



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT OGEMBO

ELECTION PETITION NO.3 OF 2017

RONALD ACHIRA ONGAGA1ST PETITIONER

SANGAE JERIAH BOSIBORI2ND PETITIONER

OMWANDO CHRISTOPHER MWENDIAH..3RD PETITIONER

VERSUS

EVANS MOKORO OMWANSU.....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

J U D G E M E N T

The people of Moticho ward within South Mugirango Constituency within Kisii County, like the rest of Kenya on the 8th day of August 2017 woke up to go and vote. Eight people were cleared by the Independent Electoral and Boundaries Commission to battle it out, for the position of Member of County Assembly representing Moticho ward. They were:-

1. Achira Ronald Ongaga
2. Maera Diaz Onderi
3. Maraganga Joel Makanga
4. Muyomah Ennah Asayi
5. Omwando Christopher Mwendiah
6. Omwansu Evans Mokoro
7. Osoro Shem Magona
8. Sangae Jeriah Bosibori.

On the 10th day of August 2017 after voting, counting and tallying of votes had been done, the 2nd Respondent (Returning officer) declared the 1st Respondent Evans Mokoro Omwansu as the winner with 2242 votes.

The petitioners being dissatisfied with the results as declared filed this petition jointly seeking the following prayers:-

- a. It be determined that the non compliance, irregularities and improprieties in the impugned elections for Member of County Assembly for Moticho ward held on the 8th day of August 2017 were substantially significant that they affected the integrity and quality of the election results and the returns thereof are vitiated by the said irregularities, non compliance and improprieties.
- b. There be a scrutiny and recount of ballot, kiems kits, un-used ballots and polling day diary in the election held on the 8th day of August 2017 for the office of Member of County Assembly representing Moticho ward Code No.1309 in the Kisii County Assembly.
- c. The Elections held on the 8th August 2017 for the office of Member of County Assembly for Moticho ward Code No. 1309 was not conducted in accordance with the Constitution and the written law and the elections regulations governing the said process hence the said elections be and is hereby declared null and void.
- d. The Certificate of election issued by the 2nd Respondent to the 1st Respondent Evans Mokoro Omwansu be and is hereby recalled and cancelled.
- e. The 3rd Respondent be and is hereby directed to conduct a fresh election for the seat of Member of County Assembly Moticho ward Code No.1309 in strict compliance with written law and Election(General) Regulations governing the said elections.
- f. Costs of the petition be awarded to the petitioners.

The petition was supported by the petitioners' own affidavits and affidavits of 5 others who included agents during the elections.

The petition is opposed by the Respondents. The 1st Respondent filed a response to the petition which was supported by 7 affidavits including his. The 2nd and 3rd Respondents filed a joint response which was supported by an affidavit sworn by the 2nd Respondent and 5 others who were Presiding officers and Deputy Presiding officers from various polling stations within Moticho ward.

The 1st Respondent denied the allegations contained in the petition and contended that the elections were free and fair and devoid of the malpractices alleged in the petition. As such he prayed that the petition be dismissed with costs to him.

It was the 1st Respondent's case that the petitioners' allegations on collation of results for the polling stations are fallacious and fail the simple test of logic.

(b) The claim of violence was not proved.

(c) The petitioners' allegations of imported voters to Nyakeyo Primary

School polling station was false, unlawful and unconstitutional.

The 2nd and 3rd Respondents opposed the petition on the following grounds:-

- a. That there was no occurrence of any irregularity in the conduct of the elections and of their

alleged effect on the results of the election.

b. The petitioners have not demonstrated succinctly how the irregularities if at all there was any affected the outcome of the election. The petitioners have failed to show how the will of the people of Moticho ward was subverted by the 2nd and 3rd Respondents.

c. The Petition is laced in generalities and lacks substance as would annul, an election and overturn the will of the people.

d. The Petitioners have not laid a foundation for the scrutiny and recount of the ballots, kiems kits, un-used ballots and polling day diary.

The 2nd and 3rd Respondents prayed that the petition be dismissed with costs to them.

Before I proceed any further, I wish to thank the counsels for the parties herein for their efforts that they put in and the manner in which they conducted themselves during the proceedings. I also want to thank the supporters of the various candidates for the support that they gave to their candidates. I also wish to extend my gratitude to the entire Ogembo Law Courts fraternity. I am indebted in you all. Having said that I wish to revert to the matter at hand.

The parties herein filed their issues at the pre trial stage. I went through them and narrowed them down into the following issues for determination:-

a. Whether the Elections held on the 8th day of August 2017 for the position of Member of County Assembly Moticho ward of South Mugirango Constituency within Kisii County complied with the Constitution and the Electoral Laws.

b. Whether there were incidences of violence and malpractices during the conduct of the impugned elections.

c. Whether the 1st Respondent was validly elected to the office of Member of County Assembly for Moticho ward in Kisii.

d. Who should bear costs of this petition.

e. What relief/orders should this Honourable Court grant.

I have carefully considered the evidence on record and appraised myself of the applicable laws. I have also given due regard to the parties submissions and the Authorities relied upon. Article 81 of the Constitution of Kenya enumerates the general principles for the electoral system. The said provision reads as follows:-

81. The electoral system shall comply with the following principles-

a. Freedom of citizens to exercise their political rights under Article 38.

b. Not more than 2/3 of the members of elective public bodies shall be of the same gender.

c. Fair representation of persons with disabilities.

d. Universal suffrage based on the aspirations for fair representation and equality of votes; and

e. free and fair elections which are

i. by secret ballot

- ii. Free from violence, intimidation, improper influence or corruption.
- iii. Conducted by an independent body.
- Iv. Transparent.
- v. Administered in an impartial, neutral, efficient, accurate and accountable manner.

In view of the above general principles and evidence on record, I wish to address the issues for determination as follows:-

a) Whether the election held on 8th August 2017 for the position of Member of County Assembly Moticho ward of South Mugirango Constituency within Kisii County complied with the Constitution and the Election laws.

Article 86 of the Constitution reads as follows:-

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 malpractice are put into place, including the safe keeping of election materials.

The petitioners together with their witnesses testified that the voting was done by secret ballot. Voters were afforded an opportunity to vote and the ballots were counted at the polling stations. The petitioners confirmed that counting of ballots was done in the presence of their agents and other accredited persons, the results form 36As were duly witnessed by the parties herein.

The Returning officer confirmed that the tallying process was carried out as accurately as possible and the Presiding officers delivered to him all the form 36As from Moticho ward containing the election results of each candidate from the polling stations in the ward. The Returning officer transposed the results into form 36B and declared the winner. The 1st petitioner on cross examination testified that no candidate lost a single vote, in the course of transposition from form 36A's to form 36B. All the petitioners in principle testified that they had no problem with the results of the election but they had a problem with the process.

There were incidences where the form 36A's were not signed by the agents of the petitioners. Some of the agents testified in Court that they were chased away by the Presiding Officers.

In Chikati – vs – Returning Officer Tongareni Constituency, it was held that Regulation 79 does not require that the statutory form MUST be signed by the agents.

Regulation 79 (6) & (7) is emphatic that absence of candidates or agents or failure to sign the form by candidates or agents does not invalidate the results declared in the form.

Regulation 79(6) reads as follows:-

The refusal or failure of a candidate or agent to sign a declaration form under Sub Regulation 4 or to record the reasons for their refusal to sign, as required, under this regulation SHALL not by itself

invalidate the results.

Regulation 79(7)

The absence of a candidate or agent at the signing of a declaration form or at the announcement of results SHALL by itself invalidate the results announced.

It is my considered view that the elections were conducted in accordance with the Constitution and the Election Laws.

b) Whether there were any electoral malpractices during the conduct of the impugned elections.

The petitioners alleged that there was voter importation to Nyakeyo Primary School Polling station. They presented a list of names they alleged were imported voters. However they did not prove that those people were imported voters.

The rights of citizens to vote is contained at Article 38(3) of the Constitution which reads as follows:-

38(3). Every adult citizen has the right, without unreasonable restrictions-

- 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.

Any Kenyan can vote in any part of this country for as long as they have registered to vote in those areas.

The 2nd petitioner (Sangae Jeriah Bosibori) testified that she was assaulted inside Sare Primary School polling station and she produced documents to that effect. However the alleged assailants were not charged in any election offence.

The 2nd Respondent herein also produced a post mortem of Jared Omwansu Omune who was allegedly shot on the 9th day of August 2017 at Nduru primary school playing field, that was one day after the elections had been conducted. She failed to demonstrate how the shooting affected the voting process and the subsequent tallying of results.

The 1st Petitioner confirmed that he was roaming throughout the ward on the polling day. He confidently asserted that he met people at Ndonyo polling station who were armed but he could not identify any of them and neither could he produce any evidence to show that they were hired by anyone. This Court noted from the evidence of the Returning officer that no polling station was closed because of any violence.

PW5 Wilson Oigara Kenyana contradicted the evidence of the 2nd petitioner Sangae Jeriah Bosibori as to the identity of the persons who allegedly attacked her. PW5 presented inconsistent documents. His names on the Identity card do not match the names on the treatment note from Tabaka Mission hospital and his P3 form that he produced as exhibits before Court. This Court noted that PW5 contradicting himself on cross examination. He says that he was born in 1980, yet his documents indicated that he was born in 1983. He testified that he was 38 years old, yet the person who was treated for the alleged injury was 30 years old. His evidence was incredible so much that it could not be relied upon.

The Presiding Officer of Ndonyo polling station RW5 Mr. Thomson Marube Osoro confirmed that there was commotion at Ndonyo polling station. He called upon the security officers who took charge of the situation and the commotion was quelled within 30 minutes. This Court noted that no voter was

disenfranchised by the alleged violence. Voting continued as usual after the commotion was quelled.

In case of Raila Odinga – vs – IEBC and 3 others (Election Petition No.5 of 2013), the Supreme Court held that in an election petition, the standard of proof is more than a mere balance of probabilities but less than beyond reasonable doubt. This Court further observed that where there are allegations of commission of election offences the allegations must be proved to the standard required in Criminal cases which is beyond reasonable doubt. From my analysis of the evidence on record, it is clear that the petitioners have failed to discharge the legal burden placed on them. They have failed to prove their allegations to the required standard.

c) Whether the 2nd Respondent was validly elected as the Member of County Assembly for Moticho Ward.

In the celebrated case of **Morgan and others – vs – Simpson and another 1974 ALL ER 772** Lord Denning laid down the following principles:-

1. If the election was conducted so badly that it was not substantially in accordance with the law as to election, then the election is vitiated irrespective of whether the result is affected or not.
2. If the Election was conducted substantially in accordance with the law it cannot be vitiated by a breach of the rules or mistake at the polls, provided that the breach or mistake did not affect the result of the election.
3. If the Election was conducted substantially in accordance with the law but there is a breach of the rules or mistake at the polls which affect the result, then the election is vitiated.

From the foregoing, the primary consideration in an election dispute is:-

- a. Whether the election was conducted in accordance with the law and to what extent.
- b. Whether the will of the electorate was affected by irregularities in the conduct of the election.

The petitioners having failed to prove their case to the required standards for the reasons already given I hereby declare that the 1st Respondent (Evans Mokoro Omwanso) was validly elected as the Member of County Assembly for Moticho ward in the general elections that were held on the 8th day of August 2017.

d) Costs

It is trite law that costs follow the event.

Rule 30 of the Election(Parliamentary and County elections) petition parties and Section 84 of the Election Act empowers an Election Court to make orders on:-

- i. Costs payable.
- ii. Person who pays the cost.
- iii. Person to whom the costs are payable.

I do find that since the petitioners have failed to prove their case, they ought to pay costs to the Respondents.

This petition was complex and that was clearly reflected by the number of the witnesses and the nature of evidence which was adduced. I have taken into account the time spent in the matter during mentions and hearings.

In light of the above, I am of the view that an award of Kshs.450,000(Four hundred and fifty

thousand)only to the Respondents is adequate compensation in terms of costs.

(e)What relief/orders should this Honourable Court grant.

Having made the foregoing findings I make the following orders:-

- a. The Petition is hereby dismissed.
- b. A certificate of this determination to issue to the Independent Electoral and Boundaries Commission and the Speaker of County Assembly of Kisii County in accordance with Section 86(I) of the Elections Act.
- c. The Petitioners shall bear the costs of the petition which costs are hereby capped at Kshs.450,000/=.
- d. The sum of Kshs.100,000/= deposited by the petitioners as security shall be held by the Court pending determination of the costs payable either by agreement or taxation.

DATED AND DELIVERED THIS 23RD DAY OF FEBRUARY 2018.

BY M.M.NAFULA

SENIOR RESIDENT MAGISTRATE

Judgment delivered in open Court in the presence of:-

Court Assistant Gladys

Mr.Okemwa h/b for Mr.Beki for the petitioners

Mr.Mirembe h/b for Nyamweya Mogusu for the 1st Respondent & Nyamweya Mamboleo for the 2nd & 3rd Respondents.

1st petitioner

2nd petitioner

3rd petitioner

1st Respondent