



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

THE ELECTIONS ACT, 2011

PETITION NO. 1 OF 2013

AND

ELECTION FOR THE SENATOR FOR BOMET COUNTY

NICHOLAS KIPTOO ARAP KORIR SALAT.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

WILFRED ROTICH LESAN.....2ND RESPONDENT

ROBERT SHUNET (COUNTY RETURNING OFFICER),

BOMET COUNTY.....3RD RESPONDENT

KENNEDY ONCHAYO.....4TH RESPONDENT

WILFRED WAINAINA.....5TH RESPONDENT

PATRICK WANYAMA.....6TH RESPONDENT

MARK MANKO.....7TH RESPONDENT

ABDIKADIR SHEIKH.....8TH RESPONDENT

J U D G M E N T

Following the general elections held on 4-3-2013 the 2nd respondent was declared senator in the senatorial contest for Bomet County by garnering 115,931 votes. His nearest contestant was the petitioner who was declared to have got 98,036 votes. The other contestants were Andrew Langat 4,965 votes, Antony Kimetto 2,807 votes, David Kitur 2,707 votes and Warkach Tonui 1,816 votes. The County

has five constituencies. They are Chepalungu, Konoin, Bomet Central, Sotik and Bomet East. The 2nd respondent was running on United Republican Party (URP) ticket and the petitioner on KANU party ticket.

On 26-3-2013 the petitioner filed this petition seeking the following orders:

- a. the recount and scrutiny of all votes cast for the election of the senate seat in Bomet county;
- b. a declaration that the 2nd respondent was not validly elected as senator;
- c. a declaration that he (the petitioner) was validly elected for the seat and an order directing the 1st respondent to issue him with a certificate to that effect and to gazette him as the duly elected senator;
- d. the 2nd respondent to be barred and disqualified from participating in any lawful election pursuant to the Elections Act for a period of five (5) years on account of electoral malpractices; and
- e. he (the petitioner) be paid costs of the petition.

The grounds upon which the petition was premised were set out in the petition and in the affidavit of the petitioner and the affidavits of his witnesses. He claimed that there were various polling stations where the votes cast exceeded registered voters; stations where the voter turnout was remarkably lower than the average; and stations where his votes were exceedingly understated and those of the 2nd respondent overstated. These incidents allegedly happened in named polling stations in Chepalungu, Bomet East and Sotik constituencies. The petitioner then complained of grave incidents of electoral malpractices, irregularities, fraud, intimidation, bribery and coercion by the respondents in the conduct of the election. He alleged that, as a result of all these, the election was not free and fair and neither did it reflect the will of the electorate in Bomet County.

The 1st respondent is the Commission that conducted the election. The 3rd respondent was the County Returning Officer, the 4th respondent was the Returning Officer for Chepalungu constituency, the 5th respondent was the Returning Officer for Konoin constituency, the 6th respondent was the Returning Officer for Bomet Central constituency, the 7th respondent was the Returning Officer for Sotik constituency, and the 8th respondent was the Returning Officer for Bomet Central constituency. These officers responded to the petition, and also filed affidavits, to deny the allegations contained in the petition and affidavits in support. Their case was that the election was conducted in accordance with the law, was free and fair and reflected the will of the electorate. They stated that the results declared were accurate and verifiable.

During the pre trial conference, the parties agreed that the following were the issues for determination:

- a. whether sufficient basis had been laid to support an order for scrutiny and or recount, and for which polling and/or tallying stations;
- b. whether there were election malpractices, irregularities and offences committed during the election, and by whom;
- c. whether such malpractices, irregularities and electoral offences substantially affected the outcome of the final results;
- d. whether the 2nd respondent was validly elected as the senator for Bomet County;
- e. whether the petitioner was the winner for the senatorial seat for Bomet County; and
- f. who was to pay the costs of the petition.

During hearing, the petitioner testified in support of the petition and called Alfred Kiprono Bett

(PW3) and Richard Kiplangat Sigei (PW2) to testify. PW3 was the chief agent for CORD coalition presidential candidate for Chepalungu constituency whereas PW2 was KANU's chief agent for the same constituency. Michael Korir, Richard Kipngeno Mosonik, David Mutai, Jackson Cheruiyot Rono, and Richard Sigei each swore an affidavit to support the petitioner's case, but did not orally testify. The 3rd to 8th respondents each testified. The 2nd respondent also testified. He called Rachel Cherotich (DW8) and Daniel Maritim Chelogam (DW9) to testify. He then relied on the affidavits of Nancy Chelagat and Joseph Kibet Chepkwony who did not orally testify.

The petitioner was represented by Mr. Orina whereas the 2nd respondent was represented by Mr. Lilan, Mr. Arusei, Mr. Langat and Mr. Kitur. The 1st and 3rd to 8th respondents were represented by Mr. Yego.

At the conclusion of oral evidence, the petitioner filed an application dated 24-6-2013 for the scrutiny and recount of the votes in all the polling stations in Bomet county, or, in the alternative, a partial scrutiny and recount in respect of some of the polling stations in Bomet Central, Sotik, Konoin, Chepalungu and Bomet East constituencies. Arguments were received on the application, which the respondents had opposed. A ruling was delivered on 10-7-2013 dismissing the request. That, in my view, settled prayer (a) in the petition which sought an order for the recount and scrutiny of all votes cast for the election. The prayer was the subject of issue (a) of the agreed issues for determination. This leaves issues (b), (c), (d), (e) and (f).

Before the analysis of the evidence, and the determination of these outstanding issues, it is important to consider the law relating to the resolution of petitions. Counsel, both in the written and oral submissions, addressed this point at length.

Under Article 38 (2) of the Constitution of Kenya 2010

“Every citizen has the right to free and fair and regular elections based on universal suffrage and the free expression of the will of the electors.”

Under Article 81 (e), the electoral system should comply with the principle of free and fair elections that bear the following characteristics:

- a. secret ballot;
- b. free from violence, intimidation, improper influence or corruption;
- c. conducted by an independent body;
- d. transparent; and
- e. administered in an impartial, neutral, efficient, accurate and accountable manner.

Section 83 of the Elections Act (No. 24 of 2011) provides that :

“83. 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.”

Before the new dispensation, elections in Kenya were conducted under, and regulated by, The National Assembly and Presidential Elections Act and the Presidential and Parliamentary Election Regulations made thereunder. Section 28 of the Act is what has become section 83 of the Elections Act, word for word. The Court of Appeal in **James Omingo Magara -VS- Manson Onyongo Nyamweya &**

Others, Civil Appeal No. 8 of 2010 at Kisumu had occasion to consider the implications of section 28 in a case where three ballot boxes were inexplicably missing; some ballot boxes had broken seals and there was no explanation; some ballot boxes had only the votes of the seventeen candidates and the returning officer offered no explanation; there had been attempt to burn down the building in which the ballot boxes were being kept; and the process of scrutiny and recount had disclosed numerous irregularities, among them unsigned, and therefore, unauthenticated Forms 16A. The appellant had won with 9,832 votes and his argument was that that represented the will of the electorate. Justice Omolo read the majority decision and stated as follows:

“In my view these irregularities could not have been cured under section 28 of the National Assembly and Presidential Elections Act. That section cannot be used to cure a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. Again to use the section to cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the missing boxes, should simply amount to encouraging vandalism in the electoral process. Our experiences in Kenya following the 2007 elections part of which we are discussing herein, show us that no Kenyan, whether as an individual or as part of an institution, ought not to encourage such practices. Section 28 cannot be used to white- wash all manner of sins which may occur during the electoral process and for my part I have no doubt that Parliament did not design the section for the purpose of covering serious abuses of the electoral process.”

Justice Githinji wrote a dissenting judgment in which he stated as follows:

“On analysis, I have come to the conclusion that the election was conducted in accordance with principles laid down by the electoral law and that the anomalies found in some Form 16A and 17A were not so pervasive or serious as to affect the entire election. I am satisfied that those were post-election procedural anomalies that were cured by both scrutiny and counting and by section 28 of the Act.”

The Judge relied for the decision on the English case of **Morgan-VS- Simpson [1975] 1 QB 151** which dealt with a section with similar wording. The court interpreted the section to mean as follows at page 164

“1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections the election is vitiated, irrespective of whether the result was affected or not.....

2. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls.....

3. But, even though 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 at the polls and it did affect the result, then the result is vitiated.”

What I gather from the foregoing in relation to section 83 of the Elections Act is as follows:

- a. the electoral Commission should conduct a free, fair and transparent election whose results are accurate and verifiable;
- b. such election should reflect the principles in the Constitution and the Elections Act;
- c. an election is a tedious exercise that is undertaken by officials who are human beings and who are bound to make honest mistakes and errors;

- d. nonetheless, the court will strive to preserve the election if it was substantially conducted in accordance with the principles in the Constitution and the Elections Act; and
- e. where there are transgressions and breaches of the electoral rules made under the Elections Act, it has to be shown that such transgressions and breaches were so bad or pervasive that they compromised the integrity of the election and/or affected the result.

The next question relates to the burden and standard of proof. The jurisprudence contained in the various decisions cited by counsel in their submissions, and which culminated in the decision of the Supreme Court of Kenya in **Raila -VS- IEBC and Others Petition No. 5 of 2013** at Nairobi, appears to me to be as follows:

- a. the petitioner who seeks to annul an election bears the legal burden to prove the allegations contained in the petition;
- b. after that, the Commission has the evidential burden to show that the election was conducted in accordance with the Constitution and the electoral law;
- c. the standard of proof is above the balance of probability though not as high as beyond all reasonable doubt; and
- d. when an election offence is alleged, the standard of proof is beyond all reasonable doubt.

What evidence was placed before the court by the petitioner and his witnesses" The evidence can generally be narrowed into two. One, that in various polling stations the votes cast exceeded the registered voters; stations where voter turnout was remarkably lower than the average; and polling stations where the petitioner's votes were excessively understated and the 2nd respondent's votes irregularly and unfairly overstated. These happened at Nyatembe, Sigor, Kapoleseroi, Kesosio, Kimindilil, Kabema, Kapsio, Kyogong, Cheboriot, Kipsegon, Mismis, Kiplegei, Kataret, Kamogiboi, Chebunyo, Kaptorokwo, Kaptumoi, Highland, Kimananga and Chemagel polling stations in Chepalungu constituency; Magenchi and Chepkolon polling stations in Bomet East constituency; and Kimoso, Kaptililno and Chebirbelek polling stations in Sotik constituency. For Chepkolon polling station, the allegation was that although the registered voters were 435, the votes allocated to the candidates were 647. This meant that there were more votes cast than the registered voters. The petitioner testified that he relied on his agents and the Forms 35 and 36 supplied to him by the Commission to reach the analysis above.

When cross-examined by Mr. Yego, the petitioner was shown paragraph 20 of his petition in which he had claimed that whereas the total votes cast for Presidential election in Bomet County was 226,276 (89.66%), Women Representative 227,240 (90.05%), Governor 226,817 (89.88), the Senatorial elections showed 174,334 votes (69.08). In the paragraph he claimed that the percentage was later announced to be 90% and then reduced to 80%. He was forced to admit that the senatorial votes he gave in the paragraph excluded 53613 votes for Sotik constituency. This raised the senatorial votes to 227,947 which was generally in line with the votes cast in the other elections.

The 3rd to 8th respondents admitted that there were arithmetical errors in the Forms 35 and 36 which were attributable to fatigue and pressure owing to the fact that six elections were conducted at the same time. This led to errors and mistakes in the completion of the Forms and also in tallying. They testified that the mistakes and errors were, however, minimal and honest. Further, that they affected all candidates, and not only the petitioner. The 3rd respondent testified that, for instance, in Chepalungu constituency the petitioner had been added 495 votes which he reduced and the 2nd respondent had been given 453 votes which he reduced. In Sotik constituency, the petitioner had been given 239 votes less and the 2nd respondent had been given 189 votes less. He adjusted the votes during tallying. In all, he stated, the errors and disparities did not reach 1000 votes, and affected both the petitioner and the

2nd respondent. He blamed the errors and disparities to human error and fatigue, rather than to fraud or manipulation.

The petitioner had claimed that at Magenchi and Chepkolon polling stations the votes cast were more than the registered voters. The 8th respondent was the returning officer for Bomet East constituency in which the two polling stations were. He produced Form 35 for each station to show that at Magenchi the registered voters were 292 and the votes cast were 256. At Chepkolon, the registered voters were 706 and the votes cast were 647. In either station, he stated, the tally allocated to candidates did not exceed the valid votes cast.

When the petitioner was cross examined by Mr. Arusei he stated as follows:

“I did not ask for a recount in any polling station..... In the petition I rely on information supplied to me by my agents. That was the only source of my information..... I dispute the results declared. In my calculation I won the election. I have not done the calculation in the petition.”

I consider that the petitioner has not alleged, and neither did he call evidence to show, that the impact of the errors and disputes was more than what the respondents admitted. He did not show that when all the errors and disparities are considered they were such that would materially influence the results in his favour, or at all. Further, I do not find that the petitioner has shown that there was any station in which the votes cast exceeded the registered voters.

I bear in mind that, according to the declared results, the 2nd respondent obtained 17,895 votes more than the petitioner. Considering the total number of valid votes cast and what was obtained by the respective candidates, this was a wide margin.

The second limb of the complaints was contained in paragraph 13 of the petition which stated as follows:

“13. The Petitioner states that prior to, during and after the elections at the time of tallying and announcement of the results grave and serious irregularities, fraud, intimidation and coercion of voters were committed by the Constituency Presiding Officers and the 3rd Respondent so much such that the outcome of the election was not free and fair and a reflection of the will of the Bomet County electorate.”

The petitioner then went on to outline the:

“Particulars of electoral malpractices, irregularities, fraud, intimidation, bribery and coercion by the Respondents.”

The particulars were enumerated in sub-paragraphs (a) to (v).

In the submissions by the counsel for the 2nd respondent reference was made to the definitions of the terms “malpractice” and “irregularity” as found in **Black's Law Dictionary**, 9th Edition. At page 1044 “malpractice” is defined to mean

“An instance of negligence or incompetence on the part of the professional.”

At page 906 “irregularity” means

“something irregular especially an act or practice that varies from the normal conduct of an action.”

Reference was also made to the meaning of “irregularity” as contained in the **Oxford Advanced Learner's Dictionary**, 8th Edition at page 795 as follows:

“an action or practice which is not according to the normal rules or not normal.”

In (a) it was alleged that at Kapamban polling station the petitioner got 42 votes but was declared to have got 0 votes. His agent complained and this was corrected. That, in my view, should have ended the matter. In (b), (c) and (d), it was alleged that at Siongiroi polling station the following things happened:

- i. at about 4 p.m on the voting day the agents of the 2nd respondent were conducting campaigns to influence the voters who were on the queue to cast their votes;
- ii. during voting, in the polling room, the agents of the 2nd respondent demanded, and were allowed by the presiding officer, to assist elderly voters to cast their votes; and
- iii. the agents of the 2nd respondent demanded, and were allowed by the presiding officer, to accompany some voters to the polling booth where they ensured that the voters voted for him.

Richard Kiplangat Sigei (PW2) was the petitioner's chief agent for Chepalungu constituency in which Siongiroi polling station was. He testified that he had appointed Geoffrey Rotich as their agent at Siongiroi polling station. He was, however, contacted at 3 p.m and told the agent had not reported. He went there and found that in the room the agents were mingling with voters; that agents were assisting voters and even marking the ballot papers for them; and outside some voters were wearing party caps and t-shirts. He appointed Rachel Langat to be their agent. He also complained to the presiding officer about the happenings. The officer, however, looked overwhelmed. This Rachel Langat, however, testified for the respondents as DW8. She stated that she was appointed at 11 a.m, and not at 4 p.m as alleged by PW2. The station had agents appointed by political parties and none of them raised any complaint. No agent marked a voter's ballot paper. Any voter who required assistance was assisted and his vote marked by the presiding officer in the presence of agents. At the conclusion of the voting, counting was done and she signed Form 35. She stated:

“Everything went on well. I have nothing to complain about.”

The 4th respondent was the returning officer for Chepalungu constituency and testified that the complaints being raised by PW2 were never reported to him. It is clear to me that, in view of the evidence of DW8, the evidence of PW2 is not believable and therefore the complaints in (b), (c) and (d) are without basis.

PW2 testified about 3-3-2013, a day to voting. He stated that between 6 p.m and 7 p.m at Bingwa location in Siongiroi ward he found agents of the 2nd respondent dishing out money to voters and asking them to vote for the 2nd respondent. In court, he testified that whereas campaigns had stopped he found URP campaigners still campaigning and were dishing out money. In particular, he found Augustine Cheruiyot dishing out 200/= and 300/= notes and telling people that he was doing this on the instructions of the Deputy President. Mr. Langat for Yego for the 1st and 3rd to 8th respondents correctly pointed out that Kenya does not have a 300/= currency note. When the witness was cross-examined about this incident he stated that he rung the OCS Chebunyo police station to complain about the bribery but that he did not go to the police station to formally file the complaint. He also admitted that he made no formal complaint to the Commission about the incident. I find that, if the witness found voters being bribed as he

alleges, and this was an electoral offence, he would have complained to the police station and given the particulars. He would also have written to the Commission about it. It is also material that he did not identify any voter who was given the said money, or at all.

In (e) it was alleged that at Nyatembe polling station the votes were counted but the results not announced. Alfred Bett (PW3) is the witness who testified on this issue. He was the chief agent of CORD for Chepalungu constituency. He testified that agents were chased before results were announced. During cross-examination, he was shown Form 35 which indicated that agents had signed it to acknowledge the results. How could they have signed if they had been chased away" The petitioner's agents who were allegedly chased away were not called.

In (f), (h), (i), (j) and (q) it was alleged that the petitioner's agents were either chased away from the voting process or during counting, were denied access to the voting room, or were denied results. The respondents denied receiving any complaints about such happenings. But more important, no agent was called to confirm the petitioner's allegations, and Forms 35 from the respective stations reveal that all agents (from different political parties) who were present signed them.

In (k), (l), (m), (n) and (o), the petitioner complained about the conduct of the 4th respondent while tallying the results of Chepalungu constituency at Olbutyo secondary school and subsequently at the County Tallying Centre. It was complained that after tallying at Olbutyo he announced that Andrew Langat had got 1,475, Antony Kimeto 554, David Kitur 530, the petitioner 20,559, Warkach Tonui 3,014 and the 2nd respondent 37,432, making a total of 63,535 and yet the registered voters were 51,620. The petitioner and his witnesses testified that they protested the result announced; that the returning officer did not make a formal declaration but orally made the declaration. The agents complained following which he went underground only to re-emerge later that day at the county tallying centre with a formal declaration now showing the 2nd respondent had garnered 22,164 votes. The 4th respondent denied these allegations and stated that he made a formal declaration at Olbutyo and used Forms 35 duly signed by the presiding officer and agents.

Lastly, in (r) and (s) it was alleged that at Kaptulwa polling station in Bomet East constituency, the presiding officer allowed polling clerks to mark ballot papers in favour of the 2nd respondent; that they were giving seven ballot papers to elderly voters and that the papers were marked for them by the clerks; and that the 7th paper was for senatorial election and was being marked in favour of the 2nd respondent. Richard Kipngeno Mosonik was the KANU agent here and swore an affidavit to this. Same for David Mutai who said he was called by the agent and found these happenings. The returning officer for Bomet East constituency in which the station falls was Abdikadir Sheikh Abdi (8th respondent). He testified that he did not receive such complaint. He stated that it was in the petition that he first became aware of the complaint. He showed Form 35 for the station which showed no overcasting. He stated that at the station the registered voters were 546 and total votes cast were 503. The petitioner received 245 votes as did the 2nd respondent. The Form 35 was signed by seven agents each by whom acknowledged the result without complaint. I find that the result and contents of the Form 35 for the station do not at all support the claims by the petitioner and the agents he made to swear affidavits.

The question, that remains to be answered is whether, given everything in the foregoing, it can be said that the 2nd respondent was validly elected as the senator for Bomet County. **Black's Law Dictionary**, 9th Edition at page 1690 defines "valid" to mean:

"legally sufficient or binding, meritorious."

I understand legal sufficiency in the election to mean that an election was conducted in a free, fair and

credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of any errors, mistakes or irregularities. It means that if there were any such errors, mistakes or irregularities they were not of such magnitude that they substantially or materially affected the result.

Considering all the facts that this petition has presented, and weighing them against the Constitutional and legal principles applicable, I return the verdict that the voters of Bomet County expressed their will and validly chose the 2nd respondent as their senator in an election that was free, fair and credible. The result that showed the petitioner as the runner-up was accurate. The consequence is that the petition is devoid of any merit and is hereby dismissed.

Costs normally follow the event, and there is no reason why this should not be the case here. I order that the petitioner pays the costs of the petition. Such costs shall be taxed by the Deputy Registrar, if they will not have been agreed upon.

Under section 86 (1) of the Elections Act, I certify that the allegations made in this petition challenging the election of the 2nd respondent (Wilfred Rotich Lesan) as the senator for Bomet County have not been proved. Wilfred Rotich Lesan is thus the duly elected senator of Bomet County.

Dated, signed and delivered at Kericho this 19th day of August, 2013.

A.O. MUCHELULE

JUDGE



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