



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT KAKAMEGA

ELECTION PETITION NO. 1 OF 2013

FRANCIS INGOSI KABURU-----PETITIONER

VERSUS

ROBERT LUBWA LUTATWA -----RESPONDENTS

I.E.B.C

RULING

At the close of the Petitioner's case his advocate Mr. Momanyi made an application to the court for counting and or scrutiny of votes in terms of prayer (a) (b) and (d) of the petition

Counsels canvassed the same by way of oral submissions in court.

Prayer (a), (b) and (d) of the petition are as follows:

- a. That there be a scrutiny of votes recorded as having been case in the ISUKHA NORTH COUNTY WARD on 4th March 2013.
- b. That there be a security of the rejected, void and spoiled ballot papers from all polling station, within ISUKHA NORTH COUNTY WARD.

- d) That there be a recount of all ballot papers cast at the elections of 4th March 2013 at Isukha North County Ward.

He submitted that the petitioners, through evidence adduced had laid basis for scrutiny in that -

- a. there was evidence to the effect that Forms 35 were signed before votes were cast therefore raising doubt whether they represent the actual vote – count thus necessitating recount and scrutiny.
- b. Evidence that votes were rejected because they were unstamped called for recount and scrutiny to verify the position and it is only fair and just as the Respondents stand to suffer no prejudice.

The application was strongly opposed by both Respondents through their respective counsels Mr. Khayumbi and Mr. Ojuro. They raised several issues in the submissions.

First that the Petitioner while asking for recount and scrutiny in all polling station of Isukha North Ward in his petition, in evidence he admitted having no problem with the polling stations except eight (6) which he singled out.

That in fact the eight (8) are the stations where he lost while he appears to have no problem where he won.

That failure on the Petitioner's part to specify the polling stations in which he wanted scrutiny and recount in the circumstances of his evidence is a reason for the court to reject the application.

That his evidence raised issues of bribery generally, assistance of illiterate voters and claims that he was not given results all of which are issues that the law provides for and which do not necessitate the counting or scrutiny of votes case. No written complaints have been availed to support claims that they were ever raised.

That the issue of recount of votes is clearly provided for under the Elections Act yet the Forms 35 presented before court are clearly signed with no indication that there had been any dispute as to recounting and rejected or spoiled votes raised at the polling stations as by law required.

That even in the petition and application the petitioner had not laid basis for recount or scrutiny as he did not state the number of votes rejected and what number he had issues with.

That this is a petitioner who had agents who signed Forms 35 at the polling stations confirming that regulations had been complied with appears to have raised no issues at all yet now wants the ballot boxes opened up for recounts.

The court was taken through the number of votes cast for each of the contestants and it was submitted that the margin between the winner and the second person was too wide to necessitate interference with the ballot papers as cast.

That evidence called related to only three polling stations which made up less than twenty five percent of all votes cast thus making it unnecessary for recount as there will be no difference. That in the three stations testified about rejected votes are only 36 while spoiled are 2 votes. Yet no issues had been raised on the numbers as found and declared by IEBC.

The court was referred to the case of *Peter Gichuki Kiagora Vs IEBC James Mbai & Another Nyeri High Court Election Petition No. 3 of 2013*

In this case, taking into consideration the wide margin between the votes cast for the winner and the loser, the court rejected the application for recount and scrutiny.

I have considered submission by counsel and evidence so far adduced by the petitioner in support of the petition.

I will try to confine myself to the issue at hand - whether the Petitioner has indeed laid basis for recounting and scrutiny of votes cast, in the 4th March 2013 General Elections in respect of ISUKHA NORTH WARD and specifically in terms of prayers (a) (b) and (d) of the petition.

Looking at the petition and even evidence adduced indeed the Petitioner does not give details of the declared results. Indeed this would bring out the issue of the votes in numbers that he wants the court to look at.

This is an omission which to me cannot be alone reason to reject recounting and scrutiny of votes if other more serious anomalies exist.

The petitioner was, through evidence to establish a case for recounting and scrutiny.

In the petition he did not single out any particular polling station whole result he wanted recount and or scrutiny meaning that he wanted this done in all polling station.

Indeed while being cross –examined he told the court that he had no issues to raise against some polling stations including Bukhaywa, Lubao, Shanderema, Khandidi, Buyangu, St. Kizito and even Magala.

He admitted that infact the stations he had raised queries about were where he did not win.

There is no indication that any queries respecting the casting of votes was ever raised during the voting.

The court was shown Forms 35 in respect of each of the sixteen (16) polling station duly signed. The law allows for recount at the polling stations before submission of the results to the Tallying centre.

There was no evidence to the effect that the Petitioner took advantage of this window.

There is also no evidence of Forms 35 to show that there were any disputed rejected or spoiled votes noted.

I will not at this stage go into the issue of whether or not forms 35 were irregularly signed by the Petitioner’s agents as it goes to the core of the petition. However on the face of it all the forms were signed by the agents.

The court was taken through the evidence adduced by the six witnesses called by the Petitioner which narrowed to complaints against only three polling stations-

- Bulovi, Ingolomosio and Ivakala

In all the stations none of the witnesses testified about malpractices that definitely affects votes as cast such as staffing of ballot boxes, breaking of seals, disappearance of ballot boxes etc.

The evidence adduced related to incidence of bribery or intimidation outside the polling halls which did not affect the ballot papers cast.

Looking at the details of the results by the 2nd Respondent which was have to rely on since the Petitioner did not give contrary evidence the margin between the winner the 1st Respondent herein 1740 votes against the Petitioner’s 1525, the difference is 215 votes. This difference would be significant had evidence been led to show that there were malpractices that affected votes in all the sixteen polling stations.

In this case the Petitioner while being cross-examined singled out only eight (8) polling station out of sixteen (16) stations that were involved in the election as where he had complaints

Evidence was led on three (3) out of the station cited. This is indeed a very small percentage of the votes to necessitate recount. It has been submitted by the 2nd Respondent and there is no contrary evidence, that in the three station rejected votes were 36 and spoiled votes 2. This is too small a margin to call for scrutiny as it will not serve any purpose.

The sum effect is that the margin between valid and rejected and spoiled votes is too wide to call for counting and scrutiny.

I am convinced that this is unnecessary in the special circumstances of the case before court where there is no single document to show that attempts were made at polling station to request for recount and were rejected.

The court was asked to expunge from record the affidavits of witnesses who did not testify for the Petitioner’s counsel case for the 2nd Respondent has not given legal basis for such an action by the court at this stage since it was not one of the issues for determination. I will ignore that bit of his submissions at this stage.

The sum effect is that for reasons given the application by the Petitioner to have the cast ballot papers recounted and scrutinized is hereby rejected.

Dated this 6th June 2013

S.M. SHITUBI C.M.