



**REPUBLIC OF KENYA**

**IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT BUTALI**

**ELECTION PETITION NO. 1 OF 2017**

**(FORMERLY KAKAMEGA CME PETITION NO. 11 OF 2017)**

**WALTER SHIUNDU MURUNGA .....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ENOCK OTARA (RETURNING OFFICER).....2<sup>ND</sup> RESPONDENT**

**SITANDA KENNEDY KILWAKI .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The Petitioner one Walter Shiundu Murunga brought this particular Petition against Independent Electoral and Boundaries Commission and 2 others seeking a declaration and orders as hereunder THAT:-

1. A declaration that the elections for member of County Assembly for Sango Ward was neither conducted in compliance of the Elections Act -2012, Elections (General) Regulations-2012, nor in accordance with the principles laid down in the electoral laws and the Constitution of Kenya – 2010- the principles of free, fair, transparent, credible, verifiable and accountable elections, the principles of natural justice, rule of law and democracy.

2. A declaration that the non-observance and/or compliance by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the provisions of the Elections Act-2012 and the Elections (General) Regulations-2012 are so capricious and grave that the results of the election cannot be said to be true, lawful and proper expression of the will of the people of SANGO WARD in Likuyani Constituency within Kakamega County. The acts and omissions of the respondents negated the purpose of free and fair elections, rules of fair play, and electoral laws of the Republic of Kenya and must be nullified together with the declaration of the 3<sup>rd</sup> Respondent as the winner of the elections in dispute.

3. A declaration that the 2<sup>nd</sup> Respondent through his acts and/or omissions violated and/or was in breach of the provisions the Elections Act-2012, Elections (General) Regulations-2012 and the Constitution of Kenya-2010. That his actions and/or omissions directly affected the outcome of the disputed results and declarations made thereof.

4. A declaration that the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Respondent's officers committed criminal offences under the elections offences Act-2016.
5. A declaration that there was actual manipulation of the elderly and illiterate voters, inflating of the 3<sup>rd</sup> Respondent's votes in the tallying thereof by the 2<sup>nd</sup> Respondent to the advantage of the 3<sup>rd</sup> Respondent, misuse of Regulations 69, 75, 79, 81 of the Elections (General) Regulations-2012 by the agents and/or officers of the 1<sup>st</sup> Respondent at both the polling station and at the Constituency tallying centre.
6. A declaration that there were breaches and violations of the Provisions of the Constitution-2010, the Elections Act-2012, Elections offences Act-2016, Elections (General) Regulations-2012, massive irregularities and/or electoral malpractices by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent either by themselves and/or through their agents, employees or agents of the Commission. The malpractices affected the results.
7. A declaration that the 3<sup>rd</sup> Respondent was not validly elected as the Member of County Assembly for Sango Ward in Likuyani Constituency, Kakamega County.
8. An order of fresh election for SANGO WARD in Likuyani Constituency, Kakamega County.
9. Costs of this petition be borne by the Respondents.
10. Any other order, determination and/or relief that this Honourable court may deem just to grant in the interests of justice.

The Petitioner made an application for recount and Tally through an application dated 6/9/2017 which was heard and determined. It was dismissed as per this court's ruling delivered on 30/10/2017 and the matter was set down for Hearing.

The matter was scheduled for hearing on 14/11/2017. The Petitioner through his Advocate Mr. Oburu stated that they were ready to argue the Petition with two witnesses, the Petitioner himself who was in court and another witness who was on his way. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were represented by Miss Wakoli who had been in conduct of the matter since its commencement and she too was present and ready to proceed. The 3<sup>rd</sup> Respondent was represented by Mr. Wangila who was also present and ready to proceed.

### **The Petitioner's case (Evidence)**

He stated under oath that he brought this Petition because he was not satisfied with form 36B that he was supplied by the 1<sup>st</sup> and particularly the 2<sup>nd</sup> Respondent who was acting on behalf of the 1<sup>st</sup> Respondent. He asked court to adopt his affidavit in totality as evidence in this Petition which the court indeed adopted.

When cross examined by Miss Wakoli for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, he stated that he garnered 1986 votes the form 36B supplied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shows he did gather 1986 votes, and the 3<sup>rd</sup> Respondent gathered 2547 votes.

He also said he was a candidate and not an agent, that his agents were not allowed to sign and he was a member of ANC party whose agents signed the form 36A for Sango Primary School.

He commented again and said it was in Mawe tatu where his agents did not sign forms, however when shown the form he confirmed that indeed the agents signed.

He was shown form 36B by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and he confirmed that it shows he got 232 votes

at Sango Primary School in stream No. 2 and the same is confirmed by the form 36A and it confirms that he got a total of 1986 votes.

When cross examined by Mr. Wangila for the 3<sup>rd</sup> Respondent he stated that he did complaint about the irregularities but it was not formal and no evidence to back it in court. And that he had a witness at the tallying centre but he is not his witness. He said that the results of this particular ward was done after 48 hours of the final counting and Tallying. He did not know that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had upto 7 days to declare the results and therefore this particular one was done promptly. He also confirmed that his agents did not sign forms 36A and 36B in his affidavit in support of the Petition but it does not state which agent it was. He stated that he was just told by one Athomy. He said that his agent Silas Mukenye was an agent at Mawe Tatu Polling Station, however according to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents documents he was an ANC agent at Lugulu Polling Station, so it's not true that he was at Mawe Tatu as his affidavit had claimed. At that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents forms 36B shows he garnered 1986 votes not as per his forms 3B which is Petitioner exhibit No. 1 and the only exhibit produced and lastly on cross examination he stated that he was not given form 36B and that he had nothing to show that he had an agent at the Tallying Centre.

Re-examination of the Petitioner was done by Mr. Mogaka who was acting alongside Mr. Oburu for the Petitioner. He stated that he was supplied the exhibit he produced in support of his Petition by the 2<sup>nd</sup> Respondent at 5:30pm after the declaration of the results. In his exhibit he garnered 1756 votes, the 3<sup>rd</sup> Respondent garnered 139 votes and the winner was one Songa Mulanda with 2547 votes. And that he was not satisfied with the entries in the two forms 36B before court. That according to his exhibit, the winner is one Songa Mulanda, yet Kennedy was declared the winner and that his prayer is that the election be nullified. Mr. Oburu then closed the Petitioners case.

1<sup>st</sup> and 2<sup>nd</sup> Respondent's case (Evidence in summary).

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents called one Enock Otara who was the Returning Officer Likuyani, he stated in Chief that he did respond to this Petition and that he had annexed his affidavit, which he wishes the court to adopt as his evidence in chief. The court did adopt the affidavit as his evidence in chief. He went further to produce the following as exhibits in response to the Petition.

- a) *21 copies of forms 36A exhibit 1*
- b) *A copy of form 36B exhibit No. 2.*
- c) *Form 36C exhibit No. 3*
- d) *Copies of forms 36As on pages 24 – 188 exhibit No. 4.*
- e) *ANC Party list for Likuyani Ward page 186 – 188 of the response bundle exhibit No. 5.*
- f) *Poll day Diaries for 21 polling stations pages 189 – 564 of the bundle exhibit No. 6.*

The witness was then cross examined by both Mr. Mogaka and Mr. Oburu who were for the Petitioner.

Through Mr. Mogaka's cross examination the witness took us through the roles of a Returning Officer in an Election, in this particular election we received forms from 21 polling stations, he confirmed that the Petitioner was indeed a candidate but he did not issue him with any form 36B. He again took us what a polling Diary contains and that the entries made therein are factual and cannot be interfered with or altered. He again took us to what Elections Regulations of 2012 say on conducting elections in relation to the number of agents required at a polling centre/station.

He reiterated that he did not issue the Petitioner exhibit No. 1 which is a form 36B and that the person he declared the winner was one Kennedy who is the 3<sup>rd</sup> Respondent and of ODM party who had 3 agents at

the Tallying centre and that what he had produced as his exhibit is the correct form 36B and original (exhibit No. 2) and that he did respond to the Petitioners exhibit No. 1 at paragraph 19 of his affidavit in response to the affidavit.

Mr. Oburu also cross examined RW1 and stated that indeed he declared the results of Sango Ward on 10<sup>th</sup>, he knows the Petitioner, that he never communicated with the Petitioner in relation to form 36B after the declaration of the results even if they are willing they could verify his phone records from safaricom.

Miss Wakoli and Mr. Wesonga who was also acting along Miss Wangila for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents re-examined RW1. He stated that he did not receive any complaint from anybody as regard the interference of the Petitioner's votes. That he had no powers to amend the results.

That he did not issue the Petitioner with any form 36B after the declaration of the results as he stormed out. That all the agents of the form 36B issued to the person who was declared the winner one Kennedy Kiliwaki was signed and that he did not have any contact with any candidate post declaration of the results.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent also closed their case.

The 3<sup>rd</sup> Respondent RW2 was called to the stand gave sworn evidence and requested the court to adopt his affidavit as his evidence in chief, which the court did.

Mr. Oburu did cross examination and the witness stated that he was a candidate and declared the winner of the Elections held on 8<sup>th</sup> August 2017 for MCA Sango Ward. That he has never stepped in the returning officers office and that the Petitioner was not issued with a wrong form 36B.

That he was declared the winner with 2547 votes, and if one Songa Mulanda came and contested these results then the courts had the capacity to decide and that one of his agent at the Tallying centre was his brother and law does not prohibit him to appoint his brother as an agent.

When Mr. Mogaka cross examined him, RW2 stated that he knows what forms 36As and 36B are, he also knows what a polling diary is and that all the documents he had were supplied to him through the counsel of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He also did not produce agents party list in court for his party.

Mr. Wesonga cross examined him and reiterated that, he was issued with only one copy of form 36B and it's the one he has given the court and that in that form he garnered 2547 votes, Mulanda got 139 and so Mulanda cannot be the winner. That the results were declared 48 hours after the closure of voting, that he did not notice any errors on form 36B that he was issued and he signed on it as a candidate and not agent. All his annexures were supplied to him by the IEBC which is a public body and as a private citizen he has a right to information. And that the issue of party agents was not raised in the Petition and so he did not bring a party list of agents.

Mr. Wangila did Re-exam RW2 and he reiterated that Mr. Stanly Kiliwaka was his agent and him being the agent is not raised anywhere in the Petition. That he was the one who was declared the winner and he garnered most number of votes, he is also aware of his right to access public information held by a public body. Mr. Wangila then closed the 3<sup>rd</sup> Respondents case.

That was basically a summary of the Petitioner's case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents case and finally the 3<sup>rd</sup> Respondents case.

Parties were given time to also put in written submissions to support their various positions which they did gather with authorities which the court has looked at and also will assist the court in arriving at a final decision. When the Petitioner brought his Petition, he had two other affidavits in support of the Petition. There was an affidavit sworn by one Ronald Masinde and the other was by one Silas Wafula. These two

were not called as witnesses in the matter, and so the court will not look at their affidavits in consideration of the final decision. After looking at the evidence adduced in court, the Petitioner's case is based on only 1 paragraph of his entire affidavit which i.e paragraph 16 of his affidavit in support of the Petition where he says that:-

***“ That the 2<sup>nd</sup> Respondent deliberately and willfully made erroneous entries on form 36B in respect of the number of votes I obtained at Sango Primary School polling station stream two where I received a total of 232 votes and the 2<sup>nd</sup> Respondent gave me only 2 votes as reflected on form 36B. the 2<sup>nd</sup> Respondent also has the Tally of the total valid votes, as rejected votes and the total entry per candidate and/or polling station reflecting different figures altogether”.***

However there is no averment in the main Petition or prayer in the Petition touching on this form 36B which the Petitioner produced as his exhibit. The closest there is in fact a condition of the averment in the affidavit i.e paragraph 2 of the Petition and it states:-

***“ That my agents were denied the form 36A (MCA election results at the polling station) and form 36B (Declaration of MCA election results of the constituency tallying centre), in total contravention of Regulations 79 and 83 of the Elections (General) Regulations, 2012”.***

There is no single averment in the Petition where the Petitioner states that he was given a form 36B (Pexhibit 1) which had wrong erroneous entries as claimed in paragraph 16 of his affidavit which then begs the question, where did the Petitioner get his exhibit that he produced in court when clearly the main body of his Petition does not state that he was given the same by the 2<sup>nd</sup> Respondent? As earlier observed the petition clearly states that he did not receive these forms (see paragraph 2 & 3 of the Petition) and Mr. Mogaka indeed confirmed that their entire Petition is pegged on Pexhibit 1 and the only exhibit they produced. This then brings me to the burden of proof in the election petitions.

The legal burden of proof in Election Petitions lies with the Petitioner. **See Raila Odinga Vs. IEBC & 3 others Supreme Court Petition No. 5 of 2013.** In this case it was upon the Petitioner to prove his case not on a balance of probability but also not beyond reasonable doubt so it's a standard which is higher than a balance of probability but lower than beyond reasonable doubt. So it was incumbent upon the Petitioner to provide evidence in support of his allegations on how he came to possess his exhibit No. 1. It's not enough just to come to court and say that it's the 2<sup>nd</sup> Respondent who gave me the exhibit. I am satisfied with form 36B and its contents as produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as exhibit No. 2. Its contents were confirmed by the Petitioner himself during the hearing and he cannot therefore again run away from his admissions.

This court cannot through this trial confirm the authenticity of Pexhibit No. 1 as those will require a different arm of government to do investigations and come up with a report of the same. The Petitioner did not report the alleged irregularities anywhere whether formal or orally, even if he did, no one has been called to corroborate his story.

During the 1<sup>st</sup> and 2<sup>nd</sup> Respondents case it did appear during cross examination by Advocate of the Petitioners to try and shift the burden to RW1 a Mr. Enock Otara to actual prove that he conducted a free and fair elections in accordance to the Constitution, laws and regulations. In fact the cross examination was turned into a law class where the Advocates of the Petitioner were pressing the witness literally to state what sections or Elections Laws and Regulations say. There was no attempt at all to discredit his exhibit No. 2 visa vis Petitioners exhibit No. 1.

The same happened to the 3<sup>rd</sup> Respondent to his cross examination, a Petition in my view is not about the persons who conducted the elections in this case 1<sup>st</sup> and 2<sup>nd</sup> Respondents or in on the other hand during the hearing of the Petition he the Petitioners confirmed that at the time of declaration he got 1986 votes the 3<sup>rd</sup> Respondent got 2547 votes facts supported 1<sup>st</sup> and 2<sup>nd</sup> Respondent exhibit No. 2 a copy of form 36 B.

In a nut shell the whole of this petition was about the form 36B the Petitioner had that he claimed it was issued by the 2<sup>nd</sup> Respondent to him and form 36B 1<sup>st</sup> and 2<sup>nd</sup> Respondent's exhibit No. 2, and the Petitioner was inviting the court to compare the two and give a decision on which is the correct copy of form 36B that was produced before court Petitioner exhibit No. 1 or 1<sup>st</sup> and 2<sup>nd</sup> Respondent's exhibit No. 2. Any other issues that have been raised by the Petitioner in his affidavit or during trial was not supported by any affidavit or facts, in fact he acknowledged that any other issue he raised in the Petition was hearsay. He was told by either Athony or Silas. These two were not called to support these assertions. And therefore this court will not belabor the points and facts that were not in the Petition and if there were, they are generalities with no specifics and not supported 3<sup>rd</sup> Respondent to prove his win to the Petitioner. Petitions are about the Petitioner providing evidence against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in view of annulling the win of the 3<sup>rd</sup> Respondents. In this particular case the Petitioner totally failed to put up a credible case to warrant the court to grant him any orders sought. The Petition was based on hearsay and a document whose source is unknown, its not supported by any other document or evidence and so it cannot stand the requirements of the law.

The court takes great reservations on Mr. Oburu's comments during his cross examination whenever the court directed him to focus on the issues, this court gave them an opportunity to put up a good case but they totally failed. This is a Petition which was brought without even the declared results of the 3<sup>rd</sup> Respondent as the winner together with the Petition, (**Martha Wangari karua & Another Vs. Independent and Boundaries Commission & 3 others [2017]**) a fact which the court in its own wisdom decided to overlook and issue the Petitioner to present his case on merit but the Petitioner did not take advantage and instead came up with a document that is not supported by any other evidence.

Even if the court was to consider all other allegations in the Petition, none was supported by any evidence; I have looked at the submissions of all the parties herein and to me mostly all appear to be addressing issues of law and not the evidence during the trial and that is why the court did not rely on them so much.

After all these considerations of the reasons given I am persuaded that this election was conducted in accordance with the principles laid down in the Constitution and all the written laws and regulations appertaining to Elections and there was no wrong doing.

On the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent proved in this court to warrant the voidance of the elections as conducted on 8<sup>th</sup> August 2013 for Elections of MCA Sango Ward Likuyani Constituency. The Election was free, fair and accordance to the law and declare that the 3<sup>rd</sup> Respondent was duly elected as MCA Sango Ward and his win is hereby upheld by this court and the Petitioners Petition dismissed with costs as hereunder Kshs. 300,000/= for 1<sup>st</sup> and 2<sup>nd</sup> Respondents all inclusive and Kshs. 250,000/= for the 3<sup>rd</sup> Respondent.

**EVANS W. MULEKA**

**S.R.M BUTALI**

**7/12/2017**

In the presence of :-

- 1) Wakoli Daisy Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
- 2) Petitioner present in person.
- 3) Mr. Wangila Advocate for the 3<sup>rd</sup> Respondent

**EVANS W. MULEKA**

**SRM BUTALI**

**7/12/2017**

**DATE:** 7.12.2017

**CORAM:**

**MAGISTRATE:** E. W. MULEKA SRM

**COURT CLERK:** HEZRON & BENSON

**PETITIONER:** ADV. – OBURU PRESENT

**1<sup>ST</sup> RESPONDENT:** ADV.

**2<sup>ND</sup> RESPONDENT:** ADV.

**3<sup>RD</sup> RESPONDENT:** ADV.

**At 11:27 am**

**Mr. Oburu:** I am sorry I came a bit late when Judgment has already been delivered, my car broke down at Turbo as I was on my way, I realize that there was no stay of execution on the costs awarded, I kindly pray for 45 days stay of execution on costs.

**Magistrate**

**Court:** Ruling, stay of execution 30 days.

**EVANS W. MULEKA**

**SRM BUTALI**

**7/12/2017**