REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELECTION PETITION APPEAL NO. 3 OF 2013

CHARLES NYAGA NJERU …….. APPELLANT

-VERSUS-

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION …….. 1ST RESPONDENT

NEVERT NTWIGA …….. 2ND RESPONDENT

(An appeal from Judgment and decree of C. K. Obara – SRM in Chuka Election Petition No. 1 of 2013 dated 31st July, 2013)

J U D G M E N T

The appellant **CHARLES NYAGA NJERU** the petitioner in an Election Petition No. 2 of 2013 which he had filed at Principal Magistrate Court at Chuka against the 1st Respondent and 2nd Respondent herein, had in his petition dated 5th April, 2013 challenged the declaration of the 2nd Respondent as the winner of the position of Mitheru Ward County Assembly representative as declared by the 1st Respondent.

The Respondents upon being served with the petition filed their respective responses. The 1st Respondent filed its answer to the petition on 17th April, 2013 and a Replying Affidavit dated 17th April, 2013. The 2nd Respondent on his part filed his response on 17th April, 2013 and a Replying Affidavit dated 18th April, 2013. The counsel agreed on issues for determination and the petition proceeded to hearing.

The Appellant gave evidence and called, PW2 Rose Ntiyari Karimi who relied on her affidavit dated 9th March, 2013 marked CWW-3, PW3 Martin Mwiti Kaburu who relied on his undated affidavit marked CCW-5.

The 1st Respondent called one witness DW1 Hellen Ndaki Mutuva who relied on her affidavit dated 17th April, 2013. The 2nd Respondent on his part did not give evidence but relied on his affidavit dated 18th April, 2013.

The parties closed their respective cases and put in their submissions. The trial court after evaluating the evidence and considering the relevant law and authorities relied upon by the respective parties

dismissed the Appellant's petition and ordered each party to bear its own costs.

The appellant being aggrieved by the Election Court's judgment filed this appeal setting out 11 grounds of appeal being as follows:-

1. The learned trial magistrate erred in lace and fact in arriving at a decision contrary to Law and facts/evidence before the court.

2. The learned magistrate erred in law and facts in failing to find that the interference with the ballot boxes and ballot papers plus seals thereof gave room for the tampering with the votes cast in favour of the Appellant hence diminishing his chance to win and or get favorable result.

3. The trial magistrate erred in law and fact in not finding that the number of Form 35s were and are many and varied in serial numbers and entries contrary to law namely:-

- 0025820 present in court by the IEBC (1st Respondent)

- 0025817 corrected one (also introduced by the 1st Respondent)

- 00175900 also by IEBC (1st Respondent)

- 0025816 fraud inside the box with also corrected fashion)

This was a demonstration of grave irregularities.

4. The trial magistrate erred in law and fact in not finding that the Giampampo Polling Station Ballot Box had been broken into and ballot papers interfered with and that there was no Form 35 inside or outside the box and that the ballot papers were tied with unconventional materials, namely bread material, clothing materials, sisal materials which were not the nature of the ones supplied by the IEBC, which was a grave irregularities which went to the root of the integrity of the elections herein.

5. The magistrate failed to find that in the same Giampampo polling station the petitioner's 26 votes were missing in the Ballot Box and ones of the candidates namely Simon Jonah Mugambi had been inflated by 25 votes which was a grave irregularities affecting the integrity of the election herein.

6. The trial Magistrate erred in law and fact in failing to find that Mugona Primary School poling statin had 2 different forms 35 namely:- - 00025781 (in court file)

- 00025684 (which does not have 11 rejected votes) which was a grave irregularity affecting the integrity of the election herein.

7. The trial magistrate court failed in law and fact in not finding that, there were not less than 6 polling stations where the ballot boxes had been broken side seals with effect that the inside ballot papers could be easily accessed and thus disclosure of tampering with, which was disclosed by various alterations in tallying on For 35's of the same polling stations thus undermining the integrity of the election hereof.

8. The trial magistrate erred in law and fact in not finding that in the Form 36 (original) the total of the 2nd Respondent votes was inflated by 5 votes which was a grave irregularity which goes to the route of the elections integrity.

9. Trial magistrate erred in law and fact in not finding that all the 18 polling stations had alterations which had not been owned or countersigned by anybody least of all IEBC (1st Respondent) officers in charge which totally undermined the elections integrity.

10 The learned trial magistrate erred in law and fact in not finding that there were massive irregularities which demonstrated that the elections were not held in accordance with the principles laid in the constitution and written law and that the noncompliance affected the result of the election.

11. The elections were not free, fair, transparent, impartial, neutral, efficient and accountable in terms of the provisions of Article 38 and 81 of the constitution.

When the appeal came up for hearing the court gave directions that the appeal be determined by way of written submissions and highlighting on the same. The appellant's written submissions were filed 2nd October, 2013 by the firm of M/S Charles Kariuki and Co. Advocates. The submissions on behalf of the 1st Respondent were filed on 8th November, 2013 by the firm of M/S Iseme Kamau & Maema Advocates, whereas submissions on behalf of the 2nd Respondent were filed on 7th November, 2013. The counsel opted not to highlight on their submissions and sought a judgment date.

Under Section 34(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 The High Court on hearing of the appeal 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. The High Court on the first appeal has the duty and obligation to re-evaluate and re-analyze the evidence that was adduced at the original court to enable it reach its own conclusion. That when the appellate court is doing so it has to bear in mind that it never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. These basic principles were set down in the case of **Henn vs Singh (1985) KLR 716.**

The Appellant in his submissions argued all the eleven (11) grounds together based on the issues agreed during the hearing of the petition. The Respondents on the other hand opposed all the eleven (11) grounds of appeal. I will in this judgment consider all the eleven (11) grounds of appeal as filed by the appellant and combine the grounds which are relevant and dealing with similar points.

That before I consider each ground of appeal I have to point out my observation on affidavits relied upon by the appellant. The affidavits by appellants witness contravenes Section 5 of The Oaths and Statutory Declaration Act (Cap 15) Laws of Kenya which provides:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made"

The Section is couched in a mandatory way in that the word "shall" is used meaning that in the jurat the place and date on which the oath and affidavit is taken or made must be indicated.

In the affidavits of Appellant's following witnesses Martin Mwiti Kaburu – annexture CNN 5; Japhet Mutegi; J. Borona – CNN – 8, Teressa Mukwanjeru M'Imwatha – CWW 10 do not disclose the particulars of the deponent, place of taking oath nor are they dated. These purported affidavits are not properly commissioned and are no affidavits that the appellant would have relied upon. That as regards affidavit by Rose Ntinyari Kirimi CNN – 3, the said Rose Ntinyari Kirimi disowned the signature above the word deponent. She told the court during cross-examination and I quote"

“The signature on CNN 3 is not mine”

In view of the non-compliance with the provision of The Oaths and Statutory Declaration Act, the original court ought to have struck out the Appellant’s witnesses’ affidavits, which I do note are of no evidential value and the appellant remain with his own evidence in challenging the elections of the 2nd Respondent.

I have further perused the petition and note that the petitioner did not in his petition introduce the 2nd Respondent. The address for service given is C/O Mitheru Ward Buuri Constituency, Tharaka Nithi County, Chuka. It is common knowledge that Buuri Constituency is in Meru County and not Tharaka Nithi County and what can be observed is that the Appellant was not diligent enough with the petition consequently leading to making of obvious mistakes.

The appellant in ground No. 1 and ground No. 2 of his memorandum of appeal which I will deal with together faults the original court for allegedly failing to find that the interference with ballot boxes and ballot papers plus seals thereof gave room for the tempering with votes cast in favour of the Appellant hence diminishing his chance to win and/or get favourable result.

The grounds raised under ground No. 1 and 2 were not raised in the petition and the supporting affidavit of the petitioner.

Rule 10(1) (e) of The Elections (parliamentary and County Elections) Petition Rules 2013 provides:-

a. ……..……..……

b. ……

c. ……

d. ……

e. the grounds on which the petition is presented; and
f. ……

Rule 10(3)(b) of The Elections (Parliamentary and County Elections) petition Rules 2013 provides:-

a. ……

b. be supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner; and

c. ……

The above Sections mandates the petitioner to set out all the grounds on which he or she is challenging the election in the petition and all facts and grounds in his supporting affidavit. A party is always bound by his pleadings at the time of the trial and cannot be heard to ask court to consider his petition on issues which have not been pleaded. The petitioner/appellant did not allege in his petition that any ballot boxes had been interfered with or broken into nor did he raise any complaint as regards safety of the ballot boxes. I have perused the evidence tendered by the appellant and his witnesses and of great significant is that no evidence was tendered to establish interference or breakage of ballot boxes. That even after ordering of scrutiny of the ballot boxes no cogent evidence of interference or breakage was

found. The trial court indeed in its judgment stated that and I quote:-

*"**I cannot say that with certainty because there was no evidence ……. whichever the case the petitioner did not adduce any evidence linking anyone to the alleged tampering"***

In view of the foregoing and there being no evidence in support of the appellants grounds No. 1 and 2 of the appeal the same are dismissed.

The Appellant in his ground No. 3 and 6 of appeal averred that the original court erred in law and fact in not finding the number of Form 35's were and are many and varied in serial numbers and entries contrary to law namely:- 0025820, 0025817, 00175900, 0025816, 00025781 and 0025784. The appellant argued that was a demonstration of grave irregularities which affected the integrity of the election. On perusal of the petition and the appellant's supporting affidavit it is evidently clear that this complaint was not raised at all in the petition and the supporting affidavit in compliance on the Rule 10(1)(e) and Rule 10(3)(b) of The Elections (Parliamentary and County Elections) petition Rules 2013. The Appellant having failed to raise those complaints in his petition and in the supporting affidavit as well as in his evidence before the trial court he cannot now be heard to raise the same in the appeal. Indeed the ground is on extraneous matters as the petitioner is bound by his pleadings and cannot as such divert from the same in one way or other nor should court consider issues which were not properly placed before it. I have noted the original court found that these issues were not part of issues before it as they were not pleaded and I find and hold that the court was correct in so finding.

The 1st Respondent's witness DW1, Hellen Ndaki Mutuva in her evidence testified that Forms 35 are not filled in duplicate and each have unique serial number and can be as many as 20 depending on the candidates. She testified that serial numbers have no effect to the votes recorded. It is clear for DW 1's evidence which was not challenged by the appellant that each form is filled in its original form. That under **Regulation 79 of the Election (General) Regulations 2012 and Regulations 79(2)(c) and (d),** the presiding officer is supposed to provide each political party, candidate or their agent with a copy of the declaration of the results and affix a copy of the declaration of the results at the public entrance to the polling station or at any public place convenient or accessible to the public at the polling station. DW1 further in her evidence testified that the presiding officer affixes one on the ballot box, one is placed inside the box, one is given to the Returning Officer, one is pinned outside the polling station and the rest are given to the agents. She dispelled the assumption that one Form 35 is filled then photocopied as erroneous and not based on the electoral practices.

I have perused the original court's judgment and have noted that in its judgment this point was thoroughly considered. The original court found and quite correctly that the electoral system deployed was one where original Form 35's were being filled, each with a unique serial number with no duplicate. As the trial court found I entirely agree with it, that the 1st Respondent should in the future elections reconsider their position and consider filling one original Form 35 in triplicate with carbon copies being produced. Further the 1st Respondent should come forward with a better and reliable method of filling and filing of Form 35s.

The Form 35 complained of by the appellant in his ground of appeal with unique serial numbers from one polling station or more reflected results of not one candidate but all the candidates. The forms complained of where at the time of election similar for all stations in the country, each form with its own unique serial number and each being filled separately. The Appellant in his evidence did not establish that was an irregularity which was in breach of The Election Act or Election Rules or such practice prejudiced him over and above any other candidate in the elections subject of this appeal. I have perused the trial court's judgment and I have found that the trial court indeed found that the Form 35's

were many and varied in serial numbers and I find that it is not correct for the appellant to assert in his grounds 3 and 6 that the trial court did not find so.

Having said so and having carefully considered the evidence and submissions by all counsel I find no merits in ground No. 3 and 6 the same are dismissed.

The Appellant in ground No. 2, No. 4, 5 and 7 of the memorandum of appeal faults the trial court for failing to find that the ballot boxes had been interfered with and/or broken into. Significantly it should be noted that the appellant did not in his petition and in his supporting affidavit raise these complaints and further during the hearing of the petition he did not adduce any evidence to establish the fact that there was any interference with the ballot boxes.

That during the hearing of the petition the original court ordered partial scrutiny limited to ascertaining of spoilt ballot papers, total number of votes cast, number of rejected votes, number of disputed votes, number of objected votes and number of valid votes cast in favour of each candidate. The trial court's observation thereafter is clearly recorded in its judgment.

The court found that Kaganjo Primary School station, the ballot box had all five seals intact. That all 28 ballot boxes had seals. The appellant in his appeal did not bother to file a copy of the Report emanating from the re-count exercise to assist this court arrive at its own conclusion on the issue raised herein which failure is contrary to **Rule 34(6) of The Elections (Parliamentary and County Elections)** petition on Rules 2013. The only material I can refer to is the trial court's judgment which indicates amongst others as follows:-

"Kamachuku polling station ballot box had four (4) seals and one (1) missing sea, five seals were found inside. There were no evidence of how many seals were placed on the box and that one was missing nor was there evidence those were not same seals placed by presiding officer at the close of counting exercise".

I have considered the findings of the trial court that that there was no evidence that DW1 opened the ballot box for Kamachuku polling station and the finding that there was no evidence that seals used to seal the ballot boxes after results were announced were not the ones on the ballot boxes at the time of recount and I find that the trial court findings were based on evidence and on sound principles of law. The court further and correctly found that there was no evidence that the five, seals were used to seal the boxes after announcement of the results and on which basis it can be inferred or alleged that one (1) seal was missing and that five (5) seals inside the box had been as a result of tampering with ballot boxes. In absence of evidence in support of interference or tampering with the ballot boxes and having considered all arguments by both sides I find the grounds of appeal without merits and dismiss the same.

The appellant in ground 5 of the appeal averred that the trial court failed to find that in Giampampo polling Station the petitioner's 26 votes were missing in the ballot box and one of Simon Jonah Mugambi had been inflated by 25 votes which was a grave irregularity affecting the integrity of the election. That during the scrutiny and recount it was established that 26 votes which were clearly marked for the appellant had erroneously been awarded to Simon Jonah Mugambi.

The trial court in its judgment addressed the issue of tampering with the ballot box at lengthy and found that there was no evidence indicating someone broke into the ballot box and reduced appellant's votes by 26 votes. Form 35 and 36 showed correct votes of the 2nd Respondent as 37. The error noted affected the appellant whose 26 votes had been accredited to Simon Jonah Mugambi. This was a

human error but not brokage to the ballot box.

As regard Kamachuku School Polling Station the Appellant had been awarded 17 votes whereas he had actually garnered 176 votes. DW1 owned the mistake and also set out the correct results in the Replying Affidavit. The result of the recount confirmed Appellant votes as 176 instead of 17 and that the 2nd Respondent as 55 instead of 5. DW1 explained about the occurrence of the error in filling Form 35 in which it was done erroneously by using Form 35 for different election leading to the discrepancy. The appellant allegation that the Kamachuku ballot box was broken into and the 2nd Respondent added 50 votes is not supported by any evidence. The appellant and his witnesses did not know how many votes the 2nd Respondent had initially garnered before the allegation that he was added 50 votes. The petition and supporting affidavit do not contain such assertions. This is nothing more than mere speculation which the Appellant could not prove.

On Muguna Primary School polling station 11 votes which had been marked as rejected during scrutiny and recount it was revealed that the 2nd Respondent agreed to have 8 of the rejected ballots marked in favour of the Appellant as it appeared to them that the intention of voters were clear. The aforesaid 8 ballots did not have any marks on the boxes allotted for marking and as such the presiding officer acted correctly by rejecting them and could not be faulted.

In the petition it is clear that there were some minor discrepancies noted during the recount exercise and taking into account the votes not accounted in favour of the appellant, I find the discrepancies were minor and of no material effect to the overall outcome of the results as the 2nd Respondent remained overall winner after taking into account all unaccounted votes. In view of the foregoing I find no merits in the appellant's 5th ground of appeal and the same is dismissed.

The appellant in ground No. 2 and 9 averred that the trial magistrate erred in law and fact in finding that in Form 36 the total of the 2nd Respondent votes was inflated by 5 votes which was a grave irregularity and which went to the root of the integrity of the election and further in not holding that all 18 polling station had alterations which had not been owned or countersigned by anybody least of all IEBC officers in charge which totally undermined the elections integrity.

First and foremost it is worthy noting that these grounds were not raised in the petitioner's petition or supporting affidavit contrary to Rule 10(1) (e) and Rule 10(3)(b) of The Elections (Parliamentary and County Elections) Petition Rules 2013. The petitioner is bound by his pleadings at the trial and cannot be allowed to ambush the other party with ground not pleaded in the petition or supporting affidavit. Similarly it is wrong for the appellant to invite court to reconsider the petition on issues which were not alive before the original court and fault the trial court for failing to consider the same. The Appellant did not call evidence to show that all Form 35s had alterations and which Forms were not owned or countersigned by any one. Nor was there any evidence that any Form 35s which had alterations were altered after agents appended their signatures. Further no evidence was tendered to show that any alterations were tailored to sabotage the democratic will of the people of Mitheru ward. In the case of **Alhaji Waziri Ibrahim vs Shenu Shagani (1983 all N.L.R, 50)** the Nigerian court stated:-

"An amended document by itself does not speak of the motive behind the amendment. Without more, an altered or amended document is as genuine as an unamended one. Therefore, the admission of exhibits C to V, the returns from the States from which exhibits Band B 1 were collated without any evidence to add a sting to the innocent amended appearing on some of them offers no help to the case of the appellant….

I find myself therefore unable to accept the submission of the learned counsel for the appellant that

because returning officers amended and altered the returns exhibits C to V from 15 States that fact Ipso facto means that he returning officers have not complied with Section 65(4), 66, 70 and 119 of the Electoral Act 1982. **There must be evidence of indictment or of immoral, unlawful and illegal motive"**

….. It is conceivable that the occasion may genuinely arise when a statement of votes cast may of necessity be altered or amended for instance where a mistake in arithmetic is discovered during the counting of the votes or when a recount is made under Section 68 of the Electoral Act, 1982".

On whether the alleged errors materially affected the outcome of the elections I would refer to **Section 83 of the Elections Act** which states as follows:-

"This court is not persuaded that an arithmetical error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take into consideration as being a material factor, in the absence of other evidence of the irregularity, which would lead to the nullification of an election result"

The errors as noted committed in respect of Kamachuku Primary school Polling station and Mugone Primary school polling station revealed after scrutiny and recount that they did not affect the election results. The margin of results declared earlier on of 11 votes widened during the re-count to 29 votes. The appellant indeed has failed to prove that the irregularities noted during the tallying were of such magnitude as to affect the outcome of the elections. The results of the recount revealed the correct votes after corrections of errors was 2319 votes for the Appellant and 2348 for the 2nd Respondent. The margin widened from 11 votes to 29 votes. Further even if the results of the three (3) polling stations, that is Kamachuku Primary School Polling station, Giampampo primary School Polling station and Mugona Primary School were to be ignored from the final results after recount exercise it could result in the Appellant garnering 1568 votes as opposed to the 2nd Respondent's 2237 votes giving a margin of 669 votes.

Further in determining the effect of the irregularities I am guided by a decision of my brother **Justice Kimaru** in the case of **Malindi HC EP 6 OF 2013 Rishal Hamid Ahmed Amana v IEBC & Others cunners,** where the learned judge faced with similar errors stated:-

"This court is not persuaded that an arithmetical error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take into consideration as being a material factor, in the absence of other evidence of the irregularity, which would lead to the nullification of an election result".

In the case of **Joho v Nyange No. 4 (2008) 3 KLR (EP) 500** the court stated:-

"Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored."

"It is not every non-compliance or every act in breach of the election regulations or procedure that invalidates can election for being non-compliant with the law. As I have said minor breaches will be ignored." "… and the result of an election is affected when the cumulative effect of the irregularity reverses it. For instance when a large portion of the voters are by some blunder in the conduct of the election as happened in ……. do not turn up to vote, the result is said to have been affected."

In view of the foregoing I find no merits in appellant's grounds of appeal No's 2 and 9 and I dismiss the same.

In view of my above findings I find that ground No. 10 and 11 which are basically repeat of other grounds I have carefully considered, and I therefore find the same to be without merits and I dismiss the same.

The upshot is that the appellant's appeal is dismissed with costs of the appeal to the Respondents capped at Kshs.300,000/- for each of the Respondent to be taxed by the Deputy Registrar.

DATED AT MERU THIS 21ST DAY OF JANUARY, 2014

J. A. MAKAU

JUDGE

Delivered in open court in presence of:-

Mr. Muthomi h/b Mr. C. Kariuki for the Appellant

Mr. Nyenyire h/b Mr. Nyaburi for 1st Respondent

M/S Muthoni for 2nd Respondent

J. A. MAKAU

JUDGE