



REPUBLIC OF KENYA

JURISDICTION: IN THE SPM'S COURT AT KILIFI

FILE NUMBER: ELECTION PETITION NO 3/2017

BETWEEN: COSMAS FOLENI KENGA V/S I.E.B.C & 2 OTHERS.

CORAM: R.K. ONDIEKI- SPM.

HEARD: 20th NOVEMBER, 2017.

DELIVERED: 8th DECEMBER, 2017.

CITATIONS:

1. *Joho –vs- Nyange & another [2008] 3 KLR (EP) at page 500:-*
2. *Fitch v Stephenson and Others [2008] EWHC 501(QB),*
3. *Morgan v Simpson [1974]3 All ER 722 at p. 728.*
4. *Rahim Khursid v Khurshid Ahmed & Others [1975] AIR 290, 1975 SCR (1) 643,*
5. *Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others Election Petition No. 5 of 2013*
6. *Ugandan case of Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001*
7. *Mokwaledi Bagwasi v Seabe Morueng & Anor Miscellaneous Applic No. F228 of 2004*
8. *James Omingo Magara v Manson Onyango Nyamweya & 2 others (2010) eKLR*
9. *Alhaji Waziri Ibrahim v Shehu Shagari(1983) All N.L.R 507*
10. *Alhaji Waziri Ibrahim v Shehu Shagari(1983) All N.L.R 507*
11. *Nathif Jama Adama v. Abdikhaim Osman Mohamed & 3 Others Petition No. 13 of 2014; [2014] eKLR,*
12. *Hassan Mohamed Hassan & Another v. IEBC & 2 Others Petition 6 of 2013; [2013] eKLR,*
12. *Jacob Mwirigi Muthuri v. John Mbaabu Murithi & 2 Others, High Court at Meru, Petition No. 2 of 2013; [2013] eKLR*

13. *Rishad H. A. Amana v IEBC & 2 Others*, High Court at Malindi Petition No. 6 of 2013; [2013] eKLR
14. *Philip Osore Ogutu v. Michael Aringo & 2 Others*, Busia High Court Petition No. 1 of 2013
15. *Olusola Adeyeye v Simeon Oduoye* (2010) LPELR-CA-/1/EPT/NA/67/08
16. *Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R.

JUDGEMENT OF THE COURT:

Like a cannon shot, such was the fiery enthusiasm with which the Petition before me was presented. I must equally say, that in respect to Election Petitions, I am beholden to Lord Denning M.R. and in the course of swapping through his favourite decisions on the subject of Law and Justice, behold my eyes were opened to this white knight, whose Englishness with a notion of justice exhibited his passion for fair play. I am not alone. Charles Stephens in his Article entitled; The Jurisprudence of Lord Denning, A study of Legal History Volume III delivered himself;

"...Lord Goff considered that Lord Denning was the outstanding of this century in the common law world...he reminded a whole generation of lawyers that the duty of the Judge is not merely to apply the Law but to do Justice. Lord Denning as reformer of the Law, taught us all that, if justice was to be done, the common Law could not stand still- it must be developed to respond to the demands of justice in a living society..."

Word went round in the Court Registry on 6th September, 2017, that a Petition was likely to be filed before midnight and so I requested my staff to be on the lookout and possibly extend time to the night for any eventuality and true, this Petition was lodged that night. I shall in this Petition, as Lord Denning puts it, focus more on Justice as opposed to irregularities and transgressions.

Throughout the trial of this Petition, the learned Counsel indeed burnt mid night oil isolating the relevant and irrelevant authorities to support their respective positions and presented their case, professionally. I admired their presentation and one would easily mistaken to believe that they have been in this industry for a while now.

I have also burnt mid night oil bisecting the wheat from the chaff and given the best shot of my analysis and determination of this Petition while holding dear to the words of His Lordship Justice Maraga (as he then was) in Joho –vs- Nyange & another [2008] 3 KLR (EP) at page 500:-

“Election Petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great importance – Kibaki –vs- Moi, Civil Appeal No.172 of 1999. This is because when elections are successfully challenged, bye elections ensue which not only cost the country colossal sums of money to stage, but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election Court’s decision in Wanguhu Ng’ang’a & another –vs- George Owiti & another, Election Petition No.41 of 1993 that election petitions should not be taken lightly.”

So, before I delve into five clusters of complaints raised by the Petitioner, it befits this case to give a brief summary of Election Petitions as a whole. The central issue in election Petitions is uniqueness of how electoral disputes are handled. This view is given splendid support in many jurisprudential opinions within and beyond our borders. Consequently, this Court is aware that the outcome of this Petition is eagerly awaited with bated breath by all parties and their supporters. We will see in a short while, as some celebrate and some mourn, in equal measure.

Principles of Electoral Disputes:

It is settled law and a global established principle, that the validity and integrity of any election is gauged

upon it being conducted in substantial compliance with the electoral Law. In Morgan v Simpson [1974]3 All ER 722 at p. 728, Lord Denning said it all;

“Collating all these cases together, I suggest that the law can be stated in these propositions:- If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not... If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls...”

In Fitch v Stephenson and Others [2008] EWHC 501(QB), the judges stated:

“...the courts will strive to uphold an election as being substantially in accordance with the law, even where there have been serious breaches of the rules, or of the duties of the election official providing that the result of the election was unaffected by those breaches...”

In the footsteps of Lord Denning's propositions, the Supreme Court of India in Rahim Khursid v Khurshid Ahmed & Others [1975] AIR 290, 1975 SCR (1) 643, the Court said thus;

“...an election once held, is not to be treated in a light-hearted manner, and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing serious elements of uncertainty on the verdict already tendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held...”

The principle that any election that is not conducted substantially in accordance with the electoral law of that election is null and void has also been legislated in Sections 83 of the Kenyan Elections Act, 2011 which states that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

In the case of Joho v Nyange (No.4) (2008) 3 KLR (EP)500 the court stated as follows:

“Error is to human. Some errors in an election 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.”....“It is not every non-compliance or every act in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored.” “...And the result of an election is affected when the cumulative effect of the irregularity reverses it. For instance when a large portion of the voters are by some blunder in the conduct of the election as happened in ...do not turn up to vote, the result is said to have been affected.”

Burden and Standard of Proof.

The starting point regarding this Petition is setting out the standard of proof as the plumber line. Having said that these election Petitions are not ordinary suits, it goes then without saying that the standard of proof is different from a balance of probabilities.

It is settled, that the burden of proof in election petitions lies with the Petitioner and on the strength of the Supreme Court of Kenya in Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others Election Petition No. 5 of 2013 it was held;

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”

This was also the finding in the Ugandan case of Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001, where the majority on the Supreme Court bench held;

“...the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court.”

Petitioner's Case:

The Petition is dated 6th September, 2017 and it seeks among other reliefs that; immediately upon filing of the Petition, the 1st Respondent do produce, avail and allow access of electoral material in respect of Tezo Ward County election within seven days, a declaration that the 3rd Respondent was not duly elected and the election was null and void, a specific Order of scrutiny i.e BVR tallies and physical roles and recount of all the votes cast in Tezo Ward Member of County Assembly elections held on 8th August, 2017 and thereafter re-tallying of all valid votes cast for each candidate in Tezo Ward, a declaration that the 3rd Respondent was not duly elected and that the election was void, a declaration of which candidate was validly elected, an Order to whether a fresh election should be held in Tezo ward, Cost of the Petition and any other Orders the honourable Court may deem just and fit to grant.

The Petition is grounded on Articles 10, 38, 82, 86, 88, 138, 140, 163 and 249 of the Constitution of Kenya. Further, it is premised on section 39 of the Election Act, 2011. The Petitioner in paragraph 12 and 14 of the Petition contends that the 2nd Respondent failed in its statutory duty to tally, announce and declare in the prescribed form of all the final results from each polling station in Tezo Ward in that he announced and declared the wrong candidate, the third Respondent as the winner of the elections and therefore, the Petitioner sought the Court to Order a recount and scrutiny of the votes cast in all polling stations in Tezo ward in order to determine who between the Petitioner and the 3rd Respondent won the elections.

COSMAS FOLENI KENGA (PW1) told the Court in his evidence that on 8th August, 2017, he went to cast his vote at Mtondia Primary School Polling Station but was harassed by one Prudence Riziki Nyanje, a polling clerk in the presence of Charles Konde and Eric Kai even though he finally cast his vote, he was traumatised. The witness further told the Court that some old ladies were being assisted by the presiding officers, amendments were being made to Form 36A and so his results as informed by his agents, were not in tandem with the declared results. He told the Court that he had been informed by some voters that one Francis Thoya, a presiding officer at Mtondia Primary School Polling Station was moving from one stream to another monitoring how he was doing and that he was the same person who picked the Petition upon being filed on behalf of the 3rd Respondent. The witness continued to tell the Court that in Bofa Primary School Polling Station, the number of votes cast were 515 and yet the registered voters were 434. There were other anomalies at Majaoni Primary School Polling Station, Tezo Primary School Polling Station, Mikingirini Primary School Polling Station and Bahati Primary School Polling Station, where the Form 36A were not stamped. In addition, there were celebrations before the results were announced.

Consequently, the witness made a call to the returning officer Kilifi North and even sent a text message but was not acted upon. Under cross examination, the witness said that he did not avail any print of the text that he sent to the returning officer and that he did not report of the harassment to the police and further said that there were no security officers in 10 polling stations and that four agents at Mtondia were intimidated. Further he told the Court that polling clerks and presiding officers at Mtondia

Primary School polling station were supporting the 3rd Respondent.

RENISON BIDII KALAMA (PW2) and LEVITICUS KALAMA LEWA (PW3) gave a replica evidence and said that there were no security personnel at most of the polling stations, canvassing was witnessed outside most polling stations, one Francis Thoya the presiding officer at Mtondia Polling station was a campaigner for the 3rd Respondent and there were early celebrations by some youths singing funeral songs for the Petitioner.

They further said that they saw old ladies with pieces of paper with names of the candidates they were to vote for and one such lady was Khadija Katana Kombe.

However on cross examination, they said that they did not see the names of the candidates written on that piece of paper and that they just saw seven young men canvassing outside the polling station. PW2 said that he reported the matter to the Police Officers at the tallying station but was not taken serious. Further PW2 said even though an agent of Jubilee Party, he did not have anything to show that indeed he is an agent. Further he said that he was not forced to sign Form 36A at Bofa Primary Polling Station.

The Respondents' Case:

ABDWAHID HUSSEIN (1st RESPONDENT) told the court that he was the returning Officer of Kilifi North for the 8th August, 2017 General elections and regarding Tezo Ward, he received all the results from 22 polling stations but Bofa Primary School polling Station had an error where Jirani Edison was alleged to have garnered 230 votes instead of 3 votes. The Petitioner garnered 60 votes while the 3rd Respondent garnered 183 votes. In any event, the KIEMS Kit captured valid votes as 313 and not 518. He said that the error was just a clerical error but the actual figures are clearly indicated in Form 36A. In any event, the Jubilee Party agent signed Form 36A confirming the results as tallied. He denied that he was called by the Petitioner or any other and that all agents did sign the Forms without any complaint. Further the witness said that there enough security officers in all polling stations both in uniform and civilian and that he did not receive any verbal or written complaint from any complainant.

In respect to the complaints of partisan presiding and poll clerk, the witness said that all the names are on public notice board for the information of members of public and so there was no complaint raised in respect to any of those officers. Regarding assisted voters, the witness said that there was no complaint received from any of the polling station and in any event, Forms 36A did not indicate any complaint of this nature. Under cross examination, the witness said that all the forms 36A were signed indicating that there was no any anomaly from the polling station. Further he said that all names of the Polling clerks and Presiding Officers are put on a notice board for information of the members of the public and they can be deployed to their home area. The witness further said that the KIEMS machine cannot capture any results more than the registered voters. Further he said that he considered all the unsigned Forms 36A and issued Form 36C to the winner.

THOMAS MUMBA CHENGO (2nd RESPONDENT) told the court that on 8th August, 2017 he cast his vote at Mtondia Primary School Polling Station but did not meet the Petitioner or witness any ugly incidents. He further told the Court that the Petitioner did not adduce any tangible evidence that he was traumatised, harassed or that there were incidences of canvassing. Under cross examination, the witness said that he won the MCA seat fairly and freely, validly elected and that he merited it. Further he said that there were many police officers at the polling stations and there was no need to count them. The Petitioner further told the Court that Francis Thoya was a presiding Officer at Mtondia Primary School Polling Station and that he is the one who picked the Petition for him.

JUMAA KATANA KAZUNGU(DW3), DICKSON KAZUNGU(DW4), JACOB CHENGO KAZUNGU(DW5), NZINGO NGONYO(DW6), DAVID KAZUNGU(DW7) and JUMAA KATANA JEW (DW8) all gave similar evidence. They said that they voted each at different polling station and they witnessed presence of security officers and there was no any malpractices or irregularities witnessed. DW4 was an agent of KANU Party while DW8 was an agent for ODM Party. The two signed Forms 36A

and that they did not witness any ugly incidents at the polling stations.

Court's Analysis and Determination:

1. Harassment and Intimidation:

The first complaint is the harassment and intimidation. The Petitioner (PW1) in his supporting affidavit and in particular paragraphs 4, 5, 6, and 7 has raised a litany of allegations of harassments and intimidation at the Mtondia Primary School Polling Station. It was alleged that upon entering the Polling Station, he was initially harassed and pushed away by Prudence Riziki Nyanje even though later he cast his vote but was traumatised. This happened in the presence of Charles Konde Menza and Eric Kai- the Presiding Officer. Further, he told the Court that there were illiterate women who were intimidated and forced to vote for Thomas Chengo Mumba. This complaint was also raised by the witness for the Petitioner one, Leviticus Kalama Lewa (PW3) in his affidavit in support who said that he saw some ladies with pieces of papers indicating the names of the favourite candidate to be voted and were assisted by the Presiding Officer.

The conclusion that the court has reached in this segment is that the claim of intimidation and harassment which would adversely affect voters to vote for a person not of their choice, has not been sufficiently supported by the evidence on the record. Furthermore, if indeed there occurred acts of intimidation and harassment, there is no sufficient evidence to directly link them to any of the Respondents, particularly the 3rd Respondent. Put differently, those who are said to have committed the acts, were not proved to be necessarily agents of the Respondents sent and authorized by the Respondents to commit the alleged unlawful acts. For example if one Prudence Riziki Nyanje, a clerk attacked the Petitioner, there was no proof that she acted so within the authority given to her as a polling clerk. She most likely acted outside her employment and without the authority of her employer. She could only be reported to the police for criminal prosecution. The evidence adduced by the Petitioner accordingly falls short of what is required to prove that the 1st 2nd and 3rd Respondents either or through their agents committed any of the alleged criminal acts.

2. Partisan Polling Clerks and Presiding Officers:

The second complaint is Partisan Polling Clerks and Presiding Officers. The Petitioner (PW1) in his affidavit in support of the Petition in paragraphs number 9, 10, 11 and 13 alleged that all the polling clerks and presiding officers were Thomas Mumba Chengo's supporters. The Petitioner singled out Francis Thoya who according to what voters told him, was moving from one stream to another trying to find out his progressive scores and compare it with the 3rd Respondent's progress. The Petitioner further told the Court that it was Francis Thoya who picked this Petition upon being filed, on behalf of the 3rd Respondent. The same allegations were raised by RENISON BIDII KOMBE (PW2) in paragraph 4, 5 and 6 of his supporting affidavit.

There was an allegation by RENISON BIDII KOMBE (PW2) in his affidavit and oral evidence that the presiding officers and the polling clerks did assist some voters without the presence of respective party agents and cited the polling stations as Mtondia Primary School, Majaoni Primary School and Bofa Primary School.

The conclusion that the court has reached in this segment of complaint is that there was no corroborative evidence that indeed he was hovering around the streams to monitor the progress of the Petitioner's performance. In any event, once the votes are cast, the ballot papers are inaccessible till the counting time. It is then illogical to monitor the Petitioner's performance if indeed he was moving from one stream to another.

The Petitioner's allegation falls short of the requirements of specificity as set out in Rule 10(3) (b) of the Petition Rules. No witness affidavit from any witness in respect of Mtondia, Majaoni and Bofa Primary Schools Polling Stations was filed to support the Petitioner's allegations. The Petitioner in his evidence before court confirmed that he received information about this from Voters. Such evidence is clearly

hearsay and therefore unreliable and inadmissible.

The other issue is about receipt of the Petition by Francis Thoya. This happened after the declaration of the 3rd Respondent as the winner and as it were, this was a post election event and had nothing to do with tilting the results or stinging on the credibility of the elections as the same had already been announced.

Equally there was no evidence to show or support the allegations that all the polling clerks and presiding officers were canvassing for the 3rd Respondent. I expected to see those who informed the Petitioner of the irregularities to come forth and give evidence in Court and in support of the allegations and accordingly the evidence adduced falls short of the requirement of standard of proof.

Again, there was no evidence that RENISON BIDII KOMBE (PW2) was an agent and he did not exhibit proof such as Oath of secrecy, badge or any certificate that he was an agent for Jubilee Party in such and such polling station and according to the Court, this is a generalized allegation by a busy body.

All the Petitioner's witnesses had a vague and general statement in their witness affidavits that they believed that election officials deployed to their constituencies conducted the elections in a partisan and biased manner. Under Rule 12 of the Petition Rules; 2017, Witness Affidavits should contain the substance of the evidence in support of the facts and grounds in the Petitioner's Petition and Supporting Affidavit. The evidence must be targeted at a specific allegation of fact. The court notes that the witnesses failed to offer any evidence to support the Petitioner's allegations of fact.

In analyzing the evidence on these allegations I have to bear in mind the petitioner's witnesses were not specific in their evidence but gave a sweeping and vague statements. None of the witnesses gave evidence that they had been to more than one polling station to enable them evaluate the conduct of the election officials to reach to the conclusion of bias and partisanship and as such I find no basis whatsoever for them to hold that belief.

In conclusion I seek to rely on Mokwaledi Bagwasi v Seabe Morueng & Anor Miscellaneous Applic No. F228 of 2004 from the High Court seating at Botswana it was held as follows:

“Where a petitioner asserts that an election official was biased against him, he should adduce evidence to show the manner in which the election official was biased. In the instant case, the petitioner made what amounted to bald allegations and did not adduce any evidence to prove those allegations.”

I therefore find that where a petitioner asserts that an election official conducting an election is biased and partisan, he is obligated to give full particulars in his petition and call evidence in support of his allegation and prove the same to the required standards failure whereof the allegations are nothing more than malice and made in bad faith. Evidence must be produced to support all the allegations of bias or partisanship. It is not enough to make general allegations which cannot be proved.

3. Lack of Security at the Polling Stations:

The third complaint is lack of security at the polling stations. The Petitioner in paragraph 8 of his affidavit in support and in paragraph 2 of Renson Bidii Kombe's affidavit in support, it is alleged that there was lack of security at ten polling stations which affected conducive environment for election exercise. Further it was alleged that the Petitioner and his agent tried to reach the 1st Respondent and inform him about this anomaly but he did not pick his call. His text message was never acted upon. This according to him would have assisted the issue of canvassing and intimidations at some polling stations. Abdwahid Hussein (DW1) in his evidence said that he did not receive any complaint of any nature and indeed there were security both in uniform and in civilian at all polling stations. This fact is also confirmed by other witnesses for the Respondents.

The conclusion that the court has reached in this segment of the complaint is that there was no extract of

the message from any service provider that indeed on the material day, a call was made to the 1st Respondent's. There was no print out of the call logs made on the material day to establish that indeed some contacts were made to the 1st Respondent. Further it is my take that such allegations of canvassing and intimidation need not only be reported to the 1st Respondent but can also be reported to the Police Station and secure Occurrence Book Number. There was no evidence that this matter was reported to the police station or any other security officer within the vicinity, agents of various parties, media or any observer at the affected polling stations. In addition, there was no documentary proof that Renson Bidii Kombe was Chief Agent of the Petitioner on a Jubilee Party and that he indeed made a formal complaint about insecurity at the polling station.

4. Unstamped Form 36As:

The fourth complaint was that the forms were not stamped. The Petitioner neither pleaded in the Petition nor raise the complaint of the Forms 36A lacking stamps but gave evidence in Court that he perused the Forms from four polling stations, Majaoni Primary School, Tezo Primary School 1, Mikingirini Primary School 1 and Bahati Primary School 1 and noticed that the said forms bore no stamps. The Petitioner then did not tell the Court the effects of lack of stamps had on the general results but left it to the Court to speculate.

The conclusion that the court has reached in this segment of the complaint is that all the agents signed the Forms 36A to signify that all that was contained therein was true and correct, but in any event as I have always said, these are post election events that do not affect the votes cast. In this proposition, I seek reliance in the case of James Omingo Magara v Manson Onyango Nyamweya & 2 others (2010) eKLR, where Justice Erastus Githinji, regarding a failure by the presiding officer to sign Form 16A stated:

“Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard considering procedural matters... Secondly, it is my view that the mere failure by a presiding officer to sign Form 16A is a procedural anomaly which does not invalidate the results announced in a polling station...”

5. Bofa Polling Station Anomalies:

The fifth complaint was Bofa Polling Station anomalies. The Petitioner alleged in paragraph 12 of his supporting affidavit thus;

"That at Bofa Primary School which was a polling Centre, the total number of registered voters were 434, but once the counting was done, there were 515 valid votes casted and 3 spoiled votes amounting to a total of 518 votes of all the total votes casted- suppressing the register in the polling Station"

This claim was supported by his witness one Leviticus Kalama Lewa (PW3) who was an agent at Bofa Primary School Polling Centre. The two witnesses told the Court that indeed the votes cast exceeded the registered number of voters and so they suppressed the register. In answer to this, the 2nd Respondent took the Court through the provisions of the law regarding this scenario. The witness further told the Court that there was error in one of the entries indicating 230 votes instead of 3 votes which led to exaggeration of the votes cast exceeding the registered voters. The total votes cast from that Polling Station was 515 instead of 318. The witness further told the Court that the KIEMS Kit captured 318 and not 515 because it is configured in a way that it cannot capture a number higher than registered voters from a polling station. Exhibit 1 attests to this fact and in any event, Form 36A under the sub heading Polling Stations Count the correct counts are properly tabulated from that particular polling station. In addition, the witness indeed appended his signature to the contents in that Form.

The Court's conclusion on this segment is that Form 36A is signed by 11 agents and none of them has approached the court to indicate that they were forced to sign the Form adduced in court. The honesty of such a mistake is demonstrated by the fact that the error did not affect the results of the Petitioner and 3rd Respondent and that no unique disadvantage was sustained by Cosmas Foleni Kenga as a result of

the error. Further this court notes that the allegations that the excess votes were in bad faith, tailored to manipulate the results in favour of the 3rd Respondent was not proved to the required standard as no evidence was tendered to that effect before this court. If anything, the 1st Respondent took the Court through its Constitutional mandate of collating results accurately as is required under Article 86(c) of the Constitution by comparing the results captured by the KIEMS and Form 36A from Bofa Primary School Polling Station.

Further I wish to say that pursuant to the 2nd Respondent's overall Constitutional obligation under Article 86(c) of the Constitution to ensure that the tallies of votes submitted from the polling stations are accurately collated, envisages a scenario where errors are bound to occur and sometimes the Presiding officers are not barred from correcting a clerical error and of course in the presence of the agents who are normally the eyes of the candidates.

Whether there were excess votes cast than the registered voters, the petitioner was obligated to call evidence of indictment or of immoral, unlawful and illegal motive. Further, the Petitioner's witness Leviticus Kalama Lewa (PW3) alleged to have been a JUBILEE PARTY and Chief agent of the Petitioner. However he failed to adduce a letter of appointment, oath of secrecy or badge to show that he was a lawful agent. That withstanding, the said witness in his evidence confirmed that he signed form 36A from Bofa Primary School even though the Form was said to be in error. In any event, the witness did not decline to sign the results as indicated in Form 36A.

In conclusion on the errors, I wish to rely on the Nigerian case of Alhaji Waziri Ibrahim v Shehu Shagari(1983) All N.L.R 507 it was held:-

“An amended document by itself does not speak of the motive behind the amendment. Without more, an altered or amended document is as genuine as an unamended one. Therefore, the admission of exhibits C to V, the returns from the States form which exhibits Band B 1 were collated without any evidence to add a sting to the innocent amendment appearing on some of them offers no help to the case of the appellant.... .. It is conceivable that the occasion may genuinely arise when a statement of votes cast may of necessity be altered or amended for instance where a mistake in arithmetic is discovered during the counting of the votes or when a recount is made under S.68 of the Electoral Act, 1982”

I further seek reliance in the case of In Joho vs Nyange & Another (2008) 3 KLR (EP) 500 where Maraga J (as he then was) stated as follows;

“In my view the errors made and the irregularities committed in this petition fall in two categories. The first one is the errors or mistakes that I would call innocent even though negligent. The second category is those deliberate irregularities or forgeries that were committed. In respect of the first category I would like to say this: 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 any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed, different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated...”

There was no other evidence to contradict the explanation given by 1st Respondent as far as the error here is concerned and so I consider it as a genuine error.

Scrutiny and Recount.

It is settled law on this subject and the starting point is well captured in the case of Nathif Jama Adama v. Abdikhaim Osman Mohamed & 3 Others. Petition No. 13 of 2014; [2014] eKLR, the Court said in paragraph 75:

“It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.”

The Court went ahead and pronounced itself as follows [paragraph 76]:

“But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results. This is the import of the wording of Rule 33 (1) of the Elections Petition Rules, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.”

There are other decisions of their Lordships from the Superior Courts on the subject but let me mention a few as my anchorage on this subject.

In Jacob Mwirigi Muthuri v. John Mbaabu Murithi & 2 Others, High Court at Meru, Petition No. 2 of 2013; [2013] eKLR, the Court (Lesiit J) held that [paragraph 28 & 29]:

“... Unless an order for scrutiny and recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness affidavits of the Petitioner. It is clear from the foregoing that where an application for scrutiny is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying and secondly, that the order is necessary for the just resolution of the election Petition. Scrutiny is one of the tools that the court uses to investigate whether an election was conducted in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the Affidavit in support to find out whether they disclose the Petitioner’s cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly by calling of evidence and testing of that evidence through cross examination and re examination process to test the veracity of the same. There can be no need to call evidence for examination through the trial process if none has been advanced in the Petition and the Petitioner’s pleadings and in particular the affidavits of potential witnesses.”

Similar sentiments as above were expressed by Kimaru J in the case of Rishad H. A. Amana v IEBC & 2 Others, High Court at Malindi Petition No. 6 of 2013; [2013] eKLR where he emphasized that [paragraph 34]:

“...the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny.”

In the case of Hassan Mohamed Hassan & Another v. IEBC & 2 Others Petition 6 of 2013; [2013] eKLR, the petitioner had sought scrutiny of votes in 15 polling stations. The Court (Onyancha J) in dismissing the application pronounced itself as follows:

“... a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the

purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application....

On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.

The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the court's 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.” [emphasis added.]

Further elaboration on the issue of scrutiny was provided in the case of Philip Osore Ogotu v. Michael Aringo & 2 Others, Busia High Court Petition No. 1 of 2013 wherein the Petitioner had sought scrutiny of votes in 15 polling stations during the pre-trial conference. Upon making a formal application, Tuiyott J after setting out the law regarding scrutiny, observed that as pertaining to the timing of the application, it would be upon the party seeking scrutiny to choose when to approach the Court. He thus observed [paragraph 18]:

“...It all depends, I think, on the ability of the Applicant to marshal sufficient evidence to persuade the Court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the Affidavits accompanying the Petition or the responses.”

The learned Judge further observed [paragraph 20]:

“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K’opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to Court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.”

My understanding of the abovementioned decisions is that before a Court can endeavour to consider a prayer of scrutiny and recount, the Petitioner must have pleaded and given sufficient grounds. I note that the main prayer in this Petition was scrutiny and recount from all Polling Stations of Tezo Ward but at the pre-conferencing, the Petitioner changed his mind and scaled down the exercise, to eighteen (18) polling Stations.

However upon perusal of the evidence on record and from the analysis of the complaints above, they do not meet the standard of proof threshold required in Electoral disputes. The evidence is not only too sketchy but it is also too generalized

The evidence does not point to the specific polling stations and the votes that are in dispute. There was no witness from each of the list of polling stations that were filed in Court on 17th October, 2017 to show that indeed there was a dispute in specific polling station. The only polling station which may have triggered the prayer for scrutiny and recount was Bofa Primary School polling Station but the anomaly was well explained leaving no doubt that the KIEMS kit captured the right results which entry was also signed by the Petitioners Agent. In any event, the petitioner is required to establish that the irregularities and errors if any at Bofa Primary School polling station were either occasioned by the outright negligence or deliberate action or omission on the part of the guilty party. Irregularities which can be attributed to innocent mistake or an oblivious human error cannot constitute a reason for impeaching an election result.

In any event and on strength of the Nathif Jama Adama v. Abdikhaim Osman Mohamed & 3 Others Petition No. 13 of 2014; [2014] eKLR,(supra), it was incumbent on the Petitioner to set out the affected polling stations and their respective votes for each candidate and point out where the dispute arose. This was not done in either in the Petition and the affidavit in support and failure to do so renders the exercise as a fishing expedition. It is abundantly clear that the Petitioner did not provide sufficient material to enable the Court venture into the area of scrutiny and recount. the petitioner is required to establish that the irregularities and errors were either occasioned by the outright negligence or deliberate action or omission on the part of the guilty party. Irregularities which can be attributed to innocent mistake or an oblivious human error cannot constitute a reason for impeaching an election result.

My view is supported by a Nigerian Court of Appeal in the case of Olusola Adeyeye v Simeon Oduoye (2010) LPELR-CA-/1/EPT/NA/67/08 in which the court stated as follows:

“It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election against his interest. The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices.”

The Supreme Court while handling a matter on scrutiny and recount in the case of Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others, Petition No. 23 of 2014; [2015] eKLR and upon analyzing certain specific authorities, the Court noted as follows [paragraph 52]:

“The foregoing principles are the basis for certain specific questions which we have to consider: did the appellant provide a sufficient basis for the trial Court to make Orders of scrutiny and recount? did the denial of an Order for scrutiny compromise the appellant’s case? should this Court interfere with the discretion of the trial Judge, and overturn the decision of the Appellate Court upholding the trial Judge’s findings?” [Emphasis added.]

[47] The court had earlier settled the law on the matter in the case of Nathif Jama Adama v. Abdikhaim Osman Mohamed & 3 Others Petition No. 13 of 2014; [2014] eKLR, where it held as follows (paragraph 75):

“It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.”

The Court went ahead and pronounced itself as follows [paragraph 76]:

“But it is crucial that the polling stations which are the subject of a possible scrutiny, would

have been already signalled in the pleadings, as having contested results. This is the import of the wording of Rule 33 (1) of the Elections Petition Rules, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.”

The Comparative case of Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr., Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R the Supreme Court of India held that [paragraph 8]:

“Before the Court permits the recounting, the following conditions must be satisfied:

- (i) The court must be satisfied that a prima facie case is established;**
- (ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;**
- (iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;**
- (iv) An opportunity should be given to file objection; and**
- (v) Secrecy of the ballot should be guarded.**

[52] Further, the Court went on and observed that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.”

Disposition:

Before the court makes the final orders, I would like to thank the Judiciary for the research infrastructure in place. I commend counsel for the Petitioner, Mr. Kinaro and Mr. Waswa. The court equally commends the counsel for the Respondents M/s Anne Wambua, Mr. Nyamwange and M/s Mwangi. They all did their best. I finally, thank my Court Assistants Mr. Dominic Samanga and Haniel Amani for their support.

Accordingly, I make a finding that the 3rd Respondent, THOMAS MUMBA CHENGO was validly elected as the Member of County Assembly of Tezo Ward for the County of Kilifi and as it were, the people of Tezo Ward have spoken. I dismiss the petition.

Costs

Costs follow the event. The court awards costs to the Respondents and direct that the deposit of Kshs100,000/= to remain in Court till the assessment of Costs.

Written dated and delivered in the Open Court this 8th December, 2017.

R.K. ONDIEKI,

SENIOR PRINCIPAL MAGISTRATE.

KILIFI LAW COURTS.