone not entitled to vote or for an ineligible choice, or in a form or manner that does not comply with the applicable rules.

Legal Vote: a vote cast in the proper form and manner for an eligible choice by someone entitled to vote.”

Section 82(2) of the Act provides that:

“82(2) Where the votes at the trial by an election petition are scrutinized, only the following votes shall be struck off-

- a. the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;
- b. the vote of a person whose vote was procured by bribery, or treating or undue influence;
- c. the vote of a person who committed or procured the commission of personation at the election;
- d. the vote of a person proved to have voted in more than one constituency;
- e. the vote of a person who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
- f. the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.”

There is Rule 77(1) of the Elections (General) Regulations, 2012 (*hereinafter referred to as “the General Rules”*) made under the Act which indicates which vote is not valid and which, therefore, has to be excluded from the count by presiding officers. The Rule reads thus:

“77(1) At the counting of votes at an election, any ballot paper –

- a. which does not bear the security features determined by the Commission;
- b. on which votes are marked, or appears to be marked against the names of, more than one candidate;
- c. on which anything is written or so marked as to be uncertain for whom the vote has been cast;

- d. which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or
- e. is unmarked,

shall, subject to sub-regulation (2), be void and shall not be counted.”

It follows that the purpose of scrutiny is to identify votes by people who were ineligible to vote, and those who were eligible to vote and voted but their votes are void because they were not properly marked, were unmarked or had a different serial number. This is my understanding of Section 82(2) of the Act and Rule 77(1) of the General Rules. A petitioner seeking scrutiny must, therefore, bring himself within Section 82(2) or Rule 77, or both. He should in the application, identify, for the purpose of exclusion, votes by people who were not eligible to vote or votes which were included in the count but which the presiding officer should have rejected.

Lastly, under Rule 33(4) of the Rules the Petitioner should specify the polling stations in respect of which he seeks scrutiny, and the materials and documents that he wishes the court to scrutinize. Reasons have to be given why the stations should be subject of the scrutiny. Similarly, reasons should be given why the materials and documents in question should be scrutinized.

In *HARUN MEITAMEI LEMPAKA vs HON. LEMANKEN ARAMAT & OTHERS*, Election Petition No.2 of 2013 at Nakuru, Justice Emukule held that a Petitioner seeking scrutiny must lay basis founded on the provisions of Section 82(2) of the Act and Rule 33(4) of the Rules. I agree, but add that such a Petitioner should further lay a basis founded on Rule 77(1) of the General Rules.

The Petitioner also asked for the recount of all votes cast in the polling stations in the County. The counting of votes after the close of polling in a station is the work of the presiding officer, and the procedure is provided under Rules 76 to 79 of the General Rules. The declaration of the results is done in Form 35 for the senatorial election. Each presiding officer then takes the completed Form to the Constituency tallying centre where the returning officer aggregates the results from the polling stations and subsequently takes them to the County tallying centre where the County returning officer does the final tally and announces the results for the election. Tallying is provided for in Rules 83 to 85 of the General Rules.

To count, according to Concise Oxford English Dictionary, is to “*determine the total number of*” something. Basically, after the presiding officer has determined which are the valid votes he undertakes a manual exercise of counting such votes with a view to allocating to each candidate what he has got and, ultimately, to be able to declare who has the highest number of votes. Consequently, a Petitioner who seeks recount is claiming that the count was not properly done. He is saying that if the ballot boxes are opened and a recount done, the result will show that the person who was declared the winner did not win, or that he (the Petitioner) did in fact win.

The law is that a Petitioner who seeks scrutiny and recount has to demonstrate “*sufficient*” basis under Rule 33(2) of the Rules. Mr. Lilan and Mr. Yego submitted that “*sufficient*” basis means that the Petitioner has to discharge the burden required to prove a petition. That is, proof beyond balance of probability but below beyond reasonable doubt (*JOHO vs NYANGE & ANOTHER* [2008] 3KLR (EP)500). Mr. Orina’s contention was that such proof should be left for the petition; that the standard at this state is lower. I agree with Mr. Orina. Under Rule 33(2) of the Rules all that the petitioner is required to demonstrate for an order of scrutiny and recount to be granted is “*sufficient*” basis. Justice Majanja was of the same view in *RICHARD N. KALEMBE NDILE & ANOTHER vs DR. PATRICK MUSIMBA MWEU & OTHERS*, Election Petitions Nos. 2 and 7 (consolidated) at Machakos. I have in the foregoing indicated the provisions on which the basis has to be founded.

The other issue around which submissions were made was the margin between the 2nd Respondent and the Petitioner as far as the declared results were concerned. According to the declared results, the 2nd Respondent obtained 17,895 votes more than the Petitioner. I agree that, considering the total number of

valid votes cast and what was obtained by the respective candidates, this was a wide margin. What Justice Maraga (*as he then was*) observed in *JOHO vs NYANGE (Supra)* was that where the margins are narrow the courts have ordered scrutiny without necessarily seeking that a foundation (*a basis*) be laid. But where the margins are wide a foundation for scrutiny has to be laid. The Judge did not say that where the margin is wide then no scrutiny will be ordered. It only means that, the task of laying “sufficient” basis is made difficult the wider the margin.

What is the evidence in this case? This application was essentially brought under Section 82(1) of the Act and Rules 4(1), 32(1) and 33(1) of the Rules. Section 82(1) and Rule 33(1) only confer jurisdiction to the court to deal with the issue of scrutiny and recount. Rule 4 deals with the overriding objective of the Rules which, under Rule 5, calls on the court to seek to attain the just determination of the matter in an efficient, expeditious and timely manner. Rule 32(1) deals with a petition in which the only issue is the count and tallying of the votes. The Petitioner, in such a petition, may apply for an order to recount the votes or examine the tallies. In the instant petition, the Petitioner sought several prayers in which scrutiny and recount was one.

Regarding scrutiny of the votes, the Petitioner alleged in para.13(g) that on 3rd March 2013 at around 6.00 p.m. and 7.00 p.m., at Bingwa Location, Siongiroi Ward, agents of the 2nd Respondent were dishing out money to the voters to influence their decision. This was on the eve of voting. During evidence PW2 (RICHARD KIPLANGAT SIGEI), who was the Petitioner’s chief agent for Chepalungu Constituency, he testified that on 3rd March 2013 he found AUGUSTINE CHERUIYOT OF URP dishing out Ksh.200/= and Ksh.300/= notes to people. The witness also testified that on 4th March 2013 at about 4.00 p.m. he visited Kapamban polling station in Siongiroi Ward and found the agents of the 2nd Respondent campaigning for the Respondent on the queue. In the instant application bribery and undue influence were not some of the grounds on which scrutiny was sought. Yet, under Section 82(2) (b) a vote of a person whose vote was procured by bribery or undue influence should be struck off during scrutiny. If PW2 sought that his testimony be useful for the purpose of scrutiny, he had to identify the people to whom the money was given, or those who were influenced, and indicate in which polling stations they voted. Their votes would then be struck off during scrutiny. In short, he did not lay sufficient basis that would lead to scrutiny.

Other than PW2, the Petitioner and his other witnesses did not call any evidence under Section 82(2) of the Act. Neither was any evidence brought under Rule 77(1) of the General Rules to claim that there were void votes that the presiding officers included in the count.

The rest of the evidence of the Petitioner and his witnesses related to recount. It was alleged that at various polling stations the votes of the 2nd Respondent were overstated and those of the Petitioner were understated; stations where total votes allocated to candidates were more than the declared number of valid votes; stations where the votes cast were more than the registered voters; and where the postings on Form 36 did not agree with those on Forms 35. These allegations affected polling stations in Chepalungu, Bomet East, and Sotik Constituencies. The Petitioner further claimed that the Forms 35 and 36 that were supplied to him by the Commission in order to file this petition had entries that were different from the Forms that the Commission filed in court to comply with Rule 21 of the Rules. Then, there were complaints that the agents of the Petitioner were chased from some of the polling stations so as not to witness voting and/or counting; that in some stations the presiding officers allowed polling clerks and agents of the 2nd Respondent to mark ballot papers for voters. Lastly, there was claim that at the Chepalungu Constituency tallying centre at Olbutyo Secondary School, the returning officer announced the results of six (6) candidates which totalled 63,535 votes which were more than the registered voters which were 51,620. Regarding this alleged declaration, the Petitioner’s evidence was that the returning officer made a verbal declaration to those present, including chief agent JACKSON CHERUIYOT RONO of Kenya National Congress Party, but did not provide a formal declaration. When, however, the returning officer went to the County tallying centre he made a different declaration which was now within the number of registered voters. The returning officer KENNEDY ONCHAYO (DW1) denied that he made any such verbal declaration. He testified that the results he tallied in Form 36 showed that the valid votes were 46,564 out of the registered voters of 51,267.

Generally, the Respondents denied the allegations contained in the testimonies and affidavits of the Petitioner and his witnesses. The 3rd Respondent and his returning officers admitted that there were some errors and disparities in the entries in Forms 35 and 36, and that there were some tallying errors. However, their case was that the errors and disparities were not substantial. The 3rd Respondent testified that, overall, for Chepalungu Constituency the Petitioner had been added 495 votes which he reduced and the 2nd Respondent had been given 453 votes which he reduced. In Sotik Constituency, the Petitioner had been given 239 votes less and the 2nd Respondent had been given 189 votes less. He adjusted the votes during tallying. In total, he stated, the errors and disparities did not reach 1000 votes and affected both candidates. He blamed the errors and disparities to human error and fatigue, rather than to fraud or manipulation.

I consider that the Petitioner has not alleged that the impact of the errors and disparities was more than what the Respondents admitted. He did not testify that when all the errors and disparities are considered they were such that would materially influence the declared results to his favour, or at all.

All that I wish to say at this point is that all the documents, all the affidavits and all the evidence shall be subjected to critical scrutiny and consideration in determining the petition. At this stage, and for the purposes of this application, I do, however, find that sufficient reasons have not been given to allow for the order for the scrutiny and/or recount of the valid votes cast, counted and tallied for Bomet County's senatorial seat.

The result is that the Petitioner's application dated 24th June 2013 and filed on the same day is dismissed. I ask that costs do abide the outcome of the petition.

Ruling read and delivered in open court this 10th day of July 2013 at Kericho

A. O. MUCHELULE

JUDGE