



REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATES COURT AT KITHIMANI

ELECTION PETITION NUMBER 1 OF 2017

PHILIP MUIA KIMEU1ST PETITIONER

ISAAC KIIO MUTISO.....2ND PETITIONER

ALBANUS KIOKO MUTHAMA.....3RD PETITIONER

VERSUS

IEBC.....1ST RESPONDENT

RETURNING OFFICER, MASINGA CONSTITUENCY.....2ND REPENDENT

STEPHEN NZUE MWANTHI.....3RD RESPONDENT

JUDGMENT

Introduction.

This is an election petition challenging the outcome of the elections of the Member of County assembly of the Ekalakala Ward during the general elections held 8/8/2017. The first and second respondents supervised the exercise.

Background.

The three petitioners were candidates for the seat of Member of County Assembly for Ekalakala Ward in the last general elections held on the 8th of August 2017. A declaration was issued by the 2nd respondent declaring the third respondent Mr. Stephen Nzue Mwanthi to be the victor in the electoral exercise.

The said petitioners subsequently thereafter filed the present petition challenging the validity of the election.

The gravamen of the petitioners arguments is that the elections were conducted contrary to Article 81(e) of the constitution, the Elections Act 2011 and the Elections Regulations 2012 in that the 3rd respondent engaged in acts of voter bribery by way of printing and placing posters at the Ekalakala shopping center indicating that he shall be providing free maize milling services, bribing voters at Itundumuini and Makuyu Markets and Isyukoni village and that he also went around various homes dishing out money to voters as an incentive for them to vote for him. The rest of the grounds to the petition were deemed to have been filed out of time vide this court’s ruling dated 17/10/2017 and shall not be analyzed in this judgment.

Hearing of the main petition proceeded on 17/1/2018 after the High court in Machakos in its ruling delivered on 1/12/2017 directed that the main petition be heard and determined. This was after the 3rd respondents had filed a constitutional challenge to the said ruling.

Parties were represented as follows: M/S Nyamu and Nyamu advocates for the petitioners, M/S Kivuva Omuga and Company advocates for the first and second respondents and lastly M/S Maanzo and Company Advocates for the third respondents.

A technicality arose on the date of the hearing when an objection was lodged by Mr. Kivuva advocate for the first and second respondents on the form and admissibility of the supporting affidavit to the petition which had been jointly deponed to by the three petitioners. He argued, with the support of Mr. Airo for the third respondent, that this offended the provisions of the Oath and Statutory Declaration Act and Section 12 of the Electoral rules which only anticipate that one person can depone to an affidavit. Parties thereafter consented that the same can be deemed properly on record on condition that only one of the petitioners testified.

A summary of the evidence from the witnesses who testified is as follows.

Petitioners' case.

PW1 Phillip Kimeu testified that he was one of the contestants for the position of MCA Ekalakala ward in which he lost. He further stated that he was present on 7/8/2017 when the third respondent bribed voters at Itudumuini market at 9 PM. He claimed that the market was well lit and he was 50 meters away. He could identify the third respondent and two other people being Benjamin Mutinda and a Mr. Kimeu. He further claimed that Benjamin Mutinda was handing over Kes. 50/- notes to the masses. He claimed that he called the area chief and also the returning officer to report the above malpractices. The rest of the allegations on the petition were witnessed by his co-petitioners according to him.

PW2 Joshua Ngole was also a candidate for MCA at Ekalakala ward claimed to have seen Mrs Matei and another lady by the name Prisca stopping people and talking to them on the voting day as they were heading to the polling station in Zukini Primary school. He was informed by one of his supports that the voters were being induced by money to vote for the third respondent. He could not see the denominations because he was standing from a distance. He reported the matter to the District Officer by phone. He believes that it was the malpractices on the part of the third respondent that cost him the elections.

PW3 Joseph Kanyaa Mutisya a business man at the Makuyu Market claims that on 7/8/2017 he saw Benjamin Mutinda dish out the money to people at the market. He was holding 50 and 100/- shillings notes. He did not see the third respondent. He thereafter called Philip Kimeu Musia and alerted him who arrived at the scene and confronted Benjamin whereupon Benjamin got into Stephen Nzue's (third respondent) vehicle and left the scene.

PW4 Solomon Wambua Mulei said that he was the agent to the first petitioner and was called by the said first petitioner (PW1) to confirm if there was a meeting at itunduimuni market where people were being given money. He went to the area at night at 9. PM and confirmed that money was being dished out. He claims to have been around 10 – 15 meters from where the money was being dished out and could see everything although he did not want to disclose the names of those who were in the meeting for security reasons. In his evidence in chief he claimed that he clearly saw Stephen Nzue Mwanthi (3rd Respondent) and his campaigner in chief one Benjamin. That once Stephen Nzue heard that the police had been called they dispersed. He clarified that he called the first petitioner to report on his findings and that the first petitioner came the following day on 8/8/2017.

PW5 and PW6 Sarah Aluochi Nkundi and Anastacia Mwendu Mulwa claimed that they benefited from the free maize milling services that were offered to them in an attempt to influence them to vote for the third respondent.

Third Respondent's case

3RW1 the third respondent herein testified that he was the duly elected MCA for Ekalakala and denies participating in any electoral malpractices. He does not deny providing free milling services to the people but he claims to have been mitigating the effects of abject poverty and drought in the area and that it had nothing to do with campaigns but was just a service like him providing school fees for needy students. It was a humanitarian activity that he was engaged in. He confirms that the picture on the poster is his but not the words therein. He claims that the posters are a creation of his political detractors. He also denied that Benjamin Mutinda was authorized to campaign for him but confirmed that they were friends.

3RW2 Gabriel John Muli testified that he is a businessman and that he was the one operating the posho mills where the free milling services was being offered. He denies that there were posters that were prepared to this effect and that they did their announcement through speakers mounted in vehicles. He further claimed that this was the seventh time he was entering into a similar contract with the third respondent to provide free milling to the masses and it had no relation to the election as he always does this to mitigate during times of extreme drought.

3RW3 Benjamin Mutinda claimed that on 7/8/2017 at around 2 PM he met with the third Respondent at Kilango shopping center and they held talks up to 6PM when he told him that he was leaving to meet up with his brother in law. He denied the allegation that he was the chief agent to the third respondent but that they were family friends and they meet regularly. He also denied ever being given money to entice voters to vote for the third respondent and that he was unaware of any free milling services being offered by the 3rd respondent to the masses.

3RW4 Peter Dominic Kimeu testified that he is a brother in law to the third respondent and confirmed that he visited him on 7/8/2017 from 7 PM up to 9.30PM at his house.

First and second respondent's case

1RW1 Lucy Mbithe John the constituency returning officer testified that she took all candidates through the electoral code of conduct and that they were to formally report any cases of malpractices in writing.

She categorically denies that any case of electoral malpractice was brought to her attention by the petitioners during the electioneering period either through phone calls or in writing. There were also no reports of posters that were put up to entice people to vote. All campaign posters were cleared by her office and there were no complaints. The poster claiming that the third respondent will be offering free milling services was not an approved poster but she clarified that it was not brought to her attention. In her opinion the elections were free and fair and the people of Ekalakala ward freely expressed their will by electing the third respondent herein.

Parties thereafter submitted.

Petitioners' submissions.

The petitioners counsel submitted that the third respondent was involved in corrupt practices and asked the court to interrogate whether the contract entered into by the third respondent to offer free milling services and subsequently putting up the posters amounted to voter bribery.

They further submitted that one of the constitutional principles for free and fair elections is one free from violence, improper influence or corruption. (Article 80)

Counsel has quoted a number of authorities touching on the offence of bribery:

In Simon Nyaundi Ogari-v-Hon. Joel Onyancha (2008)eKLR

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient.....when it is alleged that bribery took place publicly and in the presence of many people. The court cannot be satisfied with anything less than the best evidence which is always direct evidence

given first hand”.

In Mohamed Ali Mursal-Saudia Mohamed and Others (Garissa Election Petition 1 of 2013)

“Bribery is an electoral offence and criminal offence. Being such proof of the same must be by credible evidence and in my view nothing short of proving this offence beyond reasonable doubt will suffice.”

They further argue that having been aware of the electoral code of conduct then the respondent was in breach of the same by entering into a contract to offer free milling services from 3rd to 7th August 2017. This amounted to voter bribery and campaigning after the campaign period had ended on 5th August 2017 which was a breach of the electoral code of conduct.

PW5 and Pw6 indicated that the posters were pinned on the posho mills hence the third respondents cannot claim that the same were a creation of his opponents. Further that no reason was given by the third respondent as to why he chose the said dates to provide free milling services.

1st and 2nd respondent’s final submissions.

Counsel limited his submissions to the agreed issue as to whether the elections were tainted with voter bribery and /or corrupt practices attributable to the 3rd respondent and /or his agents.

On the issue of the burden of proof he argues that it is always with the petitioner to prove that the election was not free, fair and credible. The standard of proof is above the balance of probabilities though not as high as beyond reasonable doubt. However where any allegation in the petition is the nature of commission of a criminal offence, the standard of proof is beyond reasonable doubt. {see **Phillip Osore Ogutu-v-Michael Onyura Aringo and Others(2014)eklr**}

The claims on voter bribery are quasi criminal in nature and the petitioners had a duty to prove beyond reasonable doubt but that the allegations were too general to be of any assistance to the petitioners. To this end they failed the specificity test as enunciated in the case of **John Harun Mwau and two others-versus-IEBC and two others(2017)eKLR**.

Having denied the evidence of bribery it was incumbent upon the petitioner to present evidence from non-partisan witnesses to establish a charge of bribery and corrupt practices.

That PW5 testified that she only knew of the free milling services when she was about to pay as usual. She further stated that she still voted for her favorite candidate.

The glaring contradictions in the testimony of PW1 regarding the allegations of voter bribery makes it impossible for a court holding the petitioners to their burden and standard of proof to find the allegations established.

PW1 to PW4 are partisan witnesses whose evidence must be corroborated which was not done. That no bribery and or corrupt practices attributable to the third respondent were proved in a consistent manner with (sic) vitiating his election.

Ruling of this court delivered on 17/10/2017.

Mr. Kivuva, learned counsel for the 1st and 2nd respondents threw this court a curve ball in his submissions wherein he requested that I revisit the issue of the validity of the petition regardless of the fact that I had made a ruling on the same and it had been challenged by the third respondent at the High Court in Machakos. A host of authorities were quoted therein to sort of comfort me that I shall not be sitting in appeal of my own decision.

Whereas his arguments are very persuasive and tempting, I must respectfully decline to reopen that particular issue in this judgment. This is because in my ruling at the time I clearly stated that the matter be ventilated at the Superior Courts by anyone challenging the interpretation of the law that was made by this court. I shall say no more on the issue other than state that maybe this court may have benefited from Mr. Kivuva's submissions had he opted to do so at the stage the application was being canvassed rather than at this stage.

The 3rd respondents of submissions.

The third respondents argue that the evidence adduced in the petition shows beyond any shadow of doubt that the same is frivolous, vexatious and a total abuse of the court process. This is a petition that was solely propelled by the self induced and personal grievance of the petitioners that is purely premised on the face that they lost a free, fair and credible election.

The petition as framed and the orders sought are not premised on any cogent and legal factual basis. The evidence adduced before this court fails to satisfy the evidential threshold to support the factual assertions made by the petitioners in their petition. The election was determined by the voter registration and voter turn out.

Quoting from *Steven Bortner-v-Town of Woodbridge*:

... "the ordering of a new different election in effect disenfranchises all of those who voted at the first election because their validly cast votes no longer count, and the second election can never duplicate the complex combination of conditions under which they cast their ballots"

The burden is always on the petitioner and the threshold is very high in that an election court will not invalidate an election unless it appears that either the election as conducted was substantially in non compliance with the law or that there was a breach of official duty or the rules which affect the results.

On the allegation that the third respondent bribed voters by offering free milling services they argue that the same is not backed by any cogent evidence since no report was made by any of the petitioners or their agents. They did not formally report contrary to procedure. A distinct pattern of the overreliance on heresy was a feature of the evidence adduced by both Phillip Kimeu and Joshua Kivuva.

None of the witnesses saw the third respondent dish out money and none of the witnesses reported to the authorities about the alleged criminal activities. Mrs. Serah Aluoch confirmed that although she benefitted from the free milling services she still voted for the candidate of her choice.

In the case of **Gatirau Peter Munya-v-Dickson Mwenda Kithinji and 2 Others** (2014)eKLR: the Supreme Court held that an election is not to be annulled except on cogent and ascertained factual premise in order to safeguard the constitutional requirements of article 38(1). The court further held that where an election is substantially in compliance with the regulations the same should not be nullified mainly on ground of irregularities.

According to their arguments as long as there is substantial compliance with the constitutional and statutory provisions governing the matter the election shall not be voided. The sovereignty of the will of the people must be respected and the respect is only possible if this court finds the petition lacking in merit.

Determination

At the outset I must state that I have greatly benefited from the submissions from the three counsels herein. Indeed they have aided in shining a very bright light in a new road that I was navigating for the first time in my legal career. The said submissions will doubtless be of immense aid in the future should I pass through a similar road. I am therefore very grateful to the effort made by the counsels herein through their submissions to highlight the issues and to enunciate the legal principles as they understood them.

I shall first highlight salient aspects of case law that I deem relevant herein before I tackle the evidence before me. This approach will aid in using case law as a beacon post while the evidence is being tested for its conformity to the said law or legal principles.

The first aspect is on standard of proof. I note from the submissions that all parties are in agreement that the standard of proof for electoral malpractices involving voter bribery is one of beyond any reasonable doubt. The different authorities relied on the respective submissions and some which I have highlighted above clearly point to this fact. Voter bribery is a criminal offence.

Secondly I have also noted that the counsel for the first and second respondent has gone further and demonstrated through authorities that the witnesses who testify also matter in that the superior courts give greater weight to non partisan witnesses than partisan witnesses. The case in mind is that of **Fredrick Otieno Outa-v-Jared Odoyo Okelo (2014)eKLR** where the Supreme Court pronounced itself thus:

“...the offence of bribery ought to have been pleaded clearly with specificity. The 3rd respondent ought to have adduced sufficient evidence to prove that the purpose for distributing the CDF cheques was to influence voters to vote for the appellant, directly or indirectly. As evidence of the appellant’s presence during the distribution was controverted, the 3rd respondents ought to have provided evidence, not emanating from his own agents or even the supporters. The record reveals that most of those who testified were politically inclined to support either of the candidates.”

On the standard of proof required to vitiate an election on account of electoral malpractices and none conformity with the law, the Supreme court in **Raila Odinga Case (2013)eKLR**

“...the petitioner must not only prove that there has been noncompliance with the law but such failure of compliance did affect the validity of the elections”.

The superior courts have also made a distinction between corrupt acts committed by agents of a candidate and those committed by the candidate himself. In Moses **Masika Wetangula-v-Musikari Nazi Kombo (2014)eKLR**, the court of Appeal pronounced itself thus

“...in determining the effect of commission of an election offence, a distinction should be drawn between corrupt acts committed by agents of a candidate and those committed by the candidate himself....the corrupt acts of an agent have to be shown to have had the implied sanction or blessing of the candidate which would establish a consistent pattern from which a reasonable inference can be drawn that the candidate concerned must have sanctioned the acts.”

Hence as we analyse the evidence one should not lose sight of the above legal principles and edicts from the Superior Courts.

The evidence on record.

I agree with the counsel for the petitioners and the first and second respondents that there were five allegations of voter bribery. I however note that one allegation was not canvassed in this hearing and remained an allegation in the petition whose weight was not tested through cross examination. This is primarily because those Petitioners who allegedly witnessed them did not testify for reasons already given. Therefore I shall only deal with those allegations that were tested through cross examination.

a) Alleged bribery at Itundumuini market on 7/8/2017.

PW1 claims that he witnessed this incident in person. He claims that the third respondent was in the company of Benjamin Mutinda and Mr. Kimeu. He further claims that the third respondent was in his car while the money was being dished out. The witness who could have corroborated this account was Solomon Wambua Mulei (PW4). In his testimony he confirmed that he was PW1’s agent in the said elections. He however contradicted the testimony of PW1 materially by claiming that PW1 came to the market the following day and not 7/8/2017. He testified that PW1 had called him and asked him to go to

Itunduimuni market to confirm if money was being dished out. According to him therefore he was the one who went there and not PW1. He was the one who called the area chief and not PW1. He then later called PW1 who came to the market the following day.

This testimony by PW4 also impeaches the credibility of PW1 in that his own witness has exposed him as an untruthful witness because he claimed to have been an eye witness yet his own witness has clarified that he was not there at the time and day he claims to have been there. PW1 also conceded that he did not follow the laid down procedures for electoral malpractices and instead called the Returning Officer (1RW1) on her cell phone ten times.

The returning officer flatly denied that any complaint was brought to her attention either through phone or letter. She clarified that even if one had reported through phone call they were still obligated by procedure to follow it up in writing which was not done.

The fact that the said witness is also an agent to PW1 does not help in terms of the weight his testimony on bribery should be given in light of the Court of Appeals finding in the **Fred Ota Case** above.

b) Bribery by Benjamin Mutinda Kilonzo on 7/8/2017 at Makuyu market

This incidence was allegedly witnessed by Joseph Kanyaa Mutisya (PW3). He claimed that he saw the said Benjamin Mutinda dish out the money in denominations of Kes.50/-. He did not report the incident to the authorities but instead opted to call PW1. He further confirmed that PW1 came to the scene and witnessed the bribery himself and even confronted the said Benjamin Mutinda who got into the third respondent's vehicle and drove off.

The testimony fails on account of material contradiction and also for lack of corroboration. PW1 only testified to one incidence of bribery that he allegedly witnessed himself and that was at Itundumuini market as explained above and no other. The claim therefore by PW3 that he called PW1 and he came to Makuyu market is not corroborated.

PW3 also claims to have been neutral in the elections yet when he witnessed the alleged incidences of voter bribery he opted to call PW1 rather than report to the authorities. The fact that he had PW1's number confirms that they knew each other and an inference can be drawn that he was not neutral after all regardless of his claims to the contrary. It therefore appears to me that this witness was also not truthful.

c) Bribery by Mrs. Matei and Prisca at Zukini Primary School.

These allegation was raised by Joshua Nyolo (PW2) who claimed in his affidavit and testimony that after he had finished voting at zukini primary school he noticed the two ladies on the road side and that they were approaching voters as they went to the polling station and tried to induce them to vote for the third respondent by offering money.

On being asked how he knew that they were bribing people to vote for the third respondent he claimed that he got the information from an unnamed supporter which is essentially hearsay. He also claimed that he was watching from a distance and could therefore not see the denominations that were being given to the voters.

In testing the weight to give to this witness' testimony it was not lost to me that he was also a contestant in the said election and there was no corroboration of his account. The fact that he admitted that he was given the information from one of his supporters as to what the two ladies were doing on the road was heresay. He also did not follow the laid down procedures of reporting electoral malpractices and instead opted to call the district officer yet it is clear that there must have been police officers nearby since he claimed that it happened outside the polling station. I take judicial notice that every polling station in the country normally has police officers providing security.

d) Third respondent's voter bribery by printing posters offering free milling services.

The fact that the third respondent had offered free milling services was not disputed. He confirmed it himself and also 3RW2 confirmed the same. What is hotly disputed is the ownership of the posters. The third respondent vehemently denies printing such posters and 3RW2 also disputes this. He claims that after entering into the contract the only thing he did was publicize to the public through speakers mounted on a pickup around the market and not through print. 3RW2 further claims that this was the seventh such contract he was entering with the third petitioner and the modus has always been the same.

The petitioner argues that this was a clear breach of the electoral rules and that the third respondent bribed voters in this way to sway them to vote for him.

The second respondent on the other hand argues that the issue was not brought to her attention and according to her the election was free and fair.

The **Raila (2013)** case (above) sets the standard herein in that it is not enough to prove malpractice but that one should go further and demonstrate that it affected the outcome of the elections.

None of the two beneficiaries who testified demonstrated how the free milling services affected them in terms of their choosing their preferred candidate. In fact PW5 initially testified on cross examination that she voted for her candidate of choice but later claimed that her choice was affected. On further cross examination by counsel for the third respondent she claimed that her vote is her secret. With greatest respect to this witness her prevarication did not help or rather assist the court understand how she was affected by this free milling services especially when one considers that she stated that she has always been going to that particular miller for a long time hence it was not the free milling that enticed her to the shop. In fact she was about to pay for the service when she was told by the worker that the milling had already been paid for. PW6 also confirmed that although she always used that particular milling services she clarified that her vote is her secret implying that it did not affect her choice. She also claimed that she was called by the second petitioner and asked to testify to this fact implying that they knew each other.

It is not in dispute that free milling services were offered by the third respondent who claims that he has been doing so repeatedly out of altruism to mitigate against the effects of drought and poverty in his region. The petitioners claim that it was for the sole purpose of inducing voters. The witnesses presented by the petitioners have not demonstrated if they were induced as claimed by the petitioner but appear to have voted for the candidate of their choice.

The timing of the free milling services is suspect but I have to consider whether by itself, it influenced the outcome the elections and also whether by itself it is enough for this court to vitiate the election seeing that the other allegations have remained largely unproven as I have analyzed them above.

The edict by the Supreme Court in the Raila (2013) case is instructive herein. I have also considered the case of: **John Fitch vs. Tom Stephenson & 3 Others (2008) EWHC 501(QB)** where it was held:

“.....the courts will strive to preserve an election as being in accordance with the law, even where there has been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches This is because where possible, the courts seek to give effects to the will of the electorate ...”

Taking the above directions into consideration I do not think the issue of providing free milling services to the residents of Ekalakala market so close to the election date is, by itself sufficient to negate the will of the voters in Ekalakala ward who freely expressed the said will in an election that was deemed largely free and fair.

It was not enough to claim that there was an electoral irregularity but it was incumbent upon the petitioner to demonstrate how the alleged malpractice affected the electoral process to the extent that it can be claimed that the will of the electorate had been impeded. With the greatest respect to the petitioners, they failed to do so.

Determination

It is my finding therefore that the election for Member of County Assembly, for Ekalakala Ward was largely conducted in accordance with the principles enunciated by the Constitution and the various Election laws. The election was by and large free and fair and by secret vote. The Petitioners have failed to discharge their evidential and legal burden of proof relating to the malpractices they pleaded in their Petition.

It is therefore my finding that the third Respondent Mr. Stephen Nzue Mwanthi was duly elected as Member for County Assembly Ekalakala Ward in Machakos county.

Costs

Section 84 of the Election Act 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 Election Petition Rules 2017 provide that the court shall at the conclusion of an election petition, make an order specifying the total amount of costs payable by the party and to whom the costs shall be paid. Costs should be reasonable. I have considered the pleadings filed, the applications heard and the length of time, research and submissions made. I award the Respondents costs of one million shillings (Kshs 1, 000,000/-) to be shared equally between the 1st and 2nd Respondent on the one hand and the 3rd Respondents on the other hand. The petitioners shall share the above costs jointly and severally. I also order the security of costs deposited be released in the share of Kshs 50,000/- to the 1st and 2nd respondents and Kshs 50,000/- to the 3rd Respondents.

Conclusion.

I make the following Consequential Orders;

- a) That a Declaration be and is hereby issued that the 3rd Respondent Mr. Steohen Mwanthi was duly and validly elected as the Member of County Assembly- Ekalakala Ward, Narok County;
- b) That a Certificate of validity do issue to the 3rd Respondent and be transmitted to the Speaker of the County Assembly –Machakos County; and
- c) That the Petition is hereby dismissed with costs to the Respondents as determined above.

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Gilbert Shikwe (Mr) SRM

Dated and delivered in open Court this 1st day of march 2018 in the presence of:

..... For the
Petitioners

.....For the 1st and 2nd
Respondents

.....for the 3rd
Respondent