



## **IN THE CHIEF MAGISTRATE'S COURT**

**AT KISII**

**ELECTION PETITION NUMBER 1 OF 2017**

**NUNDA FRED NDIGWA..... PETITIONER**

**-VERSUS-**

**1. MATUNDURA ISMAEL BOSIRE.....1<sup>ST</sup> RESPONDENT**

**2. DAVID KIPROP.....2<sup>ND</sup> RESPONDENT**

**3. INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....3<sup>RD</sup> RESPONDENT**

### **JUDGMENT**

#### **BACKGROUND**

The petitioner herein Nunda Fred Ndigwa was among the 13 candidates who contested for the position of Bogiakumu ward member of County Assembly in the elections that were held on 08/08/2017.

After the voting exercise, the Bonchari constituency Returning officer returned the 1<sup>st</sup> Respondent as the candidate who had been duly elected with 2,612 votes.

The petitioner was aggrieved by the outcome and lodged a petition in court on 16/08/2017.

The grounds upon which the petition is premised are as follows;

1. The Presiding Officer Mr. Fred Kebaya made a major alteration on the total number of registered voters in the polling station and total number of rejected ballot papers in form numbers 36A in respect of Mosando primary school polling station 2 of 2 without consulting with all agents who never signed, wrote their names, ID numbers, name of party they represented or independent candidate, their telephone contacts and date of election.
2. The presiding officer Mr. Fred Kebaya never recorded reasons why all the agents for the 13 candidates could not sign, write their names, ID numbers, name of the party they represented or independent candidate, their telephone contacts and the date of the election in form 36A for Mosando primary school polling station 2 of 2.
3. The petitioners agent was seriously assaulted by the 1<sup>st</sup> Respondent's supporters or thugs but the presiding officer never bothered to capture the heinous act in his form No.36A in respect of Mosando primary school polling station 2 of 2.
4. For Mosando primary school polling station 1 of 2, the presiding officer Mr. Makori Douglas gave no reasons why agents for all agents never signed, wrote their names, ID Numbers, Name of party they represented or independent candidate, their telephone contacts and the date of the election.
5. In respect of Ekerore primary school polling station 1 of 2, the presiding officer Mr. Jeremiah Misati never wrote down reasons why agents for 11 candidates did not sign, write their names, ID. Numbers, Name of party they represented or Independent candidate, their telephone contacts and the date of the election on form 36A.
6. At Ekerore primary school polling station 2 of 2, the presiding officer never wrote down the reasons why agents for 11 candidates did not sign, write their names or ID. Numbers, name of party they represented or Independent candidate, their telephone contacts

and date of the election.

7. The presiding officer never recorded reasons why agents for 9 candidates did not sign, write their names, ID. Numbers, name of party they represented or Independent candidate, their telephone contacts and the date of the election in form 36A for Matongo primary school polling station 1 of 1.

A total of 46 grounds were set out by the petitioner as being the basis upon which he was aggrieved by the outcome of the said election.

All the respondents promptly filed their responses upon being served with the petition, contesting the petitioner's case.

### **PETITIONER'S CASE**

The petitioner herein NUNDA FRED NDIGWA testified on 2/11/2017.

He set out paragraph 1-57 of the supporting affidavit the issues in contention and main reasons why he sought to have the elections nullified.

In a nutshell, the determination he seeks is that;

- a) The 1<sup>st</sup> Respondent was not validly elected and the election was void for being wrought with apparent errors of the commission and commission by the 2<sup>nd</sup> Respondent who was the constituency Returning officer for Bogiakumu ward in Bonchari constituency within Kisii county.
- b) Scrutiny and recounting of the ballots cast at the Bogiakumu election ward, (afterwards this prayer seeks to have been abandoned) .
- c) If scrutiny and recounting confirms that the petitioner was validly elected, a declaration be so made by this honourable court (This ground also seems to have been abandoned in the course of time).
- d) This Honourable court to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents engaged themselves in electoral Malpractice of a criminal nature.
- e) The Honourable court be pleased to order that fresh elections be held in Bogiakumu ward.
- f) The Respondents be condemned to pay the costs of this petition.

**Pw2, ALEX MATOKE MARUCHA** testified that he was the chief campaigner for the petitioner in the elections that were held on 08/08/2017. The 1<sup>st</sup> Respondent was also a contestant for Bogiakumu ward.

He testified that he was assaulted and chased away from the polling station on the material date.

He alluded to a criminal case No.1584/2017 pending in court relating to that violence wherein he is the complainant.

### **RESPONDENTS CASE.**

The 1<sup>st</sup> Respondent **ISMAEL BOSIRE MATUNDURA** testified on 03/11/2017. His version was that he is a member of the county assembly Bogiakumu ward, Kisii County.

He was declared the winner in the elections of 8/8/2017 and denied that there were any irregularities to warrant nullification of the results.

His contention is that he was validly elected.

**Dw2, KEVIN OSORO BOSIRE** also testified on the same date.

His evidence was that he was an agent for the 1<sup>st</sup> Respondent at Mosando primary school polling station and there were no irregularities.

**Dw3, ZACHARIA GWARO JUVINALIS** stated that he was the agent of the 1<sup>st</sup> Respondent at Iruma polling station and there were no irregularities to warrant nullification of the poll results.

The evidence by **Dw5, JULIUS SIANYO MBORO** was that he was the presiding officer at Kiamoiro Tea Buying centre and there were no irregularities as he conducted the exercise in accordance with the law.

The presiding officer for Bogiakumu primary school **SCHOLASTICA MORAA KAVESA** testified as **Dw6**.

Her position was that the exercise went on well without any hitches and the allegations by the petitioner do not have any basis.

A similar position was taken by **Dw7, DAVID KIPKEMO CHEROP** who testified on 10/11/2017.

**Dw7** was the Returning officer for Bonchari constituency and his version was that the exercise went on well in accordance with the law.

### **ANALYSIS AND DETERMINATION**

I have considered the evidence adduced by the petitioner and his witnesses and the respondents and their witnesses.

I have also considered the submissions made by all the sides in this matter.

#### **What therefore are the issues that fall for determination in this petition?**

The issues can be set down as here under;

1. Whether the Bogiakumu member of County Assembly election was conducted in accordance with the principles laid down in the constitution and relevant law relating to elections.
2. Whether there were irregularities and illegalities committed in the conduct of the said County Assembly election to warrant nullification.
3. What consequential orders, declaration or reliefs should the court make in the circumstances.

Chapter seven of the Constitution of Kenya 2010 deals with representation of the people.

Part1 thereof deals with the electoral system and process.

Article 81(e) provides for free and fair elections which are;

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

The principles cutting across all the Articles in the constitution governing elections include; integrity, transparency, accuracy, accountability, impartiality, simplicity, verifiability, security and efficiency as well as those of a free and fair election which are; by secret ballot, free from violence, intimidation, improper influence or corruption and the conduct of an election by an Independent body in a transparent, impartial neutral, efficient and accountable manner.

Considering those constitutional provisions in line with S.83 of the Elections Act, **Justice Professor Lilian Tibatemwa Ekirikubinza** in the case of **Col. DR. KIZA BESIGYE –VS- ATTORNEY GENERAL (constitutional petition No. 13 of 2009, Uganda)** stated;

**“Annulling of election results is a case by case analysis of the evidence adduced before the court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election”**

The issue as to how section 83 of the Elections Act ought to be interpreted by a court of law in determining the validity or otherwise of an election was also settled by the Supreme court of Kenya court in **GATIRAU PETER MUNYA VS DICKSON MWENDA GITHINJI & 2 OTHERS (2014) e KLR.**

The court stated that S.83 of the Elections Act should be applied in a disjunctive manner.

The 7-judge bench was categorical that;

**“It is clear to us that an election should be conducted substantially in accordance with the principles of the constitution as set out in article 81(e). Voting should be conducted in accordance with the principles set out in Article 86. The Elections Act and the Regulations therefore, constitute the substantive and procedural law for the conduct of elections. If it should be shown that an election was conducted substantially in accordance with the principles of the constitution and the Elections Act, then such an election is not to be invalidated only on grounds of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise**

procedural or administrative errors occasioned by human imperfection are not enough, by and themselves to vitiate an election.....where an election is conducted in such a manner as demonstrably violates the principles of the constitution and the law, such an election stands to be invalidated.”

The Kenya Supreme Court in **RAILA AMOLO ODINGA & STEPHEN KALONZO MUSYOKA –VS- IEBC & OTHERS, Presidential Election Petition No.1 of 2017** held that;

**“The two limbs should be applied disjunctively; we would not take the route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect.....before vitiating it, the court should , looking at the conduct of the whole election , be satisfied that it breached the principles in the constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what professor Ekirikubinza refers to as a “spurious imitation of what elections should be”**

Guided by the principles in Articles 10, 38 and 86 of the constitution, the decision in **RAILA AMOLO ODINGA & STEPHEN KALONZO MUSYOKA –VS- IEBC & OTHERS, Presidential Election Petition No.1 of 2017**, the two limbs in section 83 of the Elections Act should be given a disjunctive interpretation.

### **STANDARD AND BURDEN OF PROOF.**

The common law concept of burden of proof is a question of law which can be described as the duty which lies on one or the other of the parties either to establish the facts upon a particular issue.

Black’s Law Dictionary defines the concept as;

**“Party’s duty to prove a disputed assertion or charge.....and includes both the burden of persuasion and the burden of production.”**

A person who alleges then has a duty to prove the set of facts that he alleges.

Section 107 of the evidence Act cap 80 Laws of Kenya provides that;

**Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?**

In the case of **HASSAN ABDALLA ALBEITY –VS- ABU MOHAMMED ABU CHIABA & ANOTHER, petition No. 9 of 2013;(2013) e KLR**, it was held that a petitioner who seeks the nullification of an election on account of non-conformity with the law or the basis of irregularities must adduce cogent and credible evidence to prove those grounds to the satisfaction of the court.

### **What then is the standard of proof?**

The Black’s Law Dictionary defines it as;

**“The degree or level of proof demanded in a specific case in order for a party to succeed”.**

In the 2013, **Raila Odinga** case, the Kenya Supreme Court stated that;

**“Where there are criminal charges linked to an election, the party bearing the legal burden of proof must discharge it beyond any reasonable doubt”.**

However, where no allegations of a criminal or quasi criminal nature are made in an election petition a standard beyond the ordinary civil litigation of proof on a “balance of probabilities” but below the criminal standard of “beyond reasonable doubt” is applied.

This position was stated in the Kenya Supreme Court decision in the 2013 **Raila Odinga** case.

The petitioner raised several issues that the agents did not sign or provide the details on form 36A that the presiding officers failed to make comments or give reasons as to why some agents failed to sign the forms 36A.

In the case of **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & 2 OTHERS (2014) e KLR** it was held that;

**A candidate or her agents, cannot abscond duty from a polling station then ask the court to overturn the election because of his failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved; that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody and it is therefore, in everybody’s collective and solemn duty to safeguard it”**

Regulation 79(7) of the Elections (General Regulations) provides that;

**"The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced".**

The Respondents and their witnesses contended that in some of the instances where the agents did not sign the declaration, they were nowhere to be found and there was no mechanism to compel them to sign the declaration.

**Pw2, ALEX MATOKE MARUCHA** testified that he was the petitioner's chief campaigner and was assaulted on the polling date at Mosando primary school.

Whereas there is a criminal case No.1584/2017 pending before court, it does not relate to an electoral offence and no evidence was led to demonstrate that voting at that station was disrupted due to widespread violence, probably orchestrated by the Respondents.

At paragraph 43 of the petition, the petitioner raised an issue about 8 unexplained votes that changed the total in form 36B.

From the version by the Respondents, even if the said 8 votes were taken in favour of the petitioner, they would not change the election result that the 1<sup>st</sup> Respondent won the election.

In my considered view, the Bogiakumu Member of county assembly election was conducted in accordance with the principles laid down in the constitution and the law relating to the elections.

There were no substantial irregularities and or illegalities committed in the conduct of the said election to warrant its nullification.

In the premises, I therefore proceed to dismiss the petition with costs to the Respondents.

### **COSTS.**

An election court is obliged to award and has power to cap costs of and incidental to an election petition pursuant to the provisions of S.84 of the Elections Act and Rule 30 of the Elections (Parliamentary and County election petition) Rules 2017.

That issue was amplified in the case of **GEORGE MIKE WANJOHI – VS- STEPHEN KARIUKI** Supreme Court Petition No.2A of 2014.

An election court may also direct that the whole or part of any moneys deposited as security may be applied in the payment of costs under Rule 31 (3) of the Elections (Parliamentary and County Elections) petition Rules 2017.

The rationale for the power to cap costs is to encourage genuine petitioners to challenge flawed elections without being unduly hindered by the fear of incurring huge costs as was held in the decision of **EVANS ODHIAMBO KIDERO & 4 OTHERS –VS- FERDINAND NDUNG’U WAITITU & 4 OTHERS**, Supreme Court Petition No. 18 of 2014.

Therefore in the circumstances of this case, I order that the security for costs of Ksh.100,000 deposited by the petitioner to serve as the costs to be shared equally among the respondents. Orders accordingly.

**Hon. Nathan Shiundu Lutta-SPM**

22/12/2017.

**Judgment written, read and signed by me Nathan Shiundu Lutta-SPM this 22/12/2017 in the open court.**

### **Coram**

**Court Assistant – Nyaberi.**

**Petitioner -**

**1<sup>st</sup> Respondent -**

**2<sup>nd</sup> Respondent -**

**3<sup>rd</sup> Respondent -**