



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ELECTION PETITION APPEAL NO. 1 OF 2018**

**BETWEEN**

**LUCAS MUSAJI OSEMBO.....APPELLANT**

**AND**

**FELIX OPONDO OMANYI.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL &**

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

**THE RETURNING OFFICER:**

**BUDALANGI CONSTITUENCY.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment in Busia Chief Magistrate's Court*

*Election Petition No.1 of 2017 by Hon. W.K Chepseba- Chief Magistrate).*

**JUDGMENT**

1.The appellant herein, **LUCAS MUSAJI OSEMBO**, was a registered voter in Bunyala Central Ward in Budalangi Constituency. He participated as a voter in the election held on 8<sup>th</sup> August 2017.

2. In the election, there were seven candidates vying for the position of Member of County Assembly for Bunyala Central Ward and in the results that were declared, each candidate garnered votes as shown herein below:

i) Opondo Wilson Tabu	<b>28</b>
ii) Mwolo Vincent Odhiambo	<b>501</b>
iii) Adiwa Christine Odhiambo	<b>319</b>
iv) Muruka Lucas Afwande	<b>54</b>
v) Ogolla Michael Nobertel	<b>1554</b>

vi) Okoba Johannes Boy	1155
vii) Omanyi Felix Opondo	1874
<b>TOTAL VOTES</b>	<b>5485</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 Wangalwa Oundo & Company Advocates. He based his appeal on fifteen grounds which I have summarized as follows:

- a) That the learned magistrate erred in law and fact by making a finding that the 1<sup>st</sup> respondent was validly declared the winner of member of County assembly for Bunyala Central Ward.
- b) That the learned magistrate erred in law and fact in dismissing the petition whereas there was ample evidence of issues of illegalities and irregularities.
- c) That the learned magistrate erred in law and fact by failing to appreciate that the 3<sup>rd</sup> respondent admitted the existence of irregularities in some form 36A.
- d) That the learned magistrate erred in law and fact by failing to appreciate that some Form 36A were not legible.
- e) That the learned magistrate erred in law and fact by failing to appreciate that some 36A had not been signed by agents.
- f) That the learned magistrate erred in law and fact by failing to appreciate that the 3<sup>rd</sup> respondent admitted that the 1<sup>st</sup> respondent was declared a winner with incorrect figures in form 36B.
- g) That the learned magistrate erred in law and fact by failing to appreciate that the polling station diary was not produced in spite of being mentioned severally in evidence.
- h) That the learned magistrate erred in law and fact by failing to appreciate the evidence of bribery and violence.

5. The appeal was opposed by the respondents. The first respondent was represented by the firm of Ouma Okutta & Associates Advocate while the second and the third respondents were represented by the firm of Masire and 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 were various incidents of violence meted against Mr. Ogolla Michael Nobertel and his supporters.
- b) That there was rampant voter bribery.
- c) That there were discrepancies between the results that were announced and the results that were

in the Kenya gazette.

d) That some polling stations posted more votes than the registered numbers.

8. The burden of prove in an election petition is borne by the petitioner. This was restated in the case of **JOEL NYABUTO OMWEGA & 2 OTHERS vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER (2013) eKLR** where the court said:

***The Burden of proof in election Petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court...an Applicant who seeks to annul an election bears the burden of proof throughout.***

I will therefore endeavor to establish if the appellant discharged his burden before the learned trial magistrate.

9. Some grounds of appeal were not raised in the petition before the learned trial court. These are:

d) That the learned magistrate erred in law and fact by failing to appreciate that some Form 36A were not legible;

e) That the learned magistrate erred in law and fact by failing to appreciate that some 36A had not been signed by agents; and

g) That the learned magistrate erred in law and fact by failing to appreciate that the polling station diary was not produced in spite of being mentioned severally in evidence.

It is not open to the appellant to raise these grounds at this stage.

10. The petitioner, **LUCAS MUSAJI OSEMBO**, in his evidence affidavit averred that on 7<sup>th</sup> August 2017 when Ogolla Michael Nobertel went to distribute badges at Muhobola, he was accosted by rowdy youths wearing tee shirts bearing the name and symbol of the Labour Party of Kenya. He said that this group of attackers were allied to Omanyi Felix Opondo. This was however contradicted by the evidence of **OBADO OBADO(PW2)**. This witness claimed that it was the petitioner who was distributing badges at Muhobola. He was driving him as he did the distribution. He contended that the rowdy youths confronted them on realizing that the petitioner was in the vehicle. This alleged incident at Muhobola is not believable. Though the learned trial magistrate did not make a finding on it, was right in disregarding it.

11. Another incident of violence, the petitioner contended, was at Mundika. He contended that the aggressors were a group allied to Omanyi Felix Opondo. This was on 7<sup>th</sup> August 2017. Other than making this general statement, the appellant did not adduce any evidence to satisfy the court that the alleged violence existed and that it was instigated by the said Omanyi Felix Opondo.

12. The petitioner contended that there were rampant instances of voter bribery on various dates including on the 8<sup>th</sup> August 2017, the election day. He averred that this was carried out by the supporters of Omanyi Felix Opondo. The bribery was in form of cash, hoes, sugar, cooking fat and other items. It was however clear during cross examination that he did not witness any single instance of bribery. This is what he said:

***They gave them money, jembes(hoes), and farm inputs. A witness will testify to it. People voted for Felix after being bribed. One is a witness Francis Mathias Nyangweso. No one is mentioned in paragraph 1.***

In his evidence **FRANCIS MATHIAS NYANGWESO (PW3)** testified that on 7<sup>th</sup> August 2017, Felix Opondo Omanyi visited him at night. He gave him Kshs.1000/= so as to vote for him. He took the bribe.

This was denied by the 1<sup>st</sup> respondent. Since it was claimed that at the time of bribery they were just the two of them, it is Nyangweso's word against that of the 1<sup>st</sup> respondent. If indeed bribery took place, this witness is an accomplice. The issue of accomplice witnesses is settled in criminal law. In **REPUBLIC vs. NDARA S/O KARIUKI & 6 OTHERS (1945) 12 EACA 84**, at Page 86 the Court prescribed the correct approach in dealing with accomplice evidence as follows:

***A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.***

Though the Court in this decision was addressing its mind to a witness in a criminal trial, this position applies in the instant case for two reasons:

(a) The allegations made herein are of criminal nature and;

(b) A witness is a witness whether in civil proceedings or in criminal cases. In both instances he is required to create an impression that he is a truthful witness on whom the court can rely upon. There was no evidence that the alleged bribery was reported to the police or to the IEBC. In the case of **WILSON MBITHI MUNGUTI KABUTI & 5 OTHERS vs. PATRICK MAKAU KING'OLA AND ANOTHER (2013) eKLR** the court observed:

***The second schedule of the Elections Act specifically provides that any misconduct can and should be reported by any person to the Electoral Code of Conduct Enforcement Committee, which committee will liaise with government security agencies in the constituency and report suspected malpractices. Failure therefore to report the campaigning out of time, alleged bribery and vote buying cannot be remedied by this court unless there is concrete proof. [ Emphasis added]***

In the case of **WILLIAM KABOGO GITAU VS GEORGE THUO & 2 OTHERS [2010] eKLR** the court said:

***The burden of establishing that any election offence was committed to justify the nullification by this court ...is on the Petitioner. To discharge this burden, the Petitioner must adduce evidence that establishes the alleged election offence and alleged electoral malpractices to a standard of proof that is higher than that applied in ordinary civil cases of proof on a balance of probability. [ Emphasis added]***

And in the case of **SIMON NYAUNDI OGARI & ANOTHER VS. HON. JOEL OMAGWA ONYANCHA & 2 OTHERS [2008] eKLR** the court held the following:

***Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.***

In the instant case, the allegation of bribery was not proved.

I therefore find that the learned trial magistrate was justified in disregarding this evidence.

13. It was contended for the appellant that the results that were announced by the returning officer and the results in the Kenya gazette were different. Since the learned trial magistrate did not appreciate the discrepancies, this vitiated his decision. The election results that were announced were on the basis of Form 36A and not what was later contained in the Kenya gazette. Form 36A is the primary document from which an election results can be obtained. The appellant testified that the agents informed him that the winner had 1874 votes contrary to what was entered in the Kenya gazette that the winner had 3748 votes. From his evidence it is clear that what was entered in the Kenya gazette was erroneous. This error did not affect the results that were announced and could not have been a basis of allowing the appeal.

14. The appellant contended that some polling stations had more voter turnout than the ones registered. In his supporting affidavit he only singled out Mundika polling station but did not indicate how many more voters, than the registered ones, voted. There was no evidence to support this allegation and it remained as such; a mere allegation.

15. From my evaluation of the evidence on record, I find that though the learned trial magistrate did not frame the issues for determination, I cannot arrive at a different conclusion from his. Equally, had he framed the issues he could not have arrived at a different verdict except that it would have been easy to follow his arguments.

16. I was urged to make a finding that the appeal was incompetent for it failed to comply with Rule 35(6) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. This Rule does not exist but the 1<sup>st</sup> respondent must have had in mind Rule 34(6) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. This Rule provides as follows:

***(6) The appellant shall, within twenty-one days of the filing of the memorandum of appeal in accordance to sub-rule (3), file a record of appeal which shall contain the following documents***  
—

***(a) the memorandum of appeal;***

***(b) pleadings of the petition;***

***(c) typed and certified copies of the proceedings;***

***(d) all affidavits, evidence and documents entered in evidence before the magistrate; and***

***(e) a signed and certified copy of the judgment appealed from and a certified copy of the decree.***

In the instant appeal, the appellant did not include a certified copy of decree.

The effect of failure to have a certified decree in the documents of appeal was expressed in the case of **NDEGWA KAMAU T/A SIDEVIEW GARAGE vs. FREDRICK ISIKA KALUMBO [2016] eKLR** as follows:

***It therefore follows that the preparation and delivery of the decree ... is not a pastime which one may choose to overlook but rather it is a mandatory ritual without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate court.***

The court went on to deliver itself as follows:

***...this failure is fatal to the appeal; sheer failure to comply with the foregoing mandatory statutory and procedural provisions renders this appeal incompetent and of no consequence; it is hereby struck out...***

In the instant case, had the respondents made this application at the appropriate time, I would not have hesitated to strike out the appeal for incompetence. however, due to the exigencies of time, at the time of

highlighting of submissions I urged the parties to make submissions on the issue for my consideration with the appeal, for in my view no party would suffer any prejudice.

17. The upshot of the foregoing analysis of the evidence on record is that the appeal lacks merits and is accordingly dismissed with costs.

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

**KIARIE WAWERU KIARIE**

**JUDGE**