



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT AT KITUI**  
**ELECTION PETITION NO 1 OF 2017**

**MUSEE MATI.....PETITIONER**

**-VS-**

**BARIDI FELIX MBEVO.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER KITUI WEST CONSTITUENCY.....2<sup>ND</sup>  
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The petitioner herein Musee Mati was a candidate for the MCA (Member of County Assembly) seat Mutonguni Ward in Kitui West Constituency. He (therein after) referred as the petitioner claims to have won the elections held on 8/8/2017 but the second respondent denied him victory after he awarded the certificate of elected member of County Assembly to the 1<sup>st</sup> Respondent **Baridi Felix Mbevo** on 9/08/2017.

2. The petitioner on realising he had been denied victory immediately lodged a complaint with the 2<sup>nd</sup> respondent who agreed to a re-tallying after notifying all the candidates and their agents.

3. The re tallying exercise was conducted on 11/08/2017 in the presence of all candidates and the results that came out showed the petitioner had the following votes contrarily to the entry in the form 36B's.

<b>Polling Station</b>	<b>1 votes shown in 36B</b>	<b>Actual votes in 36B</b>
Kutha Primary school	1	17
Kyambiwa Primary School	0	53
Uvaani Primary ‘	30	40
Kakeani Primary	85	87
Kwa Ndondo	10	58
Kiatine	0	124

4. The petitioner therefore states that with the re-tallying results showing he had garnered **3,330** votes against the first respondent **3,319**, he ought to have been declared the winner and the results announcing the 1<sup>st</sup> petitioner as the MCA elect nullified.

5. The petitioner maintains that the second respondent refused to nullify the results even after realising the certificate had been issued to the first respondent erroneously as he had not won the elections.

6. The petitioner therefore prayed for the following orders:-

(i) A determination that the first (1<sup>st</sup>) respondent Felix Baridi Mbevo was not duly and validly declared elected winner of Mutonguni Ward West constituency.

(ii) A determination that the petitioner herein Musee Mati was the duly and validly winner of the elections of Mutonguni Ward in Kitui West Constituency held on 8/08/2017.

(iii) A determination declaring the certificate of elected member of County Assembly for Mutonguni Ward No. **150700346-1** issued to the 1<sup>st</sup> respondent null and / or as cancelled.

(iv) A determination that the petitioner herein Musee Mati be issued with a certificate of elected member of County Assembly for Mutonguni Ward in Kitui Ward Constituency.

(v) A determination that any gazette notice declaring the 1<sup>st</sup> respondent as the validly elected member of the County Assembly for Mutonguni Ward. In the general elections held on 8.08.2017 be declared null and void to that extent only.

(vi) The petitioner be awarded costs of the petition.

7. The petition was supported by supporting affidavits sworn by petitioner Musee Mati, Boniface Muimi Mali and Victor Kyalo Mutua.

8. The first respondent on being served responded by filing a preliminary objection dated 21.08.2017 which objection was opposed and the court proceeded to dismiss the same on 24.11.2017.

9. On 4.09.2017, the first respondent Baridi Felix Mbevo filed a response in which he maintained the petition was bad in law and defective for failing to comply with mandatory requirements of the law by failing to set out the results for each candidate.

10. The first respondent went on to plead that the results announced showing the 1<sup>st</sup> respondent as the winner captured the will of the people of Mutonguni.

The first respondent denies any irregularities in the tallying of results, that no complaint was ever lodged after the announcement. The claims that the other candidates were informed of the re-tallying exercise was denied.

11. The first respondent goes on to state that the re-tallying exercise produced suspect results as results for all other candidates changed and there is no explanation for the loss of **205** as the total votes after re-tallying reduced from **12,500** to **12,283**.

12. Further, it was pleaded by the 1<sup>st</sup> respondent that election ended with the issuance of the certificate to the 1<sup>st</sup> respondent as there is no law that allows a Returning Officer to recall a certificate/declaration of results or to issue another certificate lastly the first respondent pleaded that the re-tallying results showed the results were tampered with during that exercise and what was done amounted to an election offence which would disentitle the petitioner from being a candidate.

13. The first respondent therefore prayed for the dismissal of the petition with costs to the respondents

and the 1<sup>st</sup> respondent to be declared duly and validly elected as the MCA of Mutonguni Ward.

## **SECOND AND THIRD RESPONDENTS CASE**

14. The second and third respondents filed a response on 4.09.2017. They (2<sup>nd</sup> and third respondents) opposed the petition on the following grounds.

**(a) That the second respondent discharged its duty under Regulation 87 (1) (b) and 2(b) by declaring the winner of the Mutonguni Ward elections and transmitting the results to the third respondent who gazetted the name of the first respondent as the winner.**

**(b) The third respondent issued the first respondent with a certificate and thereafter the third respondent declared the first respondent as duly elected and gazetted him after he garnered a total of 3,273 votes.**

**(c) That the 8<sup>th</sup> August 2017 election were free, fair and credible as they were well managed.**

**(d) That there is no lawful basis advanced by the petitioner that warrants him the prayers he has sought in this petition.**

**(e) That the alleged re-tallying was not official and was conducted after the 1<sup>st</sup> respondent had been declared by the 2<sup>nd</sup> respondent as the winner and issued a certificate (Form 36 c (i))**

**(f) That the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have no powers to nullify or recall or cancel an election in which a declaration has been made and a certificate issued.**

**(g) That with the gazettment of the first respondent as the duly elected MCA for Mutonguni Ward, this petition has been overtaken by events.**

**(h) That this court lacks jurisdiction to determine this petition.**

15. During the hearing, the petitioner and his 2 witnesses namely Boniface Muimi Mali and Victor Kyalo Mutua gave evidence. Their testimony was based on their affidavits sworn on 18/08/2017 which they fully adopted.

16. The summary of their evidence was a demonstration of how the second respondent manipulated the results he was announcing then the entry in Form **36B** for Kutha Primary School, Kyambiwa Primary School, Uvaani, Kakeani, Kwandondo and Kiatine was not conforming to what was being announced. The petitioner's votes were being reduced consistently as they were allocated to other candidates. In another case a candidate by the name Everlyne Nzambi was awarded **212** votes when the actual votes she has garnered were 8 therefore inflating her votes by a whopping **204** votes.

The petitioner therefore answered the question, the first respondent asked as to where the extra **205** votes disappeared to after the re-tallying.

The petitioner lodged a complaint with the second respondent who agreed to do re tallying and the re tallying was done by the second respondent even though he is denying. He even signed the re tallying results in all the pages in his presence. His agent signed the tallying results but petitioner was told by returning officer it was not necessary for him to sign since he was a candidate.

17. The second respondent James Mutua who was the returning officer for Kitui West Constituency testified stating he declared the first respondent as the winner after he garnered the most votes **3,273** against his nearest challenger who was the petitioner who had garnered **3,071** votes.

18. The declaration of the winner was made between 10:00 PM and 11:00 PM on 9.08.2017. After

declaring the winner he filled the necessary forms and proceeded to issue a certificate of elected MCA between 2:00AM and 3:00 AM on 10.3.2017.

19. He maintains that at the conclusion of the tallying, the petitioner was not at the tallying center Matinyani.

After he issued the certificate, the 2<sup>nd</sup> Respondent states that a complaint was filed through his deputy. The deputy returning officer brought the petitioner to his office and told him the petitioner was the actual winner.

20. The deputy who was identified as a Mr. Alphone Elijah Muthuri and Petitioner started demanding a re-tallying but he told them off since according to him his hands were tied after he had declared the first respondent as the winner and issued him with a certificate.

When he was questioned about a letter dated **11/08/2017 (Document no. 7 (a))** of the petitioner's document) he stated that the letter was drafted by his Deputy and handed to him to sign. He states he refused to sign it since it's English was not flowing. He decided to withhold it. The letter appears to have been corrected then he signed it. He then sought advice from IEBC and decided not to dispatch the letter. He locked it in a cabinet in his office because according to him, it was illegal for him to cancel results after a certificate is issued. He advised the petitioner to go to court if at all he had any complaints when the second respondent was referred to document (8) titled Mutonguni info-he maintained the document is not authentic as there is no letter requesting for it from any party **to be provided with such information as per regulation 15 of Election Technology Regulations of 2017.**

21. When asked about which results were being shown on the screen at Matinyani, he stated the system had failed and only the presidential results were being displayed as they came in from various polling stations within the constituency.

22. During cross examination by petitioner counsel, the second respondent admitted IEBC had a public portal where the public could access information on what was happening on elections.

### **FIRST RESPONDENTS EVIDENCE**

The first respondent **Baridi Felix Daudi Mbevo** opposed the petition and called one witness Muusi Kiiti Kiio who was also a candidate in these elections.

23. He says he was not at the tallying centre when the declaration of his win was announced as he had left briefly to go to the nearby Matinyani Market. He confirms being given a certificate at **4:00 AM** on **10/08/2017.**

He went on to state he had not seen the petitioner at the tallying centre nor were any complaints raised during the tallying of the results.

The first respondent came to learn of the re-tallying exercise later on and states he was never notified nor did he send any agents.

The first respondent concluded his evidence by asking the court to dismiss the petition as no errors were done by IEBC in declaring him the winner.

24. **Muusi Kiiti Kiio** on the other hand, confirmed she was a candidate, she got **349** votes and after the results had been announced she received a text message on her phone summoning her for a re tallying exercise.

25. They waited for the returning officer until **2:00 PM** when the Returning Officer (second respondent confronted his deputy demanding to know what people were doing at the tallying centre.

The deputy Returning Officer informed the Returning Officer people had come for a re tallying exercise.

26. After sometime, the Returning officer and his deputy entered the re tallying room where the Returning Officer read 3(three) Form 36 As and then the deputy read the rest. Muusi Complained over the re-tallying because all candidates were not present but the Deputy Returning Officer insisted that the re tallying must go on.

27. With this stalemate between the Returning Officer and deputy Returning Officer Muusi decided to walk out in protest and the Returning officer decided to ignore the exercise and slept on a table as his deputy took over the re tallying.

27. As she was walking out, the petitioner followed him begging her to give her 35 votes. She protested to that request telling petitioner her votes were few and she could not agree to the request. She left the venue before the re tallying was over.

28. That was the summary of the evidence tendered by the parties and their witnesses in these proceedings.

### **ISSUES FOR DETERMINATION**

29. **The first Respondent framed the following issues for determination;**

**(i) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents discharged their constitutional mandate and conducted free, fair and credible elections and as such declared 1<sup>st</sup> respondents as the winner.**

**(ii) Whether the standard of proof has been met in this petition.**

**(iii) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents became functus officio after declaring and issuing a certificate.**

**(iv) Whether it was in order for the court to order production of Form 36As by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent ought to comply with the order.**

**(v) Whether the 1<sup>st</sup> Respondent is entitled to be awarded costs regardless of the outcome of the petition.**

30. **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents framed issues as hereunder;**

**(i) Whether or not the 1<sup>st</sup> respondent was validly elected and declared the winner of the MCA Mutonguni ward- Kitui West Constituency.**

**(ii) Whether the elections for Mutonguni ward were free and fair and credible.**

**(iii) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents discharged their constitutional mandate in conducting a free, fair, accurate and transparent election of County Assembly Mutonguni Ward.**

**(iv) Whether there was breach and substantial non-compliance with election laws which non-compliance affected the results of the elections.**

**(v) Whether there were irregularities which affected the outcome of the Mutonguni ward elections.**

**(vi) Whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have powers to nullify or recall election or**

**cancel an election after declaration and issuance of a certificate.**

**(vii) Who bears the burden of proof in this petition.**

**(viii) Who bears the costs of this petition.**

**31. The court after considering the issues as framed by the parties finds that issues can be narrowed to:-**

**(i) Were the elections conducted in a free, fair, accurate and verifiable and transparent manner?**

**(ii) Were there any irregularities**

**(iii) Who bears the burden of proof and was it discharged in this petition.**

**(iv) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents became functus officio after anomaly, declaring and issuing a certificate in an election.**

**(v) Was it in order for the court to order 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to produce/file form 36As.**

**(vi) Costs – who is entitled.**

32. To answer these issues parties filed submissions at the conclusion of the proceedings.

On the **first issue**- whether the elections were free, fair, verifiable verifiable and transparent, it is to be noted no major issue was raised by the parties apart from the complaint by the petitioner that there was lack of transparency on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents after they failed to listen to his complaints during the tallying.

33. He was promised his complaints will be addressed at the conclusion of the exercise but the 2<sup>nd</sup> respondent took an about turn by declaring he could not address the issue of recalling the certificate already issued to the 1<sup>st</sup> Respondent as he had become functus officio hence the reason he referred the petitioner to court.

34. The 1<sup>st</sup> respondent maintained he was **validly** elected as the MCA because of his impeccable development record in Mutonguni ward and mentioned the projects he had done for his people.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondent submitted that they conducted the elections in accordance with Article 81 (1) e of the constitution hence the people of Mutonguni ward elected the person of their choice namely the 1<sup>st</sup> Respondent.

35. **Issue 2**- were there irregularities? And if so, did they affect the outcome of the election?

The Respondents maintain there were no irregularities but the petitioner submits there was an irregularity after his pleas to have him given the certificate was ignored.

The Petitioner stated he pointed out the anomalies as the tallying was going on. The tallying went on until it was concluded then the 2<sup>nd</sup> Respondent hurriedly generated Form 36B signed it and proceeded to issue certificate to the 1<sup>st</sup> Respondent.

The Petitioner sustained his complaint leading to a re tallying which showed he had won but the 2<sup>nd</sup> Respondent said the elections were over and only a petition could save him.

The Petitioner demonstrated how the exercise was done and the end results as captured in documents clearly showed he had won by **11** votes. The petitioner further produced a letter authored by the 2<sup>nd</sup> Respondent recalling the certificate from 1<sup>st</sup> respondent.

The 2<sup>nd</sup> respondent admitted signing the letter but said he locked the letter in a cabinet and does not know how it was leaked to the public.

The question that begs an answer is why he signed it if he knew it was illegal or irregular or was he forced?

He appears to blame his deputy but surprisingly failed to table evidence showing he took any disciplinary action or reported him to employer for breach of confidentiality or insubordination.

The court after carefully considering the evidence is of the view that the 2<sup>nd</sup> respondent willingly signed and released the letter to be served upon the 1<sup>st</sup> respondent but has chosen to deny it for unexplained reasons.

The court therefore rules that the petitioner has proved the existence of an irregularity which affected the outcome of the elections.

### **36. ISSUE 3**

#### **Who bears the burden of proof and was it discharged?**

#### **In Raila Odinga and 5 others vs. IEBC and 3 others Election Petition NO. 5 /2013 and Abdinasir Yasin Ahmed & 2 others vs Ahmed Ibrahim Abass petition No. 9/2013- Garissa**

It was held that the burden of proof lies with the petitioner.

To discharge this burden the petitioner produced a letter dated 11.8.2017 (exhibit 7a) authored by 2<sup>nd</sup> Respondent though denied. He further produced form 36B for Mutonguni (Document 6) which are duly signed and stamped with IEBC stamps.

All these show he won after garnering **3,330** votes against the 1<sup>st</sup> Respondents **3,319**.

The 1<sup>st</sup> respondent claims the re-tallying exercise was tainted with illegalities and amounted to a criminal offence. The 1<sup>st</sup> Respondent never expounded on which law was breached yet regulation 80 (Elections Regulations 2012) make it mandatory for a recount to be done upon any complaint being raised. At least 2 recounts are allowed.

In the present case a recount was done by the Returning officer and Deputy but the results of the re tallying were ignored.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents though maintaining the petitioner had not discharged his duty failed to file results of the Mutonguni ward even after being challenged to do so by the plaintiff.

It is worthy to note that on 11.10.2017, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents sought leave to file the results for Mutonguni ward but 7 days later on 18.10.2018, they took an about turn. Saying there is no requirement for IEBC to file results. They therefore abandoned the leave they had sought.

The court went ahead to order for the filing of the results but the order was totally ignored.

The court finds that when the petitioner filed results from IEBC whether obtained after official request or downloaded from their public portal, the burden of proof shifted to them(IEBC) to show otherwise. They

therefore failed to rebutt the petitioners assertions. In any case no, affidavit was filed from IEBC to show the results were not in their systems.

The court therefore finds that the petitioner has discharged his burden by showing he garnered **11** more votes than the 1<sup>st</sup> respondent and ought to have been declared the winner notwithstanding the slow margin.

#### 37. ISSUE 4

#### **Whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents became functus officio after declaring the 1<sup>st</sup> Respondent winner and issuing certificate**

**Steven Kariuki –vs. George Wanjohi and 2 others Election Petition NO. 2 of 2013 –NAIROBI** **which was submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent** in page 25 paragraph 79 the court was of the view that a certificate can be cancelled even after its issuance and gazetted if there are justifiable reason submitted. The court clearly stated the basis of their residual power bestowed on IEBC is provided under Article 1, 2 and 38 81and 82 of the constitution.

38. In that particular case the petitioner's certificate had been cancelled. The petitioner moved to the High (he was contesting a parliamentary seat) the IEBC cancelled his certificate and he sued but the petition never saw the light of the day as it ended getting dismissed as the cancellation or/recall was based on a re tallying exercise which showed the 1<sup>st</sup> respondent as the actual winner.

That in the same scenario in the present case where the IEBC declined to recall the certificate on claims it was functus officio. If they cancelled the certificate in that election why not this one yet the results had clearly showed the person given the certificate was not the winner. They even defended the petition successfully.

In light of this judgment I find that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant did not become functus officio after declaring and issuing the certificate to the 1<sup>st</sup> respondent.

#### 39. ISSUE 5

Was it in order for the court to order 2<sup>nd</sup> and 3<sup>rd</sup> respondent to file Form 36As.

The answer is in the affirmative, IEBC was under an obligation to file these results because it had filed a response claiming the re tallying was not official.

40. The petitioner adduced evidence supported by 1<sup>st</sup> Respondents witness showing none other than the 2<sup>nd</sup> Respondent started the exercise. The 2<sup>nd</sup> Respondent went on to sign a letter dated 11.8.2017 which he claimed he put in a cabinet. That cannot be true as he has never launched a complaint on how the letter came to be in the hands of petitioner and public.

#### **FINDINGS /CONCLUSION**

41. Having determined the above issues in favour of the petitioner the court proceeds to issue the following orders

(i) That the 1<sup>st</sup> Respondent Baridi Felix Mbevo was not duly and validly declared as the winner of Mutonguni ward-Kitui West constituency

(ii) That the petitioner herein Musee Mati was the duly and validly elected winner of the Election of Mutonguni ward Kitui west Constituency.

(iii)The certificate of elected member of county Assembly for **Mutonguni ward No. 150700346**-issued to the 1<sup>st</sup> Respondent Baridi Felix Mbevo is hereby declared null and void/or cancelled forthwith.

(iv) That the petitioner herein Musee Mati be issued with a certificate of elected member of county Assembly for Mutonguni ward in Kitui west Constituency.

(v) That the gazette Notice which declared the 1<sup>st</sup> respondent as the validly elected member of the county assembly for Mutonguni ward in the general elections held on 8.8.2017 is hereby declared **null and void** to that extent of deleting the name of the 1<sup>st</sup> respondent only;

(vi) A certificate of determination of this petition to issue and be served upon the **Speaker Kitui County Assembly** and **IEBC** as provided for under **Section 86 Elections Act 2011**.

## **ISSUE 6-COSTS**

**Under Section 84 Elections Act 2011**costs follow the event.

42. In the present case the court finds that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are to blame for the misfortune that befell the petitioner and even the 1<sup>st</sup> respondent who has had to defend this petition after being sued by the petitioner. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents shall bear the petitioners costs.

Learned counsel for the 1<sup>st</sup> respondent Morris Kimuli rightly submitted that the 1<sup>st</sup> respondent is entitled to costs no matter the outcome. This court is in agreement with that submission because none of the parties have alluded to any role he played in denying the successful petitioner his win. I therefore find the petitioner and the 1<sup>st</sup> respondent are entitled to costs.

43. Rule 36 1(a) provides for capping of costs. In the present case the petitioner had to defend 3 applications and a preliminary objection on top of the main petition. For the Preliminary objection and the 3 applications, I award costs of **Kshs. 125,000/=** for each of the applications/P/O and a further **500,000/=** for the petition making a total award of **Kshs. 1000,000** (one million) These costs shall be paid by 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally.

44. The 1<sup>st</sup> Respondents costs are hereby assessed at **Kshs. 500,000/=** (five hundred thousand) to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly and severally.

**J. MUNGUTI PM**

**31.1.2018**

Dated and delivered in Kitui this 31.01.2018.

**J. MUNGUTI PM**

**31.01.2018**

Judgment delivered in the presence of Kilonzi and Ms Mati for petitioner. Miss Mulundu for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent Miss Muatha holding brief for Kimuli for the 1<sup>st</sup> Respondent.

**J. MUNGUTI PM**

**31.01.2018**

**COURT**

Ms Mulonde – I apply for copies of proceedings and judgment.

**Order**

Copies of proceedings and judgment to be supplied to parties on payment of requisite charges.

**J MUNGUTI PM**

**31.01.2018**

**Order**

Deposited security to be released to payee/petitioner.

**J. MUNGUTI**

**PRINCIPAL MAGISTRATE**

**31/01/2018**