



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**ELECTION PETITION APPEAL NO.1 OF 2014**

**TWAHER ABDULKARIM**  
**MOHAMED.....APPELLANT**

**VRS**

**MWATHETHE ADAMSON KADENGE.....1ST**  
**RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IBEC).....2ND**  
**RESPONDENT**

**HAMISI HALFANI TSUMO.....3RD**  
**RESPONDENT**

**JUDGMENT**

**Introduction:**

The 2<sup>nd</sup> respondent, the Independent Electoral and Boundaries Commission (*herein after referred to as the IEBC*) conducted a by election for the Shella Ward in Malindi Constituency, Kilifi County on the 29/4/2014. The 1<sup>st</sup> respondent was declared the winner. The Returning Officer announced the results as follows:

- Abbas Abdalla Omar -955 votes
- Athman Ali Said - 76 votes
- Benard Owade Otsieno -85 votes
- Gilbert Kambi Shutu -207 votes
- Jamal Hassan Kale -25 votes
- Jonathan Mdzomba Katana -68 votes
- Kenneth Otieno Nyacharo -285 votes
- Mwathethe Admason Kadenge – 2,236 votes
- Twaher Abdulkarim Mohamed - 1,965 votes

The appellant participated in the elections as a candidate and was the runner-up. He filed Election Petition No.1 of 2014 before the Chief Magistrate's Court, Malindi. The court delivered its judgment on 21/11/2014 and dismissed the petition. This appeal is against that decision.

**The Grounds of Appeal:**

The Memorandum of Appeal dated 16/12/2014 sets out 15 grounds of appeal: They can be summarised

as follows:

1. That the trial court erred in law in its findings despite the fact that promises to pay Ksh.200,000/= to voters of Shella Ward were made during the campaigns. This amounted to offence of bribery under Section 64 of the Elections Act 2011.
2. The trial court erred in law by holding that there was no evidence that the 1<sup>st</sup> respondent distributed bursary cheques to the electorate in Shella Ward during the campaigns.
3. The trial court erred by dismissing the appellant's notice of motion filed on 29/8/2014 seeking the production of reports by the 2<sup>nd</sup> respondent relating to complaints that had been referred to the Ethics and Anti-corruption Commission and the Commission on administrative justice. The dismissal of the application was contrary to Articles 47, 50 and 159 of the Constitution and section 80 of the Election Act.
4. The trial court reached the wrong conclusion in law by holding that the speaker's failure to declare the seat vacant did not amount to commission of any election offence contrary to section 68 and 72 of the Elections Act.
5. The trial court erred in law by holding that the appointment of the 3<sup>rd</sup> respondent as the returning officer for the by-election did not interfere with the choice of the people.
6. The trial magistrate misapprehended the law on scrutiny and re-count particularly section 82 of the Election Act and Rule 33 of the Elections (*Parliamentary and County Elections*) Petition Rules, 2013.
7. The trial court mis-applied the principle of judicial authority under article 159 of the constitution thereby occasioning a miscarriage of justice to the appellant.
8. The trial court erred in law in its evaluation of the entire evidence and in considering the principle of adverse inference as the respondents failed to present the necessary evidence that would have assisted the court thereby making the court reach at the wrong conclusion.
9. The court erred in law by holding that the elections were substantially conducted in accordance with the law on the basis that the appellant's agents signed forms 35 without considering the reasons for signing.
10. The trial court erred in law by holding that the ballot boxes were tempered with after votes were counted at the polling stations without evidence to that effect.
11. The trial court reached the wrong conclusions in its evaluation of the evidence on record.
12. The trial magistrate failed to shift the burden of proof to the respondents in view of the findings of the scrutiny and re-count report.
13. The trial court erred in law by raising the standard of proof to beyond reasonable doubt contrary to the requirements of the law.
14. The court mis-interpreted and mis-applied articles 38 (2) and 81(e) of the Constitution of Kenya 2010 and section 33 of the Elections Act.
15. The trial court erred in law by dismissing the appellant's petition on conclusions that were based on no evidence on record.

**Appellant's Submissions:**

Mr. Abubakar, counsel for the appellant relied on his written submissions filed on 11/5/2015. Counsel contends that the appeal is competent. The allegations that it was served outside the 7 days after filing could have been raised during directions stage. A legal issue must be raised by pleadings or application but not at the submissions stage. Even if the appeal was served outside the 7 days period, Order 50, Rule 4 of the Civil Procedure Rules stops time from running from part of December to 13<sup>th</sup> January the following year. The appeal was filed on 19<sup>th</sup> December 2014 and served on 8/1/2015. Counsel also referred to section 57 of the Interpretation and General Provisions Act.

Counsel for the petitioner further submitted that failure to include a certified copy of the decree can not be a reason to dismiss the appeal. This issue ought to have been raised during the directions stage. A certified copy of the judgment is on record. A decree only echoes the contents of the judgment. Order 42 Rule 13 requires a judgment or order from which the appeal arises or a decree. No prejudice will be suffered by the respondents for lack of the decree. Counsel relied on the Case of **Nicholas Salat V IEBC & Others, NRB CA No.228 of 2013**.

According to Mr. Abubakar, the trial court and the respondents put much reliance on the Case of **Joho V Nyange & Another (No.2) [2008] 3 KLR, Mombasa High Court Election Petition No.1 of 2005** which is a High Court Judgment and was decided in 2005 before the promulgation of the new Constitution. The facts of that case are different from this case. In the absence of the evidence of interference with the ballot boxes after elections, the presumption is that malpractices were conducted during the elections. The trial court relied on speculations.

During the hearing of the case PW7 produced a CD showing the 1<sup>st</sup> respondent's campaigns. Promises of money were made by his campaign team. This included a bursary fund of Ksh.6,000,000/=, Ksh.11,000,000/= to be distributed to all schools in Shella Ward and Hon. Mung'aro promised people in a church compound Ksh.200,000/= for a public address system. All these promises were acts of bribery and contrary to section 64 of the Election Act. Those who made the promises are within the control of the 1<sup>st</sup> respondent as they were part of his campaign team. Under section 64, an act of bribery does not have to be committed by the concerned person as it can be committed by any other person on his behalf. It can be direct or indirect. Counsel for the appellant relies on the Case of **Musikari Nazi Kombo V Moses Masika Wetangula. Bungoma HC Election Petition No.3 of 2013** where Justice Gikonyo held that Moses Masika Wetangula had bribed pastors and Bishops by giving them Ksh.460,000/=. The CD produced in court was quite clear and Hon. Mung'aro promised to give the money for a public address system. The trial court relied on the Case of **Mable Mururi V Wycliffe Ambetsa Oparanya & 3 Others, Kakamega High Court Election Petition No.5 of 2013**. The facts in that case are different as the promises were made to buy milk to take care of babies born in the County for 6 months from birth.

With regard to ground 2, it is contended that the 1<sup>st</sup> respondent collected bursary cheques from Kilifi County and took them to his office in Malindi. The cheques were distributed to the beneficiaries who were all voters for Shella Ward. At that time, the election of the 1<sup>st</sup> respondent as the member of the County Assembly for Shella Ward had been nullified by the court. The act of collecting the cheques and distributing them during the campaign period amounted to bribery.

Mr. Abubakar submitted that the appellant referred complaints to the Ethics and Anti-corruption Commission as well as the Commission of Administrative Justice. The complaints related to offence of bribery on the part of the 1<sup>st</sup> respondent who distributed cheques during the campaign. The appellant made an application for the production of the reports by the second respondent in respect of the complaints. It is a judicial principle that in an election petition the court admits every piece of evidence that can help it resolve the election disputes in a fair and just manner.

It is the appellant's submissions that the failure by the speaker of the Kilifi County Assembly to declare the seat vacant did occasion the commission of an election offence but the trial court held otherwise. Article 194 of the constitution provides for the manner in which a vacancy can occur in the office of an MCA. Despite the fact that the 1<sup>st</sup> respondent's election had been nullified, he continued to enjoy the benefits, resources and privileges of an MCA. This included drawing of an illegal salary and distribution

of bursary cheques. The 1<sup>st</sup> respondent was to be disqualified for using public resources in his campaigns.

It is further submitted that, the 3<sup>rd</sup> respondent ought not to have been appointed as the returning officer for the by-election. He caused the petitioner to be arrested and charged in a criminal case. He had also participated as a returning officer in an earlier election that had been nullified. He was likely to be biased. The trial court ought to have found that the appointment of the 3<sup>rd</sup> respondent as the returning officer affected the results.

Counsel further maintains that, scrutiny and recount was done for some polling stations and it was found that some votes that had been rejected and in favour of the 1<sup>st</sup> respondent were discovered. The scrutiny report confirms the testimony of the petitioner's witnesses who testified that they were unable to verify the votes at the time of counting. Scrutiny is one way of investigating the propriety of an election as held in the Case of **Peter Gatirau Munya V IEBC & Others. Supreme Court Pet. No.2 B of 2014.**

It is contended that the principle of judicial authority under article 159 of the Constitution was misapplied. The appellant's petition ought not to have been dismissed. The evidence by the appellant together with the report of scrutiny showed that the appellant had won. The elections were not substantially conducted as per the law. The appellant's agents signed the form 35 after they were told that they could not get copies without signing them. The signing of those forms did not cure the irregularities and breaches of the law. When the re-count was done, the seals on the ballot boxes were intact. The burden of proof shifted to the respondents after the scrutiny report showed that the appellant had obtained more votes than the 1<sup>st</sup> respondent.

According to the petitioner, given the evidence on record, he proved his case but the standard of proof was raised to that of beyond reasonable doubt contrary to the requirements of the law. The election was not conducted by an independent body that was transparent and it was not administered in an impartial, efficient, accurate and accountable manner.

### **Submissions by 1<sup>st</sup> Respondent:**

Mr. Mouko, counsel for the 1<sup>st</sup> respondent relies on his written submissions filed on 3/6/2015. Counsel submitted that this is the 2<sup>nd</sup> election petition between the appellant and the respondents. The appellant lost the election in 2013 but the High Court nullified the election. During the by-election of 29/4/2014 the 1<sup>st</sup> respondent won the election. The appellant filed his petition for the Chief Magistrate's Court but it was dismissed. The current petition is bad in law, vexatious and an abuse of the court process. Counsel maintains that the grounds of appeal mainly raise three issues. That there were election irregularities, there was bribery and the results on scrutiny and recount. All the appellant's allegations were dis-proved.

Mr. Mouko maintains that the appellant's petition was based on outright lies, half truths, conjecture and speculations. PW6 Feisal Nassor testified that he signed the Form 35 confirming that the results at Karima Primary School Polling Station were accurate. Yet in his evidence, he claimed that there were many irregularities. The same applies to all the appellant's agents who testified. The petitioner alleged that the ink that was used during the election was not indelible but was snowman ink. That allegation was repeated by all the agents of the appellant.

It is submitted that the appeal is incompetent as it was served out of time. The Civil Procedure Rules on time do not apply to election petitions. The election petitions are governed by the election rules. No affidavit of service was filed to prove when service was done. This is a legal issue that can be raised at any time. There was no need to file a preliminary objection. Further, the failure to include a copy of the decree is a fatal failure. The appeal is not against the judgment but the decree. The decree sets out in a formal manner the findings of the court. If the court is left to interpret the judgment, it can come out with different findings. The decree has to be certified. Rule 34 (6) of the Elections Rules gives the list of the required documents. A certified copy of judgment and a certified copy of a decree must be included.

Mr. Mouko contends that the appeal is simply re-arguing the petition before the trial court. The report on scrutiny shows that there was serious interference with the ballot boxes by unknown people. The manner in which it was done is clear. It is only the votes of the 1<sup>st</sup> respondent that were allegedly spoiled. The petitioner's agents are not reliable witnesses as they changed their stories despite having signed the Forms 35.

### **Submissions for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents:**

Mr Mokaya, counsel for the two respondents relied on his written submissions filed on 3/6/2015. Counsel associate himself with the submissions of Mr. Mouko on the position that the appeal is incompetent for having been served out of time and for failure to include the certified decree. Counsel maintains that the allegations of bribery were not proved. Counsel cited the Case of **Joho V Nyange & Ano. (Suppra)**: There was no evidence that the 1<sup>st</sup> respondent distributed bursary cheques. The 3<sup>rd</sup> ground of appeal is based on the dismissal of an interlocutory application during the hearing . That cannot be a ground of appeal. The failure by the speaker of the Kilifi county Assembly to declare the seat vacant did not amount to an election offence.

Counsel maintains that the appointment of 3<sup>rd</sup> respondent as the returning officer did not affect the elections. The report on scrutiny and recount has to be looked into together with the appellant's evidence. The appellant had no allegations of double marking of ballot papers during the tallying process. Most of the double marked ballot papers belonged to the 1<sup>st</sup> respondent. The trial court rightly held that the double marking was a consequence of tampering with the election materials after the election had been concluded. There was no shifting of the burden of proof. The appellant's agents signed the Forms 35 voluntarily and were present in the counting halls. They witnessed all the events. There were no allegations of violence during the elections. The appellant established that there was sufficient security in all polling stations. The petitioner did not prove his case before the trial court.

Mr. Mokaya submitted that there is a cross appeal challenging the issue of costs. The trial court awarded costs against the 2<sup>nd</sup> respondent yet the petition was dismissed. The 2<sup>nd</sup> respondent can not be blamed and the costs should follow the cause.

### **Appellant's Case before the Trial Court:**

The appellant was the petitioner before the trial court. The petition is dated 26/5/2014. The main issues raised in the petition are that the election was not free, fair and transparent, that the 2<sup>nd</sup> & 3<sup>rd</sup> respondents allowed people who were not registered voters to vote. The appellant cited three polling stations namely: Karima Primary School, Airport Primary School and Malindi High School. It was also contended that the the 2<sup>nd</sup> respondent interfered with voters who needed assistance in casting their votes. This made the appellant to lose 159 votes. According to the appellant in his petition, the 1<sup>st</sup> respondent who was a candidate promised monetary benefits to the voters. He distributed bursary cheques during the campaigns. There was a huge contingent of police officers at the appellant's strong holds and this was meant to impede or prevent the voters from exercising their rights to vote. During their campaigns, the 1<sup>st</sup> respondent and his campaign team threatened the voters of Shella Ward. The speaker of Kilifi County Assembly also failed to declare the seat vacant after the appellant's petition was successful and this was due to the fact that the 2<sup>nd</sup> respondent failed to notify the speaker in good time. The petitioner's agents were denied access to the polling stations while those of the 1<sup>st</sup> respondent had unlimited access.

The petition was fortified by the evidence of 20 witnesses. The petitioner's evidence before the trial court is basically a summary of his petition as highlighted herein above. He testified that the difference between his votes and those of the 1<sup>st</sup> respondent was 269 votes. In all the polling stations there were more than 500 assisted voters. Out of these 469 assisted voters wanted to vote for the appellant. These 469 voters were in 9 polling stations. There were police officers with riot gear sent to his strongholds to intimidate people. The 1<sup>st</sup> respondent's stronghold was Malindi High School but the rest of the polling stations were 50/50.

The appellant further testified that the 2<sup>nd</sup> respondent allowed people who were not registered to vote and they voted for the 1<sup>st</sup> respondent. The IEBC and the 1<sup>st</sup> respondent were in the same side. Votes meant for him were counted for the 1<sup>st</sup> respondent. Some presiding officers in the polling stations were campaigning for the 1<sup>st</sup> respondent. The polling stations were closed before the permitted time and this locked out some voters. His agents were intimidated but some signed the Forms 35. The agents complained of the use of snowman's ink. People who were not recorded on the machine were allowed to vote. The appellant vied for the position on a Wiper party's ticket and the voters who wanted Wiper were given another party.

It was the appellant's evidence that during the campaigns, it was alleged that he was a member of *al-shaabab* and therefore voters could not vote for him. At Town Primary School Polling Station the Form 35 show that the 1<sup>st</sup> respondent got 133 votes but the Form 36 indicates 131 votes. The appellant got 1967 votes but the form 36 indicate 1965 votes. There was peace in Malindi on the voting day and there was no use of having many police officers. Their presence intimidated the voters. The evid machines that were being used failed to work.

PW2 was **Noah Mutinda**. He was the appellant's agent at Malindi High School stream 1. His evidence was that when voters touched the evid machine, it did not make the required sound and was therefore not working. When it stopped making the sound, people in the queue started leaving. Snowman's ink was also used instead of indelible ink. At his stream 450 people voted and 170 were counted. He could not get all the details as the presiding officer was counting them quickly. PW3 **Mohammed Ahmed** was the appellant's agent at Karima Polling Station. He testified that voting started at 6.00 a.m. and initially the voting was okay. He could not access the evid machine. His complaint was that the evid machine was not operational as it was not making a sound. Snowman's ink was also used. He saw 38 assisted voters for his candidate. During the counting, he did not see any vote for the appellant being counted for another candidate but he suspected that some votes were being given to the 1<sup>st</sup> respondent who was an ODM candidate. Everything was okay when the voting started and the queue was proper. He signed his checklist which showed that he did not make any complaint.

PW4 **Eddie Mwangale Shangia** was the appellant's agent at Malindi High School stream 2. He testified that the evid machine was not working. Some people were not identified by the machine but were in the manual register and were allowed to vote. He witnessed 51 assisted voters. There were 11 voters who went with their own people to assist them. He signed Form 35 but did not see all votes. The ones he saw were correctly admitted. There was a possibility that some of the appellant's votes were given to the first respondent. There were 2 streams at Malindi High School. **Jimmy Alex Agalo** was PW5. He was the appellant's agent at Airport Primary Polling Station. He signed his check-list. He noted that the evid machine had a problem and was not working. They had been taught on election procedures before the election. He saw 33 assisted voters who wanted to vote for the appellant. After the votes were counted, his candidate got 20 votes.

PW6 **Feisal Nassor Ahmed** was the appellant's agent at Karima Primary School Stream 2. Voting started at exactly 6.00 a.m. Some voters were identified by the use of manual register. Some people were stopped from voting as they were not registered voters. He signed his check-list. A lady voted using the old generation identity card. He believes several votes for the appellant were cast for the 1<sup>st</sup> respondent but he did not see that happening. He was a candidate in the past election. PW7 **Shekue Issa Omar** was the appellant's agent at Sir Ali Bin Ali stream five. Voting started at 6.30 a.m and there was no problem at the polling station. Most of the voters at the station required assistance. They were assisted by the presiding officer but did not see them marking their ballots. From 2.00 p.m, the presiding officer started calling them to witness the marking of the votes by assisted voters. A voter wanted Wiper but the presiding officer marked ODM. The voter was surprised. He did not sign the Form 35. There were 242 votes cast. Less than 40 voters were not assisted. PW8 **Mohamed Salim Barrak** was the appellant's deputy chief agent. He testified that Nidhamia Polling Station was opened at 6.30 a.m. Uhuru Garden Polling Station was closed at 4.55 p.m and stream 2 was closed at 5.30 p.m. He was not at the stations when they opened and closed but was informed by his agents.

**Muhammed Ahmed Hajj** was PW9. He was a voter during the elections registered at Sir Ali Bin Salim. There was a candidate by the name Abas who said during the campaigns that people should not elect the appellant as he was *al-shaabab*. He went and reported to the police. He recorded the statement. He did not vote during the election. **Ali Hamid Ali** was PW10. He was the appellant's agent at Town Primary Stream one. He raised an issue about assisted voters and disputed votes. Voting started at 6.08 a.m and the station closed at 4.55 p.m. He signed the Form 35. There were no voters on the queue when the station closed. The appellant got 199 votes while the 1<sup>st</sup> respondent got 5 votes. There were 3 rejected votes and 1 disputed vote which had no stamp.

PW11 **Davis Kebabe Muchama** was the petitioner's agent based at Uhuru Garden Stream 2. The polling station had 657 voters. Only 151 voted and there were 150 valid votes. He signed both the check-list and the Form 35. One voter wanted to vote for the appellant but the presiding officer ticked ODM. When he complained, the presiding officer said it was a spoilt vote. There was no any other incident at the station. PW12 **Festus Mwawea Maitha** is a businessman in Malindi. He heard one Abas Abdalla saying that the appellant was *al-shabaab*. He informed the appellant about the allegation and the appellant responded that those were people who did not want him to succeed in the election. Later he swore an affidavit to that effect. The affidavit was taken to Mombasa for commissioning while he had signed it in Malindi. He is a pastor at Pentecostal Faith Brotherhood Ministries Worldwide. PW13 **Esha Lali Athman** lives in Shella. She did not vote. She went to the polling station but found many police officers. She was scared so she went home. Those who were not scared voted.

Pw14 was **Joshua Musile**, a businessman at Malindi tourist Market. He was with PW12 when Abas alleged that the appellant was *al-shaabab*. They were at the market when those words were uttered. He is the market chairman. He later signed an affidavit to that effect and the matter was reported to the police. PW15 **Ahmed Amin Faruk** was an agent for the appellant at Karima Stream 2 polling station. He realised that the evid machine was not working. The station opened at 6.00 a.m and closed at 5.00 p.m. The presiding officer was a Giriama and he heard him saying "*mpigieni Mgiriama wenyu*" - vote for your own Giriama. He complained why he was campaigning while people were on the queue. He believed the votes for the appellant were put for the 1<sup>st</sup> respondent. One voter wanted to vote for the appellant but was surprised to find that the mark was for ODM. The ink used was not indelible. Other people left without voting. The polling station room was small and one could not see what was happening. The clerks were using a ruler to trace a particular voter.

PW16 **Omar Ismail Omar** was the appellant's agent at Karima Stream four polling station. The station was opened at 6.30 a.m and closed at 5.00 p.m. There were nine agents of different political parties. They were given a place to sit and they could see the voting process. The evid machine was not working but the mistake was detected in the afternoon. In his opinion the process was flawed. There were 34 assisted voters. It is possible that the presiding officer was marking the votes for someone else other than the one the voter wanted. PW17 **Mohamed Abunoor** was the appellant's Deputy Chief Agent. He produced a CD showing the campaigns of the 1<sup>st</sup> respondent. One Priscilla Majune, a nominated ward representative told the people that if they did not vote for the 1<sup>st</sup> respondent they will not get their Ksh.6 million. Another person by the name Lenox Karisa Kili *alias* Malindi Sonko told people at the same campaign that their scholarship of Ksh.11 million was coming. Hon, Mung'aro promised to assist the church to buy a public address system at Ksh.200,000/=. The CD was recorded on 27/4/2014. PW18 **Muhammed Omar Ali** was the appellant's agent at Uhuru Garden Stream 4. The presiding officer was a lady. His only issue at the station was the assisted voters. He saw the presiding officer erroneously marking 3 votes meant for the appellant but were marked for the 1<sup>st</sup> respondent. He complained and the votes were declared spoilt. The voters were given fresh ballot papers to vote. He did not see the appellant's votes being counted for the 1<sup>st</sup> respondent. He voluntarily signed the Form 35. The total registered voters were 657. Three voters were assisted.

PW19 **Police Constable AP Fauz Mitsanze** was based at Ndomboni. On the voting day of 29/4/2014 he was sent to Upeoni Polling Station. He arrested one Omar Swaleh who was bribing voters. Omar said he was an agent and was talking to voters to vote for Abas. The said Abas went to the station after his agent had been arrested. Omar was with four other people who escaped. PW20 **Dominic Kyambo**

was also the appellant's agent based at Airport Primary School Stream 2. He signed an affidavit as a witness but did not want to testify. He was stood down.

### **1<sup>st</sup> Respondent's Evidence before the Trial Court:**

The 1<sup>st</sup> respondent **Mwatete Adamson Kadenge** was a candidate in the election and was declared the winner after garnering 2,236 votes. He had initially won the seat during the 2013 elections but the election was nullified by the court. His evidence was that he was called *Tumbiri* (monkey) and *maziwa lala* while the appellant was referred to as a lion. One Ibrahim Matumbo is the one who made that reference and he recorded it in a CD. He took the words as normal campaign language. He collected bursary cheques from Kilifi County on the 9/4/2014 and brought them to his Malindi Office in Shella. The cheques were received by Kaneno (DW3). At that time he was still the MCA. He did not promise any monetary benefit to the voters. Honourable Mung'aro never promised voters to vote for him so that they could get the Ksh.200,000/= public address system. The recipients of the bursary cheques had applied. It is his evidence that the elections were free and fair. During the previous election the appellant was violently thrown out of the tallying centre as he tried to stop the Returning Officer from announcing the results. After the elections were over he was called by IEBC officers for investigations on allegations that he had distributed cheques during the campaigns.

DW2 was **Aziz Mohammed Swaleh**. He is the chairman of Shella Ward Scholarship Committee. People applied for bursaries and the 1<sup>st</sup> respondent collected them from Kilifi and took them to the office in Malindi. Some of the applicants for the bursaries were not successful. DW3 **Margaret Kaneno William** is a secretary at the 1<sup>st</sup> respondent's office in Shella ward. She received the cheques from the 1<sup>st</sup> respondent and listed the cheques *vis-a viz* the beneficiaries school. The cheques were collected between 11<sup>th</sup> and 15<sup>th</sup> April 2014 by the beneficiaries. DW4 **Narolds Kalama Wandori** was a voter in the ward. He voted at Sir Ali Polling Station at 10.a.m. He was the ODM coordinator and their base was at Lawfords Hotel. At Sir Ali Stream 5 total number of valid votes was 242. He collected all the Forms 35 from the polling stations. DW5 **Michael Kenga Henry** was also a voter in the ward. He had applied for bursary and later learnt that it had been approved. He got a cheque for Ribe Girls School and another one for Technical University of Mombasa for his children. He collected the cheques from the MCA's office in Shella Ward.

DW6 **Abas Abdallah Omar** was a candidate during the elections. He had his agents in all polling stations. He did not see any malpractices during the elections. The elections were free and fair and he had previously worked with the IEBC as a presiding officer. He reported that the appellant was going round saying he was *al-shabaab*. He vied for the seat on a Republic Congress Party which was affiliated with Jubilee. The appellant and the 1<sup>st</sup> respondent were in CORD. After the votes were counted he was number 3. PW7 **Ronald Thomas Mosoti** was the chief agent for the 1<sup>st</sup> respondent. They had an office at Lawfords Hotel. He got the check-list from all his agents. According to the total votes the appellant got 1965 votes although in his petition he indicated 1967 votes. They were in ODM while appellant was in Wiper. At Nidhamia Hall Polling Station, the appellant got the highest votes of 166. No one refused to sign the Form 35 at that station. At Town Primary the appellant won by 203 votes while the 1<sup>st</sup> respondent got 7 votes. The ODM agent signed the Form 35. He did not receive any complaints that the police had chased people from polling stations.

### **Evidence for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents before the Trial Court:**

**Hamisi Halfani Tsumo**, the 3<sup>rd</sup> respondent, was the returning officer during the by-election. He explained how the election process is normally conducted. When he filled the Form 36 he had the Forms 35. Before the elections, he had trained the agents of the political parties. Once someone votes, a black ink is put on his finger. When a voter put his finger on the evid machine, it would make a sound. Where a voter needs assistance, the presiding officer would call the agents who would witness the marking of the ballot. He opened the ballot boxes for Town Primary Stream 1 and Uhuru Gardens Stream 3 in the presence of the agents. There was one disputed vote for Uhuru Garden and the votes were reduced from 37 to 36. The appellant was charged with the offence of obstructing an election officer. The offence

occurred on 6/3/2014 and he was the election officer involved in the case. The results were declared on 30/4/2014. The appellant got 1965 votes. The election was free and fair. No unregistered people were allowed to vote. No one voted twice. There was security to maintain peace. The appellant wanted the votes to be recounted at the tallying centre but this is not lawful. Recounting of votes can only be done at the polling station.

**Halkasia Machenye Mohambe** was the 2<sup>nd</sup> witness for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He was the presiding officer at Uhuru Gardens Stream 4. The elections were fine and he filled the Form 35. Votes cast were 145. Five votes were rejected and there were 140 valid votes. There were nine agents but only three signed the Form 35. He counted the votes in the presence of the clerks and the agents. There was only one spoilt vote. The Wiper agent Mohamed Omar Alwi signed the Form 35. **George Kitsao Thuwa** was another witness for the two respondents. He was the presiding officer at Malindi High School Stream 2. The registered voters were 450. The elections were conducted according to the rules and regulations. He did not receive any written complaint that the evid machine was not working. According to him the machines were working. The votes were counted in the presence of the clerks and the agents. No-one complained that he had not seen the ballots while being counted.

**Zena Kanja** was the 5<sup>th</sup> witness for the 2 respondents. She was the presiding officer at Karima Primary School Stream 1. She made a mistake when tallying the votes and added the spoilt and rejected votes. By that time, the agents had already signed the Form 35. The correct number of valid votes was 338 instead of 340. She did not allow anyone who was not registered to vote. Or anyone who did not have his identity card to vote. The evid machine was working. After every 3 hours she would announce the number of people who had voted and she would send an SMS to the tallying centre. **Emmanuel Mwakiku Kithi** was 6<sup>th</sup> witness for the two respondents. He was the presiding officer at Karima Stream 2. There were 319 votes cast. He denied that he spoke some words in Giriama. Amin Farook was the agent for Wiper at the station. Some unregistered voters went to the station but he did not allow them to vote. Voters were identified by the use of the evid machine. There was also a black book which was used in the event that the voter's name was not found in the evid machine. There were 9 agents and there was no complaint.

**Zuena Abdala** was the 7<sup>th</sup> witness. She was the presiding officer at Malindi High School Stream 1. There were 174 valid votes. There was no rejected votes. 3 agents signed the Form 35. The evid machine was producing sound. Abas Omar got 7 votes. Shutu got 11 votes. Appellant got 38 votes. The 1st respondent got 106 votes. There were no 52 assisted voters. **Maqcel Oduor Otieno** was the 8<sup>th</sup> witness. He was the presiding office at Karima Primary School Stream 4. There were 797 registered voters. The names were in the evid machine as well as in the register. There were 3 rejected votes. The agent for Wiper was Omar Ismael Omar. **Elijah Sulubu** was the 9<sup>th</sup> witness although the record of the trial court indicate 8<sup>th</sup> witness. He was the presiding officer at airport Primary Stream 2. There were 11 voters who were in the evid machine but not on the manual register. Dominic Kiambo was the agent for Wiper at the station. The elections went on well. The votes were later poured on a table and counted. There were nine agents. **Nicholas Waweru** was the last witness for the 2 respondents. He was the presiding officer at Airport Primary School Stream 1. The evid machine had a problem and he noted the problem after 45 voters had voted. He told the agents that there was a problem. The total number of votes was 174. Valid votes were 172. 2 votes were rejected. 3 agents signed the Forms 35. He did not make any mistake on the figures.

### **Report on Scrutiny and Recount:**

The court made an order for scrutiny and re-count for some polling stations namely: Airport Primary School Streams 1 & 4. Malindi High School Streams 1 & 2 and Karima Stream 1 & 2. The executive officer of the Malindi Court, James Obura conducted the exercise between 27<sup>th</sup> October and 30<sup>th</sup> October 2014. He submitted his report on 31/10/2014.

He found many votes with many marks and he decided that they were rejected votes. In Airport Stream 1 there were 74 rejected votes and 72 disputed votes. The IEBC had only 2 rejected votes. During the

recount he found 72 rejected votes. He is the one who decided on the 72 votes as rejected. Karima Stream 1 had 234 votes cast. There were 105 rejected votes. The 1<sup>st</sup> respondent according to IEBC got 175 votes. Karima Stream 4 there were 314 votes. The 1<sup>st</sup> respondent according to IEBC got 268 votes and the appellant 20 votes. During his recount, he got 98 rejected votes. All the rejected votes were for the 1<sup>st</sup> respondent. He is the one who concluded that the votes were rejected. Malindi High Stream 1, there were 174 votes. The 1<sup>st</sup> respondent got 106 according to IEBC but after his re-count process the 1<sup>st</sup> respondent got 46 votes. According to IEBC there was no rejected or disputed vote. Malindi High Stream 2 there were 202 valid votes. The 1<sup>st</sup> respondent got 144 votes according the IEBC but got 99 votes after his recount. It is only the votes of the 1<sup>st</sup> respondent that were affected in the re-count process. There were no complaints recorded in the ballot boxes. The 1<sup>st</sup> respondent appeared in all the votes with double marking. If one looked at the ballot papers at a glance he would have seen the double marks. The respondents insisted that the votes had been tempered with.

Mr. Obura's further evidence was that there were markings of pencil and blue pen. He observed the marks on the ballot with different biro's, one could be in blue while others could be in black. Most of them appeared to have been marked with a pencil and blue pen. The votes were in bundles of 25.

### **Court Analysis and Determination:**

The main issues raised in this appeal can be discerned from the appellant's grounds of appeal. These can be summarised as:-

1. Whether the appeal should be dismissed for having been served outside the required period.
2. Whether the appeal should be dismissed for lack of the certified copy of decree in the Record of Appeal.
3. Whether the 1<sup>st</sup> respondent committed an election offence by distributing bursary cheques to beneficiaries in Shella Ward.
4. Whether the non-declaration of a vacancy of the Shella Ward by the Kilifi County Assembly speaker affected the by- election.
5. Whether the 1<sup>st</sup> respondent's campaign team engaged in bribery of voters.
6. Whether the non-production of the reports of the Investigations on the appellant's complaints by the IEBC and the Commission on Administrative Justice affected the by-election.
7. Whether the appointment of the 3<sup>rd</sup> respondent as a returning officer interfered with the choice of the people.
8. The results of scrutiny and recount and whether the trial court failed to shift the burden of proof to the respondents.
9. Whether the elections were free and fair and conducted within the law.

#### **1. Whether the Appeal should be dismissed for having been served out of time:**

The appeal was filed on 19/12/2014: The respondents were served on 8<sup>th</sup> January 2015: Rule 34 (5) of the election rules requires service on the Memorandum of Appeal to be effected within seven (7) days after filing. The Record of appeal is to be filed within 21 days after the filing of the Memorandum of Appeal. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's advocates filed a Notice of Cross appeal on 16<sup>th</sup> January 2015. It is not clear when this document was served upon the other parties: When the matter came for directions on

23/3/2015, counsels for the parties herein informed the court that the Record of Appeal was proper. Counsels agreed to determine the appeal by way of written submission. Since during the directions stage, none of the counsels for the respondents raised the issue of service. I do hold that the issue was compromised. The difference of time between 19/12/2014 and 8/7/2015 is quite minimal to make in a contentious issue. Had that matter been raised during the directions stage, this court could have exercised its powers under Rule 20 of the Election Petition Rules and extend the time of service. More still, section 59 of the Interpretation and General Provisions Act, Cap 2, allows the court to extend time even if the application to extend time is made after the expiry of the allowed period. What is important is to focus on the overriding objective of the rules as per Rule 4 which is to facilitate a fair and affordable dispute resolution. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are equally to blame for not indicating when their Notice of Cross Appeal was served. No affidavits of service were filed. I do find that the appeal was filed and served within time:

## **2. Whether the Appeal should be dismissed due to non attachment of the Certified Copy of the Decree:**

Rule 34 (6) of the Elections Rules requires certain documents to be included in the Record of Appeal. Rule 34 (6) (g) requires the inclusion of signed and certified copy of the judgment appealed from and a certified copy of the decree. The appellant's counsel concedes that he included the certified copy of judgment but did not include the decree. Several authorities were cited to advance the position that non-inclusion of the decree is fatal and appeals have been struck out.

As indicated herein above, parties appeared before me on 23/3/2015 and confirmed the Record of appeal was proper. All counsels for the parties herein were present. By confirming to the court that the record was proper, counsel for the respondents were confirming that the absence of the certified copy of the decree was not an issue. They agreed to file written submissions on all other issues relating to the appeal. They could have filed an application to have the Record of Appeal struck out due to lack of the decree. They opted to let the appeal proceed upto the very end only to spring up with that issue. They are estopped from doing so as a consent confirming that the record of appeal was proper is already on record.

Apart from the above, my view on this highly litigated issue of a decree and striking out of Records of appeal for lack of decree is that an appeal should not be struck out simply because the certified copy of the decree has not been included in the Record of appeal. It is always contended that an appeal emanates from the decree and not judgment. The wording of Rule 34 rule (6) (e) is to the effect that a certified copy of the judgment appealed from has to be included in the Record of Appeal. In simple terms, under Rule (34), the appeal emanates from the judgment. Without a judgment, there cannot be a decree. What is normally attacked in the appeal is the trial court's findings including the evaluation of the evidence and legal findings. Several grounds have been raised in this appeal relating to the law on scrutiny and the general election law among other issues. These cannot be found in a decree but can only be traced from the judgment. The obsession with a decree seems to blind us from seeing the overriding objective of the dispute. Once the record is, struck out, one can still come back to file another appeal. Striking out of Records of Appeal due to lack of decrees only makes litigation expensive for Kenyans. I believe Article 159 of the new Constitution relating to administering justice without undue regard to technicalities comes into play. What is so difficult for the court to ask the appellant to file a Supplementary Record of Appeal and annex the decree. At times the decree is already in the trial court's file especially where execution proceedings have commenced: In this case Rule 34 (8) requires all the proceedings before the trial magistrate to be brought to the High Court. Ordinarily, these documents would include the decree: why should the court close its eyes and pretend that there is no decree in the lower court record. Having participated in the case, the respondents should be taken to know the outcome of the lower court case and by extension, the contents of the decree. In any case a decree is always extracted after the parties or their counsels have had the advantage of seeing the draft.

In short, I do find that the lack of a certified copy of the decree in the Record of Appeal is not fatal. Had the issue been raised at the directions stage, the court could have allowed for the filing of a Supplementary Record of appeal. Having confirmed that the Record of Appeal is proper, I do find that the record is proper and the appeal cannot be struck out at this stage. What is remaining is the

determination of the appeal on substance.

### **3. Whether the 1<sup>st</sup> respondent committed an election offence by distributing bursary cheques to beneficiaries in Shella Ward.**

Section 64 of the Elections Act, no.24 of 2011 provides for the offence of bribery. The appellant contends that on 27/2/2014, the election of the 1<sup>st</sup> respondent was nullified by the court. However the appellant continued to serve as a member of the Kilifi County Assembly and in the process distributed bursary cheques to beneficiaries who were voters. It is equally contended that by continuing to occupy the MCA seat, the 1<sup>st</sup> respondent unlawfully earned monies in form of salary and other emoluments. He used the unlawfully earned public resources in his elections and this amounted to an election offence.

The record shows that the 1<sup>st</sup> respondent collected the bursary cheques from Kilifi County Offices on 9/4/2014. He took the cheques to his Shella Ward Office in Malindi and handed them over to Margaret Kaneno William (DW3), his Secretary in the ward office. Apart from that evidence, there is no evidence to the effect that the 1<sup>st</sup> respondent went around Shella Ward distributing cheques to the beneficiaries. According to DW5, Michael Kenga Henry, he had applied for the bursary over one month before he collected his two cheques for his children at the ward offices. It is also not in evidence that the 1<sup>st</sup> respondent was handing over the cheques to the beneficiaries personally or that he asked those who were receiving the cheques to vote for him. No one testified to the effect that he voted for the 1<sup>st</sup> respondent as a result of having received the cheques.

Given the evidence on record, I am satisfied that the trial court properly dealt with this issue and came to the correct conclusion. The offence of bribery has a criminal element and must be proved beyond reasonable doubt. Had it been proved that the 1<sup>st</sup> appellant committed bribery, he would have been prosecuted in court and the prosecution would have had to prove its case beyond reasonable doubt. The allegations of bribery could not have been confirmed by the court on a balance of probabilities.

With regard to the allegation that the 1<sup>st</sup> respondent used public resources in form of unlawfully earned emoluments, it is clear that the 1<sup>st</sup> respondent had no role to play in the declaration of vacancy in the MCA office. The election was nullified on 27/2/2014. The IEBC, according to the appellant issued a gazette notice dated 11/3/2014: The gazette notice indicated that the campaign period was to start from 2<sup>nd</sup> April 2015 and to end on 27/4/2014. There is no evidence that the 1<sup>st</sup> respondent attended the sessions of the County Assembly after 27/2/2014. It is also not established that he received any salary. From 27/2/2014 to 29/4/2014, when the elections were done, the difference was only two months salary. The allegations that the appellant received the salary during this period is mere speculation. Even if he did receive the salary, the next cause of action would be to have him surcharged and refund the amount. Such an issue cannot amount to use of public resources. The court cannot find out whether the 1<sup>st</sup> respondent had already earned other benefits such as sitting allowances from committees that were paid to him during the campaign period. If this happened, then the payments were lawful as the 1<sup>st</sup> respondent had duly served as an MCA and the benefits were due to him. The sum total is that the collection of the cheques and the alleged receipt of emoluments by the 1<sup>st</sup> respondent did not in any way affect the by-election or give advantage to the 1<sup>st</sup> respondent. No offence was committed.

### **4. Whether the Non-Declaration of a Vacancy of the MCA for Shella Ward by the Speaker of the Kilifi County Assembly Affected the By-Election:**

Article 194 (1) ( C ) provides for the occurrence of a vacancy of MCA in the event that the MCA is removed under other legislation made under Article 50 of the Constitution. Section 19 of the Elections Act provides for the procedure of initiating County Assembly election. Under section 19 (2) (c) election is supposed to be conducted not less than 21 days after the date of nomination. The County Assembly Speaker is expected within 21 days after the occurrence of the vacancy to issue a notice to the IEBC. The commission is supposed to transmit that notice to the relevant returning officer within 21 days. In essence therefore, at least 41 days might elapse from the date a vacancy occurs to the transmission of the

notice to the returning officer.

The record shows that on 2/4/2014 the Director of Legal Affairs of Kilifi County wrote to M/s Gicheru Kimani & Associates Advocates indicating that the Speaker's Office had not issued any notice to the IEBC about the occurrence of a vacancy for Shella Ward. The MCA's election had been nullified on 27/2/2014 and therefore a vacancy had automatically occurred. The letter was written over one month after the nullification. By that time, the IEBC had already issued a gazette notice on 11/3/2014 and nominations had already been done. Indeed the 2/4/2014 was the 1<sup>st</sup> date for commencement of campaigns. According to the speaker, he expected 21 days to elapse from 27/2/2014 before the notice could be issued. The speaker can be blamed as by 2/4/2014, over 21 days after the nullification, he had not issued any notice. However, this did not affect the election since the IEBC had already started the by election process. The 1<sup>st</sup> respondent was not in control of the process after his election was nullified.

#### **5. Whether the 1<sup>st</sup> Respondent's Campaign team engaged in acts of Bribery and Election Malpractices:**

The appellant contends that during the campaigns, the 1<sup>st</sup> respondent's team lured voters through monetary promises. Hon. Mung'aro promised to buy a public address system worth Ksh.200,000/= for a church. There were promises made for Ksh.6 million and 11million for bursary for the Shella Ward. It is the appellant's position that although these promises were not made by the 1<sup>st</sup> respondent directly, they do constitute the offence of bribery under section 64 of the Elections Act. Under section 64, a candidate who directly or indirectly or in person or by any other person on his behalf makes any gift, loan, offer, promise among other things commits the offence of bribery.

Before the trial court, PW17, Mohamed Abunoor produced a CD which showed one Priscilla Majune, a nominated ward representative telling voters that if they did not vote for the 1<sup>st</sup> respondent, they won't get their Ksh.6 million. The same CD also showed Hon. Mung'aro making the Ksh.200,000/= promise: One Lenox Karisa also promised Ksh.11 million for scholarship. The main issue is whether these promises amount to acts of bribery.

In any election, each candidate would come up with his/her own bag of promises. In most cases, at the national level, these promises would be in form of a document popularly known as a manifesto. It would stipulate what the party or candidate promises to do for the electorate in a particular area if elected. The Jubilee Government promised to build roads and buy Ipads for class one pupils. Individual candidates made their own promises both at the Governor, Senate, Women Representative, Member of Parliament or Ward Representative level. In other words, campaigns are full of promises. Each competing candidate would make his/her own promises and it is up to the voters to decide. I believe even the appellant made his own promises to the electorate. One cannot simply go round campaigning and ask voters to vote for him without any development agenda. On the subject of bribery, Halbury's Laws of England, vol.1.4, 3<sup>rd</sup> Edition, Paragraph 384 states as follows:

***“Proof of bribery. Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice. The court strips the proceedings in each case of every colour, every dress, and every shape to discover its real and true nature. The court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction.*”**

***A corrupt motive must in all cases be strictly prove. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribing him.***

***Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required than in the case of a successful standing. A general conversation as to a candidate's wealth and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of particular acts has presumably been”***

In the Case of **Karuri V Mbogo & Another, [2008] 1 KLR (EP)** allegations of bribery were made to the effect that one candidate had thrown bundle of notes in the air for people to collect. The court summarized that part of dispute as follows:

***“Paragraph 2: this dealt with allegation of bribery by the 2<sup>nd</sup> respondent and his agents. On this ground we heard the evidence of the petitioner that he saw 2<sup>nd</sup> respondent throw money in the air so that people could vote for him. The petitioner testified that he saw the 2<sup>nd</sup> respondent throw a bundle of Ksh.10,000/= in the air and people scrambled for it. We heard the evidence of one Kailanya (PW13) and Kamencho (PW15). All this was, of course denied by the respondent and his witnesses. We have carefully examined the evidence in respect of this ground and we are of the view that this being a serious allegation connecting those involved with election offences a court would require a high standard of proof. We also find it odd that the 2<sup>nd</sup> respondent would throw a bundle of Ksh.10,000/= in the air for people to scramble for it. We are not satisfied that there is enough evidence to support this ground.”***

Given the evidence on record, I do find that the promises made during the campaigns cannot amount to acts of bribery. There is no direct evidence showing that the voters were influenced by those promises. Even if they were, it would mean that those promises were more appealing than those of the appellant. This ground of appeal has not been proved.

#### **6. Whether the Non-Production of the Investigation Report on Complaints made by the Appellant affected the Elections:**

A summary of the appellant's complaint was that the 1<sup>st</sup> respondent engaged in election mal-practice by distributing bursary cheques during the campaigns and by earning a salary yet his election had been nullified by the court: A letter dated 4<sup>th</sup> April 2014 by George Ojowi of the Ethics and Anti-Corruption Commission addressed to the Regional IEBC Co-ordination office indicates that the allegations amounted to election malpractice. The letter was calling upon the IEBC to investigate. The Commission on administrative Justice wrote to the IEBC on 8<sup>th</sup> May 2014 about the issue. By then, the elections had been concluded.

Since the 1<sup>st</sup> respondent was cleared to vie for the post, the complaints seem to have been dealt with. There is no indication of a report done by any of the concerned organs such as IEBC or the EACC proposing to have the 1<sup>st</sup> respondent barred from participating in the elections. The appellant's position is that the 1<sup>st</sup> respondent ought to have been barred from contesting in the election. Having been cleared to be a candidate in the election, this court cannot speculate on the contents of a report or reports that were not produced in court.

#### **7. Whether the Appointment of the 3<sup>rd</sup> Respondent as the Returning Officer affected the Choice of the Shella Ward Voters:**

The 3<sup>rd</sup> respondent was the Returning Officer in the initial March 2013 election that was nullified. On 19<sup>th</sup> March 2014 the appellant wrote to the IEBC objecting to the appointment of the 3<sup>rd</sup> respondent as

the Returning Officer. The main reason is that the 3<sup>rd</sup> respondent caused the appellant to be charged in a criminal case and that he instructed the police to eject him at the tallying centre. There is Criminal Case Number 72 of 2013 pending in court.

The Returning Officer has the overall duty of ensuring that the elections are free and fair. The actual voting is done at the polling station. The Returning Officer waits for the results to be brought to him at the tallying centre by the presiding officers. He then posts the results from the Forms 35 to Form 36. There is no evidence that the 3<sup>rd</sup> respondent was giving instructions to the presiding officers not to allow voters to vote for the appellant: It is true the 3<sup>rd</sup> respondent was the complainant in the criminal case but that should not be used as the main reason of him being unfit to be a returning officer: The record does not show that the returning officer had any influence over the presiding officers. There were no instructions to the presiding officers to favour any specific candidate. This ground of appeal also fails.

**8. The report on Scrutiny and Recount and its Effect on the Election and its Results:**

The appellant filed an application dated 29/8/2014 seeking scrutiny and recount of the votes. The appellant sought to have the following polling stations recounted.

1. Karima Primary School 1
2. Karima Primary School 2
3. Karima Primary School 3
4. Airport Primary School 1
5. Karima Primary School 2
6. Malindi High School 1
7. Malindi High School 2
8. Sir Ali Primary School 5
9. Uhuru Garden Stream 4

10) Uhuru Garden Stream 2

After hearing the parties, the court made an order for recount and scrutiny in the following stations:

1. Airport Primary School Stream 1
2. Karima Primary School Stream 1
3. Karima Stream 4
4. Malindi High School Stream 1
5. Malindi High School Stream 2

The Executive Officer's report on scrutiny and recount is found between pages 1862 – 1868. What follows thereafter is the individual details for each polling station.

The report raises several issues. These include whether the ballot boxes were interfered with after the elections, whether the results reflected in the Forms 35 for the above stations were correct and whether that number of ballots with double markings could have passed before being notice during the counting process. The trial court held that someone must have tampered with the ballot boxes after the election was over:

My analysis of the report shows that there were 376 rejected votes for the 1<sup>st</sup> respondent. This is given by the chart below:-

**ADAMSON KADENGE**

**TWAHER MOHAMED**

<b>POLLING STATION</b>	<b>BEFORE</b>		<b>AFTER</b>		<b>VARIANCE</b>	
<b>AIRPORT PRIMARY</b>	127	55	72	20	20	-

<b>MALINDI HIGH SCHOOL 1</b>	106	46	60	38	27	11
<b>MALINDI HIGH SCHOOL 3</b>	144	99	45	37	37	-
<b>KARIMA PRIMARY 1</b>						
	279	175	104	26	26	-
<b>KARIMA PRIMARY 4</b>	268	173	95	20	20	-
<b>TOTAL</b>	<b>924</b>	<b>548</b>	<b>376</b>	<b>141</b>	<b>130</b>	<b>11</b>

The Form 35 for Airport Primary Stream 1 shows that the 1<sup>st</sup> respondent got 127 votes while the appellant got 20 votes. The scrutiny and recount results gives the 1<sup>st</sup> respondent 55 votes and the appellant 20 votes. The Form 35 was signed by three party agents namely: Margaret William (ODM), Lewiston Baraka Thoya (FPK) and Emmnuel Munga (R.C). The tallying sheets for each candidate were found to be intact.

With regard to Malindi High School Stream 2: The Form 35 indicates that the 1<sup>st</sup> respondent got 144 votes while the appellant got 37 votes: The verification report gives the 1<sup>st</sup> respondent 99 votes and the appellant 37 votes. The Form 35 was signed by three agents, Edy Mwakole Shangia (WIPER), Joseph Karema Mulewa (ODM) and Alphonse Jembe Mrima (R.C): For Malind High School Stream 1, the form 35 indicates that the 1<sup>st</sup> respondent got 106 votes while the appellant got 38 votes: The verification results give the 1<sup>st</sup> respondent 46 votes and the appellant 27 votes: Three party agents signed the Form 35 namely Daniel Mutiso, Athman Said Mohamed and Shee Mdzomba: The agents did not indicate their party affiliation.

At karima Primary School Stream 1, the Form 35 indicate that the 1<sup>st</sup> respondent got 279 votes while the appellant got 26 votes. The verification results gives the 1<sup>st</sup> respondent 175 votes and the appellant 26 votes. The Form 35 was signed by eight party agents. These are Gladys Wairimu Mbote, Feisal Nassor Ahmed, Inyasi Okonda, Bosco Katana, Rabecca Mwaka Rabindo, Daniel Mwakulongo, Getrude Zawadi Nicholas and Solomon Kalama. Finally, Karima Stream 4's Form 35 indicate that the 1<sup>st</sup> respondent got 268 votes while the appellant had 20 votes. The verification results give the 1<sup>st</sup> respondent 175 votes and the appellant 20 votes. The Form 35 was signed by party agents, Othman Shee (Wiper), Douglas Shutu (Shirikisho), Peter Kiarie Gikuru (R.C.); Waima Ramadhan (Kadu Asili), Omar Mohammed (CCM), Maurine Ochuka (FPK) and winston Milola (ODM).

The above is the scenario presented by the scrutiny and recount report as well as the relevant forms. In some cases the party agents did not indicate their party names: I have seen the ballot papers with the double markings. The Record of Appeal annexes photocopies and I took the trouble of seeing the original ballot papers. This was done on 15/6/2015 at about 10.00 a.m in the store where the ballot boxes are kept and in the presence of Mr. Omwancha, Counsel for 1<sup>st</sup> respondent, the appellant, two IEBC officers (Hamisi Tsumo and Raymond Kaingu), Mohamed Abenoor for the appellant and Haroon Bakari for 1<sup>st</sup> respondent.

Given the status of the initial results as declared at the five polling stations that were recounted as well as having seen the original ballot papers with the double markings, it is my finding that those ballot papers were tampered with. This could only have happened after the election had been finalised. How could 104 ballot papers with double markings pass the eyes of all the agents present without being noticed: The ones who signed the Forms 35 are not necessarily the only ones who witnessed the counting. Some agents usually leave the polling stations midstream while others leave at the end when they realize that their candidate has lost. The marks on the ballot papers are clearly visible even from a distant. If it was

one or five affected ballots, that could be excusable. The law allows an agent to ask for a recount at the polling station. The appellant's evidence is that the ballot papers were being counted very fast. How comes only his agent could not see the ballot papers as they were being counted. Indeed his agents signed the Forms 35. Even if they didn't sign the Forms 35, that could not have changed the situation. Regulation 79 (6) of the Elections (General) Regulations 2012 state as follows:

***“The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2) (a)”***

The appellant has put great emphasis on the fact that the seals that were installed after the boxes were closed were found intact: I managed to see the seals and it is possible for one to carefully remove the seal without breaking it. These are plastic strips with numbers and one can carefully loosen it and thereafter replace it if the intention is not to cut it off.

Once voting is over the ballots are counted. At Malindi High School Stream 1, the appellant's agent PW2 Noah Mutinda testified that he could not get the details of the results as the presiding officer was counting them quickly. PW3 Mohammed Ahmed was the appellant's agent at Karima Primary School Stream 3. His candidate got 26 votes: His complaint was that the evid machine was not operational. He testified that during the counting he did not see the appellant's votes being counted for another candidate. Eddie Mwangale Shangia was the appellant's agent at Malindi High School Stream 2: He signed the Form 35 which gave his candidate 37 votes: The same Form 35 gave the 1<sup>st</sup> respondent 144 votes: According to him there was a possibility that some of the appellant's votes were being given to the 1<sup>st</sup> respondent: The verification results show that the 1<sup>st</sup> respondent lost 45 votes at Malindi High School Stream 2: I have seen the specific affected ballot papers and the only conclusion I can make is that the votes were originally cast for the 1<sup>st</sup> respondent and were later tampered with. Why were the votes not declared as spoilt and the voters given fresh ballot papers. Assisted voters usually have the votes marked by the presiding officer in the presence of agents. If the double marks were made assisted by voters, it would have been very easy to detect the problem as the party agents and the presiding officer could have seen them.

For the court to be convinced that over 300 valid votes could turn out as rejected votes, the evidence on record has to be in line with the petition. The petitioner's complaint for these polling stations was that people who were not registered voters were allowed to vote and that some voters voted more than once: These are the only complaints. There is nothing like votes being counted for the 1<sup>st</sup> respondent or that double marked ballots were counted in favour of the 1<sup>st</sup> respondent. The total number of votes cast did not exceed the number of registered voters. Only six voters were barred from voting for registering twice: It cannot be held that the appellant was taken by surprise when he saw the huge number of double marked votes. The 1<sup>st</sup> respondent got 1,082 votes at Karima Primary School's four streams (279, 273, 262, 268) while the appellant got 90 votes (26, 18, 26 and 20): The total registered voters were 3,190 with two streams having 797 voters each and the other two having 798 voters each:

Each of the two streams at Malindi High Court 450 registered voters. The 1<sup>st</sup> respondent got 106 in stream one and 144 votes in stream 2. the appellant got 38 and 37 votes respectively. The voting trend shows that each of the candidates had his own strong polling centres. Karima and Malindi High School were for the 1<sup>st</sup> respondent. The appellant got the highest votes in all the six streams at Sir Ali Bin Salim Primary School.

The evidence on record is not in line with the report on scrutiny and recount. I do agree with the findings of the trial court that the ballot boxes were tampered with. Those who did it targeted the 1<sup>st</sup> respondent's strong polling areas. If the appellant's agents could not see the double markings, what about the agents from the other parties or the observer. The double marks can be seen from a distance and the allegations that the votes were being counted very fast cannot hold. The current voting system is quite transparent. Only violence occurring at the polling station can enable someone to tamper with the boxes. This was a

by election and there was enough security. No violence was recorded. There was no room for confusion as there were no other elections such as Member of Parliament or Governor:

The election process is well documented in our laws: Article 86 of the Constitution states as follows:

***“At every election, the Independent Electoral and Boundaries commission shall 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 safekeeping of election materials.”***

Further, Regulation 76 of the Elections (General) Regulations 2012 states as follows:

***“76. (1) The presiding officer shall, in the presence of the candidates or agents-***

- a. ***open each ballot box and empty its contents onto the counting table or any other facility provided for the purpose and, shall cause to be counted the votes received by each candidate; and***
- b. ***record the total number of votes cast in favour of each candidate.***

***2. Each ballot paper shall be counted as follows-***

- a. ***the presiding officer shall in respect of every ballot paper announce the candidate in whose favour the vote was cast.***
- b. ***display to the candidates or – agents the ballot paper sufficiently for them to ascertain the vote; and***
- c. ***put the ballot paper at the place on the counting table, or other facility provided for this purpose, set for the candidate in whose favour it was cast.***

***3. The presiding officer shall record the count of the vote in a tallying sheet in Form 33 set out in the schedule.***

***4. A candidate or an agent shall have a right to-***

- a. ***dispute the inclusion in the count, of a ballot paper; or***
- b. ***object to the rejection of a ballot paper.”***

Given the above procedure, which in my view was followed to the latter, there was no room for double marked votes to enter the ballot boxes without being detected. Those involved in the process could have easily picked the double marked votes. It is also not possible to have a ballot marked with two different pens. The executive officer detected some ballot papers marked in blue, others in black while others in pencil at the same time. How can a single voter put marks on one ballot paper using two different pens? The irresistible conclusion is that the ballot boxes were opened and the papers interfered with. Further, how comes it is only the votes of the 1<sup>st</sup> respondent that were affected. Only 11 votes for the appellant

were affected. The votes of the rest of the candidates were intact.

### **Was the election Free and Fair:**

The totality of the appellant's evidence before the trial court was that unregistered voters were allowed to vote, that some voters were allowed to vote more than once, that the campaigns were characterized by acts of bribery, that there was heavy presence of police officers at the appellant's stronghold areas and this scared away voters, that the presiding officers were counting the votes very fast and there was likelihood that the appellant's votes were counted for the 1<sup>st</sup> respondent, that the evid machine was not working and that the 3<sup>rd</sup> respondent ought not to have been appointed as the Returning Officer.

I have dealt with most of the issues herein above. The appellant's witness never testified that any voter was barred from voting. The presence of police officers did not prevent those who wanted to vote from voting. Being a by election, the turnout seems to have been quite low. All voters were accorded the opportunity to vote. PW6, Feisal Noor testified that voting started at 6.00 a.m. Some voters were identified by the use of the manual register. All the appellant's agents who testified informed the court as to how the voting exercise went on. Where the polling station was closed before the prescribed time, the explanation was that there were no voters on the queue. The evidence shows that most voters required assistance. Others went with their own people to assist them. The allegation that some of the appellant's votes were counted for the 1<sup>st</sup> respondent were not proved. There were no acts of bribery, intimidation or violence during the elections. There was no double voting.

There was no shifting of the burden of proof. The report on scrutiny and recount did not shift the burden of proof to the respondents. The election records showed that the ballots had been properly counted and announced at the polling stations. The results were taken to the tallying centre and announced. What happened to the ballot papers after the results were announced does not need explanation on the part of the respondents. It is obvious that someone accessed the ballot boxes and created the double markings. The intention was to reduce the 1<sup>st</sup> respondent's votes: The correct results are those found in the Forms 35 and not those of the executive Officer who conducted the scrutiny and recount exercise: The paper trail is quite clear and it represents the will of the people of Shella:

One of the appellant's prayers in the petition was that he be declared as the one who was validly elected. The petition does not have any basis for that. There is an allegation that he lost 159 votes out of the assisted voters: The table in the petition shows that the appellant got 140 votes at Sir Ali Stream Five Polling Stations but only 104 were counted. The Form 35 shows that the total valid votes cast at the station was 242. The appellant got 104. If the alleged lost 36 votes are added to the total votes cast, it will give a total of 278 votes. This is more than the total votes cast. It is not alleged that the votes for the other candidates were meant for the appellant. The same applies to all the other polling stations indicated in the appellant's table. Indeed the appellant never complained of double marked votes being counted for the 1<sup>st</sup> respondent.

Election petitions, though fought through the legal process, carry political connotations. The voters are keen to know the outcome of the petitions unlike ordinary civil disputes. The evidence adduced in election petitions is looked at with a different lense as compared to ordinary cases. That is why the requirement of proof is that of above balance of probabilities but not beyond reasonable doubt. In the Case of **Kiiza Besigye V Yoweri Museveni Kaguta & Another. Election Petition No.1 of 2001 (Uganda)** where the court states as follows:-

***“An election petition is a highly political dispute, arising out of a highly politicized contest. In such a dispute, details of incidents in question tend to be lost or distorted as the disputing parties trade accusations, each one exaggerating the others' wrongs, while downplaying his or her own. This is because most witnesses are the very people who actively participate in the election contest.”***

The general presumption is that an election is conducted as per the guiding laws, rules and regulations. It

can only be declared void if the contrary is proved: Section 83 of the Elections Act is quite clear. Once the election is conducted in accordance with the laid down principles, it should not be declared void irrespective of non-compliance with Election Laws in some aspects especially where the results are not affected by the non-compliance. There was compliance with the law in the by-election.

### **Final Determination:**

The appellant's case before the trial court was not backed by any tangible evidence. There are no irregularities relating to the election process. The misposting of about 3-5 votes in the Form 36 is so insignificant as to be held to be an irregularity taking into account the fact that the winning margin was 269 votes. The appellant's case seems to be based on the scrutiny and recount report. The report does not shift the burden of proof:

Regulation 79 of the election regulations is clear. The votes are supposed to be opened and counted for each candidate by the presiding officer. Five presiding officers for Airport Primary School, Malindi Primary Streams one and four counted the votes for each candidate. Eight party agents signed the Form 35 for Karima Stream one. This was after the votes were counted. One cannot conclude that all those who saw the votes at that time were wrong and that the status of the votes was as found by the executive Officer in the scrutiny and recount report. This defeats any logic. For Karima Primary Stream 4, Othman Shee, wiper's agent signed the Form 35 confirming that his candidate got 20 votes while the 1<sup>st</sup> respondent got 268 votes: Under what circumstances did the votes undergo a complete metamorphosis and the 268 valid votes for the 1<sup>st</sup> respondent became 173. this can only be due to human acts conducted after the election was over. The presence of the original seals does not prevent the court from reaching at that conclusion.

In the end, I do find that the appellant did not prove his case as required by the law. The evidence is quite insufficient and does not prove any wrong doing on the part of the respondents.

Counsel for the appellant filed a preliminary objection on 12/6/2015 indicating that Mr. Mouko has no practising certificate. This notice was brought to my attention on 16/6/2015 and the judgment was scheduled for 17/6/2015. The letter dated 6/6/2015 from the Law society of Kenya does confirm that Mr. Mouko had the 2014 practicing certificate: The written submissions dated 3/6/2015 for the 1<sup>st</sup> respondent were filed by the firm of Omwancha & Co. Advocates. Apart from appearing for directions, Mr. Mouko only made the orals submissions which in essence is repetition of the written submissions. I am aware that A. M. Omwancha & Co. Advocates are different from Mouko & Co. Advocates. A. M Omwancha & Co. Advocates filed a notice of appointment on 11<sup>th</sup> May 2015 indicating that they would act alongside Mouko & Co. Advocates.

Since Mr. Mouko Advocate had the 2014 practicing certificate, all the proceedings before the trial court were proper: Expunging the oral part of Mr. Mouko's submissions does not change the position as the written submissions by M/s A. M. Omwancha & Co. advocates are on record. Further, there is the submissions of the 3<sup>rd</sup> and 4<sup>th</sup> respondents who are opposing the appeal. I do find that the preliminary objection is late on the day and lacks merit. It does not solve the dispute in any other way other than my findings herein.

With regard to the Cross-appeal, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents contend that they were wrongly condemned to pay costs. Rule 36 of the Election Petition Rules deals with the issue of costs. Section 84 of the election Act state that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. Although it has always been contended that section 84 calls upon the court to condemn the losing party to pay costs and that the section is couched in mandatory terms, my view is that the court should award costs depending on the circumstances of each case. If for instance the IEBC makes several irregularities which leads to the filing of an election petition, even if the petition is dismissed, the petitioner should not be made to suffer costs as it would be the acts of the IEBC that would have caused the filing of the petition. This is only when those irregularities are found to be true. The supreme court in Election Petition Nos 18 & 20 of 2014, **Evans Kidero & Others V Ferdinand Waititu**

**& Others**, ordered each party to meet their own costs after allowing the appeal.

Given the long history of the dispute between the parties herein and the way the election was properly managed by the IEBC, I do find that condemning the IEBC to pay costs is not ideal. The order of the trial court on costs is hereby set aside. The cross appeal is allowed. I do find that costs should follow the cause as per the provisions of section 84 of the Elections Act:

In the end, the appeal lacks merit and is hereby dismissed with costs to the respondents for both the subordinate court and this appeal.

Dated, signed and delivered at Malindi this 17<sup>th</sup> day of June, 2015.

**SAID J. CHITEMBWE**

**JUDGE**