



IN THE HIGH COURT AT NAIROBI

ELECTION PETITION APPEAL NO. 3 OF 2014

BETWEEN

WILLIAM KINYANYI ONYANGO APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

RETURNING OFFICER KARIOBANGI

SOUTH UHURU WARD 2ND RESPONDENT

ROBERT MBATIA 3RD RESPONDENT

*(An appeal from the judgment and decree of the Resident Magistrate's Court at Nairobi, Milimani
by Hon. L. M. Wachira, PM dated 21st March 2014)*

CONSOLIDATED WITH

ELECTION PETITION APPEAL NO. 4 OF 2014

BETWEEN

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST APPELLANT

RETURNING OFFICER KARIOBANGI

SOUTH UHURU WARD 2ND APPELLANT

AND

WILLIAM KINYANYI ONYANGO 1ST RESPONDENT

ROBERT MBATIA 2ND RESPONDENT

(An appeal from the ruling and order of the Resident Magistrate's Court at Nairobi, Milimani by Hon. L. M. Wachira, PM dated 4th December 2013)

JUDGMENT

Introduction

1. The petition giving rise to these consolidated appeals has had a chequered history and to put the matter in context it is necessary to recount its history.
2. William Kinyanyi Onyango was a candidate in the general elections held on 4th March 2013. He vied for the seat of county representative for Kariobangi South Ward (1429), Nairobi County. The elections were conducted by the 1st and 2nd respondents and the results were as follows;

James Omar Kongo Gathumbi	1,238
Robert Mbatia	14,049
Samuel Mureithi Gateru	110
Sospeter Kimani Njoroge	1,098
William Kinyanyi Onyango	9,167

3. The appellant lost to Robert Mbatia, the 3rd respondent. He was aggrieved by the declaration of results by the Independent Electoral and Boundaries Commission ("the IEBC"). He lodged an election petition in the lower court on 14th March 2013 challenging the election of the 3rd respondent.
4. Hon. Timothy O. Okello, Senior Principal Magistrate, was gazetted to hear the petition. On 20th May 2013, the IEBC presented a motion to strike out the petition on the grounds that the petitioner had not complied with **rule 10(1) (c)** of the ***Elections (Parliamentary and County Elections) Petition Rules 2013*** (hereafter ***the Petition Rules 2013***) by failing to state the results of the election and that the petition did not disclose a cause of action. In a ruling delivered on 31st May 2013, the learned Magistrate found that "*the petition [was] incurably defective and fatally incompetent for want of legal format and or legal content*".
5. The entire petition was thus struck out with costs to the respondents and as a result the petitioner filed **Nairobi Election Petition Appeal No. 2 of 2013** contesting the decision. The appeal was heard by Kimondo J., and by a judgment dated 27th September 2013 he ruled as follows;

[30] In the result, the appeal succeeds on grounds 2, 6 and 7. The appeal is allowed. The undated ruling of Timothy O. Okello, Senior Principal Magistrate, delivered on 31st May 2013 at Nairobi is hereby set aside in its entirety. I order that the appellant's petition dated 11th March 2013 and filed on 14th March 2013 be and is hereby reinstated for hearing. The petition shall be heard by any Resident Magistrate gazetted for that purpose other than Timothy O. Okello.

[31] Costs follow the event and are at the discretion of the Court. I grant the appellant costs of the appeal to be paid by the respondents jointly and severally. Under Rule 36 (1) (a), I cap those costs at Kshs 200,000. The appellant will present a bill to be taxed by the taxing master of this court.

6. After the appeal, the Hon. Chief Justice assigned the petition to Hon. L. M. Wachira, Principal Magistrate, who heard the matter until completion. The matter gave rise to two appeals which were consolidated for the convenience of hearing.
7. **Election Petition Appeal No. 3 of 2014** is an appeal from the ruling delivered on **27th February 2014** dismissing the petitioner's application for scrutiny and recount and the judgment delivered on **21st March 2014** dismissing the petition.
8. **Election Petition Appeal No. 4 of 2014** is an appeal from the ruling on **4th December 2014** dismissing the 1st and 2nd respondents application filed on **4th November 2013** seeking to strike out the petition.
9. The parties filed written submissions and also made brief oral arguments which I have considered in making my findings below.

Appeal No. 3 of 2014

10. Following the dismissal of the petition on 21st March 2014, the appellants filed an appeal on 28th March 2014 and set out the following grounds in memorandum of appeal;
 1. *The learned magistrate erred in law and failed to evaluate evidence on record properly thereby dismissing the petition without addressing all issues before her.*
 2. *The learned magistrate erred in law by considering matters that had been dealt with in the Superior Court while determining the issue of costs she awarded to the respondents.*
 3. *The learned magistrate erred in law and misdirected herself that the Petitioner went completely outside his pleadings in both the evidence and submissions filed in Court.*
 4. *The learned magistrate erred in law by dismissing the petitioner's application for scrutiny when there was overwhelming evidence and enough reasons to order the same.*
 5. *The learned magistrate failed in law by questioning the source of a document in her judgment when the said document had not been disputed or denied by the respondents.*
 6. *The learned magistrate erred in law by failing to address the issue of open ballot papers being in possession of a police officer.*
11. Before I proceed to consider the ground of appeal, it is important to appreciate the scope of the High Court's intervention in election appeals. The relevant provision governing the jurisdiction of the Magistrates Court and the High Court in respect of an election of a member of the county assembly is **section 75** of the **Elections Act, 2011** which provides as follows;

75.(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.

(1A) A question as to the validity of the election of a member county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—

(a) filed within thirty days of the decision of the Magistrate's Court; and

(b) heard and determined within six months from the date of filing of the appeal. [Emphasis mine]

12. A similar provision limiting the appellate jurisdiction of the Court of Appeal in election matters is to be found at **section 85A** of the ***Elections Act, 2011***. The nature and scope of the meaning of “matter of law” has been the subject of determination by the Supreme Court. In the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, S.C. Petition 2B of 2014*** at paragraphs 81-82, the Court stated as follows;

[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase ‘matters of law only’, means a question or an issue involving:

- a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;
- b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;
- c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on ‘no evidence’, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were ‘so perverse’, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge’s commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand. [Emphasis mine]

13. It is against this background that I now proceed to consider the grounds of appeal set out by the appellant. The first ground of appeal cited by the appellant is an omnibus ground that calls upon the court to re-evaluate the evidence in order to ascertain whether or not the learned magistrate addressed all the issues raised in the petition. Furthermore, it is vague and ambiguous in that the

specific issues the magistrate failed to address are not specified with the necessary precision. I therefore agree with the respondents that this ground also violates **rule 34(2)** of the **Petition Rules, 2013** which states as follows;

The memorandum of appeal shall concisely set out under distinct head, the grounds of appeal, without any argument or narrative, from the judgment appealed from and grounds shall be numbered consecutively.

14. Ground 1 also calls on the court to evaluate the evidence when the right of appeal conferred by **section 75** of the **Act** is limited to matters of law. The ground does not identify the issues of law, as elucidated in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)**, which the learned magistrate addressed or failed to address and which this court can cure in these proceedings. I therefore dismiss the ground 1 of the appeal.
15. In ground 3, the appellant faults the learned magistrate for holding that the petitioner went completely outside his pleadings in both the evidence and submissions filed in Court. In the petition dated 11th March 2013, the petitioner cited irregularities in the conduct of the election which were the basis for his request to the court to annul the election. The irregularities were as follows;
 - a. The results announced were altered and incomplete and hence did not reflect a true account of the votes that were cast during the 4th March 2013 election.
 - b. There were irregularities at the time of voting and counting and alteration of the results in favour of one candidate.
 - c. That some of the petitioner's supporters were not allowed to vote due to inaction by the returning officer who had been informed that there were some boys who had placed a barriers at the entrance and would not allow people to access the polling station.
 - d. That voters from the 3rd respondent's *Gikuyu* community got priority on the queues or had special queues.
 - e. That some ballot boxes were transported by unauthorized persons.
 - f. That the 3rd respondent had, prior to the poll, committed election offences by issuing land allotment letters with the intention of bribing potential voters.
16. In each of the allegations set out in grounds (b), (c), (d), (e) and (f) I have outlined above, the learned magistrate found that the same were not proved by the petitioner and his five witnesses. In her judgment, the learned magistrate stated that, *"As I stated in my ruling on scrutiny, the parties are bound by their pleadings. The Superior courts have also time and again insisted that decisions strictly on pleadings. A court cannot suo moto draft its pleadings, frame the issues and determine those issues."* Unfortunately, the appellant did not demonstrate how the learned magistrate erred in failing to determine the issues that were placed before her for determination. What the learned magistrate did was to set out the general principle of law applicable. The observation of the learned magistrate was borne from the fact that the petitioner's allegations in the petition were not specific and that is why she observed that, *"From the onset, the petitioner does not give specific streams or polling centres where he alleges that results were altered or doctored. It appears like the petitioner is making omnibus allegation and trying to find out in which exact polling centres and streams the petitioner's case relate to."* I have studied the petition and I agree with the observation. Notwithstanding this finding, the learned magistrate proceeded to consider the petitioner's complaint regarding the alleged alteration of forms 35 filed.

17. The gravamen of the petitioner's complaint was that the results were altered, doctored and manipulated. In his testimony, he referred the court to forms 35 for stream 1, 2 and 3 in Buruburu Primary School polling station where spoilt votes were not included in the number of votes cast and in the three streams where the total votes cast were the same as the valid votes. He also told the court that the same applied to Kariobangi South Primary School Streams 6 and 11. He complained about Dr Mwenje Secondary School polling station which had a blank form 35 which was signed by the presiding officer and which he claimed was a clear sign that the results were manipulated. The petitioner further testified that the forms 35 he was holding were different from the ones in possession of the IEBC and those of the winning candidate. As a result he argued that there was no clear winner of the election.
18. In response to the petitioner's evidence, the IEBC called two witnesses. The presiding officer of Stream 2, Kariobangi South Primary School polling station. She testified that the form 35 for the Stream 2 was amended to show valid votes of 729 to 727 and the individual results from of the petitioner from 395 to 393. She explained that the difference in valid votes was that there were stray votes which ought not to have been counted. She told the court that she is the one who corrected the entries and countersigned corrections. She also explained that it was possible for witnesses to have different results of one stream with different serial numbers on the forms as many forms, which are not necessarily carbon copies, are filled so that all the party agents can get copies.
19. The returning officer also testified that she received results from the presiding officers which she verified and asked for explanation where necessary. She also informed the court that the forms 35 had alterations on the upper part but the individual results remained unaltered. She also agreed with the presiding officer that many forms 35 are filled so that agents could get copies. She further testified that the amendments in the forms 35 were caused by mishandling of the rejected votes and simple arithmetic would confirm the position since the individual results were clear.
20. In dealing with the issue, the learned magistrate directed herself on the issue of burden and standard of proof required. She was guided by the decision of the apex court in ***Raila Odinga and 5 Others v The IEBC and 3 Others SC Election Petition No. 5 of 2013 [2013]eKLR*** where it was held that in order for the petitioner to succeed, he must not only prove that there was non compliance with the law but that such non compliance did affect the validity of the elections. The learned magistrate considered the evidence of the principal witnesses on the issue of manipulation and doctoring of the results. She accepted the evidence of the presiding and returning officers and concluded that the alteration affected all candidates and that the petitioner had not proved that the alterations would substantially affect the integrity of the results. I find that the learned magistrate cannot be faulted in her analysis of the evidence and the appellant has not demonstrated that the conclusions reached amounted to errors of law that would require this court to intervene.
21. Ground 4 deals with the issue of scrutiny and it flows directly from the issues that the learned magistrate considered on the allegations of incomplete, manipulated and doctored results. In the application for scrutiny, the petitioner sought the following order, *"That an order for recounting and scrutiny of the registers and votes cast on 4th March 2013 General Elections at Kariobangi South Primary School and Uhuru Primary School."* It is worth noting that at the time the application for scrutiny was made, the learned magistrate had already taken the evidence of the parties and was in a position to appreciate the entire evidence.

22. The grounds of the application were that during the hearing it emerged that there were alterations of forms 35 in various centres upon which the petitioner concluded that the results were not clear hence he prayed for the scrutiny and recount in order for the court to verify the results which he alleged were manipulated and doctored. The respondents opposed the application on the ground that the alterations had been explained and the errors were not material given the margin of votes between the petitioner and 3rd respondent.
23. In making her determination, the learned magistrate considered the alterations in forms 35. The said alterations were not denied by the 1st and 2nd respondents and the returning officer in her testimony gave an explanation of the alterations which explanation the learned magistrate found satisfactory. She noted that there were no material changes in the results of the candidates including those of the appellant and the 3rd respondent given the margin of over 4,000 votes between them.
24. It is now well established that scrutiny may only be ordered where sufficient reason has been established. **Philip Ogutu v Michael Aringo and 2 Others Busia EP No.1 of 2013 [2013]eKLR** Tuiyott J., stated that, *“An order for scrutiny will not be made as a matter of course. In the words of Rule 33(2) of the Election Petition Rules, the court must be satisfied that there is sufficient reason to require an examination of the ballots. This rule codifies a long held Judicial opinion that scrutiny may only be ordered where a foundation or basis has been laid (see for instance the Court of Appeal decision in Masinde v Bwire and Another (2008) 1KLR (EP) 547.”* In **Abdinasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 others Garissa HC EP No. 9 of 2013 [2013]eKLR** Mabeya J., held that, *“Rule 33 requires scrutiny to be confined to the polling stations in which results are disputed. Failure to comply would be construed as a fishing expedition and would be rejected... that the courts reason to grant scrutiny must be good, logical and necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition.”*
25. In light of the general principles governing scrutiny and recount of the vote, the learned magistrate was within her discretion to conclude that the alterations did not warrant the granting of the application for scrutiny. In this regard, I cannot intervene with the said decision as it was within the four corners of the law.
26. Grounds 5 and 6 raise factual issues which call for analysis of the evidence and again, in light of the injunction issued by the Court of Appeal in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)**, they must be rejected. Furthermore, that the grounds fall outside the allegations that were pleaded as the basis of the petition as I set out in paragraph 13 above. They cannot be grounds of appeal for consideration at the appellate stage when in fact they were not pleaded and were not issues before the trial court. I therefore dismiss ground 5 and 6 of the memorandum of appeal.
27. Finally, ground 2 of the appeal challenges the learned magistrate’s consideration of matters that had been dealt with by the High Court in determining the costs. In considering the issue of costs, the learned magistrate stated, *“...determining the costs the courts must consider the circumstances of each case, taking into consideration time taken, the complexity and importance of the matters before court and the effort and skills invested including the research conducted. This petition has been pending in the courts for about one year. The reason is that it was heard by the Chief Magistrates court, went on appeal at the High Court and then re heard again as a retrial in the Chief Magistrates court. No doubt that the parties have spent a considerable amount of time in the prosecution of this petition. Going by the volume of the documentation filed in court,*

the submissions and the authorities, it is clear that the parties invested time, resources and skills to enable them conclude the petition. All that considered and considering the previous awards granted in election petitions..."

28. The learned magistrate capped the total costs at Kshs. 1,800,000.00 to be borne by the petitioner with the petitioner being apportioned a maximum of Kshs. 1,000,000.00 and the 3rd respondent being apportioned a maximum of Kshs. 800,000.00.
29. The appellant complains that the learned magistrate erred in looking at the age of the matter without considering the fact that the actions save for pleadings prior to the decisions of the High Court had been dealt with hence the issue of costs could only be dealt with from the time the learned magistrate took over the handling of the matter when the petition was reinstated. The respondents, on the other hand, contend that costs are a matter of discretion and that the appellant has not demonstrated that the learned magistrate did not take into account relevant factors or ignored material factors.
30. Under **section 84** of the ***Elections Act, 2011*** provides "*An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.*" The costs in an election petition are to follow the event and the Court has broad jurisdiction to determine who bears the costs and to what extent. (See ***Charles K. Waibara and Another v Francis Kigo and Others Nairobi EP No. 15 of 2013 [2013]eKLR*** and ***Kituo cha Sheria v John Ndirangu Kariuki and Another Nairobi EP No. 8 of 2013[2013]eKLR***).
31. I have considered the reasoning of the learned magistrate and I do not detect any misdirection on her part. The only costs awarded so far were those awarded by the appellate court when it set aside the initial decision striking out the petition. The court merely capped the costs but did not determine the quantum due to each party. Such quantum will still be subject to taxation and the attendant process of filing a reference if the petitioner is dissatisfied. The learned magistrate exercised her discretion on the basis on the material before her and I have no reason to intervene with the exercise of discretion. I therefore find this ground.
32. The appeal against the judgment of the subordinate court is therefore dismissed.

Appeal No. 4 of 2014

33. The genesis of the appeal was a Notice of Motion dated 4th November 2013 filed on behalf of the IEBC seeking to strike out the petition filed on 14th March 2013. The learned magistrate declined to strike out the petition by a ruling delivered on 4th December 2013.
34. Under **section 75(4)(a)** of the ***Elections Act, 2014*** an appeal from a decision of the subordinate court must be lodged within 30 days. It is clear that the appellant filed the appeal on 22nd April 2014 which is beyond the 30 day period for lodging an appeal from the ruling of 4th December 2013. Although the decision appealed from is an interlocutory decision, it is not necessary to decide the issue whether such an appeal lies as the appeal, of whatever nature, is time barred by reason of **section 75(4)(a)** of the ***Act***.
35. In the circumstances, the appeal is incompetent and must be struck out.

Disposition

36. The result of my findings are as follows;

- a. *Election Petition Appeal No. 3 of 2014* be and is hereby dismissed.
- b. *Election Petition Appeal No. 4 of 2014* be and is hereby struck out.
- c. As all the parties have won and lost in equal measure, each party shall be its own costs.

SIGNED BY

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 13th day of August 2014.

M. NGUGI

JUDGE

Mr Were instructed by Odera Were Advocates for the appellant.

Mr Mukele instructed by Mukele Moni & Company Advocates for the 1st & 2nd respondents.

Mr Wanjohi instructed by J. W. Wanjohi & Company advocates for the 3rd respondent.



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