



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL APPEAL NO. 31 OF 2013**

**PETER KIPKURUI LANGAT.....APPELLANT**

**-VERSUS-**

**ROBERT KIPKIRUI METET.....1ST RESPONDENT**

**THE BOMET CENTRAL**

**RETURNING OFFICER.....2ND RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSIONER.....3RD RESPONDENT**

*(Being and appeal from a Judgment and Decree of the learned trial Magistrate Hon. V. Karanja Resident Magistrate in Bomet Senior Principal Magistrate's Court Election Petition No.1 of 2013 delivered on 30th August, 2013)*

**JUDGMENT**

On 30th August 2013, Hon. V. Karanja, learned Ag. Senior Resident Magistrate, declared **Robert Kipkirui Metet**, the 1st Respondent herein, to have been validly elected and as the winner of the seat of the member of Bomet County Assembly (M.C.A), Silibwet Township Ward. The learned Magistrate proceeded to dismiss the Petition of **Peter Kipkirui Langat**, the Appellant herein. Being dissatisfied with the above decision, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in his memorandum of appeal:

1. **THAT the learned trial Magistrate erred in law and fact in dismissing the Appellant's Petition against the weight of evidence tendered.**
2. **THAT the learned trial Magistrate erred in law and fact in failing to appreciate the provisions of the constitution, Election Act and the Rules and Regulations made thereunder.**
3. **THAT the learned trial Magistrate erred in law and fact, in putting so much reliance on the uncorroborated evidence of the 1st and 2nd Respondents.**

4. **THAT the learned trial Magistrate erred in law and fact failing to appreciate the evidence tendered by the appellant in the support of the petition.**
5. **THAT the learned trial Magistrate erred in law and fact by failing to uphold the Constitutional provisions governing Election Petitions.**
6. **THAT the learned trial Magistrate erred in law and fact by failing to appreciate that there was no evidence tendered in support of the alleged complaint as provided for in the election rules of procedure on settlement of disputes.**
7. **THAT the learned trial Magistrate further erred in law and fact in awarding costs to the Respondents upon find the 2nd and 3rd Respondents culpable.**
8. **THAT the learned trial Magistrate erred in law in failing to address the substantive legal issues raised in the petition.**
9. **THAT the learned trial Magistrate erred in law and fact by failing to appreciate that the certificate of election had not been legally revoked and was still valid.**
10. **THAT the learned trial Magistrate erred in law in failing to appreciate that there were a lot of inconsistencies in the Respondent's evidence.**

When the appeal came up for hearing, learned counsels appearing in the appeal recorded a consent order to have the appeal disposed of by written submissions. I have considered the rival submissions and re-evaluated the case that was before the trial court. I think it is convenient at this stage to set out the brief facts of the case. Following the general elections held on 4th March 2013, the electorate of Silibwet Township Ward, in Bomet County, had three candidates to choose who to elect. Of the three candidates who contested, the Returning Officer, Bomet Central, the 2nd Respondent herein, initially declared the Appellant herein as the winner and proceeded to issue him with a certificate to that effect. However, Robert Kipkirui Metet, the 1st Respondent through his agent disputed the decision. The results were re-tallied by the 2nd Respondent who then discovered that the 1st Respondent actually won the election and not the Appellant. The 2nd Respondent then made a decision to revoke the certificate he had earlier issued to the Appellant and issued it to the 1st Respondent herein. The 2nd Respondent communicated his decision through a text message on 5th March 2013 and later followed it up via the letter of 15/03/2013. This prompted the Appellant to file an election petition on 19th March 2013 which petition was heard and dismissed on 30th August 2013.

Though the appellant put forward a total of ten grounds of appeal, the same were aptly summarized to three main grounds:

- i. **That the trial Magistrate failed to appreciate the provisions of the construction, Elections Act, Rules and Regulations made there under.**
- ii. **That the trial Magistrate did not re-evaluate the evidence in support of the Petition.**
- iii. **The appellant should not have been condemned to pay costs.**

It is the submission of the Appellant that the trial Magistrate failed to appreciate the fact that the 2nd Respondent had no power to revoke the certificate of results issued to the Appellant and that the I.E.B.C also lacked jurisdiction to entertain any dispute after the declaration of the results. The Respondent on the other hand are of a divergent view. The record clearly shows that the learned Magistrate considered the reasons given by the 2nd Respondent in seeking to have the certificate given to the appellant cancelled and for another to be issued to the 1st Respondent. The trial Magistrate found that there was an error in posting of results from Njerian Primary School Polling Station in form 35 to form 36 where the results from form 35 for the Women Member of the National Assembly had been erroneously posted instead. When the error was corrected, it turned out that the 1st Respondent had won and not the appellant as

earlier announced. The question to be determined is whether or not the 2nd Respondent had power to revoke the certificate issued to the Appellant? It would appear that though this question was posed to the trial Magistrate she did not address her mind to it.

The other question which is related to this, is whether or not the results initially declared were final. Let me start by stating that the learned trial Magistrate fell into error when she held that the results initially declared by the 2nd respondent at the tallying centre were final. The correct position is that the final election results are declared by publication in the Kenya gazette while those declared at constituency or county tallying centre are merely provisional results. Therefore the certificate issued to the appellant and the 1st Respondent at the constituency or county level are merely provisional until the publication of the results in the Kenya gazette. It is, in my humble view, that the election results of the member of county assembly, Silibwet Township Ward were officially declared by the 3rd Respondent on 13th March 2013 vide the Kenya gazette. In short, the 2nd Respondent acted with his power to correct the error as contemplated under **Section 74(1)** of the **Election Act** hence he had power to revoke the certificate erroneously issued to the Appellant. I have re-evaluated the case that was before the trial Magistrate and it is clear that the court conducted a re-count of all the votes of Silibwet Township Ward and no irregularities were detected in that exercise. The end result of the recount found the 1st Respondent with the highest number of votes hence the winner of the election pursuant to **Section 75(3)** of the **Elections Act**, the trial court correctly declared the 1st Respondent as validly elected member of the county assembly for the aforesaid ward.

The second ground argued on appeal is to the effect that the trial magistrate is accused to have failed to evaluate the evidence presented before her in support of the Petition. It is the appellant's submission that though there was a written complaint available, the same was never shown to the trial court, therefore that complaint was not sufficiently proved before the trial court. It is also argued that there was a complaint by the presiding officer to the police station that wrong results were posted. It is said an inquiry file was opened but the police officer who investigated the complaint was never called to testify. For this reason, the appellant submitted that the trial Magistrate erred when she formed the opinion that no irregularities were detected. The Respondents faulted this ground arguing that the Appellant had failed to discharge the burden of proof. The appellant had approached the court vide an election petition alleging that the election had been marred by malpractices and irregularities. It was incumbent upon the appellant to prove the alleged irregularities and malpractices on a balance of probabilities. The record shows that the learned trial Magistrate considered and analysed the evidence presented by the appellant in support of his Petition. He was required to prove that the 2nd Respondent acted without a complaint from the 1st Respondent. There was evidence that the 2nd respondent acted on an oral complaint. The law did not bar any person from making an oral complaint at that level. The trial magistrate found the recounted votes to tally with the results posted in form 35 hence she was right when she formed the opinion that there were no irregularities that could be used to vitiate the election.

The final ground on appeal is to effect that the trial Magistrate erred when she condemned the appellant to pay costs yet she found the 2nd Respondent to have breached the law, though the breach did not materially affect the election result. The appellant argued that he had merely made genuine complaints and concerns hence he should not have been condemned to pay costs. The award of costs is provided for under **Section 84** of the **Election Act**. It is stated that costs follows the event. There is no doubt that the appellant's petition was found to be without merit and dismissed. It is clear from the recorded evidence that the trial Magistrate noted that 2nd Respondent made minor and insignificance errors and irregularities. Those deficiencies did not affect the credibility and result of the election. The appellant was enjoined by law to show that those defects indeed materially affected his election but he failed to discharge that burden. The learned Ag. Senior Resident Magistrate cannot therefore be faulted for ordering the appellant to pay costs.

In the end, I see no merit in this appeal. The same is ordered dismissed with costs to the Respondents.

**Dated, Signed and delivered in open court this 14th day of March, 2014.**

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**J.K.SERGON**

**JUDGE**

**In the presence of:**

**Mr. Mutai holding brief for Mr. Orina for Appellant**

**Mr. Langat holding brief for Mr. Yegon for 2nd & 3rd Respondent**

**Mr. Langat for 1st Respondent**