



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE 'S COURT AT MAUA
BEFORE HON.C.MAUNDU
ELECTION PETITION 2 OF 2013

JAPHET KIRIMI KOBIA.....PETITIONER

VRS

JULIUS KABIRA AMBAU.....1ST RESPONDENT

BERNARD MUSEE.....2ND RESPONDENT

I.E.B.C.....3RD RESPONDENT

JUDGEMENT

JAPHET KIRIMI KOBIA is the petitioner in this petition dated 8th April 2013 and filed in court on 10th April 2013. The petitioner was a county representative candidate on the ATHIRU RUUJINE WARD of IGEMBE CENTRAL CONSTITUENCY, in MERU COUNTY in the elections held on the 4th March 2013 in which the 1st respondent(JULIUS KABIRA AMBAU) was declared by the 2nd respondent (BENARD MUSEE- Returning Officer) and 3rd Respondent(I.E.B.C) as the validly elected County Representative and was thus gazetted as such. In the said elections the petitioner garnered 2394 votes whereas the 1st respondent got 3701 votes.

The petitioner having been aggrieved by the outcome of the elections prays for the following reliefs

- The immediate scrutiny and recount of the votes cast in all the polling stations of the Athiru Ruujine ward.
- A declaration that the 2nd respondent was not validly elected as the County Representative of Athiru Ruujine ward during the general election held on 4th March 2013.
- A declaration that the elections for the county representative for Athiru Ruujine ward was a sham and to that extent is void/and or invalid.
- The cost of and the incidental to the petition be paid to the petitioner.
- Any other better alternative and/or expedient order and/or direction the court may make that will ensure and promote the rule of law and justice in our society.

This Petition is based on the following grounds:-

1. The 1st respondents and his agents and his supporters:-

a) Engaged in widespread and well co-ordinated bribery and vote buying and unduly influenced voters at inter alia,

(I) KANATHU PRIMARY SCHOOL POLLING STATION

(II) KAWIRU PRIMARY SCHOOL POLLING STATION

(iii) MATIRINE PRIMARY SCHOOL POLLING STATION

(iv) MURERA PRIMARY SCHOOL POLLING STATION.

b) Engaged in widespread and conceited vote buying while carrying voters in several vehicles all throughout the polls day.

2. The 2nd and the 3rd respondent and their subordinates

a) Denied the petitioner agents the right to participate in the election

b) Denied the petitioner's agents the right to audit the electoral exercise.

c) Failed, refused and/or neglected to take any action over complaints of malpractice by the first petitioner and his supporters.

d) Conspired and/or participated in presenting fraudulent tally of the votes cast by among other instances under declaring the petitioner votes while over declaring the 1st respondents votes

e) Conspiring and/or allowing for the petitioner's votes at the THIMBILI PRIMARY SCHOOL POLLING STATION to be destroyed by dropping them in a pit latrine.

f) Conspiring and/or abetting to the breakdown of the electronic voter identification kits in order to introduce non-participating voters.

g) Conducted the election in a partisan and biased manner by misleading illiterate and incapacitated voters to vote in favour of the 1st respondent

h) Omitted, neglected, refused and/or otherwise failed to protect results for the agents as were entered into the computers and also failed to transmit results from the polling stations electronically to the tallying station centre.

i) Fairly and/or refusing to post the results on prominent public places within the polling stations, contrary to the express and implied provision of inter alia regulation 79(2) (d) of the ELECTIONS (GENERAL) REGULATIONS 2012

j) Entering and presenting inaccurate returns into the 3rd respondent's computers.

On his part the 1st respondent filed his response to the petition on 25th April 2013. He averred that the elections were free and fair, genuine expression of the free will of the voters, free from violence, intimidations unlawful influence and corruption on his part, transparent and were administered in an impartial, neutral, efficient, accurate and accountable manner. He averred that he was rightfully returned as the winner of **ATHIRU RUUJINE COUNTY REPRESENTATIVE** seat.

The 2nd and 3rd respondents filed a joint response to the petition on 25th April 2013. They acknowledged that the petitioner was a candidate for the position of county representative for **ATHIRU RUUJINE WARD** in the election held on 4th March 2013. They averred that the election on the 4th March 2013 were conducted in accordance with the constitution of Kenya, the election Act, the (Rules and Regulations made there under)and all other provisions of the law and the 1st respondent was elected in a free and fair election and the 2nd and 3rd respondent were transparent, open and accountable in the process.

The 2nd and 3rd respondents further averred that no incident of bribery, vote buying and/or undue influence was reported on the voting date and the 2nd and 3rd respondents is not aware of any such incident and none occurred within the polling stations. They also averred that the election process was open and/or transparent and all political parties and/or candidate were duly represented at every stage of the process and were accorded every opportunity to participate and observe the process.

They also denied that elections materials were destroyed and/or thrown away to create an unfair advantage on one candidate as against the others.

Lastly 2nd and 3rd respondents averred that the breakdown of voters identification kits and electronics tallying system did not in any manner affect the elections exercise and/or the elections results thereof as the 3rd respondent had put in place measures to ensure that the exercise was transparent, impartial, efficient, accountable, free and fair.

The electronic system failed across the country and it is therefore baseless to affirm that it was designed to fail in Athiru Ruujine ward to the disadvantage of the petitioner.

Evidence was presented by way of affidavits pursuant to rules 12 & 15 of the Elections (Parliamentary and County Elections). Petitions Rules 2013. The petitioner called seven (7) witnesses who swore affidavits and were duly cross examined by the respondents counsels and re-examined by their advocate. The 1st respondent called eleven 11 witnesses who swore affidavits. These witnesses were duly cross examined by the petitioner counsel and and the counsel for the 2nd and 3rd respondents. Only the 2nd respondent (i.e the returning officer) testified on behalf of 2nd and 3rd respondents.

The petitioner and respondents filed separate issues.

PETITIONER ISSUES

- Whether the 1st respondent and his supporters committed election offences in the elections subject of this petition.
- Whether 2nd and 3rd respondents and their subordinates conducted the elections in a manner substantially inconsistent with the provision of the Constitution and other written laws.
- Whether the validity, integrity and audibility of the elections were as compromised.
- Whether in particular there was vital bribery by agents of the 1st respondent.
- Whether the votes cast were properly tallied.
- Whether the petitioner's prayers should be allowed.

RESPONDENTS LIST OF ISSUES

- Whether the elections held on 4th March 2013 for Athiru Ruujine were Free, fair and responsive.
- Whether the elections held on 4th March 2013 were conducted in accordance to the constitution and the relevant laws and regulations
- Whether the 1st respondent was validly elected on the 4th March 2013 as County Representative for Athiru Ruujine ward.

- Who bears the cost of this petition.

These issues are substantially similar.

PETITIONERS CASE

1. The petitioner in his supporting affidavit he deponed that his votes were under declared in six polling stations whereas the 1st respondents votes were overstated in some of those stations. He also claims that he believes that the Biometric Voter Identifications kits were purposely interfered with to facilitate rigging. He also claims that some of his agents were refused participation while others were allowed into the polling stations until tallying time when they were ordered to leave by the presiding officers.

He also claimed that his party's agents were picked by his party's parliamentary candidate Mr. James Mithika Ntongai who was his political enemy and who averily supported the 1st respondents against him.

He also accused one Harriet , Peter Mutoria Kaberia, Kavindu and James Riungu of having been involved in voter bribery on the day of the elections. He also list five(5) vehicles of having been used by the 1st respondent to ferry voters to the polling stations.

2. Pastor Henry Kangentu told court that he was the deputy chief agent on Sisi kwa Sisi party in charge of the Athiru Ruujine ward. He told court that on 04/03/2013 at about 10:00am he was at KAWIRU PRIMARY SCHOOL POLLING STATION NO. 032 when he got word that one James Riungu was buying votes outside the said school compound and instructing prospective voters to vote for the 1st respondent and one JAMES MITHIKA NTONGAI a parliamentary candidate and he immediately went near where James Riungu was buying votes. He called O.C.S Laare police station and informed him. The said officer came and arrested the said James Riungu who he later learned was released after about two(2) hours in police custody. On being cross examined by the 1st respondent counsel he told court that he did not see the said James Riungu bribe votes. He also said that he did not report the alleged bribery incidents to any Police Station.

3. Joseph Maore told court that he was given Kshs 200 by one James Riungu with instructions to vote for the 1st respondent and James Mithika Ntongai as a parliamentary candidate. After receiving the said money he saw police officers coming and he ran away as the police pounced on James Riungu and bundled him into their vehicle. He did not go to report the matter to the police. In court he displayed a Kshs 200 note which he claimed he was bribed with but had preserved it as evidence.

4. William Mugambi (Pw4) told court that he was an agent of the petitioner. He said that he was evicted from the polling station at around 5:30pm by the presiding officer for no reason or justification.

5. Arafah Nkirote told court that she was a T.N.A (the National Alliance party)gent. She said that she was instructed by the party's parliamentary candidate one JAMES MITHIKA not to bother on who would win County Assembly seat but to focus her attention on parties parliamentary and presidential candidates. She did not produce any document to show that she was a party agent.

6. Doreen Kamathi told court that she was petitioner's agent at **KIANI KIA AARU POLLING STATION**. At the end of the voting and closure of the voting exercise the presiding officer inquired why she was present yet the T.N.A party which her candidate was contesting on was represented by other agents in the room. She was then ordered to leave the counting room immediately. She said that voting was smooth. She did not produce any document to prove she was a party agent.

7. Gerald Meme told court that he met one BENSON KAMWANA who is a friend, campaigner and agent to the 1st Respondent handing out Kshs 100 notes to the people going to vote at Kanathu Primary School and instructing them to vote for the 1st respondent. During cross examination he said that he only saw the said Benson Kamwana give Kshs 100 to only one person.

1st RESPONDENTS CASE

1. The first respondent told court that he won the seat of county representative Athiru Ruujine ward and he was sponsored by the Alliance Party of Kenya(APK). The petitioner came second with T.N.A party. He vehemently denied bribing voters. He also denied collaborating with one James Mithika who was a parliamentary candidate with TNA.

He said that some of his votes were under declared. He acknowledged that there were differences between the petitioner and Mr. James Mithika who was TNA parliamentary candidate for Igembe Central Constituency.

2. Nkunja Jerald was APK agent at Thimbili Primary School polling station. He denied that there were votes which were dropped in a pit latrine.

3. Peter Mariti was APK party agent at Athiru Ruujine primary school. He said that people voted peacefully and that the petitioner was ably represented by his Party's agent one John Mutua.

4. Mary Nkoyai was APK Party agent based at Matirine Primary School polling station. She told court that she was in the same polling station with one Harriet who was an agent of Democratic Party. She said that Harriet never bought votes at all since they were together throughout. She said that Pastor Henry Kangetu confronted Harriet blaming her of buying votes for KIMATHI.

5. JAPHET KITHIA said that he did not see one BENSON KAMWANA dishing out money to voters at Kanathu Primary School

6. Mwiti David told court that he was recruited by the 1st respondent to be his observer in Athiru Ruujine together with M' ANAIBA KARAMBU JOSINA and ROBERT MUTIGA. They visited 21 polling stations within Athiru Ruujine ward. They did not encounter any incidences of vote buying and/or other malpractices.

7. Robert Mutiga gave similar evidence with Mwiti David above.

8. Lawrence Meme told court that one DOREEN KAMATHI was not an agent at KIENE KIA AARU polling station and that she was not chased away. During cross examination it came out that his signature in form 36 was different from the one in his supporting affidavit. He could not explain the difference in the said two (2) documents. To me he was not a truthful and candid witness.

9. M'ANAIBA KARAMBU JOSINA was an APK observer in the elections. She said that the elections were free and fair, free from any malpractices.

10. Josephat Mberia Mbaabu was a TNA agent at Matirine Primary School. He told court that one Harriet was an agent for one MORRIS KIMATHI who was a Democratic Party candidate and not 1st respondent agent.

11. Patrick Mithika Baikanatha he told court that one KAVINDU did not visit Kathithine market and/or polling station on the 4th March 2013. He said that he was able to see what was going on at Kathithine Primary School from his bar which is about 400 metres from the said school.

12. Edward Mwinga Kobia told court that was at Akuune Primary School when the Presiding Officer collapsed because of fatigue and he was taken to hospital. The two (2) deputy Presiding Officers who were present took over the duties of the Presiding Officer and had the votes counted and tallied without a hitch at all.

2ND AND 3RD RESPONDENTS CASE

BENARD MUSEE is the Returning officer of Igembe Central Constituency in MERU COUNTY. He told court that there were a total of eleven candidates for the Athiru Ruujine ward county representative. He said that after a free, fair and transparent voting process and an open, accountable and accurate tallying of the votes, he declared the 1st respondent as duly elected. As required by law the official results of the tallying of the votes was announced in the open and posted and/or supplied to any person who required an official copy. He said that due to the enormity of the exercise there are arithmetical errors committed by the presiding Officers but the same do not affect the result. He further said parties offering candidates and who presented agents were represented at each and every polling stations. Lastly he deponed that no report was made to him or any of his officers within Athiru Ruujine ward during the election exercise on 4/3/2013 regarding any malpractices.

Having summarized the evidence adduced by the parties herein several issues emerges for determination. **The first issue is whether the petitioner's agents were denied the right to participate in the elections?**

The petitioner claims that some of his agents were denied the right to participate in the election as well as the right to audit the electoral exercise. It is not in dispute that the petitioner was a candidate under the TNA political party. TNA political party submitted a list of agents who were accredited by the 3rd respondent. 2nd respondent told court that legally only agents of political parties were being accredited and/or agents of any independent candidate. It is not in dispute that TNA political party agents participated fully in the electoral process. I therefore concur with Mr. Kerongo's submissions for the **(2nd and 3rd Respondents)** that if the petitioner had any political, personal and/or social problems with other candidates within his political party then the only way of solving those problems is and/or was through the party machinery under its constitution or through the Political Parties Dispute Tribunal established under the Political Parties Act. Those problems cannot form a basis for an election petition.

Regulation 62(1)(c) of the Elections Regulations states as follows:-

“The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time and may exclude all other persons except **authorized agents**”(emphasis mine)

According to the returning officer Dw13 an authorized agent is one who has been accredited as an agent. He should have an appointment letter and accreditation badge. It should be noted that all the witnesses who were called by the petitioner as his agents had no such documents.

Regulation 62(3) states as follows:-

“The absence of agents shall not invalidate the proceedings at a polling station”.

I find that the petitioner has failed to establish that the persons he was calling his agents were indeed authorized agents who were entitled to access the polling stations on the material date. They did not have letters of appointment nor accreditation badges as required by the law. It has also not been established that failure by the petitioner to have personal agents at the polling stations affected the outcome of the elections.”

The other issue that emerges for determination is the allegations of multiple election offences and malpractices

It was alleged that the 1st respondent engaged in widespread and well-coordinated bribery and vote

buying and unduly influenced voters. There was no credible evidence to show that the 1st respondent personally participated in the commission of the alleged acts.

Names were given of the persons who were allegedly involved in the said acts but there was no evidence tendered to show that the said persons were doing so at the behest of the 1st respondent. The 1st respondent was not seen with any of the alleged bribe givers.

Pw3 Joseph Maore told court that one James Riungu gave him kshs 200 and asked him to vote for the 1st respondent and one James Mithika Ntongai. There is no evidence however to show that the said James Riungu was working for the 1st respondent.

Bribery is a serious offence with grave consequences. It was upon the petitioner to prove that there was bribery. Pw3 Joseph Maore whom the petitioner referred to “as a whistleblower” told court that he received Kshs 200 from one James Riungu with instruction to vote for the 1st respondent and one James Mithika. However he ran away when police officers arrived at the scene. He went into hiding. He never reported that incident to the police. Although there were police officers at a nearby polling station he did not bother to report the matter to them.

Pw7 Gerald Meme also told court he saw one Benson Kamwana give Kshs 100 to one Mwigwa outside Kanathu Primary School. He also never reported the said incident to the police.

The returning officer took the witness stand and confirmed his evidence in the affidavit and further stated that during the entire election period he was on call and no report of any malpractice or bribery in relation to Athiru Ruujine ward was received by himself or any other officers working under him.

Pw3 Joseph Maore and pw7 Gerald Meme did not substantiate their allegations of bribery. They were in agreement that they did not report the matter either to the police and/or I.E.B.C Officials. There is no concrete evidence to back up these allegations and I find them to be baseless.

There was an allegation that the 1st respondent was involved in vote buying while ferrying voters in several vehicles throughout the polls day. The allegation was denied by the 1st respondent. The petitioner did not prove any connections between the 1st respondent and the listed vehicles which were allegedly used.

There was allegation that breakdown of BVR kits favoured the 1st respondent and that the results were not posted on prominent public places within the polling stations. The returning officer stated that the breakdown of BVR kits did not affect the voting exercise and that the results were announced in the open and/or supplied to any person who requested an official copy.

In any case it is common knowledge that the electronic systems failed across the country and it is baseless to allege it was designed to fail in Athiru Ruujine ward.

The returning officer(2nd respondent) admitted that due to enormity of the exercise some arithmetic errors and entries were made by various clerks at the tallying centre. The question which begs answer is whether these errors affected the results of the election?

Hon Justice Luka Kimaru had this to say in the case **of RISHAD HAMID AHMED AMANA -VS- I.E.B.C and 2 others. ELECTION NO. 6 of 2013 HIGH COURT AT MALINDI.**

“A petitioner was not only required to establish that there were irregularities which were committed during the elections, he had to also establish that such irregularities were of such magnitude that it affected the outcome of the results. This was what was referred as the materiality test. The petitioner was also 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 could be attributed to an innocent mistake or an obvious human error could not constitute a reason for impeaching an election result”

The only irregularity and which has been admitted by the 2nd respondent was the errors in feeding the entries into form 36. These errors affected both the petitioner and the 1st respondent and therefore cannot be said to have been intentional.

Section 83 of the Elections Act states as follows:-

“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 elections”

To follow up in the foregoing issue the court did order the recount and scrutiny of the votes as prayed in the petition.

The said exercise was supervised by Mr. J.M Michubu (Executive Officer). I wish to congratulate this officer together with the other officers who assisted him for work well done. The process proceeded smoothly without hitch. The results showed that the 1st respondent won with 3,981 votes with the petitioner coming second with 2,482 votes. Disputed votes were 11 whereas the rejected votes were 46. It should be noted that one ballot box in respect of Kabukuro Primary School polling Station number 035 was not availed by the returning officer.

According to form 36 Kabukuro Primary School had 480 registered voters. Therefore failure to produce the said ballot box did not affect the results.

Even if all the 480 votes are added to the petitioner he will not be able to bridge the gap between him and the 1st respondent. There were no material discrepancy between the results declared by the 2nd respondent and the results of the scrutiny. Arithmetical errors emerged during scrutiny but the same are not sufficient to nullify this election.

I wish to point out that the petitioner alleged that some of his votes were dropped in a pit latrine at Thimbili Primary School polling Station. The scrutiny shows that all the votes which were cast there were still intact.

FINAL DETERMINATION

It is my considered finding that although there were arithmetic errors and entries made by various clerks at the tallying centre, the same did not affect the results of the election. The petitioner has failed to prove allegations of multiple election offences to the required standard.

I therefore find that the elections held on 4th March 2013 for **ATHIRU RUUJINE WARD** were free, fair and conducted in accordance to the constitution, the relevant laws and regulations.

All in all I find that the 1st respondent was validly elected. This petition is therefore dismissed with cost to the respondent

C.M MAUNDU SPM

18/9/13

18/9/13.

Before C.M Maundu SPM

Cc Doreen

Petitioner Present

1st Respondent present

2nd Respondent Present

Mr. Kerongo present for 2nd & 3rd respondents.

Mr. Kerongo also holding brief for Mr. Atheru for 1st Respondent.

Mr. Mutembei present holding brief for Mr. Mbogo for the Petitioner

Court: Judgement delivered in an open court.

C.M MAUNDU SPM

18/9/13

Mr. Kerongo: I wish to say that we thank you most sincerely for having the patience to listen to us during this period. We know that we as advocates and parties tested the patience of the court. We apologize. We wish to thank the court for determining the petition within the period set.

Mr. Mutemebi: I associate myself with Mr. Kerongo. We apply for certified copies of the proceedings and of Judgment.

Mr. Atheru: On behalf of 1st respondent I associate myself with the sentiments for Mr Kerongo. We thank the court for being patient and focused.

Court: I appreciate the kind sentiments by the counsels. Mr. Mutembei advocate to be supplied with certified copies of the proceedings and Judgement upon payment of the required charges.

C.M MAUNDU SPM

18/9/13.