



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT VIHIGA

ELECTION PETITION NO1 OF 2013

**IN THE MATTER OF THE ELECTIONS(PARLIAMENTARY AND COUNTY
ELECTIONS)PETITION RULES 2013**

**AND IN THE MATTER OF THE ELECTIONS FOR MEMBER OF THE NATIONAL
ASSEMBLY OF WEST -BUNYORE COUNTY WARD IN EMUHAYA CONSTITUENCY
WITHIN VIHIGA COUNTY.**

IRENE MWIHAKI ASIKOYE.....PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

PATRICK GATUMA.....2ND RESPONDENT

JOSEPH MUNAYI OMWACHE.....3RD RESPONDENT.

JUDGMENT.

INTRODUCTION.

On the 4th of March 2013 The General Elections were held pursuant to the provisions of The Constitution of Kenya 2010;

(2)The Election Act 2011;

(3)The Election (General Regulations) 2012;

(4)The Elections (parliamentary and county elections) Petition Rules 2013.

(5)The Independent Electoral Boundaries Commission Act.

The burden is on the petitioner to prove;

(1)The commission of any irregularities and or electoral offences,

(2)That the irregularities affected the outcome such as to render the said election not to be a true reflection of the expression of the will of the voters.

The court has to determine the Legal Issues; The factual issues; The Evidence tendered, and the defence tendered by the Respondents.

The standard of proof is higher than balance of probabilities although not equal to beyond reasonable doubt.

The Petitioner was to establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process.

PETITION.

The petition was filed on the 27th day of March 2013. The grounds relied upon by the petitioner are enshrined in paragraph 7 of the petition;

(1) Lack of Academic Qualification by 3rd Respondent,

(2) Third Respondent declared the winner when he did not attain the highest number of votes.

(3) Allegations of malpractices, voter bribery, scaremongering, illegal campaigns as against the third Respondent.

(4) The Votes Declared at the Tallying Centre were at variance with those at the polling station.

The Petitioner was whereof praying for the following reliefs;

(a) Scrutiny of the votes recorded and cast at the said General Election for the WEST BUNYORE WARD

(b) Scrutiny of the spoilt, rejected and /or disputed votes cast at the said General Election for the **WEST BUNYORE WARD**

(c) A declaration that the Election of the **WEST BUNYORE WARD** conducted on 4th March 2013 is null and void

(d) A Declaration that the Third Respondent announcement as the duly elected County Ward Representative is null and void.

(e) An order that the First Respondent conduct a fresh, fair, credible and transparent Election for the WEST BUNYORE WARD.

ISSUES FOR DETERMINATION

By consent of the parties the following issues were identified for determination:-

1. Whether the Electoral process was valid and a valid declaration of the outcome of the election for West Bunyore County Assembly Ward was made validly

2. Whether the third Respondent was validly elected as member of the **WEST BUNYORE COUNTY ASSEMBLY WARD.**

3. Whether the people of **WEST BUNYORE COUNTY ASSEMBLY WARD** exercised their sovereign power to vote and the fate of that decision

4. What consequential orders will the court issue?

5. Who should bear the costs of this petition?

The matter regarding the eligibility of the third Respondent to participate in the Election, considering his academic qualifications as an issue was left to submission.

PETITIONER'S CASE

The petitioner faults the election process for various reasons which I have tabulated above, including the fact that at Esibila Polling Station where she voted she witnessed an identified voter not associated with the 1st Respondent assisting more than one person to vote, she said in total there were six people who were assisted by one Joel Andiva. The petitioner argued that this was contrary to the provisions of section 58 of the Elections Act.

Section 58 deals with Offences relating to voting. Section 58 (n) provides inter alia that;

A person who interferes with a voter in the casting of his vote in secret;

Section 58 (o) provides that A person who pretends to be unable to read or write to be assisted in voting.....commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or both.

The Presiding officer was at the polling station and there were police officers at the polling stations the petitioner should have reported the matter if it is true that Joel Andiva was openly assisting voters to vote yet he was not the Presiding Officer. The petitioner was cross-examined by the counsel for the 1st and 2nd Respondents and she averred that, she talked to the presiding officer she told the court that she did not even know the name of the presiding officer. The petitioner stated that the presiding officer ordered her to go home but she declined. pw1 further told the court that she voted at 9,00am, and ANDIVA assisted three (3) people before pw1 voted, further that JERUSA NJEKA voted between 9.00am and 9.30am.HELLEN voted between 11am and 1.00pm and ZACHARIAH voted at 11.00am.PW1 in the same breath said that by 9.00am as she was voting the three had not voted. When cross-examined by counsel for the 3rd respondent she averred that this six people were assisted by ANDIVA between 9.00am and 1.00pm, the question is which version should the court adopt? When asked the same by counsel for the 1st and 2nd respondents she averred that the first version she gave was not true yet she said the same under oath. Did the petitioner witness any anomaly or not?.

LACK OF ACADEMIC QUALIFICATIONS BY 3RD RESPONDENT.

The counsels on record agreed by consent to address this issue in their final submissions. The submissions have been duly filed and I have perused the same. The petitioner contends that ARTICLE 38 of the constitution of Kenya guarantees to the Kenyan people political Right as a fundamental Right. She further submitted that the amendment of the Election Act was unconstitutional.

Section 22(1) of the Elections Act NO.24 of 2011 provides inter alia that;

A person may be nominated as a candidate for an election under this Act only if the person_

(a) Is qualified to be elected to that office under the Constitution and this Act; and

(b) Holds a certificate, diploma or other post-secondary school qualification acquired after a period of at least three months study, recognized by the relevant ministry and in such a manner as may be prescribed by the Commission under this Act.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as president, deputy president, county Governor only if the person is a holder of a degree from a university recognized in Kenya.

In the year 2012 the Act was amended as follows;

(2A) For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24(1)(b), save for the position of the President, Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and County Assembly representatives.

The argument by the petitioner in her written submissions that the said amendment was unconstitutional is not a subject matter of this court as this court is not a Constitutional Court. The petitioner upon being cross-examined by the 1st and 2nd respondent's counsel averred that had she been aware of the section (section 2A) of the Election Act she could not have come to court on the issue of third respondent's qualification.

ii.7(b) The 3rd Respondent was declared a winner when he did not attain the highest number of votes.

The 3rd Respondent was declared the winner with 2504 votes. The petitioner did not endeavour to challenge the same. In cross-examination by counsel for the 1st and 2nd Respondents she confirmed that DEXH 2(a)-2(c) were in order and a true reflection of what the first Respondent announced as the results at the Tallying station and the final results.

III.7 (d) The votes declared at the tallying centre were at variance with those at the station significantly. In her supporting affidavit paragraph 18 she stated that she knew of results that were varying from what was stated at the polling station and also inflated numbers not tallying with the registered voters. The court observes that under section 39 of the ELECTIONS ACT, the 1st and 2nd Respondents are allowed to prepare provisional results and final results, Further under Article 86(c) of the Constitution the 2nd Respondent is under a duty to collate, verify, carry out a sanity test and make a valid and lawful declaration of results. Upon being cross-examined by counsel for the 1st and 2nd respondents, the Petitioner averred that there was no variance between forms 35 and 36 as exhibited in DEXH 2a b and (c). The results as set out in DEXH 3 still stand. The court observes that the transposition errors were in the provisional form 36(b) which were rectified in form 36(c).

PW 1 further averred that Whimsy Manoah had 43 votes and at the end of exercise Whimsy was announced to have gotten 3 votes, she stated that the data she was relaying on she got data from another guy at Ebusiratsi, she never disclosed to court who the guy was. PW2 told the court that Whimsy Manoah got 126 votes at Ebukoolo polling station, she said she heard 1st respondent declare that Whimsy got six votes, she said at the end of the exercise Whimsy got 126 votes and not six, she said she did not hear properly so the court should pardon her.

PW2 averred that **LUKAS MULUBI** got 113 votes she said she heard them announce 3 votes she said she did not hear them announce properly, she urged the court to pardon her. The question is can this witness be believed? She is not sure of what she told the court.

The petitioner told the court that the exercise was full of malpractices, voter bribery, scare mongering and illegal campaigns committed by the third Respondent. The petitioner when testifying and when cross-examined by counsel for the 1st and 2nd Respondents contended that the Elections were free and fair. In regard to the allegation on bribery, she never testified on the same. The only witness who alluded to bribery was **JOEL LIVINGSTONE OLUCHIRI** (PW7), He instead told the court that he was the one who was arrested for allegedly bribing the voters. This witness also told the court that he saw the wife of the 3rd Respondent talking to voters he was not categorical in his testimony to disclose who these voters were and neither did they come to court to testify over the same. There was no report made to the Presiding officer in regard to this bribery allegation. **PW3 JANET RAEL ASIKOYE** also talked about bribery, but upon being cross-examined by the Respondent's counsel it came out that the money that they exchanged was indeed TNA'S Agents and officials' money for lunch and supper and not a bribe. Thirdly **PW9 FRED NGOTA** averred that he witnessed bribery at Enyahera Primary School Polling Station but he never disclosed to court who was bribing and who was being bribed, he even never reported the same to the Presiding Officer or the police officers who were at the said polling Station. The allegations on scaremongering and illegal campaigning were not proved at all hence the court will not delve into the same.

The Petitioner also testified on other extraneous issues which issues were not set out in the Petition, some of those issues were contained in the affidavits. It is trite law that a petition shall contain grounds on which the petition is presented .Under Rule 10 1(e) of the Elections(Parliamentary and County Elections)Petition Rules,2013,subrule2 each paragraph shall be confined to a distinct portion of the subject. The Petitioner talked of:

EXCLUSION OF AGENTS

The petitioner told the court that there were agents (outside agents) who were excluded from the tallying and counting centre. Under Regulation 85(1) the Returning Officer is under no obligation to admit more than one party agent. This further buttressed by the provisions of section 30(1) of the Elections Act which provides inter alia that;

A political Party may appoint one agent for its candidates at each polling station

SECTION 42(a)of The Election Act provides that;

The Commission may at any election accredit_

a person as an observer, agent or media representative;.....

Regulation **62 ELECTIONS ACT 2011(REGULATIONS AND RULES)** the Presiding Officer is designated to admit authorised agents. Regulation 62(3) specifically provides that;

Absence of agents shall not invalidate the proceedings at a Polling Station. Further Regulation 74 provides that no agent shall be deemed to be an agent for purposes of counting unless he has been accredited at least 48 hours before and is not obliged to admit more than one from one party or independent candidate. Having made the foregoing observations it is evident that in the instant case no accredited agent was locked out of the polling Station.

Secondly, the PETITIONER Averred that there were irregularities because some agents did not sign form 35.The agents were duty bound under Regulation 79(3) not to sign form 35, if they noted any irregularities. The same Regulation 79(3) provides inter alia that;

Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidates or agents shall be required to record the reasons for the refusal or failure to sign. The court observes that the allegations by the **PETITIONER** in regard to the irregularities have no basis and are unfounded.

Thirdly, there are allegations of double voting by one **WASHINGTON ROYOLA** (PW) and **HEZEKIAH AYWA** (PW the former in his testimony in court never alluded to the fact that he voted twice. In her affidavit **CHRISTINE NELIMA** (PW2)alleged double voting but when testifying she only mentioned that only one set of ballot papers were cast. The other set which she said she remained with were never produced in court as exhibit.

Fourthly, the petitioner contended that there was EXCLUSION OF VOTERS at Essalwa Polling Station. The same allegation was countered by DW8 the Presiding Officer who told the court that the people who were on the queue at 5.00pm were allowed to vote .he further told the court that the station was closed at 6.30pm.In this case no voter testified as having been locked out.

The question the court poses at this juncture is, having made the foregoing observations in view of the evidence tendered and the defence tendered, can one comfortably say that there were profound irregularities that could vitiate the election? There were minor transcription errors which were corrected to arrive at the correct accurate and verified results, the same were gazzetted pursuant to section 39 of The Elections Act.

The court further observes that the election was not devoid of merit the same was not distorted as not to

reflect the expression of the people's electoral intent.

The court finds that the 3rd Respondent did obtain the votes which justified him to be declared the winner of West Bunyore County Ward.

Conclusion and Disposition

A summary of my conclusions and findings are as follows;

The 3rd Respondent was duly and validly declared the winner for the **WEST BUNYORE WARD REPRESENTATIVE**, this is because Sections 22,22(A) and other amendments to the Election Act, No. 24 of 2011 exempted the 3rd Respondent and others vying for that seat for being holders of the alleged requisite academic qualifications.

The 3rd Respondent got the highest number of votes cast at **WEST BUNYORE COUNTY WARD** the contrary has not been proved by the petitioner

There is no concrete evidence adduced by the petitioner and or her witnesses to prove that the Third Respondent was engaged in a plethora of election malpractices including voter bribery, scaremongering, and illegal campaigning.

The second Respondent declared the valid results at the Tallying centre, the same were not at all at variance with the ones declared at the Polling Station.

The Petitioner prayed for the following Reliefs;

scrutiny of votes recorded and cast at the said General Election for **WEST BUNYORE WARD**. This relief cannot be given as a final order as the Petitioner never sought for it in the cause of the hearing of the petition, she never applied for the same. This is provided for by the provisions of section 82 (1) of the Election Act, which provides inter alia;

An election court may on its own motion or on application by any party to the petition, during the hearing, of an election petition order for the scrutiny to be carried out in such a manner as the election court may determine. This was the holding in the case of,

Nyeri high court HC EPno.3 of 2013,

PETER GICHUKI KANG'ARA

VS

IEBC AND 2 OTHERS.

The upshot of the foregoing is that the election exercise was credible free fair and reflected the will of the people of **WEST BUNYORE**.

I hereby make the following orders;

1. The Petition dated 25th March 2013 be and is hereby dismissed.
2. The Petitioner shall pay the Respondents' costs which are capped at a total of Kshs. 100,000.00

DATED AND DELIVERED at VIHIGA this 16th of August 2013

GRACE. A MMASI

AG. SENIOR PRINCIPAL MAGISTRATE

VIHIGA.

Mr. Siganga for the PETITIONER.

Mr. Magare for the 1st and 2nd Respondents.

Mr. Kimanga for the 3rd Respondent.