



REPUBLIC OF KENYA IN THE MAGISTRATES COURT AT

MALINDI ELECTIONS ACT 2011

ELECTION PETITION NUMBER 002 OF 2013

BAKARI HASSAN

**JUMA.....
.....PETITIONER**

=VERSUS=

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC).....1ST RESPONDENT**

HAMISI HALFAN

**TSUMA.....
.....2ND RESPONDENT**

MWATHETHE ADAMSON

**KADENGE.....3RD
RESPONDENT**

JUDGMENT

During the elections that were held on 4/3/2013, Twaher Abdulkarim Mohamed was one of the contestants for the position of member of county assembly for Shella Ward in Kilifi county.

The results were officially declared on 13/3/2013 and Mwathethe Adamson Kadenge, the 3rd Respondent was declared as having been duly elected. The petitioner feels that the elections held on 4/3/2013 were held in circumstances that violated the Constitution of Kenya and the electoral laws made thereunder rendering them not free and fair and therefore not credible.

He seeks orders that;

1. The 3rd Respondent was not duly elected and therefore the said election was null and void.
2. An order for a recount of votes.
3. An order for scrutiny of the ballot papers cast, form 33, 34, 35 and 36 from the constituency tallying centers for the county representative of Shella assembly ward in Malindi Constituency.
4. An order of the repeat of the elections held on 4/3/13 for the position of county representative for Shella Assembly ward in Malindi Constituency.
5. In the alternative to prayer 4 above a declaration that the petitioner Twaher

Abdulkarim Mohamed was the winner of the said elections. The grounds advanced by the petitioner are that:-

- a) The 1st Respondent denied the petitioner the right to appoint his individual agents as allowed by the law.
- b) The 1st Respondent restricted the appointment of agents of political parties without considering the possibility of conflicting loyalty of the agents to the party candidates of the same political party.
- c) The 1st Respondent failed to effectively and or properly employ the use of the Biometric voter Registration in almost all the polling stations in the Malindi Constituency therefore rendering the process of identifying the voter vulnerable and or ineffective.
- d) The 1st Respondent allowed voters whose names were not in the master register and who could not be identified by the BVR machines to vote contrary to the law. e) The 1st Respondent allowed the use of voter registers other than the master register in identifying voters.
- f) The 1st Respondent denying the petitioner's party agents access to the relevant election documents.
- g) The 1st Respondent failing to transmit results electronically as was required to have been done.
- (h) The 1st Respondent refusing the candidates to polling stations to monitor the voting process.
- (I) The 1st Respondent failing to scrutinise the relevant election documents.
- (j) The 1st Respondent refusing to receive the candidates written complaint and therefore denying them the right to be heard as guaranteed by the Constitution and the laws of Kenya.

The other grievances alluded to by the Petitioner relate to alleged electoral offences committed by the 1st Respondent through its officers and or employees who conducted the election for the county representative Shellia Assembly ward in Malindi constituency including the 2nd Respondent.

The Petitioner sought to rely on the evidence of 14 other witnesses who swore affidavits.

Nine (9) witnesses testified in court in support of the petition. The Respondents on their part contested the petition. The 1st and 2nd Respondents called a total of seven (7) witnesses and the 3rd Respondent called a total of two (2) witnesses in opposition to the petition. I have considered the evidence adduced by the Petitioner and the Respondents in this matter, the submissions made by learned counsel and the authorities cited.

The issues that fall for determination are as follows:-

1. Were the elections held on 4/3/13 for the county representative Shellia ward free and fair?
2. Whether the Petitioner was denied any of his rights as provided by law.
3. Whether the Petitioner was denied the right to appoint agents by the 1st Respondent.
4. Whether there were irregularities on the part of the Respondents as to render the election not free and fair.
5. Whether any electoral offences were committed by the Respondents.

6. Whether the 3rd Respondent used or threatened the use of physical violence to influence the outcome of the election.

In making a determination in this matter, the court is minded of the provisions of Article 159(2)(d) of the constitution of Kenya which provides that:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principals –

“(d) Justice shall be administered without undue regard to procedural technicalities.....”

What is therefore the requisite standard of proof in an election petition? In the case of HOHO VS NYANGE & ANOTHER (2008) 3 KLR, it was held that election petitions should be proved by agent, credible and consistent evidence.

In the case of MORGAN & OTHERS VS SIMPSON & ANOTHER (1974) 3 ALL ER 722, jurisprudence emerged that demonstrating how election dispute resolution must be guided by the law but also take cognisance of the principles of democratic elections in particular the idea of respect for the “will of the people”. It should be taken that the electorate has made its choice, unless it can be showed that the law was not applied substantially.

In the recent authority of RAILA ODINGA VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS, PETION NO. 5 OF 2013 SUPREME COURT OF KENYA AT NAIROBI, it was held that:-

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..... 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.

In the Canadian case of OPITZ VS WRZESNEWSKYJ 2012 SCC 55 – 2012 – 10 –256, it was stated in the majority opinion that:-

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

The Petitioner in this matter was a party candidate of the Wiper Democratic party vying for the post of county representative of Shella ward. Several witnesses testified that they were agents. The said agents testified that they had been appointed to take care of the interests of all party candidates. Section 30 (1) of the Elections Act No. 24/2011 provides that a political party may appoint one agent for its candidates at each polling station.

On the issue of the Biometric voter register, the petitioner's witnesses testified that the said machine failed to function and the exercise was conducted using the manual register. The witnesses testified that failure of the machines did not bring to a stop the voting exercise. No evidence was adduced to the effect that any voter was turned away because of the failure of the machines. Another ground which was raised was that the

1st Respondent allowed voters whose names were not in the master register to vote contrary to the law.

Petitioner's witness 2 Yusuf Ismael Omar testified that he went to vote but found that his name was missing. He did not allude to any person having been allowed to vote whereas their names were missing from the register. The contention by the 1st Respondent's witnesses was that they took it

upon themselves to direct voters to another stream where it was found that their names were missing in a given stream.

The Petitioner raised a complaint about his agents not having been supplied with the requisite forms namely 33, 34, 35 and 36 and the various sheets and declarations. According to regulation 79 (2)(a), form 34 relates to declaration of Presidential election results. Under regulation 79 (2) (b) form 35 relates to county Assembly results.

The petitioner's witnesses testified that they were not at the tallying centre and his witness No. 8 Morris Mareka Kubo under cross-examination stated that he was removed from the counting hall due to an alleged electoral offence.

The agents conceded that prior to the elections they had been trained on what was expected of them. The contention by the 1st Respondent is that Regulation 79 (2) (b) does not require all agents to sign form 35 and that the requirement is that the presiding officer shall request each of the candidates or agent then present to append his signature.

The 1st and 2nd Respondents advanced reasons why some of the agents may not have been given the form 35. It is to the effect that a copy was given to one agent to be photocopied by the other agents, due to shortage. They also testified that a copy of the forms was posted on the door of the polling station.

Another complaint raised by the petitioner was that the 1st Respondent failed to transmit the results electronically as was by law required. The Petitioner and his witnesses did not lead evidence as to which polling stations there was such a state of affairs. The contention by the 1st and 2nd Respondent's witnesses was that the results were transmitted electronically. The Petitioner did not demonstrate how he was disadvantaged.

Another ground raised by the Petitioner was that the 1st Respondent did not allow the candidates access to the polling stations to monitor the voting process.

PW8 dwelt on that issue and his evidence was that several agents were allowed into the polling stations and confirmed that each agent had a checklist of what was required to be done during the exercise. The Petitioner did not indicate the polling station that he was denied entry to monitor the voting process.

The 1st Respondent's witness Harriet Munyazi who was a presiding officer testified that agents were present and she could call two agents at a time in the event of a voter who required assistance.

The Petitioner also enumerated a number of electoral offences that were allegedly committed by the agents of the 1st Respondent. They range from causing ballot papers validly cast for the petitioner to be removed from the ballot boxes and causing them to be cast for the 3rd Respondent, the 2nd and 3rd Respondents putting into ballot boxes ballot papers other than the ballot papers which were authorised by law to be put into the ballot boxes, the 2nd and or the 3rd Respondents either by themselves or through their agents and or employees forging and or counterfeiting ballot papers and causing them to be cast as valid ballot papers for the 3rd Respondent.

Election offences are set out in Section 58 and 59 of the Elections Acts. The said offences if proved can have serious implications on the election results. The petitioner was cross-examined on the issue and his response was that after being denied the relevant forms namely forms 34 and 35, he concluded that election offences were being committed. He did not state specifically who committed which offence and at which polling station.

Another aspect of the petitioner's prayers that requires consideration is the one for recount of votes and an order for the scrutiny of the ballot papers cast, form 33, 34, 35 and 36 from the constituency tallying centers for the county representative of Shella Assembly Ward in Malindi Constituency.

The applicable law governing scrutiny and recount is set out at part vi of the Elections (Parliamentary

and County Elections) Petition Rules 2013. Rule 32(2) thereof provides that:-

“The Petitioner shall satisfy in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.”

My understanding of that provision is that where a prayer for scrutiny and recount is being sought, then it cannot be mixed up with other reliefs in the petition as is the present case.

Rule 33 (4) of the Elections (Parliamentary and County) Petition Rules provides thus; “Scrutiny shall be confined to the polling stations in which the results are disputed.....”

The Petitioner did not set out specifically in the petition the polling stations in which the results were being disputed and hence the need for scrutiny and recount. The petitioner has cast his net too wide and it cannot be ascertained from the petition the specific areas that he seeks scrutiny and recount.

Due to the reasons I have alluded to, I find that I am unable to grant the relief sought of scrutiny and recount. The upshot of the matter is that I find that the Petitioner has not surmounted the requisite hurdle to warrant the grant of the relief sought in the petition. I therefore proceed to dismiss the petition with costs to the 1st, 2nd and 3rd Respondents and make a finding that in the result, the 3rd Respondent was validly elected as member of the county assembly for Shella Ward in Kilifi County.

N. SHIUNDU

Ag. SENIOR PRINCIPAL MAGISTRATE

15/8/2013

Judgment was read and signed by me **Nathan Shiundu Ag. SPM**, this **15th** day of

August, 2013 in open Court. Coram

Court clerk – Onyancha

Petitioner – Present

1st Respondent – Present

2nd Respondent – Present

3rd Respondent – Present

Mr Abubakar present for the Petitioner

Ms Ngugi present for the 1st and 2nd Respondents

Mr Mouko present for the 3rd Respondent