



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
AT KISUMU
ELECTION PETITION NO. 01 OF 2017

JULIUS OCHIENG OMORO.....PLAINTIFF

VERSUS

- 1. INDEPENDENT ELECTROAL &
BOUNDARIES COMMISSION.....1ST DEFENDANT**
- 2. THE RETURNING OFFICER
NYANDO CONSTITUENCY.....2ND DEFENDANT**
- 3. OKKY CAROL KANGALA OMOTO.....3RD DEFENDANT**
- 4. JOHN KENNEDY AGENGO.....4TH DEFENDANT**

J U D G E M E N T

INTRODUCTION AND BACKGROUND

The Petitioner herein brought this Petition against the Respondents seeking the following prayers;

- (a) That the ballot boxes from Luora, Nyakongo, Olasi, Kanyangoro, Kuth Awendo, Waradho and Kogwedhi Polling Stations be produced for further scrutiny and counting.
- (b) That the BVR Kits for Luora, Nyakongo, Olasi, Kanyangoro, Kuth Awendo, Waradho and Kogwedhi be brought to court for verification of the figures and scrutiny.
- (c) That the register be scrutinized to determine the number of dead voters who voted.
- (d) That upon finding that the deceased persons voted, the results of those Polling Stations be nullified.
- (e) That the court be pleased to vary and review the 1st, 2nd and 3rd Respondent's decision to declare the 4th Respondents as nominee and that Petitioner be declared as the bona fide MCA elect for East Kano/Wawidhi Ward.
- (f) That in the alternative the elections be repeated in the entire Ward.

(g) That the cost be granted to the Petitioner.

I need to point out from the onset that the 2nd and 3rd Respondents refer to the same person hence a repetition but this position was never changed and/or amended upto the conclusion of the matter.

This Petition arises out of the 8th August 2017 General Elections wherein the Petitioner – JULIUS OMORO contested to be elected the Member of County Assembly of East Kano/Wawidhi Ward on the Orange Democratic Movement Party (ODM).

The other contestants were;

John Kennedy Agengo, 4th Respondent herein as an Independent Candidate, Karie Caren Wambui, Migire Vialis Olwendo, Obongo William Tindi, Oloo Fred Abande, Ochieng Kevin, Rebok and Ochele Moses J. Odhiambo.

In the elections – the Returning Officer returned JOHN KENNEDY AGENGO as the victor.

It is this return that the Petitioner contests.

From the pleadings the declared results were as follows;

1. Agengo John Kennedy	-	2317 Votes
2. Kiarie Caren Wambui	-	71 Votes
3. Migire Vitalis Olwendo	-	108 Votes
4. Obondo William Tindi	-	822 Votes
5. Ochele Moses J. Odhiambo	-	1713 Votes
6. Ochieng Kevin Rabon	-	42 Votes
7. Oloo Alfred Abande	-	657 Votes
8. Omoro Julius Ochieng	-	1921 Votes

The Petitioner has raised several grounds in support of this Petition as follows'

(i) That the officials of the 1st, 2nd and 3rd Respondents mostly Presiding Officers and Polling Clerks campaigned for and favoured the 4th Respondent.

(ii) That the Officials of the 1st and 2nd Respondent together with the agents and supporters of the 4th Respondents locked out the agents of the Petitioner from the Polling Stations.

(iii) That the Officials, servants and representatives of the 1st, 2nd and 3rd Respondents stuffed the ballot boxes in the absence of the Petitioners agents.

(iv) That the Officials, servants and representatives of the 1st, 2nd and 3rd Respondents refused to give the Petitioners agents documents basically form 36A and 36B to sign and verify and subsequently the 2nd and 3rd respondents entered the figures in favour of the 4th Respondent.

(v) That the Officials, servants and representatives of the 1st, 2nd and 3rd Respondents refused to display the results outside Polling Stations as required by Law.

(vi) That Officials, servants and representatives of the 1st, 2nd and 3rd respondents conspired with

the agents of the 4th Respondent and denied the agents an opportunity to accompany the ballot boxes to Ahero multipurpose and chased them to go away without any reason or justification at all.

(vii) That the Officials, servants and representatives of the 1st, 2nd and 3rd Respondents conspired with the agents of the 1st Respondents to temper with the results of the poll by breaking seals of the ballot boxes in the absence of the Petitioner's and other agents and changing the figures in favour of the 4th Respondent.

(viii) That the Officials, servants and representatives of the 1st, 2nd and 3rd Respondents conspired with the agents of the 1st Respondent and allowed dead voters to arise from the grave, vote and go back to the grave.

(ix) That on the 9th August the 1st, 2nd and 3rd Respondents declared the 4th Respondent with 2317 votes against the Petitioners 1921 votes as fake and fraudulent figures.

(x) That the Petitioner should have been declared the winner had the 1st, 2nd and 3rd Respondents followed the Law.

(xi) That the political rights of the Petitioner and other fundamental rights under Articles 1, 38, 27, 35, 38, 51, 81 and 86 of the Constitution were breached by the Respondents.

(xii) That the 1st Respondent, its Officials, agents, servants failed to ensure that Biometric Voter Registration system and Electronic Voter Identification Devices were fully functional and incapable of being interfered with resulting in ballot stuffing, double voting and cooked up figures.

The 1st, 2nd and 3rd Respondents filed a joint response to the petition. The Respondents contention is that they are strangers to the averments or assertions by the Petitioner.

The 1st, 2nd and 3rd Respondents invoked the doctrine of ***“ei qui affirmat, non ei qui negat, incuribite probation and actori incunibit onus probandi”***.

The 1st, 2nd and 3rd Respondent avered that the Petitioners agents and those of the Orange Democratic Movement were granted free and unfettered access to the Polling Stations by the Presiding Officers of the Respondents.

That the 4th Respondent was declared the winner pursuant to the Constitutional and Statutory Mandate that was exercised by the 2nd Respondent.

The 1st, 2nd and 3rd Respondents stated that the declaration of 4th Respondent as the victor followed garnering the highest number of votes among the eight candidates who were contesting.

According to the 1st, 2nd and 3rd Respondents the elections were conducted in accordance with the law and all enabling regulations and thus none of the Petitioners rights as alleged in the Constitution were infringed.

Further that no electoral irregularity and/or offence was reported by the Petitioner on the poll day, during the tallying and declaration of the results of the elections. To the 1st, 2nd and 3rd Respondents to the letter of complaint dated 10/8/2017 addressed to the OCPD Nyando and copied to them raised various complaints from the polling and tallying during elections and that they were raised when the Respondents had become ***Functus Officio***.

The 1st, 2nd and 3rd Respondents also took issue with the question of security of costs having not been evidenced.

They further denied the jurisdiction for this court on the basis that the matter arose out of Nyando Constituency. In the end the 1st, 2nd and 3rd Respondents sought that the Petition be dismissed with

costs.

The response is grounded further on a detailed affidavit by Okky Carol Kengele Omoto (3rd Respondent) sworn on 5th September 2017.

The 4th Respondent too filed a response to the petition and denied all and singular the Petitioners averments, statements and/or allegations as set out in the petition.

The 4th Respondent clearly stated in response that in the elections of 8th August 2017 for the Member of County Assembly East Kano/Wawidhi Ward he garnered the highest number of valid votes and hence validly declared the winner and returned duly as elected and was presented with the certificate in the light of the relevant provisions of the ***Election Act, 2011***.

The 4th Respondent stated that he was an independent candidate in the impugned elections and at no time was he assisted, joined by and or teamed with the 1st, 2nd and 3rd Respondents as alleged at all or that he received any favour or preference from any person or institution.

According to the 4th Respondent the impugned election was carried out in compliance with the relevant provision of the ***Elections Act, 2011*** and the ***Election (General Regulations) 2012*** and that there was no Election Offences that were committed, reported/noted and or documented.

That the entire process and procedure leading to the 4th Respondent being declared the winner in the impugned elections was free, fair and transparent and that there were no incidents, activities, occurrences and/or happenings which would substantially affect the outcome of the elections.

That the issues raised did not go to the core, or the substance of the impugned elections and that he relies on the maxim "***de minimis non Epat lex***".

The 4th Respondent prayer is that this petition be dismissed with costs.

In this matter/petition the Petitioner filed affidavits and statements to support the claim and called 7 witnesses who swore affidavits.

The 1st, 2nd and 3rd Respondent too filed affidavits and called 6 witnesses who swore affidavit too.

On the part of the 4th Respondent, he filed his affidavit and called 5 witnesses who filed affidavits.

It was generally agreed that the affidavits were treated as evidence in Chief and the witnesses were cross examined and re-examined on the contents of the affidavits.

It means, the affidavits formed part of the pleadings as per the applicable law.

The petitioner filed an application for scrutiny and re-count that was canvassed and allowed. In total votes in 8 Polling Stations were recounted and scrutinized. I will later on deal with the issue of the outcome of the scrutiny and recount.

ISSUES FOR DETERMINATION

In this petition each party filed their issues for determination. I have considered them and the pleadings generally.

After the pre-trial conference the following emerged as the broad issues for determination

- (i) What is the outcome of the recount and scrutiny herein and what bearing does it have to this petition?

(ii) Whether there were any election malpractices, irregularities, and illegalities in the elections herein of 8/8/2017.

(iii) What are the Constitutional and statutory standards and/or threshold of holding a free, fair, transparent, verifiable, accountable and credible elections?

(iv) Whether the 4th Respondent was validly elected and returned as the member of County Assembly of East Kano/Wawidhi Ward?

(v) Does the court have jurisdiction to handle this petition.

(vi) Who is to bear the costs of the petition.

APPLICABLE ELECTION LAW

Generally and broadly the applicable electoral law in Kenya includes but not limited to;

- (i) Constitution of Kenya – 2010
- (ii) Election Act, 2011
- (iii) Election Offences Act (2016)
- (iv) Independent Electoral and Boundaries Commission Act (2011)
- (v) Political Parties Act (2011)
- (vi) Public Officer Ethics Act (2003)
- (vii) Leadership and Integrity Act (2011)
- (viii) County Governments Act (2012)
- (ix) Case Law/Precedents

I wish to briefly analyse the application of the law in respect to this petition. It is generally agreed that an election petition is not an ordinary Civil dispute. It has its own standard of proof unlike in the ordinary Civil suits. It is a special dispute or a claim sui-generis which calls upon the court to determine whether the political rights of Citizens under **Article 38** of the Constitution have been upheld.

This right is exercised by the citizen through elections as voters and ultimately cast their vote. Indeed it is the process where a majority surrender their right to a sovereign. The representatives in turn will have the authority to bind the voters in the making of the law and even making of decisions that have a direct impact on the citizens and the County or State at large. This is why the election petitions generally are highly emotive.

This is why the standard of proof unlike in the ordinary Civil disputes being proof beyond the balance of probability but lower than beyond reasonable doubt applicable in Criminal Cases. It is now referred to as the intermediate standard of proof.

This position is well articulated in the;

Raila Odinga and Another -vs- The Independent Electoral and Boundaries Commission and others [2017] eKLR where it 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 probabilities”, 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”.

It ought to be remembered that however in cases where there is allegation of Criminal or quasi – Criminal nature, the standard of proof applicable is the one of “beyond reasonable doubt”.

In the case of *Khatib Abdalla Mwashetani -vs- Gedeon Mwangangi Wambua [2014] eKLR* the Court of Appeal clearly pronounced itself clearly on this;

“Purely from the consequences that flow from the finding that a person is guilty of improper influence in a serious conduct that has attributes a kin to those of an election offence. It is now settled beyond peradventure that the standard of proof where election offence or such conduct is alleged, is proof beyond reasonable doubt”.

It then follows that in the instant petitions the standard of proof is settled thus is higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of Criminal or quasi-Criminal nature are made, the proof is beyond reasonable doubt.

It is now important for me to look at who is to discharge the burden of proof. It is trite law that whoever alleges must prove.

It then means that in a petition like this, the burden is on the Petitioner to prove. It is therefore the duty of the Petitioner that there was non-compliance with the Constitution and the Electoral Law and that it affected the outcome of the election.

This position was well stated in the *Raila Amolo -vs- IEBC and 3 others [2013] eKLR* where the court held

“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 Respondents bears the burden of proving the contrary. This emerges from a long standing common approach in respect of alleged irregularity in 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”.

This is also the correct position as per the provisions of **Section - 107** of the **Evidence Act, CAP 80 Laws of Kenya.**

It then follows that it is the duty of the court to carry out an examination on the basis of grounds raised by the Petitioner as to whether or not the Constitution and Electoral Law has been complied with in an election process. The relevant Articles of the Constitution are; **Articles 1, 38, 81, 83 and 86.**

In summary, it is to ensure that the election was free and fair. That it reflects the will of the people/electorate.

For that to be so, it means the elections must be free from violence, intimidation, improper influence and corruption. It must be transparent and administered impartially, efficiently, accurately and in an accountable manner.

The voting method must be one that is simple, accurate, verifiable, secure and credible. They must also be by way of secret ballot where the results are ultimately tabulated and announced promptly.

I now wish to consider the specific issues for determination having laid down the parameters of the applicable law;

(a) JURISDICTION

I wish to dispense with this issue first because jurisdiction is everything.

The 1st, 2nd and 3rd respondent in their pleadings raised the issue that this court lacks jurisdiction to handle this petition having originated from Nyando Constituency.

I wish to point out, that this cannot be correct. Election petitions are no ordinary suits and the law is clear that Judicial Officers to handle petitions must be gazetted by the Honourable Chief Justice. In regard to this petition I was gazetted on 15/9/2017 vide gazette notice no. (Vol. CXIX – 137 No. 9060) . The gazette notice was specific hence this ground lacks merit. I therefore find that this court has the requisite competence and legal backing to proceed and dispose of this petition.

(b) OUTCOME OF RECOUNT AND SCRUTINY.

In this petition a re-count and scrutiny was done in respect to the following stations;

- Apondo
- Nyakongo
- Olasi
- Kanyangoro
- Kuth Awendo
- Waradho
- Kogwedhi
- Luora

Apondo, Kanyangoro and Luora had two Polling Stations each, hence making a total of 11 stations/ballot boxes.

The re-count and scrutiny touched on both the manual aspects of the voting and also the KIEMS Kits. They had the same results hence I will address the two jointly in-terms of the outcome. The contents of the ballot papers were recorded and also the serial numbers plus the seals used were also recorded.

The (scrutiny)of the seals and boxes detected nothing abnormal as per the initial findings. The court was able in each polling station able to record, the results of Form 36A, stray ballot papers, rejected ballots, tallying sheets for candidates, counterfoils of used-ballot papers, unused ballot papers and the ballot papers.

In Apondo Polling Station which had two Polling Station, in Apondo 1 of 1 – the results were as presented.

In Apondo 2 of 2 – the results were also as per the reported.

An anomaly was established in Nyakongo Polling Station – the total number of votes cast were 488.

The petitioner had been allocated 216 votes but in recount it was found that instead he had 275. The Petitioner tally had been reduced by 59 votes. At Olasi, Waradho and Kuth Awendo nothing major was noticed or established.

In Luora 2, 3 votes belonging to the Petitioner were added to Ochele Moses J – Odhiambo hence reducing by 2 votes the Petitioner's tally.

In Kanyangoro 1, 1 vote was subtracted from the 4th respondent in recount.

In Kanyangoro, 3 votes were found to be rejected and they had been allocated to the Petitioner, 4th Respondent and Kiarie Caren Wambui.

In the exercise no form 32 for Assisted Voters were available.

There were also several Form 36A that were not signed by some agents and with no comments from the Presiding Officers.

It is clear that the above irregularities involving wrongful entry of votes and allocation during counting and tallying definitely affect the result.

This in more specifically so when a sample is scrutinized and yields such a figure of over 60 votes given that the the difference in the margin is not that big between the declared winner and the second candidate. The difference was about 395 votes.

(c) WHAT ARE THE THE CONSTITUTIONAL AND STATUTORY STANDARDS AND/OR THRESHOLD OF HOLDING FREE, FAIR, TRANSPARENT, VRIFIABLE, ACCOUNTABLE AND CREDIBLE ELECTIONS

In respect to this issue I wish to add no more. I have clearly covered it in my analysis of the Electoral Law applicable. I have cited the relevant case law and wish to adopt my earlier comments on the subject. I will however be guided in the next issue on the standard and legal basis laid in my earlier analysis. This therefore properly leads me to the next relevant issue (d).

(d) WHETHER THERE WERE ANY ELECTION MALPRACTICES, IRREGULARITIES AND ILLEGALITES IN THE ELECTION OF THE 4TH PETITIONER HEREIN?

I will now start from the outcome of the scrutiny and recount and note that it is evident that some irregularities and illegalities were noted.

It is clear that the officials of the 1st and 2nd respondent failed to adhere to the established regulations in the counting and tallying of the votes.

That is why some anomalys were noted in the counting. Any election has the issue of numbers being central as it is the one who gets more than others is declared the winner. In some instances it is only one vote that makes the difference. It is then important that each vote must be guarded as it counts and ought to be properly accounted. It is through the vote that the will of the voter is reflected and collectively.

In a station like Nyakongo the difference of about 59 votes has not been explained at all to the satisfaction of the court.

RW 14 attempted to say the same were as a result of carbon paper error.

This is a matter that ought to have been explained by the Presiding Officer who was said to be one Rebecca Okach but she did not give her evidence or called a witness. I found that this is a proper case to

draw an adverse inference against the 1st, 2nd and 3rd Respondents.

This was a serious matter that called for explanation

The law is settled on this as pointed out in the case of Jacinta Wanjala Mwatala -vs- IEBC and 3 others [2013] eKLR the court held;

“In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action”.

The petitioner also raised several allegations of bribery and influence of voters, vide the evidence of;

PW 8 - Julius Ochieng Omoro,

PW 2 – Lilian Atieno Otieno

PW 3 – Maurice Otieno Agony

They even named those who were distributing money who included – Guy Polo, Gabriel Match Onditi and Settler Omolo.

Indeed the complaint was referred to the Police vide a letter dated 10/8/2017 by the Petitioner and copied to the 1st, 2nd and 3rd Respondents.

In his evidence the 4th Respondent indeed acknowledged that those mentioned were his supporters. They were called and they denied the allegations.

The only problem is that both the Police and the 1st, 2nd and 3rd Respondents appeared not to have acted on the Petitioner's complaint. They did not even attempt to respond to the letter of complaint. As it is the matter was just kept in abeyance and this being a matter that touches on criminal liability it's prove ought to be beyond reasonable doubt. This burden can only be discharged vide Criminal Proceedings pursuant to the Election Offences Act. If indeed this were proved it would definitely have affected the outcome of the result as it would be a way of influencing the will of the voters.

The other malpractice that was raised by the Petitioner is that voters who were illiterate and being assisted were not handled well as per law.

This was the evidence of;

PW 6 – Lilian Akinyi Ochieng

PW 1 - Hellen Anne Okoth

PW 2 - Lilian Atieno Otieno

as agents they claimed not to have been allowed to get closer as agents in the assistance of assisted voters. The Respondents witnesses specifically **RW 13** - Beatrice Akoth Owiti

RW 10 – Walter Webukhe Edward

RW 1 – Simon Otieno Oyere

Who were handling Presiding Officers roles stated that they complied with the law.

All the Presiding Officers confirmed that there were illiterate voters who were old mothers and men and

needed to be assisted.

Given the assertion or allegations by the Petitioner that the proper procedure was not followed, the evidentiary burden shifted to the 1st, 2nd and 3rd Respondents to show the contrary which they failed to do.

No single Form 32 was exhibited to the court to show that the correct procedure was followed.

In the scrutiny exercise, no form 32 were also present in the ballot boxes. This is what would counter the Petitioners assertion. As it is the issue was not properly handled by the 1st, 2nd and 3rd Respondents.

I have no otherwise but to agree that what is claimed by the Petitioner was the situation obtaining.

It is clear that this would definitely affect the outcome of the election.

In the absence of Form 32 and the voter register, the issue of verification and also use of register cannot be established. It then means the election fell short of being verifiable.

It means the 1st, 2nd and 3rd Respondents were in breach of regulation 72 of the General regulations 2012.

This regulation ensures that to confirm that a voter was assisted in voting and in accordance with the law, the person assisting the voter is required to fill Form 32 and present it before the Presiding Officer. The documents are to be returned to the Returning Officers together with the ballot boxes after the voting exercise.

The Presiding Officer is to assist the voter in presence of the agents. Indeed the fact of a voter being assisted and reason for assistance must be recorded in the Polling Station Register. None was exhibited by the 1st, 2nd and 3rd respondents in this petition.

Indeed this is the basis for the vote being secret. The issue of secrecy of the ballot goes to the core of every election and must be guarded at all cost as it form the basis of free and fair election.

This is the finding in the case of Nairobi HC Election Petition No. 14 of 2017 . In the matter of Gubernatorial Election for Wajir County by Justice A. Mebeya in his judgement delivered on 12/1/2018.

There were other malpractices and illegalities raised by the Petitioner that included in failure of the agents to sign the forms, Form 36A and other Polling documents.

From the evidence it emerged that the Presiding Officers failed to comply with **Regulation 79** of the **Election (general) Regulations 2012**. Which provide;

“The Presiding Officer, the candidates or agents shall sign the declaration in respect of the elections.....”

(3) Where any candidate or agents refuses or otherwise fails to sign the Declaration Form, the candidate or agents shall be referred to record reasons for refusal or failure to sign.

(4) Where a candidate or agents refuses or fails to record the reasons for refusal or failure to sign the Declaration Form the Presiding Officer shall record the facts of their refusal or failure to sign the Declaration Form.....”

I find that this was a very crucial thing to comply with in this election moreso under the prevailing circumstances where agents alleged that they were locked out or chased from the Polling Station and that in some cases they were denied the opportunity to sign the documents.

No Presiding Officer gave any good reason for their failure to give or record reasons for non-signing of the Forms by some of the agents.

This therefore gives, credence to the allegations being raised by the Petitioner.

There were also allegations of dead voters having been allowed to vote. The Petitioner failed to prove this allegations at all.

The other allegation were those of vote stuffing and opening of ballot boxes by breaking the seals. This was also not proved by the Petitioner.

The allegation that the agents of the 4th Respondent and the Officials of the 1st, 2nd and 3rd Respondents conspired has also not been proved.

In the light of the allegations of malpractices, irregularities and illegalities that have been proved I do find that the same were grave and would affect the outcome of the results. Indeed it was clear from the evidence of 1st, 2nd and 3rd Respondent that despite the complaint by the Petitioner herein they took no steps to address it. The response from the Respondents is that the issues arose on 10/8/2017 after the act.

I do not accept this. It must be noted that election is not an event but a process. This is why the avenue of petitioning and even subsequent appeal in such an election is granted by law.

(e) WHETHER THE 4TH RESPONDENT WAS VALIDLY ELECTED AND RETURNED AS THE MEMBER OF COUNTY ASSEMBLY OF EAST KANO/WAWIDHI WARD.

I have initially pointed out the relevant law that governs and ensures that elections are free and fair for a candidate to be validly elected.

The precise circumstances under which an election can be invalidated are stated in Section 83 of the ***Election Acts***.

This section was amended by the ***Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017)***, the said amendment came into force on 2/11/2017.

This amendment, is not applicable to this election in issue since the election herein was conducted on 8/8/2017.

Indeed this was the position then by the Supreme Court in the case of *John Harun Mwau & others -vs- IEBC Presidential Petition No. 2 & 4 of 2017*

The initial section 83 of the Act, which is the relevant one herein provides;

“83 – No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the Principles laid down in the Constitution and that written Law or that the non-compliance did not affect the result of the election”.

The Supreme Court expounded on this Section in

Raila Amolo Odinga & Another -vs- IEBC and 2 others. Presidential Petitioner No. 1 of 2017.

It elaborated clearly that this Section had two limbs.

- (i) Compliance with the Constitution and the law on elections, and
- (ii) Irregularities that may affect the result of the elections.

The court held;

“Guided by these Principles, and given the use of the word “or” in Section 83 of the Elections Act as well as some of our previous decisions. We cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the Principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the elections as Counsel for the Respondents assert. On our view, such an approach would be tantamount to misreading of that provision”.

I do find that the election herein is faulted on the grounds that the 1st, 2nd and 3rd Respondent violated the Principles of the Constitution and Electoral Law. There were instances of crucial documents not being signed without any reasons being assigned, and in some cases there are votes that were not correctly counted hence affecting accuracy of the results. A good example is Nyakongo Polling Station where the Petitioner had 59 votes not counted in his favour yet no explanation was offered by the responsible officials.

The issue of secrecy of the vote also was an issue. This also directly affects the free will of the voter to exercise his or her right to vote.

The 1st, 2nd and 3rd Respondents also totally failed to act on the complaints raised by the Petitioner. It is trite fact that the above shortcomings affected substantially and materially the outcome of this election. In the light of the above I do find that there are good grounds to find that the 4th Respondent was not validly elected and returned as the Member of County Assembly of East Kano/Wawidhi Ward.

COMPETENCE OF THE PETITION

The 4th Respondent raised the issue of competence in the submissions. It was not an issue in the pleadings. It is now settled in Electoral Law that a party is bound by his/her pleadings. I say no more on this.

(f) COSTS

It is trite law that costs follow the event.

Rule 30 of the ***Election (Parliamentary and County Elections) Petitions*** parties, 2017 and **Section 84** of the ***Election Act*** empowers election court to make orders on; (i) Costs payable

(ii) Person who pays the cost

(iii) Person to whom the costs are payable

I do find that the 1st, 2nd and 3rd Respondents are responsible for the success of this petition and they ought to pay costs to the Petitioner.

I found no proved contribution on the part of the 4th Respondent hence find that he is to bear his own costs. The costs will be limited to what he has incurred in answering to this petition.

This petition was straight forward and the issues not complex. This is clearly reflected by the number of witnesses and the nature of evidence adduced. I have also taken into account the preparation and the processing of the entire case by the parties, to include research, attendances and time spent in the matter during mentions, hearings and scrutiny.

In the light of the above I am of the view that an award of Kshs. 300,000.00(Three hundred thousand only) to the petitioner is adequate compensation in terms of costs.

FINAL ORDERS

Flowing from the above I do allow the petition herein as follows;

- (a) That the 4th Respondent was not validly elected and returned as the member of County Assembly of East Kano/Wawidhi Ward.
- (b) That there be a fresh election in the entire East Kano/Wawidhi Ward.
- (c) A certificate of this determination to issue to the Independent Electoral and Boundaries Commission (IEBC) and the speaker of the County Assembly of Kisumu.
- (d) The 1st, 2nd and 3rd Respondents pay costs assessed at Kshs 300,000.00(Three hundred thousand only) to the Petitioner herein.
- (e) That the Kshs. 100,000.00(One hundred thousand only) deposited herein as security for costs be released to the Petitioner.

J. K. Ng'arng'ar

CM

Judgement read in open court this **26/1/2018** in the presence of;

Court Assistant – L. Ofafa

For the Petitioner – Omondi T. holding brief for Mwamu.

For the 1st, 2nd and 3rd Respondents - Onsongo holding brief for Lugano.

For the 4th Respondent - Onsongo

J. K. Ng'arng'ar

CM