



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MIGORI

ELECTION PETITION NO. 1 OF 2017

MICHAEL ONDONG AGUNDA (VOTER.....1ST PETITIONER

JOASH MWAURA OJUNE (VOTER).....2ND PETITIONER

WILLIAM ODOYO CHACHA (VOTER).....3ND PETITIONER

(Suing on Behalf of Kwa Ward in Suna East Constituency within Migori County)

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, SUNA

EAST CONSTITUENCY.....2ND RESPONDENT

ODHIAMBO BEATRICE ADHIAMBO.....3RD RESPONDENT

JUDGEMENT

By a petition filed in court on 24/08/2017 **MICHAEL ONDONG AGUNDA (1st Petitioner)**, **JOASH MWAURA OJUNE (2nd Petitioner)** and **WILLIAM ODOYO CHACHA (3rd Petitioner)** sued **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (1st Respondent)**; **RETURNING OFFICER of SUNA EAST CONSTITUENCY (2nd Respondent)** and **ODHIAMBO BEATRICE ADHIAMBO (3rd Respondent)** for the following:-

a.) There be an order to compel the 1st and 2nd Respondents to avail all the material to wit Kiems Kits and all ballot boxes to be secured from all the 15 polling stations at Kwa Ward in Suna East Constituency within Migori county and the same be secured in a proper place pending assessment of the voting materials, verification and fresh counting.

b) A specific order to compel the all (sic) Kiems Kit Operator to appear before court to verify the information that indeed the data stored in Kiems kit were compatible with valid votes cast in all

Kwa Ward Polling Stations in respect to MCA.

C) A specific order for scrutiny of votes in all the ballot boxes as compared with Form 36A.

d) An order for scrutiny and audit of the Kiems kit to iron out the doubts occasioned by the manner the elections of Kwa Ward was conducted.

e) That upon confirmation of the irregularities aforementioned, this court may declare that all the votes attested by each and all irregularities are invalid and shall be struck off the election of MCA at Kwa Ward one Beatrice Adhiambo Odhiambo.

f) A declaration that the 3rd Respondent was invalidly elected hence that declaration is invalid, null and void.

g) An order directing that the 1st Respondent to organize and conduct a free MCA election of Kwa Ward in conformity with the constitution and Elections Act.

h) Costs of the petition and my other relief Court shall deem fit to grant.

SUMMARY OF EVIDENCE

PETITIONERS

Four witnesses testified for the Petitioners. The 3rd Petitioner testified that he was an agent for one of the candidates at Nyamongo Polling Station. That at about noon, he saw agents of the 3rd Respondent give out money to people. That he and others protested and police came to the scene, but effected no arrests.

He went on to state that some forms from Nyamongo Polling Stations were not rubber stamped. That he also learnt that there were discrepancies between the results shown on the Kiems kits and those shown on form 36. That while at the counting Station, he learnt from others, that there were more discrepancies in other Polling Stations as well.

He went on to say that at the Polling Station (Nyamongo)) a voter was found with two ballot papers prompting a commotion.

On Cross Examination, he stated that he was an agent of a candidate for Senatorial seat. That he had been owned before he was assigned as an agent at that Polling Station. That he was told of several discrepancies in Form 36A and the Kiems Kit. That he had no other results for Kwa Ward for the poll of MCA. That in as much as the results per forms 36A reflect the 3rd Respondent as the victor in the elections, the results were fictions.

On further cross examination, he stated that the agent of the 3rd Respondent whom he saw dishing out money to voters going by the name Ezekiel was moving from inside the polling station to outside and back. That he became aware of the said Ezekiel's activities when some women whom he had approached with a view of bribing them raised alarm. That the figures(results) on the Kiems kit were lower than those reflected in the forms 36A. He gave a breakdown of the variations in 7 polling centres, saying that there was a total variations of 266 votes in all those polling centres. That there was no truth in the way the elections was done in the polling centres he talked about.

PW-2 testified that he was an agent at one of the Polling Stations. That at about 6:00am on 08/08/2017, the voting day, he was chased from Radienya Polling Station by an official of the 1st Respondents and only moved back after about 3 hours and with a warning not to record whatever was going on inside the voting room. That some illiterate voters had also complained that the said official had marked candidates

other than their (voters) choices. That some clerks voted twice. That the official he complained of (The Deputy Presiding Officer-no-less) committed other several elections offences. That some voters were also given more than one ballot papers(for the same seat) and a voter complained. That a relative of the 3rd respondent gave food to the Presiding Officer and other official.

The witness went on to say that the Presiding Officer allowed strangers to enter the Polling Station. That one of the strangers was armed with bows and arrows. That there was a discrepancy in the figure displayed in the Kiems kit and that on the Form 36A so he declined to sign the Form 36A.

On Cross Examination, he clarified that he was an agent for a candidate for MP. He conceded that the allegation of people being given more ballot papers was not captured in his affidavit. That he had carried a notebook to the Polling station to record any anomalies/incidents. That he cannot confirm the serial number of the ballot papers alleged to be extra.

On further cross examination, he said he was threatened by the stranger who entered the Polling Station while armed with crude weapons. That when an illiterate voter protested that a candidate not of her choice had been given her vote, she was given a fresh ballot paper, while the first one was taken by the Presiding Officer. That another illiterate voter also underwent the same ordeal.

He went on to say that the person who supplied the election officials with food was a supporter of the 3rd Respondent. That the Presiding officer (P.O) cast a vote after voting had ended but before the start of counting, but he has no idea which candidate the P.O voted for. That at Radianya where he was an agent there were 10 extra ballots papers cast.

PW-3 also testified that he was a voter as well as an agent at Radianya Polling Station. He too talked of the malpractices that PW-2 had talked about at that Polling Station.

On Cross Examination, he admitted that he was an agent for a candidate for MP. That he had not seen any agent for MCA sent who had complained. That it was the clerks of the 1st Respondent, not the agents of the 3rd Respondents, who were misleading illiterate voters.

On further cross examination, he said that he saw only two clerks(of 1st Respondent) vote twice. That the two voted for the second time without passing through the Kiems Kit. That the two voted for all the six positions that were contested in the general elections.

PW-4, one Gordon Okoth Amondi, introduced himself as an ICT Consultant. He said that he is a member of the Corporate Society of Kenya and is holder of a Masters Degree in Computer Science and in the process of acquiring a doctorate degree in the same field. He stated that Kiems Kits have very high accuracy levels. That the way the Kits work, the voters who are identified, either bi-metrically or through the complementary systems must be captured by the logs in the Kiems Kit. He concluded by stating that it is not possible, by using Kiems Kits, to have higher figures in Forms 36A than the figures captured by the kits.

On Cross examination, it emerged that the witness had actually been an official of the 1st Respondent during the August 8th General Elections as a Presiding Officer based at the county tallying centre. He clarified that as a Presiding Officer at the County Tallying Centre, he dealt with results of the Governor, Senator and Women Representatives only.

Objections to have the evidence of the witnesses testified on grounds that there was conflict of interest was rejected by court.

He went on to state in cross examination that the data fed on to the Kiems Kits must come from a Form. That Form 36A is the Primary Documents. That in case of any conflict in the figures on the kits, one would have to go back to Form 36A. That he did not wish the Public Portal of the 1st Respondent to confirm the information he received from the Petitioners.

On further Cross examination, he said that he got the information about variance in the figures on Kiems Kits and Form 36A from the petitioners. That Forms 36A is supposed to be scanned to the tallying centre. That figures on Forms 36A cannot change during scanning. That the figures on form 36A should either be equal or less than the figure on the Kiems Kits.

THE RESPONDENTS'S CASE:

DW-1 was the ICT Officer in charge of ICT at Suna East Constituency where Kwa Ward falls within. He adopted his affidavit which was rebuttal to the affidavits sworn by the petitioners and their witnesses.

On Cross Examination, he conceded that each and every voter was identified by the Kiems Kit. That there is no way a person can vote without being identified by the Kiems Kit. That the numbers of voters identified by the Kiems Kits should tally with the results of voters.

He went on to state that the Kiems Kits worked partially within Kwa ward on the day of voting. That the device (Kiems Kit) would give the actual figures.

DW-2 was the Presiding officer at Kwa Secondary School Polling Station. His evidence was to the effect that there was no anomaly at the Polling Station.

DW-3 was the 2nd Respondent. He testified that elections in all stations in Kwa Ward went on smoothly. That he only made correction in forms 36A for Radienya and Opassi Polling stations to reflect the actual totals from 360 to 361 for Radienya and 478 to 473 for Opassi. That the said corrections did not change any votes assigned on Form 36A by the Presiding Officer's to each candidate.

On Cross Examination he confirmed that he received forms 36A from all Polling Stations in Kwa Ward and used the information therein to fill form 36B which showed the 3rd Respondent as the winner of the elections.

DW-4 was the Presiding Officer for Radienya Polling Stations. He relied on his affidavit which denied the claims by PW-1 and others that some people were given more than one ballot of paper, that two clerks voted twice and generally all the anomaly ascribed to Radienya Polling Station. He clarified that he is a registered voter in Nairobi and thus could not have voted in Radienya. Vide page 11 of this affidavit, he also confirmed that only voters identified by the Kiems Kit could be allowed to vote.

On Cross Examination, he conceded that he has sought authority of the two clerks who had allegedly voted twice to swear the affidavit on their behalf.

On further Cross Examination he said that PW-2 never complained at all about the voting process to him that two of his clerks voted at the onset of voting just before voting was opened to the public that the other two clerks voted at the end of voting. That he did not send away any agent from his Polling Station, as long as the agent has an appointment letter from the candidate that he wanted to be an agent for.

He went on to state that the alleged supporters of the 3rd Respondent who gave them food on the Polling Day was a person he had met for the first time on 06/08/2017, only 2 days before the date of election, and he had the Deputy Presiding Officer contributed money which he gave to that alleged supporter of 3rd party for preparing lunch for them on the voting day. That nobody entered the polling Station with any crude weapon. That PW-1 never brought to his notice any incidence of an armed person within the Polling Station. That at some point he mandated Deputy Presiding Officer to assist illiterate voters. That the Deputy Presiding Officer was to do this in presence of agents. That he never at any one time get a complaint from the agents about the Deputy Presiding Officer pertaining that duty.

DW-5 was the 3rd Respondent, she relied on her replying affidavit which basically denied the allegations in the Petition/Affidavits.

On Cross Examination by the petitioner's counsel, she said that she was at the constituency tallying centre. That she does not know why only her agents signed the Form 36B.

On further Cross Examination, she confirmed that she was at the Tallying Centre when she was declared the winner. That after voting at the her station, she went back home and did not go to Radienya Polling Station which is about 5 Km away. That is anybody went to Radienya Polling Station with Crude weapons, it was not under her instructions.

DW-6 was the chief agent of the ODM Party in Kwa Ward during the elections held on 08/08/2017. He adopted his affidavit sworn on 20/11/2017.

All the parties in the petition filed their list of issues to be determined. I have looked at them and find that the issues filed on behalf of the 3rd Respondent on 24/11/2017 captured in detail the issues raised on behalf of the petitioners and the 1st two Respondents. I will thus deal with those issues as raised by the 3rd Respondent.

Before detre into the issues, I have retained at the back of my mind the principle that this being an election petition, the standard of proof need not be as high as in Criminal Proceeding, but must certainly be higher than the standard of proof required in civil proceedings.

On the first issue, I not that there were allegations (by the petitioner) and denials (by the Respondents). It was the word of the petitioners against that of the Respondents. I wish to disect the issue as follows:-

PW-1 alleged that a person whom he knew as an agent of the 3rd Respondent dished out money to voters. The 3rd Respondent was able to show that at that Polling Station (Radienya) she had agents and the alleged agent was not one of them. Her agents signed the form 36A at the end of voting. PW-1 or any other witness was not able to link the person who allegedly gave out money to the 3rd Respondent. Thus the aspect of bribes of voters was not proved.

Further both PW-1 and PW-2 talked of violence, or threat thereof. Their evidence was countered by the Presiding Officer himself who said that he never dealt with any such issue at Radienya Polling Station while he was the Presiding Officer. He never saw any armed person. Nor was any such incident reported to him. Thus the allegations of violence remaining just that -an allegations.

On whether the election officials were bribed with food cooked by the supporters/relatives of the 3rd Respondents, I am unable to agree with the petitioners. As stated by the Presiding officer himself, he was not a local, he visited the polling station two days before voting to familiarize himself with the surrounding; he visited nearby homes and found one where meals would be prepared for them on election day at a consideration. The Presiding officer said that they contributed and gave out the money for food. Surely in a rural set up, that arrangement is not abnormal.

Besides, the petitioners did not prove that the person who was giving food to the Presiding Officer and his team was doing so on behalf of the 3rd Respondent. Nor did they prove that he was a supporter of the 3rd Respondent. That aspect also fails the test of proof.

On voting twice by clerks, voting by the Presiding Officer, giving of extra ballots to some voters or even misleading the illiterate voters, I am unable to state with Certainty whether they actually happened. The illiterate voters who were allegedly misled did not testify. On the other hand the two clerks alleged to have voted twice did not file any affidavit is rebuttal. The Presiding Officer denied having cast a ballot. The people allegedly given extra ballots were not called to testify in court.

In short all the irregularities complained of were not specifically proved to the required standard. Perhaps they are some of them took place, but I am unable to state either way with certainty.

On the 2nd issue, both PW-4 and DW-1 were in agreement that the number of voters effected on the

Kiems Kit must tally with those on forms 36A. PW-4 was a witness called by that petitioner. While DW-1 was a witness and an employees on the 1st Respondent. Both are experts in matter ICT.

Both experts were in agreement that for a person to vote, he must have been identified either biometrically or by other means by the Kiems Kits. DW-4 concurred with the two experts and stated expressly in his affidavit at Paragraph 11 that only voters identified by the Kiems Kit were allowed to vote.

Taking cue from the evidence of the three witnesses, it follows that any variance between the figures on the Kiems Kits and Form 36A, unless explained, is a sign of irregularity.

On the 3rd issue, which I will look at alongside the 4th issue, I note that during the process of recount and verification on 22/01/2018, the Form 36A for Pemo Polling Station showed that 576 voters noted. Conversely the Kiems Kit (SD Card) showed that a total of 521 voters were identified by the Kit. As observed above, the ICT experts who testified herein stated that figures on the kit and Form 36A must tally. That the Form 36A cannot have a higher figure than the Kiems Kit. Yet that is exactly what was found for Pemo Polling Station.

The discrepancy noted (55 votes) was not explained. It is against the evidence of what the two experts and the Presiding Officer for Radienya said.

It was the duty of the 1st Respondent to oversee the elections, count the votes accurately and transmit the accurate figures to their constituency tallying centre from where a winner would be declared. It cannot be said that the 1st Respondent performed its duty in the face of such discrepancy as noted above. A variation of SS when in a single station where only a few hundred voters took part cannot be ignored especially when juxtaposed against the evidence of PW-4, DW-1 and 4.

I do therefore come to a finding that the declaration of the 3rd respondent as the winner of the MCA post in KWA WARD lacked transparency credibility and variability. This finding thus vindicates the petitioner's claimss that the election/ results was marred with impropriety and illegalities.

Granted , the irregularities/ impropriety have been established in only one Polling Station. But what if the same had been replicated in other stations.

On the punultimate issue, I am convinced by any findings in the 2nd, 3rd and 4th issues above that the petitioners have entitled to the relief sought. I do therefore grant prayers (f) and (g) of the Petition dated 24th August 2017. in Particular, I declare that the 3rd Respondent was not validly elected as the MCA for KWA WARD and that a fresh elections be held in KWA WARD.

On who pays the costs, it is well settled that costs do follow the event. The petitioners having succeeded in their case are entitled to costs. As for the 3rd Respondents, no illegality or impropriety was proved on her part. Thus she may not have been part of the activities carried by the 1st Respondent through its agents. I therefore order that the 1st Respondent shall bear the costs of the petition incurred by the petitioners as well as the 3rd Respondents.

Judgment delivered, dated and signed in the open court on the 23rd February, 2018

Hon. R. Odenyo

SPM

23/02/2018