



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 75 OF 2013

EMMANUEL OKORE SANGO.....1ST APPELLANT

JOSEPH MAKOKHA OUMA.....2ND APPELLANT

VERSUS

PAUL CHERUIYOT KONES.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....2ND RESPONDENT

STEPHEN OMENDA MUKANGA.....3RD RESPONDENT

J U D G M E N T

Introduction

1). The appellants herein Emmanuel Okore Sango and Joseph Makokha Ouma vied for Bunyala South ward county in the 4th March 2013 general elections. The said elections were conducted by the 1st and 2nd respondents. Both the appellants lost the elections to Stephen Omenda the 3rd respondent.

2). Aggrieved by the declaration of the results by the Independent Electoral and Boundaries Commission (hereinafter referred to as IEBC) they jointly lodged a petition before the lower court on 2-4-2013 contesting the 3rd respondent's election.

In their petition they complained that there were irregularities in the said election namely:

(i) **the party name and symbol of 1st appellant did not conform with the party ticket that he was vying,**

(ii) **the 2nd appellant's party name and symbol were not specified on the ballot paper.**

3). The learned trial magistrate dismissed the petition on the grounds that the 1st appellant did not prove **“that the inaccuracy of his party name and party symbol on the ballot paper had any material effect on the election that would justify invalidation of the election results”**.

4). She went further when dealing with the 2nd appellant's case that he had also **“failed to prove that the winning party had any material effect on the election that would justify invalidation of the election results”**.

5). Being aggrieved by the said decision the appellants have filed the appeal citing six grounds which essentially are revolving around the issues of the party symbols and name.

Analysis

6). Having carefully perused the entire proceedings as well as the respective parties written submission herein the substantive issue to be determined herein revolves around the defects on the ballot papers. As alluded above the appellants are aggrieved by the fact that the trial court held that the errors on ballot paper could not invalidate the election.

7). The parties felt that due to the mix up of the party name and party symbol on the part of the 1st appellant and the missing symbol on the part of the 2nd appellant their supporters were misled and therefore failed to vote for them. The 1st appellant told the court that he had been nominated by UDF Party whose symbol was a clapped pair of hands. He contended that there was an anomaly in the ballot paper in that instead of UDF party symbol whose symbol was a pair of clapped hands, there appeared UDM Party whose symbol is a flag against his name.

8). On the other hand the 2nd appellant who was an independent candidate had a boat as his symbol. His complaint was that his symbol was missing in the ballot paper.

9). Both the appellants told the court that they raised these anomalies prior to the election period to the respondent who agreed to rectify but instead the election went on as scheduled. They further told the court that the 2nd petitioner through a newspaper article had indicated that the election for county representative for Bunyala South ward had infact been postponed which was not the case.

10). On their party the respondent conceded that there were anomalies in the ballot paper as alluded by the appellants. They however argued that even though there were such anomalies the appellants could be identified by their names and photographs as well as party symbols. They denied that the elections were ever postponed. Other than this the respondent argued that the elections were free and fair.

Determination

11). The issues for determination are well set herein namely whether the defects in the ballot papers would have rendered the election annulity and whether the election had been postponed.

Article 82 (2) of the Constitution demands that the election must be conducted in a simple, transparent manner and must take into account the special needs of persons with disabilities *inter alia*.

12). Fundamentally, article 83 of the Elections Act 2011 provides a threshold saving clause that an election shall not be invalidated unless it offends the constitutional standards and election laws, or it fails to comply with the written law in such a manner as to affect the result of the election. It states:

“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 principals laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election”.

0. In the famous case of **Morgan -VS- Simpson [1974] 3 ALL ER 722**

the court of appeal in England had this to say:

“Collating all these cases together, I suggest that the law can be stated in these proposition (i) if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election invalidated irrespective of whether the result was affected or not, that is shown by the Hackney case, where 2 out of 19 polling stations were closed all day and 5000 voters were unable to vote. (2)

if the election was so conducted that it was in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the poll provided that it did not affect the result of the elections. That is shown by Islington case where 14 ballot papers were issued after 8 p.m (3) But even if the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the or as mistake as to polls and it did affect the result the election is vitiated”.

14). While dealing with the issues of anomalies in the ballot paper Judge Karanja in **Charles Majiwa Chedotum & Another -VS- IEBC & 2 Others Election Petition No. 11 of 2013** Kitale said:

“Most importantly, no evidence was provided by the petitioners that the mix up of their names was a deliberate act by the 1st and 2nd respondents or any other candidate. Most likely than not, the mix up was as a result of typographical or print errors. In any event, the mix up could not have prevented the voters or the petitioners exercising their constitutional rights. This was because, the name of the candidate was not the only means of identification in a ballot paper. There were other means which included the candidate's political party's name, symbol and colour. Infact, in the areas where a majority of voters are assisted voters they would more likely than not identify their preferred candidates by his party symbols, colour and name. It cannot be true that voters at certain polling stations refrained from voting or voted for wrong candidates due to alleged mix up of the petitioner's name in the ballot papers”.

15). I would not agree with my brother more. In this case the names and the photographs of the appellants were clear. If the electorates could not identify them with their party symbols, then they could correctly identify them with their photo images which were very clear and also by their names. In any event apart from the defect on the ballot paper no other complaint was raised on the conduct of the election. I do not find any principles of the constitution breached or violated. As stated in the **Morgan - VS- Simpson** case, a mistake that did not affect the conduct of the election is not enough to invalidate an election.

16). As regards the postponement of the election the appellants heavily relied on an article published on the **“Nation Newspaper”** which indicated that the election in Bunyala South ward had been cancelled. In this regard they argued that many people did not vote and they suffered loss. The appellants only produced the newspaper cutting and nothing more. They did not call the correspondent or the editor or at all to articulate the information. Of great significance there was no official gazette to this effect.

17). On perusal of the results it is evidently clear that a large percentage of registered voters turned up and voted for the various candidates. The appellants even won in various polling stations which were considered to be their strongholds. The appellants also voted! It follows therefore that if the elections had been affected by the alleged announcement, all the electors were or could have been affected and not only the appellants supporters.

18). The upshot of my finding is that the elections at Bunyala South ward were conducted freely and fairly. The anomalies in the ballot papers did not at all materially affect the outcome of the results.

The electorate's wishes and desires were clearly reflected. This appeal is disallowed with costs to the respondents.

Dated, signed and delivered at Kisumu this 10th day of February, 2014.

**H.K.
JUDGE**

CHEMITEI