



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT BUSIA
ELECTION PETITION NO.6 OF 2017

BETWEEN

LUCAS MUGAJI OSEMBO.....PETITIONER

VERSUS

FELIX OPONDO OMANYI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE RETURNING OFFICER

BUDALANGI CONSTITUENCY.....3RD RESPONDENT

J U D G M E N T

This petition is filed by Lucas Mugaji Osembo a voter to contest the return of Felix Opondo Omayyi as the Member of County Assembly Bunyala Central following the General elections held on 8th August 2017.

The results were declared and set outas follows:

- | | |
|-----------------------------|--------|
| a) Opondo Wilson Tabu | - 28 |
| b) Mwolo Vincent Odhiambo | - 501 |
| c) Adiwa Christine Odhiambo | - 319 |
| d) Muruka Lucas Afwande | - 54 |
| e) Ogolla Michael Nobert | - 1554 |
| f) Okoba Johanes Boy | - 1155 |
| g) Omanyi Felix Opondo | - 1874 |

The 3rd Respondent declared Omanyi Felix Opondo as the duly elected Member for Bunyala Central and the Petitioner being aggrieved and dissatisfied filed this petition on 6th September 2017.

The Petitioner is premised on the following broad grounds;

1. Violence against one Michael Ogola supporters.
2. Voter Bribery
3. Biased, irregularities and illegal process of counting and tallying of notes which gave the 1st Respondent undue advantage over the other candidates (Paragraph 2,3,4,5,6,7,8,9 – 18 of the Petitioners.

Consequently the Petitioner sought the following Orders:

- a) The Court to secure all materials used for the election of the Member of the County Assembly for Bunyala Central ward, including but not limited to K.I.E.M.S that, their Register, all relevant forms, ballot boxes and papers and the Presiding officers diaries.
- b) Scrutiny and recount of all ballot papers in all polling Stations, to ascertain he actual number of votes cast, counted and tallied for the Member of County Assembly for Bunyala Central ward.
- c) An independent verification of the KIEMS kit bags to ascertain the number of voters who voted at all the polling stations.
- d) The 2nd Respondent to avail all copies of all forms 36As and 36B used in the tallying of the result to the Petitioner.
- e) A declaration that non compliance irregularities and impropriators in the election were substantive and significant that they affected the results.
- f) Of declarations that the elections were not conducted in accordance with the Constitution and the applicable Law rendering the declared results null and void.
- g) An Order directing the 2nd Respondent to organize and conduct fresh elections.
- h) An Order barring the 2nd Respondent from participating with elections, if found culpable for bribery.
- i) Any Order the Court may deem fit.
- j) Costs of the Petition-

The Petitioner was supported by the Petitioner own Affidavit and Affidavit of two witnesses –

The 1st Respondent filed a response dated 19th September 2017 and denied the allegations against him by the Petitioner and Respondent with witness Affidavit of –

The 2nd and 3rd Respondents filed a joint response dated 4th October, 2011 together with witness Affidavit, in which they denied the allegations against them by the Petitioner.

The parties during pre trial agreed that the application dated 23rd October 2017 will be heard after the conclusion of hearing for the parties. The application was heard at the conclusion of hearing of all the parties and after hearing the application and agreements together with written submission, dismissed the said application in the ruling dated 5th January 2017 the parties did not file statements of issues to be determined but the issues can be got from the grounds submissions and outlined in the Petition as follows:

- 1) Whether the Respondent was validly elected as member of Bunyala Central ward.

- 2) Whether the 2nd and 3rd Respondent conducted the election in an impartial, neutral, efficient and accurate manner.
- 3) Whether the votes were counted and tabulated in accordance with the Constitution and the law.
- 4) Whether the Petitioner challenges the burden of proof placed on him.
- 5) What consequential orders reliefs and declarations should the Court grant the matter, proceeded for hearing and the Petitioner called witnesses and the Respondent called 6 witnesses.

I have carefully considered the evidence on record and the filed submission by the 1st, 2nd and 3rd Respondents. The Petitioner did not file Submissions and Authorities relied upon by 1st, 2nd and 3rd Respondent and the relevant Laws. I would like to first remember the General principles applicable –

Article 38 sets out the photocopy rights which are realized through the electoral system set out in chapter seven of the Constitution Under Article 81 (e) the electoral system should comply with the principle of freed and fair and elections are free and fair when they care by secret ballot, free from violence and intimidation, improper influence or corruption and conducted by an independent body, transparent and administered in an impartial, neutral efficient accurate and accountable manner. The conduct of the voting is imposed by the Constitution IEBC. Article 86 states that. At every election, the IEBC shall ensure that;

- a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
- b) Votes cast are counted, tabulated and results announced promptly by a Presiding officer at each polling station.
- c) The results from the polling station are openly and accurately colluded and promptly announced by the returning officer and
- d) Appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of declared materials.

The electoral system is designed to ascertain the will of the people by and the dispute resolution is to ascertain the intent of the voters and to some effect to the fullest extent. The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractices and misconducts which would result in an election to be declared invalid rests on the Petitioner. The Court will not interfere with the results of the elections unless it is established to the required standards of proof that such non-compliance with the Constitution and the law the irregularities and election malpractice complained under the said election invalid.

The Supreme Court in **Raila Odinga & others –vs- IEBC & 3 others SCK Petition No.5 of 2013 [2013] e KLR** the Supreme Court held that the Petitioner bears the burden of proof –

It observed at pg 196 that this emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies *omnia praesuntur rite et solemniter esse acta* rule at Suleiman *esse acta*, all acts are presumed to be done rightly and regularly so the Petitioner must set out by raising form and credible evidence of the public authority departure from the prescription of the laws.

Pg 203 – the threshold of proof should in principle be above the balance of probability brought not as high as beyond reasonable doubt, save that it would not affect the normal standards where criminal charges linked to an election are in question. Related to the burden of proof is the fact that the Petitioner is bound to prove the case as pleaded and is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with the support the case pleaded.

The circumstance in which an elected Court will invalidate an election are set out in S 83 of the Act which reads as follows;

S 3 No election shall be declared void by reason of non compliance with any written law relating to an election of it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written Law or that non compliance did not affect the result for the elections (See **Raila Amollo Odinga & Another –vs- IEBC & 2 others (Presidential Election Petition No.1 2012)**) the Supreme Court recognized that an election is a process where mistakes will be made and malpractices may arise but in order to succeed in annulling the election he Petitioner must establish either that there was non compliance with the Constitution and the law governing the election – or that the election malpractices and irregularities that took place were of such magnitude that they substantially affected the result of the election.

In view of the above general principles and evidence on record I wish to address the issues for determination in the following order;

1) Whether the 2nd and 3rd Respondent conducted that election in an impartial, neutral efficient and accurate manner and/or whether the elections were free, fair and credible.

The Petitioner alleges violence against the candidates. Nobody reported the matter at Port Victoria. The witness did not give any name of the attackers and prove that indeed a report was made in any case the alleged attack happened before the election. Indeed he admits that during the election he voted without any problem and went home. He failed to prove there was any violence. On the issue of voter bribery it is alleged by PW1 that it happened at night and there was no witness who saw the money being given. It is not possible that the witness could keep the money for some months. He did not report that incident to either IEBC the police or any other relevant Authority. His evidence is not credible to prove bribery. They are mere allegations. On the discrepancies is said to the difference that occurred in Form 36B and the Kenya Gazette does not contain substantial errors which can make the elections flamed. I reiterate that despite the flaws in Form 36B and the Kenya Gazette the results recorded in Form 36A form the basis of the determining the will of the people as held in **IEBC V Manekial & 5 others CIVIL A. No.105/17 2017 e KLR**. The voters as recorded in Form 36A are final and unless Form 36A is disputed which has no errors in electronic frame cannot invalidate Form 36A the errors and irregularities not substantial.

From the above issue I find that the Petitioner has not proved his case on the issue of voter bribery, violence and errors. In Form 36B, the results in Form 36A are final.

2) Whether the Petitioner has discharged the burden of proof placed on him from the analysis of the evidence non record the Petitioner has failed to approve the legal burden – placed on him in the required standards of above a balance of probability.

3) The Petitioner having failed to prove his case to the required standard, I find and declare that the 1st Respondent was validly elected as Member of the County Assembly of Bunyala ward.

Having made the foregoing findings the final orders are as follows;

- a) The Petition be and is hereby dismissed.
- b) The Respondent are awarded costs.
- c) A certificate in accordance with S 86 (1) of the election petition to be issued.

Dated at Busia this 2nd day of February 2018

W.K. CHEPSEBA

CHIEF MAGISTRATE

2/2/2018

Delivered in open Court at Busia Law Courts in the presence of:

Okutta for 1st Respondent & holding brief for Nabulindo advocate

Nalindo for 2nd and 3rd Respondent

Petitioner present

Wangalwa Advocate absent

W.K CHEPSEBA

CHIEF MAGISTRATE

2/2/2018