



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

THE ELECTIONS ACT 2011

PETITION NO. 2 OF 2013

**IN THE MATTER OF ELECTION FOR THE MEMBER OF THE NATIONAL ASSEMBLY FOR KISUMU
WEST CONSTITUENCY THE PETITION OF ROZAAH BUYU**

BETWEEN

ROZAAH AKINYI BUYU.....PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

HANSON NJUKI MUGO.....2ND RESPONDENT

JOHN OLAGO ALUOCH.....3RD RESPONDENT

JUDGMENT

- 1). The petition herein filed on 10th April 2013 prays for the following reliefs:-
1. That the tallying of the votes cast in and the results declared and announced and gazetted by the Respondents after the election for Member of the National Assembly for Kisumu West Constituency on 4th March 2013 be examined.
 2. That the ballots in the election held on the 4th March 2013 for Member of the National Assembly for Kisumu West Constituency, results of which election were announced on the 5th March 2013 at Bishop Okoth Girls Secondary School Ojola and published in Gazette Notice No. 3155 of 2013 in a special issue of the Kenya Gazette on the 13th March, 2013 be recounted.
 3. That the election of John Olago Aluoch the 3rd Respondent as a Member of the National Assembly for Kisumu West Constituency announced and declared and published by the 2nd and 1st Respondent is declared null and is set aside.
 4. That the Court orders the 1st Respondent to organise afresh election to be held to elect the Member of the National Assembly for Kisumu West Constituency.
 5. That the courts determination shall be certified to the 1st Respondent commission according to law, for the determination to be notified to the speaker of the National Assembly.
 6. That the 1st and 2nd Respondents bear the costs of the petition and all interlocutory

matters involved.

2). When this matter came up for pretrial conference the parties reduced the issues as follows:-

a) Whether the election for the Member of the National Assembly Kisumu West Constituency was conducted in accordance with the law; the Election Act 2011, the Elections (General) Regulations 2012, the Constitution of Kenya 2010 and the Electoral Code of conduct.

b) Whether the Election covers pre-nomination of party candidates to and until the determination of an Election Petition.

c) Whether the outcome of the election of the member to the National Assembly for Kisumu West Constituency was valid.

d) Whether there was deliberate meddling and interference with the tallying process by the 1st and 2nd Respondents and their agents.

e) Whether the election for the Member to the National Assembly for Kisumu West Constituency was held in a free, fair and credible manner.

f) Whether the declaration of the 3rd Respondent as the duly elected Member to the National Assembly for Kisumu West was valid.

g) Whether if there were any irregularities in the course of the election process were they of any substantial impact as to affect the final outcome of the declaration of the results in terms of Section 83 of the Election Act 2011"

h) Who is to bear the costs.

3). All the parties did file their respective responses and their affidavits as well as their supporting documents and exhibits. At the conclusion of the case they equally each filed their lengthy submissions which I am indebted to.

The Petitioner's case.

4). The petitioner beside herself called 4 other witnesses. She told the court that she won the Orange Democratic Party hereinafter referred to as "ODM Party" primaries which were done on 19th July 2013. In the said election the 3rd Respondent was equally a contestant.

5). After the ODM Primary elections the 3rd respondent defected to the FORD Kenya party in which he contested the general election.

6). The petitioner raised several issues against the respondents which included the fact that there were several election malpractice which were occasioned by either the 1st and 2nd Respondent or the 3rd Respondent.

7). One of the offences was that the 3rd respondent participated in the defacing and pulling down of her bill boards at Kiboswa. She said that one of the supporters notified her of the incident and she advised her to report the matter to the police.

8). She also contended that the 3rd respondent used the ODM colours in his campaign materials during the campaign which action confused the illiterate voters within the constituency. According to her the use of Orange colour by the 3rd respondent gave him an added advantage in the sense that most voters were not sure whether he was still in ODM or had moved to FORD Kenya.

9). The petitioner on this score went ahead to produce as exhibits some orange caps inscribed “**Olago Cord**” and “**Olago Aluoch ODM Tena**”. She also accused the 3rd respondent of perpetrating bribery at Tiengre Primary School where one Assistant Chief a Mr. Omondi was seen bribing voters.

10). Further at Rota polling Station the petitioner argued that counting was done in darkness as there was no lighting and that when she organized for the lantern lamp to be brought by her son the parliamentary results had already been announced.

11). The other malpractice she noticed was at Marera polling station where there were discrepancy on the results. The contents of form 35 were not tallying with that in form 36. According to her form 35 contained 300 votes which was hers but form 36 only captured 11 votes.

She further told of discrepancies at Obambo, Kebwayi and Orinde poling stations.

12). Her witnesses testified in her favour who included one **Jackson Gwara Modi alias Max Modi** who was the ODM chairman Kisumu West. He told the court that pursuant to the instructions received from the petitioner he wrote to the respondent complaining about the use of ODM colours by the 3rd respondent. He said that the use of the said orange colours confused the electorates. There was no response however from the 1st and 2nd respondents.

13). The 3rd witness **Dennis Jorim Buyu Randiak** the petitioner's husband produced leaflets allegedly defamatory against the petitioner. He claimed that the said leaflets distressed him the most as well as the petitioner. He was however on cross examination unable to confirm the author of the leaflets.

14). The 4th witness **Owino Omollo** the ODM Chief Agent told the court that he was present at the tallying centre at Ojola. He claimed that the 2nd respondent only announced the results of the winner but failed to announced those of other candidates who included the petitioner. He went on to argue that the 2nd respondent refused to allow him or the petitioner to append their signatures on form 36.

15). **PW5 Maurine Atieno Odhiambo** testimony concerned the defacing and pulling down of the petitioners billboards at Kiboswa. After reporting the matter to the police, she went to give the names of the suspects. She is the same witness who collected the caps bearing the ODM colours and the name of the 3rd respondent and handed them over to the petitioner.

16). The petitioner equally raised the issue of the anomalies in the entries to form 36. According to her the entries were done by the 2nd respondent way after announcing the results and it was only after he had alerted him via an sms the following day. The sum total of the petitioners case was that the election was not done in a free environment and that the same was not free and fair and did not meet the constitutional threshold.

The 1st and 2nd Respondent's case

17). The 2nd respondent testified on his own behalf and that of the 1st respondent. He denied all the allegations leveled against him arguing that all the issues raised by the petitioner were addressed and some bordered on hearsay. The 2nd respondent denied that they ever received any letter from PW2

Max Modi complaining about the use of ODM colours and paraphernalia by the 3rd respondent . According to him no such complain was raised as the letter produced by the petitioner did not bore any receiving stamp by the respondent.

18). He went ahead to refute the petitioners claim that he did not announce full results at the tallying centre and in fact he did correct the anomaly by hand in form 36 and countersigned it. He concluded that if there were any errors, the same were so minor or negligible that it would not affect the outcome of the results or alter the will of the electorates in Kisumu West Constituency. On the question of service of the petition Mr. Mugo denied ever having been served and that he saw the same in the newspaper .

19). Other witnesses who testified on behalf of the respondents were **DW2 Lawrence Odhiambo Aloo** who was a presiding officer at Rota Polling Station. He denied that there was darkness at Rota polling station but he confirmed that the petitioner did make a visit at night at the said polling station but by then he had announced the results.

20). **DW3 Fredrick Okore** was the presiding officer at Kibwayi polling station. He told the court that all the agents had left the polling station by the time he was making comments on form 35.

The 3rd Respondent's case

21). The 3rd respondent did testify and he fully concurred with the 1st and 2nd Respondents. He told the court that he was a member of ODM Party when it conducted its nomination but he left to join FORD Kenya when he realised that there was a plot not to have proper nomination exercise. He said that his defection was within the law despite the assertion by the petitioner and that if there was any complain by the petitioner then she ought to have raised it with the ODM party disputes resolution mechanism but not at this stage.

22). He admitted printing the caps with “Olago Aluoch ODM Tena” which was before the party primaries but not those printed “Olago Cord” which were apparently done after the party nomination. He said that he won the election based on his strength and character and not necessarily the party.

23). He vehemently denied that he was ever served with the election petition and that what was allegedly served upon him was dumped in his law firm.

24). He told the court that he was at the tallying centre where he heard the 2nd respondent announcing the results and infact he heard the petitioner requesting for the results to be read again. When he received his winning certificate from the 2nd respondent he did not bother to wait but he left immediately and did not inquire about form 36. He did not call any witness to support his case.

Analysis and Determination

25). Having summarized the evidence as adduced by the parties herein there emerged several issues for determination and which shall lead to the final decision of this petition. The first issue that needs to be determined is the element of service. Both the 2nd and 3rd respondents have argued strongly, that they were not served and any service that was allegedly done was not as per the law established.

26). The 2nd respondent argued that he received the pleadings from the head office on 24th April 2013. The 3rd respondent denied service and stated that the petition was dumped in his law firm at Alpha house which he had apparently not visited for many months.

27). In her response the petitioner relied on the sworn affidavit of one **Millicent Ogutu**, advocate which she deponed that she served the 3rd defendant's clerk on 10th April 2013 at around 3:45 p.m. The said clerk however refused to acknowledge the service. She further stated that she went to Maseno the following day on 11th April 2013 where the 1st respondent's offices are situated. According to her she called one Yvonne of Telephone No. 0723905840. The said Yvonne was the 2nd respondent's secretary who instructed her to leave the documents with one Dianna Awuor who worked at the Kisumu Branch. Diana Awuor received the petition and signed on behalf of the 2nd respondent. The 2nd respondent denied that he knew the said Diana Awuor neither does she work in his office.

28). In light of all these allegation and counter allegations what does the law say"

Section 77 (2) of the Election Act No. 24 of 2012 prescribes how service ought to be done in an election petition. The same provides:

"77 (2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

29). The Election (Parliamentary and County Elections) Petition Rules 2013 makes it mandatory. It states in Rule 13 (1), that **"An election petition shall be served by the petitioner on the Respondent by:-**

a) direct service or

b) Publication in a newspaper of national circulation.

30). These are the two options provided under the law. In the case of **Kibaki -VS- Moi (2000)1E A . 117** direct service means service upon the respondent directly and not through an agent or proxy.

31). In the ordinary service as provided by the Civil Procedure Rules Order 5 Rule 8, Service can be effected upon an agent who is empowered to receive on behalf of a party. On the contrary election petitions and its rules are distinct, clear and precise.

32). From the case at hand it is evident that the 2nd and 3rd respondent were not directly available for service. There is no effort exhibited by the petitioner that she made to ensure that they were served directly. The petition intended for the 2nd respondent was left at the Kisumu Branch Office whereas that of the 3rd respondent was left at his law firm.

33). The option that was left was for the petitioner to be served through newspaper advertisement. Rule 13 of the Election (Parliamentary and County Election) Petition Rules 2012 (4) provides:-

"Where a petition is served by publication in a newspaper as provided under Sub Rule 2 (b) and 3 (c), the advertisement shall be sufficient if it -

a) Is in Form EP3 set out in the First Schedule and contains, as a minimum, the details required in that Form.

b) Is of, at least, font size twelve and

c) Is captured in dimensions of not less than ten by ten centimeters".

34). On perusal of the newspaper advertisement by the petitioner the same in my considered opinion is not an advertisement as envisaged by the above quoted rules. What is exhibited is a notification to the parties that the petition was served upon them and the documents are in their respective offices.

35). Having found that no service was effected upon the 2nd and 3rd respondent should the petition be disallowed on this ground as prayed for by the respondents" Mr. Ragot counsel for the 2nd respondent argued that this issue of service goes to the root of the petition and that contrary to the petitioner's assertion, the same was not a mere technicality. He argued that Article 159 (2) (d) cannot be used as a shield by the petitioner. He relied on the cases of Amina Hassan Ahmed -VS- Returning Officer Mandera County and 2 others Election Petition No. 4 of 2013 and Raila Odinga & 5 others -VS- IEBC and 3 others Supreme Court Petition No. 5 of 2013 and Chelaite -VS- Njuki & others (1999 – 2009) IEAGR 34

36). In the Chelaite case Justice Pall said:-

“Once the election court is satisfied that due to failure to serve the petition within the time prescribed by the law, the petition has become annulity, it surely has the power to strike it down without any more ado”

37). Mr. Mwenesi counsel for the petitioner argued that once the Respondents responded to the petition and vigorously argued and filed their responses within the prescribed time they were estopped from pleading this element of service. He argued that the best they would have done is for them to stay away from the proceedings and leave the court to make a finding on this score. In other words the respondents did not suffer any prejudice.

38). This court must satisfy itself that the failure to affect proper service rendered the petition annulity.

39). Harris J in Prabhudas & Co vs Standard Chartered Bank (1968) EA 670 at 675 rendered the following on the issue of service:-

“In my opinion, any doubts which may have been created by Hewitsons case were dispelled by the decision in the following year of the Court of Appeal in England in Fry -VS- Moore (1889) 23 QBD 395, which provides a significant answer to the defendants case. There a writ was issued in that in the general form against the defendant, who at the time was in Canada and therefore not within the jurisdiction. Notwithstanding the provisions of the English Rules requiring that a writ for service outside the jurisdiction should not be issued without leave of the court, no such leave had been obtained, but nevertheless some weeks later the plaintiff obtained an order for substituted service of the writ upon the defendants brother who was within the jurisdiction and in default of appearance within due time the plaintiff caused judgment to be signed. The brother who was a solicitor and had previously acted for the defendant in other matters but not in these proceedings, thereafter applied to have the judgment set aside and the plaintiff ordered to deliver a statement of claim. Shortly afterwards the defendant acting through another solicitor retained by him made a similar application. The second application was refused and the defendant appealed. The Court of Appeal upheld the refusal of the Divisional Court. Lopes L. J. in his judgment after stating that the service of the writ was entirety bad said:-

“Then comes the questions has the irregularity been waived by the defendant". It is said that the proceedings was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice. But in the present case, I think there was only irregularity. The proceeding, the issue of the writ was a proper one; the irregularity was only in the mode in

which it was attempted to carry it out by service. I think this is a mere irregularity in procedure which could be waived by the defendant....”

Applying this decision it appears to me that in the first place, the defect of which the defendant complains in regard to the service of the summons (assuming that is, that such a defect existed) Constitutes, at most an irregularity of being waived, secondly that irregularity has been waived”

40). In the appeal arising therefrom, Sir Charles Newbold emphasized on the matter and stated thus:-

“The court should not treat any incorrect act as a nullity, with consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature, matters of procedure are not normally of a fundamental nature”.

41). In our present case the 2nd and 3rd respondents were not properly served. It was not a direct service on the person of the respondents and neither can the newspaper advertisement be said to be proper as alluded earlier own. The above decisions however seemed to suggest that despite the said irregularity the petition cannot be rendered a nullity. I note too that despite the irregularity they filed their responses within the prescribed time and actively defended the petition. In fact they proceeded at the interlocutory stage to file two distinct applications which were disallowed and none of it touched on the element of service.

42). Omolo, Nyamu and Rawal JJA observed in the case of **Equatorial Commercial Bank Ltd -VS- Mohansons (K) Limited (2012) 2 EA 123** as follows:-

“Order V of the Civil Procedure Rules is worded in mandatory language by using the word “shall” and in normal circumstances the court shall give it a strict interpretation. The respondent not only did not challenge it but kept quite on the defect and participated in the legal process by unconditional appearance, filing of defence and then recorded a consent..... the respondent was at all times represented by a firm of advocates and they did not allege any prejudice on their part caused by the omission. The respondent having openly and unconditionally followed the process in the manner in which it did, especially prompting the appellant to believe in the actions taken by both parties, the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter.”

43). Consequently, though the service was bad in law it did not go to the fundamental root of the petition and it can be waived as an irregularity. Though the respondents might have acquiesce the same cannot be a ground to nullify the petition herein.

44). The other malpractice raised by the petitioner relates to the pre-election period and during the election process. This is the use of party colours. As earlier indicated the 3rd respondent was all along a member of the ODM Party. It was alleged that soon after moving to FORD Kenya Party he continued to use the materials which had the orange colour meant for ODM and not green and white which are FORD Kenya's. The petitioner and her witnesses contented that the same breached the electoral code of conduct and in deed confused the electorates majority of whom are illiterate.

45). Mr. Max Modi PW2 produced a letter dated 18th February, 2013 which he allegedly wrote to the 2nd respondent complaining about the use of such materials by the 3rd respondent.

46). The 2nd respondent however denied having received such a letter. He argued that if the same was

delivered to the office it would have bore the stamped “**received**”.

47). Mr. Mwenesi strongly submitted on this issue arguing that there was a blatant disregard of the code of conduct on the part of the 3rd respondent and more specifically paragraph 6, (g) thereof which provides that all those bound by it “**shall through the election period avoid plagiarizing the symbols, colours or acronyms of other parties...**” for continuing to use ODM colours even when he had left ODM. Counsel further relied on Section 110 (4) of the Election Act which provides that any person who contravenes the code of conduct commits an offence.

48). He further submitted that Section 110 (5) provides that trial of an offence under the Section shall be without prejudice to any proceedings in consequence upon a petition. Mr. Mwenesi relied in the case of Indian Supreme Court in All Party Hill Leaders Conference vs Captain W. A. Sangma (Supreme Court of India) Land Mark Judgments of India Volume 1 page 360 which states:-

“For the purposes of holding election allotment of symbols will find a prime place in a country where illiteracy is still very high. It has been found from experience that symbol as a device for casting votes in favour of a candidate of ones choice has proved an in valuable aid. Apart from this just as people develop a sense of honour, glory and patriotic pride for a flag of one's country, similarly great favour and emotions are generated for a symbol representing a political party. This is particularly so in a parliamentary democracy which is conducted on party lines. People after a time identify themselves with the symbol and the flag. These are great unifying insignia which cannot be all of a sudden be effaced”.

49). Its obvious from the above quotation that party symbols and colours hold great sway in an electioneering process. It can cause great confusion and cause disadvantage to individual candidates depending on their positions.

50). In Omar & Another vs Mbuzi & Another (1993-2009) 1EAGR 411 the Court of Appeal at Mombasa rendered itself thus:-

“It is obvious and need not be emphasized that a party symbol is an integral part of the parliamentary elections where more than one candidate presents her/himself for an election”.

51). From the evidence on record, as much as it is true that the 3rd respondent may have used materials which portrayed the ODM colours I do not have any evidence that the letter of complaint was delivered to the 2nd respondent. If the letter was delivered who received it" What is not clear also is whether Maxi Modi had the authority of the petitioner when writing the said letter. Was he writing the letter as ODM chair or the petitioner's agent" Equally intriguing is why did the petitioner not follow up with the 2nd respondent" These questions were not well answered or articulated upon by the petitioner.

52). This same argument apply to the use of the caps written “**Olago Aluoch ODM Tena**” and “**Olago Cord**”. Its difficult to believe the petitioners evidence on this score. First of all who was issuing the caps" Who designed and produced them" The 3rd respondent acknowledged printing and using “**Olago Aluoch ODM Tena**” caps but not “**Olago Cord**”.

53). The other difficulty with this line of argument is that there was a coalition of several parties namely ODM, Ford Kenya and Wiper Democratic Party to form CORD. The 3rd respondent in his submissions has alluded to a memorandum of understanding (MOU). I have perused the same and from my gleaning of the details, it appears that there was nothing to stop each party from using each other colours and symbols. This was naturally a strategy to win seats in all areas as much as possible. However, despite

my analysis, I do not have any sufficient evidence to conclude that the 3rd respondent was the author of the “**Olago Cord**” Caps or at all. The burden of proof was squarely upon the petitioner.

54). It was also argued by the petitioner strongly that the 3rd respondent and his supporters did deface and pull down her billboards at Kiboswa area. PW5 testified that on 25th January 2013 while on her way to Kisumu at Kiboswa she notice that the billboard had been destroyed. She informed the petitioner who told her to report to the police. She notified one Dan Mbai and Joseph Yaya who in turn reported the same to the police at Riat Police Station. They did made statement to that effect and listed several names of potential suspects whom she claimed were responsible for the destruction of the billboard. According to her they were supporters of the 3rd respondent.

55). I have perused the statements recorded at Riat Police Station and it is clear that the persons who made the report did not know the perpetrators. PW5 found the billboard already damaged.

56). The source of PW5 list of suspects she gave to the police is not known. Obviously, there were other candidates vying for the same position and it is difficult at this juncture based on the evidence on record to lay blame upon the 3rd respondent. Is it possible that the billboard was brought down by an act of nature, say, rain or wind" In the premises it is not possible to conclude that indeed the persons allegedly suspected by the petitioner's witnesses were indeed the 3rd respondent supporters or caused the destruction of the petitioner billboards. In any event there was no eye witnesses to the alleged destruction. The petitioner nor her witness did not follow it up with the police in any event.

57). The other related argument is the question of leaflets. The petitioner claimed that the 3rd respondent published leaflets that contained damaging allegations to her character. PW3, Denis Randiak the petitioner's husband told the court that the petitioner received a call from one of her supporters informing her that there were leaflets stating that she was not fit to contest in the election because of her moral uptitude. He went with his driver and collected several leaflets which were all written in Dholuo. The contents which were translated in English indeed were intended to malign and defame the petitioner.

58). Conversely, the 3rd respondent alleged that there were similar leaflets which he produced, and which were designed to malign him too. They were also written in Dholuo and the 3rd respondent also provided an English translation of the same. According to the 3rd respondent, he decided to ignore the same and put his energy elsewhere. The petitioner on the other hand told the court that she spent substantial part of her campaign disproving the contents of the said leaflets. PW3 apparently out of anger burned the leaflets.

59). My analysis of this leaflets issue is that both leaflets were defamatory of the petitioner and the 3rd respondent. It is however, difficult to know the source. None of the parties attempted to carry out any investigation. Whoever, authored them desired that both contestants be humiliated and maligned. I cannot find that the 3rd respondent authored the same. Neither can I conclude that it is the petitioner who authored those against the 3rd respondent. Both suffered in equal measure.

60). The other issue raised by PW5 was the intimidation and threatening of the petitioner's supporters by those of the 3rd respondent. She told the court that her life and others were threatened, which threats include torching of houses and poisoning of the 3rd respondent's supporters. She then reported the matter at Riat Police Station and the Occurrence Book (OB) was produced. The said OB contains several names of alleged intimidators who are alleged to be the 3rd respondents supporters.

61). The respondent's counsel have argued that such evidence ought to be disregarded because at its

best the same is hearsay and that in any case there was no conclusive investigation by the police. Frankly, there was no serious rebuttal by the respondents. In fact they argued that PW5 did not show any link between the suspect and the 3rd respondent or that they intended to execute the threats.

62). Section 63 of the Election Act provides that:-

“63 (1) (b) “A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practice, damage or loss, or any fraudulent device, trick or deception for the purposes of or on account of:-

- a)
- b) **Impeding or preventing the free exercise of the franchise of a voter**
- c)
- d)

Commits the offence of undue influence.

63). This allegation by PW5 cannot be wished away. Even though there was no arrest by the police, it was nevertheless a threat which was directed at the petitioners supporters and more so the witness. Whether the police carried out the arrest or not was not within the witness mandate. She had simply done her job and the burden was with the police.

64). This argument is buttressed by the case of **Egbema -VS- West Nile District Administration (1972) EA 60** where Court of Appeal stated:-

“Is the respondent also liable in damages in respect of the abortive prosecution” I do not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servant or agents of the respondents after investigation.... The actual decision to do so was taken by the Uganda Police”.

65). Mr. Ragot has submitted on behalf of the 1st and 2nd respondent that PW5 failed to show how she knew the suspects or whether they really intended to execute the threats.

Halsburys Laws of English 4th Edition Vol. 15 at paragraph 784 states:-

“it is the undue influence on individual voters and not general rioting or violence which constitutes the corrupt practice. In order to constitute undue influence a threat must be serious and intended to influence the voter, but it would appear that the threat should be judged by its effect on the person threatened and not by the intention of the person using the threat. A threat may amount to undue influence even though the person using the threat has no power to carry it out. An unsuccessful threat has been held to amount to undue influence.”

66). It follows then that it is not important that the persons mentioned did not have an intention to carry out their threats, it is just enough that they used threats.

In his evidence the 3rd respondent does not deny any connection to the suspects. He does not

deny that he knew them. It cannot be hearsay as the 3rd respondent claims. The witness PW5 was among the persons threatened and went to report at Riat Police Station. Was it difficult for the 3rd respondent to have stated that they were not his supporters" Absolutely not.

67). There was also an allegation of bribery at Tiengre Polling Station by one Kennedy Omondi, an Assistant Chief. The witness claimed that he was offering bribes to people who were on the queue before they voted.

68). These allegation were made by one Pamela Owino who apparently was not called by the petitioner to testify or swear any affidavit.

70). These allegation is spurious and to say the least hearsay. Bribery is a serious election offence and cogent proof is always required. The same is unsubstantiated and ought to be dismissed.

71). Turning now to the specific polling stations which the petitioners complained of, there were various allegations and malpractices levelled against the respondent.

72). At Nyanginja Primary School Polling Station No. 002 the petitioner argued that the presiding officers made comments on Form 35 without signing the form. I have perused the said Form 35 and on the face of it despite the fact that the presiding officer stamped and did not sign the portion which she ought to have done and instead signed the portion due to the deputy presiding officer the same was duly signed by her agents **Fredrick Osowu** and **Pamela Abiero** and proper statutory remarks made. I do not see any fault by the said officer. The form was duly filled.

73). It was alleged that at Rota Primary School Polling Station No. 008 there was darkness during counting and that it took the intervention of the petitioner by bringing a lantern lamp from her home. The 2nd respondent argued otherwise. Whereas there could have been a problem with the lighting at this station I do however upon perusing Form 35 realize that the petitioners agents namely **Gabriel Okoth Odhiambo** and **Caleb Onyango** appended their signatures. This act by the agents lends credence to the results. If in any event there was a problem during counting of votes and filling Form 35, then there was nothing difficult for them to have refused to sign or raise their queries. Their sole purpose as agents is to ensure that the interest of their principal is well articulated and any malpractice pointed out.

74). At Kibwayi Primary School Polling Station (No. 012) the petitioner argued that it was only one agent who signed. The respondent argued that by the time they completed the counting all the other agents had left except for the one who signed.

75). From her affidavit sworn on 15th May 2013, the supposed agents for the petitioner were **Peter Apina**, **Joshua Onyango** and **Hamad Hassan**. None of these persons swore any affidavit alleging that they were present and they were denied to sign Form 35. As it were the presiding officer has no control over agents. They are necessary in an election but are not necessarily subject to the presiding officer. There is no evidence that the petitioners agents were denied the right to sign Form 35 as claimed. This argument applies to polling station No. 003 – Obambo Primary School. It is regretted that the presiding officer did not make any statutory comment as expected but nevertheless the petitioners agent one **Maurice Ago Akumu** clearly endorsed the results. The said agent has not counteracted the petitioner's allegation. Equally, there is no provisions in law that suggest the number of agents that are required to endorse the contents of Form 35.

76). At Oluowa Primary School Polling Station No. 050 the petitioners complain is that non of her agents or any agent signed the Form 35. The presiding officer noted that:-

“The agents had left by the time of filling this form”.

77). The petitioners agents were **Margaret Achola** and **Kennedy Ouma**. There is no affidavit or any evidence to counteract any testimony of the presiding officer. Again there is no evidence that they were denied to sign the Form 35 or at all.

78). At polling station **No. 021 Dr. Robert Ouko Primary School** Form 35 has been tempered with. The entries do show that the total number of votes cast was originally indicated as 463 and then it was crossed to read 375 whereas the total number of valid votes cast originally read 449 but was crossed and written 369. The 2nd respondent admitted the error and contented that he does not know who did the correction.

79). What was however clear is that whoever did the correction did not counter sign as expected. Further, the corrected entries were not posted to Form 36 but instead it is the original entries that were entered. The respondent nonetheless argued that these cancellation and failure to capture the correct entries did not affect the results at all.

80). The same argument was raised in respect to **Marera Primary School Polling Station No. 061**. Form 35 indicated that the petitioner obtained 311 votes whereas the entries in Form No. 36 reflects 11 votes. This was admitted by the 2nd respondent who said that it was a typographical error made by his tallying clerks who omitted the figure “3” so as to read “311”.

81). The 2nd respondent contented that he noticed the said error before he made the announcement and he rectified the final tallying by adding the petitioner figures from 21,049 to 21,349 by his hand and he did counter signed. In any case, he argued the petitioner did not suffer any loss nor was she prejudice in anyway nor the outcome of the election affected at all.

82). The two instance above Marera and Robert Ouko Polling Station have been argued by the respondent as sheer human error and that the explanation given in court was sufficient.

83). Then there was the whole issue surrounding Tallying Form No. 36. The petitioner contented that after announcing the results she requested for a copy of Form 36 from the 2nd respondent. She said that the second respondent who was in a hurry to travel to Nairobi advised her to get a copy from the clerks present. The clerks gave her a copy which she presented to the court as her piece of evidence.

84). The said form has all the entries as Form 36 produced by the 2nd respondent save that the entries have not been cancelled and countersigned by hand neither has it been signed. The 2nd respondent disowned the said Form 36. He argued that his was legitimate as he signed the new entries and does bear the IEBC stamp. He wondered where the petitioner obtained hers.

85). It is noted equally that the Form 36 produced by the respondent does not bear the signatories of the candidates or their agents. The petitioner contended that the 2nd petitioner did not give her or other candidates to sign and request by her agent was turned down by the 2nd respondent.

86). On his part the 3rd respondent told the court that once he received the certificate from the 2nd respondent he did not bother to check anything else including whether or not to sign Form 36. He left the hall and went celebrating with his supporters.

87). It is noted further that the said Form 36 is not dated at all a fact that was well admitted by the 2nd respondent. It is equally instructive to note that on 6th March 2013 at 11:52 a.m. the petitioner wrote to

the 2nd respondent the following SMS:-

“good afternoon. Hope you got to Nbi safely. Noticed some anomalies in our tallying sheet. For example pls check Marera. You have indicated that I have 11 instead of 311. Pls check the sheet before you make your presentation”.

88). Thereafter and specifically on 12th March 2013 the petitioner wrote second “SMS” to the 2nd respondent. Inquiring about Form 35'S.

In one of the SMS's dated 12th March 2013 the petitioner wrote:-

“You must have used those copies to aid in the final tallying process. I need photocopies of those results. Your secretary has just told me that you are away from office indefinitely and that she cannot disclose where you are. Like I had pointed out to you in an sms, there are various anomalies and I need the copies to enable me file a court petition, that is within my right I believe. Kindly facilitate”.

89). During the hearing the 2nd respondent admitted the said sms conversation and pointed out that he was no longer in the possession of the Form 35 and that the petitioner could only obtain them after a court order. He went further to state that the agents at all polling stations must have received their copies as expected.

90). While still on this, an issue was raised by the petitioner that the agents were denied Form 35 and that the 2nd respondent did not pin the same at the door of the polling stations or any such conspicuous spots. This was denied by the respondents. He told the court that all present agents were given a copy of the Form 35 and that they were posted or pinned on conspicuous spots within the polling stations.

91). Apparently, there was no agent called by the petitioner to deny this. My finding is that the said allegation has not been backed by any tangible evidence.

92). Back to the issues surrounding Form 36 it is expected that the said form forms the final results and basis for the elections. What is captured in Form 36 is essentially what is contained in Form 35's. Any discrepancy in Form 35 ought to be corrected before posting it to Form 36.

93). From the evidence on record it appears that there were major discrepancies in Form 35 from Dr. Robert Ouko Primary School stream 001 polling station No. 21 as well as Marera Primary School polling station No. 061. The entries therein did not tally with that posted to Form No. 36.

94). The 2nd respondent nevertheless did not bother to correct this anomaly in the entries but instead concentrated on the total overall figures. Significantly the 3rd respondent was not affected by the said changes.

95). In this election there were 4 candidates who according to Form 36 obtained the following votes:-

a) Kodiaga Israel Maurice Otieno of T.P Party garnered 499 votes.

b) Aluoch John Olago of FORD Kenya Party garnered 22,946 votes.

c) Omwamba Judith Kerubo of TNA Party garnered 160 votes.

d) Buyu Rozaah Akinyi of ODM Party 21,349 votes.

96). It should be noted that the petitioner in the earlier uncorrected entries had garnered 21,049 votes. It means therefore that there was alteration on the total number of votes for the petitioner, the total number of votes cast and the total number of valid votes. The petitioners votes was changed from 21,049 to 21,349.

97). Equally the total number of votes cast was changed from 45,363 to 45,444 and the number of votes cast changed to 44,654 to 44,955.

In respect of registered voters at Kisumu West Constituency the figures as shown in form 36 is 50,064 whereas during the hearing the 2nd respondent tallied the figures to be 50,196. A closer analysis of form 36 therefore showed that the entries posted from form 35 had some discrepancies especially for Dr. Robert Ouko primary school, Marera primary school and Nyanginya primary school.

98). It is further noted that the entries by hand by the 2nd respondent materially changed the votes garnered by the petitioner. The petitioner did not indicate where the figures came from. The entries were done by the 2nd respondent unilaterally and it is difficult to know whether agents were notified as they did not sign anywhere despite there being a provision for them to sign in the said form.

It is further clear that the total number of registered voters at the constituency are varying. According to form 36 the total voters are 50,064 whereas according to the total entries in form 35 the number arrived at is 50,230.

99). The said form is undated and this has been admitted by the respondent. There was a tallying done by the petitioner based on the information she received from her agents on the ground. The same during cross examination was shown to have serious material discrepancies and I do not think it can stand the test herein. The same was not done scientifically and I do not wish to refer to it.

100). The respondents argued that such mistakes cannot be used to invalidate the elections and relied on the provisions of Section 83 of the Election Act which states:

“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”.

The Election (General) Regulation of 2012 at Regulation 83 is worth reproducing here. It states:

83 (1) “Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers if present:

- a. tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a tallying station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of election results and make a statement to that effect;
- b. in the case of an election, publicly announce to persons present the total number of votes cast for each candidate in election in the order provided in regulation 75 (20);

c. complete form 34 and 35 set out in the schedule in which the returning officer shall declare as the case may be the;

i) name of the respective electoral area;

ii) total number of registered voters;

iii) votes cast for each candidate or referendum side in each polling station;

iv) number of rejected votes for each candidate in each polling station;

v) aggregate number of votes cast in the respective electoral area; and

d) sign and date the form and

(i) give to any candidate or agent present a copy of the form; and

(ii) deliver to the commission the original form 34 and 35 together with form 36 and 37 as the case may be.

101). From the reading of section 83 of the Election Act its evident that the election will not be declared void for non-compliance with written law if it was conducted according to the principles of law.

Lord Denning in the now often quoted case of Morgan & Others -VS- Simpson & Another [1974]3 All ER 722 at 728 had this to say:

“Collating all these cases together, I suggest that the law can be stated in these proposition:

- 1. If the election was conducted so baldy that it was not substantially in accordance with the law as to election, the elections is vitiated irrespective of whether the result was affected or not. That is shown by the Hackney case, where 2 out of 19 polling stations were closed all day and 5000 voters were unable to vote.**
- 2. if the election was so conducted that it was in accordance with the law as to election, it is not vitiated by a breach of the rules or mistake or the poll provided that it did not affect the result of the elections, that is shown by Islington case where the ballot papers were issued after 8 p.m.**
- 3. But, even if the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake as to polls and it did affect the result, then the election is vitiated”.**

102). What has to be shown however is that despite compliance with section 83 one has to establish that such non-compliance with the law did not affect the results.

Stephenson LJ in the Morgan case (Supra) was clear on this when he said:

“If substantial breaches of the law are as I think enough to invalidate an election though they do not affect its result, it follows that, contrary to the opinion of the Divisional court, trivial breaches which affect the result must also be enough”.

The breaches therefore need not be substantial. They could as well be trivial and that goes to

affect the result.

103). The word “Result” was well captured in the case of Mbowe -VS- Eliu [1963] EA 242 where the court sated:

“The word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined”.

104). Did the irregularities and errors so admitted by the respondent herein affect the results" In considering this issue is the court to rely on the quantitative outcome of the election or the qualitative wholesomeness of the election as envisaged by Musinga J (as he then was) in Manson Nyamwea -VS- James Magara & 2 Others [2009] eKLR where he rendered himself thus;

“In determining the issue the court applied both the “quantitative test and qualitative test”, the nomenclature used by Musoke Kibuka J in Winnie Babihuga -VS- Masiko Winnie Komuhamhi & Others HC7-00-CV-0004-2001.

The quantitative test was said to be the most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair. While I agree with the two tests as aforesaid are important it must be borne in mind that in auditing an electoral process to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed a favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official”.

105). This court is therefore enjoined to look not only at the end result but the process as well. The respondent's perspective apparently seemed to suggest that the end justifies the means.

106). Form 35s as alluded above especially at Dr. Robert Ouko polling station was cancelled without any counter signing. Others include Obambo primary school polling station No.3, Usoma primary school, Oluowa primary school polling station No. 050. Ordinarily one would have expected the presiding officers to have countersigned the crossings.

Kimaru J in William Kabogo Gitau -VS- George Thuo & 2 Others [2010] eKLR stated that:

“It was clear to the court that whereas they did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancelled and alteration in a statutory form, the same should be countersigned by the concerned official.

In the case of electoral documents, it is important that statutory forms which contain results that will invariably be required to be verified by other parties, including the members of the public should be written without any alterations or cancellations”.

107). Lenaola J in **Bernard Shinali Masake -VS- Dr. Boni Khalwale & 2 Others Kakamega Electoral Petition No. 2 of 2008** while considering Forms 16A which are now our present forms 35 stated that:

“The forms 16A were designed as the primary document in tallying so that once form 16A was wanting in content the entire tallying exercise and the results thereafter announced were complete sham”.

108). I have earlier on enumerated errors in form 36 and I need not repeat here. The issue of errors was again captioned in the judgment of Maraga J (as he then was) in the case of **Joho -VS- Nyange & Another No.4 High Court at Mombasa** where he stated:

“1). Election Petitions are nor ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election Petitions should be proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made, instances of the bribery should be given.

2).

3).

4) An election will be nullified if it is not conducted substantially in accordance with the law as to election. It will also be nullified even though it is conducted substantially in accordance with the law as to election, if there are errors or mistakes in conducting it which however trivial, are found to have affected the result of the election”.

109). Of course the election process must always be based on the tenets of our constitution and the written laws. Articles 38, 81 and 88 of the Constitution are clear and I need not reproduce them here.

110). Having said that, what was the results announced by the 2nd respondent at the tallying centre on 6-3-2013" Was it 21,049, 21,349 or 21,048 votes as garnered by the petitioner"

Did he make the correction before announcing the results" If he did so, which corrections did he make" From form 36 it appears that he only corrected and countersigned those affecting the petitioner. Where did he get the figures" If it is true that the clerks failed to post them how did he get to know that the 300 votes for example were those from Marera polling station" Looking at Form 35 in respect to Marera polling station, the petitioner's agent one **Erick Onyando** did sign the same. It would therefore appear that the only dispute here was the posting of the results to form 36.

111). As regards Dr. Robert Ouko primary school stream 1 polling station No. 021, the petitioner's agent one **Elijah Agingo** did sign the form 35 as well as other 8 agents. Is it possible that all the other agents belonged to the 3rd respondent"

Perhaps it would have been appropriate for the said agent Elijah Agingo to swear an affidavit to shed some light on the crossings. In any case if there was an error which needed alteration why did he sign.

112). As stated elsewhere and in the Kabogo case (supra) it was imperative for the presiding officer to have countersigned the crossings at any rate. By signing the form therefore the petitioner's agent seemed to have legitimized the presiding officer's entries.

113). Further, why not allow the parties or their agents to sign form 36" It has been argued that the said form need not be signed as it is just a reflection of forms 35s which are required to be signed. My wholesome reading of Regulation 83 earlier on quoted pre supposes that all forms including form 36 ought to be signed. Infact it is on record by the 2nd respondent respondent that signing the forms means actually owning it.

114). This position is buttressed by Section 72 of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya which states:

“Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of instrument or document, or which is not calculated to mislead”.

115). There is a clear provision for the candidates to sign form 36. Why did the legislature create that space" If for instance they or their agents sign it would have been possible to believe the 2nd respondent. As it were, one does not even know when the same was announced as the 2nd respondent failed to ...date. Even if the corrections were done on the spot prior to announcing why not date" As against the petitioner, the 2nd respondent was in a better position to interrogate the documents.

The said form 36 is a serious document for this is the instrument that is presented for the 1st respondent for purposes of publishing in the Kenya Gazette. Its accuracy therefore cannot be compromised.

116). My senior learned Judge in the Nyamwea and Magara case stated that the counsel for the respondents submitted that the first respondent won the election so convincingly that it was clear that the will of the people of South Mugirango had been demonstrated.They submitted that it would be improper to interfere with the voters will.

117). Whereas it is true that judicial authority is derived from the people and as much as possible courts should seek to give effect to the will of the electorate, the courts must at all times act in accordance with the constitution and other electoral laws and regulations thereunder.

118). From my analysis of the election process at this constituency, grave errors were committed by the 1st and 2nd respondents especially in filling their statutory forms namely form 35 and 36. This court was not at the tallying or polling centres. It only relies on the evidence as presented.

119). The margin between the two contestants herein was about 1,600 or thereabouts. It was obviously very close. This court is enjoined to allow or disallow this petition.

120). Having done the above analysis the question that needs to be answered is whether with all the above irregularities the election process at Kisumu West constituency met the criteria as set out in the constitution and other electoral laws. Did the people of Kisumu West achieve their legitimate expectation"

121). In **Raila Odinga -VS- IEBC & Others Petition No. 5 of 2013**, the Supreme Court had this to say:

“Where a party alleges non conformity with the electoral law the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged

irregularity in the acts of public bodies “*Omina praesumuntur vite et solemniter esse acta*”. All acts are presumed to have been done rightly and regularly, so the petitioner must come out by raising firm and credible evidence of the public authorities departures from the prescription of the law”.

122). In Buhari -VS- Obasanjo [2005] CLR 7K, the Supreme court of Nigeria stated that:

“The burden is on petition to prove that non-compliance has not only taken place but also has substantially affected the result..... there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election”.

123). Did the error at Marera primary school polling station, and Robert Ouko primary school fundamentally affected the result" Did the lack of crossing and countersigning of form 36 by the 2nd respondent likewise fundamentally affect the results" Did the threats and intimidation allegedly by the 3rd respondent's supporters fundamentally affect the results"

124). Section 83 of the Election Act which our Supreme court as well as the Nigeria Supreme court borrowed from clearly sets the two demarcations namely that the election shall not be declared null void,

“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”.

125). My considered finding is that though there were election irregularities as demonstrated above and non-compliance that the law especially the filing of form 35s for Marera and Robert Ouko polling stations and crossing and countersigning of form 36 the same did not affect the results of the election. The results in essence did not fundamentally affect the wishes and aspirations of the electorates of Kisumu West constituency. The signing of forms 35 by the petitioner's agents as stated above validated the results as that was their role.

126). Consequently, this petition is hereby dismissed with costs to the respondent. The costs shall be assessed by the Deputy Registrar of the court and the same should not exceed Kshs. 1.5 million.

Orders accordingly.

Dated, signed and delivered at Kisumu this 4th day of September, 2013.

H.K. CHEMITEI
JUDGE

Mwenesi/Ogututu for the petitioner

Olago/Ragot, Otieno for 3rd respondent

Ragot for 1/2 respondents



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