



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT BUSIA**  
**ELECTION PETITION NO.1 OF 2017**

**BETWEEN**

**MPAKA JEAN BOSCO.....PETITIONER**

**=VERSUS=**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**NOAH BOWEN KIPKOGEI.....2<sup>ND</sup> RESPONDENT**

**EKESA MILTON KASSAMAN.....3<sup>RD</sup> RESPONDENT.**

**J U D G M E N T**

The petition is filed by **MPAKA JEAN BOSCO** contesting the return of **EKESA MILTON KASSAMAN** as the member of Bukhayo Central following the general elections held on 8<sup>th</sup> August, 2017.

Following the said General election, The following results were declared for Bukhayo Central.

<b><u>NAME</u></b>	<b><u>VALID VOTE</u></b>
1. Barasa Maximo Nyongesa	72
2. Dina David Ongangi	66
3. Ekesa Milton Kassaman	1716
4. Magero Nicholas Wesonga	110
5. Makokha Bonventure Okwach	1532
6. Maloba Chrisantus Okello	498
7. Mpaka Jean Bosco	1624
8. Oyula Sylvester Makanda	1350.

The Returning officer declared Mpaka Jean Bosco the 3<sup>rd</sup> Respondent herein as the duly elected member for Bukhayo Central County Assembly Ward and the petitioner being aggrieved filed the petition on 6<sup>th</sup> September, 2017 and the petition is premised on three main grounds;

1. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents refused entry into the polling stations some of the petitioners Agents.
2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allowed eligible candidate to contest the election.
3. That the electronic devices, kiems kit to identify voters malfunctioned consequently the petitioner prays for the following orders;
  - a) An order for scrutiny of all ballot papers casted and ballot papers issued cast and recount of ballot papers and a declaration that the 3<sup>rd</sup> Respondent was not validly Declared a winner for the position of Member of County Assembly , Bukhayo Central Ward and that the petitioner is validly elected member of Bukhayo Central Ward.
  - b) In the alternative to (a) above an order that the election of member of the County Assembly, Bukhayo Central Ward was not conducted in strict compliance with the Constitution of Kenya, the election Act and the Laws Governing General Elections of Kenya and consequently the same is null and void and that the same to be conducted afresh.
  - c) Costs of the petition.
  - d) Any other relief.

The petition is supported by the petitioner sworn Affidavit and then Affidavits of 7 witnesses together with Annextures.

The 1<sup>st</sup> and 2<sup>nd</sup> Response/Replying Affidavit dated 3<sup>rd</sup> November, 2017 in which they denied allegations against them by the petitioner and that they carried out a free and fair election. The 3<sup>rd</sup> Respondent in his response denied all allegations against him.

The parties did not file the statement, of issue to be considered and or declared but the issues can be determined from the pleadings and submissions as follows;

- a) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Response to petition dated 18<sup>th</sup> September, 2017 complies with the promises of Regulations 12(5) 6 (a,d) 8, of the Elections (Parliamentary and County Elections Rules, 2017.
- b) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the election in a an impartial, neutral, efficient, accurate and accountable manner as per the relevant laws.
- c) Whether there was lack and or failure of voter registration.
- d) Whether the 3<sup>rd</sup> Respondent was validly and lawfully elected.
- e) Burden of proof.
- f) Any other reliefs.

In order to support the above grounds, the petitioner called 7 witnesses while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents called 1 witness and the 3<sup>rd</sup> Respondent testified but did not call any witness. The parties also filed submissions on the conclusion of the case.

I have carefully considered the testimony by the witnesses, their evidence and submissions together with the Authorities relied upon.

Article 81 of the Constitution of Kenya provides the general principles for the electoral system as follows;

- a) Freedom of every citizen to exercise their political rights under Article 38.
- b) .....
- c) .....
- d) Free and fair election which are;
- e) By secret ballot.
- f) Free from violence, intimidation, improper influence or corruption.
- g) Conducted by an independent body.
- h) Transparent and
- i) Administered in an impartial, neutral, efficient, accurate and accountable manner. Article 38 provides as follows.
- j) Every citizen is free to make political choices which includes their right to (a) form and participate in forming a political party.
- k) To participate in the activities of or recruit members of political party.
- l) To campaign for a political party or cause.

Section 38 (2) Every citizen has the right to free, fair and regular election, based on usual suffrage and the free expression of the will of the election for

- a. any election public body or office established under the constitution .
  - b. Any office of any political party of which the citizen is a member.
- 3) Any adult citizen has a right, without unreasonable restrictions.
- a) To be registered as a voter.
  - b) To vote by secret ballot in any election, or refreshment and
  - c) To be a candidate for public office, or officer within a political party of which a citizen is a member and if elected to hold office.

In view of the above general principles, I wish to address the issues for determination as follows; Burden of proof.

In the *Raila Odinga and Others –vs- IEBC and 3 others. SCK petition No. 5/2013 (20 eKLR)* the Supreme court held as follows, That the petitioner bears the burden of proof and that the threshold of proof should be in principle be above this balance of probability though not as high as beyond reasonable doubt same that this would not affect this normal - where criminal charge or an election are in question. Applicant to strike out the evidence of DW 1 and/or whether the 1<sup>st</sup> and 2<sup>nd</sup>

Response to the petition dated 18/9/2017 complies with the provision of Regulations 1, 7, 1,5 (b) & 8 of the Election (P&C) Elections Rules 2017. The petitioner submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Response does not comply with the above provisions on the form by not filing a supporting Affidavit to their response but filed response a long side witness statement and a Replying Affidavit and no leave was sought by the Respondents. The Respondents submit in reply that they complied with the firm and that the application is made too late and ought to have been raised at the pre trial conference as an interlocutory application. I have looked at the relevant sections and the submissions by both parties and the authorities held. I find that even if the title of the Affidavits look slightly different it does not prejudice the petitioner in any way it is a mere technicality. In any case DW 1 testified with the leave of the court. The objection was also raised too late in the day. They should have been raised during pre trial period at the interlocutory stage. The evidence of DW 1 therefore severs part of the record.

Whether the elections were conducted in strict compliance with all the relevant laws;

The petitioner alleged that some of his agents were not allowed entry to the polling station for the reason that the petitioners party Ford Kenya has already represented in the respective polling stations and that their Parliamentary candidate were hostile to him since they had presented a petition to the senate against the candidates wife and their denial was discriminatory and subjected the objection into an operagoer exercise.

In reply the 1<sup>st</sup> and 2<sup>nd</sup> Respondents witness DW 1 told the court that agents are accredited by parties and his duty was to regulate the ages and brief them and that which agents of Ford Kenya were allowed and that the petitioner did not raise or refuse and special circumstance. The 3<sup>rd</sup> Respondent submits that the presiding officer may allow one agent for each political party or candidate and that for the evidence of PW 1 most of his agents were allowed in the polling station and that there were no evidence to show that the absence of his agents were used against how by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and that all Form 37 (a) were signed by Agents and that evidence of denial of entry of the Agents to Lwanya Primary school polling station. The petitioner was leading. Having looked at the above issue there is no evidence that the petitioner agents were denied entry. The evidence on record shows that when the witnesses arrived at the station they found other agents of their parties and left.

On the issue of failure of Kiems kit the evidence adduced by the petitioners was that they voted without proper identification and were later recalled to identify them showing which they submit was irregular and violated the Regulations on voting procedure. DW 1 told the court he had no knowledge of multifunction of Kiem kit which would ordinary could have been used at the station diary and has no report and that identification of voters are done in two ways namely, biometrically where a voter biometric was used to identify voters and alpha – numerically which involves identity cards numbers in case where biometric identification fails and that a statutory form NO. 32 was filed to that effect and that identification of a voter Alphanumerically is not synonymous with mulfuntional of the device. There is fair the above evidence adduced the petitioner has not proved that the kiems multifunction and that by identifying voter alpha- numerically exposes the process of voting to tampering or manipulation. Candidate of Chrysantus Maloba Okello on the petitioner called that the candidate of Chrisantus Okello Maloba was illegal and unlawful and in constitution of S.28 (i) of the Elections Act and that they complained but there was no action taken. The 1<sup>st</sup> and 2<sup>nd</sup> Response was that he did not have any role in the conduct of the Political parties nomination and he had never receive d any formal complaint that he had participated in the nomination of Amani National Congress Party and that from their records Chrisantus did not belief to another party and that the Dispute should have been referred of should be handled with the political parties Tribunal who deals with issues on party primaries.

Having considered the above issues and from the above analysis, I find that the petitioner failed to prove his case to the required standards and failed to discharge the legal burden placed on him to show that the action by 1<sup>st</sup> and 2<sup>nd</sup> Respondents altered the result of the election.

I hereby declare the 3<sup>rd</sup> Respondent was validly elected. The final orders are therefore as follows;-

- a) The Petition be and is hereby dismissed.
- b) The Respondents are awarded the costs of the Petition.
- c) A certificate is according with S. 86(1) of the Election Rule shall issue.

Dated and delivered on 31<sup>st</sup> day of January, 2018 at Busia in open court in the presence of ;

M/s. Maloba Advocate for 3<sup>rd</sup> Respondent and holds brief for Wangalwa Advocate 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Petitioner – present. Okeyo Advocate for Petitioner absent.

**W.K. CHEPSEBA**

**CHIEF MAGISTRATE**

**BUSIA.**