



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
ELECTION PETITION NO. 9 OF 2013

JONAS MISTO VINCENT KUKO PETITIONER

VERSUS

DAVID WAFULA WEKESA 1ST RESPONDENT

FARAH ABDI IBRAHIM 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

**BOUNDARIES COMMISSION 3RD
RESPONDENT**

[CONSOLIDATED WITH ELECTION PETITION NO. 7 OF 2013]

OMARI WAFULA ASMAN..... PETITIONER

VERSUS

DAVID WAFULA WEKESA1ST RESPONDENT

IBRAHIM FARAHI.....2ND RESPONDENT

INDEPENDENT ELECTORAL &

**BOUNDARIES COMMISSION (RO))..... 3RD
RESPONDENT**

RULING

1. This ruling arises out of an application filed at the Kitale High Court Election Petition 9 of 2013. The applicant, Jonas Misto Vincent Kuko filed the application under Section 80 of the Elections Act, Rules 4 and 32 of the Elections (Parliamentary and County Elections) Petition Rules and all other enabling provisions of the law and seeks the following orders;
 - i. That this Honorable Court be pleased to Order a recount and re- tallying of the ballot papers cast at the election of 4/3/2013 in all the polling stations comprising Saboti Constituency;

ii. That costs be provided for.

2. The application was supported by the Affidavit of the Applicant sworn on 22/6/2013, and the grounds on face of the application are as follows;

a) that the re-counting and re-tallying of the votes cast on 4/3/2013 was materially erroneous and the said errors definitely affected the election results.

b) that the margin between the petitioner/applicant and the 1st Respondent were 433, and the 2nd and 3rd Respondents in their response have reduced the margin to 266;

c) that the re-count and re-tallying shall lead to an expeditious disposal of the petition in terms with the overriding objectives of the election petition rules;

d) that the errors complained of regarding the entries in forms 35 and 36 have been admitted.

e) that the recount and re-tallying shall enable the court to ascertain the integrity of the results that were announced by the 3rd Respondent.

f) that the Respondents shall not be prejudiced.

3. The Applicant's Supporting Affidavit reiterated the grounds and deposed the basis for a recount and re-tallying in paragraphs 10-15 as follows;

a) That form 35 for stream 5, Trans Nzoia Primary School polling station (No. 033) shows that I garnered 74 votes yet form 36 shows only 5 votes. None of the agents signed that form 35.

b) That form 35 for stream 3, in Trans Nzoia Primary School polling station (No. 033) shows that I garnered 97 votes, yet form 36 has no reflection of the said votes.

c) That form 36 has duplicated results for stream 3 in Trans Nzoia Primary School polling station (No. 033) while the results for stream 3 in the same polling station were left out.

d) That form 35 for Town Hall polling station (No. 022), stream 2, shows that I garnered 77 votes, yet form 36 shows only 4 votes.

e) That form 35 for Town Hall polling station (No. 022) Stream 5 shows that the total votes cast were 490 with 30 rejected votes and yet the valid votes cast are shown as 450 instead of 460, leaving 10 votes unaccounted for.

f) That form 35 for Matisi Polling Station (No. 18) stream A, 3, 4 and 5 show alterations/cancellations in the results entered and only one was countersigned. None of the agents countersigned the alterations.

g) that the samples shown go to demonstrate that the results declared from form 36 are not credible and only a recount and re-tallying of the votes cast can really credibly tell who won the parliamentary election for Saboti Constituency

4. In opposing the application, David Wafula Wekesa, 1st Respondent in Petition 9 of 2013, filed a Replying Affidavit sworn on 1/7/2013 in which he deposes *inter alia*-

a) That I am advised by Counsel, which advice I verily believe to be true that the Application as filed is misconceived, incompetent, the same does not lie

in law and is an abuse of process.

b) That the counting and tallying of the votes cast was duly undertaken as by law prescribed and the discrepancies, if at all, alluded to by the Petitioner would have had, no effect on the election result.

c) The plea for a recount and re-tally is unsupported and not lawfully feasible; given that the Petitioner's duly authorized agents duly signed the form 35's upon successful counting of the votes cast, without indicating any displeasure with the said process, or noting any breach of the Elections Act, 2011 and the rules and regulations made there under. Further the same is being sought for the ulterior purpose of fishing for grounds to support an ailing petition, and to avoid the rigmaroles of a trial, so as to obtain summary judgment on the petition

5. The application was also opposed by Farah Abdi Ibrahim, the 2nd Respondent and the Independent Electoral and Boundaries Commission (3rd Respondent) through the Replying Affidavit sworn by the 2nd Respondent on 28/6/2013. He deponed that;

a) That the said Application is premature and lacking in merit.

b) That indeed the counting and tallying of votes cast in Saboti Constituency was accurate, transparent and verifiable and the results declared reflected the wishes of the people of Saboti Constituency.

c) That indeed any tallying errors if any, arose from human flaws and were not premeditated or skewed against the Petitioner or any other candidate.

d) That any tallying errors were duly detected and duly corrected. In any event the disparities, if any, did not affect the final outcome.

e) That the Petitioner's agents were granted opportunity for recount of votes up to three times in every polling station as required by the elections regulations. The Application is therefore superfluous and is an afterthought.

f) That having looked at the petition, the Petitioner did not indicate in his petition that he only requires a determination on recount and re-tallying of the votes cast in Saboti Constituency.

g) That the Petitioner's application is overtaken by events since in my affidavit in response to the petition I have challenged the results posted by the Petitioner and have posted the right results which duly addressed the Petitioner's concerns hence rendering the present application superfluous.

6. Counsels for the Applicant and the Respondents made their oral submission on 9/7/2013. Before the submissions commenced this court delivered its ruling on the consolidation of Kitale High Court Election Petition number 7 of 2013 with Election Petition 9 of 2013. The court cautioned the Petitioner that he is not obliged to participate in the instant application. Mr. Kraidu, Counsel for the Petitioner in Election Petition 7 of 2013 elected to participate in the proceedings. The Petitioner in Election Petition number 7 of 2013 had filed a Replying Affidavit-under protest sworn by Asman Omari Wafula (Petitioner in Petition 7 of 2013) in which he deponed as follows;

a) That the Orders sought herein shall prejudice him as it will pre-empt his petition.

b) That the Orders are sought in vain because the Applicant's complaints of excluded votes were fully addressed by the 2nd and 3rd Respondents by carrying out a re-tally.

c) That the Application is mere fishing expedition which the Court ought to disallow.

APPLICANT'S SUBMISSIONS

7. Learned counsel, Mr. Kiarie, submitted on behalf of the Applicant. He begun by informing the Court that the Petitioner wishes to withdraw and abandon the prayer for scrutiny of the votes cast. The only other prayer in the petition is for a recount and re-tallying of the votes cast in Saboti constituency.
8. It was his submission that the counting and tallying of the votes was erroneous and it affected the end result. Counsel submitted that in Trans Nzoia primary School polling station, stream 5 the results transposed from form 35 to form 36 which is used to declare the final results were undercast by 71 votes; That the results is Trans Nzoia Primary School, stream B are duplicated in form 36; that the double entry of stream B led to the exclusion of the results of stream 3 in the same polling station; that the results entered in form 36 for stream 2 at Town Hall polling station was undercast by 73 votes and in stream 5 there are 10 unaccounted votes. In Matisi polling station form 35 has alterations and cancellations and the presiding officer did not countersign against the amendments. It was the Learned Counsel's view that those results are therefore not credible.
9. Mr. Kiarie further submitted that the re-tallying conducted by the 2nd and 3rd Respondents was done after the declaration and gazettment of the results. The re-tallying reduced the margin between the 1st Respondent and the Applicant to 266 votes. Despite the re-tallying, it was counsel's submission that the errors ran across all the polling stations and thus necessary to order a recount to re-dress the human flaws. As such, this court shall establish the integrity of results announced by the 2nd and 3rd Respondents.
10. Learned Counsel for the Applicant in closing his submission submitted that it will be in the interest of justice if a recount in all the polling stations is ordered. He relied on the case of **Kalembe Ndile** Election Petition No. 1 of 2013 where the court observed that the interest of justice would be served if a recount is ordered since mistakes whether deliberate or not had been admitted by the Respondents.
11. In opposing the application, Mr. Wandabwa submitted that there has not been a formal application to amend the petition. As such the lawful petition bears a prayer for scrutiny of the votes. According to counsel election petitions are not civil proceedings where parties can whimsically drop or abandon prayers. This therefore dis-entitles the Applicant from relying on Rule 32 which would allow a party to pursue for an Order of recount.
12. It was Counsel's view that an absurdity may result if both the Applicant's and the Petitioner's Petition No.7 succeeded in putting forward their respective cases. On a re-count, the Applicant may be declared that he won the election and on the other hand the Petitioner in petition 7 succeeds in nullifying the whole election.
13. In response to the disparities, counsel submitted that the petitioner has not questioned the votes entered in form 35 but the transposition of the said votes to form 36. The Applicant had therefore not laid a basis for a recount of all the votes in Saboti constituency.
14. On the alterations and cancellation of form 35, it was Counsel's submission that the Applicant did not adduce any material when the alleged alteration occurred. In his view, it could have occurred after the agents agreed and duly signed at the back of form 35's.
15. Counsel relied on the case of **Rashad Hamid Ahmed Amana V. IEBC and 2 Others**, Election Petition 6 of 2013 to submit that the Applicant had not established sufficient foundation for a recount. Firstly, there was no sufficient material produced to show irregularity; That the margin between the applicant was not narrow. On this ground, he referred to the decision in **Philip Ogutu V. IEBC and 2 Others**, Election Petition 1 of 2013 where courts stated the margins to be considered. Thirdly, the court should not afford the Applicant a fishing expedition; Fourthly, that scrutiny may be ordered after the Applicant has adduced evidence so as to allow the Respondent to test the evidence; Lastly, that a recount can only be in specific polling stations where basis is laid.

2ND AND 3RD RESPONDENT'S SUBMISSIONS

16. Mr. Yego, Learned counsel for the 2nd and 3rd Respondents opposed the application and

- associated himself with the submissions of Mr. Wandabwa.
17. Mr. Yego submitted that the Applicant had not prayed for recount and re-tallying as contemplated in Rule 32 of the Rules. The Applicant did not specify in the petition that he did not require any other determination except a recount or examination of the tallies. He therefore urged the court to find that the application has no foundation in the petition.
 18. Counsel also submitted that the Applicant had not laid sufficient basis to warrant the orders sought. The concerns with respect to the three polling stations had been adequately remedied by the re-tallying. It was counsel's view therefore that the basis of the application was overtaken by event and the Applicant had not challenged the re-tallied results.
 19. The learned Counsel submitted that under Regulation 80, the agents were given an opportunity to count the votes up to three times. He therefore urged the court to find that the Application is an afterthought and incompetent because the re-tallied results had not been challenged.
 20. Finally counsel relied on the case of **Harun Lempaka V. Lemanken Aramat**, Election Petition 2 of 2013 where the margin was 400 votes. The court found the margin to be wide and there was insufficient material placed before it to warrant a recount. Counsel urged the court to be persuaded by the decision and to dismiss the application lacks merits.

PETITIONER IN PETITION 7 SUBMISSIONS

21. Mr. Kraido, learned counsel for the petitioner in petition number 7, opposed the application. He associated himself with the submissions of Mr. Wandabwa and Mr. Yego.
22. He reiterated that the Applicant had not laid sufficient basis to warrant the Orders. It was his submission that the Applicant needed to call *viva voce* evidence and to file sufficient evidence that the counting errors was in all the 51 polling stations. According to counsel, errors in only three polling stations was not sufficient foundation to seek a recount in all the polling stations. This would amount to the court assisting the Applicant in a fishing expedition.

APPLICANT'S REJOINDER

23. As to whether the application is competently before this court. Mr. Kiarie submitted that there was no requirement to file a formal application to seek withdrawal of the prayer for scrutiny. A formal application is only required when withdrawing the full petition.
24. He further submitted that the purpose of Rule 32 which was introduced under the new rules was to serve the interest of justice. According to counsel this was such a case where it would be in the interest of justice to order a recount and re-tallying of the votes cast.

ISSUES FOR DETERMINATION

25. Taking into consideration all the submissions made by the respective Counsel herein this Court finds the following issues for determination;
 - i) Whether a sufficient basis has been laid to warrant the orders sought:
 - ii) Anomalies/Irregularities/discrepancies
 - iii) Two sets of Forms 36
 - iv) Margins
 - v) Costs

ANALYSIS

26. The petitioner contends that there were discrepancies and irregularities in the tallying process in Forms 35 and 36 and gave examples in polling stations hereunder namely;
 - i. Trans-Nzoia Primary School –Stream 5

- ii. Trans-Nzoia Primary School - Stream 3
- iii. Trans-Nzoia Primary School - Stream B
- iv. Town Hall - Stream 2
- v. Matisi Primary School - Steam A
- vi. Matisi Primary School - Steam 3
- vii. Matisi Primary School - Steam 4
- viii. Matisi Primary School - Steam 5

27. This court observes upon perusal of Forms 35 and 36 for the above polling stations that there are indeed discrepancies in the form of deletions, transposing of votes, alterations, overwriting, inconsistency in figures and lack of signatures on election related documents. The Petitioner contends that these irregularities vitiates the integrity of the tallying and re-tallying process and is therefore demanding a recount in all the fifty-one (51) polling stations.
28. The errors anomalies and disparities are admitted by the 2nd and 3rd Respondents in its/their affidavits and that upon detection of the errors, re-tallying as a remedial measure was undertaken and corrections were done and a second Form 36 was generated leading to the existence of two (2) sets of Form 36s.
29. The first Form 36 shows a margin of 433 between the Petitioner's votes and that of the 1st Respondent. This Form 36 it was submitted was used to declare the winner and was utilized in the gazettelement process.
30. On the second Form 36 the 2nd and 3rd Respondents transposed and made corrections and it shows a margin of 266 between the Petitioner's votes and that of the 1st Respondent.
31. This court states that the existence of these two Form 36s runs contrary to the provisions of Regulation 83 of the Election (General) Regulations 2012. Reference is made to the case of **Rishad Amana V. IEBC and another**, [2013] eKLR where it was held that;

‘.....Regulation 83 of the Election (General) Regulations 2012 does not provide for a situation where there can be generated two (2) Form 36s.....’

33. From the affidavit evidence and the submissions made it is not clear or apparent to this court as to who initiated the remedial measures undertaken in the form of the re-tallying process that generated the second Form 36 and whether the Petitioner and his agents were privy to the re-tallying process as provided by Regulation 85 of the aforementioned Regulations 2012 which provides for concerned persons to be present.
34. Questions abound as to the anomalies/irregularities/discrepancies as to whether they were deliberate, premeditated or were indeed human errors. The legality of the second re-tallying of the polling station results needs to be established and questions also arise as to whether the Petitioner and his agents were party to this exercise. The court finds that there is need for all these issues to be canvassed in depth and this court humbly opines that there is need for *viva voce* evidence to be adduced and tested so as determine the legality and credibility of this particular document and the process and this can only be done at the trial.
35. On the issue of margins this court opines that there are more than two (2) candidates and there is need to take into consideration all the margins between all the candidates. This court is persuaded by the recent case of **Harun Meitamei Lempaka V. IEBC and 2 others Election Petition No.2 of 2013** where Emukule J made the following observation;

“..... A relevant factor to consider is the number of contestants.....Where there are more than two candidates, it is absolutely essential to consider the margin between all the candidates.....”

36. In this instance and at this juncture, margins cannot be a good thresh-hold for a prayer for recount without supporting oral evidence, reason being that there are currently in existence two sets of results and two sets of margins for all the candidates. Particular emphasis is made to the two margins relating to the Petitioner's votes and the 1st Respondents, that is 433 and 266 and the court reiterates that oral evidence needs to be adduced to substantiate and establish the credibility

- of the results, particularly those that were transposed.
37. At this stage this court only has affidavit evidence to go by and the court concurs with the Respondent's and the Petitioner's (Petition No.7/2013) submissions that there is need for oral evidence to be adduced and tested.
38. The prayer for scrutiny by way of recount may be revisited later and at any stage of the hearing and upon oral evidence having been adduced. The Court makes reference to the provisions of **Section 82 (1)** of the **Elections Act** which provides as follows;

“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.”

39. The above section confers this court with jurisdiction, either on its own motion (*suo moto*) or upon the application of any party to order for a scrutiny at any stage of the proceedings but before judgment is pronounced. This court is also guided by the decision in **Raila Odinga V. Uhuru Kenyatta, Petition No 5 of 2013** where the Supreme Court ordered for a partial scrutiny of Forms 34 to determine the results contained therein were reflected in the final tally.

FINDINGS

40. For the reasons stated above this court finds that the prayer for recount is found to be premature and this issue may be revisited later and at any stage of the trial upon oral evidence having been adduced.

41. The issue of costs shall be granted consequential to the event.

CONCLUSION

1. The prayer for recount is hereby deferred.
2. The costs shall follow the event.

It is so Ordered.

Dated, Signed and Delivered at Kitale this 16th day of July, 2013.

A. MSHILA

JUDGE.