



**Ojuok v Okal & 2 others (Election Appeal 3 of 2018)
[2018] KEHC 3736 (KLR) (12 July 2018) (Judgment)**

Philemon Juma Ojuok v Peter Bodo Okal & 2 others [2018] eKLR

Neutral citation: [2018] KEHC 3736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
ELECTION APPEAL 3 OF 2018
TW CHERERE, J
JULY 12, 2018**

BETWEEN

PHILEMON JUMA OJUOK APPELLANT

AND

PETER BODO OKAL 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

RETURNING OFFICER, NYAKACH CONSTITUENCY 3RD RESPONDENT

(An appeal from the Judgment of Election Petition No. 2 of 2017 at the Chief Magistrate's Court at Kisumu delivered by Hon. C. L. YALWALA (PM) on 5th February, 2018)

JUDGMENT

1. PETER BODO OKAL (hereinafter referred to as the 1st respondent), who was a contestant in the general elections held on 8th August 2017 for the position of Member for County Assembly for Central Nyakach Ward, in Nyakach Constituency, filed a petition herein contesting the outcome of the said election in which PHILEMON JUMA OJUOK (hereinafter referred to as the appellant) was declared, by the 2nd respondent, as the duly elected member of County Assembly for the said Central Nyakach Ward.
2. In a judgment delivered on 5th February, 2018, the Election Court found that there were irregularities that affected the outcome of the results and declared that the appellant was not validly elected.



The Appeal

3. The Appellant being dissatisfied with the Election Court's decision preferred this appeal and on 16.2.18 filed the Memorandum of Appeal dated 15.2.18 which raises 11 grounds of Appeal
4. When the appeal came up for mention on 8.3.18, the court directed that the appeal be canvassed by way of written submissions which the parties dutifully filed and cited various authorities. In his submissions, appellant identified 5 issues for determination as follows:
 - i. Whether the learned Magistrate erred in attributing weight to the minor discrepancies discovered after the scrutiny
 - ii. Whether the learned Magistrate erred in determining that the failure of agents to sign Form 36s impugned the election results
 - iii. Whether the learned Magistrate failed to appreciate the burden, threshold and standard of proof in election petitions
 - iv. Whether the appellant was validly elected the Member of County Assembly for Central Nyakach Ward
 - v. Who bears the costs of the Appeal.

DIVISION - SUBMISSIONS

APPELLANT'S SUBMISSIONS

- i. Irregularities
5. Appellant submitted that 1st respondent disputed results in 10 polling stations on the ground that there were irregularities in the said stations. He also submitted that the scrutiny and recount ordered by the court revealed that the alleged irregularities did not affect the results of the elections since appellant was leading by 19 votes. In this regard, appellant faulted the trial court for not applying Section 38 of the Elections Act to secure the will of the people.
 - ii. Failure of agents to sign Form 36s
6. Petitioner submitted that the 1st respondent's agents did not give any reasonable explanation for their failure to sign Form 36s and further that Regulations 79 rule 6 and 7 of Elections (General) Regulations 2012 provides that failure to sign the forms does not in itself invalidate the results.
 - iii. Whether the appellant was validly elected the Member of County Assembly for Central Nyakach Ward
7. Appellant submitted that upon scrutiny and recount, it turned out that his votes on the whole reduced by 21 votes and the 1st respondent's vote increased by 1 vote. It is appellant's case that he won the election and that the will of the voters was suppressed by nullification of the results.
 - iv. Costs
8. Appellant urged the court to find in his favor and award him costs



1ST RESPONDENT'S SUBMISSIONS

9. 1st respondent placed reliance on *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR and in summary submitted that the irregularities in the impugned election was prove that the results were not accurate, verifiable, secure and transparent.

2ND AND 3RD RESPONDENTS' SUBMISSIONS

10. 2nd and 3rd respondents submitted that the elections were credible and valid and that the minor irregularities noted, were, under the provisions of Section 83 of the Elections Act, not sufficient to nullify the results granted that appellant led in the number of votes cast in the disputed polling stations. They further agreed with the petitioner that failure by 1st respondent's agents to sign Form 36s would not under the provisions of Regulations 79 rule 6 and 7 of Elections (General) Regulations 2012 invalidate the results. They urged the court to find that appellant was validly elected and to dismiss the appeal with each party bearing its own costs.

DIVISION - ANALYSIS AND DETERMINATION

ISSUES FOR DETERMINATION

11. I have summarized the issues for determination before the trial court as follows:
- Whether there were election irregularities and illegalities in the election of Member of the County Assembly for Central Nyakach Ward
 - If so, whether the irregularities affected the results of the said election
 - Whether the appellant was validly elected as election of Member of the County Assembly for Central Nyakach Ward
 - What is the order on costs
12. Before dealing with the issues in contention in this appeal, I must bear in mind the principle that the first appellate court must re-evaluate the evidence adduced before the Election Court before reaching its own independent determination as to whether or not to uphold the decision of the trial magistrate bearing in mind that it neither saw nor heard the witnesses testify (see *Peters v Sunday Post Ltd* [1958] EA 424).

EVIDENCE

13. The results as declared by the 2nd respondent were as follows: -

CANDIDATE	VOTES
PHILEMON JUMA OJUOK	3321
PETER BODO OKAL	3235

14. The main prayers sought in the petition was for scrutiny and recount of votes in all the 25 polling stations. The trial court upon hearing the parties on an application for scrutiny and recount allowed it in respect of ten polling stations namely:

1. Ragen R. C. Primary School - 1 of 2



2. Ragen R. C. Primary School - 2 of 2
 3. Nyalunya Primary School -1 of 1
 4. Pedo Primary School – 1 of 1
 5. Kodum Primary School – 2 of 2
 6. Moro Primary School – 1 of 1
 7. Konditi Primary School – 1 of 1
 8. Bugo Primary School – 2 of 2
 9. Bugo Primary School -1 of 2
 10. Nyabola Primary School – 1 of 1
15. The Election Court summarized the results of the scrutiny and recount as follows:
- i. Polling stations with less or extra votes
 - Ragen R. C. Polling station 1 of 2 - appellant had an extra vote
 - Ragen R. C. Polling station 2 of 2 - appellant had an extra vote
 - For Bugo polling station 1 of 2 -1st respondent had one vote less
 - Nyalunya Polling Station 1 of 1 - appellant had 19 extra votes
 - ii. Form 36As not signed by the presiding officers
 - Ragen R. C. Polling Station 1 of 2
 - Moro Polling Station 1 of 1
 - iii. Form 36As not stamped
 - Ragen R. C. 2 of 2;
 - Pedo 1 of 1
 - Konditi 1 of 1,
 - Bugo 1 of 1
 - Bugo 2 of 2
 - iv. Form 36A not signed by 1st respondent’s agents and thereasons for their failure or refusal to sign the said forms were not stated
- Most

LEGAL PRINCIPLES

16. The legal principles governing the conduct of elections are contained in Constitution, the Elections Act (The Act) and the Subsidiary Regulations thereto. Article 1 of the Constitution pledges the Sovereignty of the will of the people which may be exercised through their democratically elected representatives. Article 2 declares the Constitution to be the supreme law of the Republic while Article 3 obligates every person to respect, uphold and defend this Constitution.
17. An Election Petition is but an audit undertaken by an Election Court, on the basis of the complaints raised in a Petition, to confirm if an election was undertaken in accordance with the Constitution and



the electoral law. In our case, the Constitutional principles are to be found in Articles 38, 81, 83 and 86 of the Constitution of Kenya.

18. These are to the effect that; the elections should be free and fair which reflect the will of the electors; elections that are by secret ballot; elections that are free from violence, intimidation, improper influence or corruption, transparent; that are administered impartially, efficiently, accurately and in an accountable manner; that the voting method used is simple, accurate, verifiable, secure, accountable and transparent; that the votes are counted, tabulated and results announced promptly and that mechanisms are put in place to eliminate electoral malpractice including the safekeeping of electoral materials (See Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others [2018] eKLR.
19. Elections emphatically demonstrate the sovereign will of the people, which quality to be safeguarded by the process of the law. An Election Petition is therefore not an ordinary civil dispute. It is a special dispute which calls upon an Election Court to determine whether the political rights of citizens under Article 38 have been upheld. For that reason, it's now trite that the standard of proof in an election petition is beyond the balance of probability but lower than beyond reasonable doubt that is applicable in criminal cases. (See Sarah Mwangudza Kai v. Mustafa Idd & 2 Others Election [2013] eKLR).
20. In this regard, the 1st respondent not only bore the burden to establish that there were irregularities and illegalities in the conduct of the election for Member of County Assembly for Central Nyakach Ward held on 8th August, 2017, but also to illustrate to the satisfaction of the Court, that those irregularities and illegalities affected the results of the election.
21. The results of the scrutiny and recount in 10 disputed polling stations revealed that appellant had 21 extra votes while 1st respondent had one vote less. An analysis of the votes after taking into account the results of the scrutiny and recount translates to 3300 votes for the appellant and 3236 for the 1st respondent which is a difference of 64 votes.

Results after scrutiny and recount were as follows:

CANDIDATE	VOTES
PHILEMON JUMA OJUOK	3300
PETER BODO OKAL	3236
DIFFERENCE	64

22. Section 83 of the Act provides in respect of challenges to an election as follows:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election”.
23. While there is no doubt that there was an error in the tally of votes cast for the appellant and the 1st respondent, the error did not in my considered view affect the outcome of the results since appellant remained with more votes cast compared to the 1st respondent.



24. There is evidence that some Form 36As out of the 10 scrutinized lacked official IEBC rubber stamp. It is however not clear from the record how many of these forms were or from which polling stations. The correct position on unstamped statutory forms, which I wholly approve, was rendered in the case of *John Murumba Chikati v Returning Officer Tongaren Constituency & 2 others* [2013] eKLR by Gikonyo J, as follows:

(42) What about Form 35 which had not been stamped?" The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 (hereafter General Regulations) is that the Presiding Officer signs the statutory Form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. The Forms were signed by the Presiding Officers appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the Form or the results thereto.

25. Consequently, I find that non-stamping of the statutory forms would not render results invalid.

26. As pointed hereinabove, the impugned results were also nullified on the ground that some Forms 36As were not signed by the petitioner's agents. In the case of *Odalo Makojwando Abuor v Dalmas Otieno Anyango & 2 others* [2013] eKLR the court reiterated the provisions of Regulation 79(6) of the Elections (General) Regulations as follows: -

"The refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under the sub regulation (2) (a)."

27. In the case of *Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 others* [2013] eKLR, Muriithi J, faced with a similar argument held as follows:

"It is an issue of first principles: the object of agents signing the Form 35 is to confirm the results contained therein. If it is signed by agents in other elections taking place alongside the particular election, there cannot be a valid objection to such 'over-confirmation' unless it can be shown to have affected the result adversely in some way".

28. There is no evidence that 1st respondent's agents were barred from signing the statutory forms or that the results entered on those forms were inaccurate. There is similarly no evidence that the forms were not signed by the other contestants' agents.

29. As a result, I find that it has not been demonstrated that the non-signing of Forms 36As by 1st respondent's agent affected the correctness of the results entered thereon.

30. In auditing an election, the Election Court is not to substitute its will for that of the voters. In the case of *John Fitch v. Tom Stephenson & 3 Others* [2008] EWHC 501 QB6, the Court held: -

"The decided cases, including those which Lord Denning considered in *Morgan -v- Simpson*, establish that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election



rules, providing the results of the election was unaffected by those breaches. ... This is because where possible, the courts seek to give effect to the will of the electorate.”

31. Section 107 of the Evidence Act, places the burden of proof on the person who alleges in the following terms:
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
32. The burden was therefore on the 1st respondent, to prove to the satisfaction of the court, that there was not only non-compliance with the Constitution and other electoral laws, but also that the said non-compliance affected the outcome of the election.
33. Section 83 of the Act undoubtedly creates a rebuttable presumption that elections are generally conducted in accordance with the provisions laid down in the Constitution and other electoral laws. A petitioner seeking to nullify an election should therefore clearly and decisively discharge the burden of proof by demonstrating that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the people’s electoral intent and the evidence should also disclose profound irregularities in the management of the electoral process. (See *Raila Odinga and Others v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR and *George Mike Wanjohi v Steven Kariuki & 2 Others*, Supreme Court Petition No. 2 A of 2014).
34. There is no denying that courts have acknowledged that the legal sufficiency that an election was conducted in a free, fair and credible manner would not necessarily mean that the election was devoid of errors, mistakes or irregularities. (See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others*, Kericho High Court Petition No. 1 of 2013).
35. The Supreme Court concisely pronounced itself on this issue in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others* SCK Petition No. 2B of 2014 [2014] eKLR and held thus:
 - (216) 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.
36. It is therefore not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. This position was upheld by the Supreme court in *Raila 2017 (Supra)* when at page 71 it held: -

“Where a party alleges nonconformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies *Omnia Praesumuntur rite solemniter esse acta* (All acts are presumed to have been done, rightly and regularly). So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the presumption of the law”.



37. An Election Court will therefore not easily upset an election by substituting its decision, conviction or will to that of the electorate. The Election Court has to be satisfied that the alleged irregularities affected the will of the electorate.
38. The evidence on record, from the above analysis, reveals that the disclosed irregularities are insignificant and did not in the least affect the true reflection of the will of the people of the Central Nyakach Ward as to their choice of the Member of County Assembly.
39. Having said that, my finding on the third issue therefore is that the petitioner was the voters' choice and was validly elected as Member of County Assembly for Central Nyakach Ward.
40. The upshot of the foregoing is that the appeal is considered and found to be meritorious. The election court's decision is set aside and substituted with an order dismissing the 1st respondent's petition with costs. The court further makes the following orders:
- a) Appellant was validly elected as Member of County Assembly for Central Nyakach Ward
 - b) 1st respondent shall bear the costs of the Petition and the appeal. Such costs shall be taxed by the Deputy Registrar but so as not to exceed Kshs.200,000 (eight hundred thousand) for each Respondent. Those of the 2nd and 3rd Respondent being taxed together.

DATED, DELIVERED AND SIGNED THIS.....*12th*.....DAY OF.....*July*.....2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellant - Mr. Lugano/ Mr. Achura

For 1st Respondent - Mr.Kirenga

For 2nd and 3rd Respondents - Mr. Lugano

