



Republic of Kenya

In the Principal Magistrate's Court

At Kilgoris

Election Petition Number No. 1 of 2017

In the matter of Elections Act Cap 7 Laws of Kenya

And in the matter of Sections 58 and 59 of Cap 7 Laws of Kenya

And in the matter of violation of Article 81 of the Constitution of Kenya 2010

And in the matter of elections for members of county assembly-Angata Ward

And in the matter of

Joseph Kibiego Koech.....Petitioner.

versus

Gabriel Mibei.....1<sup>st</sup> Respondent

The Independent Electoral and

Boundaries Commission.....2<sup>nd</sup> Respondent

The Returning Officer Kilgoris Constituency...3<sup>rd</sup> Respondent.

### **Ruling.**

#### **Introduction.**

1. The trial of this election Petition was conducted on 18<sup>th</sup> and 19<sup>th</sup> December, 2017 to conclusion as scheduled during Pretrial conference held on 16<sup>th</sup> November, 2017. At the close of trial Mr. Abobo Advocate for Petitioner made and oral application for recount of votes from Oldoinyo Orok Primary School Polling Station number 067 of Angata Barrikoi Ward. The application is opposed by both Mr. Kiprotich and Mr. Nyantika advocates for the 1, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively. This is a ruling on the application as canvassed before this court on 19<sup>th</sup> December, 2017 at 2.00pm.

#### **The Application.**

2. Mr. Abobo advocate for the Petitioner prays for recount of ballots with respect to the impugned polling Station. His application is premised on ground that there was contention that more votes were cast than

that the registered voters. He relies on pleading in Paragraphs 21(b) of the Petition- as amended- as well as Paragraph 16(b) of the Petitioners Affidavit in support of the Petition as sworn on 17<sup>th</sup> November, 2017. He submits that the station has only 696 registered voters and 540 of them voted and that it would not take more than an hour to conclude recount. He cites an example in Nyamira, without giving particulars, in which Justice Makau ordered recount in over 100 polling stations. That it was in the interest of justice that recount be ordered and that it was a matter for the discretion of this court.

### **The Objection/Response.**

3. Mr. Kiprotich advocate in response submits that an order for recount cannot be granted as a matter of course. That the Petitioner has to persuade this court and has to prove there are sufficient reasons to warrant recount. He submits that the Petitioner has failed to prove the irregularities alleged to have occurred at Oldonyo Orok Polling Station. He submits that the number of registered voters given by the Petitioner as 1357 was imaginary and not proved. That the actual number was 1393. He submits that the 1<sup>st</sup> Respondent and the Petitioner garnered 817 and 253 votes respectively at the said Polling Center. He further submits the margin was huge and totally separates the winner from the loser. In conceding that the application was for discretion of this court, he maintains on authority in Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others Petition No. 2B of 2014 where the court of Appeal stressed on the issues of margin and their impact on results. He submits on authority in Hassan Mohammed Hassan vs IEBC Petition No 6 of 2013 Garissa that sufficient reasons have not been laid for recount. It is his contention that recount was a tedious exercise, time consuming for court which has no luxury of time to go into a futile exercise.

4. Mr. Nyantika Advocate aligns himself to the submissions made by advocate for the 1<sup>st</sup> Respondent that recount does not lie as matter of course. That the Petitioner or applicant has to show by way of evidence that there was departure from fair election and that the outcome was affected. He submits that there was no cogent evidence presented by the Petitioner and that there was no proper basis laid for recount. He submitted that there was not a single witness who disputed the number of votes cast at Oldonyo Orok Polling Station. And that the results in Form 36A as collated in 36B have not been attacked as false. He submits that to go to the votes in the KIEMS machine requires an order for scrutiny which has not been sought in the application. He submits that the Petitioners agents were in attendance all through the election exercise and did not state any deviation from votes announced and declared.

5. On the question of time, Mr. Nyantika submits that parties have closed their cases and recount will require them to reopen to counter, interpret and elaborate the results. On this he cites provisions of Article 50 of the Constitution of Kenya on tenets of a fair hearing. In his words recount will take everyone back to square one. He further submits on authority in Harun Meitamet Lempaka vs. Lemanken Aramat 2013 that Justice Emukule held that Forms IEBC officials recorded are the primary documents to be used and cannot be disregarded. He prays for dismissal of the application and submits that the applicant has not addressed who is to pay the costs of the exercise in the vent of order for recount.

### **Issues for determination.**

6. The main issues for the determination of this court are as follows;

- 1) Whether a legal and factual basis, has been laid by the Petitioner for the grant of an order for recount.
- 2) Whether in the circumstances of this Petition, the Petitioner deserves the discretion of this court.
- 3) Whether recount of votes will aid this court to arrive at a just and expeditious disposal of this election Petition.
- 4) What consequential orders, declarations and reliefs should the court grant in the circumstances?

### **The law on recount.**

7. On the issues raised in this application, this court is not re-inventing the wheel. Our jurisprudence is rich with judicial precedent on what constitutes recount, the scope, conditions precedent for grant of order for recount of the ballot, time for and the purpose. This is a well beaten path. Time and space cannot allow this court to enumerate all of them in this ruling.

8. What are the conditions for grant of order for recount? The Supreme Court of Kenya in Gatirau Peter Munya vs. Dickson Mwenda Githinji and 2 Others proposed the following principles:-

*"[153] From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:*

*a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and **before the determination of the petition.***

*b. The trial 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 as it may specify, if it considers that such scrutiny or **recount is necessary** to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*

*c. The right to scrutiny and recount does not lie as a matter of course. 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. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.*

*d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted **in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question** in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules." Emphasis added.*

9. In Justus Gesito Mugali M'mbaya vs. IEBC and 2 Others Election Petition (Kakamega) No 6 of 2013 the court held that recount is limited to establishing the number of votes garnered by each candidate and the tallying of such votes. Anything beyond that is scrutiny. There is no room for examination of electoral misconduct in recount.

10. As a general rule, the Petitioner must establish the basis for recount. On authority in Charles Ong'ondo Were vs. Joseph Oyugi Magwanga and 3 Others Election Petition (Homabay) No. 1 of 2013, recount may be ordered where margin of victory or loss is narrow. However, on authority in Hassan Ali Joho vs. Nyange and Another Election Petition (Mombasa) No. 1 of 2005, it may also be if it would facilitate the expeditious disposal of the election Petition. Recount may also be ordered, on authority in Richard Kalembe Ndile vs Patrick Musimba Mweu and 2 Others Election Petition Machakos Nos 1 and 7 of 2013 where there are several errors, alterations or omissions in Forms.

6. On authority In Nicholas Kiptoo Arap Salat vs. IEBC and 7 Others Supreme Court Petition No. 23 of 2014 order for recount may be made before, during and at the end of the trial of an election petition. On authority in Hassan Mohammed Hassan vs. IEBC Election Petition( Garissa) No. 6 of 2013, malpractice or irregularity must be pleaded in the Petition.

7. The Elections (Parliamentary and County Elections) Petition Rules, 2017 governs applications for recount. Rule 28 of the Rules make provision for a recount or examination of tallying in the following terms;

*"28. 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."*

### **Determination and Disposal.**

11. The gist of the positions of law cited above is that it is the discretion of the court to allow or disallow an application for recount. Discretion must of course be exercised judiciously taking into consideration, the pleadings, affidavits, testimony of witnesses, all the circumstances and justice of the case.

12. What can one make of the current application? The current application is made when all the parties have closed their case. All the witnesses and who happened to be key players in the impugned election have testified. The Petitioner is within his right to pray for recount which the law says can be made at any stage before the determination of the Petition. It is therefore not true as submitted by Mr. Nyantika advocate that the grant will set everyone back to square one. In my view, it ought to have been brought earlier to enable the court determine whether to deal with it at the interlocutory stage or later. The earlier the better. The court should be accorded opportunity to have the ballot box questioned secured.

13. At this point, the crucial questions for this court to address are; whether the recount is necessary, whether there are reasons for the grant of the order and whether the reasons are satisfactory. The answers to these questions will inform the exercise of discretion of this court.

14. Mr. Abobo in his submissions calls for recount of ballots in Oldonyo Orok Polling Station No. 067. He bases his application on particulars of irregularities as itemized in Paragraph 21(b) of the Petition. The same reads thus;

*"Recording more votes than the registered voters at Oldonyo Orok Primary School."*

15. He also relies on Affidavit of the Petitioner where in Paragraph 16(b) he depones that; *"b). The number of votes cast did not match the number of votes recorded in KIEMs (Kenya Integrated Election Management System) yet there was no time that the voting was changed to manual process."*

16. Mr. Abobo further submits that the polling station the Petitioner applies for recount has 696 registered voters and only 540 cast their vote and on this basis, it would not take much of the courts time. This is a contradiction to what is being sought by the application. During hearing it emerged that the Oldoinyo Orok Primary School was a Polling Center with two streams brought about by the capping of registered voters at 700 per polling station. According to Form 36A exhibited by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Center had Oldonyo Orok Primary School Polling Station 067- 1 and 067-2. In Form 36A and in testimony of witnesses, Station One also referred to as Room 1 had 696 voters. 540 cast their vote. The Petitioner garnered 406 and the 1<sup>st</sup> Respondent garnered 121. The total votes cast do not exceed the number of registered voters.

17. According to Form 36A exhibited, Polling Station 067-2 has 697. The valid votes cast were 553. These are not more than the registered voters. Why is it necessary to do a recount? Recount is not to be ordered as a matter of course. It will not be ordered because it will not take much time, convenient and that the Returning officer says he is more than ready if and when called upon. On the other side of the coin, it will not be denied because it is laborious, time consuming and comes with attendant cost implications. There has to be a basis.

18. What is the basis? Mr. Abobo says they are not merely interested in the numbers. He let the cat out of the bag with his assertion that there is need to dispel the fears that KIEMS captured less than those who actually voted. On this score, I agree with Mr. Nyantika that recount will not inform this court on anything that is in the KIEMS and that the Petitioner is asking for scrutiny which does not feature anywhere in pleadings. I also agree with Mr. Kiprotich that this will be an exercise in futility. The petitioner is asking for more than a recount.

## **Conclusion.**

19. I have considered the oral application for recount, the oral submissions in responses made and the authorities cited in support of and in opposition to the application. This court is time-poor. That however is not the reason that this court makes a finding, which I hereby do, that the Petitioner has not laid a basis to the satisfaction of this court to warrant grant of orders of recount. The margin between the Petitioner and the 1<sup>st</sup> Respondent is stark clear. The assertion that more voters than were registered actually cast their votes is not supported by the paper trail. The recount will not expedite trial and will not serve the ends of justice. The recount will not tell us the number of registered voters and those that have voted with more clarity than has been given in exhibited Form 36As and as collated in Form 36B. The Forms speak for themselves. They are loud and clear while at it. They were signed by party agents and no complaints recorded.

20. For avoidance of doubt the following orders do issue,

- a. The application for recount is hereby disallowed and consequently stands dismissed.
- b. The Petition shall proceed to submissions stage which shall be on date to be set immediately hereafter.
- c. Costs shall abide in the outcome of the Petition.

**Dated and delivered at Kilgoris this 20<sup>th</sup> day of December, 2017.**

By: D.K.Matutu Esq. (Senior Resident Magistrate)

In open court. In the presence of;-

1. Mr. Abobo Advocate for the Petitioner/Applicant
2. Mr. Kiprotich for the 1<sup>st</sup> Respondent.
3. Mr. Nyantika for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
4. Mr. Mutai- Court Assistant.