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Case Action:	Judgment
Judge:	Stephen Githinji
Citation:	Bernard Muthomi Njoroge v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
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Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NAIVASHA**

**PETITION NO. 1 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT, 2011**

**AND**

**IN THE MATTER FOR THE ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY OF  
VIWANDANI WARD IN NAIVASHA CONSTITUENCY**

**BERNARD MUTHOMI NJOROGE.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**MILDRED N.W. WACHIYE.....2<sup>ND</sup> RESPONDENT**

**EUNICE WAMBUI MURIITHI.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

This petition which was filed by the Petitioner on 27/3/2011 is premised on the ground that the election held on the 4<sup>th</sup> March, 2013 of Viwandani Ward was not free, fair, verifiable and transparent, and that the process contravened the Constitution and other laws governing elections in Kenya.

The parties agreed on the issues for determination by the court as follows:-

- 1) Whether the election as was conducted by the Independent Electoral and Boundaries Commission on 4<sup>th</sup> March, 2013 was free, fair, transparent and the results reflective of the wishes of the people of Viwandani Ward.
- 2) Whether there was failure to identify the voters and to transmit the results electronically resulting to doing the same manually, and if so, how it affected the results or outcome in Viwandani Ward.
- 3) Whether given the manner in which Independent Electoral and Boundaries Commission conducted the elections in Viwandani Ward, it was possible to know the winner.
- 4) Whether the 3<sup>rd</sup> Respondent hoodwinked the electorate to belief she was in the Jubilee Coalition, and if so, how that affected the outcome of the election in Viwandani Ward.
- 5) Whether the 3<sup>rd</sup> Respondent through ex-Councillor John Mugo committed an election offence of "treating" under Section 62 of the Elections Act, 2011 and if so, the effect of it in her election as the

County Representative for Viwandani Ward.

On 23<sup>rd</sup> May 2013 the parties compromised in an application filed by the petitioner, dated 7<sup>th</sup> May 2013, as follows:-

1. The court be pleased to order a recount and a retally of all the votes cast on 4<sup>th</sup> March 2013 at all polling stations in Viwandani Ward.
2. That the recount and retally to begin on 27<sup>th</sup> May 2013 and to run daily till conclusion.
3. That each party be allowed to have two agents present during recount and retallying.
4. After the recount and retallying the witnesses whose affidavit are filed shall be cross-examined and re-examined if need be.
5. That the response by 1<sup>st</sup> and 2<sup>nd</sup> Respondents be deemed filed within time.
6. Parties will take further directions after the recount and retallying.
7. Costs be in the Cause.

The ballot boxes were received by the court on 27<sup>th</sup> May, 2013 and their conditions noted. However the recounting and retallying exercise commenced on 29<sup>th</sup> May 2013 and proceeded well upto 31<sup>st</sup> May, 2013. Notes were made of the observations and results entered into prepared forms.

On 29<sup>th</sup> May, 2013 notes were made about two ballot boxes. These are boxes Serial Number 181646 and 181576. The observations for box Serial Number 181646 were as follows:-

Seals found on top were Number 0031762, 0031874, 0031789, 0031803 and 0031642. All were intact. Inside the box were broken Seals Number 1509267, 1509303, 0031766, 1509266, and 0031709. These seals were recorded in the poll diary as the seals used at start of polling exercise.

For Box Serial Number 181576, the following was noted:-

Aperture Seal Number was not recorded in the polls diary (Number 0138672). The seal number recorded in it's place is 1509365. Seals Number 0138659 and 0138623 are recorded in the poll diary. Seal Number 138618 is in the poll diary but not in the ballot box. Four seals found inside the ballot box, numbers 0138626, 0138676, 0138661 and 1509368, are all recorded in the poll diary except that one, probably Number 0138661 is recorded as 0138616.

On 30<sup>th</sup> May, 2013 notes were made about two Ballot Boxes. These are ballot boxes Serial Numbers, 179461 and 180968.

Observations made are that for box serial number 179461, one seal had six serial numbers instead of seven. This is number 039182. The same is recorded in the poll diary. On this day, Governor's ballot boxes which contained the polls diary for Municipal Park Stream Six County Assembly were availed. Their serial numbers were recorded as follows:- 075582, 0066473, 0031970, 0066500, 0066412 and 0066415. They were to be opened after recounting and retallying for the other remaining stations.

For box serial number 180969, observations made were that aperture seal was broken to put in 4 leftout

ballot papers: The broken seal was number 1509215: New seal placed was number 1763845.

On 31<sup>st</sup> May, 2013 observations made were for only one box, serial number 179994. What was observed was that seal number 0391792 was broken, and the same had been noted on 27<sup>th</sup> May, 2013 when the court received the ballot boxes from the Independent Electoral and Boundaries Commission.

On this day the Governor's box was opened and the poll diary for stream six retrieved.

In recounting and retallying exercise, the parties had agreed it be done for all the candidates in the Ward, but the total sum of votes cast in favour of candidates be done only for the petitioner and the 3<sup>rd</sup> respondent. That was done, and the petitioner total votes cast in his favour totalled to 6101, the figure given after the polls by Independent Electoral and Boundaries Commission, but the 3<sup>rd</sup> respondent's figure increased from 6213 votes which was declared by Independent Electoral and Boundaries Commission after the polls to 6,234 votes. A difference of more votes on her part of 21. The votes had been tied in a bundle and inadvertently left out uncounted in Municipal Park Polling Station Stream 6.

After the exercise of recounting and retallying, the hearing was to commence on 11<sup>th</sup> June, 2013. On this day the parties agreed that the petitioner produces two recorded CD's as exhibits, and some campaign posters for the 3<sup>rd</sup> respondent. They agreed not to call witnesses, but to submit, and for the court to write a judgment. The procedure was adopted.

Parties submitted and it's noticeable at this point that the petitioner used his own set of issues for determination rather than those agreed upon by parties and the court. The reason for that is unexplainable.

Having given the history of the matter, I now turn to consider the issues for determination one after the other.

## **ISSUE - 1**

***Whether the election conducted by Independent Electoral and Boundaries Commission on 4<sup>th</sup> March, 2013 was free, fair, transparent and the result reflective of the wishes of the people of Viwandani Ward.***

Article 38 of the Constitution, which is about political rights, states that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors.

The general principles for the electoral system under Article 81 (e), is for free and fair elections, which are:-

- i. by secret ballot;
- ii. free from violence, intimidation, improper influence or corruption;
- iii. conducted by an independent body;
- iv. transparent and
- v. administered in an impartial, neutral, efficient, accurate and accountable manner.

I move on also to consider provisions of Article 86 which obliges Independent Electoral and Boundaries Commission to ensure that:-

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

The foregoing provisions of the Constitution buttresses the need for fair and free elections; and states how such should be achieved in an election. The question is whether such was achieved in Viwandani Ward.

During recount and retallying, we established that the system was not perfect as mistakes were made where some seals were not indicated rightly, some seals were broken, and some ballot papers casted in favour of the 3<sup>rd</sup> respondent not counted. In Election Petition No. **5 of 2013, of Raila Odinga Versus Independent Electoral and Boundaries Commission and 3 Others**, the Supreme Court similarly noted that the election was not perfect. I do find that, it can hardly be given that to err is human, and it involves a large population and a myriad of activities.

The noted errors were not made intentionally and most of them were easily explained. They were not by design, and nor meant to favour any candidate against the other. None could specifically be pointed out to have favoured a certain party against the other, save for the 21 votes in favour of the 3<sup>rd</sup> respondent which had been missed out. The fact that the petitioner number of votes amounted to the same given by Independent Electoral and Boundaries Commission shows that the process was to a good extent administered in an impartial, neutral, efficient, accurate and accountable manner.

In the case of **Joho Versus Nyange and Another, Election Petition No. 1 and 2 of 2005**, it was observed that:-

“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. But where deliberate irregularities or forgeries are committed different considerations should be given as to the effect if any, that those errors have on election before it’s vitiated.”

My stated position on the noted errors is well embraced in the above quotation.

**I move to issue two:-**

***Whether there was failure to identify the voters and to transmit the result electronically, resulting to doing the same manually, and if so how it affected the results or outcome in Viwandani Ward.***

It's not in dispute that electronic identification of voters and transmission of results gadget failed in most of the polling stations and Independent Electoral and Boundaries Commission personnel resulted to manual electoral system.

However I have gone through the filed affidavits by the petitioner witnesses, and none discloses how that worked to the disadvantage of the petitioner. It's not established that if the electronic system served the purpose perfectly, the results would have been different, that is in favour of the petitioner. There is no evidence of any votes lost or misplaced due to resulting to manual electoral system. The failure of the electronic system if by design or otherwise, is not connected at all to any of the candidate and whatever disadvantage it caused, was to all the candidates. Probably save for the delay in polling and tallying, I do not see how it otherwise affected the end result.

Article 86 of the Constitution of which I earlier on quoted, does not provide specifically for electronic system of voting, but for whatever method which would ensure the system is simple, accurate, verifiable, secure, accountable and transparent. When the system failed Independent Electoral and Boundaries Commission resulted to the other only option they had.

On the stated reason the ground must fail.

### **ISSUE NO. 3**

***Whether given the manner in which Independent Electoral and Boundaries Commission conducted the election in Viwandani Ward it was possible to know the winner.***

I wish to import to this issue what I have already considered in the first and 2<sup>nd</sup> issues. The carried out tough exercise of recounting and retallying, vindicates the manner in which Independent Electoral and Boundaries Commission conducted elections in Viwandani Ward. If there was anyone adversely affected it was the 3<sup>rd</sup> respondent who had missed out a well entitled 21 votes. The petitioner votes tallied with what he had been accorded. The other noted errors were insignificant and affected all candidates equally. The announced result well expressed the winner and the people's choice. She had more votes than any other candidate. There is no doubt about that and it was easily possible to know the winner.

### **ISSUE 4**

***Whether the 3<sup>rd</sup> respondent hoodwinked the electorate to belief she was in the Jubilee Coalition and if so, how that affected the outcome of the election in Viwandani Ward.***

The 3<sup>rd</sup> Respondent was a member of Mazingira Green Party of Kenya, and was nominated as a candidate by the said party. The petitioner alleges that she presented the party sponsoring her to the electorates as a member of Jubilee Coalition, which was the most popular in the region and presented herself as a candidate within Jubilee Coalition, which made her garner underserved votes.

To support the allegation the court was presented with two CD's and posters used in her campaigns. I had a look of at all of them. The posters which are also captured in one of the two CD's shows that it was well indicated she was a candidate under Mazingira Greep Party of Kenya. The posters, at the bottom, captures that very well. However there's also a portrait of Honourable Uhuru Who was the presidential candidate for Jubilee Coalition.

The other CD has songs which are introduced by allegedly the 3<sup>rd</sup> respondent with a brief speech. In it

she urges the voters to vote for her for development and claims she is in Jubilee Coalition. I may say I considered this as the strongest point probably the petition or had in this petition. I have weighed it properly.

The CD with songs and speech was not backed with evidence establishing that the speech was by the 3<sup>rd</sup> respondent. I cannot tell where the CD was recorded, when and by who, and how the petitioner obtained it. There is also no evidence that it was ever played. The standard of proof in an election petition is higher than in normal Civil Matters but lower than in Criminal Cases. It is in between, but not specifically defined. That was well stated in the case of **John Kiarie Waweru Versus Beth Wambui Mugo and 2 Others, Election Petition No. 13 of 2008.**

The 3<sup>rd</sup> respondent positions is that the Mazingira Green Party of Kenya had no presidential candidate and she was free to support any presidential candidate, and supported Honourable Uhuru Kenyatta; the presidential candidate for Jubilee Coalition. This is not disputed by the petitioner.

Since the party which nominated her had no presidential candidate she violated no provision of law by supporting the presidential candidate she opted to. There is no evidence adduced to show that any one who would otherwise not voted for her did so due to mistaken belief that she was in Jubilee Coalition. I also find it not entirely irrelevant to state that a party who had been nominated by The National Alliance (TNA), which could be argued to have been a popular party in the area, lost. This could portray that the electorate were well informed and went for the candidate of their choice, and not simply influenced by the party nominating the candidate. I find no reliable evidence than anyone who would not have voted for the 3<sup>rd</sup> respondent was hoodwinked in voting for her by the speech given before the music in the CD, the posters used in the campaign by her, and the motorbike riders in the campaign who were in support of the now president, Uhuru Muigai Kenyatta. It's for this reason that this 4<sup>th</sup> ground also fails.

***The last but not least issue, Issue number 5, is of whether the 3<sup>rd</sup> Respondent through ex-councillor John Mugo, committed an election offence of "treating" under Section 62 of the Election Act, 2011 and if so the effect of it in her election as the County Representative for Viwandani Ward.***

Section 62 of The Election's Act, 2011 defines what amounts to the offence of treating. It states:-

"Any candidate who corruptly, for the purpose of influencing a voter or refrain from voting for a particular candidate or for any political party at an election:-

a. before or during an election:-

i. undertakes or promises to reward a voter to refrain from voting;

ii. gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expense for giving or providing any money, ticket or other means or device to enable the

procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or

(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforementioned, commits the offence of treating.”

The petitioner, vide an affidavit sworn by Bernard Muthomi Njoroge, in paragraph 15, alleges that on the voting day, that is on 4<sup>th</sup> March, 2013, the 3<sup>rd</sup> Respondent’s supporters and mainly ex-councillor John Mugo was ferrying voters into polling stations within Viwandani Ward, using motor vehicles registration number KAA 863V, Nissan Sunny/cream or yellow under the pretext that those voters were sickly. The second respondent was called on phone number 0716-454014 but took no action.

The 2<sup>nd</sup> Respondent on her part, in response to the allegation stated that she received a call from Esther Njeri and informed that John Mugo was conversing with voters at the polling stations. The 2<sup>nd</sup> Respondent reported the same to the Officer Incharge of Station one John Owuoth who proceeded to the polling stations but did not find the said John Mugo.

The petitioner did not provide or adduce evidence to prove that the said John Mugo was a supporter of the 3<sup>rd</sup> Respondent. Apart from mere claim that he was ferrying voters to polling stations on the voting day, there’s no evidence to support it. Those allegedly ferried are not disclosed and none swore an affidavit. In law he who alleges proves and it was the burden of the petitioner to establish the allegation to the required standard. In the case of ***Joho –versus- Nyonge***, Justice Maraga J. stated that:-

“Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in proceedings. Election petitions should be proved by cogent, credible and consistent evidence.”

It’s such evidence which petitioner failed to present to prove the allegations. On the ground the issue fails.

In a democratic society, an election properly conducted should express the will of the people. The court’s duty therefore, in an election petition, is to establish whether that was realized, but not to impose leaders on the people.

Having well considered and weighed all the issues in question, vis-à-vis the manner in which the 1<sup>st</sup> respondent conducted the election in Viwandani Ward, I am satisfied that it was free and fair; free from violence, intimidation, improper influence or corruption; and administered in an impartial, neutral, efficient, accurate and accountable manner, “Accurate” here does not mean perfect, but one that yields correct result. The deserving candidate fairly won and is the one who was declared the winner. This petition therefore fails with cost to the respondents.

I now wish to thank all the parties who took part in this petition. They demonstrated calm and great understanding which has greatly eased my work.



Judgment read and delivered in the open court in presence of all parties this **14<sup>th</sup>** day of **August**, 2013.

Right of appeal 28 days.

**Signed:**

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**STEPHEN GITHINJI**

**CHIEF MAGISTRATE**

**14<sup>TH</sup> AUGUST, 2013**



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