



Case Number:	Election Petition Appeal 10 of 2013
Date Delivered:	30 Jan 2014
Case Class:	Civil
Court:	High Court at Garissa
Case Action:	Judgment
Judge:	Pauline Nyamweya
Citation:	Abdinoor Adan Abdikarim v Independent Electoral & Boundaries Commission & another [2014]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Garissa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KENYA AT GARISSA**

**ELECTION PETITION APPEAL NO 10 OF 2013**

**ABDINOOR ADAN ABDIKARIM.....APPELLANT**

**VERSUS**

**DEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....**

**<sup>ST</sup> RESPONDENT**

**MOHAMED MOHAMUD OSMAN.....<sup>2ND</sup> RESPONDENT**

**(An Appeal arising out of the Judgment of Mr. Linus Kassan, Principal Magistrate in Election Petition No 3 of 2013 delivered on 16th July 2013 in the Chief Magistrate's Court at Garissa)**

**JUDGMENT**

**Introduction**

The Appellant contested for the position of County Assembly Member for Adamasajide Ward within Wajir West Constituency in the general elections held on 4<sup>th</sup> March 2013, and in which elections the 2<sup>nd</sup> Respondent was declared winner by the 1<sup>st</sup> Respondent. The Appellant subsequently filed an election petition in Election Petition No 3 of 2013 at the Garissa Chief Magistrates Election Court, and the petition was heard and dismissed by the Honourable Linus Kassan P.M., the magistrate gazetted to hear and determine the election petition. The Appellant being aggrieved has appealed the judgment of the said magistrate.

The Appellant in his petition in Garissa CM Election Petition No 3 of 2013 had sought declarations that the election with respect to the ward representative for Adamasajide Ward was not in accordance with the Constitution and Elections Act; that the 2<sup>nd</sup> Respondent was not validly elected, and that the said elections be declared null and void. He also sought orders that fresh elections be conducted. His petition was premised on the ground that his photograph appeared twice on the ballot paper in respect to the election of the County Assembly Representative for Adamasajide Ward, and that this disenfranchised and dissuaded the voters from casting their vote in favour of the Appellant. Further, that the said election was thus not free and fair.

The Appellant's arguments on the above Grounds of Appeal were in the Appellant's submissions dated 10<sup>th</sup> October 2013 and filed in Court on 14<sup>th</sup> October 2013, and in the Appellant's Responding Submissions dated 22<sup>nd</sup> November 2013 and filed in court on 23<sup>rd</sup> November 2013. The 1<sup>st</sup> Respondent opposition and response to the Appeal herein is in its submissions dated 28<sup>th</sup> October 2013 and filed in Court on 29<sup>th</sup> October 2013. The 2<sup>nd</sup> Respondent also opposed the appeal and his response is in his submissions dated 12<sup>th</sup> November 2013 and filed in Court on the same date.

**The Grounds of Appeal**

The Appellant relied on 17 grounds of appeal in his Memorandum of Appeal dated 26<sup>th</sup> July 2013 and filed in court on 29<sup>th</sup> July 2013. the Appellant subsequently collapsed his grounds of appeal to five grounds, in his submissions dated 10<sup>th</sup> October 2013 and filed on 14<sup>th</sup> October 2013.

The five collapsed grounds of Appeal are as follows:

1. That the learned Magistrate erred in law in entering judgment for the Respondents against the Appellant with costs.
2. That the learned Magistrate erred in law in disregarding the Appellants evidence and submissions and regarding with bias the Respondents evidence and submissions.
3. That the Learned Magistrate erred in law in finding that the elections held in Adamasajide ward met the required standard in law.
4. The trial Magistrate erred in law and in fact in failing to apply clear principles of law and misdirected himself in reaching the decision therein.
5. The learned Magistrate erred in law in holding that the elections in Adamasijide Ward were free and fair.

The Respondents argued in their submissions that various grounds appearing in the Appellant's Memorandum of Appeal should be struck out as they raised matters of fact and not law. However, as the Appellant subsequently collapsed his grounds of appeal to five grounds, and the parties herein argued their submissions on the basis of these five grounds of appeal, I will not belabor the issue of striking out the grounds of appeal urged by the Respondents.

The role of this court in hearing this appeal is as provided by the provisions of sections 75 (4) of the Elections Act and Rule 34(10) of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 on the hearing of appeals from a Magistrate's Court. Section 75(4) of the Elections Act provides that an appeal from a decision of Resident Magistrate's Court as to the validity of the election of a member of a county assembly shall lie to the High Court on matters of law only. Rule 34(10) of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 provides that 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 the original jurisdiction.

The duty of this court as an appellate court is therefore to review the evidence given at the trial court, and determine whether the findings of the trial court on matters of law should stand, and if not to reach its own independent conclusions. It is necessary to state at the outset in this regard that the standard of proof required in election petitions as held by the Supreme Court of Kenya in **Raila Odinga vs The Independent Electoral & Boundaries Commission and Others S.C Petition No 5 of 2013** is higher than a balance of probabilities, but not beyond reasonable doubt.

### **The Evidence**

I will proceed with a summary of the evidence that was given in the trial court. On the part of the Appellant, the trial court adopted the affidavits he had filed in support of his election petition as evidence. The Appellant filed two affidavits, one sworn on 28<sup>th</sup> March 2013, and another on 20<sup>th</sup> May 2013. His testimony was that he took part in the general elections held on 4<sup>th</sup> March 2013 as a candidate for the Adamasajide Ward County Assembly on the National Alliance Party (TNA) ticket. That on the said day,

he was informed by one of his supporters that his photograph was appearing twice on the ballot paper, and that his supporters were as a result confused as they thought that he had as a result been barred from running for the position of County Assembly member.

The Appellant further stated that he went to the polling station and confirmed that his photograph was appearing twice, against his name and the name of the Wiper Democratic Movement party candidate, Adan Noor Hussein. He attached a photographic image of the relevant part of the ballot paper as evidence. He stated that he then informed all the presiding officers in the ward, and returning officer, as well as the 1<sup>st</sup> Respondent's national tallying centre but did not get any response, and that the elections proceeded resulting in the 2<sup>nd</sup> Respondent being declared as winner. The Appellant also produced a copy of the press release by the Chairman of the 1<sup>st</sup> Respondent dated 4<sup>th</sup> March 2013, which he stated directed a repeat of elections in County Assembly wards where there had been a mix-up of candidates' pictures among other anomalies.

The Appellant called two additional witnesses to give evidence on his behalf. The first was Anwar Adninoor Adan, whose affidavit sworn on 28<sup>th</sup> March 2013. His testimony was that on the date of the general elections he went to the polling station to vote, and that he heard people stating that the Appellant had been disqualified since his photograph was appearing twice on the ballot paper. He stated that he went to vote, and was confused as to who to vote for as he found the photograph of the Appellant appearing twice. Upon cross-examination the witness clarified that he was a university law student and that the Appellant was his father. Further, that he did vote, for although initially confused by the two photographs, he knew the TNA colours and the first photograph had his father's name.

The second witness called by the Petitioner was Mohamed Sadiq Abdikarim, who in an affidavit sworn on 28<sup>th</sup> March 2013 stated that he is a consultant with NGOs and a Ph.D candidate. He stated that he went to vote at Waso Girls polling station, and reiterated the evidence given by the previous witness as to the confusion caused by the Appellant's photographs appearing twice on the ballot paper. Upon cross-examination, he stated that he voted despite the discrepancy in the photographs after studying the ballot paper, and as he knew the Appellant as they are family members.

The 1<sup>st</sup> Respondent's witness was Festus Mari Ngeerah, the 1<sup>st</sup> Respondent's Returning Officer for Wajir West Constituency in the general elections held on 4<sup>th</sup> March 2013. His affidavit sworn on 24<sup>th</sup> April 2013 was adopted as his evidence by the court. He stated therein that he observed the applicable rules and regulations in the elections, and gave a detailed account of the electoral processes during the elections, and the results thereof. His testimony on the mix-up in pictures was that it did not in any way affect the conduct of the elections as he instructed all the presiding officers to make sure that the voters were assisted by making sure that the anomaly was brought to their attention, and that they voted for their preferred candidate.

The witness initially denied that the Appellant made a complaint about the photographs, but upon cross-examination admitted that he was informed of the mix-up in the photographs on the ballot paper by the presiding officer of Adamasajide Ward, and that he also informed the 1<sup>st</sup> Respondent. However that he had no power to stop the election, and that Adamasajide Ward was not one of the wards listed in the press release by the 1<sup>st</sup> Respondent's Chairman.

The 2<sup>nd</sup> Respondent gave evidence and called two additional witnesses. The 2<sup>nd</sup> Respondent's affidavit sworn on 15<sup>th</sup> April 2013 was adopted by the Court. He stated therein that he vied for the seat of ward representative for Adamasajide Ward during the general elections held on 4<sup>th</sup> March 2013 on a United

Democratic Front (UDF) ticket, and that he voted during the said election. Further, that when he went to the polling station to cast his vote, he and other voters were informed of the anomaly in the photographs on the ballot paper, and advised to vote using party symbols. He denied that most of the voters were illiterate and relied on candidate's photographs, and that they did not vote for fear of their votes being spoilt.

The first witness called by the 2<sup>nd</sup> Respondent was Adan Noor Hussein who swore an affidavit on 15<sup>th</sup> April 2013. He stated that he is a development worker and was a candidate in the general elections held on 4<sup>th</sup> March 2013 and vied for membership of the Adamasajide County Assembly Ward. Further, that when he arrived at the Hadado South Market polling station to cast his vote, he found that his photograph was missing from the ballot paper, but the rest of his details including his name and party details were correct.

He stated that the photograph of one of the other candidates, namely the Appellant, was appearing in his slot. His testimony was that he was informed upon inquiring from the presiding officers that it was printing error, and that they advised him and other voters to use the party symbols and names to vote. He also testified that he was satisfied with the 1<sup>st</sup> Respondent's officer's response and the results of the elections.

The second witness called by the 2<sup>nd</sup> Respondent was Sirat Abdikadir Sadeko whose affidavit sworn on 15<sup>th</sup> April 2013 was adopted by the court. His testimony was that he voted within Adamasajide Ward during the general elections held on 4<sup>th</sup> March 2013, and that while at the polling station he was informed of the anomaly in the photographs on the ballot paper by the 1<sup>st</sup> Respondent's officers. Further that he was advised to use the said party symbols and names on the ballot paper. He further testified that the 1<sup>st</sup> Respondent's officers were assisting the persons with disability and the illiterate persons in this regard, including his father and mother who informed him that they had been so assisted.

### **The Issues and Determination**

Upon examination of the grounds of appeal and the evidence by the parties, it is evident that the photograph of the Appellant appeared twice on the ballot paper for the County Assembly elections for Adamasajide Ward, firstly against his name as the National Alliance Party candidate, and also as against the name of the candidate for the Wiper Democratic Party. I therefore find that the issues of law that are raised by the Appellant's appeal are three.

The first issue is whether the trial magistrate erred in law by finding that the elections held in Adamasajide Ward met the requirements of the law in the circumstance where the photograph of the Appellant appeared twice on the ballot paper. Secondly, whether the trial magistrate erred in law by finding that the elections held in Adamasajide Ward were free and fair in the said circumstances. Lastly, whether the trial magistrate erred in law in awarding costs against the Appellant in the said circumstances.

The analysis and findings of this Court on these issues is as follows.

#### ***a. On the issues arising from the Appellant's photograph appearing twice on the Ballot Paper***

The Appellant made several arguments on the first two issues as to whether the trial magistrate's erred

in law in finding that the elections held in Adamasajide Ward met the requirements of the law, and were free and fair in the circumstance where his photograph appeared twice on the ballot paper. Firstly, he submitted that the trial magistrate disregarded the Appellants evidence and submissions and was biased towards the evidence and submissions of the Respondents.

The Appellant argued in this respect that he brought the trial court's attention to the press release and directions given by the 1<sup>st</sup> Respondent's Chairman that elections where there were issues of photo mix-ups would be postponed and new ballot papers printed. However, that the trial magistrate held that Adamasajide Ward was not included in the list provided by the said Chairman, and that the mix-up of photos was a mere printing error. The Appellant submitted that he and the voters of Adamasajide Ward were discriminated against as they used defective balloting papers, while voting was stopped in other wards where there were similar errors.

Secondly, the Appellant submitted that the trial magistrate erred in law by disregarding the submission by the Appellant on the low literacy levels in Wajir District in which Adamasajide Ward is situated, and that the voters in the District could not be able to properly discern and interpret a ballot paper that was not simple, accurate and verifiable. He stated that the trial magistrate acted in contravention of Articles 81, 82(2) and 86 of the Constitution, and relied on the decision in **Emmanuel Katan Micheal & 2 Others vs IEBC & 2 Others, Kapenguria CMCC Election Petition 1 of 2013** in this respect.

The third argument put forward by the Appellant was that the trial court relied on the wrong principles of law by putting reliance on the decision in **John Kiarie Waweru vs Beth Mugo & 2 Others (2008)e KLR** which was on electoral malpractices, and by conducting an unwarranted arithmetic exercise of counting the votes received by the Appellant as compared to those received by the winner of the election, while the Appellant's case was on the error on the face of the ballot paper due to the mix-up of photographs of the candidates on the ballot paper. The Appellant stated that he proved his case to the standard set by the Supreme Court in in **Raila Odinga vs The Independent Electoral & Boundaries Commission and Others S.C Petition No 5 of 2013**.

The last argument by the Appellant was that no free and fair elections were conducted as the ballot paper for Adamasajide Ward did not contain the correct information, and the errors on the ballot paper on the details of the candidates made it defective in its entirety and it ought to have been rejected in the same manner as provided for rejected ballot papers under Regulation 77 of the Elections (General Regulations) Rules of 2012.

The 1<sup>st</sup> Respondent's response to the Appellant's arguments was that the elections for Adamasajide Ward were not one of the elections postponed in the press release by its Chairman since the Appellant failed to bring to the attention of the 1<sup>st</sup> Respondent the said mix up after publication of the sample ballot paper. Further, that the literacy report relied upon by the Appellant was unsupported by the testimony of his witnesses, neither did the Appellant call the author of the report as a witness. The 1<sup>st</sup> Respondent also submitted in this regard that the Appellant's witnesses testified that they were able to vote for the candidate of their preferred choice.

The 1<sup>st</sup> Respondent distinguished the decision in **Emmanuel Katan Micheal & 2 Others vs IEBC & 2 Others, Kapenguria CMCC Election Petition 1 of 2013** on the basis that it was the decision of a lower court and therefore not binding, and that there was no mix-up of photographs in that case. The 1<sup>st</sup> Respondent instead relied on the decision in **Anthony Luyandi Isayi vs IEBC & Another, Kakamega High Court Election Petition No. 3 of 2013** which laid down the characteristics of a free and fair election.

The 1<sup>st</sup> Respondent responded to the Appellant's third argument by submitting that there can be no difference between an irregularity and error on the face of the ballot paper, and that the trial court did not err in relying on the decision in **John Kiarie Waweru vs Beth Mugo & 2 Others (2008) eKLR**. Further, that in this appeal the voters exercised their right to vote under Article 38 of the Constitution, and the trial magistrate was entitled to look at a scenario of any possible votes that the Appellant could have lost as a result of the alleged irregularity, including adding in his favour any votes that were cast in favour of the other candidate bearing the Appellant's photograph. The 1<sup>st</sup> Respondent relied on the decision in **William Odhiambo Oduol vs IEBC & 2 Others, (2013) e KLR** in this regard.

Lastly, on the argument put forward by the Appellant that the elections were not free and fair, the 1<sup>st</sup> Respondent argued that all witnesses testified that the elections conducted in Adamasajide Ward conformed to the law. Further, that the evidence adduced by the Appellant was below the required standard of proof set by **Raila Odinga vs The Independent Electoral & Boundaries Commission and Others S.C Petition No 5 of 2013**. The 1<sup>st</sup> Respondent urged the court to be guided by the decision in **Paul Gitenyi Mochorwa vs Timothy Mosei E. Bosire & 2 Others, (2013) e KLR** whose facts were similar to those in this appeal.

The 2<sup>nd</sup> Respondent on his part submitted that the Appellant did not lead evidence to confirm his assertions, and particularly that he did not call any evidence of an illiterate person to confirm that they relied on the photographs of the candidates on the ballot paper, or of any witness to show that they were confused by the Appellant's photograph appearing twice on the ballot paper.

The 2<sup>nd</sup> Respondent urged this Court to be guided by the decisions in **Philip Munge Ndolo – vs- Omar Mwinyi Shimbwa & 2 Others, Mombasa High Court Election Petition 1 of 2013** reported in (2013) eKLR; **Swaleh Salim Swaleh Imu & Another –vs- The Independence Electoral & Boundaries Commission & 2 Others Malindi High Court Election Petitions No 5 & 4 Of 2013** reported in (2013) eKLR; and **Antony Luyundi Isayi –vs- Independent Electoral & Boundaries Commissson & Another, Kakamega High Court Election Petition No. 3 of 2013** reported in (2013) eKLR.

On the first issue as to whether the requirements of the law were met in this appeal, the principles of law that guide elections in Kenya are found in Article 81 of the Constitution which provides as follows:

**“The electoral system shall comply with the following principles-**

- (a) freedom of citizens to exercise their political rights under Article 38;**
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;**
- (c) fair representation of persons with disabilities;**
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and**
- (e) 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”**

Specifically as to the conduct of elections and the voting processes, section 38 of the Elections Act provides that after a notice of an election has been published in the *Gazette*, every returning officer shall proceed to hold the election according to the terms of the notice and in accordance with the regulations relating to elections. The regulations on the conduct of elections are found in the Elections (General) Regulations of 2012, and Regulation 68(4) of the said regulations provides as follows on the form and content of a ballot paper that are to be used in an election:

**“Every ballot paper for use at an election shall—**

**(a) contain the name and party symbol of the person validly nominated;**

**(b) contain a photograph of the candidate where applicable;**

**(c) be capable of being folded up;**

**(d) have a serial number, or combination of letter and number, printed on the front; and**

**(e) have attached a counterfoil with the same number or combination printed thereon.”**

It is not disputed that the Appellant’s photograph appeared twice on the ballot paper for the County Assembly elections for Adamasajide Ward, against his name as the National Alliance Party candidate, and also as against the name of the candidate for the Wiper Democratic Party. It is my view in this regard that the meticulous and accurate implementation of electoral procedures are a key element for the delivery of credible elections, and for maintaining the integrity of elections, and is specifically provided for under Article 81(e)(v) of the Constitution.

The design of ballot papers also affect the integrity of the electoral process as they can help ensure that voters can easily identify the candidate of their choice on the ballot, and mark the ballot so that their intention is clear, hence the requirements as to the form and content of a ballot paper in Regulation 68(4) of the Election (General) Regulations of 2012.

In addition on the argument put forward by the 1<sup>st</sup> Respondent that the Appellant failed to bring the said mix-up to their attention after the sample format of the ballot paper was first published, I wholly adopt the decision by the Court of Appeal in **Dr. Thuo Mathenge & Another v Nderitu Gachagua & 2 Others [2013] e KLR** in this regard, wherein it was held as follows:

**“We are cognisant of the requirement under Regulation 51 (5) of the Regulations wherein the 3rd respondent is required to publish the names of cleared candidates. Upon such publication in the**



**Kenya Gazette, the obligation to point out any error is upon any member of the public but more particularly on an aggrieved person, in this case being the 1<sup>st</sup> appellant. We find that the 1<sup>st</sup> appellant failed to discharge this obligation. However, the obligation of the 3<sup>rd</sup> respondent to ensure the accuracy of the contents of the ballot paper cannot be diminished by an allegation that the 1<sup>st</sup> appellant was to inform them of any error”**

The 3<sup>rd</sup> Respondent in the said appeal was the Electoral and Boundaries Commission, who is the 1<sup>st</sup> Respondent herein.

It is also not disputed with regard to the issue of the requirements of the law, that the 1<sup>st</sup> Respondent's Chairman issued a press briefing on 4<sup>th</sup> March 2013 which was attached as annexure “AA3” to the affidavit sworn by the Appellant dated 28<sup>th</sup> March 2013, and which was adopted as his evidence by the trial court. The said Chairman stated as follows in the said press briefing

**“...An initial audit of the ballot papers has revealed a very tiny number, no more than half dozen of positions with missing political party symbols, mix up of candidate pictures and one or two candidate's names entirely missing from the register. All such cases concern only the County Assembly wards. In the interest of fairness and observant of its constitution mandate the Commission has rescheduled elections in such county assembly wars (*sic*) to 11<sup>th</sup> March 2013....”**

The Chairman then listed the wards where the elections had been rescheduled.

The argument was put forward by the 1<sup>st</sup> Respondent that the fact that Adamasajide Ward was not among the listed wards, was the reason why they did not reschedule the elections for the said ward. The 1<sup>st</sup> Respondent's witness at the trial who was the Returning Officer for Wajir West Constituency, however admitted in his evidence to being informed of the mix-up in the photographs on the ballot paper for the county assembly elections for Adamasajide Ward, and of informing the 1<sup>st</sup> Respondent of the same.

I note in this regard that the requirement of impartiality in Article 81 (e) (v) of the Constitution entails being fair and affording all stakeholders in the elections equitable and honest treatment and a level playing field, as well as treating them in a non-partisan manner. This requirement was therefore breached in the case of County Assembly elections for Adamasajide Ward to the extent that the elections were not rescheduled by the 1<sup>st</sup> Respondent upon being informed of the error on the ballot paper, which it did for other affected wards.

It is thus the finding of this court that to the extent that the requirements of Article 81(e)(v) of the Constitution and Regulation 68(4) of the Elections (General Regulations) Rules of 2012 were not adhered to, the 1<sup>st</sup> Respondent violated provisions of the laws with respect to the County Assembly elections for Adamasajide Ward. It is also my finding that the trial court erred in making a finding that there were insufficient grounds to grant the prayer in the Appellant's petition for a declaration that the 1<sup>st</sup> Respondent did not conduct the elections in respect to the ward representative for Adamasajide Ward in accordance with the Constitution, the Election Act and written law. The Appellant's appeal is accordingly found to have merit and is upheld on this issue.

As to the issue whether the said mix-up of the photographs in the ballot paper for the County Assembly elections for Adamasajide Ward resulted in the elections not being free and fair, it is in this regard essential to note that there are a number of additional requirements for a free and fair elections that are provided in Article 81(e) of the Constitution. From these requirements, it is evident that the organizing of free and fair elections is part of a process that ensures universal and equal access to the electoral

process, and to ballots which are secret and free. It also requires an absence of fraud and intimidation and that the votes are translated fairly into legislative seats in a transparent manner, and in accordance with the law. Lastly, there is the requirement that the elections should be managed by an independent body.

A determination that a given election is free and fair therefore calls for scrutinizing not just the laws that provide for elections and the election event - but the run-up to the elections as well. In addition, it is not in all circumstances that non-compliance with the principles governing a free and fair election leads to unfair elections, and section 83 of the Elections Act provides as follows in this regard:

**“ No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that non compliance did not affect the result of the election.”**

In the present appeal, other than the evidence of the mix-up of the photographs in the ballot paper, no other evidence was provided by the Appellant of other irregularities committed either in the run-up to the elections, or during the elections that made the County Assembly elections for Adamasajide Ward substantially unfair. On the specific effect of the mix-up of photographs on the ballot paper, the Appellant's main argument was that it resulted in confusion of the voters and that there was the perception that he had been disqualified from standing for the elections. However, the witnesses for the Appellant gave evidence that despite this confusion and perceptions they were still able to cast their vote.

The Appellant sought to rely on a report on “Adult Literacy in Kenya” by the Kenya Bureau of Standards that he introduced during his submissions at the trial court to illustrate the low literacy levels in the former North Eastern Province in which Adamasajide Ward is located, and the effect of the photograph mix-up in this respect. Even if this court were to disregard the procedural lapses committed by the Appellant in this regard, and was to take judicial notice of the low literacy levels in Adamasajide Ward, the Appellant still did not discharge his burden of proof as he did not bring any witnesses or evidence to demonstrate his allegations that the voters who were illiterate were not able to vote for him as alleged. On the contrary, all his witnesses were educated persons.

The Appellant's witnesses in their evidence on the other hand stated that they were guided by the party symbols and names on the ballot paper which were correct, and the Respondents also brought evidence that the voters were alerted as to the anomaly on the ballot paper and were advised to vote using the party symbols. The Court of Appeal has in this respect also noted the centrality that party symbols play in elections in **Dr. Thuo Mathenge & Another v Nderitu Gachagua & 2 Others (supra)** where it held as follows:

**“We are of the view that the error in content as to the name of the 1st Appellant's running mate was minuscule compared to the accuracy of the other contents in the ballot paper. This is because firstly, the centrality of party symbols in elections cannot be understated. The political party and its symbol are the hallmark of elections. Elections are fought on the party and its symbol. In this case, the name of the 1st appellant's political party and its symbol were properly captured and reflected on the ballot paper. Given the central role that the party and its symbol play in elections, the 1st appellant was not prejudiced by the said error of content.”**

The Court of Appeal in the said decision also distinguished its earlier decision in **Omar & Another -vs- Mbuji & Another (2006) 2 KLR 190**, where a defect in the ballot paper was held to nullify an election,

on the ground that the defect/error on the ballot paper in **Omar & Another -vs- Mbuji & Another (supra)** was on the candidate's party symbol, while in **Dr. Thuo Mathenge & Another v Nderitu Gachagua & 2 Others (supra)** the error was in respect of the name of the 1st Appellant's running mate. The same distinction applies in this appeal as the error herein was on the photograph of the candidate for the Wiper Democratic Party, and not on the Appellant's party symbol as was the case in **Omar & Another -vs- Mbuji & Another (supra)**.

It is thus the finding of this court and for the above reasons, that the trial court did not err in relying on the decision in **John Kiarie Waweru vs Beth Mugo & 2 Others (2008) eKLR** that proof is required of irregularities and electoral malpractices that materially affect the outcome of an election before an election can be nullified.

Further, that the trial court also did not err in considering the scenario of any possible votes that the Appellant could have lost as a result of the alleged mix-up of photographs, as a way of determining the possible effect the mix-up in the photographs on the ballot paper would have had on the elections for the ward representative for Adamasajide Ward. Lastly, the trial court therefore did not err in finding in this regard that the County Assembly elections for Adamasajide Ward were free and fair, and that the 2<sup>nd</sup> Respondent was validly elected at the said elections. The Appellant's appeal on this issue is therefore found to have no merit and is dismissed.

b. ***The Issue of Costs***

On the issue as to whether the trial magistrate erred in awarding costs to the Respondents, the Appellant submitted that the 1<sup>st</sup> Respondent failed to discharge its mandate by printing a defective ballot paper that had an apparent and glaring error. He argued that the awarding of costs to the Respondents in the circumstances was punitive and deterrent especially as the 1<sup>st</sup> Respondent was at fault and admitted the fault, and cannot therefore benefit from its wrongful act.

The Appellant also submitted that costs do not necessarily follow the event and relied on the decision by the Supreme Court in **Raila Odinga vs The Independent Electoral & Boundaries Commission and Others S.C Petition No 5 of 2013** and by the Court of Appeal in **Dalmas B Ogoye vs KNTC Limited (1996) e KLR**, as well as various academic texts in this respect. It was further argued that the 1<sup>st</sup> Respondent should be the one condemned to pay the costs

The 1<sup>st</sup> Respondent on its part argued that it is trite law that costs follow the event, and that the Appellant's petition having been dismissed, it was only fair for the court to have awarded the Respondents the costs. He relied on section 84 of the Elections Act of 2011 in this respect. The 1<sup>st</sup> Respondent further argued that the Appellant's details appeared clearly on the ballot paper which fully complied with the provisions of Regulation 68(4) of the Elections (General) Regulations of 2012, and that the fact that the Appellant's photograph appeared twice on the ballot paper did not make it defective.

The 2<sup>nd</sup> Respondent on his part submitted that the rule that costs shall follow the cause is also manifest in Rule 36 (1) (b) of the Elections (Parliamentary and County Elections) Petitions Rules of 2013.

The applicable law on this issue is section 84 of the Elections Act which provides that an election court shall award the costs of, and incidental to a petition, and that such costs shall follow the cause. Rules 36 to 38 of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 provide more details

on the process of awarding and recovery of costs. Rule 36 (1) (a) of the said rules gives power to the courts to set the total amount of costs that may be payable in this respect. Rules 36 (2) (b) of the said rules also give the courts discretion to impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

I have taken into account the above provision of the law, and I concur with the Appellant that his election petition and this appeal arose as a result of the error on the ballot paper, and this court has already found that the 1<sup>st</sup> Respondent did not conform with the principles of law in this respect. The 1<sup>st</sup> Respondent is therefore to blame for causing the unnecessary expenses of the said election petition and this appeal, despite the fact that the said error did not affect the election results. I am also guided in this regard by the decision of the Court of Appeal in **Dr. Thuo Mathenge & Another v Nderitu Gachagua & 2 Others (supra)** to this effect.

It is also to be noted in this regard that the Appellant has succeeded in his appeal on two of the three issues that were before this court. I accordingly orders as follows on the issue of costs:

1. The 1<sup>st</sup> Respondent shall pay the costs of the Petitioner and 2<sup>nd</sup> Respondent in the trial court and of the Appellant and 2<sup>nd</sup> Respondent in this appeal.
2. The total taxed costs awarded to the Petitioner and 2<sup>nd</sup> Respondent respectively with respect to the Petition in the trial court shall not exceed Kenya Shillings 1 million for each party.
3. The total taxed costs awarded to the Petitioner and 2<sup>nd</sup> Respondent respectively with respect to this appeal shall not exceed Kenya Shillings 750,000/= for each party.
4. The sum of Kshs 100,000/= deposited in the trial court by the Appellant as security for costs shall be released to him forthwith.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2014.**

**P. NYAMWEYA**

**JUDGE**



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