



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT OF KENYA
AT MALINDI
ELECTION PETITION NO. 3 OF 2017
(GANDA WARD)

KIPONDA JOSEPH JOSEPE NGUMBAO..... 1ST PETITIONER

KATANA REUBEN MWAMURE..... 2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION..... 1ST RESPONDENT

MASHA SUDI..... 2ND RESPONDENT

MOHAMED ABDUL OMAR..... 3RD RESPONDENT

JUDGMENT

INTRODUCTION:

Before me for determination is an Election Petition filed by the petitioners on 16th July, 2017 challenging the outcome of and declaration of the 3rd respondent as the winner of Member of County Assembly for Ganda Ward in the General Elections held on 8th August, 2017, the petitioners being one of the contestants of Member of County Assembly (MCA) seat in Ganda Ward, Malindi Constituency within Kilifi County in the Republic of Kenya.

In the said elections, it is said that the 3rd respondent emerged the winner by garnering 2,961 votes, the 1st petitioner garnering 2,245 votes hence emerging third and the 3rd petitioner in to 2nd position by garnering 2,512 votes.

In his petition the petitioners have sought orders for:-

1. Determination that the 3rd respondent was not validly elected as Member for County Assembly for Ganda Ward in Kilifi County.
2. A scrutiny and recount of votes in all the polling stations in Ganda Ward to ascertain the valid votes and the correct number of votes to petitioners and the 3rd respondent obtained thereat (spent)

3. That the respondents jointly and severally meets the costs of the petition.

In support of the petition, a total of twenty eight affidavits were filed by the petitioner and other persons who were to be called as witnesses. However, at the hearing, the petitioners narrowed down the list of their witnesses and consequently fourteen witnesses who swore affidavits testified.

The 1st and 2nd respondents opposed the petitioners' petition by filing their responses and witness affidavits and three witness testified.

The 3rd respondent similarly opposed the petition by filing his response and witness affidavits. Six (6) witnesses testified for the 3rd respondent.

PETITIONERS' CASE

The petitioners made various allegations against the respondents, namely:-

1. The petitioner contended that the 1st and 2nd respondents violated constitutional provisions particularly Articles 38(2) (a), 88 (4) (h), 88 (5), 81 (a) (d) (e) (ii) (iii) (iv) (v), 84, 86 (d), 88 and /or other legal obligations namely section 109 of the Elections Act 2011 and part XII, XIII of the Elections (General) Regulations, 2017.

2. It is further the contention of the petitioner that the 1st and 2nd respondents intimidated the petitioners' agents from raising complaints and that where the agents were adamant or persistent with their complains, they were ejected out of the polling station and tallying centres. Further, that the 1st and 2nd respondents were hostile, unfriendly and that first polling station opened late and closed early.

3. That the 1st and 2nd respondent were biased when its came to assisted voters as the Presiding Officers did not allow all the agents to witness the presiding officer assisting a voter and that is most of the times only the ODM (Orange Democratic Movement) party agents were favoured.

4. The petitioners also contended that the 1st and 2nd respondents in all polling stations did not allow agents to verify the votes during the sorting out and counting of votes.

5. The petitioners accused the 1st and 2nd respondents of allowing the ODM agents and supporters to openly campaign in and around the polling stations.

6. That the 1st and 2nd respondents declared results at Takaye Primary School Polling Station number 3, Mere primary School Polling Station number 1 and 2 and Gandeni Primary School Polling Station number 1 without Form 36A.

7. The petitioner further contended that the 1st and 2nd respondents declared results at Milimani Nursery School Polling Station without declaration of results Form 36A being signed by the presiding officer.

8. It is the petitioners' contention that the 1st and 2nd respondents declared results of Kijiwe Tanga Primary School Polling Station number 1, 2 and 3 and Miwani Nursery School Polling Station without declaration of results Form 36 A being stamped.

9. The petitioner further accused the 1st and 2nd respondents that they allowed persons who were not allowed to vote. That the persons who were not allowed to vote were not registered or were not registered in the respective Polling Stations.

10. That the 1st and 2nd respondents conveniently placed the agents far away from the KIEMS kit

that they were not able to verify the persons being identified to vote.

11. The petitioners also contended that the aggregate votes of the Polling Station without lawful result is 1854 while the margin of votes between the declared winner and the candidate who was number two (2) is 449 and that of the candidate who was number 3 is 717.

That the results for the Member of County Assembly (MCA) for Ganda were declared on 14th August, 2017 and that there was a sham to deny the petitioners a win.

Consequently, the petitioners asked this Honourable Court for a determination that:

- 1) The 3rd respondent MOHAMED ABDUL OMAR was not validly elected as Member of County Assembly (MCA) for Ganda Ward.
- 2) A scrutiny and recount of votes in all Polling Station in Ganda Ward to ascertain the valid votes and correct number of votes the petitioner and the 3rd respondent obtained.
- 3) That the respondents, jointly and severally to pay costs of this petition.

The 1st and 2nd respondents denied all the contentions of the petitioner and set out the steps they took to ensure that the elections were free, fair, credible and in accordance with the Law of Elections and the Constitution of the Republic of Kenya, including the use of the KIEMS kit, set up of Polling Stations, engagement with stake holders in the preparation of the elections, like training the agents for the different political parties and their own staff and officers who were to preside over and/or conduct the elections and the putting up of security measures at the polling stations and during the voting process.

The 1st and 2nd respondents denied any harassment or intimidation of agents and further denied any ejection of any agent from any polling station or at all.

The respondents denied that any political party or their agents were favoured when it came to assisting voters and further that no agent complained of the polling station set ups as was designed where all agents were paced at a designated place.

It is the position of the 1st and 2nd respondents that where election materials or voting materials delayed, time was extended to cover up for the lost time.

The 1st and 2nd respondents further respond that the results were announced and declared on 10th August, 2017 and not 14th August, 2017 as alleged by the petitioners, after receiving all Form 36As from the presiding officers.

It is the 1st and 2nd respondents' explanation that their printer developed a problem (printing problem) on 10th August, 2017 and could not print the declaration of results in A3 size paper and that after notifying all the agents and contestants of the contesting parties of the problem with the agreement of all the agents and the contestants, the 2nd respondent printed the results on A4 size paper, but the agents and the contesting parties refused to sign it saying they will sign the one printed in A3 size paper (statutory form), once the printer will be capable of printing and that consequently, Form 36B was filled and signed on 14th August, 2017.

According to the 1st and 2nd respondents, only registered voters were allowed to vote. To the 1st and 2nd respondents, any defects in Form 36A's did not invalidate the results as posted in Form 36A's.

It is also the 1st and 2nd respondents' case that the results as obtained in the votes of all the aspirants was lawful and valid and further denied that any Form 36A was neither signed by the presiding officer nor stamped.

Consequently the 1st and 2nd respondents asked this Honourable Court to dismiss the petition with costs.

The 3rd respondent denied all the allegations by the petitioner and in particular denied any scheme between him and the 1st and 2nd respondents to deny the petitioner victory in the 8th August, 2018 General Elections.

The 3rd respondent denied any harassment or intimidation of the petitioners' agents and stated that all agents were treated equally without biasness and that as far as he is concerned, the 1st and 2nd respondents discharged their duties under **Article 88(4) of the Constitution, 2010** in a transparent, impartial and neutral manner as provided by law saying the elections were free and fair and in accordance with the law.

It is the position of the 3rd respondent that he was declared the winner on 10th August, 2017 when declaration of results was made and not 14th August, 2017 as alleged by the petitioners.

For the reasons given by the 3rd respondent, the 3rd respondent contended that the petitioners are not entitled to any of the prayers sought in the petition and urged this Honourable Court to find relief:-

- a) That the 3rd respondent was validly elected as Member of County Assembly (MCA) for Ganda Ward, Kilifi County.
- b) That there is no need of scrutiny and recount of votes in Ganda Ward (spent).
- c) That there is no ground laid for penalization of the 3rd respondent with costs of this petition.

CONSTITUTIONAL PRINCIPLES AND LAWS GOVERNING ELECTION IN KENYA.

These principles and laws are found under **Articles 38, 81, 83, 86 and 88** of the Constitution 2010, Section **109** of the Elections Act, 2011, Regulation 64(3), **79(b), 83, 66, 82(2)** and 72 of the Elections regulations among other provisions of relevant law.

It has also been held in *Raila 2 (2017)*, that Election is a process and that the entire process must be conducted within the laws governing elections.

Unlike ordinary civil cases where the standard of proof is that of balance of probability, in election petitions, the standard of proof is beyond the balance of probability but lower than beyond reasonable doubts as is required in criminal cases. It is referred to as intermediate standard of proof.

In **RAILA 2 (RAILA ODINGA & ANOTHER VS THE IEBC & OTHERS [2017] eKLR**, the Court by majority held:-

“in many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition, an intermediate standard of proof, one beyond the ordinary civil litigation standard of proof on a ‘balance of probability’, but below the criminal standard of ‘beyond reasonable doubt’ is applied, In such cases, this Court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt...”

Guided by this authority, thus is the standard of proof required in the case before me, that the petitioners must proof or establish.

In **KHATIB ABDALLA MWASHETANI VS GIDEON MWANGANGI WAMBUA [2014] eKLR**, the Court held as follows:-

“Purely the consequences that flow from the finding that a person is guilty of improper

influence, is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such conduct is alleged, is proof beyond reasonable doubts...

In all election petitions, the burden of proof is on the petitioner to prove to the satisfaction of the court that there was not only non-compliance with the certification and the electoral law but also that the said non-compliance affected the outcome of the elections.

The petitioner has to prove that the irregularities and failure to comply with the law, as alleged by him in the petition, affected the will of the electorates. This was established in **Raila 2013 RAILA AMOLO ODINGA VS IEBC & 3 OTHERS [2013] ECLR**, where the Supreme Court held that:-

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common approach in respect of alleged irregularities in the acts of public bodies, omnia praesumuntur rite et solemniter esse ecta; all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the Public authority's departures from the prescriptions of the Law”.

Looking at Articles **38(1) (2) (3) (a) (b), 81(a) (d) (e), 83(3) and 86 (a) (b) (c) (d)** of the Constitution 2010, elections should be free and fair and must reflect the will of the electorates, it should also be by secret ballot, free from violence, intimidation, improper influence or corruption, transparent and should be administered impartially, efficiently, accurately I accountable manner and transparent and further, the voting method used is should be simple, accurate, verifiable, secure, transparent and that the votes are counted and tabulated and results announced promptly and further that the mechanisms are put in place to eliminate electoral malpractices including the safekeeping of electoral materials.

On affidavits filed by the parties or their witnesses, it is now a triable law that such affidavits must be subjected to cross –examination to establish the credibility of the evidence that they contain failure to which such affidavits are not of much help to the court and are of little significance, their evidence are not considered and are devoid of probative value. This was held in the cases quoted here below. In **MOSES WANJALA LUKOYE VS BENARD WEKESA SAMBU AND 3 OTHERS [2013] eCLR**, it was held:-

***“...the only safeguard design of the law is either the court does not consider such evidence at all or exercises its discretion under section 80(1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the Elections Rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the Petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the Petitioner does not call the deponents to testify; their evidence should not be considered*”**

In **NOAH MAKHALANG'ANG'A WEKESA VS ALBERT ADOME & 3 OTHERS [2013] eCLR** (Supra), the Court held:-

“In as much as the rest of the petitioner's witnesses who deponed supporting affidavits were not availed in court for cross examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner's case may be treated as being inconsequential and devoid of probative value.”

Guided by the authorities I have quoted, save for the affidavits of the witnesses who testified in this petition, the rest shall remain of less probative value to this Court as their deponents have not testified and cross-examined to enable this Court verify the contents thereof.

Parties for this petition have filed their submissions which I have duly looked at and considered.

ISSUES

The issues emerging from this petition for determination are:-

- (i) Whether the Member of County Assembly (MCA) elections for Ganda Ward, Malindi Constituency, Kilifi County in the Republic of Kenya held on 8th August, 2017 was in accordance with the electoral laws.
- (ii) Whether there was any electoral malpractices or irregularities in the said elections that affected the outcome of the election.
- (iii) Whether the 3rd respondent was validly elected as Member of County Assembly (MCA) elections for Ganda Ward, Malindi Constituency, Kilifi County on 8th August, 2017 in the 2017 elections.
- (iv) Who bears the costs of this petition

The 1st and 2nd issues appears intertwined and hence it is worthy being considered together.

- 1) Whether the Member of County Assembly (MCA) elections for Ganda Ward, held on 8th August, 2017 was in accordance with the electoral laws or whether there were irregularities or malpractices which affected the outcome of the elections.

By looking at the way the election for MCA Ganda Ward was conducted on 8th august, 2017 by the 1st and 2nd respondents and the various allegations made by the petitioners in this case in attempting to discharge their burden of proof, will assist me in reaching a proper finding on this issue.

(i) Assisted Voters

In the 2017 elections, there were two registers, electronic and hard copy register. When this Court conducted its scrutiny exercise and a report filed, it was found that there was a marked hard copy register in respect of Takaye Primary School Polling Station number 3 where two (2) voters were assisted to vote.

Under regulation 72 it is a requirement that Form 32 be filled by the person assisting the voter to vote and that the presiding officer does mark the register in respect of the assisted voters who are assisted for a good reason. This is for purposes of fulfilling the constitutional requirement that an election should be transparent, accountable, verifiable and credible, and in the absence of Form 32, as is the case before me, the 1st and 2nd respondents are not able to account for the assisted voters. No Form 32 was ever availed to this Court as evidence by the 1st and 2nd respondents for purposes of verifiability and accountability on the part of the election officials.

To me, this confirms the allegation of the petitioners that some voters were assisted irregularly and in contravention of the laws. In my mind this conduct on the part of the 1st and 2nd respondents compromised Articles 86 of the Constitution.

(i) Date of declaration of results (Form 36B)

Upon scrutiny exercise, two forms were availed by the 1st and 2nd respondents purported to have been used in the declaration of results of the election by the 1st and 2nd respondents.

Form 36B

- a) Is in A4 size paper which by ordinarily look appears to be in a white photocopying paper.
- b) Has no serial number.
- c) Has no IEBC logo.
- d) Has no water mark.
- e) It is not signed by the agents for the candidates or by the contesting candidates for MCA seat.
- f) Is dated and signed on 10th August, 2017 by the returning office (2nd respondent).
- g) It has no name of the constituency tallying centre.
- h) It does not show the aggregate results.

Form 35B

- a) It also indicated as Form 36B
- b) Has serial number
- c) Has been signed by the returning officer (2nd respondent).
- d) Has been dated and stamped using IEBC stamp on 14th August, 2017.
- e) Has been signed by the 3rd respondent only (Abdul. O. Mohamed)
- f) Is in A3 size paper.
- g) Has water mark feature and with IEBC logo.
- h) Is beige (greenish –yellow in colour)

The explanation given by the 1st and 2nd respondents is that Form 36B in the A4 size white paper was an improvise by him since a printer which was supposed to print the results in an A3 size paper developed mechanical or technical problem and refused to print and that he then, with consultation of the agents and the contestants, who all agreed, he printed the results in an A4 size paper but that the agents and the contestants for the MCA (Member of County Assembly) refused to sign it. According to the 2nd respondent, this printing in A4 size paper of the results was done on 10th August, 2017 and that therefore the results for the MCA seat were declared on 10th August, 2017 and not 14th August, 2017.

Taking note of the shortcomings in the said Form 26A which I have already highlighted herein, it appears the 2nd respondent did not comply with the law governing declaration of results and this explanation falls short of convincing any reasonable person in the circumstances narrated by the 2nd respondent, for the following reasons:-

- (a) The witness (2nd respondent) did not produce in court any incident report complaining on what he is saying.
- (d) It is very unlikely that agents and MCA contestants would reach an agreement, to print the results in A4 size paper (Photocopying paper) then refuse to sign it.
- (c) In any event, even if the agents and the MCA seat contestants were in agreement as alleged by

the 2nd respondent, the law provides that declaration of results must be made in a statutory form and therefore they cannot enter an agreement to do that which is unlawful and in contravention of the electoral law.

(d) It was imperative for the witness (returning officer) to produce Form 36A's from all polling stations (thirty polling stations) within the ward for purposes of verification of the results in the form. This was not done by the returning officer (2nd respondent) and the only thing the witness attempts to do was to compare the results in the said Form 36 B in the A4 size paper with the results in the A3 size paper, which to me was not sufficient to discharge the allegation by the petitioners that declaration of results was made on 14th August, 2017 and not 10th August, 2017.

Consequently, looking at the features of the purported declaration from signed on 10th August, 2017 by the 2nd respondent, as brought out clearly in the scrutiny exercise, the contents and results therein are not verifiable nor accountable. This to me defeats the very purpose of Article 86 of the Constitution 2010 and falls short of the requirements of that Article.

Faced with a similar situation, **A. Mabeya, J. in NBI/HC/EP. No. 14 of 2017 (AHMED ABDULAHI MOHAMED & ANOTHER VS IEBC & 2 OTHERS)** at paragraph 98 – 101 of the judgment held:-

“...Anthony Kirori Kimani the Returning Officer who prepared that form explained that he printed the results in an A4 paper because the printer he was provided with did not have capacity to print all that was required. That he captured this in the incident report. However, the court notes that he did not produce that incident report. Neither did he tender any evidence to show that the entries he made in that form were from the Forms 37A submitted to him by the various Presiding Officers.

To my mind, for the results in that Form to be said to be accountable, credible and verifiable, it was imperative for the said Returning Officer to produce Forms 37A from all the 119 polling stations so as to verify that what was in that an unofficial form, was what had been transferred from acceptable verifiable statutory Forms 37A. He produced none. I have seen the copies of Forms 37A produced by the 1st respondent in his Replying Affidavit to scrutiny application. They are for only 80 polling stations out of the 119 polling stations in the Wajir South Constituency. A total of 29 Forms 37A were not produced. The results in that Form 37B cannot therefore be said to be verifiable. I should point out here that the 2nd and 3rd respondent did not produce in court Forms 37A for all the polling stations...

There was no explanation why a page for Presidential Form 34B was used to declare the results for the election of Governor...”

In **HASSAN ALI JOHO AND ANOTHER VS SULEIMAN SAID SHAHBAL AND TWO OTHERS (NBI C.A. E.P. No. 10 of 2013)**, the Honourable Judges got an opportunity to clarify on which instrument is used to declare elections results and to court unanimously held:-

Para 95

“Declaration, from a legal perspective, requires the use of an instrument. Black’s Law Dictionary (p. 869) defines “an instrument” as “a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note or share certificate.” From the above definitions, it is clear that an instrument bears legal force particularly because of its content, and its formal face of authority and validity. The process of election culminates in the issuance of a certificate which squarely falls within the said definition of the instrument.”

Para 94

“Black’s Law Dictionary, 9th Ed., p. 467 defines “**declaration**” as “**a formal statement, a proclamation, or announcement, especially one embodied in an instrument.**”

Guided by this authority, it is clear that declaration of election results must be made in a written legal document. Form 36B used by the 2nd respondent in the A4 size photocopy paper, in the circumstances of the authority quoted, cannot be said to be a declaration of results in Ganda Ward. It was and is a piece of paper lacking any legal force.

A declaration made in a statutory document derives legal force from the provisions of the law governing elections in beige, to use particularly from **Article 86** of the Constitution 2010.

Perhaps it may also be important to quote to reply (words) of the 3rd respondent during cross examination by counsel for the petitioner Mr. Aboubakar, during the hearing of this petition in reference to Form 36B and Form 35B which form is subject issues herein.

“We did not have the declaration in Form 36B on 10th August, 2017, I did not have it, I was not given. I was given Form 36B on 14th August, 2017, it was given to me on an A3 paper. On the same day of 14th august, 2017, I was also given another Form A4 having declaration of results. Am aware the petitioner filed an application dated 30th October, 2017, the application was filed on 30th October, 2017. In the application, it was the petitioners’ case that there was no declaration of results made in Ganda Ward on the 8th August, 2017 elections. He sought summary judgment of the petition. I filed my further response on 1st December, 2017 in it I did not state that declaration of results were made on 10th august, 2017. I do not know why my advocate did not annex the declaration but I gave it to him.....The Form 36 B has no serial number, it has no name of constituency tallying centre, it has no IEBC water mark, it has no aggregate results. It also has no IEBC symbol. I am the one who has signed the declaration made in A3 paper, I was alone with IEBC officers when I took it. No other candidate was there at that time.”

From the responses of the 3rd respondent, upon cross-examination it appears the 3rd respondent acknowledges that no declaration of results for Ganda Ward was made on 10th august, 2017 but on 14th august, 2017.

The upshot of all I have said is the cumulative effect that I hereby do find that no declaration of results was made by the 2nd respondent on 10th August, 2017 and the certificate (Form 36C) having been issued to the 3rd respondent on 10th August, 2017 (not disputed), it is clear that he was issued with the certificate without declaration of results in Form 36B as required by law.

In my mind, this reasons and finding herein on the issue of Form 36B is sufficient to allow this petition. However, for future not only to be done but to be seen to be done, I will proceed to reach a finding on to other issues raised in this petition.

(ii) Invalidity of Statutory Forms.

Upon scrutiny of the electoral materials as ordered by this Court, the following illegalities, irregularities were noted:-

a) In Form 36A of Mere Primary School Polling Station, the Form 36A found inside the ballot box indicated that one Peter Mwanyale got zero (0) votes and that Joseph Kiponda (1st petitioner) got 69 votes yet in the Form 36 A that was given to court by the 1st and 2nd respondents it is indicated that Peter Mwanyale got 1(one) vote, while Joseph Kiponda got 169 votes.

These irregularities was not explained by the 1st and 2nd respondents

b) In Mere primary School Polling Stations Number 2 (two), 307 counterfeits were traced in the ballot box yet as per the ICT report, voters who were identified were 303. Also Form 36A was not found inside the ballot box.

e) In Miwani Nursery School Polling Station, Number 1 (one), the number of valid votes as per Form 36A found inside the ballot box was 298, yet the copy of Form 36A given to court indicated the valid votes as 293.

The Form 36A which was found inside the ballot box also indicated that there were no registered voters (number of registered voters was not indicated) while the Form 36A earlier availed to court shows that the registered voters were 407

In the same polling station, in the Polling Station Diary, (PSD), the number of spoilt ballots were 4, yet upon scrutiny it was found that infact there was no spoilt vote.

e) At Milimani Primary School Polling Station Number 2, the number of spoilt votes as per the polling station diary was two (2), but upon scrutiny, there was none.

In the same station, the number of used counterfoil as shown by the PSD was 290 but upon scrutiny, they were 292 used counterfoil, yet as per the KIEMS, identified voters were 288. There was no marked register. There was no explanation for this variances by the 1st and 2nd respondents.

e) At Mashamba Polling Station Number 1, in the Form 36, rejected ballot was shows as two (2) but upon scrutiny, there was no rejected ballot.

f) At Kijiwe Tanga Polling Station Number 2, the PSD indicated that there was no counterfoil the PSD did not indicate any use of counterfoils) but upon scrutiny 442 counterfoils were found, yet further the KIEMS kit revealed that only 429 voters were identified, 4 voters having been identified using the manual register.

Ordinarily ballot papers and their counterfoils should be equal in number, but in this case, it appears more ballot papers were issued than the voters who actually voted, yet there was no explanation for this by the 1st and 2nd respondents.

g) At Kijiwe Tanga Pollig station Number 3, Form 36 A was not stamped by the presiding officer or the deputy presiding officer and also no agent signed the PSD at the tallying centre yet there was no comment by the returning officer (2nd respondent)

In **MANSON OYONGO NYAMWEYA VS JAMES OMINGO MAGARA & 2 OTHERS [2009] eKLR, Musinga, J.** (as he then was), it was held that:-

“Where a presiding officer presents to a returning officer a Form 16A which is neither signed by that presiding officer and/or any of the candidates, that declaration is of no value and cannot be used or authenticate any declared results.”

In my view, the irregularities as pointed out under this paragraph did not affect the result or could not affect the result of the election but is a grave irregularity that destroys the credibility and authenticity of the results contained in the documents therein. The documents do not meet the verifiability test (they are not verifiable).

(iv) Intimidation and Harassment of The Petitioners’ Agents

No evidence was placed before this Court that indeed the petitioners’ agents were harassed, intimidated when they raised any complain with the presiding officers at the polling station or even that they were ejected from such polling stations when they complained. Consequently, this allegation fails.

(v) Allowing ODM (orange democratic Movement) party agent to campaign in and around the polling stations

These allegations was never proved by the petitioners against the 1st and 2nd respondents or even against the 3rd respondent. Consequently, it fails.

(Vi) Allowing Persons Not Registered To Vote.

Scrutiny at mere Polling Station Number 2 revealed that 307 counterfoils were used, no register (hardcopy register) was marked but as per the KIEMS kit, 302 voters were identified.

The 1st and 2nd respondents have not told this Court where the four (4) ballot papers obtained from the counterfoils went. This constitutes and brings a reasonable explanation in the mind of this Court that the four ballot papers could have landed in the hands of persons not registered to vote as alleged by the petitioners.

Similarly, there is no explanation by the 1st and 2nd respondents way as per PSD, used counterfoil is indicated as 300, yet upon physical scrutiny 304 counterfoils were found used yet again as per KIEMS kit, 303 voters were identified and the register not marked.

In Kijiwe Tanga Polling Station, as stated earlier, it was not indicated by the 1st and 2nd respondents, in the PSD to number of used counterfoil, yet upon scrutiny, 442 counterfoils were found used and only 439 voters were identified.

There is no explanation where the ballot papers obtained from the 3 (three) extra counterfoils went.

It is therefore that the allegation by the petitioners has partially been proved though not to the extent sufficient enough to avoid the election.

(Vii) Not allowing agents to verify the voters during the sorting out and counting of votes.

The irregularities already pointed out on Form 36A's, the counterfoils and the Polling Station Diary (PSD) and refusal of agents to sign Form 36B to use gives a pointer that indeed the agents were not either allowed or given sufficient time to verify the votes during the sorting out and counting of votes and this brought into question the issue of verifiability and accountability on the documents already mentioned severally herein and goes squarely into the credibility of the results as contained in those documents. If indeed the agents were allowed to verify the votes, then the irregularities already pointed out in the documents could not have occurred. I believe so.

(Viii) That the Aggregate Votes of The Polling Stations Without Lawful Result Is 1854.

This allegation by the petitioners has not been proved or even the total number of invalid, spoilt, and rejected results in all the polling stations, was never established. Consequently, this allegation fails.

(ix) Whether the 3rd respondent was validly elected as the Member of County Assembly for Ganda Ward, Malindi Constituency within Kilifi County.

In the case of **RAILA ODINGA & ANOTHER VS IEBC & 2 OTHERS** (supra), It was held:-

“At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law to not only determine whether, the election was characterized by irregularities but whether, those irregularities were such nature, or such magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the

election, that no reasonable tribunal would uphold it.”

Under **Section 83** of the Election Act, 2011:-

“83. No election shall be declared to be void by reason of noncompliance 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.”

The Supreme Court in **Raila 2** (supra) had an opportunity at Section 83 of the Elections Act 2011 and held as follows:-

In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

Guided by this authority and Section 83 of the Elections Act, 2011, I hereby reach a finding that the petitioners has proved that the election of Member of County Assembly (MCA) for Ganda Ward was not conducted in accordance with the Constitution and other laws governing elections in the Republic of Kenya. This Court has already dealt with the illegalities and irregularities committed by the 1st and 2nd respondents during the 2017 elections, during the elections of MCA Ganda Ward. Indeed, to me the failure to make a declaration of results in Form 36B as required by laws before issuing the certificate in Form 36 C was grave and given a fatal blow to the respondents. The one the failure to do so amounted to offending Articles 38 and 86 of the Constitution leading to the MCA Ganda Ward election being not verifiable, fair credible and unaccountable and consequently this Court finds that the 3rd respondent was not validly elected as a Member of County Assembly (MCA) for Ganda Ward in the 8th August, 2017 General Elections.

For purposes of clarity, it is not a dispute that the 2nd respondent, issued both the petitioners and the 3rd respondent with Form 35B (also referred by the respondents as Form 36B) on 14th august, 2017 as a declaration of results for Member of County Assembly (MCA) for Ganda Ward

Consequently, in my humble view and with respect of all those parties herein, the petitioner was clearly within his legal rights to file the petition within the time he filed it, it can then not be argued that the petitioner filed the petition out of time. It is on the basis of the said Form 35B and the entire contents therein, including the date that this petition was filed on 7th September, 2017. This petition is not time barred.

(iii) Costs

Costs follows events and consequently this Honourable Court awards costs of this petition to the petitioners.

Disposition

I must thank all the counsel for their patience, reserve and diligence in prosecuting and defending this matter, the petitioners having been represented by Mr. Aboubakar Mwanakitina and Ms Hamid, the 1st and 2nd respondents were represented by Mr. Ondego and the 3rd respondent by Mr. Mwadilo.

Litigants are equally appreciated for their patience, co-operation and calmness during the hearing of this petition to finality. I must also thank, sincerely, all the judicial staff of Malindi Chief Magistrate's Court, particularly the court assistants of this Court for their administrative assistance, and finally I must also thank myself for the energy, time expartised and stewardship that I dedicated to this election petition to its finality. God bless us all.

Final orders;

- a) The petition succeeds and is hereby allowed.
- b) The 3rd respondent was not validly elected to the position of *Member of County Assembly (MCA) for Ganda Ward and his election is hereby declared null and void.*
- c) The 1st and 2nd respondents to hold a fresh election in conformity with Constitution, the Elections Act, 2011 and all other laws governing elections in the Republic of Kenya.
- d) The 1st and 2nd respondents jointly and severally are liable to the petitioners and accordingly to pay costs to the petitioners to be taxed by the Executive Officer, Malindi Law Court, which is hereby capped at Kshs.2,000,000/- (two million Kenya Shillings)

It is so ordered.

Dated and delivered at Malindi this 6th day of March, 2018

C.O. NYAWIRI

SENIOR RESIDENT MAGISTRATE

6/03/2018

Petitioners/Advocate

Aboubakar – present

1st and 2nd respondents/advocate – Mr. Ondego – present

3rd respondent/advocate- Mr. Ondego holding brief for Mr. mwadilo present.

C.O. NYAWIRI

SENIOR RESIDENT MAGISTRATE

6/03/2018