



**Mange'ra v Ondari & 2 others (Election Petition Appeal E002 & E005 of 2023
(Consolidated)) [2023] KEHC 19900 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION APPEAL E002 & E005 OF 2023 (CONSOLIDATED)**

HK CHEMITEI, J

JULY 6, 2023

BETWEEN

JOSIAH OBEGI MANGE'RA APPELLANT

AND

JOSEPH NYARANG'O ONDARI 1ST RESPONDENT

THE RETURNING OFFICER, BORABU CONSTITUENCY . 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

*(Being an appeal from the whole Judgment and Decree of Principal Magistrate
at Keroka Hon. B.M Kimtai, issued on the 20th January 2023 in the
Keroka Principal Magistrate's Court in Election Petition No. E002 of 2022)*

JUDGMENT

1. This appeal rises from the Judgment rendered by Hon. B.M Kimtai on 20th January 2023 whereby the court nullified the election of the appellant as the Member of County Assembly, Esise Ward in Nyamira County. In his Judgment the learned trial magistrate found that the Appellant had not been validly elected as Member of County Assembly of Esise Ward. He allowed the Petition and nullified the said election.
2. The Appellant was aggrieved by the said judgment and filed the appeal herein. The grounds of the appeal are as follows:
 - a. The learned trial magistrate erred in law and fact by nullifying the election of the Appellant as a member of the Nyamira County Assembly, Esise Ward, on un-pleaded and unproved matters.



- b. The learned trial magistrate erred in law and misdirecting himself on the threshold of evidence required to nullify an election.
- c. The learned trial magistrate erred in law and in fact by nullifying the Appellant's election after finding and holding that the Petitioner had not proved his case as pleaded in the Petition.
- d. The learned trial magistrate erred in law and fact and misdirected himself thus misapplying the effect of the word 'shall' as used in Regulation 81 of the Elections (Parliamentary & County Elections petitions) Rules, 2017 as the sole ground for nullifying the Appellant's election as a member of the Nyamira County Assembly, Esise Ward.
- e. The learned trial magistrate erred in law by making a finding that the missing counterfoils from the ballot boxes of Ensoko Primary School stream two and some at Nyansakia Primary School amounted to a grave irregularity to warrant nullification of elections of Esise Ward in relation to the member of the County Assembly.
- f. The learned trial magistrate erred in law and fact by treating the recount and scrutiny exercise as sole and only evidence that could be used to invalidate the election of the Appellant as the member of the County Assembly of Nyamira, Esise Ward.
- g. The learned trial magistrate erred in law and fact by making a finding that the missing counterfoils affected the results in a substantial manner and warranting nullification of the Appellant's election.
- h. The learned trial magistrate erred in law and fact by predisposing himself to a position favourable to the petitioner and failed to accord the Appellant a fair hearing and determination and arrived at a decision that is unreasonable, wrong in law and unjust in effect and consequence.
- i. The learned trial magistrate erred in law and fact by ignoring the time-tested principle that parties are bound by their pleadings and evidence in support of their petitions, and allowed the Petitioner to travel outside his pleadings and then determining the entire election petition on the basis of issues not pleaded at all.
- j. The learned trial magistrate erred in law and fact by relying on overturned decisions.
- k. The learned trial magistrate erred in law by making no reliance and/or reference on the entirety of the evidence, affidavits, submissions, authorities and oral submissions made by the Appellant in court and gave no reasons for disallowing them in his judgment.
- l. The Learned Magistrate erred in law by failing to dismiss the entire Petition for being devoid of merit despite reaching conclusion that the 1st Respondent had not established any ground pleaded in the Petition.

3. The Appellant urged the Court to set aside the said judgment and substitute it with an order dismissing the petition with costs to the appellant. He also prayed for costs of the Appeal



4. The 2nd and third respondent did file the appeal as well and generally reiterated the grounds raised by the appellant herein. One of the key ground was that the trial court erred in law and fact when it held that the lack of the counterfoils in the ballot boxes meant that the ballot papers in the ballot boxes could not be ascertained.
5. The 2nd and 3rd respondents prayed for the appeal to be allowed as well.
6. Parties were directed to canvass the appeal by way of written submissions which they have complied.

Appellant's Submissions

7. The appellant in his submissions identified 5 issues for determination by this court.
8. On the first issue, whether the trial magistrate erred in law and fact by nullifying the appellant's election despite the court finding that the 1st respondent had not established the pleaded grounds the appellant submitted that Article 81 of *the Constitution* read together with section 83 of the *Elections Act*, 2011 place a burden of proof on the 1st respondent to provide cogent and credible evidence to demonstrate his case to the required standard. Further, that it was trite law that where a petitioner has not adduced sufficient evidence to overturn an election, the petition must be dismissed forthwith.
9. It was the appellant's submission that the 1st respondent did not discharge the burden of proof which led to the dismissal of the grounds pleaded in the petition including the vote result doctoring and unlawful ejection of agents. That the trial magistrate having concluded that the 1st respondent had not discharged the burden of proof on all the grounds pleaded in the petition, the only recourse which was available to the trial court was to dismiss the petition entirely.
10. Further, that the trial magistrate committed an error of law by nullifying the elections based on matters not proven and pleaded by the 1st respondent as it was not his duty to go beyond the parties' pleadings and conduct an investigation suo moto and make his own independent findings.
11. The appellant placed reliance on the following cases; Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others [2022] KESC 56(KLR), Gitarau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, Vashist Narain Sharma v Dev Chandra & Others cited with approval Odinga & Another v IEBC & 2 Others [2017] eKLR and IEBC & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR.
12. On the second issue, whether the trial magistrate erred in law and in fact by finding that the irregularities unearthed during scrutiny exercise were grave and substantial to warrant nullification of appellant's election the appellant submitted that it was not in dispute that the trial magistrate annulled the elections based on the lack of counterfoils, 3 unaccounted rejected votes and 1 vote which had been rejected but was validly marked in his favour. That in reaching his conclusion, the trial magistrate did not address his mind to the fact that same were minor and insignificant human errors which did not affect the results declared as observed during recount exercise.
13. The appellant submitted further that the results declared in form 36As at the polling stations were not affected by the missing counterfoils. That it was also undisputed that the results tallied and declared in Form 36B at the tallying centre were not affected. Similarly, that the 3 unaccounted rejected votes did not affect the final results.
14. Therefore, taking into consideration the "margin" between the petitioner and the 1st respondent without demonstrating arithmetically how the said margin would have been affected by the missing counterfoils and unaccounted rejected votes, the trial magistrate committed an error of law.



15. The appellant placed reliance on several cases among them; *Timamy Issa Abdallah v Swaleh Salim Imu & 3 others* [2014] eKLR and *Mwahima Mwalimu V IEBC & 4 Others* [2018] eKLR.
16. On the third issue, whether the trial court misinterpreted and misapplied the doctrines of stare decisis and precedents the appellant submitted that in reaching the above impugned decision, the trial magistrate heavily relied on the overturned decisions which are no longer good law, thus committing error of law by failing to uphold the doctrines of stare decisis and precedents. That an example of cases relied on by the trial magistrate were *Thomas Malinda & 2 Others v IEBC & 2 Others* [2013] eKLR and *Manson Onyongo Nyamweya v James Omingo Magara & 2 others* [2009] eKLR both of which were overturned by the Court of Appeal in *IEBC & Another v Stephen Mutinda Mule & 3 Others* (Supra).
17. On the fourth issue, whether the learned magistrate erred in law by misinterpreting and misapplying the word “shall” in Regulation 81 of the Elections (General) Regulations 2012 the appellant submitted that Regulation 81(1) (d) of the Election (General) Regulations, 2012 as amended by L.N No. 72 of 2017, required that upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box, counterfoils of used ballot papers sealed in a tamperproof envelope. That thereafter, Regulation 81 (2) required the presiding officer to deliver to the Returning officer, the 3rd respondent herein, the sealed ballot boxes, the statement, copy of register of votes and polling station diary.
18. The appellant submitted further that the Returning Officer was not permitted in law to break the seals and opened the ballot boxes after being sealed in the polling stations for him to confirm the contents of the ballot boxes. That, there was no way the 3rd respondent would have noticed the missing counterfoils and rejected votes during tallying of the votes. Therefore, having found that the 1st respondent failed to establish any ground pleaded in the petition, the trial magistrate had no basis at all to shift the burden to the IEBC to justify the validity of the declared results.
19. On the fifth issue, whether the trial magistrate erred in law by denying the appellant the right to be heard as per the law the appellant submitted that the trial magistrate in the entirety of his judgment ignored and made no reference to his response to the petition, his replying affidavit, the affidavits of 13 other witnesses and submissions. It was trite law that all parties have a right to be heard and it included the court’s duty to analyse and evaluate all the evidence adduced by all the parties in totality.
20. Therefore, the trial magistrate erred in law by failing to accord him the right to be heard before arriving at his decision. He placed reliance on the cases of *Johannes Matiko & Another v Republic* [2014] eKLR and *MKK V Republic* [2019] eKLR.
21. Lastly, on the issue of costs as to who should bear the same he placed reliance on the provisions of section 84 of the *Elections Act*, 2011 which provided that cost incidental to the petition, including the costs for all interlocutory applications and scrutiny and recount exercise, should follow the cause. Further, that Regulation 30 (1) and (2) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 gave court the discretion to impose the payment of costs on the party who had caused an unnecessary expense.
22. In conclusion, the appellant urged the court to allow the Appeal dated 24th January, 2023 with costs to the Appellant to be paid by the 1st respondent. Additionally, that the Court to issue certificate of validity of election to him as the Member of County Assembly of Esise Ward to the Speaker of the County Assembly of Nyamira as contemplated under Section 86 of the *Elections Act*, 2011.



1st Respondent Written Submissions

23. The 1st respondent while placing reliance on the case of *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others* (supra), submitted that the instant appeal was bad in law and an abuse of the court process. That the factual issues were a preserve of the trial court and not this court as was held in the case of *John Manuve Mati v Returning Officer, Mwingi North Constituency & 2 Others* (supra).
24. Additionally, that pursuant to the provisions of section 75 and 85A of the Election Act appellate courts in election appeals should not be drawn into a reappraisal of the evidence that was before the trial court. It was his submission therefore that the appellant had not discharge his duty to ensure that what was presented in the instant election petition appeal were strictly matters of law.
25. The 1st respondent went on to submit on the issues raised in the appellant's submissions. He submitted that the trial magistrate was perfectly correct in nullifying the subject election and there was a proper, firm and sufficient basis for the scrutiny as was sought in his application dated 5th September 2022. Further, that scrutiny and recount having been informed in his pleadings, the results thereof form part of his evidence.
26. Additionally, that courts could not ignore irregularities unearthed during scrutiny. He placed reliance on the cases of *Abdirahman Ibrahim Mohamud v Mohamed Ahmed Kolosh & 2 others* [2019] eKLR, *Cyprian Awiti & Another v Independent Electoral and Boundaries Commission & 2 Others* [2019] eKLR and *Lenny Maxwell Kivuti v IEBC & 3 Others* [2019] eKLR.
27. The 1st respondent submitted further that it was in order for the trial court to consider the issue of missing counterfoils and excess ballot papers. That in this case the 2nd and 3rd respondents did not provide the counterfoils within the ballot boxes or as separate envelopes as was required under rule 81(1) of the Election (General) Regulations despite there being a clear court order on the same.
28. Further that the difference in the votes between them was 174 votes and the irregularities affected the difference in announced votes, confirming that election could have gone either way. It was therefore the 1st respondent's submission that the trial magistrate was correct in law and in fact by finding that the said irregularities unearthed during scrutiny exercise were grave and substantial to warrant nullification of appellant's election.
29. The 1st respondent went on to submit that contrary to the appellant's assertion that the trial magistrate misinterpreted and misapplied the doctrine of stare decisis and precedents, the trial magistrate conducted sufficient analysis of the irregularities and their impact on the elections.
30. Further, by appellant's asserting that the trial magistrate misinterpreted and misapplied the word 'shall' in Regulations 81 of the Elections (General) Regulations 2012, he was attempting to subvert the will of the people through a misconstrued, bold and disingenuous misreading of the law and the judgment of the trial magistrate. Additionally, that the assertion by the appellant that he was denied his right to be heard by the trial magistrate had not merit. He urged the court to dismiss the appeal as the same was not merited with costs in his favour.

The 2nd and 3rd Respondent Submissions

31. In their submissions the 2nd and 3rd respondent identified three issues for determination by this court.
32. On the first issue, whether the learned magistrate erred in law in holding that the irregularities found during the recount and scrutiny exercise substantially affected the results of the elections they submitted that no election could be perfect as human beings in nature were prone to make errors. That



thus, procedural or administrative irregularities and other errors occasioned by human imperfection were not enough by themselves to vitiate an election. Further, that an election was not to be annulled except on cogent and ascertained factual issues.

33. They placed reliance on section 83 of the Election Act, the cases of Gatirau Peter Munya v Dickson Mwema Kithinji & 2 Others (supra) and Raila Amolo Odinga & Another v IEBC & 2 others (supra).
34. On the second issue, whether the learned magistrate erred in law in determining the petition on the basis of unpleaded and unproved matters they submitted that parties were bound by their pleadings and the court could not therefore frame an issue not stated in the pleadings. That the court in doing so overstepped its mandate by abandoning its role as an independent and impartial arbiter and descended to the arena of conflict. They placed reliance on the Raila case where the court cited the Indian Supreme Court case, Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R and IEBC & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR.
35. On the last issue, on who should bear the costs of both the election petition and appeal they submitted that costs followed events in election matters and that the elections were conducted in compliance with the principles of constitution and the administrative errors did not warrant an invalidation of the elections. They prayed for costs.
36. In conclusion, the 2nd and 3rd respondent submitted that the irregularities found did not affect the election since all the other documents were required to be in the ballot were present and the serial numbers matched. They prayed that the election of the appellant should be upheld and they be awarded costs of the suit.
37. The matter came in court on 11th April 2023 for highlighting of submissions by the parties herein. The advocates for the parties highlighted several issues raised for determination in their written submission.

Analysis and Determination

38. The substantive issue that came up during the highlighting of the submissions essentially was the issue of scrutiny. All the parties spent their energy and rightfully so on this matter.
39. I have perused the trials courts record and it is evident that scrutiny was done after the orders of the court and after the trial had been concluded. It is not therefore true to allege that the court picked it up suo moto as all the parties were involved. It is the view of this court that this was the crux of the matter and it proposes to analyze the same as of first priority. The rest of the grounds generally fall after this.
40. There were 4 polling stations which the court directed that scrutiny be done after the petitioner had raised complaints against. These were Riangombe primary school stream 2, Ensoko primary school stream 1 and 2, Nyansakia primary school and Manga girls primary school stream 2.
41. The trial court went ahead to analyse the same and gave a summary of what he found during scrutiny. I have also perused the record of appeal and in particular forms 36A which form the basis of the results.
42. The trial court in regard to Manga girls stream 2 concludes that there was no variance and it appears there were no problems with the counterfoils. The appellant obtained 20 votes against 118 of the 1st respondent.
43. In respect to Ensoko primary stream 2 the counterfoils were missing and the appellant garnered 37 votes against 76 votes of the 1st appellant. The court found that there was no variance on announced results.



44. In Nyansakia primary school the appellant got 327 while the 1st respondent obtained 33 and the remarks by the court was that the counterfoil falls within the used ones.
45. In Riangombe primary school stream 2 the appellant obtained 284 against the 1st respondents 27 and the court found that there was no variance with counterfoils.
46. In Ensoko stream 1 the appellant obtained 86 votes and the 1st respondent 29 votes. The court went ahead to indicate the used and unused counterfoils.
47. Regulation 81 of the Election (General) Regulations states that upon completion of a count including a recount the presiding officer shall seal in each respective box counterfoils of used ballot papers sealed in tamperproof envelop.
48. In regards to Ensoko stream 2 no counterfoils were found during the scrutiny exercise. What is the net effect of this.? Did it call for the invalidation of the results? Was it a glaring and material omission on the part of the 2nd and third respondents that it affected the wishes of the electorates of the ward?
49. The 1st respondent thinks so while the appellant's things otherwise. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* (2014) eKLR the Supreme court stated as hereunder.;

“It is clear to us that an election should be conducted substantially in accordance with the principles of *the Constitution*, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

(217) If it should be shown that an election was conducted substantially in accordance with the principles of *the Constitution* and the Election Act, then such election is not to be invalidated only on ground of irregularities.

(218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in *Morgan, Opitz and Nana*.

(219) By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.”

50. It appears to me that the threshold held by the superior courts is to the effect that for the election to be invalidated the irregularity or irregularities must be so gross and so bad that it violates all the known legal principles that it leaves the court with no other option but to declare the election null and void.
51. In this matter can one declare clearly that the failure to avail and or account for the counterfoils was so grave and contrary to the wishes of the electorates.? Was it a human error as envisaged by the authorities cited and relied on by the parties or a planned mooted by the 2nd and 3rd respondents.?



52. I have looked at the margins and the same is around 174 votes between the appellant and the 1st respondent. In Ensoko stream 2 the total number of registered voters are 412 and total votes cast were 223. The 1st respondent garnered 37 and the appellant 76 showing a variance of 39 votes. Is it possible that the 1st respondent would have obtained the other votes.? It is hard to tell.
53. Is the fact that the counterfoils absence is an indication that his votes were lost.? I do not think so. The way the rest of the polling station managed the voting and the ultimate results does not in my view indicate a deliberate sabotage of the elections. The errors found in the other three stations scrutinized shows that there was no variance at all as per the findings of the court. The variance if any was to do with a single vote at Riangombe primary school stream 2. The rest of the stations received positive remarks from the court after scrutiny had been undertaken.
54. It is now accepted generally that there may not be a perfect election anywhere humanly speaking. Looking at this election and save for the issues raised during scrutiny the other issues raised in the petition were not proved and that is why the trial court did not agree with them and i think rightfully so.
55. Although it was not explained what happened with the missing counterfoils i doubt whether their absence vitiated the will of the people of Esise ward. The trial court should perhaps have pressed the 2nd and 3rd respondents to explain what happened with the missing counterfoils. This court finds that in the absence of any doctoring or meddling with the paperwork by any of the parties' lance credence to the fact that the elections to a larger extent save for the two stations were within the acceptable legal parameters of valid elections.
56. In my view the error impugned by the petitioner at the lower court did not vitiate the general desire and wishes of the electorates of Esise ward.
57. Section 83(1) of the [Elections Act](#) 2011 supports the above finding. The same states that;
- “(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
- (a) the election was conducted in accordance with the principles laid down in [the Constitution](#) and in that written law; and
- (b) the non-compliance did not substantially affect the result of the election.”
58. The margin of 174 votes however was so wide that i do not think the lost or misplaced counterfoils would have aided the 1st respondent's case. In the Munya case(supra) the court held that where a recount, retalling or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election outcome.
59. I think i have stated so much to show that the findings of the trial court whether on facts or law was in error. The absence of the counterfoils did not vitiate the general will of the electorate in the Esise ward. Although there was no explanation of the whereabouts of the said counterfoils, their absence would not have affected the overall results.
60. In the premises, i find that the appeal is meritorious. The other issues raised by the appellants in my view are not germane. They do not go into the root of the petition and engaging in them for now is purely academic. As intimated earlier the issue of scrutiny was well taken by the parties during their submissions.



61. On the issue of costs, the same as is well known now follow the event. Regulation 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 [Elections Act](#) is very clear on this. The same grants the court the discretion on what amount to give and to cap it at the said figures.
62. I note that the trial court capped it at kshs 400,000 which amount in my view is reasonable in the circumstances. I shall therefore order that the said amount be paid by the 1st respondent to the appellant and the 3rd respondent respectively.
63. In addition, the 1st respondent shall pay the sum of kshs 100,000 being the costs in this appeal and the same shall be added to the above kshs 400,000 making a total of kshs 500,000 which shall be paid equally by the 1st respondent to the appellant as well as the 3rd respondent.

Conclusion

It is hereby ordered that;

- (a) Both appeals are hereby allowed as prayed.
- (b) The trial court's judgement and decree dated 20th January 2023 in Keroka Principal Magistrate Court Election Petition Number E002 of 2022 is hereby set aside.
- (c) The 1st respondent Josiah Obegi Mangera was validly elected member of the county assembly representing Esise ward in Nyamira county assembly.
- (d) The appellant and the 2nd respondent IEBC shall have consolidated costs of kshs 500,000 payable by the 1st respondent equally to them, that is kshs 250,000 each to cover both this appeal and the costs at the lower court.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 6TH DAY OF JULY 2023.

H. K. CHEMITEI

JUDGE

