



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KITALE
ELECTION PETITION NO. 1 OF 2013

JAMES GICHUHI WANYOIKE] PLAINTIFF

VERSUS

1. FRANCIS OBINGO WERE] 1ST RESPONDENT

2. FARAH ABDI IBRAHIM] 2ND RESPONDENT

3. (INDEPENDENT ELECTORAL AND] 3RD RESPONDENT

BOUNDARIES COMMISSION OF KENYA)

J U D G M E N T

MR. James Gichuhi Wanyoike is the petitioner in this petition dated 8th April, 2013. The petition is against the election of Mr. Francis Obingo Were as the County Assembly Representative for Tuwan Ward in Trans-Nzoia County in the elections held on March 4th, 2013.

Mr. Farah Abdi Ibrahim, the Elections Co-ordinator in Saboti Constituency in which Tuwan Ward is situated is the second respondent while the Independent Electoral and Boundaries Commission of Kenya has been sued as the third respondent.

In the above mentioned elections for Tuwan Ward, there were five candidates who included the following:-

The petitioner, the first respondent, Mr. Samuel Shivambo Lutungu, Allan Simiyu and Ezekiel Mwangi. In the results declared by the second respondent on 6th March 2013 vide Form 36, the five candidates polled as follows:-

First Respondent 5,486 votes

Petitioner 3,410 votes

Mr. Samuel Shivambo 1,560 votes

Mr. Allan Simiyu 882 votes

Mr. Ezekiel Mwangi 454 votes

The petitioner prays for the following reliefs:-

(c) That the election of the first respondent as the County representative for Tuwan ward be declared null and void.

(d) There be a fresh election in respect to County Representative for Tuwan ward within Saboti Constituency.

(e) That the respondents be condemned to pay the costs of this petition.

Prayers (a) and (b) which concerned recounting, retallying and scrutiny were abandoned in the course of these proceedings.

The petitioner has laid several grounds for seeking to nullify the election of the first respondent as the county assembly representative. They are to be found in paragraphs 12,14,15,16,18,19,20 and 21. They include:-

- i. That the entire process of election, the counting and tallying of the votes cast was not conducted in accordance with the Acts and the regulations made thereunder and this seriously affected the election results to the detriment of the petitioner.
- ii. That the second and third respondents failed to administer a free and fair election in that voters who had been registered electronically could only be identified electronically but instead the second and third respondents relied on the manual register to identify the registered voters which resulted in many registered voters being turned away on the ground that their names could not be traced in the manual registers.
- iii. That the petitioner was denied the opportunity to enter polling rooms as he moved round to monitor the electoral process within the ward and his agents were not availed copies of forms 35 and 36.
- iv. That the second and third respondent exaggerated the number of registered voters to 55,791 down from less than 15,000 voters to pave way for exaggeration of votes in favour of the first respondent.
- v. That the outcome of the election results as indicated in form 36 (declaration of Results at Tuwan Ward No. 0685) is not a true reflection of the results as per forms 35 from the various polling stations of Tuwan ward.
- vi. That at the polling stations, the presiding officers were given incomplete registers and consequently many of the petitioners supporters were either turned away or failed to cast their votes as a result of the incomplete registers.
- vii. That many people who turned up to vote were disenfranchised and thus denied their constitutional rights.
- viii. That at many polling stations within the ward, the presiding officers deliberately refused to stamp the ballot papers with the official stamp and consequently many of the ballot papers cast in the petitioner's favour were rejected.
- ix. That the petitioner did not get the opportunity to inspect the documents e.g forms 35 in respect of seven polling stations even though he has requested for them. This had made the petitioner unable to particularise any other irregularities which may have been committed at the election making it necessary that the petitioner be allowed to adduce and contend any other grounds or irregularities

which may be detected on inspection of the election documents and

- x. That the errors which occurred at the polling stations in question were substantial and definitely affected the result of the election.

The petition is supported by five affidavits and several annexures.

The first affidavit is by the petitioner. It reiterates what is stated above in the grounds.

The other four affidavits are by Isaac Kimani Wambugu, Jacinta Nyambura Muigai, Anne Agila Yakobo and Mary Wangui Mbatia.

The gist of the deposition in the four affidavits is that the four witnesses were all registered as voters at Tuwan ward. On 4th March 2013, they all went to their respective polling stations only to find their names missing from the registers. Some of them raised the issue with the returning officer. They were told to wait. They patiently did so but nothing was eventually done to remedy the situation. They went home frustrated as they never voted. They were therefore disenfranchised.

When the petitioner testified on 9/7/13, he said that he had agents at every polling station and some were told to sign the forms 35 before polling took place. Although he did not know the exact number of votes that he got, he said he polled over 4,800 votes while the first respondent polled about 4,400 votes.

The petitioner did not have a breakdown of the votes that he polled per polling station or stream. His agents who told him this did not testify or swear affidavits.

According to the petitioner over 400,000 votes were stolen from him and forms 35 show that he polled 4,173 votes against 4,953 polled by the first respondent. Two streams were missing from the records available to him by the third respondent. They include St. Columbus Primary school stream C and Tuwan primary school stream D.

The petitioner took issue with the difference in the figures in forms 35 and form 36. For example at Kaloleni primary school stream B, he got 136 votes according to form 35 but zero according to form 36. At Trans-Nzoia primary school stream 5, he got 345 votes according to form 35 but only 9 votes according to form 36. At stream 4, though he got 396 votes form 36 recorded only 19 votes. At Kaloleni stream 3, he got 116 votes but form 36 only recorded 10 votes for him. Errors were also recorded in respect of the other four candidates.

It was however admitted by the petitioner that he would not have beaten the first respondent even if the errors were rectified.

Other complaints by the petitioner are that many people did not vote although he does not know who they would have voted for. Some presiding officers did not stamp the ballot papers though they did not know in advance who the votes would have been cast for. The petitioner's agents were not allowed to accompany the ballot boxes to the tallying centre though this also applied to agents for other candidates. Two ballot boxes were said to have been open according to one Sammy but the petitioner had agents at the centre and Sammy did not swear any affidavit. Almost all polling stations had incomplete registers and this affected all candidates and the first respondent was not to blame.

The petitioner was not allowed to enter Kaloleni polling station and this was not his polling station and he had agents at the place. The first respondent was not at Kaloleni polling station when the petitioner went there. One polling station was open at 8.30 pm.

It is the petitioner's case that all these errors amongst others affected the result and he sued the first

respondent because he benefited from the errors made by the second and third respondent.

The first respondent Francis Obingo Were filed his response to the petition on 30/4/13 through his counsel David Ingosi Advocate. In the response he avers that the County Assembly election for Tuwan Ward was conducted in accordance with the Constitution, the Elections Act/Act no 24 of 2011 and the Regulations thereunder as well as the common law and should not therefore be declared void for non compliance with any written law.

Other averments are that the said elections were transparent and free from manipulation; that no candidate or political party was given undue advantage; that the result was lawful, accurate and correct; that failure of electronic voting did not prejudice the petitioner alone; that all those that appeared at the polling stations and were duly re registered were allowed to vote and if there were any who did not vote, then all candidates were affected equally; that the presiding officers had authority to limit the number of persons to be admitted at the polling stations including the agents; that all agents present appended their signatures on the declaration of results forms and those who failed to sign were required to record their reasons and none of the petitioner's agents recorded any complaints; that failure to provide a copy of the declaration of results cannot invalidate the results announced; that the votes cast in favour of the first respondent were not exaggerated and they reflect the free will of the people of Tuwan and the figure of 55,791 as the number of registered voters did not give undue advantage to the first respondent nor did it prejudice the petitioner; that if there was any incomplete register, it affected all the candidates equally; that since no voter could be admitted at a polling station while wearing anything like badge or party symbol, no official of IEBC could have known before hand which candidate a voter would vote for and thereby deliberately fail to stamp the back of a ballot paper issued to voters perceived to be supporters of the petitioner; that if the IEBC officials failed to stamp the ballot papers as required, then this affected all the candidates equally; that the first respondent and his agents did not commit any election offence or breach of the Regulations or the Electoral Code of Conduct; that there was proper tallying, counting and totalling of votes cast in the election; that he petitioner and his agents participated in the process of voting, counting and tallying and no errors, irregularities, malpractices or election offences were pointed out during the said process as would affect the result of the election.

For the above reasons, the first respondent called for the dismissal of the petition with costs. At the hearing of the petition, the first respondent did not call any evidence.

The second and third respondents through their counsel on record Gumbo and associates advocates filed forms 35 for all polling stations at Tuwan ward. The forms were 22 in total. In addition, the second respondent I. M. Farah filed a replying affidavit dated 26/4/2013. In the affidavit, the second respondent deponed, inter alia, that the manual register was resorted to after the failure of the electronic register but no voter was turned away as all the names in the electronic register were also in the manual register; that the petitioner was not denied entry into any polling room within Tuwan ward; that all agents present at the polling centres during the declaration of results and also at the constituency tallying centre were issued with forms 35 and 36 respectively and this included TNA on whose ticket the petitioner vied; that the number of registered voters indicated as 55,791 on form 36 for Tuwan ward was due to an inadvertent typographical error which did not affect the result in any way; that no request was ever received for an opportunity to inspect forms 35 for various polling stations within Tuwan ward and such forms were supplied to all agents at all polling stations and other copies pinned at conspicuous places at the polling stations; that no error occurred at any of the polling stations; that no voter was disenfranchised or prevented from voting; that no presiding officer was given an incomplete register; that no presiding officer deliberately refused to stamp the ballot papers with the official stamp; that there is no legal requirement that agents for candidates accompany ballot boxes to the constituency tallying centres from the polling station and it is the duty of the presiding officer and security officers to secure and deliver the ballot boxes to constituency returning centre and that the election for Tuwan ward county representative was conducted in accordance with the constitution, all electoral laws and regulations and the elections were free and fair.

At the hearing of the petition on 9/7/13 the second respondent said in cross-examination that he is the one who prepared form 36 for Tuwan ward in Saboti constituency. All agents including the petitioners' signed the form and they raised no complaint. In compiling form 36, the second respondent used forms 35. Some agents signed forms 35 while others did not. Some were said to be too tired according to some of the forms. It is not the duty of the presiding officers to ensure that the agents sign.

It is the evidence of the second respondent that no voter was denied the right to vote, no voter complained that his/her name was missing from the register or that they could not vote as all presiding officers had complete registers including the green books which are the primary registers. In case there were voters in the queue at 5 p.m when polls closed, such voters were allowed to vote even after 5 pm.

The second respondent admitted that there were what he called transpositional errors at Kaloleni primary school streams 2 and 3 and Trans-Nzoia primary school streams B 4 and 5. These errors were caused by the use of manual forms 35 that did not follow the order of candidates in the printed forms. Since the IEBC officials were tired and exhausted after working non stop for three days and three nights, they transferred the results from the manual forms 35 as if they were in the order in the printed forms. This error affected all the candidates and not only the petitioner. The errors were as follows.

Form 35

Form 36

Petitioner
stream B

Trans-Nzoia primary school

327
173

votes

1st Respondent

173

8

Petitioner

Trans-Nzoia primary school

stream 4

396

19

1st Respondent

185

185

Form 35

Form 36

Petitioner

Trans-Nzoia primary school

Stream 5

345

9

Form 35

Form 36

Kaloleni primary school

Petitioner

Stream 2

138

0

Petitioner

Kaloleni primary school

Stream 3

116

10

After correcting the mistakes, the returning officer came up with the following figures which are correct.

Francis Obingo Were - 5,279

James Gichuhi Wanyoike - 4,521

The difference between the petitioner and the first respondent is 1,758 votes.

Total rejected ballots were - 256

The total registered votes were - 14,166 and

Total turn out was - 11,998

The figure of 55,791 was for the entire constituency of Saboti.

There is no legal requirement that a candidate accompanies the ballot boxes to the tallying centre neither was there any complaint of open ballot boxes. None of the four witnesses for the petitioner ever complained to any IEBC official and all complaints are supposed to be written down or made to the party agents. Since the queues were long some voters may have not been patient enough to wait.

In some polling stations with more than one stream, each of the presiding officers came up with his own figure resulting in double counting and an exaggerated figure.

At the pretrial conference held on 25/6/13, the court with the assistance of the counsel of the parties came up with three (3) contested issues. They were as follows:-

1. Was there disenfranchisement?
2. Was the election at Tuwan ward conducted in accordance with the constitution and the Election Act?
3. Did the irregularities, if any, affect the final result?

It was also agreed that the contested issues be resolved by evidence and the deponents of the affidavits to be cross-examined thereon. Counsel for the parties filed written submissions which they highlighted on 6/8/13.

Both counsel for the respondents said in the submissions that the petitioner has not proved any of the allegations made in the petition to the required standard which is above proof on a balance of probabilities. It was contended by counsel that no law was proved to have been contravened by the respondents or their employees.

Secondly, it was urged for the respondents that the agents for the petitioner who were present at all polling stations and who were trained did not report even a single complaint to the third

respondent or its agents. The agents' evidence would have been the best evidence yet none of them swore any affidavit.

Thirdly, it was said that not even one of the forms 35 was identified to have a problem save for the transpositional errors in form 36 which were well explained and even after the retally, the petitioner still lost by a wide margin.

Fourthly, the fact that there was a high voter turn out of over 80% means there was no disenfranchisement as alleged by the petitioner and the four voters who claimed to have been denied the opportunity to do so could as well have voted or they may have possessed voters cards without necessarily being registered.

Finally, counsel concluded my saying that the petitioner having failed to move the case asked the court to find out the truth without giving the court the capacity to do so.

On the other hand, counsel for the petitioner said that Articles 38 and 81 of the constitution and the Elections Act were the laws that were contravened and this is reflected in failure of forms 35 and form 36 to agree.

Secondly, Mr. Nyamu urged that the irregularities in this case cannot be covered by section 83 of the Elections Act because the law has to be complied with generally and the errors must be minor to be allowed to override clear provisions of law.

Finally, counsel said that the second respondent being the returning officer of the whole of Saboti constituency could not have been at all the polling stations and the best evidence would have come from the presiding officers.

I have carefully considered the evidence adduced in this case by both sides. I have also carefully considered the submissions by learned counsel for the petitioner and the respondents. I found the submissions very helpful. They elucidated the law on the issues at hand very well. I thank counsel from both sides for this and for their timely compliance with deadlines.

On the first issue, I find that there was no disenfranchisement. The voter turn out recorded in form 36 is 82.02%. The turnout after the correction made by the returning officer is 84.69 percent. By any standards, it is a high voter turnout. If there was disenfranchisement, the turn out would have been much lower.

The petitioner and his four witness have not proved that the said witnesses did not vote or that they were registered. Only a vote scrutiny would have determined if indeed they voted. Such scrutiny did not take place. This point is therefore not proved.

Furthermore, possession of a voters card is not per and the evidence that such a voters name is in the register. Under section 6 of the Elections Act, voters are allowed to inspect the register within a given period and have their names confirmed to be in the register. There is no evidence that the four witnesses who swore affidavits in support of the petition's case over verified their registration status.

If their names were missing from the register as they depone, the fault could well have been their's.

Failure of the electronic voter identification device (EVID) meant that IEBC resorted to manual voting. The Elections Act envisages a situation or situations where manual voting may be resorted to. In fact the law does not outlaw manual voting. Rule 59(2) provides “ A voter shall cast his or her vote by use of a ballot paper or electronically” Then rule 61(4) (a) provides;

“ The returning officer shall provide each polling station with both electronic and hard copy

of the Principal Register of voters or such part thereof as contains the names of the voters entitled to vote at that polling station” Manual voting was therefore lawful and there was nothing wrong with it. The second and third respondents could not have sat back and done nothing after the failure of electronic system.

After all, there is no evidence that the manual voting worked to the advantage of the first respondent. I believe that if there were any disadvantages, they affected all the candidates equally. Thereby the petitioners' witnesses that they failed to vote since their names were missing from the register cannot therefore be credible. I find this element not proved to the required standard which is above proof on a balance of probabilities.

Regarding the second contested issue of whether the election in Tuwan ward was conducted in accordance with the constitution and the Elections Act, I find that it was.

The petitioner's petition is based on ten (10) grounds all of which made serious allegations against the second and third respondents. The burden of proof as correctly submitted by the two counsel for the respondents, is always on the petitioner. The standard of proof is above a margin of probabilities.

The only evidence called by the petitioner is that of his four witnesses who sought to prove only one point ie. Disenfranchisement. As we have seen above in the determination of the first contested issue, the four witnesses failed to prove this issue.

Failure to call the agents in all the twenty two (22) polling stations or at least have affidavits from them, coupled with failure to record any complaint in forms 35 seriously weakened the petitioner's case. It made all the evidence in his affidavit hearsay. He claimed to have heard what he deposed in the affidavit from agents who are themselves not witnesses. Yet he has a heavy burden of proof in all the ten allegations that he made.

In the case of Raila Amolo Odinga – VS – IEBC & others Election Petition no 5 of 2013, the supreme court stated.

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there was non compliance with the law, but that such failure 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 acta*” 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. ... while it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it becomes the person who thus alleges, to produce necessary evidence in the first place and thereafter, the evidential burden shifts, and keeps shifting”

The petitioner did not discharge the heavy burden placed upon him by the law. It is presumed that the second and third respondents conducted the elections in issue in accordance with the law. It was upon the petitioner to prove otherwise. He has not done so except in respect of the fifth grounds ie the one where he said that the out come of the election results as indicated in form 36 is not a true reflection of the results as per forms 35 from the various polling stations of Tuwan ward. This is for reasons already stated.

As for the fifth ground, the second respondent was able to explain how the discrepancy came about. Further he was able to prove that the discrepancy was inadvertently occasioned.

The agents for the petitioner were shown to have been present at all the polling stations. Even if

they were absent, this would not have invalidated the proceedings at any of the polling stations as provided under Rule 62 (3) of the Election Regulations 2012.

Since Rule 62 (6) forbids any person to be admitted into a polling station wearing a badge, dressing symbol or other indication of support for any political party or candidate, it was not possible to know in advance or even afterwards which party a voter supported. This exonerates the respondents or their employees from the allegation that they failed to stamp ballot papers for the petitioners supporters. It is also a serious offence under Rule 69(4) to deliberately refuse to stamp any ballot paper and this calls for strict proof.

Rule 66(2) allows that any voter on a queue before 5 o'clock be allowed to vote. This explains why some voters may have been allowed to vote at 8.30 pm. There is no evidence that all those in queues after 5 pm only voted for the first respondent. They could also have been the petitioners supporter.

On third and final contested issue, I find that the only discrepancy or irregularity mentioned above as having been proved did not affect the final result at all. After correcting the errors at the final polling stations where there were discrepancies, the first respondent still had 1,758 more votes than the petitioner. If the error did not occur in the first place the final result would still have been the same. The first respondent would still have been declared winner of the Tuwan ward election of 4th March 2013.

This brings into play section 83 of the Elections Act which provides “No election shall be declared to be void by reason 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 in that written law or that non compliance did not affect the result of the election.

From the evidence in this case it is obvious that the transpositional errors made by the second respondent did not in any way change who the winner was. With or without the errors the first respondent is the clear winner.

For the above reasons, I dismiss the petitioners petition. As regards costs, I have considered section 84 of the Elections Act and Rule 34 of the Elections (parliamentary and county Elections) Petition Rules 2013 and I find that the petition was not wholly without merit because of the errors mentioned above. There is also evidence that the petitioner sought clarification from the second and third respondents regarding the errors and got no response.

There is also the decision of the supreme court in one case of Raila Amolo Odinga and others – VS – IEBC and others (supra) where no order of costs was made. Guided by the above considerations, I will make no order as to costs order accordingly.

Right of appeal within 30 days explained.

M. N. GICHERU

CM

21/8/13

