



REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT WAJIR

ELECTION PETITION NO.3 OF 2017

HASSAN JIMAL ABDI.....PETITIONER

VS

IBRAHIM NOOR HUSSEIN.....1ST RESPONDENT

RETURNING OFFICER, WAJIR NORTH

CONSTITUENCY.....2ND RESPONDENT

IEBC3RD RESPONDENT

RULING

1. Vide a notice of motion dated 21st August 2017 brought under Articles 177 (1) and 193 (2) (a) of the Constitution of Kenya, Section 80 (1) (d), Section 82 of the Elections Act 2011, Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 the Petitioner/Applicant herein seeks orders;

a) that this court be pleased to issue an order of recount of the votes received by the candidates at Basineja Centre, Batalu Primary Polling station; and

b) That this honorable Court be pleased to issue an order for scrutiny of the votes cast at Basineja Centre, Batalu Primary Polling station; and

c) That the 3rd Respondent provides the Petitioner/Applicant with the Kenya Intergrated Elections Management Systems (KIEMS) report and the polling station diary of the said Basineja Centre, Batalu Primary Poling Station.

2. The grounds in support of the said application as set out on the face of the application to witch: That forms 36A of the said polling stations were altered in favour of the 1st respondent; that the said alteration was aimed at triggering a win for the 1st respondent; That the alterations were done after the signing of the said forms by the agents; That it is incomprehensible that Form 36A for Basineja Poling station reflects the valid votes cast as 439 yet at the same time reflecting that the 1st respondent garnered 464 votes. That a prima facie case had been laid out for the grant of the sought orders; that the court is vested with discretion under section 82 (1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes; that such scrutiny will assist the court to investigate allegations of irregularities and breaches of the law; that an order for recount and scrutiny will further assist the court in determining the valid votes cast; that an order for scrutiny and recount would help the court understand the vital details of

the electoral process and gain impressions on the integrity of the electoral process; that the victory margin for the 2nd respondent was narrow which is a legal basis for a recount and scrutiny and finally that a recount and scrutiny would facilitate the expeditious disposal of this election petition.

3. These grounds were expanded in the supporting affidavits of Hassan JimalAbdi (petitioner).

4. Briefly, he depones that he was vying for member of county assembly Batalu ward in Wajir North Constituency, Wajir County; That he allegedly came second with a return of 946 votes against the respondents 1099 votes; that forms 36A of Batalu Primary Polling station and Basineja Center polling stations were altered in favour of the 1st respondent. That the alterations were aimed at triggering a win for the 1st respondent. That the said alterations were made after the agents had signed the forms. That the election in Batalu polling station was held from 7:00am to 10:30pm. That in Basineja polling station the presiding officer was calling on people to bring ID numbers of people who had not voted after counting had already started. That the results for Basineja, Batalu and Kurrow polling stations had not been transmitted to the Constituency tallying center at Bute by noon of the 9th of August 2017. That at about 3:00pm of the 9/8/2017 the ballot boxes for Basineja, Batalu, and Kurrow had arrived aboard the 1strespondent's car. That he lodged his protest over the conveyance of the same in the 1strespondent's car and was informed by the presiding officer that they didn't have transport. That the 2nd respondent was then informed that they had the results for Kurrow polling station but that the results for Basineja and Batalu polling stations were in a sealed ballot box. That the presiding officer for Basineja and the deputy presiding officer moved aside and conversed whereupon the Deputy presiding officer was handed a notebook. That he objected to results being read from a notebook and demanded that they read the results from Form 36A. That he was then kicked out of the tallying centre. That the returning officer then came out of the hall accompanied by the chief agents for Orange Democratic Movement (ODM) and Jubilee. That they then had a meeting wherein he and the ODM agent protested the opening of the ballot boxes. That the 2nd respondent made a decision to open the ballot boxes. That the ballot box for Batalu was opened and he recorded the serial numbers on the broken seals as

a) IEBC 167326

b) IEBC 1762303

c) IEBC 1762301

d) IEBC 1761167

e) IEBC 1762302

f) IEBC 1762355

5. That he also recorded the new seals for the Batalu Ballot Box as

a) IEBC 167326

b) IEBC 1761852

c) IEBC 1761167

d) IEBC 1762398

e) IEBC 1761504

f) IEBC 1762399

6. That the Basineja polling station seals were;

- a) IEBC 171758
- b) IEBC 1762380
- c) IEBC 1762389
- d) IEBC 1762388
- e) IEBC 1762387
- f) IEBC 1761154

7. In reiterating the grounds already canvassed above, it is his deposition that a scrutiny and recount as sought is necessary to enable this court arrive at a just and fair determination of the petition.

8. He has annexed copies of forms 36A for Basineja and Batalu as well as an affidavit sworn by Abdisirad Hajj Ali.

9. In the said affidavit Abdisirad Hajj Ali depones that he was an agent at Batalu Primary School on 8/8/2017. That he arrived at the said polling station at 6:00am on the 8/8/2017 and voters started streaming in at about 6:30am. That the exercise of voting was smooth save for minor fracas caused by an MP representative dishing out money to voters. That between 5:00-6:00pm only one or two voters were still coming in. That at about 7:10pm no more voters were coming in and he expected voting to close. That he approached the Presiding officer and enquired why voting had not stopped and was told that they were waiting for a motor vehicle carrying voters. That he protested to no avail. That at about 8:00pm more voters started to stream in. That he noticed that some were voting for the 2nd time. That he voiced a new protest and was then promised that his Member of Parliament candidate would be awarded 5 votes. That he turned down the offer but the presiding officer nonetheless marked two ballot papers in favor of the said MP. That voting continued until about 10:30pm. That at about 11:00pm the seals to the ballot boxes were opened and the counting began. That the counting for the presidential, Governor's, Senator's, and Member of National Assembly's votes were counted by announcing the candidates in whose favor the votes had been cast whereas that of the Member of National Assembly were not announced. That at the end of the exercise the presiding officer announced that votes cast in favor of the 1st respondent was 487 and the other candidates garnered zero votes. That he refused to sign the forms 36 A at the first instance but was directed to do so by the Presiding officer. That the crowd became hostile and he complied in fear for his safety. That the presiding officer put the said forms in an envelope and the same was put in a bag labeled IEBC. That about 8:00am on the 9th of August 2017, the Presiding officer from Basineja came in the company of the 1st respondent, Dr. Kassim and two other persons. That they called the presiding officer at their station and moved aside for about 30minutes then left. That the presiding officer then returned to the hall and announced that they were leaving for the tallying center at Bute Arid Zone Primary School. That the clerks and security officers collected the voting materials and walked towards Batalu. That he accompanied them to Batalu with the other agents. That on reaching Batalu the voting materials were put in a house and the presiding officer directed that they leave as the voting exercise was at an end.

10. Finally he depones that their continued protests were ignored and a direction made to the security officers to disperse them.

11. The application is opposed by all the respondents.

12. In his replying affidavit sworn on 1st September 2017, Gedi Noor Arale (the 2nd respondent herein) on his own behalf and on behalf of the third respondent depones that the elections in which the petitioner participated were conducted in a free, fair, transparent and verifiable manner as stipulated by articles 81 and 86 of the constitution of Kenya.

13. He further depones that he personally ensured that all electoral materials were supplied to the various polling stations. That he ensured that the stipulated time for voting was adhered to. That the rule of one voter one vote was strictly adhered to and it was thus impossible for a voter to vote more than once as the KIEMS kit identified all the voters. That subsequent to the votes being cast at Batalu ward the votes were counted and tallied in the presence of the party agents and the total votes garnered by each candidate properly entered in form 36A. That due to security concerns prevailing in Basineja and Batalu polling stations, the Presiding officers of both stations sealed the filled forms 36A at the polling stations within the ballot boxes. That the Presiding officers arrived to the polling centre a tad late causing anxiety and suspicion from members of the public that the results had been doctored. That these fears were allayed once the presiding officers arrived. That upon being informed that the forms 36A had been sealed within the ballot boxes he called a meeting of the candidates and their agents and by a majority consensus decided to break the seals to the said boxes and retrieve the forms 36A and that no alterations of any manner had been done to forms 36A. It is thus his deposition that the petitioner herein has provided no evidence to warrant the grant of the orders sought.

14. In a further replying affidavit in aid of the 2nd and 3rd respondents case, Mahat Bishar Hassan, an official of the 3rd respondent and the Presiding officer at Basineja Polling Station depones that due to time constraints and security concerns the ballot papers at Basineja had been given to various clerks to assist in counting in the presence of all agents and that thereafter the same had been returned to him for collation.

15. It is the contention of the said Mahat Bishar Hassan that after collating the ballot papers and finding a figure of 439 in favor of the 1st respondent, and just before he embarked on tallying the votes for the governor position, he realized that one of the polling clerks had slept before returning the ballot papers to him.

16. That upon waking the said clerk and counting the ballot papers received from him the same tallied at 25 in favor of the first respondent necessitating that he makes changes to form 36A in the presence of all agents to reflect the additional 25 votes.

17. I note that there is also a replying affidavit on record purportedly sworn by the 1st respondent. However, whereas the replying affidavit seems to have been commissioned by a competent advocate in line with the provisions of section 5 of the advocates Act, the same does not bear the signature of the deponent.

18. That said, and given that the other concerned parties have raised no issue over the said replying affidavit, I believe the error is excusable by dint of article 159 of the Constitution as a technicality. Indeed my suspicion is that the copies given to the other parties were duly signed hence the lack of opposition to the same. I will therefore consider the averments in the said affidavit in the interest of arriving at a just and balanced decision.

19. The first respondent joins the other respondents in deponing that the elections held in Batalu and Basineja polling stations were conducted in a free and fair manner and that he was declared the winner with a vote of 1,099 against the petitioners 946 votes.

20. He further depones that in seeking the orders highlighted above, the petitioner is guilty of concealing material facts to wit; that once the counting process was complete in both Batalu and Basineja polling stations in the presence of all the agents, the results were verified and the documents signed by the respective agents.

21. The 1st respondent concedes that Form 36A for Basineja polling station shows that he got 464 votes whereas the votes cast is indicated as 439 but depones that this was a trivial error made by the presiding officer. He asserts that his position is supported by the number of total votes cast for the positions of Governor, Senator, Women representative and Member of parliament which he claims showed the votes cast as 464. In aid of this argument he has annexed copies of the election results for the senatorial, Gubernatorial, Women Representative and Member of Parliament for Basineja Poling station.

22. He further depones that the race for Member of County Assembly for Batalu Ward was a tight one with four strong candidates and the win margin was always expected to be small. He therefore rebuts the assertion that the win margin of 153 was narrow.

23. He further refutes the assertion that the polling station was kept open beyond 5:00pm and/or that Dr. Kassim was allowed to vote twice at Batalu polling station since the said Dr. Kassim is a voter at Basineja and not Batalu.

24. By consent, the parties agreed to dispose of the application by way of written submissions pursuant to which each party filed their written submissions.

SUBMISSIONS

25. To attempt a reproduction of the submissions or even a summary of the same here would prove a daunting task and in my view quite unnecessary as the parties seem to agree on at least the fundamental issues.

26. For a start they are united that this court has jurisdiction to grant the orders sought and that the manner and conditions under which such orders should be granted have been set out in the law and several decisions of the superior courts.

27. The sections of the law quoted are rules 28 and 29 of the Elections (parliamentary and County Elections) Petitions Rules and section 82 of the Elections Act.

28. Section 82 of the Election Act provides:

(1) “An Election Court may on its own motion or on application by any party to the Petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such a manner as the election court may determine.”

29. Rule 28 of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides

“A petitioner may apply to an elections court for an order to: (a) recount the votes; or (b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.”

30. Rule 29 of the elections (Parliamentary and County Elections) Petition rules provides:

“ The parties to proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast

2. On application under sub-rule 1 an election court may, if satisfied that there is sufficient reason order for scrutiny or recount of the votes

3. The scrutiny or recount of votes ordered under sub rule (2) shall be carried out under the direct supervision of the registrar or magistrate and shall be subject to the directions the election court gives

4. The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results disputed and may include the examination of

(a) The written statements made by the returning officer under the Act

(b) The printed copy of the register of voters used during the elections sealed in a tamper proof envelope

(c) The copies of the results of each polling station in which the results of the election are in dispute

(d) The written complaints of the candidates and their representatives

(e) The packets of spoilt ballots

(f) The marked copy register

(g) The packets of counterfoils of used ballot papers

(h) The packets of counted ballot papers

(i) The packets of rejected ballot papers

(k) The statements showing the number of rejected ballot papers

31. Parties are further united that contemporary precedent on the subject of recount and scrutiny dictate that:

“The right to scrutiny and recount does not lie as a matter of course. [And that] the party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request to the satisfaction of the trial judge or magistrate. [And further, that] such a basis may be established by way of pleadings and affidavits. (see Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Raila Amolo Odinga & another V Independent Electoral and Boundaries Commission and 2 others [2017] eKLR)

32. Being adversaries it is only natural that the parties then differ on the import of these sections and legal authorities on the matter at hand.

33. The petitioner on his part strongly argues that based on the grounds laid out in the application they have provided a basis for orders of recount and scrutiny.

34. For clarity, and as accurately captured in the 1st respondents submissions, those grounds are:

- a) That forms 36A in Batalu and Basineja polling stations were altered in favor of the 1st respondent after the forms had been signed by the agents in both the polling stations; and
- b) That the votes garnered by the 1st respondent in Basineja polling station as indicated in form 36A in Basineja Polling station is more than the votes cast. (Votes garnered =464, votes cast 439); and
- c) That the 1st respondent won by a narrow margin of votes (153 votes); and
- d) Voting was allowed to continue past the legal time in Batalu polling station

35. The petitioner further argue that even if they had failed to provide such a basis an order for recount and scrutiny would still be made where the margin of victory or loss is narrow. They refer the court to the case of Charles Ong’ondo Were V. Joseph Oyugi Magwanga & 3 others Election petition (Homa Bay) No. 1 of 2013) and to paragraphs 4.6.5.5 of the Judiciary’s Bench Book on Election Disputes Resolution.

36. On his part the 1st respondent submits that based in the decision of Raila Amolo Odinga & another V Independent Electoral and Boundaries Commission & 2 others [2017] KLR orders of recount could only be forthcoming if the petitioner satisfied the court that:

- a) a prima facie case had been established; and

- b) that material facts and full particulars had been pleaded stating the irregularities in counting votes; and
- c) that the order of recount would not be used as a roving and fishing inquiry; and
- d) that an opportunity to file an objection had been filed; and finally
- e) that secrecy of the ballot be guarded.

37. The 1st respondent then submits that these grounds have not been met. It is his contention that the petitioner has failed to prove any irregularities in the process of voting, counting or tallying; That no breaches of the law had been demonstrated; that the narrow margin was expected in such a close contest and that the votes cast for the MP, Governor and Women Representative are consistent with the votes cast and the alluded error does not vary the result thus does not necessitate the scrutiny.

38. He reiterates his claim that the petitioner is guilty of concealing facts from the court and submits that failure to make such disclosure makes the petitioner unworthy of the orders sought.

39. The 2nd and 3rd respondents took the same position as the 2nd respondent and submit that the petitioner is on a fishing expedition with the aim of obtaining the evidence to invalidate the whole process.

40. They further submit that it is glaringly clear that the results for Basineja center polling station and Batalu Primary Polling station were not manipulated intentionally in favor of any candidate and that no challenge had been mounted against the correctness of the whole process

ISSUES

41. Each party independently framed the issues for determination based on how they perceived the controversy herein. I have gone through each of those issues and I believe they could be broadly distilled into the following:

- a) Whether the petitioner has established a prima facie case for the grant of the orders for scrutiny and recount of votes in Basineja and Batalu polling stations;
- b) Whether the orders for scrutiny and recount of votes in Basineja and Batalu polling stations ought to be granted;
- c) Whether the KIEMS report and polling station diaries of Basineja center polling station and Batalu Primary should be availed to the petitioner.

Whether the petitioner has established a prima facie case for the grant of the orders sought.

42. As rightly pointed out in the petitioners submissions, a prima facie case as defined in the Black's Law Dictionary 4th edition is "such as will suffice until contradicted and overcome by other evidence" The 8th Edition of the same dictionary gives the meaning of "prima facie" as "sufficient to establish a fact or raise a presumption unless disproved or rebutted."

43. As such it was crucial that the allegations as laid by the petitioner stand against other evidence. Put differently, those allegations needed to withstand all other evidence.

44. As captured severally in this ruling, the petitioner premises his application primarily on three grounds;

- a) That forms 36A in Batalu and Basineja polling stations were altered in favor of the 1st respondent after the forms had been signed by the agents in both the polling stations; and

- b) That the votes garnered by the 1st respondent in Basineja polling station as indicated in form 36A in Basineja Polling station is more than the votes cast. (Votes garnered =464, votes cast 439); and
- c) That the 1st respondent won by a narrow margin of votes (153 votes); and
- d) Voting was allowed to continue past the legal time in Batalu polling station

45. On the first ground, the petitioner has annexed forms 36A for both the subject stations to his affidavit and having examined the same it is indeed discernable at face value that the numbers appearing as the valid votes obtained have been tampered with. Both documents show that there were initial numbers underneath which was then super imposed with other number. In the one pertaining to Basineja I can clearly see the number 6 super imposed over the number 3 and a number 4 superimposed over an indistinct number. The final figure therefore appears as 464 but is unclear what the original figure was.

46. In Form 36A pertaining to Batalu it is clear that the figure 5 has been superimposed over a number 4 and the number 0 superimposed over the number 8. It is equally discernible that the number 2 has been superimposed over the number 7.

47. I have gone through the forms 36A for Basineja and Batalu annexed to the respondents affidavits and the alterations are equally clear on those forms.

48. The respondents counter this by stating that the alterations were made in the presence of the agents and further explain that the alterations in form 36A for Basineja station occurred due to one of the clerks falling asleep and therefore surrendering his results late. Even so, the explanation, as far as it goes, only addresses the concern in Basineja center. No explanations have been rendered to justify the apparent alterations in the form 36A for Batalu polling station.

49. It is also strange that despite the strong assertion that the said alterations were made in the presence of the respective agents, the form was not countersigned to validate said alterations. Similar concerns were noted in the case of *William Kabogo Gitau V George Thuo & 2 others [2010] eKLR* where Justice Kimaru stated

“There are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to form 16 as where specific results of specific candidates were either altered or cancelled without the presiding officer countersigning the cancellation or alteration. The 3rd respondent explained away the cancellations and alterations to be on account of, once again, human error which, according to him, was to be expected in the circumstances. Having evaluated the questioned form 16As, it was clear to the court that whereas the regulations do not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation or alteration in a statutory form, the same should be countersigned by the concerned official. In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties including members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the Form 16As produced in this court raised questions regarding the veracity and authenticity of the said results”

50. Going through forms 36A for Batalu Primary Polling Station and Basineja Center Polling Station I find myself assailed by similar misgivings. It appears to me that if indeed the alterations were made with the knowledge and acquiescence of the agents then the same ought to have been countersigned by the relevant officers.

51. On the first ground, I therefore make a finding that the petitioner has demonstrated a prima facie case.

52. The difference in votes garnered vis-a-vie votes cast is readily admitted by the respondents who again attribute it to human error and support their assertion with the results showing that in all the other elective

seats the votes cast in Basineja polling station were properly registered as 464 and not 439 as indicated in form 36A for the member of county assembly. I have gone through the documents annexed and find that indeed they announce the various winners and indicate the valid votes cast in Basineja center as 464

53. The petitioner has re-countered this by annexing forms 35A for Member of Parliament and form 34A for the presidential position for Basineja Centre and argues that both documents were altered to show a figure of 464 as the total number of valid votes cast.

54. . My examination of the said forms 34A and 35A show similar alterations as in the form 36A and also show the same lack of counter-signage.

55. On the third ground relating to the margin of win, it is not in dispute that the 1st respondent indeed won by a margin of 153 votes, the 1st respondent however contends that the race was a close one and that in such a race it was always expected that the margin of win/loss would be narrow. In support of his assertion he has annexed form 36B (INA3) showing the collation of Batalu Ward election results. That collation shows that Batalu Ward encompasses 12 polling stations including the two centers that are subject of this petition. I further note that of the said 12 polling stations the 1st respondent garnered less than 5 votes in nine of them and got almost all of his votes from Batalu, Basineja and Kurrow centers. To be more accurate he got 502 votes in Batalu, 464 in Basineja and 128 in Kurrow. It then becomes clear that if the votes in Batalu or Basineja are called into question, as is the case here, the margin of 153 must be construed as narrow.

56. The assertion that voting was allowed to go on beyond the hours allowed by law remains mere allegations at this juncture and the court will therefore not attach much weight to it in this ruling.

57. In the end, based on my observations above, I find that sufficient reasons have been advanced for the grant of the orders sought.

58. As was stated in **Philip Mukwe Wasike V. James Lusweti Mukwe & 2 others Bungoma High Court Petition No. 5 of 2013; [2013] eKLR**

“The purpose of scrutiny is:-

(1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.

(2) Assist the court in determining the valid votes cast in favor of each candidate.

(3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.”

59. A further necessary injunction was given in **Raila Amolo Odinga v. Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**that:

“The decision to grant scrutiny and recount is clearly not only discretionary but is also judicious. That is to say the courts reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the petition”

60. My decision to grant the orders sought is informed by the above criteria. Consequently, and as it appears to me that the controversy revolves around only two polling stations, I issue orders as follows

(a) An order for a recount of the votes received by the candidates at Basineja Centre Polling Station and Batalu Primary Polling station

(b) An order for scrutiny of the votes cast at Basineja Centre Polling Station and Batalu Primary

polling Station.

(c) That the 3rd respondent provides the Petitioner with the Kenya Elections Intergrated Elections Management Systems (KIEMS) report and the polling station diary for Basineja Centre Polling Station and Batalu Primary Polling station within 14 days of this ruling.

(d) That pursuant to the orders in (a) and (b) above, the exercise of recount and scrutiny be done at the IEBC warehouse under the direct supervision of the court on a date to be agreed upon today.

(e) That advocates for all the parties be present during the recount and scrutiny.

(f) Costs of the application will be in the course

Ruling dated signed and delivered in open court on this 6th day of November 2017 in the presence of;

Mr. Noor for the petitioner

Mr. Muganda for the 1st respondent

Mr. Muganda H/B for Mr. Odhiambo for the 2nd and 3rd respondents

Halima/Noor:- Court assistants

A.K.MOKOROSS

SENIOR RESIDENT MAGISTRATE