



**Shafat v Independent Electoral and Boundaries Commission (IEBC) & 2 others
(Election Petition E002 of 2022) [2023] KEMC 3 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 3 (KLR)

**REPUBLIC OF KENYA
IN THE GARISSA LAW COURTS
ELECTION PETITION E002 OF 2022
HM NYABERI, CM
FEBRUARY 27, 2023**

BETWEEN

SALAH HASSAN SHAFAT PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

IBRAHIM ABDI FARAH 2ND RESPONDENT

HASSAN DAHIR NOOR 3RD RESPONDENT

JUDGMENT

1. The Petitioner Salah Hassan Shafat and the 3rd Respondent Hassan Dahir Noor were the only two candidates for Member of County Assembly (MCA) Election for Baraki Ward, in Garissa County for the election held on the 9th of August, 2022. The 1st and 2nd Respondent declared the 3rd Respondent as the winner for having garnered 1779 votes whereas the Petitioner garnered 1083 votes.
2. The Petitioner was dissatisfied with the election process and the subsequent declaration of the 3rd Respondent as the duly elected MCA Barakii Ward, filed this petition dated August 30, 2022 and filed in court on September 2, 2022. The Petition is on the basis that the election was done in contravention of the Constitutional principles outlined in the [Constitution of Kenya, 2010](#) and the [Elections Act](#).

Petitioner's Case

3. The Petitioner states that the electoral process was marred by massive irregularities instigated by the 3rd Respondent or by his agents in Afweine Centre Stream 1, Afwein Centre Stream 2, Afwein Primary School, Afweine Chief's Office, Afweine Dispensary, Afweine Secondary, Darusalam, Togdub and Lunguyato Polling Stations in order to instigate voter apathy and to instill fear amongst the electorates.



4. The Petitioner avers that his agents namely Salah Mohamed Abdi Bulle was attacked at Afweine Centre Stream 1 Polling Station and Abdikhan Abdi Mohamed was attacked at Afweine Primary School Polling Station. The appointed and accredited agents of the Petitioner were unlawfully ejected from the polling station on claims that people from Afwah clan were not allowed in Afweine location. The voting process was greatly affected by failure of KIEMs Kits failing to identify numerous voters across Afweine Location in all 9 polling stations leading to a low voter turnout as the voters gave up on their queue to vote.
5. The Petitioner further avers that there was massive manipulation of figures in favour of the 3rd Respondent as KIEMs Kit identified only 690 voters across Afweine Location with 9 polling station. While in Baraki Location, KIEMs Kit captured 1300 voters. That it is impossible for the 3rd Respondent to have received 1669 votes while the Petitioner received 1211 votes when the total number of valid votes was about 1901 votes.
6. The Petitioner further states that the 1st and 2nd Respondent and their agents colluded with the 3rd Respondent by allowing voting process to continue until 10.00pm at Afweine Centre Stream 1 and directed voters on whom to vote for thereby interfering with the voters' freedom of choice. There was collusion where the agents of the 1st Respondent issued numerous ballot papers without being identified and marked in favour of the 3rd Respondent in violation of the Constitution, Elections Act and Regulation rendering the process illegal and invalid.
7. The Petitioner therefore seek orders that: -
 - i. A declaration be made that the 3rd Respondent has not been duly elected as a Member of County Assembly representing Baraki Ward;
 - ii. An order be issued that there be a scrutiny, audit and recount of votes in Afwein Centre Stream 1, Afwein Centre Stream 2, Afwein Primary School, Afweine Chief's Office, Afweine Dispensary, Afweine Secondary, Darusalam, Togdub and Lunguyato Polling Stations in Baraki Ward in Garissa County;
 - iii. A declaration be made that the Petitioner was duly elected having attained the majority votes in Baraki Ward;
 - iv. In alternative to (iii) above, an order be issued that fresh elections be held for the seat of Member of County Assembly representing Baraki Ward in Garissa County.
 - v. A declaration be made that election offences of a criminal nature occurred in Baraki Ward on the election day 9th day of August 2022 to warrant preference of charges by the Office of Direction of Public Prosecutions against complicit officials of the 1st Respondent and agents of the 3rd Respondent;
 - vi. Costs of this petition be awarded to the Petitioner

Respondents Case

8. The 1st and 2nd Respondent filed a joint response to the petition together with witness affidavit. They state that the final results declared by the 2nd Respondent at the Constituency Tallying Centre were that the Petitioner Salah Hassan Shafat garnered 1083 and the 3rd Respondent Hassan Dahir Noor garnered 1779 votes. They refute claims of massive irregularities and violence and states that the voter turnout was within the voter turnout pattern for the entire ward.



9. The 1st and 2nd Respondent confirm that there was a brief scuffle between the Petitioner's agent one Salah Mohamed Abdi Bulle and the 3rd Respondent outside Afweine Centre 1 Polling Station. The security personnel deployed at the polling station resolved the issue by sending away both the agents and the alleged scuffle did not in any way interrupt the voting process. They deny that an agent namely Abdikhan Abdi Mohamed was attacked. That KIEMs Kits were working save for one at Darusalam Primary Polling Station 1 and Baraki Primary School Polling Station 1 and the two were immediately replaced and voting resumed. The voting process at Afweine Polling Station 1 was closed at 9.00pm to allow those who were in the queue to vote.
10. The 1st and 2nd respondent contend that it did not breach or contravene the Constitution, the Election Act and Regulations made thereunder by declaring the 3rd Respondent as the Member of County Assembly elect for Baraki Ward.
11. Whereas the 3rd Respondent in his response dated 2September 6, 2022 states that he won the election by 568 votes. He denies knowledge of any violence that took place in any of the pleaded polling stations.
12. The 3rd Respondent states that Baraki Ward is inhabited by two clans and the pattern of results indicates the voting pattern based on clan distribution. He states that the Petitioner is on a fishing expedition as he has not pleaded with clarity the form, mode and manner of the alleged irregularities and further that the polling station pleaded therein have not sufficiently indicated the type of irregularities and how they were manifested, who was responsible and how it affected the final results.
13. The 3rd Respondent avers that the allegations of violence are hot air as the same are demystified by the averments of Quresha Ali Ahmed affidavit dated September 7, 2022 filed in Election Petition No. 003 of 2022 filed in High Court contradicts her averments in her affidavit sworn on September 1, 2022 filed in this petition. That the OBs are not supported by any OB extracts and that the Petitioner is merely speculative and is on a fishing expedition as there were other candidate agents domiciled in the said polling stations during the voting and no one would have been in a position to perpetrate any electoral mischief.
14. The allegations of KIEMs kit failing are far-fetched, unfounded as the Petitioner has not pleaded with certainty the exact polling stations that was affected by the alleged failure of KIEMs kit and has not brought any evidence from the alleged voter who were disenfranchised by the alleged failure. That the Petitioner has not sufficiently pleaded how failure of the KEMs Kit affected the credibility, integrity, security, accountability, transparency and verifiability of the election.

Standard of Proof

15. In the case of *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) the Supreme Court stated at paragraph 32 as follows: -

“(32) Suffice to stress that the Court has been consistent that a petitioner who seeks the nullification of elections for alleged non-conformity with the Constitution or the law or on the basis of irregularities, has the duty to offer cogent and credible evidence to prove those grounds to the satisfaction of the Court. Once the Court is convinced that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is IEBC), to present evidence by way of rebuttal of the assertion.”



In the 2017 *Raila Odinga* Case, the supreme Court stated at paragraph 152 of its majority decision that: -

“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. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.”

The above authorities by the Apex Court of the land sets higher standards of proof in Election cases as above a balance of probabilities but below one for criminal cases of beyond reasonable doubt.

Analysis and Determination

16. I have considered the parties’ pleadings, evidence and parties rival submissions. The issue for determination are;

(a) Whether there was violence, illegalities and irregularities and malpractices committed in the electoral process within Baraki Ward across 9 polling stations which affected the validity and results thereof?

1). Allegation of violence and expulsion agents

17. The Petitioner alleges that the electoral process was marred by massive irregularities including instigation of violence by the 3rd Respondent and his agents against the agents and supporters of the petitioner in the 9 polling stations namely;

1. Afweine Centre Stream 1,
2. Afwein Centre Stream 2,
3. Afwein Primary School,
4. Afweine Chief’s Office,
5. Afweine Dispensary,
6. Afweine Secondary,
7. Darusalam,
8. Togdub and
9. Lunguyato Polling Stations.

18. The violence was intended to instigate voter apathy and to instill fear amongst the electorate.

19. In determining the issue of irregularities, ranging from instigation of violence, expulsion of agents and threats of violence, the Petitioner must adduce credible evidence to the satisfaction of the Court.

20. The petitioner submits that the 3rd Respondent acting in cahoots with some of his agents and a group of rowdy youth from the Afgab Clan instigated violence against the Petitioner’s agents and supporters in the above listed polling stations claiming that people from Afwah Clan were not allowed in Afwaine



Location. During the instigation of the violence, some agents were assaulted, others were threatened with violence while others were unlawfully and forcefully removed from the polling stations during the voting and tallying process.

21. The beating and chasing away the Petitioner's supporters and agents from the nine mentioned polling stations of Afweine Location was a calculated move to scare his supporters from voting, making the voting process and tallying of the vote's opaque, unverifiable, not accountable and to facilitate double voting. That noting that over 80 percent of the voters in Afweine Location are assisted voters and all the Petitioner's agents had been removed and/or threatened with violence by the 3rd Respondent, the assisted voters' choice could not be verified because only the agents of the 3rd Respondent remained at the polling station to oversee the voting process.
22. The forceful and unlawful removal of the Petitioner's agents from the polling stations listed above and the intimidation of other candidates' agents by threats of bodily harm rendered the voting process and the tallying of votes unverifiable thus affecting the integrity and the validity of the election process as a whole and the results declared by the 1st and 2nd Respondent. The irregularities and the malpractices materially affected the quality of the elections and made the electoral process opaque, not verifiable and not credible.
23. During the Election Day, voting, counting, tallying and declaration of results was not done in strict conformity with the electoral principles set out in the Constitution and the Elections Act. The 3rd Respondent, his agents and some of the supporters were allowed to enter into tallying room and to intimidate the agents of other candidates in the other elective positions who questioned their motive of surrounding the tallying table at the exclusion of the agents.
24. The said electoral malpractices and the instigation of violence by the 3rd Respondent has rendered the election results declared by 1st and 2nd Respondent invalid, null and void owing to the unexplained voting by unidentified persons, the forceful and unlawful removal of the Petitioner's agents and the unlawful interference of the electoral process by the 3rd Respondent in cahoots with a group of rowdy youth. The interference of the voting and tallying exercise had the effect of rendering the election not verifiable, secure, accountable or transparent.
25. The Petitioner relying on the decision in the case of Francis Wambugu Mureithi v Owino Paul Ongili Babu & 2 others [2018] eKLR where the issue of violence was discussed invites the court to find that indeed Afweine Primary School Polling Centre was marred with violence and thus the election did not meet the constitutional principle of free and fair as provided under Article 81[e][ii] of the Constitution. In the above stated case, the court held as follows at paragraph 63 and 67:

“63. Secondly, the other issue which is related to the issue I have just determined is whether or not there was violence which rocked Soweto Social Hall polling centre. Having considered the evidence tendered by the petitioner and the 2nd respondent and having taken into account the report on the scrutiny of the polling station Daily Diary in respect of the above polling centre I am convinced that the polling centre was marred by violence. The evidence shows that the voting exercise had to be adjourned in some instances for hours. In fact, it is noted that the security personnel had to be called in to restore law and order. The incidences of violence and fracas were attributed to the voters and youths...

...67. Arising from the above findings, the question which need to be addressed is whether or not the election was adversely affected. A careful reading of



Article 81(e) (ii) of the *Constitution of Kenya, 2010*, is that one of the parameters to be considered to determine whether an election was free and fair is whether the election was free from violence, intimidation and improper influence. I have already identified from the evidence that there was violence which took place at Soweto Social hall polling centre. Though the violence cannot be attributed to the 1st respondent, the truth of the matter is that the election in the entire polling centre was affected.”

1st and 2nd respondent submissions

26. The 1st and 2nd Respondents submit that violence is an external factor to an election. In the instant petition, the complained act of violence, though not proved at all was isolated incident and limited to only Afweine Centre 1 Polling Station and only lasted for a period of twenty (20) minutes. The said scuffle was promptly and adequately controlled and/ or managed by the security personnel deployed by the 1st Respondent and thereafter voting was conducted peacefully in all other polling stations in Baraki Ward.
27. That the Petitioner did not demonstrate the alleged violence to the required standard as was set in the Court of Appeal case of *Julius Makau Malombe –vs- Charity Kaluki Ngilu & 2 Others*(*supra*). Indeed, he has not demonstrated that the scuffles were widespread, systematic, planned and organized.
28. The 1st and 2nd Respondent further submit that the allegation that the Petitioner’s Agents at Afweine Center 1 Polling Station were assaulted and ejected is false, unfounded, was not backed by any cogent evidence. PW-3 confirmed that she was only shouted at by a crowd but she did not leave. Later on her own volition left Afweine Center 1 Polling Station at around 3:00 AM on the following day.
29. The 1st and the 2nd Respondent rely on the authorities in the case of *Owino Paul Ongili Babu –vs- Francis Wambugu Mureithi & 2 Others*, Election Petition Appeal No. 18 of 2018; *Julius Makau Malombe –vs- Charity Kaluki Ngilu & 2 Others* (2018) eKLR and *Justus Gesito Mugali M’mbaya – vs- IEBC & 2 Others* (2013) eKLR, Hon. Justice E. K. O. Ogola

3rd Respondent submissions

30. The 3rd respondent submit that violence as alleged by the Petitioner only lasted for less than Twenty (20) Minutes and thus the magnanimity is of little or no consequence so as to affect the results of the election of the 3rd Respondent. There has to be proof of widespread violence and intimidation of voters such that voters were prevented from exercising their right to vote. It is not enough to find that there was some form of violence in a given station and then proceed to nullify the result of an election. There has to be a demonstration that the violence affected not only the voting but the final result of the election. With respect, the Petitioner has not demonstrated through evidence the manner in which the election was affected by the violence that lasted for less than 20 minutes, and the demonstration by only PW2 is not sufficient at all.
31. The 3rd Respondent submits that PW 3, Quresha Ali Ahmed testified during hearing that she arrived at the Afweine Polling station at around 10:00 a.m. and found that there were chaos as young men were shouting slogans and a few others were beating a man she could not identify. Given that both PW2 and PW3 were both agents for the Petitioner, how true is it that PW3 could not identify PW2 at the alleged scene of violence? When put on her cross-examination by counsel for the 3rd Respondent, PW3 confirmed that she actually did not see PW2 being beaten. The question then remains, who assaulted PW2? We submit that the 3rd Respondent was not in any way involved with the alleged violence at



- Afweine polling stream 1 as no evidence was led that associated the 3rd Respondent with the said violence.
32. The 3rd Respondent submit further that the evidence tendered was to the effect that the security apparatus that were at the said polling station were able to respond to any security challenge that arose and further that the alleged violence was only for less than 20 minutes. Thereafter, the voting process resumed normally until the close of polls. No evidence has been tendered to prove that the alleged violence altered the results of the election or the voting process neither were any voters turned away as a result of the said violence. Further, PW3 confirmed that she was present at the polling station until about 3:00 a.m. of the following day. She did not testify to any incidence of violence during the tallying process until the results were announced by the Presiding Officer.
 33. The 3rd respondent submit further that the Petitioner did not present any evidence to demonstrate to the court that any of his agents or any other agent was forcefully ejected or denied entry into their respective polling stations. The absence of a party agent cannot be the basis of nullifying a free, fair, transparent, accountable, verifiable and secure election. All other agents that were present at the various polling stations during closure of the vote counting signed the requisite statutory Forms.
 34. The 3rd respondent in buttressing his submissions cited the authorities in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR (Munya's Case), *Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others* [2013] eKLR, *Lenno Mwambura Mbaga & another v Independent Electoral & Boundaries Commission & another* [2013] eKLR and *Mohamed Ali Mursal v Saadia Mohamed & 2 others* [2013] eKLR.
 35. During the hearing of the Petition, 4 witness testified. Save for PW1 whose evidence was in generality. The evidence of PW2, PW3 and, PW4 was centered on Afweine centre stream 1. None of the Petitioner's witnesses testified on the allegation of violence in eight (8) of the polling stations namely, Afweine Center 2, Afweine Primary School, Afweine Chief Office, Afweine Dispensary, Afweine Secondary, Darusalam Primary school, Togdub Water Pan and Languyato Village Borehole.
 36. PW-2, Salah Mohamed Abdi Bulle in his witness statement recounted on how at around 9.30am, he heard some commotion outside Afweine Centre stream 1 in one of the class room that was being used as polling station and the chaos escalated outside their classroom with stones being thrown at their classroom. When chaos subsided, the 3rd respondent forced his way into their locked center in company of unknown rowdy people. He picked him up and demanded that he leave while raining blows on him and teared his shirt and was forcefully ejected. In cross examination, he testified that he did not identify anyone who was throwing stones. He left for Modogashe for treatment. He testified that most of the voters were being assisted. He further testified that the 3rd respondent is facing a charge of assault and the criminal case is pending in court.
 37. PW-3 on the other hand, testified on how she arrived at 10:00AM, some five (5) hours after the opening of the Afweine Centre 1 polling station, and was allowed entry into the polling station as she was an agent. Her testimony was that she was threatened with expulsion from the polling station. She confirmed that she was not removed from the polling station and that she left the polling station on her own volition at around 3:00 A.M.
 38. RW-1, Abdinoor Sikow Haji, who was the Presiding Officer of Afweine Centre 1, on his part testified that there was a brief scuffle outside Afweine Centre 1 polling station and he alerted the OCS Modogashe police station. Within 25 minutes he arrived at the polling station.
 39. It is not in dispute that a commotion described by the petitioner as violence and or described by the respondents as a brief scuffle did occur in one polling station namely Afweine Centre1 polling station



in which most of the witnesses alluded to have lasted for merely 20 minutes. There is no evidence that was adduced by the petitioner to link the rest of the 8 polling station with chaos and violence.

40. In view of the evidence tendered by the parties the authorities submitted, I am persuaded by the following authorities. the Court of Appeal in the case of *Owino Paul Ongili Babu –vs- Francis Wambugu Mureithi & 2 others*, Election Petition Appeal No. 18 of 2018 pronounced itself on the issue of violence and aptly stated as follows

“It is not enough to find that there was some form of violence in a given station then proceed to nullify the result of an election. There has to be a demonstration that the violence affected not only the voting but the final result of the election; for example, that the violence disenfranchised some voters and/or gave an undue advantage to one of the parties.”

41. The Court of Appeal also in the case of *Julius Makau Malombe –vs- Charity Kaluki Ngilu & 2 Others* (2018) eKLR also grappled with the magnitude of a violence that might vitiate an election and stated as follows:

“We have considered the allegations on violence and intimidation of voters. Proof of violence per se cannot vitiate the results of an election. To vitiate the results, the violence must inter alia be widespread. In English dictionary, widespread means extending over a wide area, to a large extent or to a great extent. In *Dickson Mwenda Kithinji -v- Gatirau Peter Munya & 2 others* [2013] eKLR, Meru High Court Election Petition No. 1 of 2013, it was stated that in electoral context, widespread violence can only be taken to mean a systematic, planned or organized infliction of injury, harm, damage or loss on any person because they have voted in a particular way or to induce them to vote in any particular way. There must be evidence to prove the widespread violence. Widespread violence may also include indiscriminate violence...”

42. Similarly, the High Court in the case of *Justus Gesito Mugali M’mbaya –vs- IEBC & 2 Others* (2013) eKLR, Hon. Justice E. K. O. Ogola addressed the issue of violence during an election and stated as follows:

“The Petitioner’s case finally hinged on two limbs. First, the violence meted out against him on the eve of the elections, which the Petitioner considered an electoral offence by the 3rd Respondent itself enough to nullify the elections. I have analyzed this issue in all its perspectives. My finding is that there was indeed violence as alleged. However, that violence was not traceable to anybody, leave alone the 3rd Respondent. I have also found that the violence was isolated and had no effect on the voting. Indeed, in all the surrounding polling stations, near the scene of the attack, there were high voter turn-out and the verdict by all the Presiding Officers was that the elections were peaceful. This isolated and unfortunate incident, which is not traceable to the 3rd Respondent, cannot be a ground upon which to base a decision to nullify an otherwise credible electoral result. If a single act of violence, which is not widespread and which does not affect the voting process, either in one or several polling stations, were to be a basis of nullifying elections, then what would stop a rogue candidate, upon sensing defeat, from self-inflicting violence with the hope that the ensuing results would be nullified? The Court cannot allow this to happen.”



43. In the case of *Mohamed Ali Mursal v Saadia Mohamed & 2 others* [2013] eKLR the Court in analyzing the petitioner's evidence, made the finding below;

“It has been alleged that the Petitioner's agents were locked out the polling stations in contravention of Regulation 62. The Petition avers that his agents were locked out of the polling stations during voting process by the 2nd Respondents' presiding officers. The testimony of the Petitioner in respect of this allegations contained in his affidavit is “I am informed by Jamali Dawid, information I very believe to be true that some of my agents were locked out from a number of polling stations including but not limited to Wajir Girls Secondary School in Wajir West Constituency.”

The Petitioner called 12 witnesses including himself. Among the 12, three were unsuccessful candidates for Member of National Assembly for TNA Party (PW1), KNC Party (PW2) and URP Party (PW3); six agents for URP Party (PW5 and 6), TNA Party (PW4 and 8), Safina Party (PW7) and KNC (PW11). The latter was the Petitioner's agent at Wajir Girls Secondary School. He told the court that he presented his credentials to the presiding officer at Wajir Girls Secondary School polling stations (Code 060) but the presiding officer pushed him outside. He was later allowed in after the Petitioner went to the polling station and intervened. On cross examination PW11 said he did not sign Form 35 and did not know what that form was. He said he was in charge of Stream 2 and named the Presiding Officer of that stream as Mohamed Bishar and deputy as Raha. After he was shown Form 35 for this station's both streams he changed his evidence to say that he could not remember the Stream he was in and that the Presiding Officer is Mohamed Hassan Maalim and deputy is Raha was in Stream 1. He also admitted to signing Form 35. His signature appears on Form 35 for Stream 1. He told the court that he did not have any problems with the counting and tallying of votes in this station and he did not complain to the presiding officer. The Petitioner on his part testified that he had agents in all the polling stations in Wajir County. RW2 told the court that PW11 was removed from the station after he misbehaved but was reinstated after PW12 intervened.

I have considered this ground and the evidence in support. I find the witness unreliable and inconsistent. He contradicted himself, did not know what Form 35 was and could not remember where he took the oath or before whom. I also find no evidence to show any other agent was locked out. Other than PW11 no other agent for PW12 testified on this issue. It is my view that the other agents who testified for the Petitioner did not represent his interests. They were concerned about the welfare and interests of the Parties they represented. It is my finding that their evidence did not establish that the Petitioner was denied votes due to breaches of the law or irregularities. I find that this ground has not been proved, has no merit and Regulations 62 was not breached.”

44. It is therefore apparent that following the above cited authorities, the petitioner has not tendered any evidence to demonstrate that the violence affected the voting and the final results. It was wide spread, systematic, planned or organized. It is the view of this court that the unfortunate single incidence at Afweine Centre 1 polling station was an isolated act which was handled and contained in 20 minutes and the voting continued peacefully without any arrests. It was of a minor magnitude which did not affect the voting process. The other 8 polling stations were not affected by any incidence of chaos and or violence as alleged. Thus, the allegation has no merit and it is dismissed.
45. On the issue of ejection of the petitioners' agents, this court find that PW3 Quresha Ali Ahmed was not ejected from the polling station despite arriving at 10.00am. Whereas PW2 Salah Mohamed Abdi



Bulle left after the scuffle incidence. On this issue, the evidence tendered is scanty and cannot justify a nullification of the election.

2) Failure of KIEMS kits

46. PW1 testified that he received a report that KIEMS kits had failed but did not mention any polling station. RW2 confirmed that in the whole of Baraki Ward, there were only two incidents of KIEMS Kits failure namely Darusalam Primary School Polling Station 1 of 1 and Baraki Primary School Polling Station 1 of 1 which he replaced with two KIEMs Kits and voting resumed immediately.
47. The learned counsel for the 1st and 2nd Respondent submit that failure of a KIEMs Kit cannot be a sufficient ground for nullification of an election Petition.
48. The learned counsel for the 3rd respondents submit further that the Petitioner's assertion that the voters were disenfranchised on account of failure of the KIEMS kits was not backed by any evidence.
49. It is the view of this Court that out of the many KIEMs kit, there is a probability that one may fail. In the instant case RW1 testified that he had a backup and the fault kit were replaced in Darusalam Primary School Polling Station 1 of 1 and Baraki Primary School Polling Station 1 of 1. In the circumstance this ground is too remote to sustain a nullification of an election.

3) Ballot stuffing

50. The claim for voter stuffing was not supported by any evidence. In any event there was no scrutiny done to verify the allegation. In the premise, the claim fails.

(b) Whether the election for MCA Baraki Ward held on August 9, 2022 was conducted in accordance with the principles laid down in the Constitution and in conformity with the provisions of the Elections Act and the Regulations made thereunder and all other relevant laws.

51. Article 81[e] of the Constitution of Kenya, sets out the principles which the electoral system must comply which includes the following:
 - (e) free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) Free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

52. Article 86 provides that: -

At every election, the Independent Electoral and Boundaries Commission shall ensure that

—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;



- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

53. Whereas Section 83 of the [Elections Act, 2011](#) provides: -

“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 in that written law or that the non-compliance did not affect the result of the election.”

54. The Supreme Court in the case of [Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 others](#), their Lordship observed that;

“where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.”

55. I have considered the allegedly irregularities and I am of the view that they are not of such magnitude to have affected the outcome of the election. The procedural irregularities for not opening and or closing the polling station in time cannot vitiate the election. There is no complaint that there were apparent errors during the tallying and declaration of results. The issue of low voter turnout is an external factor which cannot be attributed to the Respondents alone. There no sufficient evidence on how the voters voted without being identified through the KIEMs Kit. The allegation that merely 690 voters were identified across Afweine location with 9 polling station is unfounded. The issue that the Petitioner garnered 1211votes whereas the 3rd Respondent garnered 1669 votes has not been supported by any tangible evidence.

56. I have come to the conclusion that the election of Member of the County Assembly for Baraki Ward was conducted in accordance with the provisions of the [Constitution](#) and the [Elections Act](#) and the Regulations made thereunder. Therefore, the petition is dismissed with costs.

(c) Whether there was a commission of an electoral offence during the election of the Member of County Assembly for Baraki Ward.

57. The Phrase ‘Electoral offence’ refers to an illegal act or conduct that is prohibited under election laws and which have some attached penal consequences. Section 87 of the [Elections Act](#) vests an election court to proffer an opinion as to whether an electoral malpractice of a criminal nature may have occurred. The court is thereafter required to transmit its order to the Director of Public Prosecutions.

Section 15 of the [Election Offences Act, 2016](#) prohibits public officers from participating political activities. It provides as follows:

“(1) A public officer who—



- (a) engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
 - (b) publicly indicates support for or opposition against any party, side or candidate participating in an election;
 - (c) engages in political campaigns or other political activity; or
 - (d) uses public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county, commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.
- (2) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.
- (3) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.”
58. The learned counsel for the 2nd and 3rd respondent submits that during the hearing of the Petitioner’s case, the Petitioner and three (3) other witnesses testified namely PW-2 Salah Mohamed Abdi Bulle, PW-3 Quresha Ali Ahmed and PW-4 Amin Abdullahi Dagane.
59. PW-2, PW-3 and PW-4 all confirmed in their respective testimonies that they were Public Officers employed by the County Government of Garissa and that they have actively participated in the 2022 General Election as political agents.
60. They further confirmed that they neither informed nor communicated to the 1st Respondent, its officers and the various political parties. They also confirmed that the Petitioner was indeed aware that they were employees of the County Government of Garissa.
61. The learned counsel for the 1st and 3rd Respondent submit that based on their admissions that this Honourable Court finds that an electoral offence has been committed by the Petitioner, Salah Mohamed Abdi Bulle, Quresha Ali Ahmed and Amin Abdullahi Dagane. Consequently, this should be reported to the Director of Public Prosecutions for further action against the named individuals.
62. I am in agreement with the submissions by the learned counsel for the 1st and 2nd Respondent that Salah Mohamed Abdi Bulle, Quresha Ali Ahmed and Amin Abdullahi Dagane have committed an election offence contrary to section 15 of the *Election Offences Act, 2016* and the ODPP may take up the matter accordingly.

Who bears Costs.

63. Sections 84 of the *Elections Act* grants an election court the power to award costs which normally follows the cause. Rule 30 of the *Elections (Parliamentary and County Elections) Petitions Rules 2017* on the other hand lays out the parameters of this power, which include setting out the person by whom costs are payable, the total costs payable and allowing the Court to disallow costs incurred because of vexatious conduct, unfounded allegations or unfounded objections by a party.



64. The learned counsel for the 1st and 2nd Respondent prays to be awarded the cost of this Petition and the same be capped at Kenya Shillings One Million Five Hundred Thousand (Kshs 1,500,000/=). The Petitioner on the other hand did not make submissions on this limb. The 3rd Respondent generally asked for costs. The 1st and 2nd Respondent are jointly granted full costs of the petition capped at Kshs 400,000/=. The 3rd Respondent is awarded full costs of the petition capped at Kshs 300,000/=. Mr. Ndegwa costs capped at Kshs 250,000/=. The costs will be borne by the Petitioner.

Final orders;

- i. The petition dated August 30, 2022 and filed in court on September 2, 2022 is hereby dismissed.
- ii. A declaration be and is hereby issued that the 3rd Respondent having attained the majority votes was validly elected as a Member of County Assembly representing Baraki Ward, Garissa County Assembly.
- iii. It is hereby ordered that election offences were committed by Salah Mohamed Abdi Bulle, Quresha Ali Ahmed and Amin Abdullahi Dagane. The ODPP to take up the matter accordingly.
- iv. The Petitioner shall bear the costs of the petition as follows:
 - a. The 1st and 2nd Respondent are jointly granted full costs of the petition capped at Kshs 400,000/=.
 - b. The 3rd Respondent is awarded full costs of the petition capped at Kshs 300,000/=.
 - c. Mr. Ndegwa costs capped at Kshs 250,000/=.
- (v) Deposit paid into Court as security to be agreed to which Respondents will be paid.

**JUDGMENT DELIVERED VIRTUALLY VIA TEAMS MICROSOFT PLATFORM AT GARISSA,
DATED AND SIGNED THIS 27TH DAY OF FEBRUARY, 2023**

HON. H. M. NYABERI (MR.)

CHIEF MAGISTRATE, GARISSA LAW COURT.

In the presence of:

Mr. Kipyegon: Advocate for the Petitioner

Mr. Mohamud: Advocate for the 1st and 2nd Respondent

Mr. Ndegwa: Advocate for the 3rd Respondent

