



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT GARSEN

ELECTION PETITION NO. 01 OF 2013

IN THE MATTER OF: - THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: - ELECTION ACT NO. 24 OF 2011

AND

IN THE MATTER OF: - THE ELECTIONS (GENERAL) REGULATIONS 2012

AND

**IN THE MATTER OF: - THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ACT NO. 9 OF 2011**

AND

**IN THE MATTER OF: - THE NATIONAL GENERAL ELECTIONS HELD ON THE 4TH
MARCH 2013**

AND

**IN THE MATTER OF:- ELECTION FOR COUNTY REPRESENTATIVE IN THE KIPINI EAST
WARD, GARSEN CONSTITUENCY**

BETWEEN

SHARIF ABDULDADIR ABDERHMAN-----PETITIONER

AND

ABDALLAH CHIKOPHE -----1ST RESPONDENT

INDEPENDENCE ELECTORAL AND

BOUNDARIES COMMISSION -----2ND RESPONDENT

MANASE SAMUEL GUYO -----3RD RESPONDENT

JUDGEMENT

1. Following the general election held on the 4th day of march 2013, under the charge of the **Independent Electoral and Boundaries Commission** (herein the *2nd Respondent*), among the candidates who contested for the presentation of County Assembly, Kipini East Ward, of Garsen Constituency were, **Shariff Abdulkadir Abderhaman** (herein after *the Petitioner*) who was then the incumbent, **Manase Samuel Guyo** (herein the *3rd Respondent*). Others are not parties to this petition but are set out in the petition.

The elections were held simultaneously at the same polling stations for other five elective posts, with the same polling officials (agents of the *2nd Respondent*) presiding over them, and **Mr Abdalla Chikophe** (herein the *1st Respondent*) being the returning officer for Garsen Constituency.

2. After the conclusion of the polling and tallying of the results from the various polling stations, in this case, fifteen (15) polling stations, the *1st Respondent* who was responsible for the supervision and conduct of the election in the constituency, and to make returns, as the *2nd Respondent's* principal officer, hence its agent, declared that the *1st Respondent* had garnered one thousand one hundred and seven (1,107) votes, followed by the *Petitioner* with eight hundred and eleven (811) votes.

Accordingly, he declared the *3rd Respondent* as the candidate duly elected to represent the Kipini East Ward in the County Assembly of Tana River County, and the *2nd Respondent* caused this returns to be published in the gazette as stipulated by law. The *1st respondent* also issued the *3rd respondent* with the certificate of results of County Assembly election, 2013. These were facts not in dispute at all.

3. The petitioners grievance with the results so declared, and the consequential return made, and on a consequence of which he filed this petition was that the election for County Assembly of Kipini East Ward was riddled with a lot of malpractices committed by the *1st and 2nd Respondents* and their agents to the advantage of the *3rd Respondent*, non-compliance with the electoral laws and practice, and this affected the outcome of the election in a substantial manner, therefore contended that as a result the *3rd Respondent* did not legitimately win the election.
4. The malpractices and non-compliance which forms the basis of the petitioners grievance can be recast as follows; That:-
 - i. *Several agents of the petitioner were banned for the polling station.*
 - ii. *That all the presiding Officers were for the Pokomo Community as the 3rd Respondent.*
 - iii. *The Petitioner agents were not issued with **Form 35** and **36** by the Presiding Officer or allowed to sign the same to verify the results at the polling stations as required by law.*
 - iv. *The petitioner and his agents were not given copies of **Forms 35** and **36** used to tally the results thus rendering the whole election flawed vague and unfair.*
 - v. *The presiding officers at Kipini primary School refused to let agent near the assisted voters to ascertain whether the presiding officer had captured the initial of the voters in voting on what of the assisted voters contrary to the law.*
 - vi. *That some ballot boxes at Kipini Primary School were not sealed.*
 - vii. *That the presiding officer at Kipini Primary School, one **Agnes Matata** was writing names on exercise book and then allowing people to vote without checking any register.*
 - viii. *That forms 35 and 36 pinned at the polling station did not identify the streams to which they belonged to and did not bear the *2nd Respondents* seal.*

- ix. *Registered voters who were supporters of the petitioner were banned from voting.*
- x. *By using the manual voters register and manual voting system as opposed to the electronic voting identification machines thus disenfranchising many voters.*
- xi. *By barring voters who had acknowledgments who had slips issued by the 2nd Respondent on account they were not in the principal register from voting thus disenfranchising them.*
- xii. *By falsification of votes at Kipini Primary school, stream II cast in favours of petitioner from 164 votes to 64 votes.*
- xiii. *Many voters were turned away from the voting on the basis that the time was up and yet they had been queuing even before 5.00pm. This mostly was from the Arab descent as the petitioner, while Pokomo voters were allowed to vote in order to facilitate manipulation, impropriety and tampering and general misconduct of the election.*

The petitioner therefore prayed:-

- a. *An order that there be a thorough scrutiny of the votes recorded as having been cast in Kipini East Ward election of County Assembly for each candidate.*
- b. *An order that there be a scrutiny of the rejected and spoilt ballot papers cast for the county Assembly member for the Kipini East Ward.*
- c. *An order that there be a recount of the ballot papers cast for the County Assembly Member for Kipini East Ward.*
- d. *An order that the County Assembly member for Kipini East elections be determined and declared null and void.*
- e. *An Order that the 3rd respondents election to the County Assembly Member for Kipini East Ward is Null and void*
- f. *An Order that the 2nd Respondent do furnish the Court and the Parties herein with certified true copies of the principal voters register for the Kipini East Ward.*
- g. *An Order that the 2nd Respondent do furnish the Court and the parties herein with certified true list of the names of all the presiding Officers and clerks engaged by the 2nd Respondent to conduct the elections for Kipini East Ward.*
- h. *An Order that the 1st and 2nd Respondent do furnish the Court with all the election materials used for county Assembly member for Kipini East Ward and the petitioner be supplied with certified copies of **form 35 and 36** for County Assembly members for Kipini East Ward.*
- i. *An order that upon notification of the County Assembly member for Kipini East Ward ,This honourable be pleased to order a fresh election and direct the 2nd Respondent to engage electoral officers to conduct the ensuring election from another County.*
- j. *An Order that the Respondents be condemned to pay cost.*
- k. *That such with further Order as the Court may deem **just and fit**.*

He made an affirmation in eighteen (18) affidavits which accompanied and supported the petition.

- 5. In their reply to the petition, the Respondents filed replying Affidavits, and 1st and 2nd Respondent

also filed an application dated the 15th day of April, 2013. Same was allowed by consent of the parties on 16th May, 2013 when matter came for Pre- trial conference and a further Affidavit filed in Court on 17th day of May, 2013 pursuant to the said consent Order.

6. The respondents denied the advance allegations made in the petition and instead contended that the election in which the 3rd Respondent was returned as a member of the County Assembly Ward for Kipini East Ward, which is now being contested:-
 - i. was held in compliance with the electoral Laws, devoid of any irregularity, and was thus free and fair,
 - ii. **and in the alternative**, that in the event non-compliance with the electoral laws; This never affected the outcome of the elections.

Each of the replies was supported by an Affidavit which reiterated on the contentions made therein and was in rebuttable of the adverse allegations made by the petitioner against the Respondent.

7. 1st Respondent swore an Affidavit on his behalf and that of the 2nd Respondent, 1st Respondent also swore the further affidavit already alluded to, (sworn on the 17th day of May, 2013).

The election officials who presided over the various polling stations also swore Affidavits in support thereof and all were in rebuttal of the specific adverse claims made by the petitioner or her witnesses allegedly committed.

8. On his part, the 3rd Respondent also swore an Affidavit on 25th April, 2013 and supported by two witnesses.

I will advert to this Affidavit in the course of discussing issues framed for determination by this court.

9. Pre-trial conference was held on the 16th day of May 2013. At the pre-trial conference, the issues for determination were generally agreed **viz:-**
 - i. Whether the Kipini East Ward County Assembly elections were conducted in accordance with the constitution and the elections Act and Rules and Regulations made there under.
 - ii. Whether the 3rd respondent was validly elected and declared as the winner for the seat of the county Assembly of Kipini East Ward.
 - iii. Whether the petitioner is entitled to the reliefs sought in the petition and already highlighted earlier in the judgement.

It was further agreed that the petitioner was to call 11 (eleven) witnesses and was to be heard on the 25th and 26th day of 2013.

1st and 2nd Respondent jointly were to call six (6) witnesses, while the 3rd Respondent was to call three (3) witnesses.

Respondents were to be heard on the 3rd and 4th July 2013.

Thereafter, parties were to file written submissions court was to give any further directions as matter progressed.

Lastly, it was agreed that the 2nd Respondent was to deliver the ballot boxes in respect of the election and the results on the

21st day of June 2013 (Incompliance with Rule 21 of the elections (Parliamentary and County Elections) Petition Rules, 2013).

That in effect determined prayers No.(f) and (h) of the petition. Prayer (g) of the petition was determined by further affidavit filed in court on 17th day of May 2013, by the 2nd Respondent in relation to the first three (a – c) prayers, same could have been raised before or during the hearing of the petition and before its conclusion at the instance of the petitioner.

10.The court however retained the general power to order scrutiny and/or recount of votes and/or ballot papers.

The jurisdiction to order scrutiny of votes is conferred upon an election court by **Section 82 (1) of the Elections Act** and the grounds for ordering a scrutiny are laid down in Section 82(2).

“82 (1) 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 a manner as the elections court may determine.”

And 82 (2) says:-

82(2) “where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off:-

- a. The vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or which had not been authorized to vote at the station.*
- b. The vote of a person whose vote was procured by bribery, treating or undue influence.*
- c. The vote of a person who committed or procured the commission of personation at the election.*
- d. The vote of a person proved to have voted in more than one constituency.*
- e. The vote of a person who by reason of conviction of an election offence or by reason of the election court, was disqualified from voting at the election.*
- f. The vote cast for a disqualified candidate by a voter knowing the candidate was disqualified or the facts causing the disqualification or after sufficient public notice of the disqualification or when the facts causing it were notorious.”*

And Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013 (the petition rules) provides:-

- 1. The parties to the proceedings may at any stage apply for scrutiny of the votes for the purposes of establishing the validity of the votes cast.*
- 2. Upon application under sub rule (i) the court may, if it is satisfied that there is a sufficient reason, order for a scrutiny or recount of the votes.*
- 3. Scrutiny or recount to be carried out under the direct supervision of the registration and subject to the directions as the court may give.*
- 4. Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to examination of:-*
 - a. The written statement made by the presiding officer under the provisions of the Act;*
 - b. The copy of the register used during the election;*
 - c. The copies of the results of each polling station in which the results of the election are in dispute;*
 - d. The written complaints of the candidates and their representatives;*
 - e. The packets of spoilt votes;*
 - f. The marked copy registers;*
 - g. The packets of counter foils of used ballot papers;*
 - h. The packets of counted ballot papers;*

- i. *The packet of rejected ballot papers, and*
- j. *The statement showing the number of rejected ballot papers.*

In this case, the petitioner did not raise the issue either as an interlocutory matter or during the hearing by way of an application. It was therefore left open to the court to decide whether there should be scrutiny, re-count or retaining of the votes.

After hearing the petition, the court was not satisfied that satisfactory reasons or grounds had been laid to warrant scrutiny, but ordered re-count in only one polling station, Kipini Primary School, Stream II.

11. An order of recount of votes is usually made for purposes of untangling questions of numerical figures. And here is the reason why I made that order of recount.

In paragraph No. 10 and 11 of the petition, petitioner averred that he had obtained 264 votes at Kipini Primary School in stream II but only 64 votes were recorded.

He repeated that allegation in paragraph 5 of his affidavit and that of his agents, Jamila Salim, and Awadh Mbarak Hussein, (the petitioner chief agent).

On perusal of form 35 which is usually filled by the presiding officer after tallying at the polling station, and which was annexed to the further affidavit by the 1st Respondent, I noticed that the form had alterations which had not been countersigned. Further the presiding officer, one Agnes Matata was not called to give evidence and explain the alterations, and also rebut the allegations made against her.

12. The recount was done on the 8th day of July, 2013 in the presence of the parties and/or agents as agreed.

After recount, it was established that form 35 placed inside the ballot box was different from the one annexed to the affidavit and which was used to tally and generate results filled in form 36.

The results were as follows, in alphabetical order:-

- i. ADA HADULA MANGA – 01 instead of 52 given.
- (ii) BADA SARES ISRAEL – 00 instead of 23 given
- (iii) MANASE SAMUEL GUYO – 79 (tallied with 79) given.
- (iv) MAURICE KARISA CHARO – 04 instead of 02 given.
- (v) SAID SELEMAN NYARA – 03 instead of 23 given.
- (vi) SAIDI OMAR SAID – 49 instead of 58 given.
- (vii) SHARIF ADDULKADIR ABDERHMAN – 163 instead of 64 given.
- (viii) SWALEH KOFA KASE – 01 instead of 04 given
- (ix) ZABLON DIDAH KATENDE – 05 instead of 03 given.

Save for the 3rd Respondent, all the candidate had their votes inflated or deflated. Petitioner had 99 votes taken from him and distributed to the other candidates. I will revert to that issue later in this judgement.

13. I will now address each of the three issues framed for determination.

Issue No. 1

Whether in the conduct of the County Assembly elections from Kipini East ward, there was non-compliance with the laws and practice regulating the conduct of elections in Kenya?

The right of every eligible citizen to determine who will represent them in government without encumbrance is a basic cornerstone of any democracy and a prerequisite for social cohesion and solidarity.

Elections are indeed an element within the principle of rule of law because they give voice to the political will of the people involved.

The quality of an election is a key ingredient for deepening democratic governance. Elections are the primary inter linkage between representative democracy and political accountability.

High quality elections substantively add value to accountable governance and the realization of citizens becomes a political expectations. Low quality elections liability to democracy if they institutionalize undemocratic culture and practice. Actually public confidence in government is established when citizen believe that their will has been freely expressed and honoured through genuine elections.

It is out of this cherished recognition that the constitution of Kenya 2010 entrenches these principles in a number of its articles, and such principle is the right to be represented by a candidate of your choice. This right can only be guaranteed by the electoral body putting in place mechanisms that will enable such a voter to express his wish in a secret ballot. On the other hand where the electoral body breaches this fundamental requirement of the law in the conduct of the elections, such elections cannot be considered to be free and fair and therefore invalid.

14. In the matter before me, the petitioner's case is that there were instances of non-compliance with the laws and rules regarding the electoral process, and that these substantially affected the outcome of the election, **viz:-**

1. Several agents of the petitioner were banned from the polling stations.

In paragraph 13 of the petition alleges that petitioner's agents were locked out of polling station, even after producing their letters of appointment and oaths of secrecy. He gave the example of Matangeni Primary School. The same allegation is repeated in paragraph II of the petitioner's affidavit where he talks of one Jafer Salim, who is also mentioned in paragraph 14 of the affidavit of Swaleh Mbaruk Said, the head agent for Wiper, the petitioner's party.

In response, the 1st Respondent in paragraph 33 of the replying affidavit denied the allegations, and stated that the petitioner's agent was one **Mohammed Omari Heleman**, not Jafer Salim. Also the affidavit of **Mary Andrew Bada**, *paragraph 9* and who was the presiding officer at Matangeni Primary school reiterates the same.

I have also looked at the written submissions of the parties on this issue.

I have first looked at form 35 from Matangeni Primary school and nowhere is the name of Mohammed Omari Heleman appearing as an agent.

I also find that no evidence that the said Jafer Salim met the conditions to be an agent. He did not even swear affidavit.

As correctly observed in the submissions by 1st and 2nd Respondents, Regulation 62(1) (c) allows only authorized agent to be at the polling station. However under subsection (2), the presiding officer should not allow more than one agent from each candidate on political party.

Under **subsection 4**, every agent must have official badge supplied by the commission. Jafer Salim has not adduced any evidence he had such items aforementioned.

Lastly **under Regulation 62(3)** the absence of agent can not by itself invalidate the proceedings at a polling station.

I dismiss that allegation.

2. All presiding officers were of the Pokomo tribe just as the 3rd Respondent.

The 2nd Respondent in his further affidavit produced a list of all presiding officers within Kipini East Ward. In the affidavit by 1st Respondent, he explained the process of recruitment and even gave examples of presiding officers who were not Pokomos.

I was satisfied with that explanation and since petitioner or his party did not complain before the general elections, I find that claim holds no water and as an afterthought.

Co-related to that was allegation that children of the 3rd Respondent were elections officials and hence there was a conflict of interest thought admitted, I don't agree that led to conflict of interest and as was observed in the Ugandan case of *Shaban Nkulu – Vs – Asuman Kiyafu & ANOR* (He – 03 –CU – OU – 2006 where similar allegations were raised, Justice D. K. Wangutusi held thus:-

“I have gone through the laws and regulations governing elections and I have not come across any provision that ban a son of an active politician from holding office in the election commission.

To do so would be to reduce the employment opportunities to such sons of politicians....”

I also hold that would be discriminatory and regrettable. Evidence must be adduced to show how they interfered with the electoral process.

I dismiss that ground.

3. The petitioner agent were not issued with forms 35 and 36, and also not allowed to verify the results.

No single agent of the petitioner swore an affidavit to claim he or she was denied forms 35 and 36. That bare allegation is only found in paragraph 20 of the petition, and paragraph 9 of the petitioner affidavit. No names have been given of anyone such agent.

Jamila Salim who was PW 2 told the court she signed form 35 but it was blank. That could be true because the form 35 stuck outside the ballot box was not in tandem with one found inside the box, but that is act of negligence on her part.

All the forms 35 produced are duly signed, and though court cannot say by whose agents, petitioner did not prove his allegations.

Regulation 79(1) (2) provides that the presiding officer, the candidate or agents shall sign the declaration in respect of the election. (**See also Regulation 79(2) (b), (3) (4).**)

Regulation 79(6) then provides that the refusal or failure by a candidate or an agent to sign a declaration form under **sub -regulation (4)** or to record the reasons for their refusal to sign as required under that regulation shall not by itself invalidate the results as announced under sub regulation 2(a).

Petitioner has failed to prove that allegation.

4. The presiding officer at Kipini did not let agents near when she was assisting the assisted voters.

Of course that was not alleged in the petition. That was only raised at paragraph 10 of the petitioner's affidavit and 10 of the affidavit of Awadh Mbarak. He said he was given this information by Jamila Salim, who repeated the same in paragraph 6 of her affidavit.

However, she did not give the name(s) of one such assisted voters, and that is a blanket assertion.

The procedure for assisted voters is set out under **Regulation 72**. However under **sub regulation (7)**, no person other than the person acting for such assisted voter can be allowed in the compartment where such voter is marking his or her ballot paper.

I don't therefore understand the allegations by petitioner that his agents were not allowed to ascertain the intention of the voter. I also agree with submission by 1st and 2nd Respondents that no special register for assisted voters as claimed by the petitioner.

I dismiss the petitioner's allegation on that point.

5. The ballot boxes at Kipini Primary school were not sealed.

That claim is in paragraph 17 of the petition and paragraph 13 of the petitioner's affidavit.

He says he got this information from Awadh Mbarak who repeats the same in paragraph 7. However, he talks of one Mrs. Ages Matata, who was in stream II.

I note Jamila Salim was the one at Kipini Primary school to represent the petitioner and she had not made such allegations.

I have looked at the replying affidavit by the 1st Respondent. Attached thereto is the polling day diary for use by the presiding officer.

At page 14, she gave out the serial number of the seals used to seal the ballot box for Kipini Primary school, stream II at the start of counting.

At page 18, Jamila Salim signed to confirm the ballot box was sealed. Further when the ballot box was brought to court.

When the ballot boxes were availed in court, I observed seals No. 0794890; 07760377; 1214449 and 0934752 were intact while 1214463 was broken.

That was ably explained. The one broken was during transportation and a fact this court can take judicial notice of.

At page 21, presiding officer gave the seal number used at the end of counting. However only one agent from Jubilee signed. No comments why the other agents did not sign.

6. The presiding officer at Kipini Primary school, stream II, one Agnes Matata was writing names in an exercise book and then allowing people to vote without checking the register.

That is in paragraph 21 of the main petition, and paragraph 13 of the petitioner's affidavit. He says he was given this information by Awadh Mbarak who repeats that in paragraph 8 of his affidavit.

However Jamila Salim who was the petitioner's agent did not make those allegations.

Where did Awadh get that information from? He told the court he was moving to all polling stations.

Did that mean unregistered voters voted? Who? I hold that is a blanket accusation.

In her affidavit filed with the replying affidavit, Agnes Matata denies she used any exercise book, and I agree.

I dismiss that allegation as it has not been proved.

- 7. That form No. 35 and 36 were not pinned at the polling stations, and did not indicate the streams and did not have commission's seal.**

That is found in paragraph 20 of the petition and paragraph 13 of the petitioner affidavit. He annexed SAW 5. Respondents denied that.

The issue is where did the petitioner get the forms he attached to his affidavit? Their source cannot be vouched for. It was for him to explain.

I dismiss that allegation.

- 8. The presiding officer colluded with the 2nd Respondent and/or his agents to bar voters from the polling station and also to bar voters of the Arab descent from voting but allow Pokomo to vote in order to facilitate manipulation, impropriety, tampering and general misconduct of the election.**

That is found at paragraph 15 of the petition but was not reiterated in the affidavit. Petitioner also in his evidence discounted that allegation and said all residents were treated equally without discrimination.

None of his witnesses actually made the allegations in the affidavits or in court and I dismiss the same.

Another issue was that after 5.00pm, only Pokomo elders were allowed to vote while Arab descent voters were banned.

Similarly petitioner disputed that allegation, as well as his witnesses.

Actually from the affidavit of Sharif Said Ali (PW 7), Hawa Yusuf Abdalla, they were still on the queue past 5.00pm.

Though Jamila Salim (PW 2) in her affidavit at paragraph 7 alleged many voters were turned away at 5.00pm, she did not give any specifics.

That allegation is dismissed.

9. There was the allegation that voters who had been registered and issued with an acknowledgement slip were banned from voting.

That is paragraph 14(c) of the petition and paragraph 14 of the petitioner's affidavit and also in the affidavit of Riziki Abdalla Bwanake (PW 6), Abdu Masopera Mohammed (PW 9), Heleman Awadh Heleman (PW 10), Athman Somoebara Hassan (PW 11), Badawi Saidi Ali Abubakar Shariff Ali (PW 12), Ibrahim Mohammed Salim, Rashid Hussein.

Of course I note PW 6 did not annex any acknowledgement slip.

The law is for one to vote, he must be a registered voter. His name must appear in the records kept by the commission.

As correctly submitted by the 1st and 2nd Respondents, to register is a process, and an acknowledgement slip is only evidence that one applied to be registered. However, non-registration may occur due to a

number of reasons such as double registration, etc.

An acknowledgement slip is only a step towards being a registered voter.

I also find that is not an issue in an election petition unless the petitioner shows how that affected him to the exclusion of the other candidates. Denial of right to vote is a constitutional issue that can be addressed in a constitutional court.

10. The last issue raised by the petitioner (paragraph 14(a) of the petition), and paragraph 7(1) of the petitioner's affidavit. According to the petitioner, the use of manual register exposed the process for manipulation and was contrary to the law.

However, the petitioner admitted the problem was not peculiar to Kipini East Ward but throughout the country, and it equally affected the other candidates.

This issue was decided by the supreme court of Kenya in the case of ***Raila Odinga – Vs – The Independent Electoral Boundaries Commission and others; Petition No. 5 of 2013***, at page 85-86 where the court held that *“with the failure of the technology, the 2nd Respondent had no other option but to revert to the manual electoral system.”*

From the above analysis of the factual issues, the petitioner only managed to prove two issues:-

- i. Failure by the Deputy returning officer, Kipini Primary school, stream II to sign form 35, and by the presiding officer one Sylvano Mwaka, give statutory comments for such failure.
- ii. Alterations of result in form 35 at Kipini primary school, stream II by the presiding officer Agnes Matata, and also reduction of the petitioner's voters by 99 votes.

This leads me to the second issue for determination.

Issue No. 2

In the event that issue No. 1 is answered in the affirmative, whether such non-compliance and discrepancy affected the result in a substantial manner.

The law in this issue is now well settled.

“An election petition is not an action at common law nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them in consideration of alleged policy because policy in such matter, are those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the court is put in a straight jacket.”

Those were words in the case of ***Jnoti Basu & Otheus – Vs – DEBI BHASAL & OTHERS (1982) AIR SC, 983***, cited with approval in case of ***HON. CLEMENT KUNGU WAIBARA & ANOR – VS – HON. FRANCIS KIGO NJEGA & 4 OTHER (2013) KLR***.

In ***Joho – Vs – Njage & ANOR (No. 4) of 2008 3 KLR*** (Election Petition) 500, where the court explained that:-

“In determining election petition, the...court is required to put in mind that election petitions are not ordinary suits where a party is enforcing a right that occurs to him as a person. The court has to take cognizance of the fact that an election as a signification of the exercise of the democratic rights of the people to have a person of their choice to represent them....the court has taken account of the fact that Kenya is a democratic state which espouses democratic ideals that recognize that it is only the people

who have the right to determine their political leadership, and exercise such determination in free and fair elections, which can be so judged in accordance with the provisions of the constitution, free and fair elections will of necessity be the internationally acceptable standard of what constitutes such free and fair elections. The court will consider whether the complaints made by the petitioner are such that apart from establishing the particular electoral malpractice, or irregularity, impacted as the right of the voters... to have a person of their choice represents them.....”

That principle has been codified into our laws by dint of section 83 of the Elections Act, 2011 which provides that “*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 the non-compliance did not affect the result of the election.*”

That section is in *pari materia* with Section 28 of the repealed National Assembly and Presidential Election Act. Commenting on that section, the majority of court of appeal judges in *Manson Oyonge Nyamweya – Vs – James Owinyo Magara & 2 others* said:-

“Section 28 cannot be used to white-wash all manner of sins which may occur during the electoral process and.....parliament did not design that section for the purpose of covering serious abuses of the electoral process.”

Broadly speaking therefore, the overriding objective of the Act **is to promote the right to vote and this requires that the act should be liberally and broadly interpreted so as to provide citizens with every opportunity to vote. The primary duty of the election court is to give effect to the will of the electorate.**

Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard when considering electoral matters.

In such cases, the burden of proof lies with the petitioner to prove the assertion in an election petition and the standard of proof is above the balance of probability, though not as high as beyond reasonable doubt:-

(See the Raila Odinga case, Supra, at page 75).

The first non-compliance was by the Deputy presiding officer who did not sign form 35. I hold this did not affect the validity of the results. Actually petitioner in his evidence was clear his grievance was in respect to Kipini Primary school, Stream II. He agreed in Stream I, he got 217 votes as declared by the presiding officer.

In the case of *William Kabogo Gitau – Vs – George Thuo & 2 others, C.A No. 126 of 2008*, the court of appeal cited with approval the following passage, in Halsbury’s laws of England, 3rd Edition Vol. 14 at paragraph 261, which states:-

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates. In the conduct of the election if the tribunal is satisfied that, the election was, notwithstanding those transgression, really and in substance conducted under the existing law, and that the result of the election was not and could not have been affected by those transgressions.”

The second issue is of non-compliance on the stream II, Kipini Primary school, I noticed the form 35 was altered or cancelled without the presiding officer counter signing the cancellation on alteration. **Whereas** the regulations do not specify what ought to be done where there are cancellation and alteration, common sense and good practice dictates that when there is a cancellation or alteration in a statutory form, the same should be counter signed by the concerned official. That is actually why this court ordered for scrutiny by way of recount. It confirmed that the petitioner had 99 votes taken from him.

Tallying that re-count remedied the petitioner grievances, and this is how the results of Kipini East Ward should have obtained on the 6th day of March, 2013.

	AGGREGATE BEFORE RECOUNT	STREAM BEFORE RECOUNT	II STREAM AFTER RECOUNT	II MARGIN	AGGREGATE AFTER RECOUNT
1 .	217	52	1	-51	166
2 .	34	23	00	-23	11
3 .	1107	79	79	00	1107
4 .	770	02	04	+2	772
5 .	129	23	03	-20	109
6 .	169	58	49	-9	160
7 .	811	64	163	+99	910
8 .	65	04	1	-3	62
9 .	56	03	5	+2	58

Despite that discrepancy it is clear the 3rd Respondent still maintained a considerable margin of 1107 – 910 = 197 votes and that did not affect the election in a substantial manner.

Justice Githinji in his dissenting judgement in the **Danson Oyonge Nyamwaya** case (supra) had then to say:-

“Further he asserted that the mere failure by a presiding officer to sign form 16A was procedural anomaly which did not invalidate the results announced in a polling station.

Agreeing with the appellant, he asserted that the election court should have addressed itself to specific 16As and 17As, without quantifying the gravity of those anomalies. He said the election court should have addressed itself to specific forms 16As and 17As, examined the anomalies and ultimately determined the impact the anomalies had in the overall result of the election.

He asserted that the anomalies in forms 16As and 17As were in counting or rather the reconciliation or tallying process, they were post election anomalies which did not affect the vote.... And the object of recounting was to eliminate any mistake made in the counting of the votes, the anomalies in some forms 16As and 17As were cured by the recounting and scrutiny of the vote which verified that the appellant had won the election.....”

In arriving at this finding, I am alive to the fact that in determining whether non-compliance or a contravention of electoral laws affected the results of an election in a substantive manner, the court should

apply quantitative and qualitative tests or both depending on the circumstances and facts of each case.

Quantitative test is relevant where the numbers or figures are in issue, while qualitative test is relevant where the quality or standard of an election on the whole is in issue.

Though this petition has manifestations of both, the petitioner in his evidence said he had problem only with the counting of votes at Kipini Primary school, stream II. However beyond considering the mathematical exercise, I also considered the grounds raised and if they sufficiently challenge the entire electoral process.

In my final analysis, I find the process was fair, free and transparent. There existed circumstances favourable for a fair election, the votes cast were verifiable, and the alleged irregularities did not affect the election in a substantial manner.

Issue No. 3.

Whether any illegal practice on election offence was committed by either of the respondents, or their agent.

Petitioner singled the two presiding officers who were at Kipini Primary school for the blame.

In respect to Sylvano Mwaka Daniel, it was alleged he did not sign forms 35 and 36, or seal the ballot boxes. I have already dismissed the issue of seals.

However, the said Sylvano admitted in paragraph 24 that he did not stamp some form 35 as people were celebrating. He said he then informed the agents. He did not however record that in the statutory comment.

Also the Deputy Presiding Officer did not sign form 35 exhibited to the court. That was in breach of Regulation 79 as well as 83. I find Sylvano Mwaka committed an election offence under section 59 (5) of the Election Act.

In relation to Agnes Matata, the Presiding Officer at Kipini Primary school, Stream II, she was the centre of the whole blame and rightfully so. She altered results to the disadvantage of the petitioner.

While in the form 35 deposited in the ballot box she indicated petitioner got 164, the one pinned on the ballot box indicated 64. Though that may pass as a human error, what happened later makes it a clear case of intentional manipulation of results. She distributed the 100 votes to the other candidates so as to ensure the number of votes cast was not exceeded.

She was in breach of **Section 59(a)** and **(g)** of the Election Act.

Pursuant to **Section 87** of the Election Act, I direct that the Director of Public Prosecutions, the 2nd Respondent and the Speaker of the County Assembly be notified of the commission of election offences by the two Presiding Officers for appropriate action.

I don't find the 3rd Respondent culpable of any election offence.

Issue No. 4.

What remedies are available to the parties.

Accordingly, I find that the petitioner has not adduced sufficient evidence to discharge the burden that lay on him and to the standard required for election petitions, to cause me to overturn the outcome of the election results for member of County Assembly, Kipini East Ward as pleaded by him.

I therefore dismiss the petition, and order that the petitioner to pay costs to the Respondents.

Lastly I am indebted to the advocate for their quite impressive and focused presentation which enable the court decide the case easily and within stipulated timeline.

DATED and **DELIVERED** on the 16th day of August, 2013 at Garsen.

HON. JUSTUS KITUKU