



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MERU
ELECTION PETITION NO. 2 OF 2013

SALESIO MUGAMBI M'ITONGAPETITIONER

VERSUS

WILLIAM KIRIMI MAGIRI1ST RESPONDENT

MR. KENNETH ONDITI R/O

SOUTH IMENTI CONSTITUENCY2ND RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSIONER3RD RESPONDENT

JUDGEMENT

By his petition herein dated 3rd April, 2013 and filed on 5th April, 2013 the Petitioner herein prays that this petition be determined thus:-

- a. That the said WILLIAM KARIMI MAGIRI was not duly and validly elected
- b. That the election was void and a nullity
- c. That the position of ABOGETA WEST COUNTY ASSEMBLY REPRESENTATIVE be declared vacant and a fresh election be held
- d. That costs of this election petition be borne by the 2nd and 3rd respondents

The Petitioner states that

- i. The 3rd Respondent printed the name of the Petitioner in the Ballot paper but put the photograph of a stranger as his photograph
- ii. That the 3rd Respondent failed to print the correct – photo of the Petitioner despite requests and notices from the Petitioner.
- iii. That the Petitioner was discriminated upon by the 3rd Respondent as his photograph on the Ballot paper was that of a stranger
- iv. That the Petitioner was prejudiced as voters accused him of dumping, misleading them during the campaign period and thus voted against him in protest
- v. That the Petitioner may have lost the position of the ABOGETA WEST, COUNTY ASSEMBLY WARD Representative due to the fault of the 3RD Respondent.
- vi. That in all round circumstances the elections were not fair and proper.

The Petitioner has supported his Petition through his supporting affidavit herein sworn on 3rd April, 2013 annexing documents marked SAM 1 to SM 13.

He also filed affidavits of his intended witnesses also sworn on the same date namely:

ALKANGELO KIRIMI MBERIA who was a voter and his agent at Kionyo Primary School Polling station;

MARIONE KINYA who was a voter at Kionyo Education Centre;

ALEX MURITHI who was a voter at Murungurune Primary School Polling Station

HENRY MWITI who was a voter and his agent at Kionyo Education Centre;

GEORGE KINYUA who was a voter and his agent at Irimbene Primary School Polling Station, and

KIM MBURUGU who a was a voter at Kariene Tea Buying Centre.

The Petitioner acted in person in this Petition.

The Petitioner was a candidate for the Abogeta West County Assembly Ward representative during the Elections on 4th March, 2013.

The other candidates for the position were the 1st Respondent herein WILLIAM KARIMI KAGIRI together with four others namely ERIC KIAMBI, PAUL MUTUMA, HARRISON GITOBU and KENNETH MANYARA

The 2nd Defendant herein was the returning officer who announced the results as follows:-

- | | |
|-----------------------------|--------------|
| a. William Kirimi Magiari | 3,648 votes; |
| b. Eric Kiambi | 365 votes; |
| c. Paul Mutuma | 202 votes; |
| d. Salesio Mugambi M'Itonga | |
| (herein the Petitioner) | 857 votes; |
| e. Harrison Gatobu | 3,171 votes; |
| f. Kenneth Manyara | 3,444 votes; |

William Kirimi Magiri was declared the winner.

Having been dissatisfied with the said results as declared by the 2nd and 3rd Respondents, the Petitioner filed this petition which was duly served on all the Respondents.

The 1st Respondent did not enter appearance or file any response and consequently under, Rule 14(3) of Elections (Parliamentary and County Elections) Petition Rules 2013, was excluded from appearing or acting as a party in this Petition during these proceedings.

The 2nd and Respondents filed memorandum of appearance and filed Answer to Petition through the firm of Isema Kamau and Maema Advocates and Mr. Nyaburi has been appearing for the Respondents.

During the pre-trial conference on 9/5/2013, the following factual issues were identified:

1. Whether what was submitted by the Petitioner to the Respondent during the nomination on 29th January, 2013 is what was in the ballot paper on the election date 4/3/2013;

2. Whether the photograph appearing on the ballot paper/on the election date 4/3/2013 is Petitioner's photograph;
3. Whether the Petitioner duly informed the Respondents of the use of the wrong photograph in place of that of the Petitioner in the ballot paper on the Election date.

These facts were conceded by the Respondents.

The following legal issues were also identified:

1. Whether there is a legal requirement for ballot papers for the County Assembly Ward Representative to contain photographs of the candidates;
2. Whether the action by the Respondents in failing to use Petitioner's photograph on the ballot paper during the election on 4/3/2013 breached any legal requirement;
3. What is the legal effect of using a stranger's photograph in place of the Petitioner's photograph on the ballot paper during the election on 4/3/2013;
4. Whether the non compliance with the legal requirement if any, materially affected the outcome of the elections on 4/3/2013;
5. What are the consequential reliefs/orders the court ought to make in view of the findings on the issues above;
6. Who should bear the costs of this Petition.

It was agreed that the parties proceed with the legal issues by way of the affidavits on record without calling any witness to testify and file written submissions which were highlighted on 20/6/2013.

The 2nd and 3rd Respondents answer to the petition stated, inter alia, that the election was conducted in accordance with the principles of the Constitution, the Independent Electoral and Boundaries Commission Act, the Election Act and the Regulations there under. That the ballot papers used in conduct of the said election substantially complied with the Provisions of elections Act 2011 and paragraph 68 of Elections Act (General) Regulations 2012.

That the photographs used in printing of the ballot papers were photographs submitted by the candidate pursuant to Part VIII of Elections Act (General) regulations 2012 and Form 18 in the schedule. That the use of photograph was not a mandatory requirement in the ballot papers. That the petition was guilty of laches.

That the error in use of the wrong photograph by the 3rd Respondent did not materially and/or substantially affect the result as to warrant nullification thereof. That the Respondents did not discriminate the Petitioner in the conduct of the elections for the position of members of the County Assembly of Abogeta West County Assembly Ward.

That the Petitioner's petition is speculative and presumptive and is not based on any factual premises.

That the petition fails to satisfy the evidential threshold to validate the factual assertions made by the petitioner.

That the elections for the position of member of County Assembly Abogeta West Ward were conducted in accordance to the principles set out in Article 86 of the Constitution and the electoral legal regime provided and was thus free and fair.

That the application singularly and collectively of the test of public interest, proportionality and harm militate against the nullification of the elections for the position-- of member of the County Assembly Abogeta West Ward.

That the Statutory threshold for invalidating the elections under Section 83 of the Elections Act 2011 has not been satisfied.

The 2nd and 3rd Respondents answer to petition is supported by Replying Affidavit sworn by the 2nd respondent herein sworn on 18th April, 2012 and filed on the same date. Respondents also filed the results in form of Form 35 from all polling stations in the ward and Form 36 for the ward in compliance with paragraph 21(b) of the Elections (Parliamentary and County elections) Petitions Rules 2013 for the Abogeta West County Assembly Ward, South Imenti constituency.

In his submissions the Petitioner relies on the following authorities:

1. Ali Omar & Electoral Commission of Kenya Vs Julius Daraka <http://mku.ac.ke/Mbuzi> & Another Mombasa Court of Appeal Case No. 50 of 2006 (Unreported);
2. Johoho Vs Nyange and Another (2008) 3 KLR 500;
3. Ntwiga Vs Musyioka & 3 others 2008 2 KLR (EP) 276;
4. Karauri Vs Kangethe & Another (2008) KLR, (EP) 135;
5. Article 10(2) (b) of the Constitution 2010;
6. Article 82, (2) of the constitution 2010;
7. Article 81 (e) (v) of the constitution 2010;
8. Regulation 72 of Election (General) Regulations;
9. Regulation 68 (4) Elections (General) Regulations;

He submitted that under, Regulation 68 (4) elections (General) Regulations where the word “shall” is used a photograph was a mandatory requirement in the ballot papers.

He called upon court to substitute the use of party symbol which was the subject of the Ali Omar case with a photograph which he states was a mandatory requirement. He submitted that in contravention of Article 81 (e), (v) of the constitution the voting exercise on 4/3/2013 was not fair to the petitioner and it cannot be deemed to have been impartial or neutral or accurate in the way the Petitioner was treated in relation to the other candidates. He also submitted that the actions of the 2nd and 3rd Respondents were therefore discriminatory, unconstitutional and illegal. He submitted that candidates in an election are entitled to correct symbols and/or photographs otherwise the election cannot be a fair process.

He submitted that he expected the voting exercise to be stopped until the ballots were corrected. He also submitted that the voters were not accorded their due right under the constitution to vote for their candidate of choice during the March, 4th 2013 elections.

He submitted that the Raila case cited by the Respondents has a different stakes from the one of the Petitioner as it was based on the tallying of the votes and failure of biometric machines. He submitted that in contravention of Article 10 (2)(b) of the Constitution which protects against discrimination he was not accorded equal opportunity like the other candidates during the March, 4th 2013 elections though IEBC as a State organ was under obligation to protect human dignity. He submitted that in contravention of Article 82 (2) which require that the Electoral Commission ensure that the elections are simple, the elections in the Abogeta Ward were not simple as there was mix up of the ballot papers and the confusion could have been rectified by the 3rd Respondent by postponing the elections and informing the voters of the mix up.

He therefore submitted that the elections of 4/3/2012 at the said Ward did not meet the constitutional threshold as it was not free and fair because confusion on the photograph was not rectified nor were voters informed of the anomaly.

In submissions, the Respondents distinguish the Karauri Vs Kangethe case, the Joho Vs Nyange case the Ntwiga Musyioka & 3 others case.

The Respondents rely on the following authorities:

1. Raila Odinga & Others Vs IEBC & Others, Petitions Nos 3,4,& 5 of 2013;
2. Mohammed Jahaz Vs Shariff Nassir A Taib Election Petition No. 9 of 1983;

3. Francis Chach Ganya & Others Vs Attorney General and others (2012) e KLR (High Court);
4. Nigeria case Agbaye Vs Fashola 2008) 6 MWLR (PT 1082;
5. South Africa case No. 1 of 2009 The Cape Party Vs The Electoral Commission & Congress of the People;
6. Kilbourne Vs City of Carpinteria 56 Cal App 3d 11 (Court of Appeal of California;
7. Supreme Court of Nigeria case of Buhari Vs INEC;
8. Olusola Adeyeye Vs Simon Oduoye (2010) court of appeal of Nigeria,

The substance of the submissions by the Respondents is, inter alia, that the legal burden rests with the Petitioner to show that there was non conformity with the law on the part of the Respondents in failing to use his photograph in the ballot papers and in the use of a different person's photograph and that the said non-compliance affected the validity of the elections. That the Petitioner must raise firm and credible evidence of departure on the part of the Respondents from the prescriptions of the law.

The 2nd and 3rd Respondents call for dismissal of the Petitioners Petition and an order for the Petitioner to bear the costs of this Petition.

On the burden of proof and the standard of proof this court is guided by the Raila A. Odinga Vs Ahmed Isaack Hassan and others Petitions Nos, 3,4, and 5 of 2013, case at paragraphs 195, 196 and 203 and agree that in this petition where the Petitioner alleges non-conformity with the electoral law including the constitution he 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 of 4/3/2013 for the Abogeta West county Assembly Ward member. He must set out by raising firm and credible evidence of IEBC's (3rd Respondent's) departure from the prescription of the law.

The standard of proof is however not beyond reasonable doubt nevertheless, it is above the balance of probability.

Article 10 of the Constitution sets out the National values and principles of Governance, which bind all State organs, State Officers, public officers and all persons whenever any of them-

- a. Applies or interprets this Constitution;
- b. Enacts, applies or interprets any law; or
- c. Makes or implements public policy decisions.

(2) The national values and principles of governance include-

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human right, nondiscrimination and protection of the marginalized;
- (c) good governance, integrity, transparency and accountability; and
- (d) Sustainable development.

Under Article 38 (2) of the Constitution:

“the right to free, fair elections based on universal suffrage and the free expression of the will of the electors “ is provided.

Article 81 sets out general principles for the electoral system as thus “The electoral system shall comply with the following principles:-

- a. Freedom of citizens to exercise their political rights under Articles 38;
- (d) Universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) Free and fair elections, which are-
 - (i) By secret ballot;
 - (ii) Free from violence, intimidation, improper influence or corruption;
 - (iii) Conducted by an independent body;
 - (iv) Transparent;
 - (v) Administered in an impartial, neutral, efficient, accurate and accountable manner”.

Article 82 states:

“1. Parliament shall enact legislation to provide for

(d) The conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections....

(2) Legislation required by clause (d) shall ensure that voting at every election is-

- (a) simple,
- (b) transparent and
- (c) takes into account the special needs of-

- i. persons with disabilities and
- ii. other persons or groups with special needs.”

Article 83 states.....

“(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.”

Section 83 of the Elections Act 2011 states 11 “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.”

Regulation 68 of The Elections (General) Regulations 2012 sets out the requirements of ballot papers.

Ballot papers for use at a county Assembly member election are inform 30 set out in the schedule.

Regulation 72 which deal with assisted voters states:

“(1) On the application of a voter who is, by reason of disability, or being unable to read or write, and therefore unable to vote in the manner prescribed in these regulations, the presiding officer

shall permit the voter to be assisted or supported by a person of the voter's own free choice and who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.....”

The issues agreed upon by the parties for determination by this court are dealt with in light of the pleadings (petition and answer to petition), the contents of the affidavits by the petitioner, his witnesses and by the 2nd Respondent, the submissions by each party both written and oral, the authorities relied on by each of the parties, the relevant laws applicable mainly the constitution 2010 and the Elections Act and the Regulations thereto and other material documentary evidence submitted by the parties.

It is not in dispute that another person's photograph was printed against the name of the petitioner on the ballot paper during the elections on 4/3/2013 for the Abogeta West county Assembly Ward Representative.

The 2nd Respondent was duly informed on the same date. The 3rd Respondent was also duly informed through its presiding officers on the same date. The Petitioner was also informed of the mix up by his agents as early as 6 am as stated by one of his agent by the name George Kinyua who was a voter and Petitioner's agent at Irimbine Primary School polling station as in paragraph 4 of his affidavit.

The Petitioner participated in the election and voted at the same Irimbine Primary School at 9 a.m. when he states at paragraph 12 of his affidavit that he discovered that the photograph on the ballot was not his photograph. The petitioner in his affidavit at paragraph 10 also confirms the contents of paragraph 4 of Kinyua's affidavit that he was informed by George Kinyua who was his agent about the mix up. The elections went on and the petitioner received a total of 857 votes, emerging in the 4th position among the six candidates who participated in the said election.

The 1st Respondent who was declared the winner received 3,646 votes, No 2 received 3,444 votes and No.3 received 3,171 votes while No. 5 received 365 votes and No. 6 202 votes.

Under Regulation 68 of Election (General) Regulations 2012, the ballot paper for County Assembly Ward Representative was to be in form 30 in the schedule. It is clear from the form provided for ballot papers for the election of County Assembly Ward Representative (form 30) that there was no provision for a photograph. The same apply for the ballot papers for the position of Women representative, senator and National Assembly. Photographs are only provided for the ballot papers for election of the president and governor. It is noted that the Election Act and the Election Regulations in reference were enacted in 2011 and 2012 which is after the Constitution 2010. The legislators who enacted the Election Act 2011 and the Election (General) Regulations 2012 were aware of the Provisions in the constitution regarding elections. There has not been any challenge to the said Election Act and the said election Regulations.

It is therefore clear that the standards set in the Election Act 2011 and the Regulations in reference confirm to the standards set out in the constitutional provisions set out herein above. It is noted that the photographs for County Assembly Ward Representatives were submitted for purpose of Nomination under Part VIII of the said Regulations, Regulation No. 34 in Form 18 in the schedule which has provision for a photograph of the candidate unlike in the case of Form 30.

The photographs were therefore not a legal requirement on the ballot paper during the voting on 4/3/2013 for the election of County Assembly Ward representative though the IEBC (3rd Respondent) decided to use photographs on the ballot papers during the voting.

It is clear from the evidence that other than the fixing of a stranger's photograph against the name of the Petitioner, the ballot paper used for the election of County Assembly Ward Representative for Abogeta Ward on 4/3/2013 complied with all the requirements of a ballot paper as set out in Regulation 68 of the Regulations in Reference.

The requirement of photograph in regulation 68(4) (b) indicate "where applicable" and this can only be in reference to the case for ballot papers for the election of the president and the Governor where the use of photograph is a requirement. The case of Ali Omar and Electoral commission of Kenya Vs Julius Daraka Mbuji & another, Mombasa Court of Appeal case No.50 of 2006 (unreported) is therefore distinguished since unlike in this petition the court was dealing with a party symbol which was a mandatory requirement. In this petition there is no complaint relating to the use of party symbol.

There is no evidence that the mix-up was a deliberate move by the Respondents aimed at aiding the 1st Respondent or any other candidate to win the elections at the expense of the Petitioner. The mix-up can only be attributed to normal human error.

There is no evidence that the Petitioner was discriminated by the Respondent in light of the foregoing.

As for failure by the Respondents to stop the elections and the indication that the 3rd Respondent cancelled other elections for similar mix-up as announced by the Chairman of the 3rd respondent as in the media on 5/3/2013, a look at the newspapers report on the issue on 5/3/2013 indicated the specific wards where voting was halted due to the magnitude of the mix-up and it is clear that the mix-up at Abogeta West County Assembly Ward Representative elections were not of similar magnitude as to warrant halting or cancelling of the elections.

There is no evidence that any voter who may have been confused by the mix-up during the said elections sought assistance from any of 3rd Defendants presiding officers manning the polling stations for purposes of being assisted to identify their favourite candidate in this case the Petitioner and that such assistance was denied.

None of the Petitioner and his agents stated that he sought assistance from any of the 3rd Respondent's presiding officers for any voters claiming they wished to vote for the Petitioner and they could not be able to identify the Petitioner on the ballot paper because of the mix-up. Indeed none of the voters who indicated they did not vote for the Petitioner stated that they were not able to identify the Petitioner because of the mix-up and that they sought assistance to be assisted to identify the Petitioner but they were denied. Each of the witnesses for the Petitioner who stated that they did not vote for the Petitioner stated that they noted the presence of his name only that the photograph was of a different person. There is no evidence of a name similar to that of the Petitioner on the ballot paper.

It is noted that the instructions to the voters in the ballot paper (form 30) is for the voter to put a mark against the name of the candidate and the symbol of the party the voter wishes to elect. From the Petitioner's evidence he was nominated by Vision Party whose symbol he used during the campaign and was used on the ballot paper.

The two voters Marion Kinya and Alex Murithi, each of whom stated in her/his affidavit that she/he did not vote for the Petitioner due to the mix-up were able to identify Petitioner's name, an indication that each of them was literate and could therefore also easily identify Petitioner's party symbol. No weight can therefore be attached to their evidence that they did not vote for the Petitioner and that they did not vote for the Petitioner because of the mix-up.

It is therefore clear that there were sufficient features namely the name of the Petitioner, and his party symbol to aid any voter who wished to vote for the Petitioner, to identify the Petitioner. It is also clear from the evidence on record that those who wished to vote for the Petitioner were able to identify the Petitioner and voted for him. Any voter who may have intimated to the Petitioner or any

of his agents that she/he did not vote for the Petitioner due to the mix-up could not have been sincere since they could easily identify the Petitioner with his name and his party symbol as did those who voted for him and if any of them was not able to read his name and could not identify his party symbol they could have sought assistance from any of the presiding officers or complain to the agents or the Petitioner that they had sought such assistance but they were denied the assistance.

It is therefore clear from evidence on record that the voters of Abogeta West Ward county Assembly Representative elections were given appropriate opportunity to vote for their favourite candidate and they were able to express their will. They were given their due right under the Constitution which they freely exercised.

The election of the County Ward Representative for Abogeta West held on 4/3/2013 were held in accordance with the Constitution and the other relevant laws and were free and fair in the circumstances.

Consequently the court find that the mix-up of the photograph herein did not make a difference in the ultimate results of the elections at the said ward and the Petitioner has not made out a case to justify his prayer that the elections be declared as being void and a nullity.

The result is that this court finds that the 1st Respondent was validly elected. The Petition is consequently dismissed.

The court however find that Petitioner's petition cannot be said to be frivolous consequently the court does not wish to punish the Petitioner with costs and order that each party bear its own costs for this petition. Certificate under Section 86 (i) to issue.

R.N. KIMINGI

C.M. 20.8.2013

Judgment delivered and signed by me in open court this 20th day of August, 2013. Right of Appeal explained to Petitioner.

Miss Nyaga holding for Mr. Nyaburi for 2nd and 3rd Respondent

Petitioner present

Faith Court Clerk

R. N. KIMINGI

C.M. 20.8.2013

PETITIONER:

I do not wish to file any appeal. I therefore request that the security I deposited be released to me.

R. N. KIMINGI

C.M. 20.8.2013

MISS NYAGA

I have no instructions about the deposit . I will inform Mr. Nyaburi the results. If they will not have made any appeal within 14 days then the court can make further orders.

R. N. KIMINGI

C.M. 20.8.2013

COURT

KShs.100,000/= deposited by the Petitioner be released to him if 2nd and 3rd Respondents will not have filed an appeal on the issue of costs within 14 days from today.

R. N. KIMINGI

C.M. 20.8.2013