



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MACHAKOS

ELECTION PETITION NO. 1 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF A PETITION BY

JEREMIAH KIOKO KYALO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

LEONARD OKEMWA

(RETURNING OFFICER)2ND RESPONDENT

PETER MUNYWOKI NZOKA.....3RD RESPONDENT

JUDGMENT:

On 4th March 2013 the General Elections under the new Constitution were conducted. It was a momentous event as for the first time in this country's history a voter had to elect six representatives from the president to the country representative. It was the aftermath and that has resulted in the present petition where Jeremiah Kioko Kyalo a candidate for Matungulu North county Assembly seat with Muungano Party felt aggrieved by the results that were pronounced.

He filed the present petition on 27th March 2013 and named the Independent Electoral and Boundaries Commission (hereinafter IEBC), Leonard Okemwa (Returning Officer) and Peter Munywoki Nzioka and the 1st, 2nd and 3rd Respondents respectively.

In the said petition the petitioner is seeking nine prayers listed as A-I 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 North County Assembly.**
- d. **The said election of the 3rd respondent as the member of the County Assembly for Matungulu North County Assembly be determined and declared null and void.**

- e. **The petitioner be declared as the duly elected candidate for Matungulu North Assembly.**
- f. **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**
- g. **That fresh election be held in Matungulu North County Assembly.**
- h. **The respondents be condemned to pay the petitioner's costs of and incidental to this petition.**
- i. **Such further, other and consequential order and this court may lawfully deem fit to make .**

The petitioner did deposit the requisite security for costs and also served the respondents with the petition and on 10th April 2013 the respondents entered appearances. The 1st and 2nd respondents were represented by the firm of M/s Mereka and company advocates while the 3rd respondent was represented by the firm of M/s B.M. Mungata and company advocates. Parties herein did file their responses and supporting affidavits. I wish to also state at the outset that the petitioner had filed an application under certificate of urgency seeking that he be supplied forms 33 and 35 for all the polling stations in the ward and form 36 for which the 1st and 2nd respondents raised a preliminary objection but when the matter came up for pre-trial conference the said application was compromised as the 1st respondent had complied with what the petitioner was seeking.

On 3rd May 2013 this matter came up for pre-trial conference and after deliberating on the pertinent issues as regard the hearing and determination of this matter the following directions were given by the court:-

- i. **That this matter would be listed for hearing for 2 weeks commencing 13th May 2013 through to 24th May 2013 both days inclusive.**
- ii. **That the matter will commence by a re-count being done of all the votes cast.**
- iii. **That parties will rely on the affidavits filed herein and where there was a contention the parties will be at liberty to cross-examine the deponent and will zero in on the paragraphs or amendments that are in dispute.**
- iv. **That where there are more than one affidavit sworn, parties will choose one deponent to testify with the other deponents adopting the evidence adduced.**
- v. **The 1st respondents was to ensure that all ballot boxes in respect to the petition herein are put in the custody of the court by 10th May 2013.**
- vi. **Each party was to appoint one agent to participate in the re-count and respective counsel to be at liberty to be present.**

Parties also filed the pre-trial check lists as required by Rule 17 of the

Elections Parliamentary and County Election petition Rules 2013, this court did draw and give further directions on the procedure on how the recount was to be conducted and on 14th May 2013 all the parties signed the document committing themselves to the said Procedure and this set the stage for the conduct of the re-count.

The re-count was done in two days and on 16th May 2013 parties herein had this matter mentioned where they confirmed the same. They further agreed to rely on affidavits, responses and statements filed and they file written submissions to canvass the matter. This was done and they forfeited their right to highlight the same and asked the court to make its own informed judgment.

In the petition filed herein it was the petitioner's contention that the counting and tallying of the votes cast at the said election was not accurate and grossly erroneous. That form 36 forwarded to the 1st respondent by the 2nd respondent showing the results of the outcome of the election was full of mistakes wherein the final tally didn't at all correspond with the votes cast at the polling stations. The petitioner mentioned polling station No. 020 Kistimani Primary School where the votes were doubled and the 3rd respondent had scored the highest number of votes. That in the end the total number of valid votes was reflected as 6905 while the number of votes cast in favor of all the candidates was 6883 giving a difference of 22 votes which were unaccounted for.

It was also contended that the second respondent and or his agents or persons acting on his behalf prevented the petitioner and his agents from being near the counting and tallying area and interfered with the tallying process thereby falsifying the number of votes received from the polling stations particularly, Kitsimani Primary School , polling station No. 020. That the second and third respondents and/or their agents used violence to intimidate the petitioner and his agents and other means to cause periods of disruption in the counting and tallying process thereby compromising the integrity of the process.

There was also an allegation of the polling stations having been opened at 7.00 a.m. and closed at 5.00 p.m. and this denied many voters the right to vote. It was alleged that the third respondent committed unlawful acts and was guilty under section 63 of the Elections Act 2011 of the offence of undue influence on the voters.

In the 1st and 2nd respondents' response, they averred that the elections which are the subject matter of this petition were conducted in a free and fair manner and that the 3rd respondent emerged the winner and duly declared as such. It was also averred the counting and tallying of the votes was carried out as per the law save for very minimal human errors and that even in polling station No. 020 Kistmani Primary School the votes keyed in were doubled for all the candidates. That the error was not intentional and in any event all the candidates got double the number of votes and this would not have changed the outcome in any way. They denied that any violence was meted out at the polling stations and tallying centers as every polling station was manned by two police officers while the tallying center had more than two hundred police officers.

It was argued that the polling stations had sufficient light otherwise there is no way the candidates agents would have signed the form 35. The same averments above stated were contained in the replying affidavit sworn by the 2nd respondent sworn on 22nd April 2013.

The 3rd respondent on his part also filed a response and replying affidavit sworn on 24th April 2013. He also filed others affidavits sworn by Jane Syombua Mwatha, Mary Ndinda Munyao, Thomas Munywoki Ngadi, Raphael Muendo Wambua and Michael Nzioka respectively all of which were challenging the petitioner's case.

In his response, the 3rd respondent denied all the petitioner's allegations and went to state that the elections were conducted in a free, fair and credible manner and in accordance with the law. That the error in tallying at Kistimani Primary school affected all the candidates and the same was duly rectified by the 1st and 2nd respondents. In the end he prayed that the petition herein be dismissed with costs.

Parties agreed on three issues for determination and they submitted on the same namely:-

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

The issues above cited form the sub- stratum of this petition. They cover all the allegations made there in together with the reliefs sought. On the first issue above cited it is now settled principle that a general election is a process not an event and while the voting took place on one day there are many issues that must be set right for one to say at the end of it all the same was credible.

In this case we must assess what happened when the polling stations were opened, what happened during the voting process, the security situation, closure of the polling stations, vote counting, tallying and finally the pronouncement of results.

There was a complaint by the petitioner that the polling stations were opened late and closed at 5.00 p.m.

thereby denying the voter's an opportunity to cast their votes. One of the aspirants by the name for Nduva P. Kiaba swore an affidavit where he gave an overview of the situation in various stations that he visited. He averred that in polling station number 021 voters had arrived by 5.45 am when he arrived there. The ballot boxes were there. As regards lighting there is evidence that the 1st respondent had provided each polling station with gas lamps. The deponent/petitioner never challenged this averments. In the said affidavit, the deponent indicated that on getting to Katulye polling station and Kituluni Primary School he found that everything was okay. The other allegations of the agents not being allowed into the polling and tallying centers were countered appropriately with the arguments that the said agents signed form 35 signifying that they indeed participated in the whole exercise.

There was an admission by the respondents that an error was committed when tallying the votes in polling station No. 020 Kitsmani Polling Station. It emerged from the evidence on record that what actually happened was a doubling of the votes garnered by each candidate. I agree with the respondents that the error was human and never gave any candidate undue advantage since the doubling by its very sense meant it was on the same ratio.

This error was also cured by the recount conducted by the court. The parties submitted to court that they were satisfied with the manner in which the same were conducted and the results generated. The results in the two processes were as follows:-

4/3/13

VOTES

1. Alphonse Kawinzi Musyoka	- 147
2. Jeremiah Kioko Kyalo	-1185
3. Johnson Mutinda Maingi	- 585
4. Josefrida Nthenya Ngila	- 435
5. Michael Ngwili Maundu	- 724
6. Nduva P. Kiamba	- 1141
7. Nicholas Kilonzo Nzwili	- 70
8. Nicholas Kaunda Kioko	- 656
9. Patrick Ngunza Muteti	- 88
10. Peter Munywoki Nzoka	- 1631
11. Samuel Musau Wambua	- 52
12. Simon Mwanthi Wambua	- 68
13. Stephen Kimilu Nyamai	-101

RECOUNT

VOTES

1. Alphonse Kawinzi Musyoka	- 143
2. Jeremiah Kioko Kyalo	-1125
3. Johnson Mutinda Maingi	- 550
4. Josefrida Nthenya Ngila	- 432
5. Michael Ngwili Maundu	- 717
6. Nduva P. Kiamba	- 1099
7. Nicholas Kilonzo Nzwili	- 69

8. Nicholas Kaunda Kioko	- 662
9. Patrick Ngunza Muteti	- 95
10. Peter Munywoki Nzoka	- 1508
11. Samuel Musau Wambua	- 50
12. Simon Mwanthi Wambua	- 67
13. Stephen Kimilu Nyamai	-98

There were also 4 disputed ballots which the Executive Officer of his court kept in a separate envelop for this courts determination. I wish to deal with them singly. In ballot No. CA 0386/00002490 the voter signed in the box of the preferred candidate. The same is within the box. The ballot paper indicates the voter's mark to be a tick “

cross “x” thumb print or any mark. I find a hold that this falls within the meaning of “any other mark” and I allow it in favour of Jeremiah Kioko Kyalo.

In ballot paper No. 0386/00002557 the voter put a mark that resembles a tick and within the box in favour of Jeremiah Kioko Kyalo and I allow it in favour of the said candidate. In ballot paper No. 0386/00002022 the voter affixed two ticks in favour of two candidates. This ballot is spoilt as it is not clear as to who was his/her preferred candidate.

In the forth and final ballot No. 0386/00005689 none of the stipulated marks were put by the voter. He or she never voted for his/her preferred candidate and the same is adjudged as a spoilt ballot.

In the final tally I find and hold that Jeremiah Kioko Kyalo garnered 1127 votes. After carefully comparing the totals reached by the 1st and 2nd respondents at the time of tallying on 4th March 2013 and those of the recount carried out between 14th and 16th May 2013 and find and hold that there differences in the two sets of results. The question that begs an answer is how does the same affect the overall standings of the candidates and the credibility of the whole voting process? Firstly, despite the differences noted in the two sets o results the same did not affect the positions held by each candidate. The petitioner's votes were reduced by 58 votes while the 3rd respondent's votes were reduced by 123 votes. A total of 115 votes were rejected by mutual consent of parties and this implies that the court need not adjudicate on the same.

The requisite forms were filled by officials of the 1st respondents and counter signed by the candidates, agents which in essence authenticated the process. The errors above cited do not go to the root of the process herein and I concur with the respondent's submissions that section 83 of the Elections Act addresses this. 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.”

In the case of:-

BENARD SHINALI MASIKA

&

DR BONI KHALWALE & 2 OTHERS

ELECTION PETITION NO. 2 OF 2008

The court has this to say at paragraph 47

“It must be borne in mind that in editing an electoral process to determine whether the result as declared in an election ought to be disturbed, the court is not dealing with the mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenged the entire electoral process and lead to a conclusion that the process was not transparent, free and fair.”

The above holding encompasses the matters raised by the petitioner in issue 1 above and I hold that constitutional and legal requirements were met by the 1st and 2nd respondents.

On the second issue the petitioner must lead evidence that there were acts of omission or commission by the respondents which if interrogated will make the court reach a decision other than the one reached by the 1st and 2nd respondent in declaring the 3rd respondent the elected member for Matungulu North County Assembly.

The supreme court of Kenya in its judgment in the case of

RAILA ODINGA

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS &
OTHERS**

Petition No. 5 of 2013 had this to say about Election Petitions:-

“Where a party alleges non-conformity with the Electoral law, the petitioner must not only prove that there has 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 Presumptor rite at solemniter case 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 departure from the prescriptions of the law”

The petitioner has listed two points under this head namely:-

- 1. Intimidation, threat of violence and bribery**
- 2. Parliamentary results**

On the first point there was a mention of one Hon. Moffat Maitha having been ordered out of the Tallying Center and that he was also assaulted and sustained injuries. I didn't understand the context with which the petitioner named Hon. Moffat Maitha. What role was he playing in the petitioner's election bid? He failed to establish the nexus between Hon. Maitha and him. He also failed to demonstrate that probably even as a voter Hon. Maitha was assaulted. No treatment notes and medical report was annexed and produced herein or proof that any formal report was made to the police or any other authority. The evidentiary value of this piece of evidence and submission is low.

I must say that I got confused with the second point in that while it is header “parliamentary results” the contents thereunder dealt with the result of the Matungulu North County Assembly. He stated that the differences noted should not be ignored by the court as the correct figure should have been reflected.

IN ELECTION PETITION NO 13/08

JOHN KIARIE WAWERU

&

BETH WAMBUI MUGO, S.K. NJUGUNA

ELECTORAL COMMISSION OF KENYA the court held:-

“As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is a consensus by electoral counts that generally the standard of proof in election petition is higher than applicable in ordinary Civil cases is that of proof on a balance of probabilities, but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral mal-practices, like for instance bribery require a higher proof.”

Applying the above stated principle, I hold that the petitioner failed to meet the threshold to warrant the court disturb the actions by the 1st and 2nd respondents in declaring the 3rd respondent the winner the County Assembly seat in question. The petitioner opted to make generalized allegations of electoral malpractices which cannot hold.

Having dealt with the first two issues, I now delve into the third issue which is what other remedies, if any should this court grant, arising from the relief's pleaded by the parties herein.

Under this issue the petitioner left it to the court to decide. The petitioner having failed to prove the first two issues, I agree with the respondents that other reliefs sought in the petition cannot be granted as there is no basis laid for the same. The election herein was free and fair and the 3rd respondents was lawfully declared the winner of Matungulu North county Assembly.

I accordingly dismiss the petition herein in its entirety. As regards costs, it is now settled principle that the same follow the event. The respondents are entitled to reasonable and accurate costs and I so award.

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

P.N. GESORA

SENIOR PRINCIPAL MAGISTRATE

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

Petitioner represented by Mr Laichena instructed by M/s Mugambi Laichena & Company Advocates

1st and 2nd respondents represented by Ms Gichuki holding brief for Ms Jemator instructed by M/s Mereka & Company Advocates

3rd Respondent represented by Ms Gichuki instructed by B.M. Mung'ata & Company Advocates