

point. The common thread that runs through all of them is that there is
scrutiny is ordered. Nor is there one that scrutiny will always be ordered
whether or not a basis has been laid. However, where the vote margins
are narrow like in Onamu – vs – Maiti Election Petition No 2 of 1983
where the margin was only 30, Kirwa – vs – Muliro Election Petition No
Joho v Nyange & another (No 2)
(Maraga J)
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13 of 1988 where the margin was only 7 and Hemed Said – vs – Ibrahim
Mwaruwa Election Petition No 1 of 1983 where the margin was only 62,
scrutiny was ordered without laying any foundation.

Scrutiny has also been ordered without laying foundations even where the
margins are wide on the ground that a recount may lead to an expeditious
disposal of the petition. Burundi Nabwera – vs – Joshua Angatia Election
Petition No 4 of 1983 and Said – vs – Maitha & another Election Petition
No 1 of 1998 where the margins were 521 and 534 respectively as cases
on the point.

I concur with the holding in Onamu – vs – Maiti Election Petition No
2 of 1983 that where the margin is very narrow justice will be done and
seen to be done if scrutiny and recount is ordered right from the word go.
However, where the margins are high I am unable to agree that scrutiny
should be ordered without laying a foundation simply to expeditiously
dispose of petitions and save the time which would otherwise have been
spent on full hearing. For my part I will not agree that expediency should
be the sole or main factor in ordering scrutiny. Courts are there to hear
cases including election petitions and should not resort to short cuts for
their own expediency.

The cases cited herein above were prior to the year 2002 when counting
was done in one counting hall for each constituency and sometimes went
on throughout the night for even upto two or three days. In such cases
one would expect mistakes arising from sheer fatigue. In this petition that
was not the case. As we all know counting was done in polling stations

cannot be ruled out they are, in my view, minimal.

With a margin of 1061 votes in this petition I am not persuaded that an
order of scrutiny and recount should be made before a foundation is laid.
I therefore decline to grant the order for scrutiny at this stage and order
that the petitioner can renew the application after adducing evidence and
laying a foundation. Costs in cause.