



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE’S COURT AT KAKAMEGA
ELECTION PETITION NO 5 OF 2017
CONSOLIDATED WITH
ELECTION PETITION NO 3 OF 2017

SHIYENJI SILAS MUYEYIA.....1ST PETITIONER
JOYCE MUGASIA KHADOHI.....2ND PETITIONER

VERSUS

BENSON MANUNI MULINYA.....1ST RESPONDENT
THE RETURNING OFFICER,
IKOLOMANI CONSTITUENCY).....2ND RESPONDENT
INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

As we are all aware Kenyans went to the polls on 8/8/2017 to elect various political representatives including members of county assemblies. This is in accordance with various provisions of our hallowed Constitution and electoral laws. In Idakho East Ward voters, I want to believe, trooped in their numbers to twenty two polling stations spread across the Ward to elect a Member of County Assembly (MCA) of their choice. Among those contesting the MCA seat were the 1st Petitioner, 2nd Petitioner and the 1st Respondent. The 1st Respondent was returned as the victor.

Being dissatisfied the 1st and 2nd Petitioners filed separate petitions contesting the declaration and subsequent gazetement of the 1st Respondent as MCA-elect for Idakho East Ward. The petitioners were consolidated for ease of hearing and it is clarified that the two petitions are distinct and the cases presented in support and opposition thereof shall be considered separately.

1st Petitioner’s Case

The 1st Petitioner alleges fraud, electoral malpractice and irregularities committed by the respondents and specifically the following particulars are enumerated;

1. That at Kasavayi Primary School Polling Station when votes were counted and in the presence of the Petitioner's agent called Charles Itivinali Shivonje, the Presiding Officer Kennedy Amiani announced that the Petitioner had got 47 votes, but when the said Kennedy Amiani signed Form 36A it indicated that the Petitioner had 46 votes.

2. At Kasavayi Primary School Polling Station the Deputy Presiding Officer Shikali Ndenga who is a nephew to the 1st Respondent comes from the same village within which Kasavayi Primary School Polling Station is situated.

i. That at Kasavayi Primary School Polling Station an IEBC Clerk called Geoffrey Otieno Muyembe is a nephew to the 1st Respondent

ii. There was an IEBC clerk at Kasavayi Primary School Polling Station called Caroline Mukwana who was the wife of Geoffrey Otieno Muyembe and therefore a daughter in law to the 1st Respondent

iii. There was an IEBC clerk at Kasavayi Primary School Polling Station called Imbosa Mitchell who is a niece to the 1st Respondent

iv. That there was an IEBC clerk at Kasavayi Primary School Polling Station called Masheti Vincent Shikokoti who is a cousin to the 1st Respondent

v. That there was an IEBC clerk at Kasavayi Primary School Polling Station called Sophy Muyayano Muhati who was a sister in law to the 1st Respondent and that further the BVR Clerk in the same polling station called Bruno Mulinya is the son of Sophy Muyayano Muhati and his father is a brother to the 1st Respondent. With the foregoing it is unclear as to how those votes were cast and counted and therefore a recount would unravel this mystery

3. That at Shitoli Primary School Polling Station there was a presidential vote that was disputed. After a dispute had arisen to this presidential vote the presiding officer known by the name Ann assigned it to one Lishebu who was not a candidate at all. It is therefore unclear as to whether the one disputed was assigned to the unknown candidate called Lishebu or was by error or design counted among those got by the real candidates. To clarify this position, it is therefore necessary that those votes be recounted.

4. That at Lwenya Primary School Polling Station the Presiding Officer called Justus Taali Bitienyi prepared and issued Form 36A to the Petitioner's agent called Josephat Dumbido Mukangai indicating that one of the candidate for Member of County Assembly Idakho East Ward had got no vote and this foil is Serial No CA000120 but there was yet another Form 36A under Serial No CA 000109 kept by the 2nd Respondent that showed that this candidate Wendo Edwin Palapala had got 24 votes. Again this discrepancy can only be resolved by ordering for recount of these votes.

5. That at Shiveye Primary School Polling Station there were only 678 registered voters. There was only one stream only 482 voters cast their votes. Yet these results were never released until 9:00AM in the morning of 9/8/2017. This is contrary to a larger station like Makhokho Primary School Polling Station where there were three (3) streams/centres with 1,406 registered voters. Out of this 1,023 voters cast their votes yet the counting exercise for Member of County Assembly votes ended at 1:00PM just about seven hours after the closure of the voting exercise. It is unclear as to how counting took so long at Shiveye Primary School Polling Station and this could be understood if a recount of the votes cast is ordered.

6. That at Ivole Primary School Polling Station the Petitioner's agent Oliver Lichalo Matasio was denied entering into the voting room/centre by the Presiding Officer called Masingu Kennedy and as a result the Petitioner's interest were not protected during the voting and counting exercise at this polling station. It is necessary therefore that a recount be ordered to confirm the votes cast in this polling station and how candidates for member of county assembly position scored

The 1st Petitioner testified as the first witness (P1W1) and reiterated in evidence the above grounds. Allegedly a complaint about the IEBC officials at Kasavayi Primary School Polling Station being related with the 1st Respondent was raised with the Presiding Officer but a remedy was not provided. He went further to state that his bid to have his agent at Ivole Primary School Polling Station allowed into the polling room was unfruitful and therefore the 1st Petitioner's interests at the said station were not taken care of. This was the situation which was obtaining at Ivole Primary School Polling station and again the intervention by the 1st Petitioner did not make the Presiding Officer yield.

The second witness (P1W2) to testify in support of the 1st Petitioner's case was **Josephat Lugonzo Shitsama**. He was an agent for the 1st Petitioner at Shitoli Primary School Polling Station and was duly trained to effectively play the role. He testified that the voting process went well but a problem arose at the time of counting. Allegedly at the time of counting of the votes a presidential vote was assigned to a stranger by the name Lishebu.

The third witness (P1W3) to testify in support of the 1st Petitioner's case was **Oliver Matasia Licholo**. He testified that he assigned by the 1st Petitioner to be the 1st Petitioner's agent at Ivole Primary School. However on reaching at the said polling station, he was denied entry by the Presiding Officer. He reported this incident to his principal who advised him to go and stay at his home as he waited for the 1st Petitioner's intervention. Allegedly the 1st Petitioner arrived at the polling station at 4:00PM and tried to intervene for the witness to be allowed inside the polling station but permission was never granted.

The fourth witness (P1W4) to testify on behalf of the 1st Petitioner was **Silvia Muwongo Sore**. She testified that she was the 1st Petitioner's agent at Shiveye Primary School Polling Station. She went further to state that elderly and illiterate voters were being assisted by the Deputy Presiding Officer and the agents were not allowed to participate. It was her evidence that twice she heard such voters shouting that they desired to vote for the 1st Petitioner but she was not sure whether the ballots for those voters were marked to capture the choice of the said voters. The witness went further to state that the counting in respect of the MCA votes began at 3:00AM when the IEBC officials were exhausted and had impaired concentration thus arriving at inaccurate result.

The fifth witness (P1W5) to testify in support of the 1st Petitioner's case was **Charles Itivinali Shivonje**. He was an agent for the 1st Petitioner at Kasavayi Primary School Polling Station. He testified that all the IEBC officials save for the Presiding Officer at Kasavayi Primary School Polling Station came from the same family and were related with the 1st Respondent. He went further to state that at the time of announcing the results, the 1st Petitioner was announced to have garnered 47 votes but when he was given the Form 36A the votes for the 1st Petitioner were indicated to be 46. The witness nevertheless signed the Form 36A.

With such evidence the 1st Petitioner sought the following reliefs;

- a. An order for scrutiny and recount of the ballot cast in the member of county assembly for Idakho East Ward
- b. A declaration that the petitioner was/is the validly elected member of county assembly for Idakho East Ward
- c. An order that the cost of this petition be borne by the respondents
- d. Such other or further relief this honorable court may consider fit and proper in the circumstances

2nd Petitioner's Case

The 2nd Petitioner contests the validity of the elections for Idakho East Ward on the following grounds:

1. There was a lot of violence against the 2nd Petitioner and her supporters, agents and/or representatives and which was perpetuated or instigated by the 2nd Petitioner's opponents and particularly by the 1st Respondent and the supporters of the 1st Respondent.
2. IEBC had employed the relatives of the 2nd Petitioner's two main opponents being the 1st Respondent and the 1st Petitioner which fact is contrary to the rules and regulations of IEBC
3. The presiding officer did not allow the 2nd Petitioner's agents to participate and confirm the results before being transmitted
4. There were glaring discrepancies and blatant attempts to manipulate results and an example is given of Kasavayi Primary School Polling Station where the 2nd Petitioner garnered 49 votes yet it was announced that the 2nd Petitioner had garnered 3 votes
5. The 2nd Petitioner's authorized agents were refused entry into several tallying centres by the 2nd and 3rd Respondents despite repeated requests to be so allowed. Specific examples are given of Makhokho Polling Station and Lhirembe Polling Station where the 2nd Petitioner's agents were allowed in at 1:00PM and 11:00AM respectively.
6. The 2nd Petitioner's agents were not issued with Forms 36A as required by law

The 2nd Petitioner testified as the first witness (P2W1). She reiterated the averments in her petition. The second witness (P2W2) to testify in support of the 2nd Petitioner's case was **Gerishom Mwangi Juma**. He introduced himself as an outside agent for the 2nd Petitioner at Lusui Polling Station. He testified that many of the IEBC officials were related to the 1st Respondent. He mentioned the name of one Geoffrey Mulinya who was openly giving money to voters telling them to vote for the 1st Respondent. He also testified that he was denied entry into the tallying room. He went further to state that the 1st Respondent before the elections threatened that he would hire people to burn the witness' house just because the witness was an agent for the 1st Respondent's opponent. True to the threat on 9/8/2017 the witness house was burnt down by one William Shivachi forcing the witness to flee from his home. He reported both the threat and the arson to the police who are yet to take any action. He concluded by saying it was his honest belief that the elections were not free and fair.

The third witness (P2W3) to testify in support of the case for the 2nd Petitioner was **Brian Lugonzo Anami** who was the chief agent for the 2nd Petitioner. His work was to ensure that the agents for his candidate were in each and every polling station. His candidate had a total of 44 agents, two agents for each of the 22 polling stations. There was delay in the 2nd Petitioner's agents being allowed into polling stations and particularly at Musasa, Masiyenze and Impaka. The witness gives specific names of IEBC officials said to be related to the 1st Respondent who were bribing voters to vote for the 1st Respondent. He goes further to state that in 17 out of the 22 polling stations the 2nd Petitioner's agents were never issued with Forms 36A. The 2nd Petitioner's agents were not allowed to witness the transmission of results from the polling station to the tallying centre. He also stated that the assisted voters were deliberately misled in marking of the ballot papers and the votes ended up being declared spoilt. Allegedly at Kasavayi the spoilt votes belonging to the 2nd Petitioner were tallied as valid votes and added to those of the 1st Respondent.

The fourth witness (P2W4) was **Charles Ngaira Mulama** an agent for the 2nd Petitioner at Masiyenze Polling Station. He was denied entry into the polling station for the reason that the letter he presented had no green rubber stamp at the back. At 8:00AM he was still allowed into the polling station with the same later rejected earlier. He held the elections as not free and fair as he was not present when the polling station was opened and the opening of the ballot boxes before the voting begun.

The fifth witness (P2W5) was **Mary Shikunye Adanga** who was the 2nd Petitioner's agent at Kasavayi Polling Station. She testified that when she reached the polling station, she found the 2nd Petitioner's supporters were being harassed and chased away by the 1st Respondent's agents. She noted that almost all the IEBC officials were related with the 1st Respondent. At the time of counting allegedly the spoilt votes were added to the tally of the 1st Respondent's votes. On realizing this she started shouting at the IEBC officials and in doing so, a brother to the 1st Respondent spotted her. On 9/8/2017 at night her house was burnt down by the 1st Respondent's agent. During the campaigns the 1st Respondent had threatened her that the 1st Respondent would make the witness migrate from her home.

The sixth witness (P2W6) was **Electine Khatimba Milavi** who was an agent for the 2nd Petitioner at Musasa Polling Station. She testified that she was twice sent out of the polling station for the reason that she did not have the 'correct' accreditation letter. She was also refused copies of 'signed forms.'

The 2nd Petitioner sought the following orders;

- a. The 2nd and 3rd Respondents are in breach of their constitution (sic) obligations under Article 10, 81(e), 86 and 88 of the Constitution of the Republic of Kenya in relation to the 8/8/2017 election for the member of county assembly for Idakho East Ward within Ikolomani Constituency
- b. The declaration that the 1st Respondent had won the election for member of county assembly for Idakho East Ward within Ikolomani Constituency is invalid
- c. The 3rd Respondent was in breach of his obligation under section 59,60,61,62,74,79 and 82 of the Election (General) Regulations, 2012
- d. The 2nd and 3rd Respondents failed to properly tally and verify the count of votes in breach of Article 101 of the Constitution of the Republic of Kenya during and in relation to the Member of County Assembly for Idakho East Ward within Ikolomani Constituency elections held on 8/8/2017
- e. The 2nd Respondent is in breach of his constitutional obligation under Article 75 of the Constitution of the Republic of Kenya in relation to the 8/8/2017 election for member of the County Assembly for Idakho East Ward within Ikolomani Constituency
- f. The 2nd and 3rd Respondents are guilty of offences under the Election Act, 2011
- g. A declaration that the 1st Respondent was not validly elected as the Member of County Assembly for Idakho East Ward within Ikolomani Constituency at the concluded elections held on 8/8/2017
- h. An order that the 1st Respondent is disqualified due to contravention of provisions of Election Act and more in particular in contravention of section 65 of the Act
- i. A declaration that the petitioner duly won and was elected as member of the County Assembly for Idakho East Ward within Ikolomani Constituency at the concluded elections held on 8/8/2017
- j. In the alternative an order that there be a fresh election for the Member of the County Assembly for Idakho East Ward within Ikolomani Constituency in strict compliance with Constitution
- k. An order that the costs of the petition be borne by the respondents
- l. Such other or further relief that this honorable court may consider fit and proper in the circumstances

1st Respondent's Case

The 3rd Respondent testified as the sole witness and controverted the evidence by the 1st and 2nd Petitioners and their respective witnesses. He prays that it be determined that the 1st Respondent was duly elected and the election was valid.

2nd and 3rd Respondents' Case

Hudson Oloishuru Salenoi testified and denied that the 3rd Respondent employed relatives of some of the contestants. He stated that the 3rd Respondent adopted an indiscriminate employment policy when it came to employment of electoral officials. He went further to give the role of polling clerks which was to use the KIEMs kit to identify voters, show voters respective ballot boxes for the six electoral posts and mark the left hand small finger to identify the voters who had already voted. He also stated that the 3rd Respondent had not by the time he was testifying received any complaint that the clerks had not performed their roles to the expected standard.

The witness went further to state that the names of the polling clerks were publicly displayed seven days before the elections and the 1st and 2nd Petitioners never raised any objection. He termed the allegations by the 1st and 2nd Petitioners as an afterthought.

He also stated that there was no oral or written request by the 1st and 2nd Petitioners to be supplied with any of the statutory forms. He denied that any of the contestants' agents were locked out from the polling stations. He also supplied Polling Station Diaries for a number of polling stations to show that the agents for all contestants participated and freely played their roles during the voting day.

He denied allegations of voter bribery and violence.

He prayed that the petitions be dismissed.

1st Petitioner's Submissions

The 1st Petitioner highlighted several issues in his submissions. First he took issue with the large number of 1st Respondent's relatives who were employed and worked at Kasavayi Primary School Polling Station the home village of the 1st Respondent. The 1st Petitioner opines that it would be practically impossible for such a large number of election officials related to a candidate to show equal fairness to the other candidates.

The 1st Petitioner took an issue with the stray vote at Shitoli Primary School Polling Station which he termed as an iceberg of the worse things that happened at the said polling station.

Third, the 1st Petitioner feels the counting at Shiveye Primary School Polling Station took 'exceptionally too long.' This is even after considering the fact that the polling station is a one stream polling station. He compared the same with Makhokho Primary School Polling Station with three streams with 1,023 voters having cast their votes and counting was concluded at '1PM in the night of the voting day (8/8/2017).' He compared this with Shiveye where 482 voters cast their votes yet counting went up to 9:00AM in the morning of 9/8/2017.

Fourth, the 1st Petitioner submitted that his agent at Ivole Primary School Polling Station was denied entry into the voting room and was therefore absent during the voting and counting. The effect of this was that the interests of the 1st Petitioner were prejudiced. He took issue with one Wycliffe Masheti who was indicated as the ODM agent at the said polling station yet his name did not feature in the list of its agents supplied to IEBC by ODM.

The 1st Petitioner cited the case of **Musikari Kombo Nazi v Moses Masika Wetangula & 2 Others [2013] eKLR.**

2nd Petitioner's Submissions

In her submissions, the 2nd Petitioner underscored some actions which were in clear breach of the Constitution and other electoral laws. First, there were relatives of the 1st Respondent who worked at Kasavai Polling Station. The 2nd Petitioner contends that this arrangement presented a conflict of interest and thus impinged on the impartiality and neutrality test at the said polling station.

Second, the 2nd Petitioner took issue with the unsigned and unstamped Forms 36A by the Presiding Officers. He listed five polling stations where such forms were not signed by the Presiding Officers and/or Deputy Presiding Officers. The 2nd Petitioner's position is that in their unsigned state those forms are not authentic. To back up this, the 2nd Petitioner cited the case of **Raila Amolo Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR** (hereinafter **Raila Odinga Case 2017**).

Third, the 2nd Petitioner submitted that her agents were denied access to Forms 36A and thus could not verify the results announced. To the 2nd Petitioner this is a breach of the electoral laws.

1st Respondent's Submissions

The 1st Respondent's submissions were covered under the following heads. First, the 1st Respondent submitted that the elections complied with the principles set out in Article 81(e) of the Constitution. He went further to state that no election can be perfect and in this regard he quoted the case of **Gesito Mugali M'mbaya v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR.**

Second, the 1st Respondent sought to demonstrate that the evidence adduced by the 1st Petitioner in respect of Kasavayi, Shitoli, Shiveye, Lwenya and Ivole polling stations did not meet the threshold required by law in election disputes.

The 1st Respondent has taken the same angle in respect to the petition by the 2nd Petitioner.

The 2nd and 3rd Respondents' Submissions

The 2nd and 3rd Respondents in their submissions attacked the issues raised by the petitioners with an underlying theme that the evidence adduced does not meet the legal threshold.

Determination

From the above submissions, I single out the following issues whose determination will dispose of the two petitions. The issues are derived from those proposed by the parties and also from the evidence adduced during the hearing of the two petitions. The issues are as follows;

1. Whether the election was marred with illegalities and irregularities. The illegalities and irregularities singled out are;

- Employment of relatives of some of the candidates to work as election officials
- Barring access to polling stations for the candidates' agents
- Failure to provide Forms 36A to agents

2. Whether the cited illegalities and irregularities significantly affected the outcome of the election

3. Whether the respondents jointly and/or severally committed election offences
4. What was the effect of a stray presidential vote?
5. What was the net effect of the length of time taken in counting of the votes at Shiveye Primary School Polling Station?

Before dealing with the above issues, I would like to set out some general principles which will offer guidance.

i. Burden and Standard of Proof

The Supreme Court at paragraph 130 in the **Raila Odinga Case 2017** while quoting from its own decision in **Raila Amolo Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** (hereinafter **Raila Odinga Case 2013**) had this to say;

[195] There is apparently a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner...

[196] This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. ...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

A petitioner in discharging this burden must go further to show that failure of compliance with the law did affect the validity of the election.

At paragraph 132 of the **Raila Odinga Case 2017**, the Supreme Court stated as follows

Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

What comes out clear from those two quotations is that the legal and evidential burden rests on the petitioner and the latter would oscillate dependent on the weight of the evidence adduced to prove a fact in issue.

What about the standard of proof? At paragraph 152 in the **Raila Odinga Case 2017**, the Supreme Court states as follows;

We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.

ii. Interpretation of section 83 of the Elections Act

The Supreme Court yet again the **Raila Odinga Case 2017** had this to say

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.

The Supreme Court was however quick to make the following clarification

Therefore while we agree with the two Lord Justices in Morgan v Simpson [1974] All ER 722 that the two limbs should be applied disjunctively, we would on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word 'substantially' is not in our section, we would infer it in the words 'if it appears' in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law.

iii. Parties bound by own pleadings

Parties are bound by their own pleadings. The Supreme Court provides guidance on this principle in the **Raila Odinga Case 2017**. The Supreme Court cited the case of **Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another Civil Appeal Nos 5710-5711 of 2012 [2014]** determined by the Supreme Court of India;

[52] Further, the Court went on and observed that:

In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.

Now to the determination of the identified issues.

1. Whether the election was marred with illegalities and irregularities

In determining this issue I will concurrently be dealing with the second issue of the effect on the outcome of the election.

a. Employment of relatives of some of the candidates to work as election officials

Both the 1st and 2nd Petitioners alleged that the 3rd Respondent recruited as election officials relatives of the 1st Respondent. P1W5 who was the 1st Petitioner's agent at Kasavayi Primary School Polling Station stated in his evidence that the Deputy Presiding Officer at the said polling station one Shikali Ndenga is a nephew to the 1st Respondent. P1W5 also gave the names of polling clerks from the same polling station who are said to be the relatives of the 1st Respondent. He gave the following names: Geoffrey Otieno Muyembe; Caroline Mukwana; Bruno Mulinya; Sophy Muyayano Muhati and; Imbosa Michelle.

Similarly, P2W5, giving evidence in support of the petition by the 2nd Petitioner stated that 'almost all the IEBC officials inside the polling station were the relatives to Benson Manuni Mulinya.'

The response given by the 2nd Respondent while testifying is that all positions for presiding officers, deputy presiding officers and polling/counting clerks were advertised nationally and applications were received online. Thereafter the 3rd Respondent engaged in a competitive, indiscriminate recruitment

process based on academic qualifications and experience. He went further to state that the names of the polling clerks were displayed by the 3rd Respondent at least seven days before the elections and the petitioners did not raise any objection.

The 1st Respondent denied any filial relationship with the cited persons. He went further to state that he does not exercise any control in the appointment of agents, clerks and officials by the 3rd Respondent.

The first question to ask is whether it has been sufficiently proven that the above-mentioned persons had filial relationship with the 1st Respondent. Idakho East Ward is fairly rural. Ordinarily, and from what I observed during the hearing, the people who appeared before me fairly know each other. For example, P1W5 could tell the clan of the 1st Respondent and the 1st Respondent in cross-examination by counsel for the 1st Petitioner admitted knowing P1W5 terming him as a neighbor. This being an election petition and the standard of proof higher than that on a balance of probabilities, it will not be safe to take the mere word of witnesses that some persons have filial relationship with the 1st Respondent. Corroborative evidence must be availed in support. In the absence of corroborative evidence, I find that the allegation of consanguinity and/or degree thereof has not been proven to the required standard.

Second, it should be established that the 1st Respondent had a hand in the recruitment of his relatives to oversee an election in which he was a contestant. The 1st Respondent denied having played any role in recruitment and deployment of election officials. Having no legal burden to prove that he influenced the recruitment of election officials and no evidence having been adduced to indicate such influence, I make a finding that the 1st Respondent had no role to play in the recruitment and deployment of election officials. When cross-examined, the 1st Petitioner he later learned that the names of the polling officials were posted on the IEBC website and the constituency IEBC office. He however stated that two weeks was not sufficient for him to verify the list. Similarly, the 2nd Petitioner when cross-examined admitted having been aware that the names of the election officials were publicized. She also admitted having not raised any complaint regarding the persons recruited as election officials.

The conclusion that can be drawn here is that IEBC opened itself to scrutiny in terms of recruitment of its election officials and never received any complaint regarding the recruitment process. In so doing, IEBC complied with regulations 5 and 6 of the Elections (General) Regulations, 2012.

Third it should also be established that the recruitment process was shrouded in secrecy that the first time it was discovered that partisan persons were referees in an election. It was the evidence of the 2nd and 3rd Respondents that recruitment of election officials is done transparently and competitively. In addition, the names of the recruited election officials were displayed at the local IEBC office and at the Constituency Tallying Center seven days before the elections. According to the 2nd Respondent such public display was meant to elicit objections to any of the recruits. No objection was ever received by the 2nd and 3rd Respondents.

Fourth and I think the most relevant is whether the elections officials observed fidelity to the process and the law in carrying out their duties. Related to this it is relevant to establish the way the 1st Respondent benefited from the deployment of his 'relatives' as election officials. P1W5 on cross-examination by counsel for the 1st Respondent stated that his 'only problem was that difference in one vote.' On re-examination, he stated that 'the polling officials conducted themselves well in their work' and he would be satisfied once it is clarified on the votes garnered by the 1st Petitioner at Kasavayi Primary School Polling Station.

E M Muriithi, J in the case of **Paul Gitenyi Mochorwa v Timothy Moseti E Bosire & 2 Others** [2013] eKLR dealt with a similar issue and stated as follows;

No matter how close the affinity or relationship of itself is not sufficient; it must be shown that it had an effect on the election, that the relative of the candidate was in a position to and did alter or

otherwise influence the outcome of the election.

b. Barring access to polling stations for the candidates' agents

P1W3 an agent for the 1st Petitioner stated that he was denied entry into Ivole Primary School Polling Station and was never given the reason why. On cross-examination, it emerged that one Wycliffe Masheti had signed as an agent for ODM under which the 1st Petitioner was a candidate. The 1st Petitioner takes issue with this person Wycliffe Masheti signing on behalf of ODM yet he was not in the 'List of Trained ODM MCA Agents Idakho East Ward.' This list was supplied to IEBC.

P2W4 was an agent for the 2nd Petitioner based at Masiyenze Polling Station. He testified that the Presiding Officer refused his entry into the polling station for the reason that his accreditation letter had no green IEBC stamp at the back. He was at 8:00AM allowed entry with the same accreditation letter he had earlier presented. The witness felt that the 2nd Petitioner was jeopardized as he (as an agent) was not present when the ballot boxes were opened before commencement of voting.

P2W6 also an agent for the 2nd Petitioner based at Musasa Polling Station stated that she was ejected from the polling room at around 9:00AM for want of a proper accreditation letter. She obtained one after two hours and was allowed back into the room only to be ejected again at 3:00PM and readmitted after the intervention of her party chairman. The witness went further to state that her ejection led the 2nd Petitioner's supporters to be misled not to vote for the 2nd Petitioner.

P2W2 an agent for the 2nd Petitioner at Lusui Polling Station had similar allegations of having been chased away. He put it in the following terms: '*That after the election process at the time of counting of votes the agents and officers who were inside polling station chased us the agents of the (2nd) Petitioner herein away.*' On cross-examination P2W2 described himself as an outside agent stationed outside the polling station and his work was to oversee how voters were arriving at the polling station. His work also involved bringing people (read voters).

Section 30 of the Elections Act provides as follows;

1. *A political party may appoint one agent for its candidates at each polling station*
2. *Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.*

Regulation 62 of the Elections (General) Regulations, 2012 provides;

1. *The Presiding Officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except;*
 - a. ...
 - b. ...
 - c. *authorized agents*
 - d. ...
 - e. ...
 - f. ...
 - g. ...
2. *Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.*

With the above provisions in mind and the fact that ODM was duly represented by Wycliffe Mateshi as an agent, it is logical to infer that the interests of ODM and its candidate being the 1st Petitioner at Ivole

Primary School Polling Station were duly protected.

A problem arises however, when the person signing as ODM agent is disowned by the 1st Petitioner who was a candidate under ODM. The 1st Petitioner refers to a list of ODM MCA agents which was introduced in evidence by the 2nd and 3rd Respondents. Under paragraph 19 of the 2nd Respondent's affidavit contained in the Response to Election Petition it is deposed thus;

THAT at the polling station and tallying centre each party was allowed at least one agent. The Orange Democratic Movement Party submitted its list of agents for all polling stations in Idakho East Ward. The parties were allowed to make alterations as they saw fit.

I have looked at the said list but the name of Wycliffe Masheti is conspicuously absent. In re-examination, P1W3 stated that he was not admitted into the polling station for the reason that another agent was already present. The 1st Petitioner was duly informed and he advised P1W3 'to go and stay at my home which is just near to the polling station as I waited for his intervention.' The witness went further to state that his principal, the 1st Petitioner did not come until 4:00PM. I do not believe this would be a reaction of a person who has just received information about an impostor. Going further P1W3 admitted knowing the said Wycliffe Masheti whom he described as a village-mate. Why was he not reported to IEBC or even to the police? It would be fair to conclude that in-as-much as ODM provided a list to IEBC, they had liberty to make changes to the said list and that is why the said Wycliffe Masheti appears as the ODM agent at Ivole Primary School Polling Station. The 2nd and 3rd Respondents introduced in evidence an extract of a Polling Station Diary (PSD) for Ivole Primary School Polling Station. The said PSD indicates that the said Wycliffe Masheti was present during the sealing of packets, at the time of closing the polling station and at the time of closure of counting. It would be far fetch to regard this Wycliffe Masheti as an impostor.

The 2nd Petitioner has made similar allegations relating to three polling stations. As noted above P2W2 described himself as an outside agent and gave his work description which was outside the precincts of the polling station. He was therefore and could not be admitted inside the polling room. At Masiyenze Polling Station, the agent's qualm was that he was not present at the time of opening the ballot boxes. What may have happened in his absence? The 2nd Petitioner has not adduced any evidence of what might have happened at the time of opening the ballot box detrimental to her. At Musasa Polling Station the agent seems to be admitting that she did not have proper accreditation. With that kind of admission, it is therefore safe to conclude that she was rightly ejected from the polling room. She deposes as follows in her affidavit;

7 THAT at around 9:00AM the Presiding Officer in charge of the station one Sammy Shamalla called me and asked me to show him my accreditation letter from my specific candidate which I did but he told me that it was not the right letter

8 THAT he told me to ask for the correct letter and hence told me to stay away from the polling station until when I get the correct documentation

9 THAT I stay out of the polling station for about 2 hours before the letter was brought from my candidate by the chairman ford Kenya Ikolomani constituency.

c. Failure to provide Forms 36A to agents

In the case of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others** [2013] eKLR, the court observed as follows;

The role of an agent in a polling station is a legal requirement which must not be taken lightly. A vigilant polling agent would detect some wrongful acts at a polling station. He could initiate a complaint at the polling station or tallying center with minimum delay. Providing the agents with Form 35 makes their work easier and tallying process manageable. An agent without results is like a blind mouse as he goes to

the tallying center. The empowerment by the Commission is critical to the work of an agent. An agent ceases to be of any use to his candidate or party if he lacks the tools.

Regulation 79(2A) of the Elections (General) Regulations, 2012 provides that:

(2A) The presiding officer shall-

(a)...

(b)...

(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.

From the above provision, it is mandatory that a political party, candidate or their agent be provided with the declaration of the results. In case of MCA the declaration of the results is the duly populated Form 36A. This Form 36A has several counterparts the number of which is not dictated by the number of agents, political parties or candidates. With this situation the law would be broken (considering the use of the mandatory word 'shall') where the number of political parties, candidates or agents exceeds the number of counterparts of the Form 36A. Alternatively, going forward, IEBC should provide duplicating machines at every polling station to enable production of copies of the statutory forms.

It would therefore be absurd if an election would be invalidated on this ground alone. This must have been the reasoning of the court in the **Bwana Mohamed Bwana Case** (supra) where the court while returning a finding that failure by presiding officers to issue Form 35 to agents was an irregularity the same did not significantly affect the outcome of the election.

2 Whether the respondents jointly and/or severally committed election offences

The 2nd Petitioner made allegations of bribery and violence committed by the 1st Respondent. P2W5 in her affidavit deposed that the 1st Respondent had threatened her that the 1st Respondent would make the witness migrate. On cross-examination, P2W5 stated that the 1st Respondent had sent someone to burn her house. The threshold for proving such an allegation is that operative in criminal cases, proof beyond reasonable doubt. The witness stated that she reported the incident to the police. Arson is a serious offence carrying a maximum sentence of life imprisonment upon conviction. Would the police not act when it is clear that such a crime has been committed? With the today's open society allow non-action from the police? I therefore find this to be a mere allegation which falls flat in the face of the higher standard of proof required.

The other criminal allegation made relates to bribery. The allegations are made by the 2nd Petitioner and loops in election officials, the 1st Petitioner and the 1st Respondent. It was alleged that one Gaylord Amalemba who was a polling clerk at Lusui Polling Station was bribing voters on behalf of the 1st Respondent. Similarly Libeya Lucas Alubisia and Shivachi Eliakim Lidoro both polling clerks were allegedly bribing voters on behalf of the 1st Respondent. All these persons mentioned are known but there is no indication that a report was ever made to the police, IEBC or any other relevant entity for investigations to be mounted and possible prosecution of the culprits. With the high standard of proof required for such an allegation, it is not enough to merely allege.

3. The impact of a stray presidential vote

P1W2 was the 1st Petitioner's agent at Shitoli Primary School Polling Station. He testified that during the counting of votes a dispute emerged over a presidential vote. This disputed presidential vote was reflected

in Form 36A. I have looked at the said Form 36A and truly it is indicated that there was one disputed vote. It is also indicated that this vote was assigned to one Lishebu. Again it is clear that there was no candidate in the election with such a name. According to the witness this disputed vote was actually for presidential candidates.

The 1st Petitioner has invited this court through his submissions to view straying of votes as a tip of the iceberg of the many worse things that happened at the station. Voting encompasses diverse people and in our case the same is through secret ballot. Again in our case voting takes place concurrently for a number of positions, actually six. Because of the principle of secrecy of the ballot, voters are directed to a private booth from where they make their markings against their preferred choices on the ballot papers. Armed with six ballot papers you cannot rule out the possibility of a voter inserting a ballot in the wrong ballot box. Unless such scenarios are so widespread in a polling station, one stray ballot/vote cannot be described as a tip of the iceberg of the many worse things that may have happened.

My finding would therefore be that if at all there was this one stray vote then the same cannot be described as an irregularity and cannot have any effect on the overall result of the election.

4. What was the net effect of the length of time taken in counting of the votes at Shiveye Primary School Polling Station?

The 1st Petitioner finds it suspect that the counting of the votes at Shiveye Primary School Polling station took a longer time. When being cross-examined by counsel for the 1st Respondent, the 1st Petitioner stated thus; *“I also had a problem with Shiveye Polling Station. I had a problem in the time it took for counting of the votes.”* He repeated the same averment when cross-examined by counsel for the 2nd and 3rd Respondents.

It is not enough to make such an allegation and stop there. It should be shown that some activities went on which interrupted and impinged on the integrity of the counting process. The law does not state the timeline under which counting should last. In the instant case, counting is said to have been completed at 9:00AM on 9/8/2017. We are however not told whether the time given was for counting in respect of all the elections or only limited to the MCA election. Whatever the case, I find that timeline to be reasonable.

Disposition

The upshot of the above rendition is that the two petitions are dismissed as the 1st Petitioner and 2nd Petitioner have failed 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. The 1st Petitioner and the 2nd Petitioner have in the alternative failed to prove that the election was fraught with irregularities or illegalities that affected the result thereof. I therefore decline to grant the reliefs sought by the 1st Petitioner and 2nd Petitioner in their respective petitions.

Costs

Any litigation involves costs and the general rule is that costs follow the event. The law under Rule 30(1) (b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 allows an election court to make an order specifying the maximum amount of costs payable. Sub-rule (2) provides as follows;

When making an order under sub-rule (1), the election court may

a) Disallow any prayer for costs which may, in the opinion of the election court have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of the petitioner or the respondent; and

b) Impose the burden of payment on the party who may have caused unnecessary expense, whether

that party is successful or not, in order to discourage any such expense.

I must say none of the conduct under (a) above was experienced during the trial of this petition. Parties and their advocates adhered to set timelines which has seen to the successful conclusion of this matter. There were no unnecessary adjournments which could have caused undue expense to other parties. I appreciate that counsels must have put in extra work and time given the strict timelines involved and generally the importance attached to election disputes. I would also want to strike a delicate balance to prevent frivolous litigation and not discourage genuine suits given the public interest element in election disputes. I would thus cap the instruction fees to the 2nd and 3rd Respondents jointly at Kshs. 150,000/= from the 1st Petitioner and 2nd Petitioner each. Equally the instructions fees for the 1st Respondent shall be capped at Kshs. 150,000/= from the 1st Petitioner and 2nd Petitioner each. Other costs shall be assessed in the normal and/or usual manner.

Conclusion

In conclusion, I now make the following orders;

- i. The two petitions and specifically Kakamega CMC Petition No 3 of 2017 and Kakamega CMC Petition No 5 of 2017 be and are hereby dismissed
- ii. A declaration that the 1st Respondent was validly elected as the MCA for Idakho East Ward, Ikolomani Constituency, Kakamega County in the election held on 8/8/2017. Consequently a certificate under section 86(1) of the Elections Act be and is hereby issued to the Independent Electoral and Boundaries Commission with a notification to the Speaker, Kakamega County Assembly
- iii. The 1st Petitioner and 2nd Petitioners shall bear the costs of the respective petitions with due regard to the capping outlined above.

Orders accordingly.

Dated and signed this 16th day of February 2018

Hon. Malesi Kidali

Read in open court this 16th day of February 2018 in the presence of