



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT OGEMBO

ELECTION PETITION NO.1 OF 2013

AND

IN THE MATTER OF ELECTION ACT 2011

AND

IN THE MATTER OF ELECTION FOR COUNTY REPRESENTATIVE,

BOSOTI/SENGERA

WARD IN KISII COUNTY, IN BOMACHOGE CHACHE CONSTITUENCY,

AND

IN THE MATTER OF ELECTION PETITION CONTESTING THE ELECTION HELD ON

4TH DAY OF MARCH 2013

AND

IN THE MATTER OF ELECTION ACT 2011

AND

IN THE MATTER OF ARTICLES 32,38,47&87(2) OF THE CONSTITUTION OF

KENYA 2010

-BETWEEN-

CYRUS BOSIRE OGEGA _____ 1ST PETITIONER

IBRAHIM ONAMI OMBUYA _____ 2ND PETITIONER

STANLEY OIRERE AYUNGA _____ 3RD PETITIONER

ELIJAH MOGONCHI MBWEKE _____ 4TH PETITIONER

-VERSUS-

TIMOTHY MOKUA NYARANGO _____ **1ST RESPONDENT**

THE RETURNING OFFICER, BOMACHOGE CHACHE

RESPONDENT **CONSTITUENCY** _____ **2ND**

RESPONDENT **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION_3RD**

PETITION

JUDGEMENT

The 4 petitioners herein Cyrus Bosire Ogega, Ibrahim Onami Ombuya, Stanley Oirere Ayunga and Elijah Magonchi Mbweke filed this joint petition in court 20-3-2013. In the said petition the following prayers were sought

- i) Scrutiny and recount of votes in the 22 polling stations.
- ii) A declaration that the declaration by 2nd and 3rd Respondents that the 1st Respondent was the County Representative elect for Bosoti/Sengera ward no.1325 and subsequent Gazzettment and swearing in was invalid and void.
- iii) Declaration that 1st petitioner was the validly elected County Representative of Bosoti/Sengera ward.
- iv) That in the alternative and without prejudice to the foregoing, the 2nd to 3rd petitioners seek that 2nd and 3rd Respondent be directed to conduct fresh elections in respect of Bosoti/Sengera ward no.1325 in free, fair and transparent manner.
- v) An order on cost and interests.

The Respondents are listed herein as Timothy Mokuu Nyarango, the Returning Officer, Bomachoge Chache constituency and the Independent Electoral and Boundaries Commission (I.E.B.C.) all of which duly entered appearance and defended this petition.

It is noted herein, that at the pre-trial conference, the parties herein duly filed respective statements of proposed issues. Directions were accordingly given. The petitioners sought directions that they would abandon the prayer for scrutiny of the votes and appropriate directions were given that the prayer for scrutiny had been abandoned by the petitioners. And after the disposal of preliminary issues arising, the petition proceeded to full hearing. At the said hearing, Mr. O.M. Otieno appeared for the petitioners while Mrs. E. Asati represented the 1st Respondent. Both 2nd and 3rd Respondents were represented by Mr. Odhiambo Advocate.

The 1st witness for the petitioners was Cyrus Bosire Ogega (PW1) whose evidence was that he had participated in the elections as a candidate on United Democratic Forum (UDF) ticket and that he got 2016 votes and that it was correct for the I.E.B.C) to give him these votes. That as a candidate he had

agents in all the 26 polling stations, though he could not recall all their names. He denied he was a candidate in Farmers Party as reflected in the petition. That the result from the polling centers shared that the 1st Respondent was announced as the winners with 2054 votes, and that 1st Respondent had in fact got 44 votes at Mochorwa Pri School though was awarded 404 votes, an additional 360 votes. He otherwise conceded that the relevant Form 35 shows 1st Respondent had in fact been awarded 44 votes. He also conceded that in Form 36 that he had attached to the petition was not on the record of the commission neither is it stamped nor signed by anyone. Also that he was satisfied with the votes award to him and was not claiming the 14 votes mentioned at paragraph 8 of his Affidavit.

The witness also confirmed that his agent had told in that at Mochorwa Pri. School, there had been 611 registered voters while the relevant Form 35 showed they were 608. He agreed with the total number of votes cast of 537 and that he got only 2 votes. On the other hand, he claimed to have had an announcement of 917 votes being announced at the tallying centre.

With respect to Kimai Pr. School he stated that same had 644 votes cast and that he got 367 votes compared to 158 votes for 1st Respondent. He maintained that there were 5 votes unaccounted for. He had got the document from his agent who had found it pinned at the door, but same had not been stamped. Also that he relied on his agent on the fact that the presiding officer Eunice Nyaboke Nyoreka is wife of one Amos Mosigisi, a chief campaigner of 1st Respondent and that she favoured 1st respondent. He otherwise had no evidence of how many votes were swayed from him to his opponent, or how many illiterate and disabled voters were misled by the presiding officer.

On being asked by counsel for 2nd and 3rd respondents, he conceded that he had obtained his provisional results (CO-2) from the I.E.B.C. Offices. Also that the Form 36 of Mochorwa Pri. School showed 1st Respondent had obtained 44 votes and not 404 votes as had been claimed. Also for Kimai Primary School, he only had in issue with 5 votes as noted in the form. He otherwise had no problem with the votes assigned to any of the candidates, the issue being only on the rejected votes i.e 7 or 12

He was categorical that he did not witness any voter being assisted at any polling station. He had no dispute as to the 2016 votes he got as per the form filed by I.E.B.C. He could not tell how many votes were inflated or swayed.

Ibrahim Onami Ombuya was PW2. His testimony was that he had also been a candidate, Standing own Democratic Party ticket and that he was not satisfied by the results and the entire process as conducted. That at Mochorwa Primary School, he had got 460 votes against 44 votes of 1st Respondent, whereas at the tallying centre, a figure of 44 was read at to 1st Respondent. According to him he would have no problem if the 404 votes do not form part of the tally was 1186 votes for position 4.

He also testified that the I.E.B.C. Had announced that there had been 911 votes cast while there were only 611 registered voters. He had no problem with the 5 votes awarded to him at Kimai Primary School, his only problem being the 5 unaccounted for votes. Further that at paragraph 11 of his Affidavit he had stated that Stanley Ayunga had been awarded 81 votes at Rianyakwara Primary School when in fact he had got 0. He otherwise conceded that the results filed by I.E.B.C. Confirmed that Ayunga got 8 votes. He otherwise conceded that none of his votes were swapped. Also that the form attached CO-2(a) were provisional results.

To Mr. Odhiambo questions, he admitted that 1st respondent was correctly awarded 44 votes from Mochorwa Primary School. He denied paragraph 24 of his Affidavit on the fact that his agents were denied access to some polling stations. And to him, no candidates votes were swapped and that though he had agents in all 26 polling stations, none swore any Affidavit. He had gone round all the stations

and saw people voting well. And on Mogombi Primary School, he conceded that results filed by petitioners and the I.E.B.C. agreed that 1st Respondent got 5 votes, and not 3 votes as he had been told by as agents.

This witness stated that the final results were announced at midnight and that he had left the tallying Centre at 1.00 a.m. After being ejected. He also stated he got the results on I.E.B.C. Website, which was not attached. He had no document to show there were 611 voters registered at Mochorwa Primary School station.

And the 4th petitioner, Elijah Mogochi Mbweke (PW2), on his part gave evidence that he had been a candidate on Democratic party ticket and that he was also aggrieved with the results and conduct of the elections.

The he had been announced of position 8 with 363 votes being announced for him. To him, he won the elections. He stated he had filed the petition so that the people may elect their leader in a fair manner. That his agent had informed him that 1st respondent had got 44 votes at Mochorwa Station whereas same had been announced as 404. He had no problem with being awarded 6 votes at the station.

He also went on that he had information that his votes had been tampered with and added for 1st Respondent. And that at Riteke Primary School, he got 2 votes in each stream while his agent told him he had got 22 and 12 respectively. None of the agents were his witness in court. Also for Kimai Primary where he had been awarded 1 vote.

According to him, he was aggrieved by the way tallying was done and that he had stayed on till results were announced. That he was chased away after he made inquiries and demanded firms to verify the results. He stated that whereas they had obtained CO-2(a) from the I.E.B.C. Offices, they had downloaded CO-2(b) from a cyber cafe in Kisii through their advocate while he was not present.

He conceded that he could not have been the winner. He claimed that at Mochorwa Primary School, he had got 26 votes, announced as 6. He disowned the 3rd prayer that 1st petitioner be declared the winner. He estimated the number of votes taken away from him at 50. He also did not annex any extract from the website showing Mochorwa had 611 registered voters. Also that the presiding officer at Kimai Primary School, Eunice Nyaboke was chasing away his Supporters. He produced no evidence of this. He also conceded that at paragraph 22 of his affidavit, he had stated that CO-2(a) were provisional results.

And Stanley Oirere Ayunga (PW4) and 3rd Petitioner herein, gave evidence that he had also participated in the elections as a candidate for Choma cha Mwananchi party and was equally aggrieved with the outcome and conduct of the elections. That the results were read out on 4-3-2013 at midnight in his presence. He had agents in all 26 polling stations.

That at Mochorwa Pri.School, he got 3 votes, announced as 9 and recorded as 0 in the final results, and that it is his agent who told him this though he is not a witness herein. He also disputed paragraph 4 of his Affidavit that he had garnered 2016 votes under stated as 2002. According to him, he relied on his agents on the allegation that at Mochorwa Primary School, he was awarded more votes than he had actually got. And that though he was declared as number 3 he was actually the winner. He otherwise conceded that he never witnessed any votes being swapped nor the presiding officers, Kimai polling stations directing illiterate and blind voters from voting for a particular candidate. He also did not witness any ghost voters. With regard to CO-2(a) his evidence was that it is a clerk of I.E.B.C. who gave

it to them while the 3rd petitioner brought CO-2(b) while they were at the after of their advocate

On being asked by counsel for 2nd and 3rd Respondents, he admitted that he had never met the presiding officer of Kimai primary School though he had gone round all the 26 stations. And that he relied on 10 panel numbers who tallied his votes reaching a figure of 1394. He went on that the votes he was given at Rianyakwara were of Timothy Mokuia Nyarangi and that Timothy had got 81 votes which were given to him on being shown the relevant Form 35, he agreed it gave Timothy the correct votes of 81. His prayer was that the elections be done again in view of the irregularities.

Benjamin Bosire Munga, was PW5. His evidence was that he was involved in the elections as an agent at Kimai Primary School for Cyrus Bosire Ogega of UDF party and that he was at the station from 6.15am to 9.00pm

This witness committed that his Affidavit had no paragraph indicating that he had been an agent of a candidate. Neither did he attach even his copy of oath of secrecy of agents or party's appointment letter. He noted various errors in his affidavit alleging that he had been a candidate. He stated that CO-2(a) was issued to him by the presiding officer, Catherine Nyaboke of Kimai Primary School and he never signed the same because of the irregularities he had noted.

He confirmed that his candidate Cyrus got 367 votes at Kimai as he has no complaints about this. His only complains was on the 2 spoilt votes and 7 rejected votes and the difference of 5 votes which votes he would not know where they would lie. He admitted that the total votes cast for each candidate at Kimai were correct and the mistake was only on the spoilt votes. Also, that their chief agent labs on is the only one who entered the tallying Centre with Cyrus.

On the other station like Mochorwa, this witness confirmed, these were information he got at the tallying centre. He did not see any votes being swapped or any ghost voters voting or the presiding officer adding other voters. At the polling centre, he confirmed he had been outside of the fence while tallying was in progress inside the building. On his evidence, the presiding officer aided voters who needed aid alone with agents. Also that he saw the presiding officer leave the station with 1st Respondent to the field outside before coming back. This however, was not contained in his Affidavit. And in his evidence, the announcement of results was between 3-4.00pm.

To Mr. Odhiambo, he answered that he handed over his appointment document to the presiding officer who never handed them back. He confirmed that rejected votes would not be awarded to any party, and also that if a voter wanted to be assisted the agents would go and see how the voter & votes. He never saw any swapping of votes.

The 1st respondent Timothy Mokuia Nyarango was DW1. His evidence was that he was a fellow contestant with the petitioners at Bosoto/Sengera ward. He denied having taken away the presiding officer of Kimai station on the voting days of that any candidates agents had been thrown out.

He denied conspiring to have the results in his favoured added that at Mochorwa Primary school, he got 44 votes as announced at the tallying Centre, or between 3.30pm and 4.00pm on 5-3-2013. That his votes were announced as 2558 with 1st petitioner having 2016 votes as per WKR-2 and CO-2(a) which was a strange document to him. He went on that his chief campaigner was Livingstone Nyandworo Omoi and chief agent was John Mosigisi Marube and that Amos Mosigisi was not his chief campaigner or part of his campaign team.

When he was cross-examined by Advocate for petitioners the 1st Respondent went on that he

does not know the source of CO-2(a) or who prepared it nor that the presiding officer of Kimai Primary School prepared multiple forms 35. He conceded that the form supplied by the I.E.B.C. has alterations on the number of registered voters also with differences on number of rejected voters. i.e. 7 and 12.

He admitted that he contested while still a director Ogembo Tea Factory, and did not know he was required to resign first before going for elections. And that he had gone to Kimai station on the material date but for a very short time. He denied that a figure of 2054 had been announced for him but that it was 2558. He denied that the petitioners were present of the tallying Centre or that they were thrown out. He also denied that the tallying was done at midnight.

1st Respondent called Evans Moranga Araka of his first witness (DW2). The evidence of this witness was that he had acted as agent of 1st Respondent at Kimai Primary School polling station, on Farmers Party. He produced his identification letter and copy of oath of secrecy of I.E.B.C.

In his testimony, all agents should their identification before being allowed in with the documents being returned back. That Bosire Benjamin Munga (PW5) only came to the polling Station as voter who voted and went home and not as an agent. That for voters who needed assistance, the presiding officer called all agents and asked the voter his candidate in their presence before marking the ballot in their presence. He denied that 1st Respondent had taken the presiding officer away. Further, that no agent present raised any complaint and his candidate got 158 votes, a result he accepted and duly signed Form 35.

To Mr. Otieno's questions, the witness went on that voting closed at 6.00pm and that Kimai only had 1 stream and he could see and properly monitor the exercise. He confirmed that there had been several agents for a candidates in the 60 seals, but did not know which agent was for whom. He only mentioned a couple of them. And that upon closing of the boxes, he had not taken the serial numbers of the seals. He identified the form 35 filed by the I.E.B.C. as the one he had signed, and denied signing the one produced by the petitioners (CO-1). He did not know why the other agents did not sign the form.

As for Benjamin Bosire Munga (PW5), he stated that he knows him as they stay in the same village, and that he was not an agent at Kimai. And according to him, Kimai had 747 registered voters, and that without bothering to note the order of counting, he had only waited for his box (of county assembly) to be counted. He thereafter did not go to the tallying Centre.

And Livingstone Nyandworo Omoi (PW2) was 2nd witness of the 1st Respondent. He testified that he had acted as chief campaigner for 1st Respondent of Farmers' Party and that he was not given any letter of appointment having just been picked. He later heard over the radio that 1st Respondent had won with 2558 voters.

He must on that his appointment was based on trust and he went home after voting. He did not hear any other results being announced for the parties herein. That the announcement was between 3.00-4.00pm over the radio Egesa F.m. He denied that Amos Mosigisi was campaign manager 1st respondent neither did he participate in the campaigns.

And Daniel Okechi Abei (PW4) was 3rd witness of 1st Respondent. His evidence was that he had been agent of 1st Respondent at Mochorwa station. He produced his appointment letter and also oath of secrecy. That at the station, Timothy Nyarango got 44 votes, which he accepted even though he was not the leading candidate there. He denied that the presiding officer had awarded him any other higher number of votes. He also confirmed that the station had 608 registered voters. He stressed that he stayed at the station till the close of the exercise about midnight when the counting ended. He denied

that agents refused to sign the form 35 after 1st Respondent was awarded 404 votes in place of 44 votes. He also had taken the serial numbers of the boxes which confirmed were sealed.

John Misingi Marube(PW5) was also a witness of 1st Respondent. His evidence was that he had been chief agent of the 1st respondent. He duly annexed his appointment badger. He testified that he went through all stations and saw that voting was peaceful and later at the tallying Centre where he heard results being announced as 2558 votes for the 1st respondent and 2016 votes for the 1st petitioner. That at Mochorwa, it was announced 1st Respondent had got 44 votes. He denied that a figure of 2054 was read out for neither 1st respondent nor 2002 for 1st petitioner. That all the votes for 1st petitioner had up to 2016 votes, not 2002.

He went further that he had taken oath before an advocate in Kisii Town and later trained for the exercise at Tendere, 2 days before the elections. And that as chief Agent, his work was to go round the stations, and not sit on one station. And that after announcement of results at tallying Centre, he had rest at about 3.30pm on 5-3-2013. He also did not sign Form 36 because they had started celebrations immediately the results were announced. He denied that the forms annexed by petitioner were genuine, or that 1st respondent was given any preferential treatment.

The 2nd respondent Wesley Kipyegon Ruto was PW2. He is the Constituency Elections. Co-ordinator, Bomachoge Chache constituency and also the returning Officer for the whole constituency. His evidence was that he was based at the tallying Centre at Tendere secondary School with duties of receiving results from the polling stations and also Forms 34 and 35 (presidential and other positions). He would then announce the results and put them in form 36.

He went on that Kimai Primary School station, code 054, had 742 registered voters and 632 were valid votes cast and he duly confirmed that the form filed by the I.E.B.C. Was the correct results as it is in the format they used, was on commission letter head, signed and stamped by the presiding Officer and also Deputy Presiding Officer and 2 agents at the back. That he had received the form as it with the correction of the figure of rejected votes, and he duly entered the results in his form 36(WRR-2) and duly announced the same. On the form 35 filed by petitioners, he stated that same was in the same form as they used but it has variations as it shows number of rejected votes as 5. Also the figures in the form are not closed while the I.E.B.C figures are closed as a security measure. Same B also not stamped at the back by the Deputy Presiding officer. To him the results filed by the petitioners are not official results.

On the form 36 filed by the petitioners, his evidence was that same was not authorities as it is not in the format of form 36 the I.E.B.C used as it is not on letterhead, and is not headed. It is also has no logo and stamped of I.E.B.C. It is also blank on the reversed side, space for signature of returning officer, agents, number of registered voters, and percentage of voter turnout. He denied that same was supplied to the petitioners from his office on his authority.

This witness further gave evidence that 1st petitioner only went to his for the copies on 20-3-2013 after he had delivered the documents to I.E.B.C Headquarters and only had and only had to arrange for them to be brought back to his office. That he had travelled to Nairobi on the morning of 6-3-2013 after being cleared from the county tallying Centre in Kisii, where he had taken his results on 5-3-2013 at about 10.00pm. He had not come to Ogembo again the day petitioners claim to have met him in Ogembo. That accordingly to the official results filed, the winning candidate got 2558 votes and the 2nd on 2016 votes, and that is what he announced, not 2054 and 2002 as claimed by the petitioners. Further, that the form 36 could not be printed from the computer in his office.

For Mochorwa Primary School, code 044, his testimony was that same had 608 registered

voters as per the register of voters. That 1st Respondent got 44 votes and not 404 votes. He denied announcing same as 404 nor that did the polling station have 611 voters.

His evidence was that he had announced the results at between 3.00 pm and conceded at 4.00pm and not at midnight. And that he never ordered anyone out of the tallying Centre, and none of the petitioners complained to him and maintained that his dealings with the parties herein were purely official. And that at the end of it all, 1st Respondent won with a margin of 542 votes as compared to his closest follower.

On being asked by Mr.Otieno for petitioners, he confirmed that it is the presiding officers who filled Forms 35. That he never received any complaint that agents were never given Form 35. And this every candidate and party are entitled to 1 agent, though the discretion on agents number is on the Presiding officer. Those ballot boxes were delivered to him at the tallying Centre and were all intact and sealed. He denied that any seal on the ballot boxes had changed when he delivered them to court, though a few seals in the boxes had broken. That to him is not strange as the seals are not permanent. His testimony was that he had not realized the differences on the "O" and "I" digits for the seals of Bekongo Primary School code 051.

He went further that presiding officers ought to note why agents have not signed form 35. He went on that it was never brought to his attention that presiding officers used multiple forms, while conceding that CO-1 must have come from the commission. He otherwise denied it was the form he received from the presiding officer. He also conceded that no agent of candidate signed his form 36.

On being re-examined with respect to Gekongo Primary School serial numbers, he stated that the Executive officer Mr.Osike had received his delivery note showing the serial numbers of the seals as starting with 1 only to make a report of numbers starting with 0, a fact, Executive Officer may explain. Also that non signing of the forms by agents do not invalidate the results. And that overall, no candidate disputed any figure of any candidate.

The last witness for 2nd and 3rd respondents was Eunice Nyaboke Nyorera (DW7), whose evidence was that she had been the presiding officer at Kimai Primary School, code 054 having been interviewed and recruited. She admitted that Amos Mosigisi was her Husband but did not know if he was involved in any political activity.

She confirmed that she had entered the results on form 35 produced and filed by the I.E.B.C, as she had stamped it, her name and signature and also signed at the back by her Deputy Bonface Moywaywa and also the comments he noted at the bottom. She admitted that she had made the enhancement on the number of registered voters and rejected votes when she was verifying the results at the polling stations before forwarding the same to the Returning Officer. She denied she did the alterations scheme to favour a candidate.

This witness also admitted having filled in CO-1 produced by the petitioners. That she had filled 4 forms with the same information as she did not use any carbon paper, but that the one filed by petitioners had not been signed by the Deputy presiding officer and was left alone and she only submitted the one filed by the I.E.B.C as the official one. She termed the form filed by petitioners as a rough copy which she otherwise had taken to the tallying Centre as same is an I.E.B.C document. She summed up the incompleteness of the form i.e no entry for stream, no signature of the Deputy Presiding officer, not stamped. She denied assisting the 1st Respondent in any way by chasing away agents or swapping votes. Those agents had to have I.E.B.C a letter authorizing them, which letters she would hand back over after persuading. She denied that 1st respondent same and talked to her that day, nor the

knowledge that Amos was Chief campaigner of Timothy since she did not see his getting involved in the campaigns.

That at Kimai, 1st Respondent got 158 votes and 1st petitioner 367 votes and there were no protests over the elections. She had later pinned the results as required.

To the advocate for petitioners. She answered that she had first verified the agents before allowing them in and that as they counted from the presidential vote downloads, the agents become fewer and fewer. That she signed form 35, then her deputy and then the agents signed last. She maintained that as a presiding officer, she is authorized to upon verification, to correct the form and enhance, like she did on the registered votes and rejected votes. She otherwise admitted that she did not indicate the reasons why the agents did not sign and that she did not provide the agents with copies of the form. She had affixed the results as required, and noted in her form that the exercise had gone well.

She admitted filling CO-1 and that the 2 agents who signed same did so voluntarily and that since this was an I.E.B.C document, she had to had it over to the Returning Officer. She stressed that the number of rejected votes did not affect the votes of any candidate. She stated that she had announced her results at 4.00am with only 2 agents present, and there was no commotion at all.

On re-examination, she confirmed she had done the corrections in the presence parties as it would have been worse to present wrong figures. That official Results must have the stamp of the commission, and that the votes for each candidate were correct and none has raised any issue on its choosing to dwell only on rejected votes.

Upon close of case of Respondents' case, the court gave directions under Section 82(1) of the Elections Act, 2011, and ordered for recount of only 3 polling stations which had been the main subjected of this petition i.e. Mochorwa primary School, Kimai primary school and Rianyakwara primary School. The exercise was carried out on 31-7-2013 in presence of representatives of the parties herein under the supervision of the court's Executive Officer. Appropriate returns were filed in court duly signed by all the representatives with no objections being raised by any of the parties herein.

The parties thereafter proceeded to file their respective written submissions. A session was then held in court on 30-8-2013 for parties to make highlights on their submissions. I have carefully considered the said submissions filed and the authorities attached. I have also considered the highlights on the submissions that each party made in court on 30-8-2013.

As I understand it, this petition was hinged both on the law regarding election petitions and on the evidence produced by the parties. The submissions of the parties and the highlights made were also both on the law and the evidence produced in court during the trial. It is noted that the 4 petitioners filed a joint statement of issues for determination. The 1st Respondent on the one hand and 2nd and 3rd respondents on the other hand also filed separate issues for determination. I have prevised the said 3 sets of issues filed and I am of the opinion that same can be synchronized into 1 set of issues as follows;

i) Whether, the election held on the 4th day of March 2013, in respect of the county assembly Representative of Bosoti/Sengera ward was conducted in a free, fair, transparent and credible manner in compliance with and of substantially conducted in conformity with the constitution, and all provisions of the law and practice of elections.

ii) Whether the 1st respondent was validly elected, declared and gazette as the county Assembly

Representative of Bosoti/sengeru County assembly Ward in the General Election held on 4th day of March, 2013.

- iii) Whether this petition is legally competent.
- iv) Whether the petitioners' petition herein has merit
- v) Who should bear the costs of this petition"

In determine the above issues. I propose to deal with matter of law first and sum of same with an analysis of issues of evidence raised by the parties.

1) Issues of Law Raised

on the matter of law raised with regard to this elections, I must commend the 3 Advocates for the parties herein for the extensive and well researched presentations. The counsel quoted both from the constitution, the relevant Act of parliament and subsidiary legislation. A number of Judicial Decisions were also relied on and highlighted. This court formed the opinion that all the parties were in agreement on the substance of the legal arguments raised. This court is bound by the decisions of the superior courts quoted by the parties.

Among the salient provisions and decisions relevant to our present case are;

First, there is the constitutional provision at section 86, which states holding 2, "At every election, the Independent Electoral and Boundaries Commission shall ensure that

- a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
- b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.
- c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer.
- d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of ballot materials.

This constitutional provision is to me. the guiding principle in the elections such as this in as far as it dictates that such elections must be conducted in a free, transparent fair and verifiable manner .of course ,the burden of proving that the election does not meet this constitutional threshold is on the petitioners making the allegation. In effects, the petitioners are duly bound to prove by way of facts and or evidence, that the said thresholds were not met in the conduct of the elections. This court is bound by the decision in **Joho vrs Nyange d and (2008)3KLR (EP)** a case relied on by all the parties that,

"The burden of proof in any election petition lies with the petitioner as he is person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court ,it can not be said that the standard of proof required in an election petition is proof beyond a reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences, a very high degree of proof is required".

The above provision dictates that the degree of proof required in an election is of such a high standard that mere allegation without sufficient evidence cannot meet those standards.

Another guiding principle on which this petition was based was raised by the petitioners i.e. Regulation 79 of the Elections (general) Regulations, 2012 requiring that the presiding officer, the candidate or agents shall sign the declaration in respect of the elections and that in case of failure to sign by the candidate and agents then, the presiding officer must note in the same declaration the reasons for the failure of the candidate or agents to sign the same. Whereas, the petitioners relied on this general provision, the 2nd and 3rd Respondents relied more on sub-regulation 6 of the same regulation that;

“the refusal or failure to of a candidate or an agent to sign a declaration form under sub-regulation 4 or to record the reasons for their refusal to sign as required under this regulation, shall not by itself invalidate the results announced under sub-regulation (2)(a)”.

To me, this sub-regulation 6, imposes a duty on the petitioners to go beyond merely alleging that the agents or candidates did not sign the declaration form, and in effect after evidence that shed light on the effect of such non-signing on the electoral process i.e refusal or failure to sign per shall not in itself invalidate the results.

A similar provision is also in the main statute, Elections Act, 2011, at section 83,

“No election shall be declared to be void by reason of non-compliance with any written law relating to that 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 results of the elections”!

The above provision puts the burden of proving that the election was not done in accordance with the principles of the constitution on the petitioner. It goes further to direct that the said breaches must be proved to have affected the results of the election. Clearly the key word here is “results “of the election.

The parties referred this court to a number of authorities on this matter. Petitioners relied on Benard Shindi Masaka vrs Dr.Boni Khalwale d 2 othres,E.P.2/08(K.K.)(2011)EKIR where at page 16 of the decision, the court stated;

“Accordingly where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to election. Conversely if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the results of the election had been affected”-(quoting lord Denning in Morgan vrs Simpson (1974) 3ALIER 722 at 728.

petitioners also relied on William Kabogo Gitau vrs George Thao d 2 others (2010)eKLR,where the court found in favour of the petitioners where in 37 polling stations ,agents had not signed with no reasons being given.

On the other hand, the 2nd and 3rd respondents distinguished this point and relied on Munguo vrs Munire d 4 others (2008)2KLR(EP 20),where the court held at 3,that whatever little deficiencies that may have occurred in the conduct of the election were not results;

“we however find the complaints raised were cannot and could not have affected the results of

the election---".

And also in the same case of Joho vrs Nyange, where at holding 5, that some errors in an election are nothing more than what is always likely in the conduct of human activity. And that if the errors are not funder mental, they should be excused or ignored.

The case of Mbowe vrs Eliu PDS(1967) EKLR 240 cited by the advocate for 1st respondent gives directions on what is regarded as affecting the results, when at holding 2 the judges held;

"Affected the result", means not only the result in the sense that a certain candidate won and another 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 appearance to be when first determined".

At page 514 of the Joho vrs Nyange case, it was held,

"Having carefully examined those forms, I am satisfied that the errors in them are arithmetical in calculating the number of ballot papers supplied and failure to record correctly the serial numbers. These are minor irregularities which should be ignored".

What comes out of the above authorities as cited by the parties is that the petitioners must prove by way of evidence that there were irregularities in the electoral process and that such irregularities substantially affected the results of the elections. As seen above, the superior courts have severally held that if the irregularities aggrieved of are of such minor nature so as not to substantially affect the results, the same shall be ignored and the elections results shall remain undisturbed. It is a matter of evidence to prove the existence and effect of such irregularities (i.e quantitatively and qualitatively as submitted by petitioners counsel).

(2) Evidence of the Parties:-

Section 107 of the Evidence Act, cap 80 guides us on this limb;

Section 107(1)

"Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist""

In effect, he who alleges must prove the allegations by way of evidence. We have also discussed the standard of prove herein (election petition) as above the normal balance of probabilities (Marete case and also Joho case).

The 4 petitioners were all candidates in the elections and jointly filed this petition and dully supported same with Affidavits they relied on. They also only filed same within the statutory period and paid the required deposits. There was no objection raised as to the competence of this petition. I am on my part persuaded that to that extent this joint petition is competent.

To prove the petition, a total of 5 witnesses testified for petitioners basing their evidence on the affidavits filed in support of the petition. I have perused the said Affidavits and I must say that they are all strikingly similar in contents and allegations.

The petitioners raised the issue of Mochorwa primary School. All the petitioners gave evidence

that at the Mochorwa Primary School polling station, 1st Respondent had been awarded 404 votes instead of 44 that he actually got. All the petitioners gave evidence that they relied on information given to them by their agents to make this claim. This court noted that none of the petitioners produced any tangible evidence to prove this claim in the form of any form 35 if any. Similarly, none of the petitioners called any of their agents at this station who could put more light on this claim. To the contrary, it is clear from the results filed by the 2nd and 3rd Respondents that in fact 1st Respondent had been awarded 44 votes at the station and not 404 as claimed by the petitioners. In fact during the hearing, when confronted with this figures, even 1st petitioners conceded that the figures filed by the respondents are correct. The 2nd petitioner also confirmed that if indeed the tally for 1st respondents did not include 404 votes of Mochorwa (but 44 votes) he had no problem. The same position was held by the other petitioners.

On this matter, the petitioners clearly relied on their agent's information. However, the said agents were never called to give evidence in court. In fact, the petitioners could not even name who their said agents at mochorwa were. I have carefully considered the form 36 filed by the 2nd and 3rd Respondents and confirmed that the tally for 1st Respondent for Mochorwa was 44 votes and not 404 votes as claimed by the petitioners.

Still on Mochorwa, the petitioners gave evidence that the station had 611 registered voters, No evidence of this was produced in court and it was clearly contrary to the records of I.E.B.C produced herein Form 36 showing there were 608 registered voters at Mochorwa polling station.

The court however notes that apart from these 2 issues of total number of registered voters and votes awarded to the 1st respondent, none of the petitioners had any compliant on the number of votes awarded to them.

The 2nd polling station on which the petition was based was Kimai Pri.School. With respect to Kimai Pri.School polling station, the petitioners had 2 issues First was that there were alterations on form 35 first increasing total number of votes cast from 647 to 747 and secondly, that there was also an accounted for 5 votes, and and increments/alterations of number of rejected votes from 7 to 12. The parties duly filed the respective statutory documents (forms 35) to support their claims and I shall shortly discuss the same. However, what came out clearly on this issue and also conceded to by the 2nd and 3rd respondents (evidence of DW 7) is that the alterations were only on the number of votes cast and number of rejected votes. There was clearly no enhancement of votes of 1st Respondent. There was also no change or any decrease in the total number of votes garnered by the petitioners. In court, none of the petitioners was aggrieved with the votes awarded to them or indeed to the other contestants. In effect therefore, the alterations (obvious even on casual look), did not affect any tally of any candidate at all.

The other issue raised with respect to Kimai Primary School polling station was on the fact that the presiding Officer Eunice Nyorera Nyabera apparently is a wife of one Amos Mosigisi, a chief agent of 1st Respondent. It was also the evidence of the petitioners that the said Presiding Officer aided and influenced illiterate, blind and lame voters to vote in favour of the 1st Respondent, by keeping the agents away as she assisted them in voting, and further, (PW5) that 1st Respondent came and took away the Presiding Officer to the filed away from the voting hall where the 2 discussed alone. On the first limb of this ground, it was admitted by the Respondents that Eunice Nyorera Nyabera was indeed the Presiding Officer at Kimai Primary School and indeed that she is married to Amos Mosigisi as claimed. However, it was incumbent upon the petitioners to prove by way of evidence that first that her husband was chief agent of 1st Respondent, and secondly, how this relationship made her act in favour of 1st Respondent. There was no evidence at all on the participation of Amos mosigisi in this election and the assertion that he was chief agent of 1st respondent remained barely an unsubstantiated claim. Similarly, there was no

claim or evidence on the manner in which the Presiding Officer acted in favour of 1st Respondent on the basis of her alleged relationship with the said Amos Mosigisi.

Further, apart from 1st petitioner, none of other petitioners called witness their agents of Kimai Primary School, Learning their allegations of the Presiding Officer influencing illiterate voters and others who needed help mere allegations. The only witness who gave evidence herein as agent was Benjamin BosireMunga (PW5) for 1st petitioner where evidence was on how the Presiding Officer influenced voters in favour of the 1st Respondent. On cross-examination however, the evidence of this witness was put to question. The defence also called witnesses to prove that the said PW5 was never at Kimai Primary School as agent of petitioner number 1. That he had only gone to the polling station as a voter.

This court is cognizant of the provisions of section 60 of the Electons Act which States;

section 60(1) Every elections Officer candidate or agent authorized to take part in any proceedings relating to the issue or receipt of ballot papers or to attend at a polling station not the counting of the votes, shall before so in the 3rd schedule.

This provision clearly requires all parties' agents or candidates to take oath of secrecy. If indeed this witness was agent of 1st petitioner, where is even a copy of the oath of secrecy he was subjected to" And where is his written authority from his sponsoring party" There documents are material here to convince this court that indeed this witness had acted as an agent of 1st petitioner, and more particularly, when the agents of 1st Respondent have annexed copies of both documents and also the evidence of DW2, Evans Moranga Araka who swore as to knowing PW5 well and had only come and voted at kimai Primary School to vote and had not been at the voting hall as an agent of 1st Respondent. In the absence of any specific proof that the said PW5 was in fact an agent of 1st petitioner at Kimai Primary School, the evidence of this witness clearly has lower probative value.

On the allegation of influencing illiterate, blind or other voters who required assistance, it is clear from the evidence on record that even PW5 also was allegedly there had no names, or even number of such voters. For the other petitioners, this again was information got from their unnamed agents.

Allegations of vote swapping were also made. At the hearing none of the petitioners or their witness gave evidence of a single case of swapping of votes. Even view of the fact that none had any issue of with the votes awarded to them, I am no convinced that this allegation was proved.

The issue of Rianyakwara polling station was raised by PW4 Stanley Oirere Ayunga, 3rd petitioner. That his agent told him he had garnered a vote announced as 81 and 3 votes announced as 9. This issue was dealt with at the recount ordered. However, the said agent of 3rd petitioner herein like the others remained unnamed and was never called as a witness. The position was the same in respect of PW3 Elijah Mogonchi Mbweke, 4th petitioner, in respect of Riteke Primary School polling stations where he claimed his agent had told him he had got 22 and 12 votes in the 2 streams, but declared as 2 in each case.

An issue was brought out of the Form 35 produced by the petitioners (CO-1) and that filed by 2nd and 3rd Respondents in their reply on 4-4-2013 (WKR-2) It was contended by petitioners that CO-1 was the result as announced and that WKR-1 was an alteration of rejected votes to 12 from 7, increments of 5. The other alteration on WKR-1 is on registered voters from 647 to 747 as in CO-1 was rough paper and that the complete form containing the official results announced at the station is WKR-1. I have carefully considered the various lengthy arguments on the 2 forms and carefully compared the 2. Since the total number of registered voters was altered to reflect the same number as in CO-1, this does not

seem to have been an issue with the Respondents. The issue is on the 5 unaccountable votes on CO-1. However, it is clear that those 5 unaccounted votes are only rejected votes and not stamped. It is also not countersigned by the deputy presiding Officer. To me, it is an incomplete form as compared to WKR-1. Further, the origin of CO-1 is itself unclear with the petitioners saying that PW5 had picked it from where the Presiding Officer had pinned it at the polling station door, while PW5 himself maintained that the presiding officer had issued it to him. The Respondent (I.E.B.C) have maintained that this is an I.E.B.C document surrendered upon delivery of election material as rough paper and not as official results.

It is clear that these 2 documents are not copies of each other since their serial numbers are not the same (i.e. s/n ending with 762 and 765). The names of the 2 agents at the back are also not the same. No figures for the candidate have been altered or changed. So, if the figures for candidates have not been changed, one would ask why the Presiding Officer decided to make the 2nd form (WKR-2) which has a latter serial number. Whatever the reason, I do not see any intentions of manipulating the results. Had there been such intentions, the figures of the candidates would have changed in favour of one candidate. CO-1 filed by the petitioners is clearly an incomplete document not stamped or countersigned by the Deputy Presiding Officer and I am not convinced it can be official results.

The other document that has raised a number of submissions is CO-2(a) filed by the petitioners. Again, the origin of this document is in dispute with petitioners' re-examining that they got it from one Caro, a clerk at the I.E.B.C offices at Ogembo, a fact the 2nd and 3rd Respondents have denied. I have perused the same carefully with respect; it is not possible to determine the origin of this document. The same is not on any letterhead nor stamped. Neither is it signed by anyone. A comparison of it with the Form 36 filed by 2nd and 3rd Respondents (WKR-2) clearly shows a complete Form 36 looks. So, being a document with no relationship with the I.E.B.C as it bears no letterhead, stamp or signature of the Returning Officer, this court cannot regard this document as an official Form 36.

The petitioners further gave evidence that at the tallying Centre, the Returning Officer had announced the 1st Respondent as the winner with 2054 votes and 1st petitioners 2nd with 2002 votes of course no evidence was laid by the petitioners to prove this. However, the petitioners have not disputed a single digit of figures on the Form 36 filed by the I.E.B.C which clearly shows that 1st Respondent got the most votes at 2558 votes, essentially giving the 1st petitioner the 14 votes he had alleged had been snatched from him.

This court noted that whereas all the petitioners testified that they had been present at the tallying hall, the evidence in totality actually raised doubts about this. All the petitioners testified that the results were announced at midnight on 5-3-2013. However, their own witness, PW5 who also testified as to being at the tallying Centre, testified that the results were announced at between 3.00pm and 4.00 pm. Why this variance in such an important and obvious evidence? In fact, the evidence of PW5 corroborated that of the Respondents on this fact; creating a huge doubt as to whether indeed petitioners were at the tallying Centre. And obviously, if they were not present, then their evidence of the results as announced has no basis at all.

On 16-7-2013, the court under the supervision of the Executive Officer received all the ballot boxes and the conditions of same were duly noted. The only material contest that came out of this process was the serial numbers of the seals on the box of Gekongo Primary School polling station, code 051. Basically, it was submitted that the Executive Officer had now noted that the serial numbers now started with "O" instead of 1. I have compared the written return of the Executive Officer in which the serial numbers with "O" are noted with the delivery note used by the I.E.B.C in delivery some to court and also duly signed by the same Executive Officer. The said delivery note clearly shows the serial numbers of the seals of Gekongo Primary School as starting with digits "1" and not "O". I do not believe

that the seals may have been later changed while in the hands of the court. I can only presume that “O” as typed by the Executive Officer was a mistake or error. It is otherwise clear that no party ever raised any issue with the results and tally of this particular station.

Again on 30-7-2013, the court ordered a recount of polling stations, being Kimai, Mochorwa and Rianyakwara. The said exercise was done under the supervision of the court Executive Officer and in presence of all the parties herein on 31-7-2013 and a unanimous report filed with the court. For Mochorwa it was noted that 1st petitioners votes remained, Elijah Mogochi got 6 in place of 0, Ibrahim Onami 460 in place of 458 while votes of 1st Respondent remained at 44. Total registered voters was found to be 608 with 532 votes cast. The 3 stations were ordered be recounted because they were the only stations mentioned by petitioners as having experienced irregularities.

For Kimai, Cyrus Ogega had 366 instead of 367 as earlier awarded, Elijah Magonchi still had 1, Ibrahim Onami also still had 5 and 1st petitioners also remained at 158 votes. The other particulars remained the same though it was noted that Form 35 was missing.

And for Rianyakwara, all the results remained the same except for 2 candidates Jared Onwanga who none got 1 more vote at 55 and John Mochabo Abok also 1 more vote.

In all therefore throughout the evidence to the recount exercise, the court noted the following irregularities:-

- I. The presence of a 2 Forms 35 for Kimai Polling station.
- II. Failure of some agents to sign the forms 35 and 36 the petitioners referred to.
- III. Failure of the Presiding Officers and the Returning Officers to give reasons for failure to sign same by agents.
- IV. The issue of serial numbers of ballot box of Gekongo Primary School polling station “i.e “O” and “1”
- V. The differences noted on recount:

The issue for determination by this courts it whether these irregularities are such as they substantially affected the results of this election. I have considered the same in extent and scope as already analyzed above. I note that all these irregularities come up after the voting exercise. I am not convinced that their magnitude is such that they could affect the results as announced. I am well guided by the authorities earlier discussed i.e the holdings in Joho vrs Nyange and Munyao vrs Munire d 4 others and Mbowe vrs Eliu Poo. Also section 83 of elections Act, 2011 and Regulation 79(6) of the Elections (General) Regulations, 2012. I am in this event persuaded that the submissions of learned counsel for petitioners that the court be guided by the William Kabogo vrs George Thuo d others case may not be proper in view of the sheet size and extent of the irregularities the court noted in the Kabogo case.

Being convinced that the conduct of this election passed both the quantitative and qualitative tests I find as follows:-

I) That the election held on 4th day of March, 2013 in respect of the County Assembly Representative of Bosoti/Sengera Ward was conducted in a free, fair, transparent and credible manner in compliance with and in conformity with the constitution, and all provisions of the Law and practice of elections.

ii) That the 1st Respondent was validly elected, declared and gazetted as the County Assembly Representative of Bosoti/sengera County Assembly ward in the General Election held on 4th of March, 2013.

lii) That though this petition is legally competent, the same lacks any merit

3. Issue of costs:-

On the issue of costs this court is guided by section 84 of the Election Act,

Section 84 "An election court shall award the costs of and incidental to a petition and such costs shall follow the cause".

In view of the above observations, i am not convinced that the petitioners have managed to prove this petition to the standards required by the law as to enable this court grant any of the prayers sought in the petition. I consequently find no merit in this petition and I dismiss the same wholly. I award costs of this petition to the Respondents. Further, as there was no sufficient evidence to prove any, I also find that no electoral offence was committed by any party herein. orders accordingly.

Dated this 6th day of September 2013

Signed.....

Daniel Ogolla

Ag CHIEF MAGISTRATE

6/9/2013



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