



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**BUSIA ELECTION PETITION NO. 2 OF 2017**

**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION**

**FOR TESO NORTH CONSTITUENCY**

**BETWEEN**

**HON. ODERA ARTHUR PAPA.....PETITIONER**

**AND**

**OKU EDWARD KAUNYA.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSON.....2<sup>ND</sup> RESPONDENT**

**JULIAN GOMITY, TESO NORTH**

**CONSTITUENCY RETURNING OFFICER.....3<sup>RD</sup> RESPONDENT**

**RULING NO. 2**

**Introduction**

1. This ruling is in respect of the petitioner's Notice of Motion dated 26<sup>th</sup> September 2017 seeking the following orders:

*1. THAT this Honourable Court be pleased to order the Officer Commanding Station (OCS), Malaba Police Station and the Divisional Criminal Investigations Officer (DCIO) for Teso North within Busia County to table their investigation report on the electoral offences alleged to have been committed in the petition dated 30<sup>th</sup> August, 2017 before the honourable Court during trial, specifically:*

*(a) Assault on Sammy Odama and Edwin Etapiro, reported on OB No. 2/8/8/2017 at Malaba Police Station.*

*(b) Incitement to violence and attacks on the petitioner and others at Jaki Guest House Hotel on 4<sup>th</sup>*

*August 2017, reported at Amagoro Criminal Divisional Headquarters.*

*(c) Violence against the Petitioner at Akobwait at Amagoro Police Patrol base.*

*(d) Attack on Benson Iyese at Kolanya nursery polling station on 8<sup>th</sup> August, 2017 reported as OB No. 26/14/8/17 at Amagoro Criminal Divisional Headquarters.*

*(e) Attack on the petitioner at Koteko polling station on 8<sup>th</sup> August 2017.*

*(f) Intimidation of Titus Oroni at Kongurakol Primary Polling Station.*

*(g) Conviction of Ian Karani Wabomba on 17<sup>th</sup> July 2017.*

*2. THAT this Honourable Court be pleased to summon the Officer Commanding Station (OCS), Malaba Police Station and the Divisional Criminal Investigations Officer (DCIO) for Teso North within Busia County to attend court and testify on the allegations of commission of electoral offences in the petition dated 30<sup>th</sup> August 2017.*

*3. THAT the cost of this application be in the course.*

## **The Submissions**

2. The application is based on the petitioner's affidavit sworn on 1<sup>st</sup> October 2017 and the grounds set out on the face of the application. The thrust of the application as urged by the petitioner's counsel, Mr Walukwe, is that the petitioner has set out several electoral offences alleged to have been committed during the election period and that it is in the interests of justice that officers be summoned to give evidence as they were either present when the alleged offences were committed or were aware of the commission of the offences. The petitioner argues that despite making several efforts to obtain police records including witness statements recorded in regard to electoral offences, the efforts have not been fruitful.

3. Counsel for the petitioner pointed out that **section 80** of the ***Elections Act, 2011*** empowers the court to summon or compel as a witness, any person whose testimony is of importance in an election petition and in accordance with the averments in the petition and the respondents' response, it is vital that the testimony of the officers be called.

4. The respondents opposed the application. The 1<sup>st</sup> respondent filed grounds of opposition while the 3<sup>rd</sup> respondent filed a replying affidavit. Their objection was two-fold. First, that the application was an attempt to introduce new and additional evidence to prop up his case after the close of pleadings and consequently an attempt to expand the scope of the petition. Second, that by granting the application, the court would be usurping the power and authority of the National Police Service under **Article 244** and **245** of the Constitution to investigate criminal offences and the authority of the Director of Public Prosecutions under **Article 157** of the Constitution to prosecute criminal offences.

## **Disposition**

5. The petitioner's allegations are proved by primary evidence of witnesses which are set out in the affidavits filed together with the petition. Police investigation reports are secondary evidence of what was reported by other witnesses to the police and in the absence of primary evidence, such a report is either hearsay or opinion evidence and only proves that an offence was reported. In this instance it is important

to recall that the law on election offences has changed following the amendment of the **Elections Act, 2011** and enactment of the **Election Offences Act, 2016**. Under the **Election Offences Act, 2016** the overall responsibility and mandate to investigate all election offences lies with the National Police Service and the Independent Electoral and Boundaries Commission. **Section 21** of the **Act** reaffirms **Article 157** of the Constitution which vests prosecutorial authority in the Office of the Director of Public Prosecutions. Unlike in the past where the election court could find a person guilty of an election offence, the power of the election court is now circumscribed and limited to determining whether an electoral malpractice of a criminal nature may have occurred. **Section 87** of the **Election Acts, 2011** provides as follows:

*87(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.*

*(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.*

*(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —*

*(a) direct an investigation to be carried out by such State agency as it considers appropriate; and*

*(b) based on the outcome of the investigations, commence prosecution or close the matter.*

6. What this provision suggests is that the Election Court, while making an inquiry into election malpractices in the nature of criminal offences, in order to determine the validity of the election, it must exercise caution and circumspection as a further process is contemplated in order to determine whether a person is guilty of an election offence. It is against this background that I now turn to consider the petitioner's request.

7. The gist of the evidence of Sammy Odama and Edwin Otapiro is that they were involved in a violent incident perpetrated by the 1<sup>st</sup> respondent's supporters. Both of them deposed that incident was reported at Malaba Police Station as OB/8/8/2017 and Edwin Otapiro was issued with a P3 form which confirmed as much. In these circumstances, there is evidence of the complaint and the result of the complaint. I do not therefore see the need to call for the investigation report or summon the police officers.

8. Regarding the incident of incitement to violence and attacks on the petitioner and others at Jaki Guest House Hotel on 4<sup>th</sup> August 2017, reported at Amagoro Criminal Divisional Headquarters, there is evidence of the petitioner and two witnesses; Martin Ichelai and Brigid Namarome. It is not necessary to call for the investigation reports and summons the police officers in this instance.

9. The alleged attack on Benson Iyese at Kolanya nursery polling station on 8<sup>th</sup> August, 2017 was the subject of a report documented as OB No. 26/14/8/17 at Amagoro Criminal Divisional Headquarters. In his deposition he has annexed his P3 form which confirms as much together with hospital treatment notes. His evidence is supported by the deposition of Ham Emeje. I therefore decline to call for the investigation report and summons the police officers.

10. The petitioner also alleged incidents of violence against him. He deposed that he was attacked at Akobwait and the matter was reported at Amogoro Police Patrol Base as OB No. 3/8/2017. He also deposed that he was attacked at Koteko polling station on 8<sup>th</sup> August 2017. The petitioner will no doubt testify about these acts. The allegation of intimidation of Titus Oroni at Kongurakol Primary Polling

Station is supported by his deposition.

11. The conviction of Ian Karani Wabomba on 17<sup>th</sup> July 2017 having occurred prior to the elections could easily have been verified by the petitioner obtaining court proceedings had he exercised due diligence. I therefore decline to order for such records.

12. For the reasons I have outlined, I decline to summon the Officer Commanding Station (OCS), Malaba Police Station and the Divisional Criminal Investigations Officer (DCIO) for Teso North within Busia County to attend court and testify on the allegations of commission of electoral offences or to produce the investigation reports of these incidents at this stage. Under **section 80(1)(b)** of the ***Elections Act, 2011*** this court reserves the right to summon them at any stage of the proceedings should it become necessary. It provides as follows:

*80 (1) An election court may, in the exercise of its jurisdiction-*

*(b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or the alleged vacancy.*

13. The Notice of Motion dated 26<sup>th</sup> September 2017 is dismissed. Costs of the application shall be in the petition

**DATED and DELIVERED at KISUMU this 13<sup>th</sup> day of November 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Walukwe instructed by Okong'o Omogeni & Company Advocates for the petitioner.

Mr Odera instructed by Odera Obar & Company Advocates for the 1<sup>st</sup> respondent.

Mr Juma instructed by Mukele Moni & Company Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



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