



**REPUBLIC OF KENYA**

**IN THE MAGISTRATES COURT OF KENYA AT HOMA  
BAY ELECTION PETITION 2 OF 2013**

FREDRICK OTIENO  
NYAGOWA

PETITIONER

AND

ISAIAH OYOO OPAP..... 1ST RESPONDENT

THE RETURNING OFFICER

FOR KASIPUL CONSITUENCY..... 2ND RESPONDENT

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION..... 3RD  
RESPONDENT

**JUDGMENT**

1. The Petitioner FREDRICK OTIENO was a candidate in the 4th March 2013 General Election in which he contested the seat of County Representative of West Kamagak ward in which the 1<sup>st</sup> Respondent ISAIAH OYOO OPAP was declared the winner having garnered 3184 votes against the Petitioner's 2960.
2. The Petitioner being aggrieved filed this petition on 27 April 2013 in which he sought the following reliefs;
  - a) An order of scrutiny and a recount of all the ballot papers cast with respect to all the candidates participating at the election of County Assembly Representative for West Kamagak ward.
  - b) An order declaring the Petitioner duly elected County Assembly Representative for West Kamagak ward should the results of the recount prove the Petitioner had led in the elections with valid votes cast.
  - c) Costs of the petition be met by the Respondents.
3. All the parties were served and the 2nd Respondent and 3rd Respondent filed joint response however and strangely enough the 1<sup>st</sup> Respondent did not file any Response nor did he appear.
4. The petition was premised on the following complaints;
  - a) The 2nd and 3rd Respondents allowed their agents employees and/or servants to

falsify records of the results of the votes cast.

b) The tallying of votes for the Petitioner and the I<sup>st</sup> Respondent were deliberately meddled by the 2nd and 3rd Respondents presiding officers and clerks so as to give the I<sup>st</sup> Respondent a lead over the Petitioner.

c) The Petitioner's agent was not allowed to scrutinize the ballots with respect to the 1<sup>st</sup> Respondent's.

d) The Petitioner's agent were never allowed by the employees of the 2nd and 3<sup>rd</sup> Respondent to sign the election results tallying sheets (Form 35).

5. The Petitioner filed his supporting affidavits alongside his witness affidavit one Phosdick Felix Omondi who was his agent at Obisa Primary School which was a polling station in the ward.

6. The 2nd Respondent who was the returning officer for Kasipul Constituency filed along the 2nd and 3rd Respondents' response his witness affidavit. The 2nd Respondent and 3<sup>rd</sup> Respondent filed the Form 35 for both streams at Obisa Primary School.

## **THE EVIDENCE**

7. The Petitioner in his affidavit evidence and in cross-examination and re-exam told the court that the results especially from stream 1 and stream 2 at Obisa Primary School polling station were doctored by the 2nd and 3rd Respondent to give the I<sup>st</sup> Respondent an advantage over him.

8. The Petitioner further alleges that the entries made in form 35 were falsified and that his agents were sent away and not allowed to participate in the scrutiny, tallying and counting of ballots cast in his favor.

9. On cross-examination the Petitioner states his agent was supposed to sign form 35 and that the Form 35 for stream 1 at Obisa Primary School showed that the total number of votes cast were 408 but on totaling the number for each candidate the total comes to 407 leaving one vote unaccounted for.

10. He also states that in stream 1 at Obisa Primary School the total votes were reflected to be 415 but when the total votes of all candidates are added the total comes to 414 also leaving one vote unaccounted for.

11. One Phosdick Felix Omondi (Pw2) was the agent of the Petitioner at Obisa Primary School and states that the scrutiny, tallying and counting of votes was riddled with secrecy, unnecessary strictness and was not allowed to verify the particulars of the person whom a vote had been cast.

12. He further states that he did not sign the form 35 and votes did not tally with individual vote casted.

13. On cross examination the witness says that during counting he was not allowed to make any verification. He further says that he got form 35 at the door.

14. Upon re-examination Pw2 says that he noticed to anomalie in form 35 that the figures were not tallying.

15. The 2nd Respondent who was Returning Officer says that there was no complaint received

from the Petitioner but during the tallying he directed the Presiding Officer from Obisa Primary School to re-tally the results and corrected the anomalies.

16. During the hearing of this petition I declined the evidence of some of the witnesses from both sides because their affidavits were filed out of time.

17. The matter then proceeded for recounting and scrutiny and re-tallying in which the Petitioners votes remained the same but the results especially of stream 2 changed for the other 2 candidates.

18. The results presented to this court were as follows;

**A- RESULTS RELEASED FOR OBISA PRIMARY SCHOOL**

NAME	STREAM 1	STREAM 2	TOTAL
FREDRICK OTIENO NY AGOWA	73	79	152
ISAIAH OYOO OPAP	224	196	420
JOASH ONYANGO AROGO	117	132	249

**B- RESULTS RELEASED AT CONSTITUENCY TALLYONG CENTRE**

NAME	STREAM 1 STREAM 2	STREAM 2 STREAM 2	TOTAL
FREDRICK OTIENO NYAGOWA	73	79	152
ISAIAH OYOO OP AP	224	196	420
JOASH ONY ANGO AROGO	117	133	250

**C- RESULTS IN COURT**

NAME	STREAM 1	STREAM 2	TOTAL
FREDRICK OTIENO NYAGOWA	73	79	152
ISAIAH OYOO OP AP	224	195	419
JOASH ONY ANGO AROGO	116	134	250

19. When this court convened Pretrial conference the following issues were framed which now fall for my determination.

- a) Whether the election of the 1<sup>st</sup> Respondent was valid, free and fair.
- b) Whether there were any irregularities and malpractices as alleged by the Petitioner.
- c) Whether if such irregularities were detected could affect the result or final outcome of the election.
- d) Whether the election in West Kamagak on 4/3/2013 met the requirements of election Act No. 24 of 2011.

20. After considering the evidence in this matter I would like to consider and consolidate the issues into 3.

- i. Whether the election of the 1st Respondent was free and fair.
- ii. Whether the irregularities detected affected the outcome of the results.
- iii. Who should pay costs of the petition.

#### **WHETHER THE ELECTION WAS FREE AND FAIR.**

21. The Petitioner in his evidence and that of his witness alleged that the counting, scrutiny and tallying of votes at Obisa polling station was doctored, falsified and riddled with secrecy, unnecessary strictness and the witness was not allowed to verify the votes.

22. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent alleged that the election went on well and that the Petitioner never reported any incident to the returning officer.

23. The Petitioner in his evidence confirms that the voting process went on smoothly though the Pw2 talked of being prevented from seeing how the aged were voting but this was not reflected in his affidavit and so this court will consider them as an after thought.

24. The Regulations under the Election Act No.24 of 2011 under Rule 76(1)

provides;

***'76(1) The presiding officer shall in the presence of the candidate or agents;***

- a) ***Open each ballot box and empty its content onto the counting table or any other facility provided for the purpose and shall cause to be recounted the votes received by each candidate. And***
- b) ***Record the total number of votes cast in favor of each candidate. (2)***

***Each ballot paper shall be counted as follows;***

- a) ***The presiding officer shall in respect of every ballot paper announce the candidate in whose favor the vote was cast.***
- b) ***Display to the candidate or agents the ballot paper sufficiently for them to ascertain the vote; and***
- c) ***Put the ballot paper at the place on the counting table, or other facility provided***

***for this purpose, set for the candidate in whose favor it was cast.'***

25. In Pw2 evidence he purported to imply that the above provisions were not complied by the presiding officer at Obisa polling station.

26. The court then wishes to address itself whether the election was conducted in a free and fair atmosphere.

27. Ugandan Supreme court in the case of Rtd co. **Dr. Kizza Besigye versus**

**Electoral commission & another (Election petition no 1 of 2006) stated;**

***'To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a levelling of ground so that the incumbents or Government***

***ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcing of the results in a timely manner. Election laws and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of Electoral process.***

***Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral commission must consider and determine election disputes speedily and fairly.'***

28. Fairness and transparency is quite important in any election process such that from the very beginning from registration of voters to publishing of results the process must be open and fair to each voter and candidate.

29. From the supreme court of Uganda case of Besigye the court had this to say:

***'In my opinion, the principles of the act can be summarized as follows;***

- ***The election must be free and fair.***
- ***The election must be by universal adult suffrage, which underpins the right to register and vote.***
- ***The election must be conducted in accordance with the law and procedure laid down by parliament.***
- ***There must be transparency in the conduct of elections.***
- ***The result of the elections must be based on the majority of the votes cast.'***

30. The Petitioner in his evidence says that the counting scrutiny was meddled with a lot of secrecy and strictness.

31. I dare state here that strictness is not wrong perse if that strictness is aimed to bring order to otherwise a process where there is a lot of anxiety and emotions where sometimes people allowed as agents and candidates or observers become rowdy and uncontrollable. However in this strictness the presiding officer must at

all stages remind himself or herself that he or she is required to be open and fair to each party such that

it will not be fair to be strict to one party while he or she allows the other candidate to freely meddle with election process.

32. In **MWENE -VS- KUBO & ANOTHER (2008)1 KLR (EP) 336** the court observed that;

***'The Petitioner must state the particulars of breaches of the law and state the provisions of the law thereto'***

33. The Pw2 in his evidence was very general in what he alleged to have been the irregularities. It was not stated whether the presiding officer failed to show them the votes cast and whether she failed to read which vote had been cast for who.

34. Pw2 did not come out clearly how the presiding officer prevented him from signing the form 35 while at one point the witness said he was not given the form

35 but he was able to show that the votes cast were adding up for individual candidates.

35. The 2nd Respondent says that he never received any complaint fact which is not disputed by the Petitioner.

36. There is no evidence that any complaint was raised from the complainant nor any other person.

37. Regulation 79 (7) of the Election Act provides inter alia

***'The absence of a candidate or an agent at the signing of declaration form or the announcement of results under sub regulation (2) shall not itself invalidate the results announced. '***

38. The circumstances of the case will show that Pw2 decided not to sign the form and that itself is not ground to invalidate the election.

39. I have had an opportunity of reading the judgment of Justice Warsame in

**DICKSON DANIEL KARABA -VS- JOHN NGATIA KARIUKI & 2**

**OTHERS (2010)e KLR** in which he observed.

***'An election ought not to be held void on the basis of transgressions of***

***the law committed without any corrupt motive by the returning officer or his subordinates. The court is concerned with substance and that the results of the election was and could not have been affected by those***

***transgression in a substantial manner. On the other hand an election process encompasses of several activities from the nomination to the declaration of the final and duly elected candidate. In my understanding the whole process from the nomination of candidates to the final declaration of the candidate as the winner must be within the law and must as far as possible represent the wishes and the voice of the electorate. It cannot be said that one part was fair while the other part was conducted in a flawed manner. The basic tenet of democracy is that the will of the people must be respected and incorporated in all the branches of the election. One cannot be heard to say that he derived a benefit from a process that did not meet all the requirements of the law is that the person with the highest votes be declared the winner'***

40. The Petitioner alleged that there were falsifications of results. But however when the court ordered a recount there was no difference in votes announced at the polling station and votes

counted at the court in favor of the Petitioner. The process to me confirmed to this court there was no manipulation as suggested by the Petitioner.

41. After considering the principles and requirements of the law I find that the elections at West Kamagak ward were free and fair.

**WHETHER ANY IRREGULARITIES DETECTED AFFECTED THE OUTCOME OF THE RESULTS.**

42. From the recounting and scrutiny and tallying that was done and the form 35 that was filed from the 2nd and 3rd Respondent it is not disputed that there were alterations made to form 35 and that there were differences noticed in the re-tallying.

43. This irregularity the 2nd Respondent explained was merely arithmetic error which was not substantial.

44. In the case of KARABA already referred Justice Warsame observed;

***'One may say that nobody may expect counting in an election to be completely accurate, indeed I suppose if one goes on recounting one will get in each case slightly different results.'***

45. The above position is confirmed by the recounting that was done it gave different results especially in stream 2 at Obisa Primary School.

46. After quoting from the KARABA decision the court observed;

***'It is the law that the issue raised by the Petitioner must be something substantial and which was calculated to determine the outcome of the election'***

47. From the results of the recounting only one vote was misplaced to the 1<sup>st</sup> Respondent to the disadvantage of one Joash Onyango Arogo.

48. In WABUGE -VS- LIMO & ANOTHER (2008)1 KLR (EP) 417 the court observed that;

***'If election was conducted such that it was substantially in accordance with the law as to elections, it would be vitiated by breach of rules or mistake at the polls provided it did not affect the outcome of the election'***

49. The court in JOHO -VS- NYANGE & ANOTHER (2008)2 (EP)20 held that whatever little deficiencies that may have occurred during the conduct of the elections cannot be said to have affected the outcome of the election.

50. In this particular case I agree that the irregularity was minor and did not affect the outcome of the results.

51. The results given by the 2nd and 3rd Respondent will show that the I<sup>st</sup> Respondent garnered 3175 against the Petitioner 2960 and with the irregularity noted this is a minor discrepancy

52. In JOSIAH & 4 OTHERS -VS- OGUTU & ANOTHER (2008)1 KLR (EP)73 the court observed that;

***'..... These and such minimal discrepancies could not and did not affect the results of the election of I<sup>st</sup> Respondent who was returned with a very substantial and legitimate majority over his nearest rival.'***

53. In the instant case I would say the same thing that the discrepancy was minimal and it did not

affect the result of the election.

54. It is apparent that this petition as presented before this court failed to satisfy this court that it has merit. Election Petition are not normal civil suits. The standard of prove is higher than that required in civil cases. That standard was not established by the Petitioner.

55. The Petitioner urged me to order that each party bears his own costs. **In** the case of **AMBALA - VS- WAITHAKA & ANOTHER (2008)1 KLR (EP) 296** it was observed that the costs follow the event.

56. The event in this particular case is that the party succeeds is entitled to costs.

57. I think I have said enough to now give my final order before I seal this petition that was placed for my determination. I make the following orders.

- i. The petition is dismissed with costs to the 2nd and 3rd Respondents to be borne by the Petitioner.
- ii. That the 1<sup>st</sup> Respondent was validly elected on 4.3.2013.
- iii. That the election of I<sup>st</sup> Respondent was free and fair.
- iv. That a certificate to issue to the speaker of the County Assembly Homa bay county to that effect.

Ordered Accordingly.

25.7.2013

**Before** S. Ongeru PM

**Cc:** Felix

**Petitioner:** Present

**1<sup>st</sup> Respondent:** Present

**2<sup>nd</sup> Respondent:** Absent

**3<sup>rd</sup> Respondent:** Absent

Mr. Nyauke for the Petitioner

Mr. Ongoso holding brief for Mr. Akide for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**COURT**

Judgement delivered, dated and signed this 25<sup>th</sup> day of July, 2013.

**NYAUKE:**

We pay for certified proceedings and judgement

**COURT**

The Petitioner be provided with certified typed proceedings and judgement

S. ONGERI

PRINCIPAL MAG ISTRATE

25.7.2013