



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ELECTION PETITION APPEAL NO. 3 OF 2018

BETWEEN

MPAKA JEAN BOSCO.....APPELLANT

AND

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

NOAH BOWEN KIPKOGEL.....2ND RESPONDENT

EKESA MILTON KASSAMAN.....3RD 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, **MPAKA JEAN BOSCO**, was a registered voter in Bukhayo Central Ward in Nambale Constituency. He was a candidate for Member of County Assembly for the said Ward on a Ford-Kenya ticket in the election held on 8th August 2017.

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

i) Barasa Maximo Nyongesa	72
ii) Dina David Ongangi	66
iii) Ekesa Milton Kassaman	1716
iv) Magero Nicholas Wesonga	110
v) Makokha Bonventure Okwach	1532
vi) Maloba Chrisantus Okello	498
vii) Mpaka Jean Bosco	1624
viii) Oyula Sylvester Makanda	1350
TOTAL VOTES	6968

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 Bogonko, Otanga & Company Advocates. He raised seven grounds of appeal which I have

summarized as follows:

- a) That the learned magistrate erred in law and fact by allowing the respondents to proceed to defend the petition when their response had not complied with the mandatory provision of the law.
- b) That the learned magistrate erred in law and fact in dismissing the petition whereas there was ample evidence of electoral malpractices by the respondents.
- c) That the learned magistrate erred in law and fact by failing to hold that the response filed did not adequately answer the petition.
- d) That the learned magistrate erred in law and fact by basing his judgment on matters extraneous that were not pleaded nor proved.

5. The appeal was opposed by the respondents. The first and the second respondents were represented by the firm of Akide & Company Advocates while the third respondent was represented by the firm of Hammerton Maloba 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 some of the appellant's agents were not allowed in the polling stations;
- b) That Chrysantus Okello Makokha was illegally allowed to contest on a Maendeleo Democratic party ticket when he had participated in the primaries of Amani National Congress Party where he had lost; and
- c) That votes at Lwanyange primary School Polling station could not be accounted for.

8. It has been contended for the appellant that the learned trial magistrate erred in allowing the response of the 1st and the 2nd respondent to stand in spite of Rule 12(5), (6) and (8) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. These sub rules provide:

(5) A response to the petition under rule 11 shall be supported by an affidavit sworn by the respondent.

(6) Each person who the respondent intends to call as a witness at the hearing, shall swear an affidavit.

...

(8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.

This issue was raised by the court after parties had closed their case. The learned trial magistrate asked the parties to submit on the same, which they did. In his judgment, the learned magistrate made a finding that the petitioner was not prejudiced by the title of the affidavits by the 1st and the 2nd respondents. He also made a finding that DW1 testified with the leave of the court.

9. I concur with the finding of the learned trial magistrate because of the following reasons:

- a) A mere erroneous description of the title of the affidavit of the two respondents could not be a basis to block their response. In any case, the appellant had not raised it before or at the pre-trial conference. The appellant did not raise the issue at all. This was an indication that there was no prejudice suffered.
- b) No prejudice was suffered by the appellant due to the wrong title of the said affidavits.

This ground of appeal lacks merit.

10. The 1st and the 2nd respondents were accused of illegally allowing the participation of Chrysantus Okello Makokha in the election on a Maendeleo Democratic Party ticket after he had participated in the primaries of Amani National Congress Party where he had lost. It was argued that this was contrary to section 28 (i) of Elections Act. This section does not exist. However, section 28 of the said Act provides:

A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least forty-five (sic) days before the date of the general elections.

The respondents answered the allegation by stating that they only received what the parties forwarded to them. There was no evidence adduced to show that the 1st and the 2nd respondent were notified of the issue which the appellant is now raising. In any case, the right forum for the issue raised was the Political Parties Tribunal. The appellant is estopped from bringing this issue up since it was not brought to the attention of IEBC, at the right moment, if we assume that the said Chrysantus Okello Makokha was not eligible as a candidate.

11. The allegation that the KIEMS kit failed at Lwanyange Primary school was denied by the respondents. The appellant did not prove the alleged failure. 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.

In the petition before the learned trial magistrate, the appellant did not discharge his burden on this ground.

12. In National elections for Parliamentary, Senatorial or Member of County Assembly, candidates are sponsored by political parties with the exception of independent candidates. The practice has been that each party nominates an agent for each polling station to represent all their candidates. This is logical for it avoids overcrowding in the polling stations. This is the correct interpretation of section 30 of the Elections Act. This is what it provides:

(1) A political party may appoint one agent for its candidates at each polling station.

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.

13. The contention by the appellant that his party's parliamentary candidate was hostile to him after he had petitioned the senate against his wife lacked merits. He ought to have brought this fact to the attention of IEBC and demonstrate that the said parliamentary candidate had influence over the party agents. Having failed to do so, he had no basis of raising this issue as a ground to support his petition. In the instant case, the 1st and the 2nd respondents operated within the law and did not stop the appellant's agents from accessing polling stations.

14. I have carefully reevaluated the entire evidence on record. I find that the decision of the learned trial magistrate was based on the evidence at his disposal. He did not consider any issues that were not pleaded. Consequently, I find that the appeal lacks merit. The same is dismissed with costs to the respondents.

DELIVERED and SIGNED at BUSIA this 17th day of July, 2018

KIARIE WAWERU KIARIE

JUDGE