



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**ELECTION PETITION APPEAL NO. 2 OF 2018**

**BETWEEN**

**IBRAHIM ARUNA ARAMADHANI.....APPELLANT**

**AND**

**EVANS BWIRE BARASA.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**& BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the judgment in Busia Chief Magistrate's Court Election Petition No.9 of 2017 by Hon. M.A Nanzushi- Senior Resident Magistrate).

**JUDGMENT**

1. **IBRAHIM ARUNA ARAMADHANI**, the appellant herein, was a registered voter in Agenga Nanguba Ward in Funyula Constituency, in the election held on 8<sup>th</sup> August 2017.

2. In the election, there were nine candidates vying for the position and in the results that were announced, each candidate garnered votes as shown herein below:

i. Majele levis O.W	<b>1600</b>
ii. Barasa Evans Bwire	<b>3340</b>
iii. Bayiekha Francis Juma	<b>117</b>
iv. Juma Patrick Nyongesa	<b>13</b>
v. Malo Stephen Herbat Halonyere	<b>1180</b>
vi. Mugwanga Chrispinus Wafula	<b>97</b>
vii. Obada Camulus Ojiambo	<b>3138</b>
viii. Omolo Rachel M. Migango	<b>199</b>
ix. Silas Masiga Okwera	<b>69</b>
<b>TOTAL VOTES</b>	<b>9753</b>

3. The appellant was dissatisfied with the outcome and filed a petition in Busia Chief Magistrate's Court. The petition was dismissed after a finding that the grounds on which the petition was based were not proved. He was aggrieved by the decision and filed this appeal.

4. The appellant was represented by the firm of Ouma Okutta & Associates Advocates. He raised the following grounds:

- a. That the learned magistrate erred in law and fact in dismissing the petition whereas there was ample evidence on irregular conduct of the election.
- b. That the learned magistrate erred in law and fact in disregarding evidence of un-stamped and unsigned statutory forms.
- c. That the learned magistrate erred in law and fact by failing to take into account the legal issues submitted in support of the petition.
- d. That the learned magistrate erred in law and fact by failing to evaluate, analyze the evidence and arrive at a correct conclusion of law and fact on issues for determination.

5. The appeal was opposed by the respondents. The first respondent was represented by the firm of Maloba & Company Advocates while the second respondent was represented by the firm of Masire & Mogusu Advocates.

6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

7. In the Chief Magistrate's Court the grounds of the petition were as follows:

- a. That there was violence and intimidation;
- b. That there was bribery;
- c. That **I.E.B.C** was negligent in handling of the election; and
- d. That there was propaganda and malicious rumours by the 1<sup>st</sup> respondent.

8. The appellant had raised an issue of violence which he argued intimidated some voters, who out of fear were unable to participate in the election. In his affidavit the petitioner averred that he witnessed violence at Bumulimba and Sigalame polling stations. He however contradicted himself during cross examination for he said that there was no violence at any polling station on 8<sup>th</sup> August 2017. He also testified that he was not at the scene of any assault. This would mean all his averments on violence was hearsay.

**9. Kizito Makokha Okwira (PW2)** testified that on 8<sup>th</sup> August 2017 at about 2 am while he was transporting some agents to their respective polling stations, he was attacked by some people known to him. He sustained injuries and reported the matter at Sio Port police station. He did not vote as a result of the injuries he sustained. Though he claimed that his attackers were Bwire's (1<sup>st</sup> respondent's) people, there was no evidence that linked the violence meted on him to the first respondent. **Bernard Milton Were (RW6)** testified that he was beaten by the supporters of Camulus Obada and the injuries he sustained caused him to be admitted for 2 1/2 weeks. He therefore did not vote.

10. It was alleged that the 1<sup>st</sup> respondent through his agents spread malicious rumours that Camulus Obada had killed a person. This allegation was not proved to the required standards. It remained in the realm of mere allegation.

11. The incidents of violence testified to, were very isolated cases. This fact coupled with the allegations of malicious propaganda did not affect the voter turnout in any way. The turnout was 79.2%. This was a reasonably high turnout. In the case of **SARAH MWANGUDZA KAI vs. MUSTAFA IDD & 2 OTHERS [2013] eKLR**, while addressing a similar issue the court said:

**If there were any pockets of insecurity, they affected all candidates equally. There is no evidence that the 1<sup>st</sup> respondent stood to gain any advantage by reason of any violence or rumours spreading insecurity in the constituency.**

An election cannot be nullified just because there were instances of violence. For the violence to be said to have affected an election, it must be shown to have been widespread and the consequences ought to be seen in the voter turnout. This was not the case in respect of the election for the Agenga Nanguba member of County Assembly.

12. The appellant averred that the disputed election was marred with instances of bribery. His witness on this ground was **Justus Oudo Barasa (PW4)**. He testified that as he passed by the home of Ayub Sadala at about 7 am, he saw a gathering of people. Ayub called him to the home. He went and found people taking *mandazi* and tea. He was invited to partake the same and offered Kshs.100/= in addition, so as to vote for Evans Bwire. When **Ayub Sadala (RW5)** testified, he denied the allegation. This allegation was therefore not proved and the learned magistrate rightly found so.

13. When allegations of criminal nature have been made, it is incumbent upon the party making such an allegation to prove it. No report was made to either the police or **IEBC** officials. There was no evidence adduced to show why the report was not made. If it was true, there could have been some arrests. in the case of **JOHO Vs NYANGE & ANOTHER (4) [2007] eKLR** where it was held:

**...the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.** [Emphasis added]

In the instant case, the appellant did not discharge his onus.

14. Though the issue of un-stamped Forms 36A came up during the hearing of evidence in the magistrate's court, I make a finding that the learned magistrate was right in disregarding that evidence. This is because the appellant had not pleaded the same in his petition. It is trite law that parties are bound by their pleading. The rationale was articulated by Jessel MR in the case of **THORP vs. HOLDSWORTH, (1876) 3 Ch. D, 637 at 639**, as follows:

**The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.**

In the instant case even if the appellant had pleaded the issue, it has been argued that the net results would still have remained the same for all the candidates were affected. The second respondent has computed the final tally as follows, if the disputed form 36As were to be declared invalid:

a. Barasa Evans Bwire (3340-650)=**2690**

b. Obada Camulus Ojiambo (3138-759)= **2379**

This computation was not challenged.

15. After a careful analysis of the entire evidence on record, and marrying the same to the applicable law, I find that I cannot arrive at a different conclusion from the one arrived at by the learned magistrate. Consequently, the appeal is dismissed with costs to the respondents.

**DELIVERED and SIGNED at BUSIA this 17<sup>th</sup> day of July, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**