



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT GARISSA

PETITION NO. 3 OF 2013

BETWEEN

ABDINOOR ADAN ABDIKARIMPETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

MOHAMED MOHAMUD OSMAN2ND RESPONDENT

JUDGMENT

The petitioner came to this court by filing his petition on 28.3.13 seeking several orders as to wit.

1. The honorable court be pleased to declare that, the 1st respondent did not conduct election in respect to ward representative elective position of Ademasijida in accordance with the constitution and especially article 81(c), articles 86 and article 88, the election Act and within law.
2. This honorable court be pleased to declare that the 2nd Respondent was not validly elected as the ward representative for Ademasijida Ward and consequently nullify the said election and or order that the election was null and void.
3. This honorable court be pleased to order that a fresh election be carried by the second respondent.

The petition was supported by a supporting affidavit of Abdinoor Adan Abdikarim and several others . In response to the petition, Mohamed Mohamud Osman said that the election was conducted in a free and fair manner and according to the election Act 2011. This was supported by the 1st respondent (IEBC) and others who annexed their supporting affidavit.

In his supporting affidavit DW1 (Abdinoor Adan) said that he took part in the election as a candidate of Ademasijida Ward Assembly member under TNA. On the date of election he was called by his supporters who informed him that his photo was appearing twice on the ballot paper and that there were rumors that he had as a result of the same been barred from running for said position of a county assembly member and that people were shunning to vote for him since they had been told that their ballot will be treated as spoilt votes.

Petitioner said he went to his polling station and confirmed that indeed his photo was appearing twice on

the name of WDP candidate of Mr. Adan Noor Hussein and on his name. He described the anomaly as big and major issue that goes to the core of the outcome of the elections. He immediately informed the presiding officer of the said anomaly and asked him to call off the election of the county assembly member so as to enable the correction of the said but no action was taken. He went further and called the returning officer and the national tallying center hotline but did not get any positive response. Petitioner said the chairman of IEBC through a press release dated 4.3.2013 directed that there would be a repeat of election of County Assembly Wards where there had been a mix up of candidate pictures, missing political parties symbols or candidates name missing but the election were not called off for Ademasijida ward.

Petitioner's witness 2 said that at the polling station he heard people stating that one of the candidates Adan Noor Adan (Petitioner 1) was disqualified from the election since his photograph was appearing twice. He added that by the petitioner's photo appearing twice the same confused him and would be voters on who to vote for. On his affidavit **plaintiff's witness 3**, a Mr. Mohamed Sadiq Abdiakim said that while at the polling station, he could hear people stating that one of the candidates, Abdinoor Adan had been disqualified from the election since his photograph was appearing twice and as such he could not differentiate who he was to vote for. By the petitioner photo appearing twice, he was confused just like the would be voters.

Anwar Abdinoor Adan and Benjamin Mwenda did not testify in court but their supporting affidavits were admitted as evidence in court. They all gave similar testimony as that of **Plaintiff's witness 2**. Markaba Abukar Hussen also gave similar testimony in her affidavit.

DW1 is Festus Mari Ngeerah who was the returning officer for Wajir West Constituency in the recent concluded March 4th election. He said that he performed his duties well without fear or intimidation and in accordance with the practices of due diligence. He said that he observed all rules and regulation outlined in the election Act and rules, IEBC Act and regulations and the constitution. He went ahead and announced the winner based on form 36. **DW1** gave detailed explanation on the whole process of voting and announcing a winner. He stated that a mix up in pictures did not in any way affect the conduct of the election as he instructed all presiding officers to make sure that voters were assisted by making sure that the anomaly was brought to the attention in all polling station under him and that they voted for their preferred candidate. **DW1** said that the candidate who could have been affected by the said anomaly was the candidate whose photograph was missing from the ballot paper. He dismisses the claim by the petitioner that he raised his concerns with him and other IEBC officials as an attempt to mislead the court because the comment could have become recorded in the polling diary. DW1 said he announced the winner as **Mohamed Mohamud Osman** and that he did not observe any irregularity.

DW2 said he contested for county assembly Ademasijida along with four other candidates. At the polling station, he discovered that his photograph was missing from the ballot paper but the rest of his details that is political party, party details were proper and correct. In his slot the photo of the petitioner was put and he inquired from the presiding officer about the omission and he was informed that it was a printing error and the officer of the IEBC at the polling station were advising votes on the said anomaly and were instructing the electorate including himself to use their respective candidate party symbol and names. **DW2** said he had no problem with the directive. He also said that he saw voter's assistants directing voters to use names appearing on the ballot paper and not the photograph. He believed that the same happened to all other polling station. He was contented with the explanation by IEBC and he did not raise further queries.

DW3 is the second respondent. He said that he vied for County Assembly Ademasijida Ward under UDF party ticket. At the polling station, the 1st respondent officials informed him that there was a slight anomaly on the county assembly member ballot paper citing the anomaly, as a mix up in the photograph of the petitioner which was appearing twice beside his names and party symbol and that of Adan Noor Hussein. He said that the 2nd respondent advised voters to vote using party symbol and their preferred candidates' names so as to avert any confusion. **DW3** noted that the 2nd respondent had their officers at the polling station assisting people with disability to vote their preferred candidate. **DW3** said that he believed that the anomaly was not grave to the extent of invalidating the voting exercise or the result

since measures were taken by the 2nd respondent to avert any confusion of the printing mix up of photos.

DW4 is called Sirat Sadeko Abdikadir said at the polling station, he was informed by an IEBC officer that the county Assembly Ward ballot paper had some anomaly and that the photo of one Abdinoor Adan Abdirahim vying on TNA was also appearing in the slot of another candidate of Wiper Democratic party but all the names and party symbols on the ballot paper were in order. **DW4** said the officer informed him and other voters to use party symbol or names of the candidate to identify whom so ever he intended to vote for he added that he knew whom he was going to vote for and that there is no way a photograph would have confused him.

The court admitted the affidavit of Nadhifo Somo Gedow and Abdikahim Abdulahi to form part of the evidence. The two gave similar evidence as that of **DW4**.

In his cross examination the petitioner he said that it was his first time to venture into politics and that he had retired from civil service. He said that he had built his political base before he decided to contest. Petitioner 1 said that his wit called Markaba Abukar was his distant relative, Mohamed Sadiq Abdikahim who is his witness is his cousin and that he was not related to Benjamin Mwenda. The last witness Anwar Abdi Noor is his son. Petitioner said that apart from being relative to his witness, he expected them to be impartial and voter turnout was 89.79% and the score 348 votes, while the winner got (1071).

Petitioner said that the person he called him and told him of the photo anomaly in the ballot is called Abdirahim Ahmed who did not swear an affidavit in support of the petition. Petitioner was the first candidate in the ballot paper which had his photo and other details correctly. The problem was that his photo appeared again in the third slot for **WDP**. He read instruction on ANH1 when said instruction “**mark the paper by placing a mark against the name you wish to elect** “ it doesn’t talk of a photo , the petition said that he did not know how many TNA (his party) candidate won March 4th elections . He however said that the Wajir Governor who won on CORD ticket and Senator won on CORD ticket and Wajir Women Representative won on CORD ticket. He admitted that CORD was a popular party in Wajir.

The Petitioner in cross examination admitted that Ademasijida Ward wasn’t amongst wards that the chairman of IEBC said that the election would be repeated. Petitioner admitted that he advised the presiding officer to call of the election because of the anomaly but he knew that the presiding officer had no powers to do so. Petitioner said that he called the returning officer at 10:00 am and told him of the anomaly and the returning officer told him that the election would be repeated on 10 March 2013. He finally wrote a letter on 6.3.13 and to complain but nothing was forthcoming. He believed that the mix up of the photo cause him to loose.

Petitioner reiterated what on and he said in his affidavit during cross examination. He added that he comes from a prominent family in terms of leadership and that it would be difficult for him to tell each and every voter who was confused as a result of the anomaly. His lawyers advised him that he would need a maximum of only five witnesses.

In being cross examined by Mr. Kuloba, the petitioner said that he knew how the ballot paper would look like before elections. The ballot paper displayed did not have pictures, He said that **ANH1** which shows signal ballot paper was a forgery. The one he saw did not have picture of the candidate. He admitted that he did not have any sworn affidavit of a voter who walked away after seeing the confusion or who voted for another person. **Petitioner** said he told the five presiding officers on the photo mix up. According to him the candidate who has the photo has a better chance than the one with two photos on the ballot. **Petitioner** said that **AAA5** which is his affidavit is a letter of communication to IEBC chairman. The letter reached the IEBC on 7.3.2013.

In cross examination **Petitioner** reiterated the content of his affidavit. He heard at the polling station that one of the candidates has been disqualified since his photograph appeared twice in the ballot paper. He did not believe the rumors until he went to vote whereupon he found that the petitioner’s photo had appeared twice. **Petitioner** read rule 70(1) “**The core words are the name and the symbol of candidate** “.

The section does not have word photograph.

Petitioners witness 3 reiterated his affidavit, in cross examination he said that he could hear people speaking in Borana Language and said that Abdi Noor had been disqualified. **PW3** said he didn't believe on rumors and that is why he went ahead and voted. He added that he knew the name and face of candidate no 3 and that their names were confusing and Adan Noor and Abdi Noor.

DW1 reiterated his affidavit in cross-examination. He was the returning officer. He said his was informed at 6:30 am by Ademasijida presiding officer that one of the photos was appearing twice in ballot paper. He told the presiding officer to guide voters and tell them of the anomaly and that voter should use names and party symbols. DW1 said that one of his mandates as returning officer is to explain errors in ballot papers. They did a mock election on 24/2/13 where they used dummy ballot papers. He said NHA1 was a copy of a ballot paper.

The returning officer said that he had received a complaint but the complain was not recorded in the polling diary. He could not explain why the complainant was not recorded in the polling diary and termed it as an oversight. He said that he called the IEBC and reported the anomaly voters had been guided to use symbols and names.

The returning officer referred to form 35 of Ademasijida ward it had not been signed by all agents because of the dispute in the photo appearing. The same applies for Hadado south market in which only one agent signed it on the same reason. The returning officer was taken to task in his replaying affidavit paragraph 5 it says, **"If an agent refuses to sign form 35 the IEBC will have to note the reasons for the same."** He admitted that there are forms which the IEBC officials have not signed and that form 35 is therefore incomplete. He said that the results were anomaly on 5/3/13 and since he did not have a printer, he wrote by use of his hand. He later printed same form 36 on 8/3/13. The returning officer also explained his MMO2 repeated one polling station twice that Ademasijida ward but the results differed that is 535 and 154. He said that his form 36 had an error. His printed form 36 that is an annexure had not been signed but the one that had the signature was the hand written one filled on 5/3/13. In re-examination the returning officer went through all form 35 showing the main reason for failure to sign the form was mixture of the photos.

DW2 reiterated the contents of his affidavit during cross examination. He said when informing the presiding officer the anomaly they were advised to use party symbol and names. DW2 said despite the anomaly, he was satisfied with the results DW2 said he only complained to the returning officer and left the matter there. He did not make a follow up. He declined having had in possession a ballot paper.

DW3 the 2nd respondent reiterated what he said in his affidavit. DW3 refused to answer question on paragraph 7 of his affidavit in which he said the 2nd respondent agents were assisting people with disabilities of whatsoever nature to vote for the referred candidate. The second respondent refers to DW3. In re-examination DW3 clarified that he indeed referred to the 1st respondent and that there was a typographical error. He denied assisting voters to cast votes.

DW4 also reiterated the contents of his affidavit. He said he was told by IEBC officials to rely on the names and party symbols.

I have read in details all the submissions by the advocate and their annexure. They have all raised pertinent issues that I shall bring forth in my analysis leading to my final decision.

First there is no doubt that there was an error on the ballot paper. The photo of the petitioner appeared twice. There were five candidates. The only anomaly is that the photo of Abdinoor Adan Abdikarim appeared on his own name and party symbol and on the name and party symbol of Adan Noor Hussein of WDP. The main issue that has been captured by Mr. Kithi submission is whether such a ballot paper was valid and if by such appearance voters were confused on who to vote for.

Mr. Kithi referred to AAA1 which is a statement of IEBC chair in which he said and I quote

“An initial audit of the ballot papers has revealed a very tiny number..... missing political party symbols, mix ups of candidate pictures..... in the interest of fairness and observation of its constitutional mandate the commission has rescheduled elections in such county assembly wards to 11th March 2013”.

The statement by the IEBC chair clear put this case into one of the instances but Adamasajida ward was not included in the list. Voting went on despite the anomalies and results declared. The turnout was almost 90%. In *John versus Nyangi and another 3 KLR at page 513 paragraph 10 honourable Maraga stated*

“It is not every non compliance or omission in breach of the election regulation or procedure that invalidates an election for being non-complaint with the law. As I have stated minors breaches will be ignored. The honourable judge quoted Morgan versus Simpson (1974) 3 ALL ER 722 at e.g. 731 when it was stated for an election to be conducted substantially in accordance with the law there must be no substantial departure from procedure laid down for instance voters vote for a person who is not a candidate or refusing a qualified candidate on some illegal ground or dis-entrenching a substantial portion of voters.

The error on the ballot was clearly a printing error. Printing a ballot paper is the job of IEBC and not any of the candidates. Such errors are bound to happen as it was detected in other areas mentioned in IEBC chair statement. There is no law that forbids printing error. Perhaps these are things that happen in normal life especially when one is dealing with huge number of ballot papers.

The main issue is not the error on the printed ballot papers but rather the results of using the ballot papers. The purpose of voting is to express the wishes of the people. The question therefore is whether the wishes of the people was expressed albeit the error on the face of the ballot papers.

The petitioner photo appeared twice. He is the first candidate in the ballot paper. All his details such as the name, party symbols and the photo are correct. The only anomaly is that his photo appears again on the slot for the third candidates whose party and names do not belong to the petitioner. There are several scenarios that can arise when one photo appears twice in the ballot paper. One is that the candidate can actually get advantage over his third rival (third candidate) who has his photo or he could be disadvantaged because some of this voters would have voted for the third candidate upon seeing his seemingly clearer photo. From the look at the copy of the ballot paper it appears on the third candidate is clearer than his own.

I have looked at the election results declined and this is how they appear.

- a. Abdinoor Adan Karim 348 votes
- b. Abdullahi Boor – 550 votes
- c. Adan Hussein Noor – 56 votes
- d. Mahfudah A – 722 votes
- e. Mohamed Mohamud – 1071 votes.

There were only 5 (five) spoilt votes. If the petitioner was disadvantaged by having his photo placed in candidate 3 slots then simple mathematics would have been $348 + 56 = 404$ which is way below the 2nd respondent 1071 votes. The second person scored 722 votes and so the second respondent would still be a winner.

For all the previous elections, no photo of candidate was placed on the ballot. The IEBC was introducing it for the first time. From the look of the ballot paper it is clear that the person who would have been greatly affected was Adan Noor Hussein. His photo did not appear on the ballot and must have lost some votes to the petitioner or the candidates. The results were not announced against photos of candidates, IEBC does not say a photo of this one or that one got these votes but they normally call out names and say how much each one got.

Voters go to vote to their candidates according to names, party symbols and photos. Assuming that a voter wants to vote for a candidate whom he does not know his name or party symbol that voter would be expected to look at his candidate photo. The ballot paper has two photos of the petitioner. I expect the petitioner voter who is purely relying on a photo to vote for the first candidate (petitioner) or the 3rd candidate who has the petitioner's photo. In this case the main loser would be the third candidate who is DW2. He would have been the right candidate to be a petitioner. The petitioner would even have the advantage of undecided voters because his photo dominated the ballot paper appearing in the first and third slot of the candidates while others appear once and the other has no own photo.

The second most important issue raised by the petitioner is that there were rumours that he had been disqualified and that swayed his would be voters to vote for an alternative. This statement appears to make sense. When a photo appears twice, that is an anomaly and whether it would lead to disqualification is a matter to be decided by IEBC. The petitioner and his witnesses voted despite the anomaly. They did not boycott the elections. DW1 said that he was informed of the anomaly at 6.30 a.m. and that he advised this presiding officer to tell voters to rely on party symbols and names. According to him the instructions were followed. All witnesses who testified for the second respondent testified that the IEBC officials advised voters to use names and party symbols.

The court has for a long time been extra careful when considering rumours as evidence. The party alleging that rumours occasioned by an error for example in the ballot paper caused him to lose an election must come with strict prove in court. All the petitioners' witnesses voted albeit the alleged rumour none was called to court to confirm that the rumours caused him not to vote for the petitioner.

The petitioner had agents in all the five polling stations. He did not call any one of them to come and challenge the respondent's evidence that voters were advised to use names and party symbols. Even in a situation where a voter needs assistance its common knowledge that agents are involved to make the election more transparent. If there was rumours indeed that the petitioner had been disqualified then due diligence would require that a voter would ask IEBC officials to clarify the matter and that would not have amounted to an election offence.

The returning officer had no powers to call off an election and so the voting went on to its conclusion. The petitioner wrote a letter to the IEBC on 7/3/13, although he had lodged his complain on 4th March 2013. Since he had no powers to call off an election the returning officer had mandate to mitigate the error on the ballot papers by instructing the presiding officers to explain the error to voters. This is what is expected to a good officer and the presiding officers must have done this job well because there is no contrary evidence from agents. In all the form 35 for the polling stations, the only reason is that the photo of the petitioner appeared twice. There is no other complaint by the party agents. There is no way therefore can one blame the presiding officer for informing voters on the anomaly and how to express their wish. None of the agent brought the issue of one of the parties suspected to have been disqualified.

The alleged anomaly was detected on the date of voting. There were five polling stations. Those who allegedly called the petitioner and his supporters must have been told that, the petitioner had not been disqualified. The petitioner and his supporters knew the truth. I do not know how a rumour fast can travel within a day. I do not know if indeed there was such a rumour. I do not know the efforts that the petitioners put allay the rumours and how effective his effort was. What is on record is that the petitioner got 348 votes and so the rumour did not affect him completely. No one can tell how much the rumour cost the petitioner and diverted his votes to other candidates. No one can tell home many extra votes the petitioner got after appearing twice in a ballot paper.

I have heard people say that politics is a dirty game indeed it is full of rumours in some stances. Sometimes these rumours can sway voters to vote in candidates with different characters. It is difficult to control campaigns at where all sorts of propaganda and rumours fly. The court must therefore be careful in relying on consequences of rumours. The rumour in this case is that the petitioner had been disqualified. It must have been some few people two or three or many people talking what the court needs is proper evidence.

The standard of prove in election petitions is clearly outlined in Supreme Court election **Petition No.5 of 2013 Raila Odinga versus IEBC and 5 others to be above the ordinary civil standard of probability through not above the criminal standard of beyond any reasonable doubt.** At page 71 it says the **burden of prove lies squarely with the petitioner. The court expects a high level of certainty on allegations made. Having said that the error on the ballot paper was not an alien thing the burden was to prove how the error occasioned prejudice onto the petitioner. The petitioner chose rely on rumours that allegedly swayed his votes but the evidence has not come out clearly.**

The constitutional is the supreme law that gives salient beacons of law. Mr. Kethi for the petitioner quoted chapter seven (7) section 81 which says

81. In election shall comply with the following principles

a. Freedom of citizen to exercise their political rights under article28

b.....

c.....

d. Universal suffrage the aspirations for fair representation and equally of vote.

a free and fair elections which are

i.....

ii. Free from violence, intimidation, improper influence or corruption

iii.....

iv.....

Article 86 of the constitution provides

86. at every election, the IEBC shall ensure that

a. Whatever voting method is used, the system is simple, accurate, verifiable, secure accountable and transparent.

b.

c.

d. Appropriate structures and mechanism to eliminate electoral malpractice are put in place, including the safe keeping of election materials.

These two provisions of the constitution sanction the election procedure. Section 81 (i) (iii) talks of free from violence intimidation improper influence or corruption. It there were such rumours than that would have caused improper influence and so the presiding officer had powers under the constitution to allay the beans without appearing partisan. Voters had a duty to clarify such rumours from the IEBC officials.

The law and especially the constitution cannot cover each and every aspect of life or provide a solution to every process. Sometimes the law varies on good judgment of an individual and each and every action of good judgment must not be provided by the law of lead to an electoral offence to an electoral offence.

The power to vote is one of the most outreached right in the constitution. The court cannot interfere in any way with such power unless there were irregularities and electoral malpractice that rendered the said election null and void. One must establish that such electoral malpractices that rendered the said election null and void. One must establish that such electoral malpractice was of such magnitude that it substantially and materially affected the outcome of the electoral process. That was held in **John Kiarie**

Waweru versus Beth Mugo and 2 others (2008) at paragraph 5. Again in John Nyange and another (2008) 3 KLR (EP) it was held that election petitioners are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence in such proceeding. Elector's petitioners should be proved by cogent, credible and consistent evidence.

The (DW1) admitted that he did not have polling diaries which were filled. These diaries were supposed to be filled by the presiding officer. He said that was an oversight. The presiding officer was required to fill them. What would not however jeopardize the petitioner because it has been proved that indeed the complainant about the anomaly. There was no other complain that would have been captured by the diary for the benefit of the petitioner. The returning officer explained very well that he filled form 35 using hand written notes because he did not have a printer. He had to transfer the details and print them while at bomas of Kenya on 7/3/13 but that the hand written form 35 are dated 5/3/13 when the results were declared.

The returning officer said that form 36 has Ademasijida ward twice. The first figure is 535 and for the second one has 154 votes. This according to him was a typing error. In fact the second ward was Lolkuta which has a total of 154 votes.

In a nutshell the petitioner has not given enough prove to show that he was prejudiced as a result of a printing error which happened in normal life. His photo appeared twice first under correct names and secondly in the slot for WDP candidate (DW2). It was DW2 who had sufficient ground to bring this election petition but DW2 decided to accept the results because he was satisfied with IEBC explanation that voters should use names and party symbols. DW2 had complained at first but he later conceded defeat. The petitioner cannot capitalized on a candidate who was prejudiced but chose to accept the results DW2 had a right to complain but he chose not to hence accepting results. The anomaly was detected early in the morning and according to returning officer, he was told of it at around 6:30 a.m. That was early enough to advise would be voters to use names and party symbols. There were only five spoilt votes. Even if the number is added to the petitioner who would still be very far from the winner. One could have argued that voters would have marked twice for the first candidate and third candidate because of the two photos but appears that there was no such confusion. One of the reasons that counts are careful in ordering for a by election is that circumstances change a lot. Kenyans were supposed to express their wishes on 4/3/13 such wishes may change drastically according to several factors. I find that there are insufficient grounds to issue orders prayed. The election petition is dismissed with costs. Right of appeal 30 days.

Read in presence of Kuloba, Mutua and Mwangi for 1st respondent and Siany for 2nd respondent. Both parties.

Mutua: I pray for the copy of judgment and proceedings and leave to appeal.

Court: Leave to appeal is granted.

Mwangi: As per rule 34(1) can we file our bill of cost.

Kuloba: We can file our bill of costs.

Mutua: We are appealing.

Mwangi: You cannot stay proceedings.

Court: The petitioner can appeal for stay at the high court. Without an order from the magistrate court cost must be paid.

Linus Kassan – PM

17/7/2013