



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

ELECTION PETITION NO. 11 OF 2013.

CHARLES MAYWA CHEDOTUM)

PHILEMON CHEPKWONY LOTUDO) :::::::::::::::::::: PETITIONERS

VERSUS

**I.E.B.C. :::::::::::::::::::: 1ST
RESPONDENT.**

PAUL CHEMUTTUT (SUED AS THE R.O. KAPENGURIA

**CONSTITUENCY :::::::::::::::::::: 2ND
RESPONDENT.**

**SAMUEL MOROTO CHUMEL :::::::::::::::::::: 3RD
RESPONDENT.**

J U D G M E N T

Charles Maywa Chedotum (first petitioner) and **Philemon Chepkwony Lotudo** (second petitioner) were among the four (4) candidates who contested for the Kapenguria Constituency parliamentary seat in the last general elections held on the 4th March, 2013 under the watch of the **Independent Electoral and Boundaries Commission (I.E.B.C.)** (first respondent) through its Returning Officer, **Paul Chemuttut** (second respondent) and in which **Samwel Moroto Chumel** (third respondent) was returned and declared as the winner having garnered a total of **15,265** votes against the first petitioner's **9,479** votes and the second petitioners **8,432** votes. The fourth candidate, **John Monte Loile**, garnered a total of **2,348** votes.

The petitioners were aggrieved by the declaration of the third respondent as the validly elected member of the National Assembly for Kapenguria Constituency by the first and second respondents. Consequently, they lodged this petition on 10th April, 2013 praying for:-

[1] An order that there be a scrutiny and recount of the ballot papers used in the National Assembly election, Kapenguria Constituency and scrutiny of the ballot papers used in the county assembly ward representatives, Kapenguria Constituency.

[2] A declaration that the first and second respondents presided over a flawed and irregular election exercise at Kapenguria Constituency on 4th March, 2013.

[3] A declaration that the first and second petitioners' rights as guaranteed under the constitution and the applicable law were violated by the apparent confusion in their names, placing of passport size

photographs in wrong ballot papers and substitution of passport size photographs.

[4] A declaration that the election of Kapenguria Constituency National Assembly seat was marred with illegalities, irregularities and procedural flaws so as to render the entire election of 4th March, 2013 at Kapenguria Constituency null and void.

[5] A declaration that the third respondent was not validly elected as a member of National Assembly for Kapenguria Constituency.

[6] An order compelling the first respondent to conduct afresh but proper, free and fair election in Kapenguria Constituency, National Assembly seat that shall be presided over by impartial and competent officials devoid of the incurable defects subject of this petition.

[7] An order that costs of this petition be borne by the respondents jointly and severally.

[8] Any other relief that the honourable court may deem fit, just and appropriate to grant.

Prayer (1) was dealt with and disposed of in the course of the hearing. The court made a finding that the petitioners had not set out the threshold or proper basis for a scrutiny order. Prayers (2) and (4) are more or less similar.

Prayer (3) alludes to violation of the petitioners' Constitutional rights and prayer (5) aims at invalidation of the third respondent's election as the Member of Parliament for Kapenguria Constituency.

Prayer (6), (7) and (8) are dependant on the outcome of the preceding prayers.

Basically, the petition is grounded on the fact that the parliamentary election for Kapenguria Constituency was not properly and legally conducted by the first and second respondents in that:-

- 1. The petitioners' constitutional rights were violated by the omission by the first and second respondents to put the correct names of the petitioner thereby denying them the opportunity to vote for themselves and they could not vote against the names and/or photographs of persons other than themselves.***
- 2. The first and second respondents presided over a sham and flawed election and declared a winner despite irregularities which were noted and acknowledged.***
- 3. The first and second respondents caused the photograph of the first petitioner to appear in the ballot papers meant for a County representative thereby compromising his very high chances of being elected as a member of parliament. Further, the second petitioner's surname was replaced with the name "Lotodo" thereby causing confusion among the voters and influenced them to the disadvantage of the second petitioner.***
- 4. The first and second respondent failed to halt the election process despite the irregularities and anomalies brought to their attention, thereby smacking of ill will, malice and bias in favour of the third respondent.***
- 5. The first and second respondents violated the Constitution and Statutory Law by failing to administer free and fair election in a manner which was impartial, neutral, efficient, accurate and accountable.***
- 6. The first and second respondents' manifest disorder was malicious calculated at benefitting the third respondent and breached the principles and doctrines of the first respondent's statutory obligation.***
- 7. The first and second respondents failed to caution the electorate of the patent anomalies in the***

names and photographs thereby connoting bias, arrogance and abdication of statutory duties enshrined in the Constitution and applicable laws.

8. *The first and second respondents failed to scrutinize the ballot papers to confirm the correctness of the details prior to the election thereby violating the petitioners' rights to a free and fair electoral process and vitiating the entire exercise.*
9. *The first and second respondents denied the Kapenguria electorate their Constitutional right to elect a leader of their choice due to manipulation and schemes orchestrated by themselves.*
10. *The first and second respondents exhibited bad faith in their actions and went against the legitimate expectation of the petitioners to a free and fair election.*

At the trial, all evidence was adduced by affidavit. The petitioners filed their respective supporting affidavits dated 10th April, 2013 and those of their witnesses also dated 10th April, 2013. The respondents filed affidavits in support of their respective response to the petition. The said affidavits include the one dated 2nd May, 2013 by the second respondent and the ones dated 6th May, 2013 by the third respondent's witnesses.

In his affidavit upon which he was cross-examined, the first petitioner averred that he contested the Kapenguria parliamentary seat after being nominated by his political party, United Republican Party (URP). He produced a copy of the nomination certificate and his national identity card (Exhibit marked "CMC 1 (a)-(b)) and averred that all necessary documents including three copies of his photograph were submitted to the first respondent. He said that the photograph had his full names i.e. **Charles Maywa Chedotum** but on the morning of the polling day, he learnt from his supporters that they were unable to vote after realizing that his name was incorrectly appearing as "**Charles Muiywa Chedotum**" instead of **Charles Maywa Chedotum**. He learnt that his photograph was misplaced and blurred. He averred further that his photograph was placed alongside that of a County representative called Emmanuel Katina at Mnagei Ward thereby confusing the voters into thinking that he was contesting for two positions.

The first petitioner went on to aver that he rushed to the polling centre and met a crowd of people in a state of confusion and frustration occasioned by officials of the first respondent. He demanded to see the Returning Officer to explain the confusion facing his supporters and was told by the Returning Officer that nothing could be done. Consequently, his supporters stayed away or cast their votes in favour of his competitors as they could not see where he was appearing.

The first petitioner contended that were it not for the apparent mix-up, he could have emerged the winner of the election as he was running on a URP ticket and had conducted a massive campaign in the Constituency. Further, he incurred enormous financial losses due to the flawed election occasioned by inadequate and/or ill preparation on the part of the first respondent.

The first petitioner prayed for the nullification of the election for having been tainted with irregularities which cost him heavily.

On his part, the second petitioner averred in his supporting affidavit that he contested the election after being nominated by his political party, Orange Democratic Movement (ODM). He produced copies of his nomination certificates, elector's card and National identity card (Exhibits marked PCL 1 (a)-(e)) and said that all relevant documents were submitted to the first respondent including "**three copies of his photograph showing his full names**" **Philemon Chepkwony Lotudo**. He said that it was on the morning of the polling day that he learnt from his supporters that they could not vote after realizing that his third name "**Lotudo**" was misspelt to read "**Lotodo**".

The second petitioner averred that his competitor one Monte Loile, son of a former member of parliament and Energy Minister, the late Francis Polis Loile Lotodo, was using the names John Loile Lotodo in his campaign posters but used the name John Monte Loile in the ballot paper. Consequently, his supporters (second petitioner's) refrained from voting for him thinking that he was the one and the

same John Lotodo.

The second petitioner averred that most of his supporters were assisted voters who could not make up their minds on whom to vote and as a result he lost the election. He contended that the glaring anomaly and mistake was grave and deliberately crafted to ensure that he lost the election on ground that he was one of the sons of the former Member of Parliament the late Lotodo who was clearly unpopular. The second petitioner also prays for the nullification of the election which cost him heavily.

The foregoing averments by the petitioners constitute their case against the three respondents and in particular the first and second respondents who were obligated to discharge their mandate in accordance with the law.

In their response to the petition, the first and second respondents stated that the first petitioner is famous and prominently known by his surname **Chedotum** and was vying on a URP ticket to contest for the seat of the National Assembly Kapenguria Constituency. That, the nomination certificate dated 18th January, 2013 was issued by his party under the name **Chedotum Charles** and was presented to the first respondent together with a national identity card No. 0277160 in the name of Charles **Maywa Chedotum**. That, upon being granted with a nomination certificate bearing the names Charles Maywa Chedotum by the first respondent, the first petitioner submitted three copies of passport size photographs bearing his face and these were submitted to the printers for purposes of preparation of ballot papers and were never submitted by the first respondent. That, the first petitioner embarked on a campaign to woo voters and in the process printed and distributed campaign posters bearing his name Charles Chedotum. He also distributed T-shirts and caps bearing his name Charles Chedotum, his party (URP), party's logo (a horn) and party's colours.

The first and second respondents stated that the first petitioner's supporters could identify him on the ballot paper either by his prominent name Chedotum or his other names Charles Maywa or his photograph or his party's name (URP) or his party's symbol (horn) or his party's colours. Therefore, no amount of illiteracy could confuse any voter as to where the first petitioner was in the ballot paper. Further, the names of all candidates in the ballot papers started with the surname, then the first names of the candidates, then the middle names and based on the first petitioner's prominent surname, prominent and popular political party, it was not possible for any voter to confuse him with any other candidate.

It was also stated by the first and second respondents that the first petitioner was not a candidate for member of the County Assembly and thus no voter could confuse him as such. That, the first petitioner had clearly indicated to his supporters the position he was vying for, the party that nominated him, his full names, his party's symbol and his party's colours (yellow and black) hence no confusion was foreseeable even to the most illiterate voter and after all, an illiterate voter could apply to be assisted by a literate voter. That, there were six wards in Kapenguria Constituency i.e. Riwo, Kapenguria, Mnagei, Siyoi, Endugh and Sook and thus any alleged mixup or duplicity of photographs could not affect the whole constituency since the first petitioner only mentioned one polling station. That, the first petitioner's middle name "Maywa" was not known to many voters since he is famously known as Charles Chedotum, a fact confirmed by his party's nomination certificate, his campaign posters and T-shirts. That, the first petitioner did not register any protest to any presiding officer or Returning officer. That, the third respondent's brother Emmanuel Katina Michael was a candidate for member of County Assembly in Mnagei ward and bears close semblance to the 3rd respondent. Therefore, there was no confusion that was apparent as the election for member of the National Assembly and Member of County Assembly was distinct and separate. That, no voter refused to vote as a result of the alleged confusion since there was no confusion in the first place. That, there was no protest by voters either in Murkwijit polling station or any other polling station with regard to the alleged mix-up of photographs or misspelt middle name of the first petitioner and after all, the first petitioner admitted that the first and second respondents placed a photograph of himself against his name.

The first and second respondents denied that the first petitioner's photograph was blurred and averred that it was the only set of passport size photograph supplied to them by the first petitioner. It was contended by the first and second respondents that the voter turn out in Kapenguria Constituency was

86.88%, slightly above the national average which was a demonstration that no voter could have abstained from voting on mere allegation of the alleged misspelt middle name of the first petitioner.

The first and second respondents deny that the first petitioner approached them with a view to halting the elections and in any event, the elections could not be halted on flimsy grievance. They contended that they could not be blamed for the alleged misspelt name as the first petitioner's political party conducted their nomination at the last minute contemplated in law, leaving the first respondent with little time to print ballot papers which had to be done outside the county for security reasons and that due to the short time it was not totally unexpected that some typographical errors would occur in the course of printing some ballot papers.

The first and second respondents further contended that the first petitioner's party agents never registered any protest in the field book and duly signed forms 35 in every polling station in acknowledgement of the results allocated to the first petitioner and all other candidates.

The first and second respondents prayed for the dismissal of the first petitioner's claims for being baseless, frivolous, malicious and spiteful.

With regard to the second petitioner, the first and second respondents confirmed that he was a candidate for Member of National Assembly, Kapenguria Constituency on a ticket held by the Orange Democratic Movement (ODM) party in a field comprising four candidates who did not include a person called John Monte Lotodo.

The first and second respondents stated that the candidate John Monte Loile campaigned using his names John Monte Loile and not John Monte Lotodo as alleged and that since the late Francis Polis Loile Lotodo was a very popular politician in Kapenguria Constituency where he served as area member of parliament between 1984 and 2001 when he died while in office, he cannot be said to have been unpopular. That, since ODM was not a popular party in the entire West Pokot County which is predominantly a KANU and URP zone, the second petitioner ought not confuse the voter's dislike for him and his party to a dislike for the name "Lotodo". That, if at all the second petitioner's name was misspelt as Lotodo instead of Lotudo, then the mistake was an inadvertent typographical error which was expected due to the short time within which ballot papers were printed due to the second petitioner's party delay in conducting nominations. That, the alleged error if any, did not affect the credibility of the electoral process which was overally free and fair. That, the second petitioner has not proved that if he and his supporters voted for the alleged Philemon Chepkwony Lotodo, the results could have been allocated to someone else who was not himself and in the circumstances, the names Philemo Chepkwony Lotudo and Philemon Chepkwony Lotodo referred to one person who was the second petitioner and who did not suffer prejudice whatsoever. In any event, in the Pokot dialect, the names Lotodo and Lotudo bear a similar meaning.

The first and second respondent contended that no reasonable voter could be confused by the typographical error in the name Lotudo which error could easily pass unnoticed. Further, there was no candidate by the name Lotodo who could have benefited from the misspelt name.

The first and second respondents stated that a mere replacement of letter "U" with letter "O" in the middle of a name could not fundamentally change the second petitioner's name. They contended that the allegations by the second petitioner are frivolous, vexatious and baseless.

In general, the first and second respondents deny that the election was sham and flawed and reiterate that the third respondent was validly elected as the member of the National Assembly Kapenguria Constituency after he garnered the highest number of votes cast. That, the alleged typographical errors, if any, did not affect the petitioners' chances to be elected and therefore did not materially affect the outcome of the results. That, the election was free and fair and was administered in an impartial, neutral, efficient, accurate and accountable manner. The first and second respondents contended that the third respondent was not in any way advantaged by the alleged confusion and that at Murkwijit polling station subject of the first petitioner's complaints, the first petitioner received the highest number of votes (i.e.

554 votes against the second petitioner's 86 votes, the third respondent's 222 votes and the fourth candidate's 9 votes) thereby demonstrating that the typographical error which was merely replacement of letter "a" with letter "u" did not cause him to lose any votes.

The first and second respondents further contended that the third respondent was validly declared as the elected member of the National Assembly, Kapenguria Constituency.

The first and second respondents pray for the dismissal of the petition for failure to disclose any profound irregularity in the management of the electoral process as to warrant the orders sought.

All the foregoing facts are elaborated, reiterated and fortified by the second respondent's replying affidavit dated 10th April, 2013.

The third respondent's response to the petition is based on the facts that he contested for the Kapenguria parliamentary seat on a Kenya African National Union (K.A.N.U) ticket and won by a total of 15,190 votes. He voted at Kanyarkwat polling station at 10.30 a.m. and thereafter went around visiting various polling stations in the Constituency. He did not hear any of the complaints raised herein by the petitioners in all the polling stations that he visited. Such complaints were also not raised at the tallying centre. Not even written complaints were raised by the petitioners at the tallying centre and polling stations.

The third respondent stated that at Mnagei ward, the first petitioner received the highest votes and celebrated accordingly. He (third respondent) was informed by his agent at Murkwijit polling station one Mr. Alomai that the first petitioner voted at the said polling station and left without raising any complaint. He (first petitioner) also brought his wife to vote at the station. The third respondent further stated that the petitioners have deliberately kept away their agents from this dispute and thus failed to explain the role played by the said agents in minimizing and/or resolving the alleged mix-up and/or confusion. That, even if there was any mix-up, confusion, blurred photographs, misreading of names which is denied, such did not affect the election results in any substantial manner that warrant annulment.

The third respondent contended that the election was held in compliance with electoral laws and regulations and that the petition is defective and bad in law for lack of material facts and conflicting details "inter-alia" the votes each candidate scored, the date of the declaration of the result and as to who won as mandatorily required by the Election Rules.

The third respondent prays for a determination that he was validly elected and for the dismissal of the petition with costs to himself.

Although the third respondent did not file his own affidavit he was allowed by the court to participate in the trial as a necessary party having filed a response to the petition. In that regard, his response was treated as his evidence in chief upon which he was cross-examined by the petitioners and the first and second respondents. Ideally, the third respondent should have supported his response by filing his own affidavit and that of his witnesses. However, his failure to file his own affidavit could not lock him out of the trial as doing so would have defeated the overriding objective of the Election Rules. In any event, the petitioners were not prejudiced whatsoever.

Nonetheless, the third respondent filed about seven affidavits deponed by his witnesses in support of his case in this petition. The evidence adduced by all the parties to this petition has been perused, heard and evaluated by this court in the light of the written submissions filed by **Messrs Millimo, Muthoni & Co. Advocates** for the petitioners, **Messrs Z.K. Yego Law Offices'** for the first and second respondents and **Messrs Barongo Ombasa & Co. Advocates** for the third respondents.

The issues for determination were framed at the pre-trial conference held on 14th June, 2013 as follows:-

[1] Whether the election of member of the National Assembly for Kapenguria Constituency was marred with irregularities which rendered the election null and void "ab-initio".

[2] Whether the third respondent (Samuel Moroto Chumel) was validly elected as the member of the National Assembly for Kapenguria Constituency.

[3] Whether (depending on the outcome of the second issue above), the first respondent (I.E.B.C.) should conduct fresh election for Member of the National Assembly for Kapenguria Constituency.

[4] Which party is to bear the costs of this petition.

Three (3) witnesses inclusive of the two petitioners appeared in court in support of the petition and were cross-examined accordingly.

The Returning Officer (second respondent) appeared on his own behalf and that of the first respondent and was also cross-examined accordingly and so did the third respondent and his team of four (4) witnesses.

The number of witnesses who appeared in court and those who did not appear in court but deposed affidavits for or against the petition was a demonstration of the public's profound quest to ensure that justice is not only done but also seen to be done with a view to having the court upholding and putting into effect the true will of the Kapenguria electorate with regard to their political representatives. The current constitutional dispensation has raised the bar on all those charged with the responsibility of ensuring that elections in this country are conducted in a free and fair manner embracing secret balloting, transparency, impartiality, neutrality, efficiency, accuracy and accountability, devoid of violence, inhumiliation, improper influence or corruption (see, Article 81 of the Constitution).

Every citizen has the freedom to make political choices and every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the Will of the electors for any elective public body or office established under the Constitution. Every adult citizen has the right without unreasonable restrictions to vote by secret ballot in any election or to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office. All these are Constitutional rights by dint of Article 38 of the Constitution.

Indeed, in the Ugandan case of **Col (Rtd) Dr. Besigye Kizza Vs. Museveni Yoweri Kaguta Election Petition No. 1 of 2001**, the Supreme Court of Uganda observed that an election is the mechanism whereby the choices of a political culture are known. These choices should be expressed in ways which protect the rights of the individual and ensure that each vote cast is counted and reported properly. That, an electoral process which fails to ensure the fundamental rights of citizens before and after the election is flawed. That, candidates should not be deprived of their right to stand for elections, and the citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. That, the entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the Will of the people. That, fairness and transparency must be adhered to in all stages of electoral process.

The foregoing observations clearly fit into the principles expounded in our Constitution. It would invariably be on the basis of the said principles and the available evidence that the framed issues will be determined and in particular, the first and second issues i.e. whether the election of member of the National Assembly for Kapenguria Constituency was marred with irregularities which rendered it null and void “**ab-initio**” and whether the third respondent was validly elected as the member of the National Assembly for Kapenguria Constituency. These two issues are somehow intertwined.

In the English case of **Morgan and Others Vs. Simpson and Another (1974) 3 ALL ER 722**, it was stated that:-

“An election court was required to find an election

invalid (a) if irregularities in the conduct of

elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results.

Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”

An election court is therefore called upon to consider whether any irregularities that might have been noted was so grave as to lead to the conclusion that the election was or was not transparent, free and fair. If the irregularities had no effect or substantial effect on the result, there would be no proper basis for nullifying an election. This proposition is strengthened by Section 83 of the Elections Act, 2011 which provides that:-

“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 the non-compliance did not affect the result of that election”.

Since not every non-compliance with the applicable law would lead to the nullification of an election, the court has a duty to consider the gravity of the alleged transgression and whether the transgression was inadvertent or deliberate before coming to a decision whether or not to nullify an election (see, Joy Kabatsi Kafura Vs. Anita Kawooya & Another Election Petition No. 25 of 2005 (Uganda)).

With regard to the standard of proof required in election cases, it is higher than on a balance of probabilities although not equal to beyond a reasonable doubt (see, **Muliro Vs. Musonye & Another [2008] 2KLR (EP) 52** and **Nganga & Another Vs. Owiti & Another (No. 2) (2008) 1 KLR (EP) 799**).

In **Mbowe Vs. Eliufoo (1967) EA 240**, the standard of proof was said to be proof to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt.

As for burden of proof, it lies on the petitioner.

In the Besigye case (supra), the court held that:-

“The burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the court. The only controversy surrounds the standard of proof required to satisfy the court”.

Seems therefore, that a petitioner who seeks to annul an election bears the legal burden of proof to a larger extent.

In the Nigerian case of **Buhari Vs. Obasanjo (2005) CLR 7K**, the Supreme Court stated that:-

“The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election”.

As for the Supreme Court of Kenya regarding the burden of proof, in the case of **Raila Odinga Vs. I.E.B.C. & Others Petition No. 5 of 2013**, the following was stated:-

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law

approach in respect of alleged irregularity in the acts of public bodies. “Omnia praesumuntur rite et solemniter esse acta” - All acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law”.

Thus, general complaints in regard to allegations of electoral malpractices would not be sufficient to invalidate an election. Allegations of malpractices, breaches of electoral law and allegations of electoral irregularities have to be established to the required standard.

Herein, and with regard to the first issue for determination, the irregularity complained of by the petitioners and blamed on the first and second respondent was the mix-up of the petitioners' names in the ballot papers availed for usage at one or two polling stations and in particular the polling station at Murkwijit Primary School.

The petitioners stated that they submitted to the first and second respondents copies of their national identity cards and passport size photographs bearing their clear names and facial images but on the polling day, the names appearing in the ballot papers were not their actual names.

The first petitioner stated that his actual middle name **“Maywa”** was replaced with the name **“Munyua”** or **“Munywa”** or **“Muiywa”** and the second petitioner stated that his actual surname **“Lotodo”** was replaced with **“Lotodo”**. Otherwise, both petitioners agreed that the rest of their names were correct i.e. **Charles Chedotum** for the first petitioner and **Philemon Chepkwony** for the second petitioner.

The first petitioner went further to state that the photograph representing his image in the ballot paper was blurred. Both petitioners contended that due to the anomalies aforementioned, some voters who were to vote for them refrained from voting or voted for other candidates. Both petitioners alleged that they did not vote for themselves on realizing the said anomalies. The first petitioner alleged that he alerted the election officials who did not do anything like halting the voting process and instead told him to go to court.

The first petitioner also alleged that his correct photograph appeared under a county assembly candidate at Mnagei Ward.

Both petitioners implied that the mix-up in their names and the presence of the first petitioner's blurred photograph at some polling stations or the presence of the photograph at the wrong place impacted negatively against them as they and their supporters could not exercise their right to vote thereby causing loss of their deserved votes at the expense of the third respondent courtesy of the first and second respondents. It was therefore the petitioners' belief that the material election was not conducted in accordance with the law and in a manner which was free and fair. They contended that the outcome of the election as presented and confirmed by the first and second respondent was not a free expression of the Will of the people of Kapenguria.

On their part, the first and second respondents indicated that apart from their names, the candidates were also identified by their party's name, symbol or colours hence no confusion was foreseeable even to the most illiterate voter. Further, out of the six wards in Kapenguria Constituency only one polling station was mentioned by the first petitioner as having been affected by the alleged mix-up or duplicity of photographs.

In any event, the first and second respondents denied the existence of any blurred photograph of the petitioners. Further, all the first petitioner's party agents never registered any protest and duly signed Forms 35 in every polling station thereby acknowledging the results allocated to the first petitioner and indeed, all the other candidates.

With regard to the second petitioner, the first and second respondent indicated that his name "**Lotudo**" was misspelt as "**Lotodo**" but this was more or less a typographical error.

All in all, the first and second respondents contended that there was no confusion to any voter created by the alleged anomalies neither was the election marred with any illegalities, irregularities and procedural flaws. Further, the alleged anomalies did not affect the credibility of the electoral process which was generally free and fair.

The third respondent concurred with the first and second respondents by contending that even if there was any mix-up, confusion, blurred photographs, misreading of names which facts he (third respondent) denied, such did not affect the results of the election in any substantial manner warranting annulment.

It is quite clear from the totality of the evidence adduced herein that indeed there could have been a mix-up of the petitioners' names in some ballot papers in a few polling station. However, the mix-up was not substantial to make a difference in the ultimate result of the election. If anything, the mix-up affected one or two polling station among them Murkwijit Primary School where the first petitioner garnered a majority votes. The mix-up did not relate to the petitioners' full names. It only related to the first petitioner's middle name "**Maywa**" and the second petitioner's surname "**Lotudo**". The other names in the ballot papers were correct.

Most importantly, no evidence was provided by the petitioners that the mix-up of their names was a deliberate act by the first and second respondents with a view to aiding the third respondent or any other candidate unfairly. Most likely than not, the mix-up was as a result of typographical or print error. In any event, the mix-up could not have prevented the voters or the petitioners exercising their constitutional rights.

This was because, the name of the candidate was not the only means of identification in a ballot paper. There were other means which included the candidates' political party's name, symbol and colour. In fact, in areas where a majority of voters are assisted voters they would more likely that not identify their preferred candidates by his party's symbol, colour or name.

It cannot be true that voters at certain polling stations refrained from voting or voted for wrong candidates due to the alleged mix-up of the petitioners' names in the ballot papers. It cannot also be true that both petitioners did not vote for themselves due to the mix-up in their names. The first petitioner was seen by his neighbour David Ruto Lopunang (RW3) voting at Murkwijit polling station while the second petitioner was seen voting at Chepnyal Primary School by a K.A.N.U. Party agent at the station, **John Riamah (RW 4)**.

It clearly emerged during cross-examination that the petitioners and their witness **Philip Lochilikwang Nangoria (PW3)** were less than candid and so were those of their witnesses who deponed supporting affidavits i.e. Abraham Ruto Aoya, Josphat Aulich Emarthe, Margaret Alimlim and Beatrice Chebet Lokolia.

Basically, the mix-up in the names of the petitioners was inconsequential for the purposes of discrediting the election process.

As to the photographs, they did not play any substantial role in the attempt to discredit the election. In any event, the petitioners did not exhibit in court any of the alleged blurred photographs. Could be that no such photographs existed anywhere near the ballot papers.

Instead of serving the interests of justice, it would appear that the petitioners and their witnesses

chose to misrepresent facts hoping that the court would come to their aid by invalidating an election without good cause. In doing so, they have failed to discharge their burden of proof by showing that the alleged irregularities were ill-motivated or that taken as a whole, they would have tilted the balance against the third respondent. There was herein inadequate and credible evidence to show that the two petitioners were deprived of their right to stand for and vote in the election. Neither, were the people of Kapenguria deprived of their right to vote for candidates of their choice through unfair manipulation of the electoral process by electoral officials. Indeed, there was nothing to show that the will of the Kapenguria electorate was subverted by any of the respondents.

There was insufficient evidence of non-compliance with the law on the part of the first and second respondent and even if there was sufficient evidence, there was no valid evidence adduced to show how the non-compliance with the law affected the results of each candidate including the petitioners.

In sum and with regard to the first issue for determination, it is the finding of this court that although the petitioners were able to partly establish that there was a mix-up or rather misspelling or omission of some letters or inclusion of some letters in their names as appeared in some ballot papers during the voting process in a few polling stations not exceeding five (5), they did not go beyond that as the law requires. They had to show but did not, that the said irregularities affected the result of the election in a substantial manner thereby rendering the entire election exercise null and void “**ab-initio**”.

The petition therefore fails on the first issue. Consequently, the second issue must be answered in the affirmative to the extent that indeed, the third respondent, Samuel Moroto Chumel, was validly elected as the member of the National Assembly for Kapenguria Constituency.

The third issue must be answered in the negative to the extent that it would not be necessary for the first respondent (I.E.B.C.) to conduct fresh election for member of the National Assembly Kapenguria Constituency as the Will of the area's electorate was clearly and loudly expressed on the 4th March, 2013 as demonstrated by the fact that the voter turnout stood at 86.88% and the vote margin between the winner (third respondent) and the runner up (first petitioner) was wide enough with 5,786 votes.

With regard to the fourth issue, this petition is a failure in its entirety and therefore, the costs must follow the event to the extent that the two petitioners shall bear the costs of the petition in favour of the three respondents.

Finally, with regard to the legal validity of the petition, it was contended by the respondents that the petition as filed was fatally incompetent in as much as the results being challenged were not stated or pleaded.

The issue was not but ought to have been raised by way of an interlocutory application prior to or during the pre-trial conference and does not therefore fall for determination at this stage.

Nonetheless, the position in that regard was stated by the Court of Appeal in **J.M.N. Mututho Vs. Jayne N.W. Kihara & Others (2008) e KLR**, in the following terms:-

“Election petitions are special proceedings.

They have a detailed procedure and by law

they must be determined expeditiously. The

legality of a person's election as a people's

representative is in issue. Each minute counts.

Particulars furnished count if the petition itself

is competent not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it Besides, the petitioner does not have results even now. Her advocate stated as much. If she does not have the results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issue raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result”.

The effect of that decision is to render fatally incompetent any petition which does not contain the results of the election. This petition would fall in that category as it was filed contrary to the requirements of Rule 10 (c) of the Elections Petition Rules 2013 which provides that:-

“An election petition filed under Rule 8 shall state -

(a)

(b)

(c) The results of the election, if any, and however

declared.

Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities is not a panacea for deliberate non-observance of procedural rules by a litigant. Indeed, the Supreme Court observed as much when it stated in the case of **Raila Odinga Vs. I.E.B.C. & Others** (Supra) that:-

“Article 159 (2) (d) of the Constitution simply

means that a court of law should not pay undue

*attention to procedural requirements at the expense
of substantive justice. It was never meant to oust
the obligation of litigants to comply with procedural
imperatives as they seek justice from the court”.*

In Chelashaw Vs. Attorney General & Another [2005] 1 EA 33, it was held that without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

All in all, this petition is devoid of both factual and legal merit. It must and is hereby dismissed.

Ordered accordingly.

[Delivered & signed this 31st day of July, 2013.]

J.R. KARANJA.

JUDGE.