



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO. 5 OF 2018

BETWEEN

MMBAYI SAYYED OMSIRITSA.....APPELLANT

AND

NANCY IYADI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

NANDWA CHARLES EDWIN LISUNU.....3RD RESPONDENT

J U D G M E N T

1. On the 1st August, 2018, the trial magistrate at Butere Court dismissed the appellant's election petition with costs and declared that the 3rd respondent herein was validly elected as the member of County Assembly for Marama North ward in Kakamega County after he garnered 3929 votes against those of the appellant as the runner-up at 2191 votes. The appellant was aggrieved by the judgment of the trial court and filed this appeal.

The appeal raises several grounds inter, alia, that the trial magistrate erred in law and fact by:

- (i) Failing to appreciate and disregarded ignored the evidence tendered in support of the petition.
- (ii) Failing to appreciate the magnitude of the omissions by the 1st and 2nd respondents and the impact of the same on the integrity and validity of the impugned elections .
- (iii) dismissing the petitioner's application for access and scrutiny of election material and
- (iv) Holding that the said elections were free and fair.

The appellant is asking for this court to allow this appeal and set aside and or vacate the decision of the trial magistrate delivered on 1st August, 2016.

2. The appeal was strenuously opposed by the 1st and 2nd respondents and the 3rd respondent. The 1st respondent was at the time of the elections the Returning officer, Marama North ward while the 2nd Respondent is the Independent Electoral and Boundaries Commission which is the body mandated by the constitution with the duty of conducting county, parliamentary and presidential elections in Kenya. The 3rd respondent is the person who was declared the winner after the tallying of votes for Marama North ward county elections.

3. In addition to opposing the appeal the 3rd respondent has filed a cross- appeal dated 31st August, 2018 in which he states that the trial magistrate erred in law in awarding costs of Kshs. 100,000/= to the 3rd respondent which amount of costs the 3rd respondent considers to be minimal and inadequate. The 3rd respondent prayed that the warded costs be enhanced to Kshs. 1,000,000/-.

4. The cross – appeal was opposed by the appellant who submitted that this court has no jurisdiction to entertain such a cross – appeal in election petitions.

5. The petitioner was represented by the firm of **M. Kiveu Advocate** while the 1st and 2nd respondents were represented by the firm of **Kadima & Company Advocates**. The 3rd respondent was represented by the firm of **M/S Namatsi & Co. Advocates**.

The petition

6. The appellant alleged in his petition that the election of the member of county Assembly for Marama North Ward was tainted with irregularities and mal- practices. The irregularities and malpractices were stated in paragraph 8-11 of the petition. These were that:-

1. the results for Bulanda R.C Primary School released by the 1st respondent in form 36 B are different from the ones announced at the polling station in that it indicated that the appellant had garnered 273 votes and the respondent 1414 votes when form 36A filled at the polling station indicated 273 and 141 votes for the said candidates respectively.

2. The particulars of offences/irregularities/malpractices as contained in paragraph 11 of the petition are:-

(i). That the undersigned ODM agent in FORM 36 B one Mr. Shariff Hassan was in fact not an agent for ODM party.

(ii). That in some polling stations the lighting facilities were poor and hence the petitioner's agents were unable to see clearly what was going on.

(iii). In some polling stations, the number of votes garnered by the petitioner were altered and other votes transferred from the petitioner to the 3rd respondent.

(iv). In some polling station, the 3rd respondent garnered more votes than the registered number of voters in that station.

(v). In many polling stations the petitioner's agent were not allowed to verify voting, counting and transmission of votes.

vi. The 3rd respondent and his agents were in some instances found bribing/treating votes.

7. The petition was supported by the affidavit of the appellant in which he deponed that the election officials in the said election committed election offences and breached their official duties and code of conduct by :

(a).declaring results which they knew or had reasonable cause to

believe to be false or that they did not believe to be correct.

(b).wilfully counted ballot paper as being cast for a candidate

which they knew or had reasonable cause to believe was not

validly cast for that candidate

(c.) failed to prevent or report to the commission or any other relevant authority, the commission of electoral malpractice or offence committed under the Act and;

(d).succumbing to the influence of the 3rd respondent in declaring

results which they knew or had reasonable cause to believe to

be false or that they did not believe to be correct.

8. It was further contended that the appellant's agents were not given an opportunity to sign form 36 A nor were they given copies of the same. That the purported ODM agent who signed the final form 36 B is not known by ODM and is a false agent.

9. The appellant called 4 witnesses in the case. In his evidence he stated that he garnered 8 votes at Ebutayi polling station yet the results as declared in form 36 B indicated that he had garnered zero votes. That at Bulanda polling station the 3rd respondent had garnered 141 votes yet form 36B indicated that he had garnered 1414 votes, meaning that he had obtained 1273 erroneous votes. The witness stated that he does not know Hasan Sharif who is purported to have signed form 35 B on behalf of ODM party. The 4 witnesses of the appellant supported some of the allegations made in the petition.

The response

10. He 1st and 2nd respondents stated in their respondent that the election for Marama North ward was conducted in accordance with the constitution of Kenya 2010, the Elections laws and other relevant legislation. That any irregularities , if at all , were few, minimal and isolated and were not in any way significant as to materially affect the outcome of the election . That the errors arose from human errors made in good faith. That the appellant had failed to discharge the legal and evidential threshold to validate the factual assertions made to warrant granting of any of the orders sought in the petition.

11. The 1st and 2nd respondents called two witnesses in the case. The 1st respondent was DW1 in the case while the presiding officer at

Bulanda polling station was DW2. DW1 conceded to the error made at Bulanda polling station where the 3rd respondent was indicated to have garnered 1414 votes instead of 141 votes. She said that it was a human error. DW1 also conceded to the error made at Ebutayi polling station where it was indicated in Form 36 B that the appellant had garnered zero votes instead of 8 votes. She also attributed it to human error. She however stated that if the erroneous votes of 1273 are subtracted from the 3rd respondent's gazette votes of 3929 he would remain with 2656 and thereby remain the winner.

12. The 3rd respondent testified as DW3 and called two witnesses. He supported the case for the 1st and 2nd respondents that the election was conducted in accordance with the law. He said that it is the 2nd respondent who is to blame for any errors in the declaration of the results and not him. He denied any wrong doing.

Submissions by the advocates for appellant-

13. The advocates for the appellant submitted that the trial magistrate ignored or disregarded critical evidence adduced by the appellant and submissions made by the appellant's advocate. He submitted that voters were identified by using the KIEMS Kit. That the respondents did not state whether forms 32A were filled and whether agents of candidates were invited to verify the same. That the trial magistrate did not address this critical issue.

14. Further that the appellant had established that there was a total of 2138 votes erroneously awarded to the 3rd respondent. That the trial magistrate failed to capture the total number of votes and the tabulations thereto as presented by the petitioner in his submissions. That the appellant requested to be supplied with some documents by the 1st and 2nd respondents which was not done which was a clear breach of the appellant's fundamental right to fair hearing.

15. It was further alleged that the trial magistrate failed to capture critical issues in the proceedings during the hearing of the petition. That the trial magistrate dismissed the appellant's application for scrutiny yet he had indicated earlier in his ruling that the issue would be considered upon the close of testimony in the petition.

16. **That** the appellant had demonstrated that the results declared in form 36 B were in some instances different from the ones declared at the polling stations. That the issue was whether the results contained in form 36 B were correct. That it was admitted that there were errors. That the trial magistrate disregarded the evidence as to the number of votes garnered.

17. That the trial magistrate failed to consider and/or dismissed the petitioner's exhibits that would help the court issue just and fair judgment. That the 1st and 2nd respondents never produced or supplied forms 3A as even after being ordered to do so they supplied forms 36 As that had no stamps of which stamping is one of its security features and also affirms the authenticity of the form.

18. It was submitted that there was power black out in some polling stations.

19. That petitioner testified that one Shariff Hassan who is said to have authenticated the results in form 36B is not known to him. That the petitioner requested to be supplied with the credentials of the Said Sharriff Hassan by the 1st and 2nd respondents but the same were not supplied. That failure to do so invited an inference that the evidence was adverse to the 1st and 2nd respondent.

20. The advocates submitted that there is no reference to a cross- appeal under the provisions of the Elections Act 2011 and the Election Petition Rules. That any issue proposed to be canvassed against a finding of an elections court on appeal to the High Court must be filed as an appeal. That the 3rd respondent ought to have filed his own separate appeal as opposed to filing a cross – appeal to the appellant's appeal. The advocates cited the case of **Twaher Abdul Karim Mohamed Vs Independent Electoral and Boundaries Commission & 2 others (2014) eKLR** where Murithi J while rejecting a cross – appeal held that:-

“ Rule 34 of the Election (Parliamentary and County Assembly Elections) Petition Rules, 2013 is a comprehensive provision for appeals from the Resident Magistrate's Court as an election court and it cannot justify reliance on the provisions of the Civil procedure Act and Rules. The rule does not contain provisions for the filing of cross – appeals or cross – objections. In the circumstances, any objection or issue proposed to be canvassed against a finding of the election court on appeal to the High Court must be filed as an appeal. In the circumstances of this case, the respondents ought to have filed their independent respective appeals on the matter.

The advocates consequently submitted that the court has no jurisdiction to hear the cross appeal.

21. The advocates submitted that the awarded costs of Kshs. 100,000/= were reasonable in that the petition was heard in a remarkable record of 3 days. That the parties adopted affidavit evidence and were cross examined and re - examined. That the applications were canvassed mainly through written submissions without much oral submissions. The issues before court were clear- cut and not complex. That the prayer to cap the costs at Kshs. 1 million is not only outrageous but also exorbitant and without justification.

Submissions by 1st and 2nd respondents

22. The advocates for the 1st and 2nd respondents submitted that the petition did not meet the requirements of rules 8 and 9 of the **Elections (Parliamentary and County Elections) Petitions Rules 2017**. Therefore that the court was right in dismissing it. That the petitioners did not discharge the burden of establishing their claims. That the respondents' documents availed in court did answer all the issues raised in the petition. Further that the election was conducted in accordance with the law. The advocates urged the court to dismiss the appeal.

On the counter claim for costs, the advocates submitted that the issue can be dealt with during taxation at the conclusion of the petition.

Submissions by the advocates for the 3rd Respondent:

23. The advocates for the 3rd respondent submitted that the errors occasioned at Bulanda and Ebutayi polling stations were fully explained by the returning officer. That the calculations by the appellant on other errors other than those at the two polling stations are non – existent. That this court cannot be turned into a tallying centre. That it is the 2nd respondent who has the mandate of tallying the votes and not the appellant. That the superior mode of voting alias alphanumeric is still part of the KIEMS Kit and is a recognized mode of identifying voters in the KIEMS Kit. That no forms are needed to be filled when using the superior mode of voting.

24. That the ODM party has not complained on the agent called Sharrif Hassan that he was not their agent. That the agent came into the picture on the 10/8/17 when he went to collect the results after the results had been announced on 9/8/2017. Therefore that his collection of the results did not affect the election

Further that the supply of documents was not put in cross examination to IEBC official who testified in court.

25. That the appellant admitted that most schools had electricity and that in the alternative the 2nd respondent had provided gas lamps. At no point was a complainant raised of lamps failing. That the allegations of polling stations experiencing blackouts was baseless.

26. That the application for scrutiny was not granted as the same would have been a fishing expedition.

27. On cross – appeal the advocates submitted that the costs awarded by the trial court were minimal. That in the first ruling when the magistrate had dismissed the petition he awarded costs of Kshs. 100,000/=. That when the matter went before him for a full hearing when further costs were incurred the magistrate again awarded costs of Kshs. 100,000/- The advocates urged the court to enhance the costs for the 1st and 2nd respondents to Kshs. 500,000/=. They cited the case of **Eliud Musikoyo Tenge Vs Nyongesa Sospeter Erastus & Another, Bungoma Election Petition No. 4 of 2017** where the lower court capped costs at Kshs. 500,000/= in instruction fees which included costs to be assessed later.

28. The advocates submitted that this court has jurisdiction to hear the cross- appeal. They cited the case of **Mwathethe Adamson Kadenge Vs Twaher Abdul Karim Mohammed & 2 others (2018) eKLR** where Thande J held that:-

“ There is no provision in the constitution, the Act and the Rules that expressly restricts or prohibits the right of a party to approach this court by way of cross – appeal. Duly guided by the foregoing holding of the Court of Appeal my finding is that the fact that the constitution, Act and Rules are silent on the filing a cross – appeal does not in itself bar a party to invoke the appellate jurisdiction of this court by way of cross – appeal. Having found so found, it follows that therefore that the preliminary objection lacks merit regarding the cross appeal and the same is dismissed.

Determination

29. The election in the Marama North Ward was being challenged in the lower court on the grounds that it was not credible. That there were many errors committed during the election to the extent that it cannot be said that it was free and fair. The yard stick for determining the credibility of an election is prescribed under article 81(e) of the constitution which states that the principles of free and fair elections are:-

- i. By secret ballot;
- ii. Free from violence, intimidation, improper influence or corruption;
- iii. Conducted by an independent body;
- iv. Transparent; and
- v. Administered in an impartial, neutral, efficient, accurate and accountable.

Article 86 of the constitution requires that whatever voting method is used, the system is

“ simple, accurate , verifiable, secure, accountable and transparent.

30. These principles were emphasized by Musinga J in **James Omingo Magara Vs Mason Onyongo Nyamwea & 2 others, Civil Appeal No. 8 of 2010** where he said that:

“ The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justified the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

31. In **Ahmed Abdullahi Mohamed & another Vs Independent Electoral and Boundaries Commission, Election petition No. 14 of 2017**, the court stated that:-

“ 202) The principles set out in article 81 and 86 of the constitution are to the effect that: the electoral process must be accurately and competently conducted; the election should have a proper and verifiable record made on prescribed forms and executed by the relevant authorized election officials ; an accountable election whose record is capable of being audited... An election must reflect the peoples free will through credibility, verifiability, efficiency and accuracy.”

The question, at the end of the day, is whether the 3rd respondent won in a free, fair and transparent election.

32. It is trite law that a party is bound by his/her pleading in the course of a hearing. A party cannot introduce matters in the course of the hearing that are not pleaded. In an election petition a party is not permitted to make out a case outside the pleadings and his affidavits. This was emphasized by the Supreme Court in **Raila Amolo Odinga & Another Vs Independent Electoral and Boundaries Commission & 2 others, presidential petition No. 1 of 2017(2017) eKLR** where the court quoted with approval the Supreme Court of **India in Arkale Narasa Reddy Vs Venkara Ram Reddy Reddygari & another Civil Appeal No. 5010 -5711 of 2012 (2014) 2 SCR** where it stated that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered, it is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings
Vs (See Jackson Nyanungo Ranguma)

The Independent Electoral and Boundaries Commission and 2 others Election petition No. 3 of 2017).

33. During the hearing of the petition the appellant herein moved out to introduce some issues that were not part of the petition. When his advocate was cross – examining the 1st respondent he alleged that there were some ballot papers for Masinga constituency that were found in the ballot papers for Marama North . The advocate in his submissions said that the said ballot papers were found being cast in Marama North. However neither the petitioner nor any of his witnesses made such an allegation though the 1st respondent admitted that there were indeed ballot papers for Masinga constituency found among ballot papers for Marama North. She said that they were not used in Marama North.

34. The only irregularity that the appellant mentioned in his petition was the erroneous additional votes of 1273 awarded to the 3rd respondent at Bulanda polling station. In his application for scrutiny the appellant introduced some other stations where he was alleging that the figures were corrected and /or manipulated and in others some votes could not be accounted for. None of the appellant’s agents who were at the specified polling stations. Adduced evidence to that effect. Neither was this pleaded in the petition. It amounted to amending the petition by the back door.

35. In his submissions the advocates for the appellant submitted that there was a total of 2138 erroneous votes awarded to the 3rd respondent. This was not pleaded neither was it captured in the affidavits of the appellant. The respondents were not cross – examined on it. In his evidence in court the appellant only mentioned the 1273 erroneous votes awarded to the 3rd respondent at Bulanda polling station. The issue of 2138 erroneous votes was thereby a submission from the bar not backed by evidence.

Question of scrutiny:-

36. In his petition the appellant was requesting for orders for recount of the total votes cast, scrutiny the BVR Kits to ascertain the number of voters at each polling station in the ward and scrutiny of all the return forms of the Marama North ward including but not limited to forms 36A and 36 B.

37. In dismissing the application for scrutiny the court held that:-

“It is not disputed by the 1st,2nd and 3rd respondents that at Bulanda primary School polling station the 3rd respondent got 141 votes but due to human error made in good faith, 1414 votes were attributed to him in the form 36B. Similarly, that at Ebutanyi polling station the petitioner’s results were erroneously captured as zero(0) instead of eight(8). There is no argument as to the figures in these two polling stations and thus in my mind conducting scrutiny therein would be merely an academic exercise that would serve no purpose. From the foregoing, it is clear that the petitioner has failed to lay a basis for scrutiny in the polling stations pleaded in his petition. The petitioner’s argument that given the errors scrutiny would help him get proof is to say the least a fishing expedition and thus cannot be allowed.

38. The learned trial magistrate cited the principles laid out by the Supreme Court in the case of **Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 others (2014) eKLR** where the court held that an order for scrutiny or recount is not automatic; that sufficient reasons for the scrutiny and recount must be established to the satisfaction of the court; that scrutiny shall be confined to the polling stations in which the results are disputed and that it is not a fishing expedition for new or expanded evidence. Further that petitioner must plead in sufficient detail why he requires the court’s intervention to order scrutiny and that the applicant is required to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized.

39. It is clear from the judgment of the trial court that the magistrate was alive to the grounds under which the court could make an order for

scrutiny. The appellant was required to lay a basis for scrutiny in the polling stations pleaded in the petition. Only one complaint in respect to Bulanda polling station was stated in the petition. One other error at Ebutayi polling station was noted during the hearing where the appellant was captured in form 36 B to have garnered zero votes instead of 8 votes. Both of these errors were admitted by the 1st and 2nd respondents. The appellant did not adduce any evidence as to why he wanted the number of voters in the BVR Kit to be ascertained. He did not lay basis for scrutinizing all the return forms. None of his witnesses raised issue on the number of voters at any of the polling stations. The appellant did not specify which returns they had an issue with and for which polling stations. The application thereby raised general issues with no specifics. The trial magistrate cannot be faulted in dismissing the application for scrutiny.

Failure to use the KIEMS Kit.

40. The advocates for the appellant submitted that not all voters were identified by the KIEMS Kit. That this fact was admitted by the 1st respondent during cross – examination where the witness stated that a form is filled where a voter is not identified by biometric register. The witness said that she did not have any of those forms in court.

41. The advocates for the appellant had by a letter dated 17th October, 2017 written to the advocates for the 1st and 2nd respondents requesting them to produce certain documents named in the letter. Forms 32 A which are filled where a voter is not identified by the electronic register is not among the documents that the advocates for the respondents were asked to produce. The issue non – identification of voters only cropped up in cross – examination. It was not part of the petition. The issue then cannot be part of this appeal.

Question of lighting

42. The petitioner alleged in his petition that in some polling stations the lighting facilities were poor and hence that the petitioner’s agents were unable to see clearly what was going. The advocates for the appellant submitted that it was established during the hearing that some of the polling stations experienced a black out thereby crippling the tallying process. That the learned trial magistrate failed and/or ignored to capture this critical issue in his judgment.

43. The trial magistrate however did address the issue of lighting and dismissed it on the basis that the petitioner in cross – examination confirmed that not only were the polling stations connected to electricity power grid but also that IEBC had provided gas lamps as a contingency. There was no evidence that there was power blackout on any of the polling stations. The appellant did not call any witness who complained that there was poor lighting of his /her polling station as a result of which they could not see the counting and tallying of votes. There is thereby no substance in this complaint.

Fake agent

44. The trial court considered the matter of Shariff Hassan and stated that there was no evidence that the said person was not an ODM agent and that his action to sign form 36 B or the failure of the petitioner’s preferred agent to sign the said form does not affect the results.

45. Indeed there was no evidence that Shariff Hassan was not an ODM agent. The appellant did not call any witness from ODM secretariat to deny that the person was their agent during the polls in Marama North Ward. The appellant has not shown in what manner the signing of form 36 B by Shariff Hassan affected the results of the election. The trial magistrate rightly dismissed the issue.

Errors in the petition:-

46. Though the advocates for the appellant submitted that the 3rd respondent was awarded a total of 2138 erroneous votes, this, as stated above, was not borne out by the evidence adduced before the court. The only errors proved before the trial court were the errors at Bulanda polling station where the 3rd appellant was given 1273 erroneous votes and at Ebutayi polling station where the appellant was denied 8 votes. No other polling station was shown to have awarded erroneous votes. The question before the trial court was whether the errors were so grave as to vitiate the election of the 3rd respondent.

47. In considering the question of irregularities in the election for Marama North Ward , the trial magistrate cited the holding of the Supreme Court in the Presidential Petition No. 1 of 2017 (supra) where the court stated that:-

“... 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 Procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves, to vitiate an election...”

The magistrate accordingly held that:-

*“ upon evaluation of the evidence I am of the opinion that the errors are of a nature reconcilable in arithmetic exploit and they were not widespread or in profound proportions which would put the victory of the 3rd respondent to doubt...The irregularities and errors established in the statutory forms were not of the kind of non – compliance that would affect the results or put the victory of the 3rd respondent in doubt. The errors could be associated with human errors expected in any activity which was conducted by human beings (see the case of **JOHO Vs NYANGE (2008) 3KLR(EP) 500.**). Substantially, the elections were conducted in accordance with the constitutional principles governing the elections and were reflection of the will of the people.*

48. In **Joho Vs Nyange(2008) 3KLR (EP) 500**, Maraga J (as he then was) held that:

“... because it (election) is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.”

49. I totally agree with the learned trial magistrate that the errors confirmed in the petition were not sufficient to vitiate the election of the 3rd respondent. The 3rd respondent had garnered 3939 votes. If the erroneous votes are deducted the petitioner would remain with 2656 votes. The appellant as the runner-up had obtained 2191 votes plus the 8 votes not accredited to make a total of 2999 votes. The appellant would still be leading by 657 votes. This is no small amount of votes in a county ward election. The error could not affect the results of the election for Marama North ward.

50. I find that the learned trial magistrate was right in holding that, the election for Marama North ward was conducted substantially in accordance with the principles of the constitution and the Elections Act. The errors that were noted in the conduct of the election were human errors that did not affect the result of the election. The appellant in his petition did not prove the contrary. The appeal is unmerited.

Cross – appeal

51. The advocates for the parties cited rival authorities on whether or not an election court in an appeal has the jurisdiction to entertain a cross – appeal. I side with Thande J in **Mwathethe Adamson Kadenge Vs Twaher Abdulkarim Mohamed & 2 others** (supra) that the court has jurisdiction to entertain a cross- appeal in an election appeal. It is my considered view that where a statute is silent on procedure the court can revert to its inherent jurisdiction to deal with the matter at hand. This inherent power of the court was recognized in the case of **Republic Vs The Public Procurement Complaints, Review and Appeals Board & Another Exparte Jacorossi Impressi Spa, Mombasa HCMA No. 365 of 2006** in which it was held that:

“The Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.”

52. The costs awarded to the winning party have to be fair and must not be punitive. In **Martha Wangari Karua Vs independent Electoral & Boundaries Commission & 3 others (2018) eKLR**, the Court of Appeal stated that:

“ It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice.”

53. The trial magistrate had initially dismissed the petition at preliminary stage and awarded costs of Kshs.100, 000/= to the 3rd respondent. After a full hearing he again awarded costs of Kshs.100, 000/= to the 3rd respondent. The full hearing, of course, entailed more work than the hearing at the preliminary stage. The costs for both cannot have been the same. It is my considered view that the 3rd respondent was entitled to a higher amount of costs than awarded by the trial court.

54. The advocates for the 3rd respondent cited the case of **Eliud Musikoyo Tenge Vs Nyongesa Sospeter Erastus & another, Bungoma Election petition No. 4 of 2017** where the trial court capped instruction fees payable to the declared winner at Kshs. 500,000/=.

55. The court is alive to the fact that there is a lot of energy, time, research and resources put up in preparing for and defending an election petition. A respondent has to be fairly compensated for this while at the same time considering the right of the appellant to access to justice. The award of Kshs. 100,000/= made to the 3rd respondent fell short of a fair compensation. The said award is set aside and the costs for the 3rd respondent at the lower court are capped at Kshs. 250,000/= which is liable to taxation by the trial court.

56. The upshot is that I find no merit in this appeal and it is hereby dismissed with costs to the respondents. The costs for the 1st and 2nd respondents in the appeal are capped at Kshs. 300,000/= and those of the 3rd respondent are capped at Kshs. 300,000/=. The same to be taxed.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 6th day of December, 2018.

J.NJAGI

JUDGE

In the presence of :

N/A.....for appellant

N/A.....for 1st and 2nd respondents

N/A.....for 3rd respondent

Court assistant.....George

Parties :

Appellant :- present

3rd Respondent – present

30 days Right of Appeal.