



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT

AT KWALE

ELECTION PETITION CASE NO. 1 OF 2013

MOHAMED KHAMIS MWASENGEZA.....PETITIONER

-VERSUS-

INDEPENDENT ELECTION & BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

DAVID MARO.....2ND RESPONDENT

JUMA ATHMAN MAONE.....3RD RESPONDENT

JUDGMENT

The petitioner herein MOHAMED KHAMIS MWASENGEZA filed this petition challenging the 4th march 2013 elections and specifically the Kinondo county assembly ward. The petitioner vied for the Kinondo county assembly seat vide an orange democratic movement ticket. The named respondents are INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION [1ST RESPONDENT], DAVID MARO [2ND RESPONDENT] AND JUMA ATHMAN MAONE [3RD RESPONDENT]. The 2nd respondent was the returning officer for the Msambweni constituency while the 3rd respondent was the declared winner of the Kinondo county assembly. Being dissatisfied with the said declaration the petitioner moved to this court to challenge the same and sought the following prayers

1. Declaration that the 3rd respondent was not duly elected and the elections were null and void.
2. Recount of the votes for the election of the member of county assembly Kinondo.
3. An order for the scrutiny of form 33, form 34, form 35 and form 36.
4. An order for the repeat of the elections held on March 4th 2013 for the position of the member of the county Assembly for Kinondo Assembly ward.
5. A declaration that the petitioner was the winner of the 4th March 2013 election for the member of the county assembly for Kinond ward.

The petitioner alleged that the elections were not free and fair as the 1st respondent denied him the right to appoint his individual agents that the 1st respondents failed to use biometric voter identification thus rendering the elections vulnerable and ineffective. The petitioner also alleged that the 1st, 2nd and 3rd

respondents tampered and manipulated election materials cast in the petitioners favour, that 1st respondent denied the petitioner access to the polling station, ignored the petitioners complaint, together with 2nd respondent committed electoral offenses, that both also committed other criminal offenses, that the 2nd and 3rd respondents allowed people not entitled to vote to do so, that 2nd respondent allowed people not authorized to vote to do so. 3rd respondent used or threatened to use violence

The 1st respondent in his reply stated that voting at most polling centers in Msambweni constituency commenced at 6:00am and immediately learned that the EVID batteries were losing power hence the decision to use manual registers, he stated that the elections were free and fair, that votes were counted and tallied at the polling stations, that in some stations electronic transmission of results was impossible and results were taken to the tallying center by the presiding officers, that the mandatory 11 hours allowed for exercise were adhered to. He told court that he heard the petitioner's complaint and counter checked the results and discovered that he was not telling the truth. He denied that any electoral or other criminal offenses were committed and averred that the 3rd respondent emerged the winner of the Kinondo assembly ward., that he did not receive any reports regarding the petitioners allegation from the Kinondo polling stations, that the petitioner was permitted to have and had his own as well as party agents during the exercise, that the failure of the electronic voter identification machines was not isolated and occurred in other polling stations but the process in such instances was carried out by use of manual registers which contained biometric details of the voters. He denied that the process was rendered ineffective by use of the manual registers

The 3rd respondent denied that the elections were not free and fair and told court that the provisions of the constitution regarding free and fair elections were observed. He denied all the allegations made by the petitioner.

The issues for determination are as follows:

- Whether the elections for the Kinondo ward were free fair transparent and credible.
- Whether the 1st respondent restricted the appointment of agents.
- Whether the petitioner was denied any of his rights as per the law
- Whether rule 10 (1) (c) of the election petition rules was complied with and if so the effect of such failure.
- If the 1st and 2nd respondents committed any irregularities and if so the effect
- Whether any electoral offenses were committed by any of the parties.
- Costs

Evidence was presented by way of affidavits and witnesses were cross examined and reexamined on the contents of their affidavits. On whether the elections were free and fair the petitioner on being cross examined on his affidavits told court that he garnered 1057 votes. He admitted that he had his party agents allowed to access to the polling stations. He denied that any of his personal agents were denied access to the polling stations and on the same breath said that they were denied access. He admitted that he was not restricted in using his individual agents. One agent Bakari Omar Kibwebwe told court on cross examination that he was allowed to enter the Makongeni polling station until midday after the petitioner intervened. He confirmed that he had been trained by the 1st respondent on the process. In fact all the petitioners' agents confirmed that they had been duly trained before the elections. The same agent confirmed that all agents could not fit at the same time and were getting accessing the polling room in turns confirming that the petitioner had at least an agent in the Makongeni polling station at any one given time including that of his party. This agent told court that at that particular polling station the petitioner garnered 250 votes but only 225 were entered in form 35. He again confirmed that the petitioner's party agent announced the petitioner got 225 votes, although he said that he arrived at that

conclusion because he was doing his own separate calculations nothing was produced in court to confirm that he kept any record as alleged. He also confirmed that he signed form 35. There is therefore sufficient evidence that the petitioner was well presented by his agents and at no one point did he miss an agent in any polling station whether his personal or party sponsored. Although the petitioner through his witnesses allege that form 35 was signed in ignorance as I said earlier I found all were sufficiently trained and knew what was expected of them. In any event regulation 79 (6) (7) of the elections {general regulations} regulations 2012 is clear that failure or refusal of an agent to sign a declaration form (form 35) shall not by itself invalidate the results.

On the alleged commission of electoral offenses by the 1st and 2nd respondent none was specifically pointed out to the court. In fact the petitioner denied that such alleged acts as stated in his petition were committed. A mere allegation in the petition is no proof that offences and irregularities were committed. It must be demonstrated to the court and by the petitioner that such acts were committed. The burden of proof placed on the petitioner in this regard was stated in the case of **Raila Odinga and others versus independent and boundaries commission and others---petition number 5 of 2013**

“ A petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden, threshold of proof should in principle be above the balance of probability though not as high as beyond reasonable doubt”

Three of the petitioner's witnesses Peter Sudi Zani, Mwanamisi Mohammed Mwadawadie and Juma Said were clear that they never noted any offenses that were committed during the elections. In fact two of the petitioners witnesses asserted that the elections were free and fair at their respective polling stations I find in this regard the petitioner has not discharged his burden as required.

The court ordered for a recount of the votes in the Makongeni and Kilole polling stations where entries in the declaration forms were disputed. After the recount the court confirmed that at Makongeni polling station the petitioner had 223 votes and not 225 indicated in the declaration form. He had been favoured with extra 2 votes. I however find this does not affect the validity of the process. The entry for Kilole polling station was accurate. The petitioner actually offended rule 10(1) (C) of the Elections parliamentary and county elections petition rules 2013 by failing to state the result of the election. However in the quoted case of **Hassan Abdalla Albeity versus Abu mohamud Abu Chiaabaand the Independent Electoral and Boundaries Commission election petition number 9 of 2013** it was held that this is not a mandatory requirement. This omission does not render the petition defective.

On the failure of the biometric voter identification system, it was acknowledged by the 2nd respondent that the electronic system failed in many polling station including polling stations in the Kinondo county assembly ward. This issue arose and was addressed in the case of **Odinga and 5 others versus Independent Electoral and Boundaries and 4 others 2013** where the supreme court observed that IEBC was entitled to resort to use of manual tallying system as the constitution and the electoral laws had specifically given IEBC the discretion to either work with a full electronic system or manual system. The court recognized due to the inherent failure of the electronic system and the fact that the manual tallying had not been faulted as being erroneous the computation could not have been challenged . It was further observed that IEBC had no option after the transmission technology failed but to revert to the manual electoral system.

In the present petition the petitioner alleges that use of the manual system rendered the system vulnerable and ineffective. Now that the 1st respondent had no option but to use the manual system it is not enough to allege that the system was ineffective. It has to be shown in which way and to what extent it was ineffective and whether it was erroneous. I find this has not been attained in this petition. The 2nd

respondent averred that the details` of the voter as per the biometric voter identification system were same as in the manual register. It was not demonstrated that unregistered voters were allowed to participate by way of voting.

The petitioner alleged that his complaints were not given a hearing but on cross examination it's clear that the returning officer gave him a hearing and even responded to the issues raised by petitioners at the time of the election.

In conclusion I find the petitioner's allegations have no basis as no evidence was adduced to support the same. The prayer for scrutiny of forms 33, 34, 35 and 36 also has no basis and is declined as well. Only form 35 was relevant in this case. . I find that the elections for the member of the county assembly representative for Kinondo ward Msambweni constituency were free, fair, transparent, and credible and were conducted in accordance with the constitution. I find no tangible evidence to justify a repeat of the 4th march2013 elections for the member of the county assembly Kinondo ward and that prayer by the petitioner is rejected.

I find that the 3rd respondent was validly elected as the representative of the county assembly for Kinondo ward. Consequently prayer 4 is declined

The petition is hereby dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at KWALE this 30TH day of AUGUST, 2013.

E.K USUI MACHARIA

PRINCIPAL MAGISTARTE

In presence of:

Mr. Hamza and Mr. Abubakar for the Petitioner

Ms. Ngugi for the 1st Respondent and 2nd Respondents

Mr. Mwangunya for the 3rd Respondent

CC- Roba

E.K USUI MACHARIA

PRINCIPAL MAGISTARTE



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