



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT KISII

ELECTION PETITION NO.5 OF 2017

IN THE MATTER OF THE ELECTION ACT NO 24 OF 2011 LAWS OF KENYA AND IN THE ELECTIONS(GENERAL) REGULATIONS, 2017 AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES

AND IN THE MATTER OF THE ELECTIONS FOR MEMBER OF COUNTY ASSEMBLY FOR KIOGORO WARD CODE NO. 1334 WITHIN NYARIBARI CHACHE CONSTITUENCY WITHIN KISII COUNTY HELD ON THE 8TH AUGUST 2017

BETWEEN

OBARE MOCHACHE WALTER.....PETITIONER

VERSUS

SAMWEL APOKO OKWANI.....1ST RESPONDENT

JULIUS MEJA OKEYO.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGEMENT

Introduction and Background

1. The petition is filed by Obare Walter Mochache who contests the election of Samwel Apoko Okwani as the Member of County assembly of Kiogoro Ward within Kisii County.

2. The petition listed the declared results for Member of County assembly of Kiogoro Ward within Kisii county in paragraph 6 of the petition as follows;-

- | | |
|-----------------------------|--------------|
| a) SamwelApokoOkwani | -2096 votes. |
| b) ObareMochache Walter | -1913 votes. |
| c) JoelexMogakaOrora | -1130 votes. |
| d) MeshackKengereOndari | -641 votes. |
| e) Wilfred Onserio Bosire | -639votes. |
| f) Wison Mose Ondieki | -290 votes. |
| g) Stephen Onserio Mangongo | -88 votes. |
| h) Josphat Nyaribo Nyamache | -87 votes. |
| i) Christopher Aruya Ongwae | -21 Votes. |

j) Naftal Kambuni Oirura -18 votes.

k) Dennis Kayago Ombogi -14 votes.

l) Momanyi Mogaka Innocent -8 Votes,

3. The grounds upon which the petition is brought were listed as from paragraph 7 of the petition where the petitioner contended that elections in most polling stations in Kiogoro ward were badly conducted and marred with irregularities.

4. The petitioner further alleged that some known supporters of the 1st respondent were recruited as clerks and presiding officers to tilt the election in favor of the 1st respondent and that the elections were also not conducted in accordance with the provisions of the constitution or electoral law.

5. That most presiding officers failed to ensure that the agents of candidates appended their signature to the statutory form 36A and 36B or give reasons for their refusal to sign and that some of the statutory forms were lacking the official stamps of the presiding officers.

6. That the returning officer failed to accurately collate results from polling stations and so as to determine which candidate had returned majority votes and there existed two different set of results in respect of the election to the office of Member of country assembly for Kiogoro ward a situation not contemplated under law or governing regulations.

7. That the petitioner and his agents protested and demanded for rechecking and verification of results from each polling station but were ignored by the 2nd respondent without any valid reason. The petitioner thus urged this court to find that the 1st respondent had not been validly elected.

The 1st respondent's case

8. The 1st respondent filed a response to the petition on the 20th September 2017 denying the allegations contained in the petition and stating that the 2nd and 3rd respondents substantially complied with the provisions of the constitution and election laws and thereby delivered transparent, accurate, credible and verifiable results.

9. That there were no two sets of results as claimed by the respondent and that the results which were declared by the or on behalf of the 2nd and 3rd respondent were as captured and stated in paragraph 6 of the petition, which are supported by the statutory declaration Form 36b.

10. The 1st respondent further denied that the petitioner herein sought for re-count and rechecking of votes at Nyangogwa tea buying polling station and that such request was denied. He further stated that at all there was any complaint the petitioner was obliged to reduce it into writing and submit the same to the presiding officers

11. That if at all there were any irregularities the same were curable under the provisions of section 83 of the Election Act 2011.

The 2nd and 3rd respondents case

12. The 2nd and 3rd respondents filed a replying affidavit sworn on the 20th September 2017 which they urged this court to find it to be a proper response to the petition. The said affidavit was sworn by the 2nd respondent who denied the allegations contained in the petition.

13. He stated that the election was properly conducted and the petition was an afterthought as the petitioner did not raise any complaint as such complain t would have been recorded in the polling day diary.

14. The 2nd and 3rd respondents urged this court to dismiss the petition.

PARTIES EVIDENCE

15. At the hearing of the case the parties and their witness adopted their affidavits as their evidence in chief and were subject to cross-examination.

16. On cross examination the petitioner alleged that there was a scheme to tilt the election in favor of the petition. That he had reservations with John Awiya the presiding officer at Kiogoro Tea buying center and Wilfida Masira and that he expressed the said reservations to the returning officer although his complaint was not reduced into writing.

That at Kiogoro tea buying center the presiding officer conspired with voters and influenced them on how to vote.

That five presiding officers did not allow agents to sign forms and that some statutory forms lacked stamps the said presiding officers being presiding officers of Nyaboribonge, Nyangogwa, Monuri primary school , Kiogoro Tea buying center 1, 2 and 3 and Boronyi D.E.B polling station one.

The petitioner further alleged that the results downloaded from the IEBC public portal did not correspond with the results announced by the

3rd respondent.

The petitioner further argued that the election was not conducted in compliance with the provisions of the constitution the electoral laws.

In his submissions the petitioner urged this court to find that the 2nd and 3rd respondents had not opposed the petition and thus urged this court to find that the petitioner was not validly elected as member of County assembly Kiogoro ward, Kisii County.

The petitioner further alleged that there were incidences of violence in which his vehicle was damaged although the driver to his damaged vehicle was not a witness in the case

17. The 1st respondent on his part opined that the elections were credible and fair. He denied that there were two sets of results. He also denied that one John Chogoo Auya was his employee. He also stated that he did not see any irregularities that affected his win. He called a further six witnesses in support of his case.

18. The 2nd respondent denied that the elections were not conducted in accordance with the constitution or electoral laws. He urged the court to dismiss the petition.

Issues for determination

The parties herein filed separate issues for determination. I have looked at the said issues, considered the parties pleadings, the testimony adduced and submissions made by the parties and I find the following issues fall for determination by this court.

- a) **Whether the Replying affidavit of the 2nd respondent is a response to the petition.**
- b) **Whether there existed two sets of results and if so the effect thereof on the election of the 1st respondent as Member of County assembly Kiogoro ward.**
- c) **Whether there were irregularities and illegalities in the conduct of the said election, and if so, whether they affected the integrity of the election and the declaration made by the 3rd respondent.**
- d) **Whether the declaration of the 1st respondent as Member of County assembly elect of Kiogoro Ward was Valid.**
- e) **What consequential orders, declarations and reliefs should the court grant if any?**

The Law and standard of Proof

19. The constitution places specific obligations on the 3rd respondent under Article 86 which states:-

86. At every election, the independent Electoral and boundaries commission shall ensure that:-

- a) **Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.**
- b) **The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.**
- c) **The results from the polling stations are openly and accurately collated and promptly announced by the returning officer and**
- d) **Appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of electoral materials.**

The burden of proving the allegations of non-compliance with the constitution and electoral law rests with the petitioner.

In election disputes the standard of proof is higher than a balance of probabilities but lower than beyond reasonable doubt.

This was what was stated by the supreme court in **Raila Odinga & others versus Independent Electoral and Boundaries commission & 3 others SCK Petition No. 5 of 2013[2013]eKLR**

“...[203] The threshold of proof should in principle , be above the balance of probability , though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election are in question”

Section 83 of the Election Laws (amendment Act,2017 prior to its amendment further provided as follows:-

“83. 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.”

Analysis and Determination

1) Whether the Replying affidavit of the 2nd respondent is a response to the petition.

20. The petitioner submitted that the 2nd and 3rd respondent had not filed a response to the petition and as such have no right of audience. The petitioner stated that the 2nd and 3rd respondent had not filed a response contemplated under Rule 11(2) of the Elections (Parliamentary and county Election petition) Rules, 2017 and as such had not denied the contents of the petition.

21. The 2nd and 3rd respondent submitted that the replying affidavit by the 2nd respondent conforms with the response contemplated under rule 11(2) of Elections (Parliamentary and county Election petition) Rules, 2017. The 2nd and 3rd respondents relied on the case of **Nahashon Akunga versus Independent Electoral and Boundaries commission and 2 others Kisii Election petition number 24 of 2017**. The attached case in the 2nd and 3rd respondents submissions was however inapplicable herein.

22. However in the case of **Karanja Kabage versus Joseph Kariambegu Nganga & 2 others [2013] e KLR** also relied upon by the 2nd and 3rd respondents similar issues arose where court stated;-

“Fourthly, certainly the first respondent’s response cannot be said to be on all fours with Form EP. It is described by the first respondent as an affidavit” and contained information ordinarily stated affidavits, and not in the form required by Rule 14(2). Failure to conform with the rule is not however fatal and does not warrant the drastic order of barring the 1st respondent from participating in the election petition proceedings”

The court went ahead to observe that the requirements are regulatory rather than mandatory.

Similarly in this case the response filed by the 2nd and 3rd respondent is not the one contemplated under Rule 11(2) of the Elections (Parliamentary and county Election petition) Rules, 2017

I am well guided by the above decision and hold that denying the 2nd and 3rd respondent’s audience is a drastic action. The 2nd and 3rd respondents participated in the proceedings without the petitioner having any objection and this application has been made too late in the day. I am further well guided by the provisions of Article 159(2)(d) that discourages procedural technicalities in deciding of cases.

Similarly on the issue of the 2nd and 3rd respondents not having entered appearance I hold a similar view that the same is merely a procedural technicality and it was not shown how if at all the petitioner was prejudiced.

II. Whether there existed two sets of results and if so the effect thereof on the election of the 1st respondent as Member of County assembly Kiogoro ward.

22. The petitioner argued that there were two different set of results. The issue is highlighted at paragraph 10 of the petition and paragraph 17 of the supporting affidavit.

23. On being cross examined however the petitioner when called upon to compare the results the petitioner stated that the results downloaded from the public portal correspond with the results declared as reflected in paragraph 6 of the petition. The petitioner further confirmed that the results downloaded from the IEBC public portal are similar to the results in Form 36B.

24. The petitioner however indicated that there must be a typographical error in the pleadings. The petitioner however never made any application to amend his pleadings at the proper stage and is bound by his pleadings. **In Jackton Nyanungo Ranguma versus Independent electoral & Boundaries commission & 2 others. Kisumu Election Petition No.3 of 2017** it was stated by Majanja .J that;-

“Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.”

The alleged downloaded results relied upon by the petitioner (exhibit 8) clearly contradict with the contents of the petition. The results contained in the public portal are also provisional and not final results and it cannot be said that there are two different set of results. I therefore find that the petitioner did not prove this issue.

25. Whether there were irregularities and illegalities in the conduct of the said election, and if so, whether they affected the integrity of the election and the declaration made by the 3rd respondent.

The petitioner alleged that there was a scheme to tilt the elections in favor of the 1st respondent. One of the major allegations concerned one presiding officer known as John Chogoo Auya who the petitioner alleged was employed by the 1st respondent. He stated that he got to know details of polling officials two days to the election and complained to the Returning officer. He admitted however that he did not reduce his complaint into writing. The 1st respondent denied this issue stating that the said John Chogoo was not his employee. I do not find this issue to

be a valid fact as the 1st respondent has no control over who gets employed by the 3rd respondent. Furthermore there is no proof that indeed the petitioner made any complaint to the returning officer.

The petitioner further alleged that most presiding officers failed to ensure agents of candidates appended their signatures on statutory forms. The particular presiding officers are however not mentioned in the petition. The allegation is of a general nature. As stated in **Joho versus Nyange & Another(4)[2007] eKLR**;-

“Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings”.

The applicant further claimed that several statutory forms were lacking stamps of presiding officers. Again, these allegations are of a general nature with no specificity but even if the petitioner had specified the particular polling stations there is no requirement for stamping of form 36A under Regulation 79 of the Election (General) Regulations, 2012. The only requirement is that of signing. This issue was well captured in the authority of **Independent Electoral & Boundaries commission & Another versus Stephen Mutinda Mule & 3 others[2014]eKLR** that was relied upon by the 1st respondent.

The petitioner further alleged incidences of violence, this issue was however not pleaded and as such does not fall for consideration by this court.

The petitioner at paragraph 16 of the petition also claimed to have sought a recount of the votes but was denied the opportunity. However no firm evidence of this fact was demonstrated and I find it not to have met the standard of proof required in an election petition.

The petitioner further claimed there were errors in reconciliation of ballot papers. This issue however was not also pleaded with specificity. The petitioner failed to show particular polling stations in which his votes may not have been taken into account.

I find that the applicant has not demonstrated an illegality or irregularities in conduct of the election. The allegations lacked specificity and no firm evidence of any irregularities was demonstrated.

Whether the declaration of the 1st respondent as Member of County Assembly of Kiogoro ward was Valid.

It is my finding that the election was conducted within the boundaries of the relevant provisions of the constitution and electoral law. The elections were free, fair, credible and verifiable and it clearly reflected the will of the people of Kiogoro ward. In the premises I find that the declaration of the 1st respondent as Member of County Assembly of Kiogoro ward was Valid.

Conclusion

26. The petitioner failed to prove his case against the respondents. The petition is therefore dismissed with costs to the respondents.

Costs

27. Section 84 of the Elections Act No.24 of 2011 provides that *“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”*

Rule 30(1) of the Elections(Parliamentary and county elections) petition rules,2017 further provides that the election court may, at the conclusion of a petition, make an order specifying-

- a) The total amount of costs payable.
- b) The maximum amount of costs payable.
- c) The person who shall pay the costs under paragraph (a) or (b) and
- d) The person to whom the costs payable under paragraphs (a) and (b) shall be paid.

28. The petition herein was fairly straight forward. I have taken into account time spent on preparation of pleadings, witnesses and hearing of the case. I award costs of Kshs.250,000 to the 1st respondent and Kshs.250,000 to the 2nd and 3rd respondents

29. I therefore make final orders as follows;-

- a) The petition be and is hereby dismissed.**
- b) The 1st respondent is awarded costs of Kshs.250, 000.**
- c) The 2nd and 3rd respondents are awarded costs of Kshs.250, 000.**

d) The security for costs deposited in court shall form part of the cost payable and shall be paid out on a pro-rata basis.

e) Pursuant to section 86 of the Election Act, a certificate of determination of this petition shall issue to the Independent Boundaries and Electoral Commission and the speaker of County Assembly of Kisii.

DATED and DELIVERED at KISII this 27th DAY OF FEBRUARY 2018

S.K ONJORO

SENIOR RESIDENT MAGISTRATE

Delivered in open court in the presence of:-

Court Assistant: Wilmah

Mr. Okemwa h/b for Mr. Begi for the Petitioner.

Mr. Oguttu Mboya for the 1st Respondent.

Mr. Wekesa for the 2nd and 3rd Respondent.