



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT BUSIA

ELECTION PETITION NO 9 OF 2017

IN THE MATTER OF CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011

AND IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS 2012

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT NO. 9 OF 2011

AND

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

2017

AND

IN THE MATTER OF NATIONAL GENERAL ELECTIONS HELD ON 8TH AUGUST 2017

AND

IN THE MATTER OF ELECTION OF MEMBER OF COUNTY ASSEMBLY FOR AGENGA NANGUBA WARD, FUNYULA CONSTITUENCY

BETWEEN

IBRAHIM ARUNA ARAMADHANI.....PETITIONER

AND

EVANS BWIRE BARASA.....1ST RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....2ND RESPONDENT

JUDGEMENT

1. Following the general election held on the 8th August 2017 under the charge of Independent Electoral Boundaries Commission (2nd respondent), elections were held throughout the country for all the 6 elective positions namely, president, governor, senator, member of parliament, women representative and the member of county assembly.

2. Agenga Nanguba Ward within Funyula Constituency had 19 polling stations within which the elections took place. There were 9 candidates in the race for member of county assembly and each garnered votes as listed.

Majale Levis 1600

Barasa Evans Bwire 3340

Bayiekha Francis Juma 117

Juma Patrick Nyongesa 13

Malo Stephen Hebert Halonyere 1180

Mugwanga Christopher Wafula 97

Obada Camulus Ojiambo 3138

Omolo Rachel M. Migango 199

Silas Masiga Okwera 69

3. The returning officer an officer of Independent Electoral and Boundaries commission herein after referred to as 2nd respondent consequently proceeded to declare BARASA EVANS BWIRE (1st respondent herein after) as the duly elected member of county assembly for Agenga Nanguba Ward.

4. The petitioner being a registered voter was not satisfied with the result and thus the petition before the court was lodged. In his petition the petitioner deponed that the 2nd respondent's declaration of 1st respondent as member of county assembly of Agenga Nanguba Ward was a result of flawed criminal and compromised conduct between the two respondents. The election did not meet the constitutional threshold for integrity and democratic process. It wasn't free and fair based on the following grounds

i) Violence and intimidation. There were several instances and incidents of violence prior to, during and after the general election of 8/8/2017 within the Agenga Nanguba Ward which intimidated and scared off voters. That people were injured and property destroyed during this incidents of violence. Some of those injured were Kizito Makokha and Milton Pamba who reported the matter to Sio Port police station.

ii) Bribery, the petitioner avers that there was massive voter bribery on the polling day at various stations. That the 1st respondent's allies were dishing out money and other gifts such as sugar and lessos.

iii) Negligence of the 2nd respondent in handling the process of election at Agenga Nanguba Ward on 8/8/2017. Which entailed refusal by IEBC clerks to allow agents of different candidate to help persons unable to vote.

iv) Propaganda and malicious rumours by the 1st respondent against one candidate called Camulus Obada Ojiambo, having murdered Bernard Were.

5. With the above the petitioner sort redress in court and prayed for:-

i) Scrutiny and recount of all votes cast in the Agenga Nanguba Ward on 8/8/2017

ii) Declaration that 1st respondent was not validly elected through the election thus null and void.

iii) An order for repeat poll elections in accordance to the Constitution of Kenya 2010 and the Elections Act 4 of 2011

iv) Costs of the petition

v) Any other remedy the court deems fit.

6. The petition was supported by the affidavit of the petitioner and 6 other witnesses

7. In response to the petition the respondents filed responses. The 1st respondent filed a response supported by the affidavit of 6 witnesses. The 2nd respondent filed 5 witness affidavits in support of their response.

8. In his response the 1st respondent states that

i) He was duly elected within the confines of the law.

ii) The electoral process was credible, verifiable, transparent, accountable, free and fair

iii) That there was no single voter of Agenga Nanguba Ward who was disenfranchised.

iv) That there was no single incident of violence reported at any of the polling stations within Agenga Nanguba Ward on 8/8/2017 and if there was anyone injured then it wasn't as a result of elections

v) There was no bribery as alleged by the petitioner neither were there any rumours whatsoever about any of the candidates that came to his attention

vi) That the margin of winning is not prescribed in any law.

9. The 2nd respondent its response stated that

i) Elections in Agenga Nanguba Ward were conducted in accordance to the law and the result were as stated below

Levis O. Majale 1,600

Evans Bwire Barasa 3,340

Francis Juma Bayiekha 117

Patrick Nyongesa 13

Stephen Herbert Khalonyere Malo 1,180

Chrispinus Wafula Mugwanga 97

CAmulus Ojiambo Obada 3,138

Omolo Racheal Migango 199

Masiga Okwera Silas 69

ii) That tallying confirmed that Evans Bwire garnered the highest number of votes. And was therefore declared member of County Assembly.

iii) That the petition is couched with generalities and not specific complainant have been raised.

iv) That it did not at any point abdicate its role as a neutral umpire in the general election 8/8/2017. All agents were present at the polling stations signed the forms 36A

v) The process of voting counting and transmitting the results was verifiable and accountable and was done in accordance to the law.

vi) That the petition is incompetent and incurable and should be struck out

10. Issues for determination at the pre-trial conference were

i) Whether the Agenga Nanguba Ward County Assembly election was done in accordance to the law.

ii) Whether the petitioner is entitled to scrutiny and recount of votes of the Agenga Nanguba Ward election 8/8/2017

iii) Whether the 1st respondent was validly elected as member of County assembly Agenga Nanguba Ward.

iv) Costs

Issue No.1

Whether in conducting of the County Assembly member of Agenga Nanguba Ward there was non-compliance with the laws and practice regulating the conduct of elections in Kenya.

Every citizen who attained the majority age has a right to universal adult suffrage, the right to vote unalienable. The same is enshrined in our **Constitution 2010**. This right can only be guaranteed by the electoral body putting in place mechanisms that will enable the voters to express their wish through the secret ballot.

In the petition before the court, the petitioner alleges instances where there was non-compliance with the laws regarding the electoral process and thus substantially affected the outcome of the election.

1. Refusal by clerks to allow agents of different candidates to assist persons unable to vote at Buduta polling Station.

This is stated in paragraph 17 of the petition.

Regulation 62(1)(c) allows only authorized agents to be at the polling station at the time of voting however (2) gives the presiding officer power to more than one agent from the party.

In response to the allegation above the 2nd respondent stated in its paragraph 11 (c) that agents of different candidates were allowed into the polling station. That there was no time the agents were denied or stopped from assisting people who wished to be assisted.

I have evaluated the evidence tendered by the petition. This allegations remains as such, the petitioner has not substantiated the claim. Has not brought evidence of any voter who needed assistance but was denied the help of an agent of any particular candidate.

I dismiss the allegation.

ii) Refusal to provide duly appointed agents with form 36A as it was done to Tiberio Egesa at Buduta polling station.

The said Tiberio Egesa Gunono did not swear an affidavit and come to court for cross examination on the above issue.

All agents who have appeared before the court were sworn and none testified the effect that they were denied access to the forms 36A

I seek to address the issue of the unsigned forms as presented by the 2nd respondent and cross examined by the counsel for the petitioner. The forms flagged out had omissions of signature by some agents and lack of rubberstamps.

Regulation 72 (1)(2) provides that the presiding officer, the candidates or agents shall sign the declaration in respect to the election.

Regulation 79(6) states that refusal of a candidate or agents to sign the declaration under **sub regulation (4)** or to record reasons of their refusal shall not by itself invalidate the result as announced under **sub regulation 2 (a)**.

The petitioner also raised the issue of alterations on the forms which were not countersigned. Whereas the regulations do not specify what ought to be done where cancellation or alteration is done, common sense and good practice dictates when an alteration or cancellation is done on a statutory form the same should be counter signed by the concerned officer.

The alterations were on **Mufumu ECD stream 1** form where results of the following candidates were altered. Mugwanga Chrispinus Wafula, Camulus Obada Ojiambo and Omolo Racheal Migango.

The 1st respondents tally was not tampered with. 8 agents present signed the form and no protest was indicated on the same. No complaint was raise by the agents about the alteration.

With this I dismiss the allegation.

11. In an election petition its general presumption that the election was conducted properly and in accordance to the law unless proven otherwise. The burden of proof therefore lies with the petitioner. I refer to the **Raila Odinga 2013 case** which is locus classicus, the Supreme Court held that in an election petition, the standard of proof is more than mere balance of probabilities but beyond reasonable doubt.

The court also observed that where there are allegations of commissions of election offences the allegations must be proved to the standards required in criminal cases which is beyond reasonable doubt.

iii) Voter bribing and treating.

The petitioner alleges that there was massive voter bribing prior to the election. The same was echoed in the affidavits of Godfrey Owori, in paragraph 7 of his affidavit he said he saw Aisa Ojiambo a campaigner of Evans Bwire dishing out money to voters.

Justus Oundo Barasa also in his affidavit paragraph 5 stated that he saw Ayub Sadara, Bwire Okoch and Anyango Agunda dishing out money to persuade people to vote for Bwire.

There was also an allegation that one of the campaigners of the 1st respondent was serving tea and mandazi at his home for people to go and vote for Evans Bwire.

I have read the replying affidavit of the 1st respondent paragraph 11, he states categorically that he did not participate in any voter bribery. He did not have any treats in form of sugar or lessos.

Ayub sadara swore an affidavit and told court he did not treat any voters to tea and mandazi neither did he dish out any money on the morning of the election.

Anyango Agunda also swore an affidavit to state that on the material day, though she was an agent of the 1st respondent she did not dish any

money

12. I have evaluated the evidence adduced what arises clearly is that the 1st respondent has not been mentioned at any moment as having bribed or having been seen bribing any voter, neither did he invite any voter for a treat. No one has been charged with any such offence as a result of the election of 8/8/2017. The 2nd respondent denies having received any such complaint.

Simon Nyaundi Ogari & Another vs Hon Joel Omagwa Onyancha & 2 others

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it’s not easy to prove bribery, more especially when done in secrecy. In such cases perhaps bribery may be inferred by some peculiar aspects of the case but when it’s alleged that bribery took place publicly and in the presence of many people, the court can’t be satisfied by anything less than best evidence which is always direct evidence”

With this I dismiss this allegation

iv) Violence prior during and after voting

The petitioner states in the second ground of petition that there was violence and intimidation of voters at various points within the ward at the period. This was to intimidate and scare away thus disenfranchising the voters. That the same was done on behalf of the 1st respondent. The same was witnessed in Bumuliba, Sigalame and other polling station.

We have the sworn affidavit of Kizito Makokha. He told the court he was attacked by people on his way home before the elections, he was able to identify some of these people. They have since been arrested and charged with the offence before the court.

On cross examination he told the court he was not assaulted at the polling station and that the 1st respondent wasn’t amongst those who attacked him. All he could tell the court was that they were campaigners of the 1st respondent claim not proven. Since the matter is pending before a court with competent jurisdiction I will rest at that.

v) Propaganda and malicious rumours

On this matter the petitioner and several witnesses deponed that the 1st respondent by himself or through agents accused one Camulus Obada Ojiambo of having killed one Bernard Were a fact which wasn’t true.

It is alleged that word went round polling station that Obada had killed someone causing many people to change their mind about voting Camulus Ojiambo Obada and instead vote 1st respondent or some just walked off the queue and did not vote.

13. This is one of the hardest allegations to prove reason being voting was /is by secret ballot one can’t tell who the other intends or voted for. Even the court can’t make pronouncement on this matter because the court even if a repeat election was ordered can’t tell who intends to vote for which candidate.

It common knowledge that 98% of voters go to the ballot with formed opinion or decision and no event humanly understandable can cause one to change his mind and if so it would be on a very negligible margin.

No case of defamation, libel or slander has been cited before more. I hold that sufficient proof has not been adduced.

14. In arriving at this finding I’m alive to the fact that in determining whether non-compliance or contravention of electoral laws affected the result of an election in a substantive manner the court should apply both qualitative and quantitative tests or depending on the circumstances of the facts of each case.

15. Quantitative skill are applicable where the figures are in question. Which isn’t in this case. I find that the process was fair, free and transparent. There existed an environment fair for an election, the votes are verifiable from the look of the form. The alleged irregularities did not affect the outcome in a substantial manner if any at all.

Issue 2

Whether the petitioner is entitled to scrutiny and recount of the votes.

The petitioner prayed for recount and scrutiny of votes in his memorandum. The basis of Scrutiny and recount is laid down in **Rule 32 and 33 of Election Petition Rules**. In this case the petitioner has failed to lay basis to warrant the court to order one neither has the court on its own motion felt satisfied with the petitioners case to a call for scrutiny.

Joho vs Nyange (2008) 3 KLR 188 –

“Scrutiny will only be ordered when a foundation and basis has been laid”

In my view ordering for the same would be a fishing expedition, where petitioner hope to come up with evidence to support his claim. There are instances where the court issues orders for recounts and scrutiny when the margins are narrow. The question would be “what is a narrow margin”

The margin in this case would be narrow as imagined but all in all a win is a win even by a single vote if the process is free, fair and verifiable.

Issue 3

Whether the 1st respondent was validly elected as County Assembly of Agenga Nanguba Ward on 8/8/2017

The petitioner having failed to prove his case to the required standards for reasons already given, I hereby declare that the 1st respondent, Evans Bwire Barasa was validly elected as the Agenga Nanguba Ward representative in the general election which were held on 8/8/17

Issue 4

Reliefs

Having rendered my verdict I make the following orders

- i) The petition is hereby dismissed
- ii) The petitioner shall bear costs of the petition which are capped at 500,000/= in total pursuant to Rule 34 of Elections (Parliamentary and County Elections) Rules 2013
- iii) A certificate be issued in accordance to S86(1) of Elections Act

Lastly, I want to thank the petitioner and the 1st respondent together with their supporters in this matter for upholding discipline throughout the trial. Thank you for having faith in this court. I’m greatly indebted to the advocates in this matter for their impressive and focused presentation which enabled the court to decide the case with ease within the stipulated time. Special appreciation to my able court assistant who offered the technical support through the trial.

Dated at Busia this 31st day of January 2018

Hon Martha A. Nanzushi

Senior Resident Magistrate

In the presence of:

Mr Okutta, counsel for petitioner

M/s Maloba Counsel for 1st Respondent

Ms Nabulindo counsel for 2nd Respondent

Brian Odhiambo Kasati, Court Assistant