



REPUBLIC OF KENYA

IN THE RESIDENT MAGISTRATE`S COURT AT MALINDI

ELECTION PETITION NO. 1 OF 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011 LAWS OF KENYA

**IN THE MATTER OF THE ELECTION FOR THE GANDA COUNTY ASSEMBLY
REPRESENTATIVE FOR GANDA WARD WITHIN MALINDI CONSTITUENCY OF
KILIFI COUNTY**

BETWEEN

JOSEPH KIPONDA.....PETITIONER

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION(IEBC).....1ST RESPONDENT

STEPHEN BAHATI MLANDA.....2ND RESPONDENT

RULING

The Petitioner`s application dated 13/6/2013 seeks the following orders:-

(a) That this Honourable Court be pleased to order for a scrutiny and or recount of all the votes cast in respect of the County Assembly Representative for Ganda County Assembly Ward within Malindi constituency in Kilifi County touching on all the polling stations.

(b) That the costs be in the cause.

The application is premised on the following grounds;

(a) That the entire voting process was marred with irregularities and other electoral malpractices,

(b) That the documents on record specifically forms 35 for Ganda ward are full of alterations raising doubts as to the credibility of the tallying exercise,

(c) That there is a tallying anomaly reflected in Form 36 touching on the declaration of election results for Ganda Ward.

(d) That the tallying exercise was manipulated to favour the 2nd

respondent, and

(e) That it is only fair, just and in the interest of justice that a scrutiny of the votes as well as arecount thereof be undertaken.

The application is strenuously opposed by the respondents. Both respondents filed replying affidavits in opposition to the application.

Mr Kabue counsel for the petitioner submitted the entire electoral process was marred with irregularities as far as Ganda ward was concerned. It was the petitioner's contention that forms 35 in respect of certain polling stations contained alterations which were not sufficiently explained. That some alterations had not been countersigned. It was further submitted on behalf of the petitioner that form 36 for Ganda ward had an anomaly in that the total in words for the petitioner's votes did not tally that in figures. The petitioner also contended that he was only given two forms 35 in respect of two polling stations but had realised that the forms he had been given were different from the ones that had been filed by the 1st respondent. The ones filed by the 1st respondent had alterations. The petitioner also took issue with the difference in serial numbers between the forms he had been supplied with and those that had been filed in court by the 1st respondent.

Ms Ndegwa, counsel for the 1st respondent opposed the application. Counsel submitted that the petitioner was not entitled to scrutiny and recount of votes. It was further submitted on behalf of the 1st respondent that the petitioner had not laid a sufficient basis for scrutiny and recount of the votes. The 1st respondent argued that the petitioner had not stated how the alterations affected the results and that documents could not bear the same serial number. It was the 1st respondent's contention that the alterations did not affect the individual votes for each candidate. Counsel for the 1st respondent submitted that the returning officer had a right to rectify any arithmetic errors and that could not affect the results. Counsel further submitted that a scrutiny or recount of votes could not answer the questions that had been raised in the petition, and that the petitioner was merely on a fishing expedition. The 1st respondent argued that the petitioner had not highlighted any particular polling station and that the petition did not support an application for scrutiny or recount. The 1st respondent prayed that the application be dismissed with costs.

Mr Oduor, counsel for the 2nd respondent associated himself with the 1st respondent's submissions. Counsel submitted that the prayer for scrutiny and recount was not in the petition and that it had taken the petitioner 2 months to make the application after being served with the documents. The 2nd respondent contended that the petitioner was trying to amend the petition by sneaking in a prayer for scrutiny and recount of votes. Mr Oduor further submitted that the petitioner had not specified the flaws and had not denied that his agents signed the forms in issue. Counsel further submitted that no reports were made to the police and nobody was ever charged with an election offence. In conclusion, Mr Oduor submitted that the petitioner had not laid a basis for scrutiny or recount and the goals to be achieved had not been explained. The 2nd respondent prayed that the application be dismissed with costs.

In rejoinder, Mr Kabue, counsel for the petitioner submitted that scrutiny could be ordered before calling of evidence. He referred the court to the recent Supreme Court decision in the case of ***Raila Odinga-Vs-Uhuru Kenyatta and Others*** where the court ordered for a scrutiny even before the hearing of the petition. Counsel for the petitioner contended that it was not mandatory that a prayer for scrutiny and recount be in the petition before the same can be granted. Counsel further submitted that the entire electoral process in Ganda ward was being interrogated and that the petitioner had laid a basis for scrutiny and recount in all the polling stations. Counsel urged the court to allow the application.

In a Ruling on the application delivered on 10/7/13, the court ordered for evidence from all the parties to be taken before it could make a determination on whether there would be a basis for scrutiny and recount of the votes. The evidence from all the parties was taken whereafter the

parties were given an opportunity to file further submissions on the application. Only the 1st respondent filed its submissions albeit late.

I have carefully considered the application, the submissions by the parties, the evidence on record and given due regard to the authorities relied upon by the parties. I have also taken into consideration the provisions of law. The jurisdiction to order for scrutiny of votes by an election court is conferred by section 82 (1) of the Elections Act, 2011 which provides as follows;-

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

From the above provision, it would appear that scrutiny of votes may only be ordered “during the hearing” of an election petition. In other words, the hearing must have commenced before scrutiny may be ordered. However, rule 32(1) of the Elections (Parliamentary and County Elections) Petition rules, 2013 envisages a situation where the Petitioner may request for recount or examination of tallying only. The said provision stipulates that where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the petitioner may apply to the court for an order to recount the votes or examine the tallying. In my considered view, and as was held in the case of **Peter Gichuki King'ara-Vs-Independent Electoral and Boundaries Commission and 2 Others (2013) eKLR**, scrutiny of votes cannot be ordered at the pre-trial stage unless the only issue in the petition is the count and tallying of votes. It is for that reason that the court ordered for evidence to be taken before considering the application for scrutiny and recount of votes.

Section 82(1) of the Elections Act provides two instances where scrutiny of votes may be ordered;

(a) By the court on its own motion:

(b) On application by any party to the petition

The Elections Act does not provide grounds upon which scrutiny may be ordered. That, in my opinion, is left to the discretion of the election court and it is my further opinion that each case must be treated with its own peculiar circumstances. The Elections Act does not expressly provide for recount of votes. The issue of recount is provided for under Rules 32 and 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Under Rule 33 thereof, an application for scrutiny or recount may be made at any stage for purposes of establishing the validity of the votes cast. Rule 33(2) provides that:

“Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes”

The foregoing provision implies that scrutiny or recount may only be ordered by the election court where such court is satisfied that there is sufficient reason. In other words, there must be a basis for scrutiny or recount.

In the case of **William Kamanda-v-Margret Wanjiru(2008)eKLR Kihara Kariuki J** (as he then was) held as follows:

“It is now well established that an order for scrutiny can be made at any stage of the hearing before final judgment whether on the court’s own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself as is the case in this petition – or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning officer or the other election officials”.

According to the above authority an order for scrutiny can be made if there is a prayer for the same in the petition or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the election officials. It would appear that in the latter case, the Petitioner need not include the prayer for scrutiny in the Petition.

However, in the recent petition of **Rishad Hamid Ahmed Amana-v-Independent Electoral and Boundaries Commission & 2 Others(2013)eKLR, Kimaru J** held as follows;-

“...scrutiny cannot be ordered where the petitioner has not specifically pleaded for scrutiny in his petition. It will not do for the petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all the polling stations in the electoral area that is the subject of the dispute. The petitioner must plead in sufficient detail why he requires the court’s intervention to order scrutiny. In that regard, the petitioner is required to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized”.

There are divergent opinions as to whether scrutiny or recount of votes can be ordered where there is no such a prayer in the petition itself. The governing statutes are silent on the issue and from the authorities cited herein above, it is clear that there is no settled judicial opinion on the issue. What clearly emerges is that there must be a basis for an order for scrutiny or recount.

The authorities of **William Kamanda(Supra)** and that of **Joho-v-Nyange(2006) eKLR** reveal that scrutiny can be ordered under the following circumstances;-

- (a) ***Where there is ground for believing that there were irregularities in the election process;***
- (b) ***Where irregularities have been established to have been committed by election officials, and***
- (c) ***Where the margin between the winning candidate and the runner-up is such that scrutiny would be the best way in which to settle the dispute as to who actually won the election i.e where the margin is narrow, there would be basis for scrutiny.***

I have considered the grounds for scrutiny and recount relied upon by the petitioner, the submissions by the parties and the entire evidence. I have also had occasion to peruse the Forms 35 from all the 19 polling stations within Ganda Ward in respect of the election in dispute. I do not wish to go into a lot of details on my assessment of the same lest I pre-empt my final judgment on the petition. However, I find that the petitioner has not laid sufficient basis to warrant orders for scrutiny and recount of votes in all the polling stations, as prayed. The evidence reveals that in some of the polling stations where Forms 35 were altered, the results of the votes cast for each candidate were not affected and the alterations were explained in evidence. It is also worth noting that the petitioner’s agents in the said polling stations appended their signatures on the forms 35 signifying their acceptance of the results. The said agents, did not dispute the results in their evidence. Clearly there would be no basis for scrutiny or recount in such polling stations.

However, upon perusing the forms 35 and upon considering the evidence on record, I find that forms 35 for Pendukiani Nursery School Stream 1 and Takaye Primary School stream one were not signed by any agent. Regulation 79 of the Elections(General) Regulations, 2012 provides that the Presiding officer, the candidates or agents shall sign the declaration in respect of the elections. In this case, the declaration would be Form 35. Regulation 79(3) provides as follows;-

“Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign”

Regulation 79 (4) provides that;

'Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form'

Regulation 79(5) provides that;

"Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence"

There is no record to show why the agents did not sign on the forms 35 for Pendukiani Nursery School stream 1 and Takaye Primary School Stream 1, yet the polling day diaries in respect of the said polling stations indicates the presence of agents during the exercise. However, the law under Regulation 79(6) and (7) of the Elections(General) Regulations, 2012 provides that the refusal or failure of a candidate or an agent to sign the declaration form, or to record the reasons for their refusal to sign or their absence at the signing of the declaration form or the announcement of the results, shall not by itself invalidate the results. The foregoing notwithstanding, I find that there is need for the court to satisfy itself that the process was proper in the absence of the mandatory records.

I also note that the form 35 for Maziwani Primary School stream 1 has alterations on the votes cast in favour of the Petitioner and one Peter Ngumbao Mwanyale. The said form is signed by two agents only and similarly, there is no record to explain why the other agents did not sign the declaration form. The forms 35 for Kijiwetanga Primary School polling station streams 1, 2 and 3 are also signed by 2 agents only. There is equally no record to explain the position. In my considered view and so as the court to satisfy itself of the propriety or otherwise of the electoral process, I find it prudent to order for scrutiny and recount of the votes in the aforementioned polling stations. This is not necessarily in the interest of the petitioner but it is in the interest of all the parties.

In summary there shall be a scrutiny and recount of votes in the following polling stations as far as this election is concerned;

(a) Kijiwetanga Primary School polling station(031)

(i)Stream 1

(ii)Stream 2

(iii)Stream 3

(b) Pendukiani Nursery School Stream 1(034)

(c) Takaye Primary School polling station – stream 1(036)

(d) Maziwani Primary School stream 1(039)

The scrutiny and recount in these polling stations shall be limited to the ascertainment of the number of votes cast for each candidate as compared with the results that were declared in the respective forms 35. The scrutiny and recount shall be presided over by the Executive officer Malindi Law Courts. The petitioner, 1st and 2nd respondents shall each be allowed to have 2 agents present during the exercise. The exercise shall commence on 12th August, 2013 at 9.00am and shall proceed on a day to day basis until the conclusion of the exercise. The matter will be mentioned on 16/8/13 for further orders and or directions. The petitioner`s application succeeds to that extent. Costs of the application be in the cause.

Dated at Malindi this 6th day of August 2013

Y.A.SHIKANDA Ag SRM

Delivered in open court in the presence of:

Ms. Mwanja holding brief for Ms. Ndegwa for the 1st respondent.

No appearance for the Petitioner

No appearance for the 2nd respondent

Nuru-c/c

Y.A.SHIKANDA Ag SRM

6/8/13