



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELECTION PETITION NO. 2 OF 2013

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ACT, 2011**

AND

**IN THE MATTER OF THE ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS,
2012**

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013**

AND

IN THE MATTER OF THE ELECTION FOR GOVERNOR OF SIAYA COUNTY

WILLIAM ODHIAMBO ODUOL.....PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST
RESPONDENT**

BENSON MUGATSIA.....2ND RESPONDENT

CORNEL RASANGA AMOTH.....3RD RESPONDENT

R U L I N G

Following the general elections conducted by the 1st and 2nd respondents on 4-3-2013 the 3rd respondent was declared to have won the gubernatorial election for Siaya County by garnering 142,901 votes. The petitioner was one of the six candidates. He was declared to have garnered 133,900 votes. He

was aggrieved by the declaration and filed this petition. He claimed that the election was marred by fraud, malpractices, irregularities of electoral laws and regulations; it was not validly conducted, lacked transparency, credibility, integrity and was not free and fair, the results were tampered with, were altered and/or manipulated and were therefore not accurate or verifiable; and, therefore that, the 3rd respondent was not validly elected as the governor of the County. The respondents defended the election and the declaration and contended that the 3rd respondent had been validly elected in a free and fair manner.

On 10-5-2013, the petitioner filed the present application in which he sought the following orders:

- the court does order the scrutiny and recount of all the votes cast in the gubernatorial election of Siaya County conducted on 4-3-2013; and
- the court orders the scrutiny and the examination of the election materials used in all the polling stations in the gubernatorial election for Siaya County conducted on 4-3-2013 including, inter alia, the following election materials and documents:-
- the written statements made by the presiding officers for the said polling stations,
- the copy of the register used during the said election;
- the copies of results of each polling station;
- the written complaints of the petitioner and his agents;
- the packets of spoilt ballot papers;
- the marked copy of register;
- the packets of counterfoils of used ballot papers;
- the packets of rejected ballot papers; and
- the statements showing the number of rejected ballot papers.

The application was supported by the following grounds:

- that the petitioner has in the petition sought scrutiny and recount and it would therefore be expedient if such scrutiny and recount is done now;
- that the various malpractices alleged to have been committed during the voting, counting and tallying call for scrutiny and recount; and
- that no prejudice will be occasioned if the application is granted.

The application was also founded on the petitioner's supporting affidavit.

The 1st and 2nd respondents filed grounds of opposition to the application. The grounds were that no basis had been laid to warrant or justify the grant of the orders sought; the application as presented was an abuse of the process of the court as it was aimed at engaging in a fishing expedition; the grounds relied on did not justify the grant of the orders sought; and that the application was bad in law and fatally inconceivable. The 3rd respondent opposed the application on the basis that neither the petition nor the application, or indeed the evidence called, disclosed sufficient basis for the order of scrutiny and/or recount, and that the petitioner was engaging in a fishing expedition through the request.

It is notable that the court has received all evidence from the petitioner and the respondents. Subject to the decision in the application, the parties will be called upon to make their final submissions and thereafter await the decision of the court on the petition.

I invited parties to file written submissions on the application following which counsel highlighted the same. I am grateful to Mr. Kwach and Mr. Wakla for the petitioner, Mr. Gumbo for the 1st and 2nd respondents and Mr. Kopot for the 3rd respondent for their industry. I have considered those submissions and the authorities that were relied upon.

Section 82 (1) of the Elections Act, 2011 confers on this court the jurisdiction to order scrutiny of votes. It provides as follows:

“82 (1) An election court may, on its own motion or application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such

manner as the election court may determine.”

Under rule 33 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013

“33 (1) The parties to the proceedings may, at any stage, apply for scrutiny for the purpose of establishing the validity of votes cast.”

It is clear from the rule that scrutiny is intended to establish “the validity of votes cast”.

Under section 82 (2) of the Act it is provided that:

“82 (2) Where the votes at the trial of an election petition are scrutinised, only the following votes shall be struck off:

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;

- (b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.”

Under rule 33 (4) by the Rules scrutiny shall be confined to the polling station whose results are disputed and shall be limited to the examination of the documents and materials in (a) to (j) of the rule.

If scrutiny is intended to establish the validity of votes cast, then the next question is what is a valid vote? Neither the Act nor the Rules define what a valid vote is. However, rule 77 of the Elections (General) Regulations, 2012 under the Act seems to indicate which vote is not valid and which, therefore, has to be excluded from the count. The rule reads thus:

“77 (1) At the counting of votes at an election, any ballot paper-

(a) which does not bear the security features determined by the Commission:

(b) on which votes are marked, or appears to be marked against the names of more than one candidate;

(c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;

(d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or

(e) is unmarked,

shall, subject to sub regulation (2), be void and shall not be counted.”

Blacks Law Dictionary (8th Edition) at page 1607 does not define what a valid vote is but defines both illegal vote and legal vote as follows:

“Illegal vote. A vote that does not count because it was cast by someone not entitled to vote or for an ineligible choice, or in a form or manner that does not comply with the application rules.

Legal vote. A vote cast in the proper form and manner for an eligible choice by someone entitled to vote.”

In my view, section 82 (2) deals with people who are not eligible to vote and rule 77 (1) of the Elections (General) Regulations, 2012 deals with a vote that is void, an illegal vote, which the Presiding Officer should not include in the count. It follows that an application for scrutiny should identify, for the purpose of exclusion, votes by people who were not eligible to vote and votes which were included in the count which the Presiding Officer should have rejected. The applicant may in the application rely on section 82 (2) or rule 77 (1), or both, depending on what he seeks to establish. Under rule 33 (4) of the Election (Parliamentary and County Elections) Petition Rules, the applicant should specify the polling stations in respect of which he seeks scrutiny, and the materials and documents that he issues the court to scrutinize.

In the present application the petitioner sought scrutiny and recount of all the votes cast in all the polling stations in Siaya county. However, in the written submissions by his counsel it was acknowledged as follows:

“My Lord, the Petitioner has applied for full scrutiny involving all polling stations in Siaya County. My Lord, although the Petitioner's main complaints are with the results from Gem, Bondo and Rarieda Constituencies, we submit that in view of the discovery of discrepancies affecting the vote tallies for the 3rd respondent a total and full scrutiny of all the polling stations would be fair and just to all parties. In doing so, we urge the court to follow in the footsteps of Justice Majanja in the case of **Richard N. Kalembe Ndile -VS- Dr. Patrick Musumba Mweu & Others (Supra)** where the learned judge when allowing full scrutiny in all the 164 polling stations of Kibwezi West constituency held:

“(27) I have considered the desirability of a partial scrutiny limited to the polling stations identified by the petitioners as the respondents have contended. Such a course, in my view, would be unfair to the 1st respondent as the errors and miscalculations appear to be random and affect all the candidates since no votes can be attributed to any one candidate.”

“We submit, in the alternative, that should the honourable court for good measure be inclined to order a limited scrutiny then the same should be in respect of Gem, Bondo and Rarieda Constituencies.”

The response by the 1st and 2nd respondents' counsel was that scrutiny should be specific as to the polling stations in issue, the evidence linking the polling stations to the the need for scrutiny, the documents sought to be scrutinised and the basis for the scrutiny of such documents. Counsel submitted that the overall effect of asking for a blanket scrutiny and recount amounts to shifting the onus probandi to the court which is not a party to the proceedings. They relied on the decision in the **Presidential Election Petition No. 5 of 2013, Raila Amollo Odinga -VS Uhuru Kenyatta & Others.**

The 3rd respondent's advocates were of similar view, that scrutiny should relate to a specific station and to a specific document.

I have no doubt that, on basis of rule 33 (4), the petitioner cannot seek a blanket scrutiny. He acknowledges that he is not complaining about all the polling stations in Siaya county. He complains about stations in Gem, Bondo and Rarieda constituencies. Any order for scrutiny can only be limited to the stations in Gem, Bondo and Rarieda constituencies.

Secondly, in **Richard N. Kalembe Ndile & Another -VS- Dr. Patrick Musimba Mweu & Others, Election Petitions Nos. 1 and 7 (Consolidated) at Machakos**, although the petitioner sought recount, re-tally and scrutiny of all votes cast, all that the court granted was a recount. The court's order read as follows:

“30 (a) There shall be scrutiny of the votes limited to recount and ascertainment of the number of votes each candidate obtained in each of the 164 polling stations in Kibwezi West constituency”.

The decision, however, reiterated the position in rule 33 (2) that all that the petitioner was required to demonstrate was “sufficient” basis for scrutiny to be allowed. It is not true, like was submitted by counsel for the 3rd respondent, that for scrutiny at this application stage the petitioner discharges the burden of proof (beyond a balance of probability but below proof beyond reasonable doubt) required in a petition.

The evidence relied upon for scrutiny and recount related to the alterations in Forms 35 which alterations had neither been countersigned nor stamped by the maker; discrepancies between Forms 35 and Form 36; vote-stuffing, over-voting; and canvassing and/or bribery.

The alterations were in respect of 33 Forms 35 in Gem, 17 Forms in Bondo and 29 Forms in Rarieda. The total was 79 stations out of 573 polling stations in Siaya county. I agree with the petitioner, and as was conceded by Hildah Akumu Imbo (DW3), that it was necessary for each alteration, cancellation or overwriting to be countersigned and stamped by the maker. In deciding the petition, the question will be what impact the alteration, cancellations and overwriting had on the overall result and, ultimately, on the integrity of the election. For the purpose of this application, however, the question is whether the votes in Forms 35 were by ineligible people or whether the votes were not properly marked and therefore ought to have been excluded. The petitioner did not address these questions.

I consider that all the disputed Forms 35 were signed by agents, and there was no indication of protest from the petitioner's agents present at these polling stations. Nonetheless, it was not certain at what stage the alterations, cancellations and overwritings were done now that the Presiding Officers or their deputies did not testify to be able to own the same, if they made them.

It was conceded that there were discrepancies in the postings in Forms 35 and 36 with the total effect that the petitioner lost 655 votes and the 3rd respondent lost 340 votes. It was the petitioner's case that full scrutiny would reveal more cases of discrepancy. The respondents' case was that, given the wide margin of the votes garnered between the petitioner and the 3rd respondent, the revealed discrepancy cannot materially alter the result (**Hassan Ali Joho -VS- Hotham Nyange & Others [2006] eKLR**). Secondly, that the court should rely on the evidence tendered by the petitioner and not go into fishing, as it were, to find out if more discrepancies will be unearthed by scrutiny and recount. Ultimately, the petitioner will prove whether or not the discrepancies were as a result by fraud, now that the respondents say it was due to human error.

There was the issue of vote stuffing at Ujwanga polling station and at River Yala. The undisputed evidence was that the 6 ballot papers found (with a polling clerk according to the petitioner or the petitioner's witness according to the respondents) were subsequently marked as spoilt and not used in the count. Regarding the happenings at River Yala, the testimony of Francis Edwin Otieno Otieno (PW5) was that he witnessed the Returning Officer of Bondo constituency and other people stuffing ballots in ballot boxes in a lorry. The lorry was part of a convoy headed for Siaya county tallying centre. It was at night. Rose Obari (DW4) was the Returning Officer. She admitted that on this night she was in a convoy, which included a lorry, and was taking results to Siaya County tallying centre. This was on 5th/6th night and she got to the centre at about 3 a.m. There was concern by the petitioner that Bondo was close to Siaya, about 15-20 minutes by vehicle, and yet it was the last constituency to deliver its results. DW4 denied that the convoy stopped on the road to Siaya or that there was any vote stuffing. She testified that the reason why there was delay was that she had received intelligence report that the petitioner and his people were going to way-lay the convoy. She organized security and they travelled to Siaya in a convoy of one lorry, about 4 land rovers and one private car. She was in the private car which had AP officers. All the vehicles, she

said, had police officers. She denied that the lorry was carrying ballot boxes. She stated that she was carrying the results in Forms 35 and ballot boxes were not required at the County tallying centre. The argument by the respondents was that votes had already been counted at the respective polling stations and Forms 35 completed and signed and therefore any stuffing of votes in ballot boxes would not have been of any consequence.

The petitioner gave evidence of over-voting in stream 1 at Awelo primary school where the registered voters in Forms 35 were 587 and the votes cast were 620, a difference of 33 votes. Then at Nyasanda primary school where Form 35 showed the registered voters to be 420 and those who voted to be 439, a difference of 19 votes. The differences were acknowledged by the respective Presiding Officers in Form 35. The respondents' case was that the Forms 35 indicate that there was no over-voting. I note that Awelo is in Alego- Usonga constituency and Nyasanda is in Ugunja constituency. The respondents argued that even if the votes in the two stations are excluded the 3rd respondent would still be the winner.

The other issue related to the canvassing and/or bribery of voters at Pala, Othach, Got Ramogi, Bar Kanyango, Nyamonye and Abidha primary schools polling stations in East Yimbo ward in Bondo constituency. These allegations were denied by the respondents. Any vote influenced by bribery, treating or undue influence would be invalid and should be excluded from the count. This means that such vote should be isolated, and that the person who was influenced should be identified and his vote excluded. The petitioner did not give the identities of the alleged influenced persons.

The last issue raised by the petitioner was that the combined gubernatorial votes in Bondo constituency were more than the votes cast for the former Prime Minister Raila Odinga who was a presidential candidate on the same party as the 3rd respondent and who hails from the constituency. The petitioner was of the view that this was further evidence that the gubernatorial votes had been inflated and manipulated.

The 2nd respondent testified and acknowledged that on 5-3-2013 he received a letter of complaint (page 835 of the petition) written by the petitioner complaining that IEBC officials were manipulating results, especially those of Bondo, Rarieda and Gem, with a view to benefiting the 3rd respondent. Particulars were given and action was being sought from the respondent. He testified that he did not take any action.

I have considered all the material placed before me in the application. I find that no sufficient basis has been shown to support an order of scrutiny. However, there are sufficient reasons to support the order for the recount to ascertain the votes garnered by each of the candidates, including the petitioner and the 3rd respondent, for the gubernatorial election for Siaya County held on 4-3-2013. The recount shall be limited to Bondo, Gem and Rarieda constituencies, and Awelo primary school polling station in Alego Usonga constituency and Nyasanda primary school polling station in Ugunja constituency.

The recount shall be undertaken by the Deputy Registrar of this court. The petitioner and the respondents shall each be allowed to have two (2) agents present during the exercise. The recount shall commence on 4-7-2013 at 9 a.m and shall continue on day to day basis until conclusion. The petition shall be mentioned on 15-7-2013 for further orders. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Kisumu this 3rd day of July 2013.

A.O. MUCHELULE

JUDGE

