



Case Number:	Election Petition 5 of 2017
Date Delivered:	22 Nov 2017
Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Ruling
Judge:	Bernard Kasavuli
Citation:	John Osumba Olum v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR
Advocates:	Onsongo & Co. Advocates for the Petitioner. Masika & Koros Advocates for the 1st and 2nd Respondents. Maxwell O. Ogonda & Company Advocates for the 3rd Respondent.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed in part.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE`S COURT AT KISUMU

ELECTION PETITION 5 OF 2017

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS

PETITION) RULES, 2017

AND

IN THE MATTER OF ELECTION FOR MEMBER OF THE COUNTY ASSEMBLY FOR

KOLWA EAST WARD

- BETWEEN-

JOHN OSUMBA OLUM.....PETITIONER

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

ACHIENG` OKEYO YVONE.....2ND RESPONDENT

OWITI STEPHEN OUMA.....3RD RESPONDENT

RULING

On **12/9/2017**, the petitioner filed a Notice of Motion application and sought for a total of seven orders. Counsel for the petitioner deferred the determination of order (e) and (f) to a later period after receipt of the testimony of witnesses.

I have since considered the evidence tendered by the petitioner and his witnesses and the answer obtained from them in cross-examination and it is my view that, in order to determine whether audit, scrutiny, recount and re-tallying should be ordered in all the polling stations, regard should be given to the testimony of all the witnesses who have so far tendered their evidence herein.

First, according to the evidence on record, 13 witnesses were lined up for the petitioner inclusive of the petitioner but one of them namely **HEZRON OPIYO ASUDI** was dropped. The evidence tendered by the witnesses show that they had a problem relating to the manner in which elections were conducted in the following stations

1. Buoye Polling station
2. Chiga Polling station
3. Kadiju Polling station
4. Okago Polling station
5. Rweya Polling station
6. Bungu Polling station
7. Orongo Polling station
8. Obino Polling station

It was the petitioner and his chief agent one **CAMLUS OMONDI APUNDA** who alleged that the electoral malpractices, irregularities and illegalities occurred in all the stations. I consider that this was generalized and too broad a view not supported by the evidence on record.

Having listened to the evidence by the Petitioner and his witnesses, I am convinced that sufficient ground has been laid to warrant an examination of the manner in which the voting exercise was conducted in the the areas complained of. For instance PW7 Brian Otieno Omondi told the court that at Rweya polling station, there was an excess of 66 votes. There is also evidence from all the agents of the petitioner that they were not allowed to witness how the sorting out and counting of the votes was conducted. In one instance, a witness recalled that lights went off during counting and when they were restored the place where the petitioner's votes had been placed on the table was exchanged with the 3rd respondent's.

However,, having also considered the authorities on record, it is clear that audit, scrutiny, recount and re-tallying cannot be granted in all the polling stations without proper basis. Such is the case herein so that I find no sufficient cause having been shown to justify the same in all the 25 polling stations.

The fact that sufficient cause has been established in a few polling station does not therefore mean that the scenario obtains in all the 25 polling stations by extrapolation. Having also read rules 28, 29 and the findings in the case of **Charles Ong'ondo Were Vs Joseph Oyugi Magwagwa Homa Bay No.1 of 2013** where the court held that scrutiny and recount would be held so as to facilitate the expeditious disposal of the election petition, I am thus satisfied that in the same breath, scrutiny and recount in the eight (8) polling stations herein is unavoidable.

In conclusion, I order as follows:

1. **THAT** at such time to be set by the court, there shall be an audit, scrutiny, recount and re-tallying of all the election materials used and unused in **KOLWA EAST WARD** in the election held on 8th August, 2017 for member of the county Assembly and the same shall be conducted strictly confirmed to the following:

1. Chiga primary school polling station.
2. Rweya primary school polling station.

3. Obino primary school polling station.
4. Buoye primary school polling station.
5. Orongo primary school polling station
6. Kadiju primary school polling station.
7. Bungu primary school polling station.
8. Okago primary school polling station.

2. **THAT:** the scrutiny ordered shall be of the following election materials.

- a) Written statements by the returning officer under the Act.
- b) Printed copy of the register of voters used during the elections sealed in a tamper proof envelop.
- c) Copies of the results of each of the polling stations stated above.
- d) Written complaints of candidates and their representatives.
- e) Packets of spoilt ballots.
- f) Marked copy register.
- g) Packets of counted ballot papers.
- l) Packets of rejected ballot papers.
- j) Polling day diary and
- (k) Statements showing the number of rejected ballot papers.

In addition to the above and while having heard from counsel for the 1st and 2nd respondents on the status of the KIEMs Kits, I order that the Petitioner be granted a read only access to the **SD Cards** in order to access information contained therein in respect of all the polling stations stated in order 1 above for purposes of ascertaining the actual number of voters who cast their ballots/ voted during the said elections. The report to be filed in court.

3. **THAT:** In order to facilitate and ensure compliance with order 1 and 2 above, compliance shall be done under the direct supervision of this court assisted by the Executive Officer of this court and two court Assistants and in the presence of all the parties and their advocates and two (2) agents/ representatives for each of the polling station being scrutinized at a time.

4. **THAT:** during the scrutiny exercise, no supporters or member of the public shall be admitted.

5. Upon completion of the scrutiny parties will be at liberty to submit on the same at the end of the hearing.

DATED and DELIVERED at WINAM this 22nd day of November, 2017

Hon Bernard Kasavuli

SENIOR RESIDENT MAGISTRATE

Coram

Cc: Susan Bala

ONSONGO & CO. ADVOCATES FOR THE PETITIONER

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MASIKA & KOROS ADVOCATES FOR THE 1ST AND 2ND RESPONDENTS

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MAXWELL O. OGONDA & COMPANY ADVOCATES FOR THE 3RD RESPONDENT

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