



REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT BOMET
ELECTION PETITION NO. 1 OF 2013
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
IN THE MATTER OF THE ELECTION ACT, 2011
IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY
ELECTIONS) PETITION RULES, 2013
AND
IN THE MATTER OF A PETITION FOR THE DECLARATION OF WHICH
CANDIDATE WAS VALIDLY ELECTED.
IN THE MATTER OF THE ELECTION FOR THE MEMBER OF COUNTY
ASSEMBLY OF SILIBWET TOWNSHIP WARD.

BETWEEN

PETER KIPKIRUI LANGAT
.....PETITIONER

VERSUS

ROBERT KIPKIRUI METET.....1ST
RESPONDENT

THE BOMET CENTRAL RETURNING OFFICER.....2ND
RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD
RESPONDENT

JUDGEMENT

1. Background

On the 4th March, 2013 Voters in Bomet Central Constituency, Silibwet Township Ward, Bomet County went to the polls to elect their representative for the position of Member of County Assembly

(MCA). There were three candidates for the position.

They were Peter Kipkurui Langat (Petitioner) Robert Kipkurui Metet (1st Respondent) and Thomas Kipkemoi Rotich.

The voting exercise was concluded and after the counting of the votes and tallying of the results the Returning Officer (2nd Respondent) declared the Petitioner as the winner and subsequently issued him with a certificate as MCA -Elect having garnered 4696 votes, The 1st Respondent garnered 4391 votes and The 3rd candidate garnered 415 votes.

It was later discovered that the results for Women Representative had been erroneously posted to the entries for Member of County Assembly (MCA) at Njerian Primary School, polling station. The error was corrected and the 1st Respondent herein was duly declared the winner having garnered 4649 votes as against the Petitioner's 4535 votes. This led to the revocation of the certificate issued to the petitioner.

The petitioner being dissatisfied with the decision of the 2nd Respondent to revoke the certificate issued to him and the subsequent gazettement of the 1st Respondent as the MCA, Silibwet Township Ward, moved to court vide his petition dated and filed on the 19th March, 2013.

2. **Pleadings**

The petitioner sought for the following orders in his petition:

- a. That the petitioner be declared the validly elected candidate for the Member of County Assembly, Silibwet Township Ward in the election held on the 4th March, 2013
- b. That the certificate of results issued to the 1st Respondent be declared invalid and void ab initio.
- c. That the Honourable court do issue such orders and directions and or relief as the court may deem fit and just to grant.
- d. That the cost of the petition be borne by the Respondents

The grounds for the challenge can be discerned from the petition and the affidavit in support sworn by the petitioner on the 19th March, 2013 paragraphs 7, 8 and 9:

7. That subsequent to the issuance of the aforesaid certificate to the petitioner, the returning officer irregularly, unprocedurally and or unlawfully purported to issue to the 1st Respondent a certificate of result as the duly elected member of the County Assembly Silibwet Township Ward and has been unlawfully gazetted as so elected,

8. That the petitioner was the duly elected member of the county Assembly Township ward as per the aggregate result declared and publicly announced to the public.

9. That the 1st Respondent was not duly elected and the certificate so issued is invalid and void ab initio and the same should be so declared.

The 1st Respondent filed his affidavit in opposition to the petition and his grounds can be discerned from paragraph 5, 6 and 7 of his response:

5. That pursuant to the said election I garnered the highest votes than any of my competitor and the 2nd Respondent duly declared me as the winner of the County Assembly Representative seat of Silibwet Township Ward. Subsequently I was issued with a certificate as the Member of the County Assembly elect by the 2nd Respondent.

6. That on 13th March, 2013 I was lawfully gazetted by the 3rd Respondent as the Member of the

County Assembly representing Silibwet Township ward.

7. That the 2nd and 3rd Respondents are the only independent bodies authorized by law to count, tally and announce the results of any election and these functions are not subject to directions by any other person or body hence the petitioner herein cannot purport to arm twist the 2nd and 3rd Respondents to declare him as the winner when infact he is not.

The 2nd and 3rd Respondents filed joint responses in opposition to the petition and the grounds can be discerned from paragraphs 12, 13, 14 and 15 of the affidavit

12. The 2nd and 3rd Respondents aver that after the tallying the results from the all the 17 polling stations the following results were returned.

a) Peter K. Langat 4535 votes

b) Robert Kipkuruimetet 4649 votes

c) Thomas KipkemoiRotich 321 votes

d) Rejected votes 70 votes.

e) Total votes cast 9575

13. The 2nd and 3rd Respondents aver that there was an intial error in the tallying of votes into form 36 when results from Njerian Primary polling station in respect of the Women Member of National Assembly to Parliament were irregularly tallied into Form 36 for Ward Representative/ Member of the County Assembly.

14. That as a result of the erroneous tallying the petitioner was erroneously allocated votes belonging to one Cecilia ChelangatNgetich(390 votes) while the 1st Respondent was erroneously allocated votes belonging to LilaChepkemoiSieley (50 votes).The said Cecelia ChelangatNgetich and Lila ChepkemoiSieley were candidates for WomenMember of National Assembly,Bomet Central Constituency.

The error was thus inadvertent and unintentional and was quickly corrected once it wasdetected.

15. That the 2nd and 3rd Respondents aver that the typographical error aforesaid was duly detected and a certificate duly issued to the 1st Respondent who was validly elected as the Member of the County Assembly for Silibwet Township Ward in Bomet County.

At the pretrial conference held on 22nd June 2013, the parties agreed the following to be issues for trial.

- a. Who was validly elected as member of County Assembly Silibwet Township Ward in the election held on 4th March,2013?
- b. Whether the 2nd Respondent had powers to revoke the certificate of results issued to the Petitioner.
- c. What led to the cancellation of the certificate of results issued to the Petitioner by the 2nd Respondent?
- d. What consequential declarations, orders, and reliefs this Court should grant based on the determination of the petition.

The petition was heard on 1st July, 2013 where the Petitioner called four witnesses and closed their case. The 1st and 2nd Respondent testified to their respective cases and each closed their case.

The court gave directions on the 10th July, 2013 where it *suomoto* ordered for a recount of votes in the 17 polling stations. The following were the results for the recount:

- a. Peter Kiprui Langat 4632 Votes
- b. Robert KipkuruiMetet 4642 votes
- c. Thomas KipkemoiRotich 312 votes
- d. Rejected 70 votes
- e. Total valid votes 9486.

All parties filed their written submissions and highlighted the same on 23rd July, 2013.

I have carefully considered the pleadings, the evidence adduced, the written submissions and the authorities filed. I will deal with the issues raised in the order I have stated them above.

3. Trial Issues.

i. **Who was validly elected as member of County Assembly Silibwet Township Ward in the election held on 4th March, 2013?**

It was the petitioner's evidence that he was a candidate in the elections conducted on 4th March 2013. That he was declared the validly elected candidate for Member of County Assembly, Silibwet Township Ward the 2nd Respondent declared him as the winner at Tenwek High School Hall and issued him with a certificate.

He was declared a winner by 4,696 votes. The 1st Respondent Robert Kipkurui Metet got 4,391 votes and the 3rd candidate Thomas Kipkemoi Rotich got 415 votes.

He stated that after two weeks, he got a letter from IEBC's (3rd Respondent) Returning officer Mr. Wanyama, (2nd Respondent) that the certificate issued to him had been revoked. He produced a copy of the said letter dated 15/3/2013. That the 1st Respondent was declared the winner and he was subsequently gazetted.

The petitioner's witnesses, **PW3 Wilson So** stated that he was the chief agent of Ford People Party. He stated that there were irregularities at Kapsimotwo polling station and the ballot boxes were taken to the police station. That the petitioner showed him a letter indicating that the 1st Respondent had been declared the winner. He never followed on the issue and left it to the petitioner to follow up the same.

PW2 Johnstone Kipkurui Sang stated that he was the petitioner's agent at Kapsimotwo polling station. During the counting of the results the 1st Respondent came to the polling station and was advised to leave. He left on his own and he further clarified that he was not thrown out by security officers.

PW 4 Thomas Kipkemoi Rotich, a candidate of the said election, stated that he met the petitioner who showed him a certificate of results. He had been declared the winner and he joined in the celebration of his victory but he later learnt that the certificate had been revoked and 1st Respondent was given the certificate.

The 1st Respondent in his evidence stated that they realized there was a mistake when the results were announced declaring the Petitioner as the winner and they launched a complaint to the 2nd Respondent through their Party agent and after the correction he was declared the winner. The 1st Respondent stated that he had absolutely no control of the election exercise particularly in the announcement of the results.

The 2nd Respondent contented that they received complaints in transmission of result for MCA from Form 35 to Form 36. The complaint came from an agent of URP. It was in respect of Njerian Primary

School, Polling Station (009). The proper results for Njerian primary school in Form 35 were as follows; Peter Kipkurui Langat had 229 votes, Robert Kipkurui Metet had 308 votes, Thomas Kipkemoi Rotich had 19 votes. In the initial Form 36 for Njerian Primary School, Polling Station, Peter Kipkurui Langat had 390 votes, Robert Kipkurui Metet had 50 votes and Thomas Kipkemoi Rotich had 113 votes.

He stated that after interrogating the complainant, they realized the results were for Women Representative. They were also 3 candidates as per the Form 35. Cecilia Chelangat Ngetich had 390 votes, Linah Chekemoi Sieley had 50 votes and Yael Chepkoech Mutai had 113 votes. They were candidates for Women Representative. These results were put in the initial Form 36 for MCA. The error occurred due to fatigue. The whole night of 3rd March 2013, the clerks never rested. Once the error was corrected 1st Respondent was thus declared the validly elected candidate.

As stated in the evidence there was an initial error in the posting of the results at Njerian polling station which led to the declaration of the petitioner as the validly elected candidate and when the error was corrected the 1st Respondent was declared the winner. The certificate issued to the petitioner was revoked.

I have had the opportunity of looking at Form 35 of Njerian Primary School, polling station and the results as reflected in the same are that the Petitioner, Peter Kipkurui Langat had 229 votes, 1st Respondent, Robert Kipkurui Metet had 308 votes and Thomas Kipkemoi Rotich had 19 votes. The same was confirmed during the recount exercise. The results of the candidates were affected after the correction and it was discovered that the 1st Respondent had garnered 4649 votes as against the petitioner's 4535 votes. During the recount the Petitioner garnered 4532 votes and the 1st Respondent garnered 4642 votes.

Election exercise is about results and it is clear that the 1st Respondent had garnered the most votes and clearly he was the voters' choice.

The Petitioner and his witnesses merely mentioned that there were irregularities on the part of the Respondents; however, no evidence was adduced to prove the said irregularities.

It is however incumbent upon the petitioner to adduce credible and satisfactory evidence to prove allegations made against the Respondents. The evidence adduced is generally intended to show that certain irregularities affected the outcome of the elections (see ***Mututho -vs- Jayne Kihara & Others Civil Appeal No. 102 of 2008***) and further the standard of proof is higher than the balance of probabilities and lower than beyond reasonable doubt as held in ***Muliro -vs- Musonye & Another (2008) 2 KLR 52***.

The 2nd Respondent attributed the error to human fatigue and the same did not affect the conduct of the election. The burden of proof throughout rests with petitioner and he was obligated to call the witnesses to establish his claims.

He ought to have impeached the conduct of the 2nd Respondent in declaring the 1st Respondent as the validly elected candidate. All that was stated were bare allegations and shifting of the burden to the Respondents.

ii. Whether the 2nd Respondent had powers to revoke the certificate of results issued to the Petitioner.

The petitioner submitted that the 2nd Respondent did not have mandate to revoke the certificate issued to him. He cited **section 74 of the Election Act**.

The 2nd Respondent contended that he was exercising his power as provided in **Regulation 83 of the Election Regulations**. That the results were provisional and the same were to be sent to the commission as stipulated by **Regulation 87 of the Election Regulations**.

The Returning officer in discharging his duties is guided by the following sections of the Election Act

and **Part XIII of the Election Regulations** as cited below.

Regulation 83 (1) of the Election Regulations provides “*Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers if present,*

- a. *Tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of that polling station in the announcement of the election results and make a statement to that effect.*
- b. *In the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2)*

Regulations 84,85, 86 of the **Election Regulations** further elaborate the role of the Returning Officer during the counting of votes and declaration of the results.

Regulation 87(2) of the **Election Regulations** provides that “*the returning officer shall after the tallying of votes at the constituency level-*

- a. *Announce the results cast for all candidates*
- b. *Issue certificates to persons elected in the National Assembly and county assembly elections in form 38 set out in the schedule and*
- c. *Electronically transmit the provisional results to the commission*

Section 74(1) of the Election Act provides that “*That pursuant to Article 88(4) of the constitution, the commission shall be responsible for the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results*”

As stated earlier the 2nd Respondent had already issued the petitioner with a certificate by the time the error had been detected and corrected. He contacted their legal Department who advised him to revoke the same and he subsequently issued the certificate to the 1st Respondent.

The question is whether he had the mandate to revoke a certificate he had issued to the petitioner?

Section 74 (supra) excludes such disputes from being handled by the 2nd Respondent. The results had been declared.

It is clear that the 2nd Respondent breached this provision. However the question is did the material breach substantially affect the outcome of the election?

This court holds the view that it did not affect the will of the voters and in revoking the certificate issued to the Petitioner the 2nd Respondent acted in good faith and had no intention of subverting the democratic exercise by the voters of Silibwet Township Ward to elect a person of their choice.

It was common ground between the petitioner and the Respondents that the information contained in the Form 35 for MCA of Njerian Primary School; polling station was more or less accurate. The error occurred during posting of the same into form 36.

Further it was clear from the outcome of the recount that the 1st Respondent had garnered the most votes. Both the Petitioners and the 1st Respondent's Votes reduced by 3 and 7 votes respectively during the recount and same could be attributed to votes rejected during the recount exercise by their appointed agents. The recount results were more or less closer to what the 2nd and 3rd Respondent had declared and it ended up establishing that the electoral officials did their work in compliance with the law

I am further guided by the provisions of **Section 83 of the Election Act** which provides “*No election shall be declared to be void by reason of noncompliance 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 noncompliance did not affect the results of the election*”

In **Rishad Hamid Ahmed Amana - Vs - IEBC & 2 Others High Court at Malindi (EP) 6 of 2013 Kimaru J** stated that “*A petitioner is not required to establish that there were irregularities which were committed during the elections that such irregularities (noncompliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test.*

Apart from that the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty six (36) hours and therefore simple arithmetical mistakes are bound to happen. This was the decision of Maraga J. (as he then was) in Joho Vs Nyange (2008) 3 KLR (EP) 500.

What Section 83 simply provides is that in any election, because it is conducted by human being, the bound to be errors which can be explained. There is no election which can be perfectly conducted. However it is only when such errors, which constitutes noncompliance with the law materially affects the outcome of the results that the court will have no option other than to nullify the said results”. I fully associate with the Learned Judge’s remarks.

iii. What led to the cancellation of the certificate of results issued to the Petitioner by the 2nd Respondent?

The 1st Respondent stated that his agents were surprised when the petitioner was announced as the winner. There was a problem with the figures. He stated his agents disputed the initial results and they refused to sign the forms. The agents decided to check and counter check with their form 35. The notified their party agent who informed the 2nd Respondent about the issue. There was an error at Njerian Primary School, polling station. It was discovered that the result in Form 35 for Women Representative were tallied in the Form 36 for MCA.

The 2nd Respondent in his evidence stated that after the error was corrected it emerged that the 1st Respondent had the majority votes and he stated that they tallied thrice and confirmed it was an error. He had already issued a certificate to the petitioner and he contacted their legal department who advised him to cancel the certificate and contact the petitioner. He stated that he did contact the petitioner but he refused to pick his calls and he subsequently sent him a text thorough his telephone no. 0723762645. He never received a response from the petitioner. The 1st Respondent was subsequently issued with a certificate at the county hall.

Form 35 and Form 36 are vital documents in the election process as they give a summary of the results of an election and it is on the basis of their accuracy that the credibility of an election is rated. If the irregularities noted on such Forms are so grave, it may lead to a conclusion that the election was not transparent, free and fair. However, if the irregularities have no effect or substantial effect on the results, then there would be no proper basis for nullifying the election. (See **Clement Kungu Waibara –vs- Benard Chege Mburu Civil Appeal No. 205 of 2011**)

In the current case the error occurred during the posting of results from Form 35 to Form 36. I have had the opportunity of perusing the forms 35 of Njerian Primary School, Polling station for both Women Representative and MCA and indeed confirmed the said error in posting. During the recount exercise the results for Njerian Primary School, polling station for MCA were the same as those supplied by the 2nd and 3rd Respondents. The error can be clearly attributed to human error and it did not affect the will of the people in their candidate’s choice.

The Petitioner stated that it was irregular to issue the certificate at the county hall as the results for MCA were supposed to be declared at Tenwek High School Hall. The 2nd Respondent submitted that the retallying was done at Tenwek High School Hall and the declaration was in his office. He stated that the County Hall is a gazetted tallying Centre and he was pressed for time to take the results to Nairobi. The Tenwek High School Hall had been vacated and the staffs were cleaning. The results were to be declared to the people of Bomet and they were in the County hall.

The petitioner ought to have established the irregularities in the announcement of the results at the county hall and not Tenwek High School Hall.

In my view the 2nd Respondent had complied with the provisions of **Regulation 84 of the Election Regulations** he acted in good faith and the explanation given was reasonable in the circumstance.

It is now accepted that in Election Petition the burden of proving allegations made in the petitions lies with the Petitioner. In **Raila Odinga –vs- IEBC & 3 Others, Election Petition No. 5 of 2013**, the Supreme Court held thus *“Where a party alleges non conformity with the electoral law, the petitioner must not only prove that there has been noncompliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for 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 be 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”*

It is therefore clear that in an election petition such as in the present one, where the Petitioner makes allegation or alleges that there has been breach of the law by the 2nd Respondent, he must lay evidence before the court to support the allegations.

It is not enough for the petitioner to point irregularities that took place during the elections. The Petitioner must establish that the irregularities were of such nature that it affected the exercise by voters of the particular electoral area, of their will to choose a candidate of their choice.

Further generalized complaints in regard to allegations of electoral malpractice are insufficient to invalidate an election.

In **Onalo –vs- Ludeki & Others (2008) 3KLR 614** It was held that *“The burden of proof of election offences like bribery etc as per the Election Offences Act in the election petition are higher because they are quasi criminal and if the offence is not proved to the satisfaction of the court and if the court is not satisfied and when it is doubt and where a reasonable doubt exists the same cannot be held to be proved against the respondents”*

iv. What consequential declarations, orders, reliefs this Court should grant based on the determination of the petition?

I have carefully evaluated the evidence adduced and would like to make the following conclusions.

The allegations particularly those related to transposition of results from Form 35 to Form 36 of Njerian Primary School, polling station were clearly attributed to human error however, they were not so grave or substantial as to affect the ultimate result of the election in any significant way particularly with regard to the number of votes garnered by each of the candidates.

It is clear from the results supplied by the 2nd and 3rd Respondents and the recount results that the 1st Respondent garnered the most votes with a margin of 114 votes as per the results supplied by the 2nd and 3rd Respondents and 110 votes as per the results of the recount as against the Petitioner’s votes.

On the question of the integrity of the ballot boxes from Kapsimotwa polling after they were taken and

held in the custody of the CID Department. I do find that there was no credible evidence to support the allegation and nothing unusual was noted during the evidence or the recount exercise. A recount was conducted when the presiding officer raised concerns about the results as stipulated by **Regulation 80 of the Election Regulations**. The candidate's agents were also present.

This court further noted that during the recount exercise, the Form 35 of Emkwen Youth Polytechnic and Silibwet Tea Buying Centre were duly filled and signed by the candidate's agents. The same had appeared blank in the form 35 annexed to the response to the petition. There was no issue noted as relates to the results of Kecheiyat polling station in relation to the results tendered by the 2nd and 3rd Respondents. The same results were reflected during the recount exercise. The form 35 was found to be duly filled and signed by the candidate's agents.

No election offence was proved in this case.

As to the quality of the election this court is satisfied that despite minor and insignificant errors and irregularities. The election for Member of County Assembly (MCA), Silibwet Township Ward held on the 4th March, 2013 measured to acceptable constitutional and statutory standards for any reasonable observer to say without adoubt that the election was free and fair such that it reflected the will of the Bomet Central electorate.

Consequently, it would therefore follow that the 1st Respondent was validly elected and declared as the winner of the seat of the Member of County Assembly (MCA), Silibwet Township Ward.

A certificate to the effect shall be issued forthwith and shall be served upon the Speaker of the Senate, National Assembly and Bomet County Assembly in accordance with **Section 86(1) of the Election Act**.

This petition is devoid of merit and is hereby dismissed with costs to the Respondents.

I must commend the Advocates for all the parties for their thorough research and cooperation throughout the hearing. It is through their diligence and cooperation that they enabled this court conclude the matter within the timeline provided by the law.

This court would not have come this far without the support of the entire staff of Bomet Law Courts who worked tirelessly to ensure the smooth hearing of the petition. I do appreciate their effort and thank each and every one of them.

Dated, Signed and Delivered in open court at **Bomet this 30th August, 2013**

Right of Appeal 30 days.

V. Karanja

(Ag Senior Resident Magistrate)

Bomet Law Court

In the Presence of

Court clerk: Alex

Counsel for the Petitioner: Mr. Kenduiwo h/b for Mr. Orina

Counsel for the 1st Respondent: Mr. Kitur

Counsel for 2nd & 3rd Respondent: Mr. Langat h/b for Mr. Yego