



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 154 OF 2013

(FORMERLY MALINDI ELECTION APPEAL NO. 2 OF 2013)

TWAHER ABDULKARIM MOHAMED.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

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

HAMISI HALFAN TSUMO.....2ND RESPONDENT

MWATHETHE ADAMSON KADENGE.....3RD RESPONDENT

JUDGMENT

Introduction

1. This is the determination and Judgement of the Court as a **first and final** appellate court in the electoral dispute relating to elections of 4th March 2013 in Shella Ward of the Kilifi County Assembly. The court's decision is delivered in a summarised format, in the interests of expeditious determination of the electoral dispute, so that the decision and judgement of the court is available immediately on delivery and, in accordance with the practice of the courts on **final** appeal, the full length of the judgment will be rendered on notice within fourteen (14) days from the date of delivery of this judgment.

2. The Court has considered the appeal and submissions made by counsel and the case-law and statutory authorities cited and has come to a decision and judgment on the appeal. As shown below, this court has also had the benefit of recent decisions of the Court of Appeal on the issues raised in this appeal. The decision of the court is based, principally, on the consideration of the issues as follows.

The Appeal on a matter of law

3. Section 75 (1A) of the Elections Act provides that the appeal from the election court in the case of electoral disputes relating to a County Assembly ward shall lie to the High Court. Under sub-section (4), the appeal shall be on a **matter of law only** and it shall be filed within thirty days of the election court's judgment and be heard and determined within six months from the date of filing. Sub-section (4) provides:

“(4) An appeal under subsection (1A) shall lie to the High Court **on matters of law only** and shall be—

(a) filed within thirty days of the decision of the Magistrate's Court; and

(b) heard and determined within six months from the date of filing of the appeal.” [emphasis added.]

4. Although the phrase ‘a matter of law’ has not been defined by the Elections Act, it has been held in **TIMAMY ISSA ABDALLA VS SWALEH SALIM SWALEH IMU & 3 OTHERS, MALINDI CIVIL APPEAL NO. 39 OF 2013 (COURT OF APPEAL), (OKWENGU, MAKHANDIA & SICHALE, JJA)** of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing *Bracegirdle vs Oxney* (1947) 1 All ER 126. See also **KHATIB ABDALLA MWASHETANI VS GEDION MWANGANGI WAMBUA & 3 OTHERS, MALINDI CIVIL APPEAL NO. 39 OF 2013 (COURT OF APPEAL), (OKWENGU, M'INOTI & SICHALE, JJA)** of 23.01.2014 following *AG vs David Marakaru* (1960) EA 484.

5. In **PETER GICHUKI KING'ARA VS IEBC & 2 OTHERS, NYERI CIVIL APPEAL NO. 31 OF 2013 (COURT OF APPEAL) (VISRAM, KOOME & ODEK, JJA)** of 13.02.2014, it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.

6. In the present appeal, the election court while dismissing the petition on the basis that the complaints of electoral malpractices and illegalities set out in the petition had not been proved by evidence, also refused an application by the petitioner for scrutiny and recount and held at p. 10 thereof as follows:

“Another aspect of the petitioner's prayers that requires consideration is the one for recount of votes and an order for the scrutiny of the ballot papers cast, form 33, 34, 35 and 36 from the constituency tallying centres for the county representative of Shella Assembly Ward in Malindi Constituency.

The applicable law governing scrutiny and recount is set out at part vi of the Elections (Parliamentary and County Elections) Petition Rules 2013. Rule 32 (2) thereof provides that:

“The Petitioner shall satisfy in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.”

My understanding of that provision is that where a prayer for scrutiny and recount is being sought, then it cannot be mixed up with other reliefs in the petition as is the present case.

Rule 33 (4) of the Elections (Parliamentary and County Elections) Petition Rules provides thus;

“Scrutiny shall be confined to the polling stations in which the results are disputed”

The Petitioner did not set out specifically in the petition the polling stations in which the results were being disputed and hence the need for scrutiny and recount. The Petitioner has cast his net too wide and it cannot be ascertained from the petition the specific areas that he seeks scrutiny and recount.

Due to the reasons I have alluded to, I find that I am unable to grant the relief sought of scrutiny and recount. The upshot of the matter is that I find that the Petitioner has not surmounted the requisite hurdle to warrant the grant of the relief sought in the petition. I therefore proceed to dismiss the petition with costs to the 1st, 2nd and 3rd Respondents and make a finding that in the result, the 3rd Respondent was validly elected as member of the county assembly for Shella Ward in Kilifi County.”

7. Section 83 of the Elections Act is clear that irregularities and illegalities unless amounting to substantial non-compliance with the Constitution and the Act cannot invalidate an election unless they affect the result of the election. The court is not concerned with the facts of the case for their own sake and therefore the court cannot re-examine the evidence to determine whether the election court made the correct findings of fact.

The Issues for determination in the appeal

8. The principal issues for determination in this appeal is whether in refusing the application for scrutiny, **as a matter of law**, the election court properly exercised its discretion and, if an improper exercise of discretion, whether the facts supporting the scrutiny application would affect the result of the election.

Whether the election court properly exercised discretion on appellant’s application for scrutiny and recount of votes

9. In accordance with principles set out in ***Mbogo and Anor. v. Shah*** (1968) EA 93, cited with approval in ***Peter Gichuki King’ara v IEBC and 2 Others***, (supra), a court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as result there has been injustice.

10. The election court refused the application for scrutiny and recount on two reasons that:

- a. *‘My understanding of that provision is that where a prayer for scrutiny and recount is being sought, then it cannot be mixed up with other reliefs in the petition as is the present case.’*
- b. *‘The Petitioner did not set out specifically in the petition the polling stations in which the results were being disputed and hence the need for scrutiny and recount. The Petitioner has cast his net too wide and it cannot be ascertained from the petition the specific areas that he seeks scrutiny and recount.’*

11. Rule 32 Elections (Parliamentary and County Assembly) Petition Rules, LN 54 of 2013, applies to recount of votes in the following terms:-

“Petitioner may request for recount or examination of tallying.

32. (1) *Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the Petitioner may apply to the court for an order to recount the votes or examine the tallying.*

(2) *The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.*

12. With respect, the provisions of rule 32 did not apply to the circumstances of the petition where other reliefs were sought and the court ought not to have considered the request for recount on the basis of the rule. There is an obvious error of law in the judgment because the rule did not apply to this petition which, as the court observed, had other reliefs sought in addition to the application for scrutiny and recount. The applicable rule is rule 33 as shown below.

13. Scrutiny of votes is provided for under Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules L.N. No. 54 of 2013, as follows:

“Scrutiny of votes.

33. (1) *The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*

(2) *Upon an application under sub-rule (1), the court may, if it is satisfied that there is **sufficient reason**, order for a scrutiny or recount of the votes.*

(3) *The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.*

(4) *Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—*

(a) the written statements made by the presiding officers under the provisions of the Act;

(b) the copy of the register used during the elections;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt papers;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers; and

(j) the statements showing the number of rejected ballot papers.”

14. Section 82 of the Elections Act provides for scrutiny of votes in terms as follows:

“82. (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”

15. As observed by the Court Appeal in **Patrick Mweu Musimba vs Richard Kalembe Ndile & 3 Others**, Civil Application No. NAI.231 of 2013, an election court has powers under section 80(1) (d) and 82 (1) of the Elections Act to order scrutiny *suo moto*. The court has power at any stage of the hearing to order for scrutiny of votes on own motion of the court or upon application by a party. Although, the Rule requires that scrutiny *“shall be confined to the polling stations in which the results are disputed,”* it does not require that the stations be set out in the petition or in the application for scrutiny. Moreover, the requirement is not in the enabling statutory provisions of section 82 of the Elections Act. Reliance by the Election Court on the lack of specification of the polling stations was not authorised by statute.

16. Although the Elections Act does not have the conditionality, in deference to the Rule 33, the conditions for the grant of an order for scrutiny by the court on its own motion or on application are as follows:

a. ‘sufficient reason’, and

b. ‘scrutiny shall be confined to polling stations in which the results are disputed’.

The conditions are in my view an attempt by the Rule Committee to provide guidelines for the exercise of the wide discretion in section 82 of the Elections Act. While it may be reasonable to offer such guide, the same cannot in law be used to limit the general statutory power to order scrutiny of votes.

17. There is no requirement that an applicant for scrutiny must have sought this in the petition and stated the disputed polling stations, although the petitioner did in fact seek orders for scrutiny and recount in the Petition and in his submissions set out polling stations whose results he challenges for various reasons. Moreover, it cannot be argued that because an applicant did not plead the issue, say of the irregularities in the Polling Day Diaries because they were delivered by IEBC in Court, it cannot subsequently be raised in the course of the hearing of the Petition. The issue of irregularity and illegality is of course pleaded in a generic way where it is contended that the elections did not comply with the provisions of the constitution and the electoral laws of Kenya at paragraph 3 (XVII) of the amended petition. If the position indicated by the Polling Day Diaries is correct it would appear there could have been illegality committed either in the records of the results entered in the respective Forms 35 and 36 or in the records of the polling materials – ballot papers, seals on ballot boxes etc. - used in the polls.

18. Either way, the effect on the election is that the results could not be verified and it could not be held to have been verifiable, accountable, free and fair as required by the Constitution. As I held **Eng. Peter Maranga and Anor. v. Joel Omagwa Onyancha**, Kisii Petition No. 7 of 2013, in cases of illegality, the court will investigate an issue even when such an issue has not been specifically pleaded. Similarly, in **Justus Mungumbu Omiti vs. Walter Enock Nyambati Osebe & 2 Others** EP No. 1 of 2008, the Court held that:

‘All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a constituency must come under spotlight, scrutiny and interrogation. They have interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the

elections ...have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not subject of any pleadings....At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair and free and transparent manner, and that they reflect the will of the voters and more importantlywhether the respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded.'

19. Moreover, the Constitution under Article 81 requires that the election results be accountable and therefore verifiable. In the absence of Form 35s for four (4) polling stations, the results in those stations amounting to 1,763 votes cannot be verified, and this was sufficient reason in terms of rule 33 of the Election (Parliamentary and County Elections) Petition Rules.

20. Additionally, in 18 out of the 26 polling stations of the Shella Assembly Ward, the poll day diaries (whose main objective is expressed as being to assist the polling officials in management of polling station activities) indicated irregularities in the record of the ballot papers and ballot box serial numbers calling into question the accuracy of the election results. These irregularities were set out in the appellants' submissions before the court as follows:

“SHOULD THERE BE A SCRUTINY OF VOTES

Your honour considering the anomalies, irregularities and offences that have proven herein scrutiny is irrevertable to tie the loose ends or confirm further what is already on record.

Sections 82 of the Elections Act, 2011 provides that an election court may on its own motion or an application by any party to the petition, during the hearing of an election petition, order for la scrutiny of votes.

Rule 33 of the Election (Parliamentary and County Elections) Petition Rules, 2013, also allows the parties to an election petition to apply for scrutiny at any stage for purposes of establishing the validity of the votes casted.

This requires the court to exercise its discretion to order for a scrutiny if it is satisfied that there are sufficient reasons.

It is the Petitioner's submission that he has established a basis for scrutiny particularly when the Returning Officer admitted in cross-examination that the only way open to prove or disapprove certain evidence is by opening the ballot boxes concerned.

The Petitioner submits that has laid a basis for scrutiny in the following Polling Stations and for the reasons given:

1. Town Primary School Stream 1

*The serial numbers of the ballot boxes for Member of County Assembly is recorded in the Polling Day Diary at the time of opening and closing of the stations is different. That is at **Pages 440** of the big book.*

This shows a confusion and votes of the Member of County Assembly may have been casted in another box or vice versa.

The number of ballot papers issued for the election for the Member of County Assembly is not certain. The Diary shows 550 at **Page 440** of the big book but 50 at Page 451 and the same page also shows 550 and at Page 453 it shows 5 or if the 2nd Respondent explains this is true then 250.

This uncertainty can only be resolved by scrutiny.

The Form 35 of the Polling Station was signed by the person other than the Presiding Officer and a person who was not an agent at the Polling Station. On scrutiny we will ascertain from the Form 35 sealed in the ballot box.

2. Uhuru Garden Stream I

We have already submitted that the Presiding Officer did not sign the Form 35.

However from Diary the record shows that Presiding Officer was not issued with Form 33, 34 and 35. Apart from his testimony in court, which in light of failure to record ;in the diary is unbelievable, there is no other record to show where did they get these Forms.

At page 424 of the Diary the Presiding Officers acknowledges that names of voters were missing from the register. He also allowed voters whose names were not identified by EVID visually or by finger print to vote. These may be illegal votes which will be established upon scrutiny.

3. Uhuru Gardens Stream 2

The Polling Day Diary shows that the Presiding Officer was not given the IEBC rubber stamp at **Page 395**. This means the ballot papers were not marked which makes them illegal by virtue of **Regulation 69 (1) (e)**.

The Diary also shows Forms 34 and 35 were not issued to the Presiding Officer. At Page 403 it indicates the Rubber Stamp for stamping ballot papers is missing. At **Page 405** of the big book it shows a fake record of the count of the ballot papers for the Ward.

At **Page 407** it shows spoilt ballot papers and yet in the Form 35 at **Page 27** of the 1st Respondent's Affidavit shows none. At the same page it shows un-used ballot papers as 50 but the counter foils of un-used ballot paper is **100**.

This is a proper case for scrutiny to ascertain the anomalies.

4. Al-Nidhamia Stream 2

The Polling Day Diary shows that the opening of the serial number of the ballot box for Member of County Assembly was not recorded. This is t Pge38 of the big book.

At **Page 43** it confirms a problem of grouping of voters as the register is not clear and the BVR failed.

Again at **Page 44** the serial number of the ballot box for Member of County Assembly is not given, Why"

At **Page 45** it does not show a proper record of the ballot paper count for Member of County Assembly. It is vague.

At **Page 47** it shows interference with the record of counter foils ballot papers used.

At **Page 50** it confirms that agent complained about assisting of voter.

Lastly, the Form 35 at **Page 28** of the 1st Respondent Affidavit shows it was not signed by any candidates or agent yet the diary shows there were agents throughout at Pages 36, 39, 40, and 48 of the big book.

This is a clear case for scrutiny.

5. Al-Nidhamia Stream 1

From the Diary no IEBC rubber stamp issued at **Page 55** of the big book. Ballot papers may not have been stamped.

At **Page 64** of the record of ballot papers count is vague and incomprehensible. There is no indication of how many ballot papers were used.

At **Page 67** the record does not make sense.

6. Sir Ali Bin Salim Stream 6

There is no record of ballot paper issued. At **Page 485** the IEBC Rubber Stamp is missing.

At **Page 486** it shows Form 33, 34 and 35 were not issued to the Presiding Officer.

At **Page 498** the record of ballot paper count is vague.

7. Sir Ali Bin Salim Stream 3

In addition to Petitioner's submission herein above the Polling Day Diary at **Page 557** does not show for certain how many ballot papers were issued. At **Page 558** no Form 35 was issued to the Presiding Officer. At **Page 57** it shows the record of ballot as 396 yet the ballot papers yet the ballot papers used are 410 excluding 1 spoilt paper. At **Page 572** it shows counter foil of used ballot papers as 409 one less what is indicated at **Page 570**. The record should reflect 411 including the spoilt ballot.

At **Page 575** no serial number of the ballot box is given so as to confirm whether it was the same box as that given on **Page 569**.

The Form 35 at Page 38 of the 1st respondent's affidavit does not reflect any spoilt ballot paper but the diary reflects one.

8. Sir Ali Bin Salim Stream 2

The diary does not show how many ballot papers were issued. This is at **Page 571** shows that the stamp for rejected votes was not issued. At **Page 580**, shows that no Form 35 were issued to the Presiding Officer. At **Page 589**, entry conforms IEBC stamp inadequate. At **Page 598** shows total number of ballot papers used as **488** yet Form 35 at page 42 of the 1st Respondent's affidavit shows the total number of votes cast as **483**. There are five (5) votes unaccounted for.

The Form 35 showed was signed by the Presiding Officer on 5th March 2013 but was signed by the deputy on 4th March 2013.

These anomalies and illegalities exposed by the 1st and 2nd Respondents on the documents call for a scrutiny of the ballot boxes from the polling station.

9. Sir Al Bin Salim Stream 1

*Apart from the submissions on the manner voters were assisted and those who could not vote. The diary does not show how many ballot papers were issued to the Presiding Officer at page 10. At page 11, it shows no form 33, 34 and 35 issued to the Presiding Officer. At page 15 it shows a serial number of ballot box as **180139** yet on page 20 it shows as **152141**. This raises the possibility that votes may have been cast in the wrong ballot box. The form 35 at Page 40 of the 1st Respondent's affidavit shows it was signed by the Presiding Officer on 4th March 2013 but was signed by the deputy on 5th March 2013. This raises the issue of authenticity of the Form. The only way to remove any doubt is by scrutiny in this station.*

10. Karima Stream 4

Form 35, at page 50, shows it was signed on 4th March 2013 by the Presiding Officer but signed by the deputy on 5th March 2013.

The diary at page 124 does not show how many ballot papers were issued to the Presiding Officer. Only Five (5) form 35 issued to the Presiding Officer one for each position at page 125. At page 124, there was serial number of ballot boxes given.

11. Karima Stream 3

At page 147, it shows that no IEBC stamp was issued to the Presiding Officer. At page 138, it shows no Form 33, 34, and 35 were issued to the Presiding Officer. At page 157, no information is given. At page 160, it shows ballot papers used as 426 yet Form 35 at page 52 shows a total of valid votes cast as 423. There are three uncounted votes. The Form 35 is signed by the Presiding Officer on 4th March 2013 by the deputy on 5th March 2013 by the deputy 5th March 2013.

12. Karima Stream 2

At page 194, it shows only 6 Form 35 were issued to the Presiding Officer. At page 206, it shows the number of ballot papers as 556, yet Form 35 shows the number of valid votes cast as 443. They are 113 unaccounted votes. The Form 35 is signed by the Presiding Officer but not dated when the deputy signed.

13. Karim Stream 1

At page 170 it shows only five (5) Form 35 were issued to the Presiding Officer. At page 1809, it shows only four (4) ballot papers were unused. This means 496 ballot papers were used. However, Form 35 at page 56 shows the total number of votes cast is 498. This is an excess of two (2) votes.

Page 187, confirms that in the morning session there was misunderstanding of the voting queues. Form 35 at page 56 shows alterations on the figures.

14. Airport Stream 2

At page 214, it shows only 8 Form 35 issued to the Presiding Officer. At page 223, the record of ballot paper count is vague. At page 225, it shows the number of ballot papers used as 364, yet form 35 at page 62, shows that the total number of valid votes cast as 365 with two (2) spoilt papers. The diary- should have reflected 367. As records stated there are three (3) ballot papers unaccounted for.

15. Airport Stream 1

At page 234, it shows only 10 Form 35, were issued to the Presiding Officer. At pages 238 and 243 the serial number of the ballot box for Member of County Assembly does not show. Page 244 record of ballot papers count is vague.

16. Uhuru Garden Stream 5

Form 35 was not delivered to the court. At page 329 of the diary, no Form 35 was issued to the Presiding Officer. Page 337 no serial number of ballot box is indicated. At page 338, it shows the number of ballot papers issued to be 1,000. It shows the number of used ballot papers as 395, number of unused 605 and one spoilt paper. This does not tally. There is one extra unaccounted ballot paper.

Page 340 shows the number of unused ballot papers at 505 and that of used as 395. This leaves 100 ballot papers unaccounted for. At page 343, the serial number of the ballot box is not indicated.

17. Uhuru Garden Stream 4

Form 35 was not delivered to court as is required by rule 21 (b). Page 350 indicates that the Presiding Officer received less Form 35 but does not indicate how many. Page 358, confirms there were few Form 35's. There was no stamp for spoilt votes. Page 360 shows the record of ballot paper is vague. It shows the number of used ballot papers as 555, for each candidate, yet Page 362 shows Member of County Assembly number of used ballot papers as 444. Form 36, shows the number valid votes cast as 443. There are 81 votes unaccounted for.

18. Uhuru Garden Stream 3

Form 35 was not delivered to court as required by Rule 21 (b).

Page 379 shows that the lids of 2 ballot boxes were initially interchanged then they were replaced. Confirming badges for agents were not adequate. It also confirms that voters were referred to other polling stations after they had queued for long periods. Page 382 shows that the record of ballot paper counts and the columns are vague. It shows each position got 583 ballot papers. However Page 384 shows ballot papers used as 441 and unused as 59 while spoilt was 1 and 34 were rejected. This indicates that only 535 ballot papers were issued. There are 48 ballot papers unaccounted for.

It is the Petitioner's submissions that he has laid a basis for scrutiny in all polling stations due to the failure to give Form 35 of the Stations to whom as well as failure to give reasons as required by the law.. However there is more in respect of these 18 stations that want scrutiny."

The total number of votes involved in the irregularities identified through the poll day diaries is 355.

21. These irregularities should have prompted the election court to order for scrutiny of votes in the

said polling stations in accordance with the rules, whether on the basis of the application or on own motion having been made aware of the irregularities. In holding that recount could only be ordered where no other reliefs are sought, the learned magistrate was clearly wrong. Rule 32 of the Election (Parliamentary and County Elections) Petition Rules is clear that it is of limited application only such situations where the petitioner applies for recount and re-examination of the tallying *'where the only issue in the election petition is the count or the tallying of the votes received by the candidates,'* and it has therefore no application to the present petition. **In using the Rule 32 provision to reject the appellant's application for recount, the learned magistrate, with respect, misdirected himself that the rule applied to the situation before him. The order for recount sought by the petitioner could have been submerged in the order for scrutiny because scrutiny must of necessity involve recount.**

22. With respect, the court did not take up the opportunity presented by the application for scrutiny in the polling stations set out in the appellant's submissions to establish whether the results of the election represented the wishes of the people of Shella County Ward. The reasoning that the appellant did not set out in the petition the polling stations in which the results were disputed, thereby, in the court's view, denying the election court jurisdiction is faulty. There is no requirement for specific pleading in the petition of such information. It is sufficient that the information as to the polling stations disputed is brought to the knowledge of the court in the course of the hearing as in terms of section 82 of the Elections Act, which provides that the order for scrutiny is available at any stage in the course of the hearing. In this case, the information as to the polling stations disputed were clearly set out in the appellant's final Submissions.

23. Section 82 of the Elections Act which gives the court power to order scrutiny on its own motion or on application does not limit the power by requirement for the setting out of polling stations in which the results are disputed. To be sure, even Rule 33 does not require that an applicant sets out in the petition or affidavit the polling stations whose results are disputed. It only requires the court to confine an order for scrutiny in the disputed stations, no doubt as a time-saving device and these polling stations may also be identified through oral testimony presented by the witnesses in court. **Accordingly, I find that in apparently holding that the court could not order scrutiny because the petitioner had not set out in the petition the polling stations whose result were disputed, the learned magistrate misdirected himself on the law.**

24. **The mis-directions by the learned magistrate obviously led to a miscarriage of justice as the appellant did not get a fair chance to show the effect on the election through the scrutiny that the court could have ordered on its own motion or on the application by the appellant, had the court considered the submissions which set out the polling stations whose results were disputed and the related poll day diaries before the court, which obviously demonstrated sufficient reason within the meaning of Rule 33 of the Election (Parliamentary and County Elections) Petition Rules. This court as an appellate court cannot speculate whether the learned trial court would have made the order for scrutiny had it considered the submissions setting out the disputed polling stations. However, in not considering the application for scrutiny on the basis of the missing Form 35s and the polling stations set out in the submissions following analysis of the polling Day diaries, the court was plainly wrong. See *Mbogo and Anor. v. Shah* (1968) EA 93.**

Whether the Irregularities affected the result of the election.

25. The Court of Appeal in *Peter Gichuki King'ara's case*, supra, quoted the Canadian case of *Opitz vs Wrzesnewsky (2012) SCC 55*: *"If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded.*

Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

26. The fact of irregularities with regard to the inconsistencies as to the numbers of ballot papers and the votes cast in accordance with Forms 35 and 36 points to an illegality to the accountability for the accurate votes garnered by the candidates at the election. The unexplained discrepancies with regard to the actual votes recorded as having been cast at the election against the ballot papers recorded in the polling day diaries should have put the court into inquiry by way of scrutiny either by its own motion or upon the application by the petitioner.

27. According to Form 36 Declaration of County Assembly Election Results at Shella Ward, the margin of difference in the votes between the appellant and 3rd respondent was **579**, the former garnering 2,368 and the latter 2,947 out of total valid votes cast of 10,708. The total number of votes involved in the four polling stations whose Form 35s were not availed were **1,763** and the votes affected by the irregularities in 18 polling stations the subject of the scrutiny application was 355.

28. The Canadian Supreme Court in the 2012 case of **Opitz**, cited in the *Peter Gichuki Kingára* case, supra, adopted the ‘magic number’ test as to whether irregularities affected the result to warrant annulling the election holding that *“the election should be annulled when the number of rejected votes is equal or greater than the successful candidate’s margin of victory.”*

29. In **Richard Nyagaka Tongi v. IEBC and 2 Ors**, Kisii High Court Petition No. 5 of 2013, I adopted a similar test based on the margin of victory following the Tanzanian case of **Mbowe v. Eliufoo** [1967] EA 240 to the meaning of the phrase “affected the result” that is broader than merely bridging the gap between the two leading candidates, and the court will invalidate an election result if it leads to a change in the result unless the margin of difference is so big that despite a substantial reduction of the gap leaves the winning candidate still with a higher majority.

30. In assessing the relationship between the votes involved in the irregularities in this case, under both the strict test ‘magic number’ test of **Opitz** and the broader test in **Mbowe v. Eliufoo**, it is clear that the votes represented in the four stations in which Form 35s were not availed and the 18 polling stations in which Polling Day records contradicted the votes shown on Form 35s, there was a real likelihood that the election result would, on account of margin of vote difference, be affected upon scrutiny and recount had this been ordered by the court of its own motion or as requested by the appellant.

Accordingly, I hold that the irregularities in this petition affected the result of the election in Shella County Assembly Ward.

Orders

31. Under section 75 (3) of the Elections Act, the appellate court has power to make orders as follows:

“(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.”

32. Should the appellate court order scrutiny on appeal" Rule 34 (10) of the Election (Parliamentary and County Elections) Petition Rules, 2013 appear to authorise the making of the same orders that the trial election court could make in the petition, as follows:

“(10) The High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and ***shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.***” [emphasis added]

33. However, as this course of action is not authorised by the provisions of section 75 of the enabling Elections Act, set out above, the court is bound to give prevailing effect to the terms of the Statute over Rule 34(10) of the Election (Parliamentary and County Elections) Petition Rules. Moreover, as noted above, the Court of Appeal in ***Peter Gichuki King'ara v IEBC and 2 Ors***, supra, held the Appeal Court may not ‘*order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court.*’

34. By reason of the foregoing, it is impossible to verify the results and determine whether the 3rd respondent was validly elected or which candidate was validly elected as contemplated by section 75 (3) (a) and (b) of the Elections Act, respectively. Without verification of results in the circumstances of the many irregularities in the Polling Day Diaries, it cannot be said that the election was free and fair and the result representative of the wishes of the people. Where, as in this case, the court cannot determine whether the respondent successful candidate was validly elected and whether the appellant or any other candidate was validly elected, the order which commends itself to the court is an order under section 75 (3) (c) that a fresh election be held.

35. Accordingly, the court hereby allows the appeal, sets aside the judgment of the Election Court dated 15th August 2013 and makes an Order under section 75 (3) (c) of the Elections Act that a fresh election shall be held at Shella Ward of Malindi Constituency Kilifi County.

Costs

36. It is the election court, which, in failing to direct an inquiry by way of scrutiny and recount of votes, denied itself an opportunity to make a finding as to whether the 3rd Respondent had been validly elected or whether the appellant or any other candidate had been validly elected. The court is not able to determine whether any party is to blame in initiating or defending the proceedings or making it necessary for any party to institute or defend, and the parties cannot be blamed for the outcome of the proceedings before the election court upon its failure to investigate the matter by an order for scrutiny and recount. I, therefore, do not consider it appropriate to order any party to pay the costs of the proceedings. Accordingly, each party will bear its own costs.

Dated signed and delivered on the 27th February 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Abubakar for the Appellant

Miss Ngugi for the 1st and 2nd Respondents

Mr. Mouko for the 3rd Respondent

Miss Linda - Court Assistant



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