



## REPUBLIC OF KENYA

### IN THE PRINCIPAL MAGISTRATE'S COURT AT KAPENGURIA

#### Election Petition No. 1 Of 2013

- **Emmanuel Katina Michael**
- **Immanuel Chedotum**
- **Edward Lutial**

VS

- **IEBC**
- **Paul Chemutut**
- **James Limanyang**

#### JUDGEMENT

The petitioners in this case moved the court challenging the Mnagei Elections of 4/03/2013.

After IEBC admitted that there was a mix up of photo; an order of scrutiny and recounting flopped, so the court was left with eight (8) prayers which were;

- A declaration that the 1st and 2nd respondents presided over a flawed and irregular election exercise at Mnagei ward on 4/03/2013.
- A declaration that the 1st and 2nd petitioners' rights as guaranteed under the constitution and applicable law were violated by the apparent confusion on their names, placing of passport size photographs in wrong ballot papers and or substitution of passport size photographs.
- A declaration that the elections of West Pokot County Assembly Mnagei ward seat was marred with illegalities,irregularities and procedural flaws so as to render the entire election of 4/03/2013 at Mnagei ward null and void.
- A declaration that the 3rd respondent was not validly elected as a member of county assembly from Mnagei ward.
- An order compelling the 1st respondent to conduct a fresh but proper, free and fair elections in Mnagei ward that shall be presided over by impartial and competent officials devoid of the incurable defects subject of this petition.
- An order that costs of this petition shall be borne by the respondents jointly and severally.
- Any other relief that this Honourable court may deem fit and just and appropriate to grant.

The 1st and the 2nd respondents opposed the petition same to the 3rd respondent as per their responses to an election petition and supporting affidavits praying that;

- The petition must fail.
- The third respondent was duly elected.
- The election was free, fair and credible.
- That the petition is vexatious, frivolous and indeed unfounded both in law and fact.
- That the petition be dismissed with costs.

*What came out during hearing in brief:-*

### **1st Petitioner**

He was among the ten (10) candidates vying for county representative; Mnagei ward seat under the URP party. In form 35, he was candidate number 4. On 4/03/2013, he missed his photo on the ballot paper that appeared on all the 25 polling stations. Instead of his photo, a member of parliament's photo was put against his name who is also in URP.

His home is Tartar. He had done massive campaign, had worked for the community so hard and was sure he would win; to improve the community. That over 70% of the people in Mnagei are illiterate and they needed assistance during voting. That one can be identified looking at photo.

He blamed IEBC for his loss in election. That if IEBC had put his photo he would have gathered more votes.

He wrote a complaint to IEBC Annexure "EKM 2a" complaining of missing photo but elections still went on. He got no redress.

### **2nd Petitioner**

He told court he was among the ten (10) candidates who vied for Mnagei ward seat as candidate number 5 in form 35. that when IEBC cleared him, his certificate read Immanuel Chedotum Chumba. His ID read Immanuel Chedotum. IEBC asked him to verify that the two names belonged to one person.

Indeed he swore to confirm the position showing court Annexure 1'c 1'b 1'c 1'a. He waited patiently for 4/03/2013 campaigning with his commonly known name Chumba under the RBK party.

Come 4/03/2013; the worst happened. In form 35 only 2 names featured Immanuel Chedotum. His commonly known name was absent in the ballot paper. Also worsening issues is that his identical brother's photo (who vied for a parliamentary seat in URP was accidentally put on candidate No: 4 who was on top of him)

That traditionally if two brother's photo appear in the same seat, both loose.

Voters asked for "Chumba" during voting and were told no one exists like that in form 35 so they voted for other candidates and he lost.

That candidate number 4 is Emmanuel, he is also Emmanuel so voters thought that candidate number 4 and number 5 are both Emmanuel, but because two brothers who resemble( were put on number 4 and number 5 photo) he lost as the voters wanted Chumba so the names confused voters.

That voters are illiterate and needed assistance during voting. It did not happen. He did an oral complaint to the IEBC but voting still went on.

That in form 36, the results for candidate number 5 is Emmanuel Chedotum Chumba. In the results but not during voting time.

He says that IEBC totally offended him. The irregularities, mix of photo, people seeing two faces for two brothers in the same ballot following each other as candidate No.4 and No.5 weakened his success; putting two Emmanuels following each other weakened his chances of winning. Inserting "Chumba" in form 36 and omitting it in form 35 for voting yet IEBC had cleared him with the three names contributed to his loss in the election and it was not fair or else he would have scored more.

1<sup>ST</sup> and 2<sup>ND</sup> respondents called the 2nd respondent as their witness and he told the court:-

- He was the returning officer for Kapenguria constituency. He oversaw the 14th of March 2013 elections at Kapenguria. He is properly versed with his mandate as a returning officer. The election to him went on well, was free and fair.
- That requirements needed for a candidate were, names, I.D, photo, party and certificates. He can act if all miss.
- He got complaints from Murkwijit and Tartar that first petitioner's photo was missing from the various presiding officers. Later he got feedback from mobile that a consensus between the agents had been reached and that elections went on.
- The ballot papers for all the 25 stations of Mnagei ward had similar problems. For Tartar and Murkwijit was sorted. He admitted that if a photo misses it is a serious anomaly. Though all the presiding officers signed. Form 35, some agents failed to sign form 35.
- It is not IEBC's duty to get agents but the party's. That no other station apart from Murkwijit and Tartar complained so there was no good reason to stop the 14th of March 2013 for Mnagei. To him the election was free and fair.
- That a voter uses party symbol, names of candidate, photo of identity whom to vote for. That absence of a photo cannot invalidate an election.
- Illiteracy in West Pokot is over 60% and those who needed help, were assisted. That election was free and fair.

### **3rd Respondent.**

He won the elections of 4th March 2013 for county representative of Mnagei Ward under KANU party as candidate no 7. He won the seat fairly and he prayed the petitioners claim to be struck off. That photo of the first petitioner missed and it was not fair.

He lives in Mnagei ward and he has three homes. He was born there and he expected to win. That Mnagei ward has illiterate people. According to Mnagei, it is one's popularity, work done, that causes people to vote for a candidate.

### **SUBMISSIONS**

Petitioners asked the court to find if:-

- Whether there were errors and irregularities in Mnagei ward elections.
- Agents got consulted on the issue of mix up of photos and name. That consensus was got from people who were not directly affected. None of the candidates got consulted to arrive at the consensus. The consensus was not produced in court, yet errors were the same in all the stations at Mnagei ward. All this is a malpractice that goes to the root of the election. Malpractice is fatal.

### **IS IT TRUE?**

- No oath of secrecy was tendered to confirm that any voter was assisted. Those who needed help were left at the mercy of the agents who took advantage of them and voted unfairly.

### **IS THAT FAIR ELECTION?**

- Agents did not sign form 35 and form 36. Those omissions are fatal. Respondents used form 35 and 36 to challenge petition. The same is flawed. There was no free will. It is upon IEBC to confirm that they did a proper election.
- They were not in possession of form 35 and 36 when coming to court till IEBC supplied the form. So how could they know a witness result?
- The question of petition competency was never raised before.
- Illiterate voters constituted 70% and a photo should be present to assist.
- Petitioners pray for free, fair, election for decision to proceed with election was never communicated to the voters so they were affected.
- That in totaling at the stated errors, IEBC was incompetent, irresponsible, the election exercise

was flawed, it was not free and fair, the errors were so grave that they went to the root of the results causing petitioners to miss a chance to be elected freely and fairly.

That this petition be allowed with costs to the petitioners.

### **1st and 2nd Respondents Submissions By Mr. Akenga, Advocate:**

That petition ought to fail. The will of the people must prevail.

Petitioners did not indicate results gathered by each candidate yet it is a mandatory requirement so they failed to comply with the law and without results the petition is a nullity.

The issue of the photo was admitted by the 1st and the 2nd respondents thus made the court to do away with scrutiny and recount.

The court should look at whether the photo of the 1st petitioner missing, 2nd petitioner's brother's photo appearing against first petitioner's name affected or went to the root of the election. It did not affect the outcome.

That affidavit was not meant to introduce a new name on the I.D card.

That the threshold of affected election was the one beyond balance of probabilities and moving towards beyond no room for doubt. Petitioners have not demonstrated such evidence.

That the issue of agents not signing form 35 and 36 was raised during the hearing. So it was not in order at this stage to call anyone to sign any affidavits more so agents were absent thus did not sign. Some left early, some did not give reason for not signing. In total absence of agents shall not invalidate the proceedings.

The failure to sign form 35 and 36 did not affect the outcome.

That second petitioner did not bring any photo to show that the brother was his or any document be it a birth certificate or anything that shows that they are identical and it indeed confused the voters.

That the people of Mnagei did exercise their will freely to vote, the election was free, fair and this petition be dismissed with costs to the respondents.

### **3rd Respondents Submissions By Mr. Kidiavai Advocate:**

That the petition be dismissed with costs for want of merit.

For lack of photo, burden rests with the petitioners it did not affect the outcome.

No witness came to court to say he did not vote due to lack of photo. Same to agents.

He associated himself to submission of the 1st and 2nd respondents praying that this petition be dismissed with costs, the will of the people should be respected and preserved.

### **ISSUES BEFORE THE COURT:**

- Were the elections free, fair, credible?
- Did IEBC, returning officer preside over flawed and irregular election exercise?
- Was 1st and 2nd petitioner's right as guaranteed under the constitution infringed?
- Was the Mnagei election marred with irregularities, illegalities thus null and void?
- Was 3rd respondents validly elected?
- Is there need for fresh but proper, free and fair elections?

- Must this petition fail?

## **COURT'S FINDING.**

I consider the entire evidence on record and all provisions of the law.

Article 81 of the constitution of Kenya provides for general principle for the electoral system (e): states that free and fair elections connotes transparent, administration of election in an impartial, neutral, efficient, accurate and accountable manner.

There was a reason as to why photo, name, party colour, party symbol was required in a ballot paper. To enable a voter identify a candidate. Especially to regions where voters are illiterate. It came out during hearing over 60% of voters are in West Pokot are illiterate and they needed assistance for the will of the people to be respected.

In any exam, all environment must be same for all, for a winner to emerge. In Mnagei we had 10 candidates, one did not have his photo on the ballot paper, another, the ballot paper had two names, form 35 had two names yet in form 36 same candidate appears to have three names. Is that candidate getting fairness yet his commonly known name missed in the ballot paper?

If IEBC before clearing him that is candidate n;5 demanded an affidavit to confirm he had three names on his certificate yet two names on his identity card.

Why did IEBC put two names on form 35 against candidate no. 5 then put 3 names against him in form 36, who will confirm to the voters that the person they voted for in form 35 under candidate no. 5 is the same one in form 36 under 3 names. Who will swear that affidavit?

Does it mean going by form 35, it had 2 names, we expect 2 names in form 36?

Does it mean candidate No. 5 does not know his result yet?

How can they then without results furnish court with results when filling the petition? Is this fairness on all the candidates?

### ***The court finds that it is not fairness.***

For fairness to be seen, to be done, subject all candidates to equal treatment, equal condition then let a winner emerge. It is recommended in future, before election date, let there be a provision for all the candidates to verify all the details on the ballot paper before election day to avoid errors of missing names, missing photos, conflict of form 35 and 36.

I therefore hold that the petitioners established that indeed the lack of neutrality to all the 10 candidates, lack of impartiality by IEBC & returning officers to set a room that was equal for all the ten candidates as to local arrangements reached at by consensus at Tartar and Murkwijit between them and agents that elections to go on. The 1st and 2nd respondents did not address the other 23 stations in Mnagei ward bearing in mind all had same ballot papers that had mistake.

To the Court this omissions are glaring not accurate and show no accountability as is required to connote fairness to all the ten candidates. It was thus an irregular act and contrary to the law. Thus rights of 1st and 2nd petitioners of free and fair election as guaranteed in the constitution got infringed.

It came out during hearing that over 60% of voters are illiterate. This percentage is beyond half of 100%. It is high. I wish to rely on the decision of **Mahamud Muhumed Sirat v Ali Hassan Abdirahman and two others** petition case No. 15 of 2008 where it was held and I quote at page 32 that;

***“To assist illiterate voters an oath of secrecy must be administered..... it appeared to the***

***court that the said presiding officers, deputy presiding officers and polling clerks were overwhelmed by the numbers of illiterate voters who presented themselves to the said polling stations that they allowed agents of the candidates to have free reign....”***

During hearing it came out that voters asked for “Chumba”. He was not in form 35 but 36. Some looked for Katina's photo, it was not there and that illiteracy is high, the presiding officers only solved issues on Tartar and Murkwijit , what of the other 23 stations that had similar problems on the ballot? It is silent. Who knows how voting went on there?

Having evaluated the facts of this petition, it is evident that the petitioners established serious breaches of the law by the electoral body which allowed illiterate voters to be assisted without swearing oath of secrecy. The court therefore holds that the petitioners has established this grounds of election were not free, fair, credible, that IEBC and returning officer presided over flawed and irregular election exercise, 1st and 2nd petitioner's rights as guaranteed under the constitution was infringed, the Mnagei election was marred with irregularities to the required standard of proof as pleaded in their petition.

Thus the failure by the Electoral officers to allow the illiterate voters to express their wish in as secret ballot meant that the said electoral officials breached the law.

Respondents submitted that this petition must fail. No results of the election were attached to this petition as per the finding in **Amina Hassan Ahmed v Returning officer Mander County and 2 others 2013 eKLR at page 4.**

Looking at the present petition; at the time the petition was filed, forms 35 and 36 were in custody of 1<sup>st</sup> and 2<sup>nd</sup> respondents and to beat the 28 day rule within which parties are to move to court after results are declared, it will be difficult for all petitioners to have all their evidences ready.

More so courts are supposed to look at substantive justice and merit of cases not technically of procedures as per article 159:2:d of Kenyan constitution.

The court finds that form 35 had 2 names for candidate no. 5 , same candidate in form 36 has 3 names (that is 2nd petitioner).

Does it mean candidate No.5 up to now does not have results? **Yes.**

If yes, how could he be expected to furnish court with results at the time of filling this petition?

The same is found to be moving towards a technicality and avoiding a substantive part of a case.

Article 82:d and 86:a of the Kenyan Constitution provide that the conduct of elections and voting in whatever method that is used, the system is simple, accurate, verifiable, secure, accountable and transparent.

Now respondents submit that the elections were free, fair, credible how? When over 60% are illiterate and needed assistance yet no oath of secrecy was furnished to court, it was accurate how? If all ballot stations yet all had problems and only in Tartar & Murkwijit a consensus got reached is that accurate, verifiable, accountable and transparent election? **NO.** There was nothing done to reach a consensus in the other 23 stations to make everything transparent. No candidates were called or informed of those developments, so it was an element of unfair on the part of IEBC.

Respondents submit that the true and wish of voters must be respected and promoted true, only if election is free and fair . But where it is established that a candidate missed his photo to identify him, another one missed a name, a Mal practice is glaring that the outcome of the results does not express the true will of the people. Then the court have no choice but to do the otherwise as was held in the case of **Supreme**

**Court of India A2 har Hussain vs Rajiv Gandhi on 25.4.1986 and I quote at page 7.**

***“... The courts will step in to protect and safeguard the purity elections for if corrupt practices have influenced the results or the electorate has been a victim, fraud or deception or compulsion on any essential matter, the will of the people as recorded their votes is not he 'free' and 'true' will exercised intelligently by deliberate choice.....”***

The respondents too submitted that the burden of proof threshold was not met; which is above civil cases standard learning towards the standards required in criminal matters as was propounded in the Ugandan case of **Col (RTD) Dr. Besigye Kizza vs Museveni Yoweri Kaguta, electrol commision.**

The same standard was re-echoed in the Kenya Presidential petition case of **Raila Odinga Vs IEBC and The Others Where The Court Unanimously Held Inter Alia That:-**

***“.....The threshold of proof should be above the balance of probability .....*”**

In the Canadian case, **Opitz v Wrzesnew sky J 2012 SCC 55-2012-10-256** the majority opinion stated

***“ .....An applicant who seeks to annul an election bears the legal burden of proof throughout.....”***

Similarly such a line of judicial thinking ia also found in the Nigerian case, **Bahari v Obasanjo (2005) CLR 7K**, in which the supreme court stated;

***“.....The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result ..... there must a clear evidence of non-compliance, then, that the non-compliance has substantially affected the election”.***

Further at page 72 of the same court found it that “IEBC is a constitutional entity entrusted with specified applications to organize, manage and conduct elections, designed to give fulfillment to the peoples' political rights (chapter seven of Kenyan constitution)..... while it is conceivable that the law of elections can be infringed especially, through incompetence, malpractices or fraud attributable to the responsible agency, it behaves the person who thus alleges, to produce the necessary evidence in the first place and thereafter, the evidential burden shifts, and keeps shifting.

From the evidence that was tendered during hearing; both parties demonstrated the evidentiary burden of: petitioners presenting evidence to call for fresh election while respondents apposing and I find the burden kept shifting. The bottom line is that the court finds petitioners have demonstrated a ground to call for free and fair elections in Mnagei ward.

The respondents submitted that failure by agents to sign or be present is not fatal enough to annul elections as per rules 79 of elections regulation 2012.

Regulation 85(1) (e) of the elections (general) Regulations, 2012 allows political party agents to be present at the tallying centre.

It came out during hearing and looking at form 35 and 36; agents did not sign. Regulation 79:2:5 stipulates that of election (general) Regulations 2012, the presiding officer shall record the absence of any agent, if agents do not sign, refusal is recorded same was not done in all the 25 stations of Mnagei ward.

Some form 35 are not signed and no reason are captured. This connotes an irregularity on the part of presiding officers to promote transparency, free and fair election.

The same was emphasized in the 3rd last page of Swazi case that is **Khumalo vs Thwala and others/ Swaziland legal Information Institute** and I quote it is similar to the findings in. In **De Villiers Vs Louw 1931 AD at page 264 curlewis, J**, stated;

***“...The court may not declare an election void except in the extent it is clear that what should influence the court in reaching such a decision is that it is proved that the constituency did not in fact have a fair and full opportunity of electing the candidate they might have preferred.....”***

Following what I have stated above, is that if election is not fair for all, then nothing stops the court from stating so as argued earlier.

The respondents wish to say the “Chumba” name was not in the petition; it should be disregarded. It is an after thought.

I find that IEBC and Returning officer relied on form 35 and 36. Form 35 omits “Chumba” name while form 36 has it, so if respondents in their evidence that is challenging petition have heavily relied on form 35 and 36 so should the court. The court was drawn to look at form 35 and 36 heavily during hearing. It came to court's attention that “Chumba” candidate No. 5; who is 2nd petitioner features in form 36.

1st and 2nd respondents relied on form 36 to confirm results outcome were free and fair so is the court.

It is out of form 36 and 35 especially for 2nd petitioner that “Chumba” name again surfaces or else what answer will IEBC give for putting Chumba on form 36 expecting the court to believe it is the true result for candidate No. 5 in form 35.

There is more than meets the eye from the form 35 and 36 especially as regards candidate No. 5 who is 2nd petitioner and the “Chumba” name that the court can not just disregard lightly.

The upshot then is that with such Mal-practice, the petition must not fail, the 3rd respondent was not validly elected and there is need to order for fresh but proper, free and fair elections.

In the present petition it is clear that the electoral malpractices and breaches of the law which the petitioners have established are of such fundamental nature that they bring into question the credibility of the entire county ward Mnagei elections that was conducted in Kapenguria constituency in the 4/03/2013 general elections.

The irregularities and electoral malpractices established by the petitioners, taken in totality, are of such magnitude that this court cannot reach a determination that the said elections were transparent, free and fair.

The voters of Mnagei ward, the majority of who are illiterate were not given the opportunity by IEBC to exercise their free will in electing a county ward representative for Mnagei of their choice.

The electoral officials in the Mnagei ward failed to promote an environment that is equal, free and uniform for the ten candidates making some to be unfortunate yet declaring a winner, tackling problems in two stations out of 25 stations yet all stations had similar problems on the ballot paper, reaching a local arrangement, consensus with agents and not informing the candidates. As such the said election officials abdicated their responsibility of ensuring that the electorate of Mnagei ward elected their county ward representative in the manner prescribed by the law.

On the issue of costs, each party shall bear its own costs, for this petition. 3rd respondent was an innocent beneficiary of a flawed process, IEBC claims ballot papers were printed outside Kenya but did nothing to publicize their local consensus to all voters as reached in Tartar and Murkwijit so there is need to redo the elections as the petition is hereby allowed.

Before concluding this judgment, I wish to thank counsel for the parties who appeared before this court during the entire hearing of the petition. All the counsel on record acquainted themselves well through their industry in research and conduct during trial.

This judgment is a reflection of their joint output. Of course this court takes ownership of any inadvertent mistake; either in law and in fact.

In conclusion, taking into consideration all the anomalies, irregularities and electoral malpractices, including clear and blatant non compliance with mandatory requirements of the law by the presiding officers in the mentioned Mnagei ward and by second respondent, this court finds that the election conducted in Mnagei ward in 4/03/2013 was not transparent, free and fair.

This court therefore pronounces and declares the said elections and the results thereto to be null and void.

The 3rd respondent was not validly elected as a representative for Mnagei ward. A certificate to the effect shall be issued forthwith and shall be served upon the speaker of the senate, National Assembly and West Pokot County Assembly in accordance with section 86(1) of the election Act.

The 1st respondent shall proceed to conduct a fresh, free, fair and credible elections as required under the law. Each party to bear their own costs.

**R.M WASHIKA.**

**Ag. P.M**

**11/7/2013**

Court: judgment signed, dated, delivered in open court in the presence of petitioners and respondents, advocate Mr. Akenga for 1st and 2nd respondents, advocate Mr. Bundi for petitioners and advocate Mr. Kidiavai for 3rd respondent. Court clerk is Susan in Swahili language that each person understands.

**R.M WASHIKA.**

**Ag. P.M**

**11/7/2013**

**COURT:** Right of Appeal explained to all the parties in Swahili language.

**R.M WASHIKA.**

**Ag. P.M**

**11/7/2013**

**MR. KIDIAVAI ADVOCATE:** I pray for stay of execution

**MR. AKENGA ADVOCATE:** I pray for stay of execution and certified copies of proceedings and judgment

**COURT:** Stay of execution granted for 30 days .

Parties to get certified copies of proceedings and the certificate

**R.M WASHIKA.**

**Ag. P.M**

**11/7/2013**