



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELECTION PETITION NO. 3 OF 2013

ERNEST OGESI KIVALI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

GODFREY ENGO (RETURNING OFFICER).....2ND RESPONDENT

YUSUF KIFUMA CHANZU.....3RD RESPONDENT

J U D G M E N T

Introduction:

- 1). The petition dated 10-4-2013 herein prays for the following reliefs:
 1. Scrutiny of votes in the parliamentary elections for Vihiga constituency.
 2. Scrutiny of counterfoils of the votes cast and the manual register.
 3. Recount of ballot paper.
 4. The election held on 4-3-2013 be declared null and void.
 5. That the 3rd respondent was not declared as the member of the National Assembly for Vihiga constituency.

- 2). When this matter came up for pre trial conference the following issues were singled out by the parties:
 - a. Whether the electoral processes was valid and a valid declaration of the outcome of the election of member of Vihiga constituency was made.
 - b. Whether the 3rd respondent was validly and duly elected as a member of the National Assembly for Vihiga constituency.
 - c. Whether the people of Vihiga sovereign power of vote and the fate of that decision.
 - d. What consequential order would the court issue?
 - e. Who is to bear the costs of this petition?
 - f. Whether the persons who voted in Vihiga constituency for the position of member of National Assembly exercised their franchise validly, legitimately, bonafide and generally in accordance with the law if viewed against the scrutiny of the manual register and the final results as delivered by the 1st and 2nd respondents.

3). The petitioner called a total number of 14 witnesses whereas the 1st and 2nd respondents called 9 witnesses. The 3rd respondent testified and did not call any witness.

Petitioner's case:

4). It was the petitioner's case that the said Vihiga constituency parliamentary elections were not done in accordance with the Constitution, the provisions of the Elections Act and the Regulations thereunder.

5). Several irregularities raised by the petitioner include counting and tallying of votes which according to him were inaccurate. He argued that he lost some of his votes whereas in other situations those of the 3rd respondent were bloated.

6). He further claimed that Form 36 was tampered with and that the same contained glaring entries which were made in favour of the 3rd respondent. He contended that the 2nd respondent tampered with the results from various polling stations such as Kidundu primary school polling station No. 1, Vigena primary school polling station No. 2 and Kegendirova polling station No. 35. According to the petitioner his agents in most of the stations were chased away or were altogether allowed but late.

7). The petitioner equally raised bribery allegation against the respondent on the material day. He accused the petitioner as well as his supporters of open bribery and inducement of voters to vote for him.

He accused the 3rd respondent of using violence and intimidation during the campaign as well as during the election day. He particularly singled out violence and intimidation at Chango primary school polling station No. 18.

He accused the 1st respondent equally of not ensuring adequate security for voters and agents during the election day.

1st and 2nd respondents' case:

8). They totally denied that there were any irregularities during the voting process. They argued that no agents of any candidate were chased or turned away from the polling station as long as they had the requisite documents expected of them.

9). It was their case that voting went on peacefully and no person who desired to vote was turned away on account of closure of the polling station before time.

They contended that all the petitioner's agents in fact signed form 35 contrary to the allegations by the petitioner and that at Vigena primary school the petitioner himself signed the said forms contrary to his assertion.

10). The respondents conceded that indeed there were some anomalies in filling form 35 and 36 but the same did not materially affect the outcome of the election. In fact they were so minor that they did not go to the root of the election.

3rd respondent's case:

11). The 3rd respondent did testify and did not call any witnesses. He alleged that he did not have any witnesses. He alleged that he did not have any agent either and that any agent available were chosen by his party UDF in which he contested the elections on.

12). He denied the allegation of voter bribery as well as intimidation and violence as alleged by the petitioner. As far as he was concerned he won the elections so convincingly that put in total his votes were over and above that of the petitioner and other contestants.

Analysis and Determination:

13). As earlier alluded above the petitioner's complaint was that his agents at Vagina and Lyamagale polling stations were denied access by the 1st respondent.

Regulation 62 of the Elections (General) Regulations of 2012 makes a provision for those persons who can be admitted to the polling station. The same state at sub-regulation (1) (c) that:

“the presiding officer shall regulate the number of voters to be admitted to the polling station at the same time and may exclude all other persons except authorized agents”.

14). But who is an authorized agent? According to DW6 the respondent's returning officer, the agent ought to have had a letter of appointment, an Oath of Secrecy and a declaration. If one did not have this items then they were not supposed to be allowed at the polling station.

15). **PW3 Fanuel Ombima**, was the petitioner's agent at Lyamagale polling station. He stated that on reaching the polling station he was denied entry and had to leave. During cross examination however it became apparent that he lacked the Oath of Secrecy which was one of the cardinal documents.

16). **PW5 Simon Alunga Mudomu**, stated that he was turned away by the presiding officer when he first went to the polling room at around 6 a.m and was only allowed in at 11 a.m.

17). In response to this allegation **DW1 Lydia Eunice Amara** the presiding officer contended that no agent was denied entry as long as he presented the right papers. She stated that PW5 came to the station at around 10 a.m and on presentation of the letter of appointment and the Oath of Secrecy he was immediately allowed into the room. She vehemently maintained that what was required was not the question of which party an agent represented but the requisite documents.

18). The petitioner at cross examination by Mr. Magare counsel for the 1st and 2nd respondents stated that Lyamagale was a clear case and at Vagina polling station his agent was allowed and as such he had no complaints concerning the two stations.

19). It is further evident from form 35 that the agent indeed signed the same meaning therefore that he fully participated in the whole voting process and the claim that he was denied entry is unfounded.

20). There was also a claim by the petitioner that his voters at Chango polling station were intimidated and that he and his wife were harassed. He said that the harassment occurred on the night before the election date when his vehicle was sandwiched between two vehicles which belonged to the 3rd respondent. He went on to state that at Mahanga Medical Centre the same vehicle chased his vehicles and one of his supporters was stopped while taking his wife to hospital. These incidences according to him were reported at police station. He did not produce any evidence or records from the police station.

21). Equally, the petitioner did not give the registration numbers of the vehicles he alleged belonged to the 3rd respondent. When cross examined he admitted that he was not sure if the vehicles that sandwiched his belonged to the 3rd respondent. Of great significance too is that neither his wife nor the driver were called to testify. His supporters did not also give evidence on the alleged acts of violence. I do not therefore think that this ground was well established to warrant this court's consideration.

22). There was also allegations of voter bribery in several polling station. Such as Inyanza, Vumale, Vagina and Chambale.

In his testimony, the petitioner stated that on being informed about voter bribery at Inyanza, he instructed his chief campaigner to bring to the attention of the presiding officer. He went on to say that at Inyanza and Vumale polling stations there were arrests made and the culprits were handed over to the police.

On this score however form 35 was signed by the petitioner and no comment on bribery was ever made. On cross examination by the counsel for the 1st and 2nd respondent the petitioner stated:

“They were unable to bribe at Inyanza. We stopped them from bribing. I do not have the affidavit of those bribed but those who were bribing. I did not see anybody bribing”.

This line of testimony obviously creates some doubt whether indeed the petitioner was sure of his evidence.

23). PW6 Beatrice Cheredi Idaki, testified that she spotted two women, namely Janita Nandi and Janet Mbudiva dishing out money. She alleged that the money they were dishing out was given to them by a county representative of Magoma.

When cross examined she stated that the two were agents of Chanzu, the 3rd respondent and they were at the polling hall. On checking the electronic register however, no such names existed or were registered as voters.

24). The offence of bribery was well articulated in the Halsburys Laws of England 4th Edition Vol 15 at paragraph 780 which states:

“One proof of a single act of bribery or with the knowledge of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate an election. The judges are not at liberty to weigh its importance nor can they allow any excuse. Whatever the circumstances may be, as such they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have bribed is not conclusive (Emphasize Mine).”

25). From my analysis this alleged bribery allegation is hearsay and to say the least based on suspicion. There is not a single case of bribery where the petitioner has given unequivocal proof of his allegations.

26). There was also an allegation of unaccompanied ballot boxes by PW 13 one Abubakar Wandala Suleiman on 5-3-2013 from Kidundu polling station. On cross examination he stated that it was dark and he was only able to see the driver and one other person. The ballot boxes were raised up to the window of the bus and it was not possible to see who was on the other side of the bus.

27). The presiding officer for Kidundu polling station testified and stated that they used the bus for Vagina school to transport the ballot boxes to the tallying centre and they left at around 6 a.m in the morning in the company of other clerks.

I do not think that this allegation holds water. The fact that he could not see the occupants of the bus did not necessarily mean that it was unaccompanied.

28). The petitioner's witnesses equally alleged that strangers were allowed to vote at some polling station. At Chambale polling station for example it is alleged that one stranger voted three times and he also went ahead to vote twice at Vumale polling station.

29). However, on cross examination **PW 7 Alice Havi**, stated that she did not see the stranger voting but that he was informed that the stranger had voted thrice. This evidence to say the least was unsubstantiated and one can conclude the same to be hearsay.

30). As regards tallying of the votes the petitioner alleged that there were several mistakes in form 36. He said that at Womulalu polling station the valid votes cast were 335 whereas the shared votes were 337 showing a difference of two votes.

31). At Vagina polling station the votes cast were 598 whereas the votes shared were 526 showing a difference of 72 votes. At Madzugi polling station total votes cast were 327 whereas the votes shared were 326 giving a difference of one vote. At Kegendirova polling station the votes cast were 230 but the votes shared were 330 giving an extra 100 votes. At Chavugami polling station the votes cast were 364

whereas the votes shared were 366 giving an extra two votes.

It is noteworthy that the petitioner seemed to have confused the valid votes cast with the total votes cast which he has used interchangeably.

32). There were some mistakes on form 36 which were occasioned when transferring data from form 35. At Womulalu polling station, form 35 shows that the 3rd respondent garnered 274 but what was entered in the form 36 was 272 creating a difference of two votes.

33). At Vihiga stream 1 polling station form 35 showed that Evans Ketanyi garnered 24 votes but the votes transferred to form 36 was 94 thus creating a difference of 70 votes.

34). At Madzugi polling station there was difference of one vote added to Kennedy Masero. At Kegendirova polling station the 3rd respondent was denied 100 votes and at Chavugumi there was a difference of two votes.

35). At Lyamagale, the petitioner claims that he got 88 votes while what was indicated in form 36 was one vote. Several witnesses stated that they heard the presiding officer announcing 88 votes as belonging to the petitioner. Forms 35 and 36 indicated that he got one vote at Lyamagale.

36). With the above differences can one safely conclude that it fundamentally impugned the elections?

Section 83 of the Election Act provides that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election”.

37). Based therefore on the evidence as adduced by the petitioner is it sufficient to nullify the election?

38). In Mbowe -VS- Eliu foo the standard of proof was said to be proof to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt. The burden of proof lies on the petitioner.

39). In the Nigerian case of Buhari -VS- Obasanjo [2005] LLR 7K, the supreme court stated:

“The burden is on the petitioner to prove that non-compliance has not only taken place but also has substantially affected the result...there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election”.

40). In the Raila Odinga -VS- I.E.B.C & Others Petition No. 5 of 2013, the supreme court on the same point of burden of proof had this to say:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies *“Omria praesumuntur vite et soleminter esse acta”*. Acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authorities departures from the prescription of the law”.

41). The above authority clearly indicate that an election will not be declared void for non-compliance with the written law if it was conducted according to the laid down legal principle. The now often quoted case of Morgan & Others -VS- Simpson & Another [1974] 2 ALL ER 722 at 728 clearly laid down

this principles. Lord Denning stated succinctly that:

“Collating all these cases together, I suggest that the law can be stated in these propositions (i) if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not, that is shown by the Hackney case, where 2 out of 19 polling stations were closed all day and 5000 voters were unable to vote (2) if the election was so conducted that it was in accordance with the law as to elections it is not vitiated by a breach of the rules or mistake at the poll provided that it did not affect the result of the elections. That is shown by the Islington case where 14 ballot papers were issued after 8 p.m (3) But, even if the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake as to polls and it did affect the result, then the election is vitiated”.

42). I have had a close scrutiny of forms 35 and the same reveal that they were well filed and they were authenticated by the agents signatures.

43). At Lyamagale, the petitioner and his witnesses stated that what was announced at the polling station was 88 votes for the petitioner and not one as was indicated in form 35. Should the figure be changed to reflect what the petitioner heard even if it was wrong?

44). At Chavugami, the presiding officer admitted that it was not possible to establish whether the figure garnered by one of the candidates was 219 or 217 and so they chose the lesser figure thereby creating a difference of two votes on the valid votes cast. It is equally on record that other errors were admitted by the 1st and 2nd respondents as genuine mistakes.

45). On this question of figures and maths Musinga J (as he then was) had this to say in the case of Manson Nyamwea -VS- James Magara & 2 Others [2009]e KLR

“.....it must be borne in mind that in auditing an electoral process to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just the question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed a favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official”.

46). From the above decision it is evident that it is not the results that matter but the trail left behind by the paper work. Form 35 were well filed and where there were alterations the same were countersigned.

47.) The only errors seemed to have been transfer figures to form 36. I do not think that such errors which were admitted by the 1st and 2nd respondents interfered with the election results or were of such significance that fundamentally affected the results.

48). Consequently, and bringing this petition into conclusion I do not think that the malpractices pointed out by the petitioner were so grave that it would vitiate the outcome of the results. I am satisfied that the election broadly speaking reflected the wishes of the people of Vihiga constituency. No cogent evidence adduced by the petitioner and his witness could stand the standard of proof alluded earlier on.

49). The petition is hereby dismissed with cost to the respondents. Pursuit to the provisions of Rule 36 of the Elections (Parliamentary and County) Elections Petitions Rules 2013 the said costs shall be taxed by the taxing master and should not exceed a sum of Kenya shillings One Million Five Hundred Thousands (Kshs. 1,500,000/=).

Accordingly.

Dated, signed and delivered at Kisumu this 3rd day of September, 2013.

H.K.

JUDGE

Amondi for petitioner

Kamau for 3rd respondent

Magare for 1st and 2nd respondents

HKC/va

CHEMITEI