



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MACHAKOS

ELECTION PETITION NO. 2 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF A PETITION BY

JOHNBOSCO MBUTHU MAKAU.....1ST PETITIONER

ERICK NZIVO MUMO.....2ND PETITIONER

DAVID KALOKI NGANGA3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (I.E.B.C.).....1ST RESPONDENT

LEONARD OKEMWA

(RETURNING OFFICER).....2ND RESPONDENT

WILSON MUTISO KASIMU3RD RESPONDENT

JUDGMENT

On 4th March 2013 the petitioners herein namely John Bosco Mbuthu Makau, Erick Nzivo Mumo and David Kaloki Nganga participated in the General elections and vied for the county Assembly seat for Matungulu East County Assembly. After the counting and tallying of the votes cast in the said elections the 1st and 2nd respondents herein namely the Independent electoral and Boundaries Commission (I.E.B.C.) and Leonard Okemwa (Returning Officer) declared the 3rd respondent herein one Wilson Mutiso Kasimu the winner. The petitioners felt aggrieved by the said declaration and filed the present petition in court on 27th March 2013 wherein they sought for eight orders set out therein interalia:-

- a. **There be a recount of the ballot papers cast at the said election.**
- b. **The said County Assembly election held on 4th March 2013 in the said ward be determined and declared null and void.**
- c. **It be declared that the third respondent has not been validly elected as the member of the County Assembly for Matungulu East County Assembly.**
- d. **The said election of the 3rd respondent as the member of the County Assembly for Matungulu East Constituency be determined and declared null and void.**

- e. **Such election offences and corrupt practices on the part of the third respondent and are disclosed and found before this honorable be reported to the speaker of the County Assembly**
- f. **That fresh election be held in Matungulu East County Assembly.**
- g. **The respondents be condemned to pay the petitioner's costs of and incidental to this petition.**
- h. **Such further, other and consequential order and this court may lawfully deem fit to make .**

The petitioners cited contravention of regulations governing, parliamentary elections, intimidation threat of violence and bribery as the main reasons on which the said petition is premised.

The respondents appointed counsel to represent them where the 1st and 2nd respondents appointed the firm of M/s Kimani Muhoro and company advocates while the 3rd respondent appointed the firm of M/s B.M. Mungata and company advocates. They filed responses and replying affidavits alongside the notices of appointments and this set the stage for the matter to be set down for a pre-trial conference. I wish to mention at the outset that the petitioners did file an interlocutory application seeking to have the 1st respondents compelled to supply them with forms 33 and 35 for all the polling stations and a certified copy of form 36 for Matungulu East County Assembly seat and a list of registered voters but his application was compromised after the 1st respondents complied with the request upon being served with the application.

This matter was listed for a pre-trial conference on 3rd May 2013. After deliberating on preliminary issues this court gave direction which were geared towards the expeditious disposal of the matter. The directions were:-

- i. **That the petition be listed for hearing for 2 weeks commencing 13th May 2013 to 24th May 2013 both days inclusive.**
- ii. **That the matter will commence by doing a re-count of all the votes casts and there after further directions be made.**
- iii. **That parties (petitioners) to rely on affidavits evidence on record and where there is a contention the respondent will be at liberty to cross-examine the deponent and will zero-in on the paragraphs or averments that are in dispute.**
- iv. **Where there are more than one affidavit parties will choose one deponent to testify with the other deponents adopting the evidence adduced.**
- v. **The 1st respondent was to ensure that all ballot boxes in respect to the petition herein are put in the custody of the court by Friday 10th May 2013.**
- vi. **Each party was to appoint one agent to participate in the re-count and re-tallying and counsel are at liberty to be present.**

The re-count and re-tallying was conducted and on 16th May 2013 this matter came up for mention where the parties reported that they were satisfied with the manner in which it was conducted and the outcome and that they had agreed to canvass the matter by way of written submissions and rely on the affidavits, responses and statements filed. They did file the same. They also opted not to highlight the same. The agreed issues for determination are as follows:-

- (i) **Whether the elections of the member of the County Assembly for Matungulu East County Assembly held on 4th March 2013 was credible, free and fair under the circumstances?**
- (ii) **Whether the 3rd respondent was validly elected as the member of County Assembly for Matungulu East County Assembly in the elections held on 4th March 2013?**
- (iii) **What other remedies, if any, should this court grant arising from the reliefs pleaded by the parties herein in the petition and the respondent's response?**

I have carefully considered and evaluated the evidence on record and the exhibits produced. The main complaint in the first issue is that the counting, tallying of the votes case at the election was not accurate and grossly erroneous. That in most polling stations particularly the one referred to in the

petition the results recorded in forms 35 are totally difference from what appears in forms 36. That they were altered and not countersigned. That this was contrary to Rule 76 (b) read with 83(i) (c) (iii) of the elections (General) regulations 2012 which states:-

“ The presiding officer shall in the presence of the candidates or agents record the total number of votes case in favour of each candidate” The Returning Officer shall declare votes case for each candidate.

There were instances given for non compliance with law. It was stated that in polling station No. 049-Kinyui Girls Secondary School the 2nd petitioner's votes were omitted and no reasons were adduced, 410 votes were cast in favour of the candidate while the valid votes were 589 giving a difference of 179 votes which were note accounted for. That the final tally of the votes cast was 6940 while the total number of votes cast in favour of candidates was 6759.

The petitioners also complained that the second respondent and/his agents prevented the petitioners and their agents from being near the counting and tallying area thereby falsifying the votes received especially Kinyui Girls Secondary School polling station No. 049. That the security arrangements were bad.

It was alleged that the 3rd respondent used violence, threat of violence and force thereby intimidating voters to vote for him or not vote for the petitioners. That the Officer Commanding Police Division (OCPD) Kangundo forcefully ejected Hon Moffat Maitha out of the tallying Center after he protested the use of a private laptop by the returning officer.

The 1st and 2nd respondents challenged the petitioner's allegations and in their response and affidavits filed herein stated that the election which is the subject matter of this petition was carried out in a free and fair manner and that the 3rd respondent emerged victorious and was duly declared as such. They however conceded that there were minor errors committed by the second respondent and his agents during the counting and tallying of the votes which would not warrant the nullification of the results.

It was also argued that by consent of parties a recount was conducted by the court and the final result generated did not vary the result in favour of the petitioner. That it in fact slightly favoured the third respondent. They denied that any violence broke out and the polling stations and tallying Centers and every Polling Center was manned by two police officer while the Tallying Center had more than two hundred police officers present.

The 3rd respondent on his part denied the petitioner's allegations. He averred in his affidavit that the conduct of election was free and fair pursuant to the provisions of the law and the laid down principles, rules and regulations. He also denied that there were mal practices such violence, threat, force intimidation and bribery as alleged by the petitioner.

That a recount was done and the result generated didn't vary the result in favour of the petitioner but slightly favoured the 3rd respondents. They submitted the burden is on the petitioner to prove non-compliance with the electoral law and to further show that the non-compliance affected the result of the election. That this has not been done and this petition must fail.

It is now settled that the standard of proof in election petitions is higher than in ordinary Civil cases which is on a balance of probability and lower that in Criminal case which is beyond reasonable doubt. A petitioner must therefore lead evidence that leaves a trail of events that will clearly demonstrate that there was non-compliance of the law that will warrant the invalidation of the election result.

The Nigerian Supreme Court in **Buhari Vs. Obasanjo (2005) (LR TK) held.** Among other things stated that:-

“He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the

pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result into the court giving judgment in favour of the party.

The Supreme Court of Kenya, in citing the above decision agreed with that court and rendered itself thus:-

“We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria where a party alleges non-conformity been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies: (Omnia praesumuntur rite et solemniter esse acts): all acts are presumed to have been done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law”.

The petitioner in his affidavit in support cited one instance where there was some discrepancy in the total arrived at. That is in polling station No. 049- Kinyui Girls Secondary School. In that station it happened that the 2nd petitioner's votes were omitted and 179 votes were allegedly not accounted for. No other error was quoted in the entire petition.

This error was cured by the recount conducted by this court. Parties herein complied with the directions given by this court on the conduct of the same and in the end submitted that they were satisfied with the conduct of the same and the result generated. The result in the two processes were as follows:-

4/3/13

VOTES

1. Charles Kyalo Ndambuki	- 251
2. Daniel Makau Kilonzo	- 150
3. David Kaloki Nganga	- 752
4. Erick Nzivo Mumo	- 1646
5. John bosco Mbuthu Makau	- 1205
6. Joseph Kibuba Kioko	- 183
7. Joshua Ndolo Mutie	- 334
8. Stephen Kilonzo Nzioka	- 81
9. Wilson Mutiso Kasimu	- 2157

RECOUNT

VOTES

10.Charles Kyalo Ndambuki	- 250
11.Daniel Makau Kilonzo	- 150
12.David Kaloki Nganga	- 749
13.Erick Nzivo Mumo	- 1822
14.John bosco Mbuthu Makau	- 1199
15.Joseph Kibuba Kioko	- 182
16.Joshua Ndolo Mutie	- 338
17.Stephen Kilonzo Nzioka	- 76
18.Wilson Mutiso Kasimu	- 2155

In the end the 1st respondent garnered 1199 votes, the second respondent garnered 1822 and the third managed 749 votes. I have compared and analyzed the totals reached by the 1st and 2nd

respondents on 4th March 2013 and of the recount carried out by this court and I hold that while there are differences noted the petitioners herein and all the other candidates went on to occupy the positions they were on 4th March 2013.

I concur with the respondent's submissions that section 83 of the Elections Act 2011 deals with this situation appropriately. It states thus:-

“No election shall be declared to be void by reasons of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and that written law and that the non compliance did not effect the result of the election.”

The other allegations of intimidation and the 1st and 2nd respondents agents preventing the petitioners agents from accessing the counting and tallying Center were generalized. The alleged forms of intimidation and bribery were not specified or even particulars of how the oathing was done and the place they were allegedly carried out were not given and this in my view watered down th petitioner's evidence.

IN ELECTION PETITION NO. 15 OF 2008

MOHAMUD MOHUMED SIRAT

AND

ALI HASSAN ABDIRAHMAN

IBRAHIM HISH ADAN

INTERIM INDEPENDENT ELECTORAL COMMISSIONER

The court had this to say as regards proof of electoral offences at page 9.

“In the present petition the petitioner was required to prove to the required standard of proof that indeed the petitioner or his agents bribed the voters. It is not enough for the petitioner to state that he saw certain persons acting at the alleged behest of the petitioner to bribe voters. The actual act of bribery must be described in sufficient detail for the court to reach a determination that indeed such bribery took place. There must be sufficient evidence to establish nexus between the person giving the bribe and either the 1st respondent or his known agent.”

This is the principle applicable and I hold that the allegation of electoral offences having been committed by the respondents especially the 3rd respondents was not proved. I also hold that the above quoted excerpt of the judgment applies in all allegations of commission of electoral offences.

The allegation of polling stations having been opened late were not substantiated. Not even the other supporting affidavits gave detailed particulars of the same.

It is also clear from forms 35 that the agents of all candidates signed the same signifying that they participated in the counting and tallying process and they accepted the result. The presiding officers also appended their signatures on their part.

I wish to note that the second issue is intertwined with the first one. It is a principle of law that he do alleges must prove as earlier observed. The standard of proof in Election petitioner is higher than in Civil cases and the petitioner must prove the specific acts complained of. The petitioner herein pleaded intimidation, threat of violence and bribery as having been meted out on the votes. They cited an incident where Hon. Moffat Maitha was thrown out of the tallying hall. I hold that a clear nexus must be drawn on how this incident affected the final result of the election if at all it happened. I agreed with the

respondents counsel that it was not stated what role the said Hon. Maitha was playing as far as the petitioner's candidature was concerned. He should have sworn an affidavit to buttress the petitioner's claim. This was not done and it leaves a gaping gap in the petitioner's case.

Allegations of bribery are serious in nature and a petitioner relying on the same to seek nullification of an election result must go a notch higher and give specifics which will convince the court that truly that the electoral process in question has been tampered with. The petitioner must for example state who gave out the bribe and who was given. These specifics must then be tested and a finding made on their veracity. In the instant case the petitioners failed to establish this, the supporting affidavits filed herein was silent on this and it follows therefore that the submissions filed herein have no legal basis on which the court can make a finding in the affirmative.

Having determined the above two issues it is my humble view that the other remedies sought in this petition cannot be granted. This is because the petitioners have not laid a basis for grant of the same.

In the end I find and hold that the petitioners have failed to prove their case and I accordingly dismiss the same and order that the 3rd respondent Wilson Mutiso Kasimu was elected fairly and the elections as held were credible. Costs follow the event and I award the respondent the same in regard to any lawful and accurate expenses incurred in this petition.

DATED, SIGNED and DELIVERED at MACHAKOS this 19th day of July 2013.

P.N. GESORA

SENIOR PRINCIPAL MAGISTRATE

Read out signed and delivered in open court in the presence of:-

Petitioner

1st and 2nd respondents

3rd Respondent