



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT HOMA BAY

ELECTION PETITION NO: 1 OF 2017

ODONGO VICTOR ROBERT..... PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER KAGAN WARD

EZEKIEL JUMA OTIENO.....2ND RESPONDENT

ONYANGO PHILEMON.....3RD RESPONDENT

JUDGMENT

Vide a petition dated the 6th day of September 2017, the Petitioner Odongo Victor Robert has moved this court for orders:-

- a) Immediately upon the filling and service of the petition, the 1st Respondent do avail all forms 32A filled and used in the following polling centres; (1) Bondo Primary School code number 045, (2) Pap Alara Primary School code 063, (3) Magwar Primary School code 054, (4) Nyawita code 048 and (5) Luora code 043 for the election of the Member of County Assembly Election of Kagan Ward within 48 hours;
- b) Immediately upon the filling and service of the petition, the 1st Respondent do produce, avail and allow access for purposes of inspection of all the logs of and all servers hosted by and/ or on behalf of the 1st Respondent in respect of the election of the Member of County Assembly of Kagan Ward within 48 hours.
- c) Scrutiny and recount of ballot cast at the election of the Member of County Assembly Election of Kagan Ward should be made in the centers; (1) Bondo Primary School Code number 045, (2) Pap Alara Primary School code 063, (3) Magwar Primary School code 054, (4) Nyawita code 048, (5) Luora code 043;
- d) An order for scrutiny and audit of the system and technology used by the 1st Respondent in the election of the Member of County Assembly of Kagan including but not limited to the KIEMS Kits, the server(s); website/ portal;

- e) A declaration that non-compliance, irregularities and improprieties in the election of the member of County Assembly of Kagan Ward were substantial and significant that they affected the results thereof.
- f) A declaration that the election of the Member of County Assembly of Kagan ward held on 8th August 2017 was not conducted in accordance with the constitution and the applicable law rendering the declared results invalid, null and void,
- g) A declaration that the 3rd respondent was not validly declared as the Member of the County Assembly elect of Kagan ward and that the declaration is invalid, null and void;
- h) A declaration that the petitioner was validly elected as the Member of County Assembly of Kagan ward on the election held on 8th August, 2017;
- i) In the alternative, an order directing the 1st respondent to organize and conduct a fresh election for the member of County Assembly of Kagan ward in strict conformity with the Constitution and the elections Act;
- j) A declaration that each and all of the respondents jointly and severally committed election irregularities;
- k) Costs of the petition and
- l) Any other order that the Honorable court may deem just and fit to grant.

The 1st 2nd and 3rd respondents opposed the petition by filing their responses and urged this court to dismiss the petition with costs. After interlocutrices, the matter was then set down for hearing and that was only after **prayers (a) – (d)** had been dealt with in the previous rulings of the court.

PW1 Victor Robert Odongo told this court that he was a candidate in the Member of County Assembly Kagan ward elections held on the 8th day of August 2017. He garnered 4,437 votes and the 3rd respondent herein was declared the winner having garnered 5081 votes. During the election time, he received information that some particular polling stations were allowing people to vote for others. There were also issues of dead people being voted for. The affected stations were Bondo primary school polling stations, Magwar polling station, Pap Alara polling station, Nyawita polling station and Luora polling station. He then instructed his Chief agent and the other agents of the affected polling stations to take up the matter. The affected polling stations were captured at page 7 of the petition.

It was his case that he had in his possession all the Form 32As of the people who were voted for. He did his investigations and established that all the people who had voted using forms 32A, were all dead. He then proceeded and obtained various death permits and death certificates of the people who were appearing in forms 32A. It was his conclusion that the electoral process was not fair, free and transparent. He asked this court to allow the petition with costs.

On cross examination he told the court that he was not present at the polling stations mentioned in the petition and that he did not report the issues to the police. He further told the court that he wrote a protest letter to the IEBC but his letter was never responded to, though he was supplied with the forms 32A. He also told the court that he did not have any evidence of inflated votes in favor of the 3rd respondent and that he did not have any contrary record challenging what the 3rd respondent had obtained. He lastly admitted that his agents had signed form 36A. All the other witnesses supported his case.

After the close of the petitioner's case, the respondents were called upon to respond. Their case was that the elections were conducted as required by law and that all the voters were identified after production of identity cards after which they were provided with the ballot papers. **DW1 Stephen Omondi Otuoma** told the court that no voters were allowed to vote using other people's cards. After the voting, the results

were recorded in form 36A and that the agents who were present and willing, did sign the form 36A. It was also his evidence that at his polling station he did not use any form 32A as the said form could only be filled by the presiding officer and only after all the details of the voter had been captured and witnessed. When he filled the form 36A, only three agents signed and he did not comment as there were no reasons given to him. The other witnesses for the respondents supported his testimony. The Returning Officer Rangwe told the court that no incidents of dead voters voting were ever reported to him. He told the court that the form 32As attached by the petitioner were foreign to him and that he never received any written request of the same. He told the court that if the forms had to be obtained from his office than there ought to have been a written request. He then prepared the form 36(C), the certificates which he issued to the 3rd respondent. At the time of declaration, the petitioner's agent was present and he signed the form 36Bs without any objection. It was his evidence that no form 32As was ever used at all as all of them were returned unused.

After the close of the petitioners and respondents cases and pursuant to the earlier orders of the court dated the day **4th day of December 2017**, a recount and/or scrutiny of the ballots was conducted in respect with the disputed polling stations and parties were thereafter directed to prepare and file their reports alongside their submissions.

I have considered the evidence by the petitioner and that of the respondents. Parties having failed to agree on issues for determination, as a duty, I will frame and come up with issues for determination of this petition. From the pleadings, I do find the following to the issues for determination:-

1. Whether the Elections of the Member of County Assembly of Kagan ward was conducted in accordance with and in compliance with the constitution, written laws and National legislation;
2. Whether the respondents non-compliance with constitution and or the law in the conduct of the elections affected the results and or the validity of the results of the elections of the Member of County Assembly of Kagan ward;
3. Whether the 3rd respondent was validly declared as a Member of county Assembly elect of Kagan ward;
4. Whether the 3rd respondent committed election irregularities
5. Whether the petitioner should be declared the winner of the election of the Member of county Assembly of Kagan ward having garnered majority votes;
6. Costs of the petition.

Having outlined the issued for determination, I will now proceed to the law applicable in the conduct of elections (Parliamentary and county Elections) and the constitution.

Having perused the pleadings and the submissions, parties are in agreement that the electoral process is a realization of the principle of the sovereignty of the people of Kenya which is articulated by the provisions of Article 1 of the constitution. Further the constitution under **Article 38** provides that:-

38(1) every citizen is free to make political choices, which includes the right:-

- a) *To form, or participate in forming a political party,*
- b) *To participate in the activities of, or recruit members for a political party , or*
- c) *To campaign for a political party of cause.*

(2) Every citizen has the right to free, fair and regular elections based on universal

Suffrage and the free expression of the will of the elections for:-

- a) *any elective public body or office established under this constitution, or*
- b) *any office of any political party of which the citizen is a member.*

(3) Every adult citizen has the right, without unreasonable restriction:-

- a) *to be registered as a voter*
- b) *to vote by secret ballot in any election or referendum, and*
- c) *to be a candidate for public office or office within a political party of*

Which the citizen is a member and if elected, to hold office.

The rights as set out under **Article 38** of the constitution have been brought down further **by Article 81(e)** which provides that the electoral system should comply with the principle of free and fair elections.

As regards the conduct of voting, the Constitution imposes specific obligations on the Independent Electoral and Boundaries Commission and at **Article 86** provides that :-

86 at every election, *the Independent Electoral and Boundaries Commission shall ensure that:-*

- a) *Whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent;*
- b) *The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- c) *The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and*
- d) *Appropriate structures and mechanisms to eliminate electoral malpractices are put in place including the safekeeping of electoral materials.*

Having been done with the law that provides for the conduct of elections, then the next question will be who shoulders the burden of proving electoral malpractices?

If I may quote **Justice Majanja** in **Election Petition No 3 of 2017 at Kisumu High Court between Jackton Nyanungo Ranguma and the IEBC and 2 others**, the Honorable judge observed that “*an election petition is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner*”. That settles the issue as to where the burden of proof lies in Election petitions.

Having dealt with the issue of burden of proof, what follows is the standard of proof required in an election petition. In **Raila Odinga & another versus IEBC and 3 others SCK Petition No.5 of 2013 [2013]eKLR**, the Supreme Court while addressing itself to the issue of standard of proof held that;

“... the threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question”.

Now that we are done with the standard of proof, I now proceed to the issues which had been framed for

the courts determination. I will deal with them one by one as follows:-

1) Whether the elections of the Member of County Assembly of Kagan ward was conducted in accordance with and compliance with the constitution, written law and legislation.-

Article 81(e) of the Constitution as earlier observed requires that the electoral system should comply with the principle of free and fair election. Elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an Independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. As regards to voting, **Article 86** provided on what the Independent body conducting the elections should ensure compliance during and after the counting.

From the record that I have, it is clear that the elections were conducted by an Independent body established under **Article 88(1)** of the constitution. The voting was conducted as provided under the provisions of **Article 86**. The voting method used was simple, accurate, verifiable, secure, accountable and transparent. This court and the parties were able to scrutinize and recount the ballots which had been casted and the ballots were capable of being recounted, tabulated and the results announced promptly by the Retuning Officer. It was also clear that there were appropriate structures and mechanisms to eliminate electoral malpractices including the safe keeping of electoral materials. This court finds that the petitioner failed to discharge his burden of demonstrating that the Elections of Kagan were not conducted as per the requirements of applicable law.

2) Whether the respondents non-compliance with the Constitution and or the law in the conduct of the elections affected the results and or the validity of the results of the elections of the Member of the County Assembly of Kagan.

On this issue, I have already observed that from the record the elections of the Member of County Assembly of Kagan ward were conducted with strict conformity with the constitution. There was no evidence of non-compliance of the constitution and or the written law. Voter identification was biometric and all the voters were identified using the KIEMS kit. All the agents were allowed access into the polling stations and tallying center. The testimonies of the witnesses who were present at the polling stations were in agreement that the Elections were conducted as provided by Electoral Laws.

3) Whether the 3rd respondent was validly declared as a Member of County Assembly elect of Kagan ward.

The record shows that after voting, the ballots were counted after which forms 36As were filled and later form 36B was generated. The form 36B was duly signed by the agents who were present and willing to witness. The certificate form 36C was then generated and issued to the winner who was the 3rd respondent.

An issue of forms 32 and 32As arose in the petition and during the hearing of the witnesses. The petitioner alleged that people were being voted for and the forms being used. During the scrutiny and recount, there was no evidence that such malpractice was committed. The 1st and 2nd respondents denied the allegations of people being voted for and indeed no form 32 and 32A were found in the ballots. This supports the evidence by the 1st and 2nd respondents that during the exercise, no form 32 and 32As were used.

I also wish to mention that it was not clear how the petitioners gained access to the forms 32 and 32As. The 1st respondent denied the forms and it was upon the petitioner to explain how he obtained them. He did not demonstrate that he wrote a letter to the 1st respondent seeking for the forms and how he was supplied with the forms. It was also clear from the annexed forms 32A that they did not have the full details of the people voting and that they had not been properly filled. My position is that the annexed forms 32As were calculated to mislead this court. The forms which had been attached had discrepancies and can only be dismissed for want of form and are so declared as mere pieces of paper. Further its worth

to note that the forms had not been certified as true copies of the originals as required.

During the scrutiny and recount and access to the SD cards, the court noted a few errors. For instance about 10 votes were found to have strayed. They were taken back to their rightful owners. I do not think the errors were grave enough to have this petition allowed. I do refer myself to what the higher courts have held under the circumstances.

In Joho vs. Nyange, the court held that:-

“Error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental they should be excused or ignored”.

My observation is that the whole exercise was conducted fairly and any errors if any were human and therefore cannot affect the wishes of the Kagan people.

In Peter Munya vrs IEBC and 2 others, the Supreme court also held that

“..... when however it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stand to be invalidated. Otherwise procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves to vitiate an election”.

I find in totality that after the scrutiny, recount and access to the SD cards, it was clear that it was the 3rd respondent who emerged as the winner. The SD cards were clear on the number of voters identified using finger prints and the number of voters identified using document identification. No form 32A was ever found inside any ballot boxes as alleged by the petitioner.

4) Whether the 3rd respondent committed election irregularities:-

It was upon the petitioner to prove these allegations. The petitioner miserably failed to discharge this duty imposed on him by law. In this case it is clear from the record that the 3rd respondent was a candidate and not mandated to conduct the elections. There is no evidence at all to suggest that in any way the 3rd respondent committed an election irregularity. If the petitioner thought otherwise, he was under duty to demonstrate by way of evidence how the 3rd respondent committed the alleged malpractices. There was no evidence to suggest that the 3rd respondent manipulated, engineered or deliberately distorted the votes cast to tilt to his favor.

5) Whether the petitioner should be declared the winner of the election of the member of the County Assembly of Kagan ward having majority votes.

After the scrutiny and recount, it was clear that it was the 3rd respondent, who was the winner of the Kagan member of County Assembly election held on the 8th day of August, 2017. The burden remained upon the petitioner to demonstrate that he was the winner with majority of votes and should be declared as the winner. On this particular issue, I do find the petitioner on a fishing expedition. From the pleadings and the evidence of the petition, he seeks for an order or invalidation of the election while on the other hand he seeks to be declared the winner of the elections. My position is that parties should be bound by their pleadings. In fact after the scrutiny and recount, it was clear that it was the 3rd respondent who emerged as the winner. The recount order provided this court with an opportunity to analyze and establish whether the errors and irregularities alluded to by the petitioner affected the final results. It was clear that after the recount, the 3rd respondent's margin win was never narrowed down wards. If the petitioner could have emerged as the winner in the recounted polling centers, then this court could have ruled otherwise.

On the issue of the application dated the 27th day of November 2017 by the 3rd respondent, my position is that the applicant never laid a basis on how the forms 32As annexed to the affidavit sworn by Maurice Onyango Ogotu were obtained. The 1st respondent denied knowledge of the said forms and testified that during the voting exercise, no forms 32As were used. Indeed it was upon the applicant to demonstrate to court how they got hold of the forms 32As. It was upon the petitioner to demonstrate how he applied for the forms and how they were supplied to him and further how he received them. I will not make any ruling on the application dated 27/11/2017 as the issues raised have already been captured in this judgment. The annexed documents will form part of the court record but will be disregarded for reasons earlier given.

The upshot is that the validity of the results was not affected by any non compliance of the law. There were no irregularities of grave nature that would have affected the outcome of the elections. During the scrutiny and recount, there were mathematical discrepancies of less than 10 votes in total in all the polling stations recounted but the discrepancies did not affect the outcome of votes cast given that the 3rd respondent led by a margin of 642 votes. On the issue of mathematical errors, I wish to refer myself to the holding of the superior court.

In Malindi High Court, Election petition No 6 of 2013, Rashid Ahmde Amana vrs IEBC & others, Justice Kimaru stated:

“ This court is not persuaded that an arithmetical error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take into consideration as being a material factor, in the absence of other evidence of the irregularity which would lead to the nullification of an election results.

I have perused the reports by the parties herein on the logs for the SD cards. The six cards clearly show the number of voters who were identified using finger prints and the number of voters identified using document identification. There was no evidence in the SD cards reports showing that dead people were being voted for. Even if I were to go by the submissions by the petitioner that dead people were voted for, the number as submitted by the petitioner was about 47 votes which again could not have affected the outcome of the results.

The above conclusion is supported by **the case of Joho vrs Nyange** wherein the court held

“.....it is not every non-compliance or every act in breach of the election regularities or procedures that invalidates an election for being non compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-compliant with the law as to the elections when it is conducted in violation of the principles of an election by ballot”.

“.....and the result of an election is affected when the cumulative effect of the irregularity reverses it”.

The Supreme court in Peter Munya vrs IEBC and others considered the interplays among Article 81 and 86 of the Constitution and section 83 of the Elections Act. The court held that:-

“..if it should be shown that an election was conducted substantially in accordance with the principles of the constitution and the elections Act, then such election is not to be invalidated only on the grounds of irregularities otherwise procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves to vitiate an election”

6) Costs

On the issue of costs, section 84 of the Act donates jurisdiction to an election court to award costs of and incidental to a petition. The Act provides that such costs shall follow the cause. **Rule 36(1)** of the rules provides as follows:

36 (1) the court shall, at the conclusion of an election petition, make an order specifying:-

- a) The total amount of costs payable; and
- b) The person by and to whom the costs shall be paid.

In Kalembe Ndile and another vrs Patrick Musimba and others Machakos High Court Election Petition No.1 and 7 of 2013 [2013]eKLR the court stated that:-

“Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politically by undermining the principle of access to justice enshrined in Article 48 of the Constitution”.

Having heard the petition from the beginning and up to the end, my position is that the issues were fairly straight forward considering the pleadings and the submissions. Doing the best I can and being guided by **Ranguma v/s Nyongo** case which I had earlier mentioned, I will award costs of the petition of ksh.1,000,000/- (one million only) to the respondents.

The long and short of it, the final orders of the court are as follows:-

- a) The petition is hereby dismissed.
- b) The respondents are hereby awarded costs of ksh.1,000,000/- to be shared as follows:
 - i. 1st respondent ksh.250,000/-
 - ii. 2nd respondent ksh.250,000/-
 - iii. 3rd respondent ksh.500,000/-
- c) A certificate of this determination under the provision of section 86(1) of the election Act 2011 to issue to the Independent Boundaries and Electoral Commission and the speaker of the county Assembly.

Orders accordingly.

Lastly, I wish to thank the advocates and the parties herein for their contribution towards ensuring that this petition was finalized within the required timelines.

Dated and delivered this 23rd day of February, 2018.

In the presence of

- i. Mr. Ochieng Adv H/B for Mss Gogi and Maumo for the 1st, 2nd & 3rd Respondents.
- ii. No Appearance for the Petitioner.

T.OBUTU

SENIOR PRINCIPAL MAGISTRATE

HOMABAY LAW COURTS

23/2/2018