



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISII
PETITION NUMBER 1 OF 2013

DAVID NYABUTO OMBUI-----PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION-----1ST RESP

SEREM (SUED AS THE RETURNING OFFICER

BOMACHOGE BORABU CONSTITUENCY) -----2ND RESP

GEORGE MORARA BIBAO -----3RD RESP

JUDGEMENT

The petitioner herein David Nyabuto Ombui filed petition dated 4th April 2013 and filed on 5th April 2013 sought inter alia as follows:

1. That an order do issue for scrutiny of ballot papers used in Bokimonge ward elections in polling stations namely:
 - Tongeri Primary School centre code 037
 - Kenyoro Primary School centre code 036
 - Motemwamu Primary School centre code 038
 - Senta Primary School centre code 044
 - Etono Primary School centre code 035
 - Kenyenia Primary School centre code 032
 - Kerongori Primary School centre code 041

And make a finding that the same did not contain the petitioner's photos as required by the Elections Act thus nullifying the results.

The petitioner also sought a declaration that the 1st and 2nd respondents presided over a flawed and irregular election exercise at Bokimonge ward on the 4th day of March 2013 and therefore it was a nullity.

It was also sought that the court declares that the petitioner's right as guaranteed under the constitution and other applicable laws were violated by the apparent confusion in names, placing of passport size photographs in the wrong ballot and substitution or non-substitution of passport size photographs.

The fourth order sought was a declaration that the election of Bokimonge Ward Assembly seat was marred with irregularities, illegalities and procedural flaws so as to render the entire elections of the 4th day of March 2013 at Bokimonge ward null and void.

In his 5th prayer, the petitioner sought a declaration that the 3rd respondent was not validly elected as a member of the County Assembly for Bokimonge Ward.

The 6th prayer was that the 1st respondent (IEBC) be compelled to conduct a repeat but proper, free and fair election in Bokimonge Ward County Assembly seat to be presided over by impartial and competent officials devoid of the incurable defects subject of this petition.

The 7th and 8th prayer was for an order that costs be borne by the respondents jointly and severally and any other appropriate relief the court deems appropriate.

In support of the petition the petitioner herein filed a 24 paragraph affidavit sworn on 4th day of April 2013 and annexed a letter dated 4th March 2013 addressed to the returning officer Bomachoge Borabu Constituency – presumably 2nd respondent herein. He also annexed an undated letter addressed to the Director of Elections IEBC Nairobi that was received on 18th March 2013 by Director of Voter Registration and Electoral Operations IEBC.

He also annexed special issue of the Kenya Gazette publishing and/or declaring persons elected as Governors, Senators, Members of Parliament, Women Representatives and County Ward Assembly Members nationwide – Kenya Gazette dated 13th March 2013.

Further, the petition was supported by the sworn affidavits of Joel Okenye Okemwa dated 4th April 2013 who also annexed an agreement of appointment as agent of one Abednego Nyambati an aspirant for the Bokimonge Ward County Assembly.

The petition was also supported by the sworn affidavit of Augustus Oseko Nyabuti a voter at Etono Primary School polling station who however didn't testify during the hearing of this petition.

Julius Otara Onyantha also swore an affidavit on 4th April 2013 to support the petitioner's claim herein as a voter and ODM agent and he said that supporters of FORD People aspirant at Kenyeny Primary School polling station complained that the petitioner's photo was missing from the ballot papers but they were not assisted as presiding officer could do nothing about it and most of the voters opted to vote for another candidate who were properly identified and some walked away in protest. He attached his letter of agency dated 4th March 2013 and oath of secrecy also dated 4th March 2013.

Paul Ombura Asiago and Mauti Wycliffe Gwaro also swore affidavits in support of the petitioner's petition dated 4th April 2013. Of the five deponents whose affidavits were filed to support the petition only 2 of them namely: Julius Otara Onyantha PW2 and Joel Okenye Okemwa PW3 testified in court and were cross examined on their averments in affidavits and testimony in court.

It was not explained why Augustus Oseko Nyabuti, Paul Ombura Asiago and Mauti Wycliffe Gwaro didn't attend to testify.

The 1st and 2nd respondents filed a joint answer to petition dated 19th April 2013 together with replying

affidavit sworn by the 2nd respondent dated on even date together with the replying affidavits for returning officers for Tongeri Primary school polling stations, returning officer of Kenyeny primary school stream 3, returning officer for Etono primary school, returning officer for Kenyoro primary school, returning officer for Kenyeny primary school polling station stream1, returning officer for Motemwamu primary school polling station and the returning officer for Kenyeny polling station stream 2.

The 2nd respondent testified in defence of 1st and 2nd respondents and presiding officers for Motemwamu primary school polling stations also testified in defence of the respondents herein together with returning officers for Kenyeny primary school streams I, II and III. The Returning Officers of Kenyoro polling station- RW5 and Tongeri Primary School – RW7 also testified and explained what happened at their respective polling stations.

The 3rd respondent also testified but didn't call any witnesses. He said he was a TNA candidate and a registered voter at Kebabe primary school polling station where he voted at about 9.30 a.m. on 4th day of March 2013. The 3rd respondent said he complied with the election rules preceding the election exercise such as presenting original National ID card, party nomination certificates together with 2 passport photos to the returning officer both in soft and hard copies.

The 3rd respondent said that out of the 523 registered voters, he garnered a total of 312 and the petitioner didn't garner any votes in Kebabe polling station.

The 3rd respondent said the people who swore affidavits in support of the petition were not members of party which nominated petitioner to vie for the Bokimonge Ward seat.

The 3rd respondent also said that intimation by the petitioner to withdraw petition and subsequent notice issued and filed in court made him to relax and as a result he didn't respond to the petition in time and had to pay costs as pre-condition for extension of time to file answer to the petition and replying affidavit out of time. The 3rd respondent said he was never assisted to win the elections of Bokimonge ward and he could not have benefitted from the fact that petitioner's photo was missing in some ballot papers.

He said he had served the people of Bokimonge ward and illiteracy levels are negligible.

3rd respondent said that the people of Bokimonge ward had made which if nullified will be against their wish and the petition should be dismissed.

3rd respondent also said that the margin of votes he garnered compared to the petitioner's votes was very wide and the difference could not have been occasioned by confusion.

RW8 said he learnt on 6th March 2013 that David Nyabuto Machoka's photo appeared twice on ballot papers but the anomaly would have favoured Nyabuto Machoka rather than himself. He said if solution to the anomaly was not found it would have been unfair.

He said during campaigns candidates sell their names and policies and not photographs.

The petitioner's advocate Mr Ondieki filed written submissions which were highlighted on 8th July 2013 to the effect that petitioner was frustrated when he found his photos were missing on ballot papers in the polling stations mentioned in the petition and in the supporting affidavit to the petition.

It was also argued that petitioner spent Kshs. 7 million in his campaigns in a ward with 30% illiteracy levels and it was necessary to have the photo of the contestant affixed to the ballot papers. Mr Ondieki submitted that allowing elections to proceed without the petitioner's photo on ballot papers flawed the exercise as petitioner's voters were frustrated and were helpless in the hands of the 1st and 2nd respondents.

It was argued that the petitioner lost elections because of the missing of his photos in the ballot papers and that the 1st and 2nd respondents' 7 witnesses confirmed the fact that petitioner's photos were missing in the ballot papers.

Mr Ondieki further submitted that the number of votes cast at Tongeri polling station exceeded the number of registered voters who were only 216 as against 341 who voted and this was proof that the elections were not free and fair.

Mr Ondieki further argued that election exercise at Bokimonge ward did not comply with Article 21 (e) of the Constitution 2010 as IEBC conducted flawed election supervised by incompetent officers like the 2nd respondent.

Reference was made to the Elections (General) Regulations Rule No. 68(4) (b) which provides;

“Every ballot paper at an election shall contain photograph of a candidate where applicable”

Mr Ondieki said this regulation was not complied with and as such the election was riddled with a lot of flaws, illegalities and irregularities and same cannot be termed as free and fair.

Reference and reliance was made to:-

1. Election Petition No. 1 and 2 of 2005 – Joho Vs. Nyange and Another
2. Election Petition No. 1 of 2013 – High Court at Busia – Philip Osore Oguttu Vs. Micheal Aringo and
3. A.C. Jose Vs. Ssivan Pulai and another [1984] All India Report

Mr Odhiambo advocate for the 1st and 2nd respondents also filed written submissions dated 7th July 2013 and highlighted the same on 8.7.2013 and said that out of the 13 candidates who vied as aspirants of Bokimonge ward, the petitioner garnered 442 votes and was number 8 whereas the 3rd respondent garnered 2,229 votes and beat the petitioner by 1,787 votes which for a county representative was a very big margin. Mr Odhiambo argued that it came out in cross examination of petitioner and his witnesses that there was no mix-up in the photos but rather that petitioner's photo was missing in some ballot papers in some polling stations and in its place replaced by that of another candidate David Nyabuto Machoka.

It was submitted that this fact was admitted by the 1st and 2nd respondent as a teething problem in the new constitutional and election laws regime and were unforeseen. Mr Odhiambo submitted that evidence was tendered by 1st and 2nd respondents' witnesses to the effect that the anomaly was rectified almost immediately and it was not necessary to halt the process as the presiding officers gave evidence of how they dealt with the anomaly and balanced the plane for all candidates to ensure elections were free and fair.

The 1st and 2nd respondent submitted that allegations by petitioner that anomaly was deliberately orchestrated in order to favour 3rd respondent was not proved by petitioner who was silent on his evidence in chief about this issue. It was argued the anomaly didn't favour 3rd respondent and could only have benefitted David Nyabuto Machoka whose photo appeared twice in some of the ballot papers even in place of the petitioner.

Mr Odhiambo for 1st and 2nd respondent urged the court to disregard the issue raised in regard to results in Tongeri primary school polling station centre code 037 as it was not pleaded and the court cannot make orders on unpleaded matters.

It was further submitted that plaintiff made general remarks as far as illiteracy status of the people of Bokimonge ward is concerned.

It was Mr Odhiambo's contention that Regulation 72 of Election (General) Regulations Legal Notice 128 of 2012 cures the problem of illiterate voters who are to be assisted to vote for their preferred candidates and 1st and 2nd respondents' witnesses testified to that effect.

It was further argued that allegations that missing photo made voters vote for any other candidate other than the petitioner was speculative and without any evidence to support the allegation.

In reference to the authority of *Joho Vs. Nyange*, Mr Odhiambo emphasised the holding that 'generalised allegations are not the kind of evidence required in such proceedings and election petitions should be proved by cogent and credible evidence.'

It was argued that the burden of proof in election petition lies with the petitioner who seeks election to be nullified.

Mr Nyagaka advocate for the 3rd respondent decried the manner in which petitioner handled the petition casually. He argued that the 3rd respondent was slapped with an order to pay costs as a result of the petitioner's conduct in filing notice of withdrawal and later on changing his mind. Mr Nyagaka further said petitioner's evidence was never corroborated by PW2 and PW3 who never voted for him and who were not agents of party which nominated him i.e. FORD PEOPLE.

The issue of registered voters and votes cast was said not to be part of pleadings and could not be regarded in consideration of whether elections should be nullified or not.

Mr Nyagaka further argued that the authority of Philip Osore Oguttu relied upon by petitioner's advocate favours their case that election cannot be nullified because of the wide margin between votes garnered by petitioner and 3rd respondent.

Mr Nyagaka urged that pursuant to Section 84 of the Elections Act the 3rd respondent should be declared to have been properly elected by the people of Bokimonge ward.

From the evidence adduced in support of the petitioner's petition and from the defence made by respondents' witnesses as well as the authorities referred to, the issues for this court's determination are as follows:-

1. Whether the petitioner's photos were mixed up with photos of other candidates at Bokimonge ward.
2. Whether the missing photo and/or mix-up resulted in confusion of voters, some of whom are alleged to have voted for other candidates and/or walked out of the polling stations in protest.
3. Whether the alleged mix-up and/or missing photo favoured the 3rd respondent in winning the election as Bokimonge Ward County Assembly Representative.
4. Whether the level of illiteracy at Bokimonge ward is such that the missing photo of the petitioner in some ballot papers led to confusion that disfranchised the alleged illiterate voters and made them to vote for candidates who were not their preferred candidates or even made them to walk away from the polling stations without voting.
5. Whether in consideration of all the issues raised by the petitioner in their entirety has proved to the required standards that the election of Bokimonge Ward County Assembly Representative should be nullified.

The petitioner herein vied and/or contested as County Assembly Representative of Bokimonge ward, Bomachoge Borabu Constituency in Kisii County in which general elections were held on the 4th day of March 2013.

In his evidence in chief the petitioner said he cast his vote at Enderet Primary School Polling station on the material day and later he received a phone call from some of his supporters telling him his photo was missing from ballot papers in some of the polling stations. He went to Tongeri Primary School and

confirmed his photo was missing and he spoke to the presiding officer who called the 2nd respondent - Returning Officer who declined to stop the exercise but promised he would sort out the issue.

He said he visited 7 polling stations where his photos were missing as shown in supporting affidavit.

The petitioner voted without any hitches at Enderet primary school polling station. His photo, names and party symbol were intact in their respective places in the ballot papers. The petitioner does not give the names of his supporters who called to indicate that his photo was missing in the ballot papers and therefore they either voted for another candidate or even walked away in protest after finding they could not vote for their preferred candidate.

There are two people who swore affidavits in support of petitioner's petition namely Paul Ombura Asiago who in the affidavit sworn on 4th April 2013 deponed at paragraph 3 that he went to cast his vote at Kerongori Primary School polling station but found names of petitioner herein had a different photo and as a result he didn't vote as he was confused. As much as an affidavit is evidence, this deponent didn't present himself for cross examination and verification of the averments he made in the affidavit in support of the petitioner's petition. This evidence therefore bears very little weight for the court to rely on it to find that the missing photo made him not to vote because from affidavit it can be discerned he even knew how to read and could read that the photo against the petitioner's name didn't belong to the petitioner.

There was also the supporting affidavit of Mauti Wycliffe Gwaro who deponed at paragraphs 3, 4 and 5 of the affidavit sworn on 4th April 2013 as follows:-

4. "That on the 4th day of March 2013 I was at Kenya polling station where I had gone to vote for my favourite aspirants in various elective positions. While I wanted to vote for my choice of County Representative I found that the names of David Nyabuto Ombui had a different photo against the name which person I didn't know."

4 "THAT I personally took the initiative and asked the presiding officer - 2nd respondent the reason for the missing photo of the petitioner but he could not help as the photo was substituted by that of another aspirant David Nyabuto Machoka."

5. "THAT this caused me confusion and did not vote for my favourite candidate who is David Nyabuto Ombui."

Again this particular witness for unexplained reasons didn't avail himself for cross examination to verify the allegations deponed in the affidavit and particularly allegation that he spoke to the 2nd respondent who was unable to sort out the issue of the missing photograph. This witness too is literate going by the fact that he was able to read the petitioner's name in the ballot paper and even the name of the other aspirant David Nyabuto Machoka whose photograph appeared against the petitioner's names.

The unverified evidence of this particular witness is challenged by the unshaken evidence of the 3 presiding officers who were manning the 3 streams at Kenya Primary School polling station who acknowledge that at 11.00 a.m. RW3 got information from the petitioner at stream II that ballot papers were not having his photo and instead had the photos of one David Nyabuto Machoka who was also an aspirant. RW3 said he consulted the returning officer – RW1 who advised that he should check with the other 2 streams within the polling stations and as confirmed by RW4 and RW6 who had extra ballot booklets was able to give RW3 2 booklets to use in stream II and the exercise proceeded on well after the anomaly was corrected.

RW6 said that there was no complaint in stream III at Kenya primary school polling station. RW4 said that there was only one booklet with anomaly and on advice of the returning officer – 2nd respondent – RW1 herein he looked for and found properly printed ballot booklets and the exercise continued well. Wycliffe Mauti Gwaro, the deponent of affidavit in support of petition didn't say which among the three

streams at Kenyeny polling station he went to vote.

The evidence of these 2 witnesses as said earlier has been challenged by the evidence of respondents' witnesses who admitted the challenge of petitioner's missing photo in some and not all ballot booklets and they explained how they dealt with the challenge to ensure that the petitioner competed with other candidates on a level playground. If these two witnesses are the voters that the petitioner wished to rely upon to seek that the election be nullified for reasons his missing photo confused them and they were frustrated because they were illiterate and could not tell whom to vote for in absence of photo, then I do dare say that that is not true because the 2 witnesses knew how to read and write and only 2 voters out of a total of 10,627 voters cannot be a basis to nullify an election. This is a negligible figure as compared to the votes garnered by the 3rd respondent.

The petitioner's witnesses PW2 and PW3 Julius Otara Onyanha and Joel Okenye Okemwa were agents of ODM and KNC parties at Kanyenya and Tongeri polling stations respectively. None of them identifies the voters from whom they received information that petitioner's photos were missing from ballot papers and as much as it is confirmed by RW7, presiding officer at Tongeri polling station that there was photo of one candidate appearing twice on ballot papers, he was able to check other ballot booklets and found others that were properly printed and the voting exercise continued. RW7 said that if is Ford People party agent who raised the complaint and after it was resolved they continued with the voting exercise. This renders evidence of Joel Okenye Okemwa as hearsay because he doesn't say that he himself saw the photo was missing and doesn't give names of voters who found photo missing.

At Kenyanya primary school, presiding officers at the three streams testified on how the issue of missing photo was sorted out. The RW3 who was presiding over stream II at Kenyeny primary school polling station was able to get properly printed ballot booklets from RW6 who had extra booklets and the exercise continued smoothly. PW2, Julius Otara Onyanha didn't also specify which of the voters complained and why as agents they were not able to assist the alleged voters to vote for their preferred candidate despite the missing photos using the names of the candidates pursuant to Regulations 72 of Elections (General) Regulations of 2012.

From the above analysis of petitioner's witnesses evidence and evidence of respondents' witnesses, it is clear that there was no mix-up in photos but rather photo of one aspirant whose name was nearly similar to that of the petitioner appeared twice on some ballot papers.

It is also clear from evidence of respondents' witnesses particularly RW3, RW4, RW6 and RW7 that, the anomaly of the missing photo in some polling stations and in some booklets was rectified and therefore didn't cause any confusion and/or frustration to the petitioner's supporters. None of the supporters came to testify on allegations of being confused and frustrated when they went to vote for the petitioner.

It is also apparent that petitioner did not prove allegations of illiteracy levels of his supporters whom he alleged got confused and failed to vote as a result of the missing photo. As said earlier, the 2 deponents of affidavits in support of petition who deponed to be voters were in my view literate and were able to read petitioner's name and identify that photo against petitioner's name was that of his opponent namely David Nyabuto Machoka.

PW2, agent of ODM at Kenyeny primary school said he is a trained teacher. PW3 said he was KNC agent at Tongeri primary school polling station. He said he is a farmer and didn't say he was illiterate and this can be seen from the affidavit he swore on 4th April 2013 by signing in his own hand.

As held in Election Petition No. 5 of 2013 Raila Odinga Vs. IEBC and 3 others, a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden.

It is my view that petitioner has not proved this allegation even to the mere standard of balance of probability. He left it to the respondents to prove there were very few illiteracy cases which were handled as provided for by Regulation 72 of Elections (General) Regulations of 2012.

There was also the issue that the cast votes at Tongeri primary school polling station exceeded the registered voters. Tongeri primary school was centre code No. 037. The petitioner in his application for a recount and/or scrutiny alleged that there were more votes cast than registered voters and this was proof of flawed election conducted at Bokimonge ward.

It is true that from the form 35 and 36 delivered to court by 1st respondent the votes cast at Tongeri primary school polling station totalled to 341 against the registered voters in that station numbering 261.

It was upon that realisation that the petitioner herein applied for audit of votes cast at Tongeri primary school polling station by his Notice of Motion Application dated 30th May 2013. In its ruling delivered on 20th June 2013, this court declined to grant that prayer for reasons that it was not part of the pleadings in the petition and leave had not been sought by petitioner to amend the petition and therefore the prayer could not be sneaked into the pleading in the manner that the petitioner had shown he intended to do.

This court in following the decision by Hon. Justice Bosire in Nairobi High Court C.C No. 659 of 1996 decided then and does decide now that unless pleadings are amended by leave of the court or parties agree on the unpleaded issues to be the subject matter of a decision, the parties are bound by and must be confined to their pleadings.

Objections were also raised by 1st and 2nd respondents' advocate when petitioner's advocate raised this issue of registered voters versus cast votes at Tongeri primary school polling station in cross examination of RW1 – 2nd respondent and RW7 and the objection was upheld for reasons that the respondents were prepared in relation to prayers in the petition and were therefore being ambushed by petitioner's advocate when the issue of Tongeri primary school polling station centre code 037 is raised from time to time when not pleaded.

The issue should not have been revisited in submissions by advocates for parties because in my view it was spent.

In any event form 36 forwarded to this court by 1st respondent's advocates vide a letter dated 18th March 2013 and received on 22nd April 2013, Tongeri polling station had 261 registered voters, 229 cast votes; 6 rejected votes and 223 valid votes. Out of the valid votes the 3rd respondent garnered only 6 votes out of the votes alleged to have been excess of registered voters. There is no way that 3rd respondent could have benefited from the mistake in totalling the votes cast at Tongeri polling station. It is the petitioner and his co-aspirant David Nyabuto Machoka who from form 36 are shown as having garnered 137 votes each from this particular polling station.

The upshot of the analysis given above is that the petitioner failed to give substantive evidence to justify his claims that the election exercise conducted on 4th March 2013 was flawed.

The evidence tendered by the petitioner herein did not warrant the nullification of the election of 3rd respondent as County Assembly Representative of Bokimonge Ward in Bomachoge Borabu Constituency considering the margin of votes between the petitioner i.e. 442 and 3rd respondent's votes which stood at 2,229 votes. This margin is clear evidence that 3rd respondent was validly elected and won the elections.

The claim of petitioner's missing photos in some ballot booklets and some polling stations within Bokimonge ward was an anomaly that was taken up immediately and corrected as shown by evidence of respondents witness nos. 3, 4, 6 and 7 and no supporter of the petitioner testified of confusion occasioned by the anomaly.

No evidence was adduced by petitioner to the effect missing photos was deliberate to aid the 3rd respondent in winning.

I do find that the elections conducted on 4th of March 2013 for Bokimonge ward were proper and regular

in the circumstances and the petition herein is dismissed with costs to the respondents. The costs shall be equivalent to security deposited by the petitioner to be shared equally among the respondents herein.

A certificate shall issue under and in accordance with section 86(1) of the Elections Act 2011. Order Accordingly.

A.C.A Ong'injo C.M.

30.7.2013

Before Adwera-Ong'injo CM

Mr Bosire Gichana Advocate holding brief for Ondieki for petitioner

Mr Odhiambo Advocate for 1st and 2nd respondents

Mr Nyagaka Advocate for 3rd respondent

Court: - Judgement delivered, dated and signed in court in presence of above parties.

A.C.A Ong'injo C.M. 30.7.2013

Mr Bosire Advocate

I wish to apply for typed proceedings and certified copies of judgement in order to prefer appeal.

I also seek leave to appeal against decision.

Order: - Leave to appeal granted to petitioner.

Copies of proceedings and certified copies of judgement to be supplied to parties upon payment of copying charges.

A.C.A Ong'injo C.M. 30.7.2013

