REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ELECTION APPEAL NO.56 OF 2013

MILLIAH NANYOKIA MASUNGO ....APPELLANT

VERSUS

1. ROBERT MWEMBE)

2. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION)

3. BENARD ODUOL (RETURNING OFFICER

WEBUYE WEST CONSTITUENCY)................RESPONDENTS

(An appeal from the Judgment of Hon. Margaret Wambani, SPM delivered on 25/9/2013

in

Bungoma CMC Election Petition No. 2 of 2013)

JUDGMENT

Background:

1. Miliah Nanyokia Masungo the Appellant herein was among five (5) contestants for the office of Member of County Representative for Misikhu Ward, Webuye Constituency, Bungoma County during the general elections that took place on 4th March, 2013. However, she was unsuccessful as the 1st Respondent was returned as duly elected whereby the Appellant filed Election Petition No.2 of 2013 in the Chief Magistrate's Court at Bungoma challenging the election of the 1st Respondent. By a Judgment delivered on 25th September, 2013, Hon. Margaret Wambani, SPM dismissed the Petition and certified the 1st Respondent to have been duly elected. Being aggrieved by that judgment, the Appellant brought this appeal to set aside the judgment and allow the Petition.

2. In the Petition, the Appellant(hereinafter to be referred to interchangeably as *"the Petitioner and Appellant,"* respectively) had alleged that there were massive irregularities, voter bribery and violence that affected the election process; that there was manipulation of results in forms 34, 35 and 36 in favour of a certain candidate; that there were breach of electoral rules and regulations that prevented the election from being a transparent process; that the total votes cast and total number of vote obtained by all the candidates did not agree; that the negligence of polling clerks led to double voting; that the 1st Respondent was involved in election malpractices including voter bribery and voter transportation and finally that the officers of the 2nd Respondent were biased and incompetent. All the respondents filed their responses wherein they denied all the allegations in the Petition.

3. The election Court adopted the Appellant's issues for determination as follows:-

i) Whether the primary documents used in conducting the County Representative Assembly elections for Misikhu Ward on 4th March, 2013 contain errors.

ii) If yes, whether the said errors are also so fundamental that they affected the final results of the said elections.

iii) Whether any election offences and or malpractices were committed by the first Respondent.

iv) Whether there is a basis for scrutiny and recount of the votes cast in the polling stations cited by the Petitioner.

v) Whether the first Respondent was validly elected.

vi) If not whether a fresh election for the County Assembly representatives for Misikhu Ward should be ordered.

vii) Who should be ordered to bear the costs of the Petition herein.

The Judgment:

4. In her judgment, the Learned Senior Principal Magistrate Margaret Wambani, after considering the Affidavit evidence and cross-examination of five (5) witnesses for the Petitioner and two (2) witnesses for the Respondents and submissions of counsel, found *inter alia* that, the election for Misikhu Ward was conducted in accordance with the Constitution and the Election Act; that the Petitioner had failed to prove to the required legal threshold that there was indeed non-compliance with the law yet she had a heavy burden of proof of all the allegations she had made; that the errors established in Forms 35 and 36 had been properly explained and did not fundamentally affect the final results of the Misikhu Ward elections; that the margin of 1600 votes between the Petitioner and 1st Respondent could not have changed the outcome; that bribery by the 1st Respondent had not been proved to the required standard or at all; that the 1st Respondent was validly elected as County Representative for Misikhu Ward and that costs of Kshs.300,000/= be paid to the 1st Respondent.

The arguments on appeal:

5. The Appellant lodged a Memorandum of Appeal in this court attacking that judgment on fourteen (14) grounds. The Appellant relied on her written submissions filed both in the lower court as well as in this appeal. At the hearing of the Appeal, the Respondents raised a Preliminary Objection to the jurisdiction of this court but I ruled that the same be raised in opposition to the Appeal and it be determined in this judgment.

6. Mr. Amasakha, Learned Counsel for the Appellant submitted that the gist of the appeal was that there were irregularities which took place during the election which compromised the integrity of and thereby affected the result of the election. That the 1st Respondent's name had been cancelled twice in the Register of voters meaning that he had voted twice; that four (4) out of sixteen (16) Polling Stations recorded double voting; that that was an election offence capable of nullifying the election as was in the Case of **Isaac -vs- Hussein & Another [2008] 1 KLR (EP) 786.**

7. Mr. Amasakha further submitted that the irregularity of double voting breached the principle of equality of the ballot under Article 81 (b) of the constitution; that there was departure from the procedure laid down by Parliament in the Election Act and Regulations; that the trial court only applied the quantitative test but failed to apply the qualitative test enunciated in **Manson Nyamweya -vs- James Magara & 2 Others (2009) eKLR;** that although the Appellant had discharged her evidentiary burden the trial court erred in making a finding that she had not discharged the burden of proof; that the Petitioner had proved her allegations of canvassing; that the trial Court erred in applying Regulation 62 (6) on the issue of canvassing; that it amounted to campaigning on election day as held in **Muliro -vs- Musonye & Anor(2008) 2 KLR.**

8. On double voting, Counsel submitted that the trial Court erred in ignoring the report on scrutiny and recount and adopting the one filed by the 2nd Respondent; that the trial Court erred in holding that the breakdown of the BVR kit did not lead to double voting as manual voting was lawful; that it failed to address the issue of double crossing of the registers; that double voting is an election offence under Section 58 (m) and contrary to Section 59 (3) of the Elections Act; that the Petitioner had discharged her evidenciary burden and it was upon the Respondents to rebut the same; that the trial Court erred in declining to rely on the evidence on record and that the trial Court failed to make crucial determinations. Counsel therefore urged that the appeal be allowed.

9. Professor Sifuna appeared for the 1st Respondent and opposed the appeal. Learned Counsel argued that; the Appellant had not discharged the burden of proof as the evidence tendered at the trial was so irredeemably weak, unbelievable, contradictory and inconsistent; that her allegations were on serious election offences thereby requiring proof beyond reasonable doubt; the Cases of **Joho -vs- Nyange (No.4) [2008] 3 KLR EP 500 and Mbogori -vs- Kang'ethe & Anor (No.2) [2008] 1 KLR (EP) 177** were relied on support of this proposition; that the Petitioners' affidavit evidence was at variance with the Petition contrary to the holding in **Mohamud Muhumed Sirat vs- Ali Hassan Adbdirahmed & 2 Others 2010 eKLR,** that the Appellant's witnesses were not credible and that two of them were thieves; that the report on scrutiny and recount could not be relied on as the trial Court admitted that the ruling ordering the same was made in error the trial Court had admitted as such; that the same was not signed by the agents; that the report was not binding on the Election Court; that there was no evidence of double voting by the 1st Respondent and that the issue of double voting was introduced at the submission level and not in the Petition.

10. Professor Sifuna further argued that double voting was an election offence and should have been proved to the required standard. That it was not for the 1st Respondent to prove that he was validly elected but the Petitioner to prove her allegations; that the appeal and Petition are unmeritorious, frivolous and vexatious and should be dismissed. Counsel relied on other authorities on the issue of discrepancy of accompanying Affidavits and Petition; minor deficiencies and non-compliance with electoral law; failure to call crucial witnesses and on scrutiny and recount.

11. Mr. Mutubwa appeared for the 2nd and 3rd Respondent. He submitted that this Court did not have jurisdiction to entertain the Appeal and relied on the Cases of **Samuel Kamau Macharia -vs- KCB & 2 Others [2012] e KLR, IEBC & Anor -vs- Stephen Mutinda & 3 Others [2014] e KLR, CA No.36 of 2013 Malindi, Timamy Issa Abdulla -vs- Swaleh Salim Imu Swaleh & 3 Others:.** That the standard of proof in election case was beyond a balance of probability but below one of beyond reasonable doubt, that on the principles enunciated in the Cases, *interalia* of **Raila Odinga & Others -vs- Ahmed Isaak Hassan & Others Pet. No. 5 of 2013 and Ibrahim -vs-**

Shagari & Others 1985 LRC, the matters of law raised which alone this court should determine cannot be sustained in this Appeal. That there was no evidence that the errors, amendments, corrections and cancellations in Forms 35 and 36 could have affected the election results; that the admitted errors were not substantial; that in any event the trial Court was right in finding that they had been explained by the Returning Officer. Counsel relied on the cases of **Josiah & 4 Others -vs- Ogutu & Anor [2008] 1KLR (EP) 89** and **Khatib Abdalla Mwashateni -vs- Gideon Mwangangi** in support of his propositions.

12. Mr. Mutubwa further submitted that the trial Court was right to compare the scrutiny report with the explanations given by the 3rd Respondent; that the Court had the discretion to grant or deny costs on the application for scrutiny; that that discretion cannot be easily interfered with; that failure to call Presiding Officers was not a ground of law in terms of Section 75 (4) of the Act; that there was no particular polling station or Presiding Officer that was cited in respect of the Appellant's allegations in the Petition; that the allegation of double voting was not a ground of law under Section 75 (4) of the Act; that it was not part of the allegations in the Petition; that the striking of the names of registered voters in the register is not in itself voting; that the signatures of the Appellant's agents in Forms 35 for the various polling stations was estoppel against the Appellant. That the allegation of assisted voters was never a ground in the Petition; that the complaint was an after thought and that the election reflected the will of the people of Misikhu Ward. Counsel urged that the Appeal be dismissed.

Jurisdiction:

13. The 2nd and 3rd Respondents argued that this Court lacked jurisdiction as the appeal contravened Section 75 (4) of the Elections Act, that the appeal was as against matters of fact yet Section75 (4) of the Act only allowed appeals to be on matters of law only. Section 75 (4) of the Act provides:

> ***"An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be-***
>
> ***a) filed within thirty days of the decision of the Magistrate's Court; and***
>
> ***b) heard and determined within six months from the date of filing of the appeal."***

14. It is clear from the said provision that appeals from an Election Court shall only be on matters of law and not findings of fact. Mr. Mutubwa quiet correctly relied on the Cases of **IEBC & Anor -vs- Stephen Mutinda & 3 Others (supra)** and **Timamy Issa Abdulla -vs- Swaleh Salim Imu Swaleh & 3 Others (supra)** in support of the contention that the court will lack jurisdiction to entertain an appeal on matters of fact. In applying the same principles, the Court of Appeal held in **Khatib Abdalla Mwashetani -vs- Gideon Mwangangi Wambua & 3 Others malindi CA No.39 of 2013 (UR)** that:-

> ***"30. As regard the ground that the appeal is incompetent as it is based on grounds contravening Section 85 A of the Elections Act, we wish to adopt what this court recently stated in CA No.36 of 2013, Timamy Issa Abdalla -vs- Swaleh Salim Imu Swaleh & 3 Others in which similar issues regarding the competence of the appeal arose:***
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> ***……. this appeal being a first appeal to this court, it is important to keep in mind the principles to be followed in a first appeal as reflected in Peters -vs- Sunday [1958] EA 424; and Selle -vs- associated Motor Boats company Limited [1968] EA 123, that although the court has jurisdiction to reconsider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and secondly, that that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts. That having been said it is evident that in determining whether the election court properly performed its duty, this court must be satisfied that the court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the Constitution of Kenya. This calls for examination of the findings of the election court and conclusions on primary facts in totality, taking into account the Constitution and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at. Thus the objection taken that the appeal is incompetent because the grounds of appeal raise issues of facts, was wrongly brought as a preliminary issue, as there is need to evaluate the conclusions arising from the primary facts.***
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> ***31. In the premises, it would have been premature to determine at the preliminary stage the distinction between issues of law and issues of facts without going into substantive arguments and analysing the basis of the conclusions of law arrived at by the election court. Indeed as stated in Attorney General -vr-David Marakaru [1960] EA 484, a decision is erroneous in law if it is one to which no court would reasonably come to. Such a conclusion cannot be made at the preliminary stage. Suffice to state that prima facie the appeal does raise issues of law particularly with regard to interpretation and application of Article 81 (e) (ii) & (v) of the constitution. It therefore meets the threshold of Section 85A of the Elections Act and is properly before us."***

15. In the same way and manner, I think that, although the grounds set out in the Memorandum of Appeal read that the trial Court *"…. erred in fact and law....."*, certain of the issues raised are of law but cannot be determined without considering how the trial Court resolved the issues of fact in relation to the law. For instance burden of proof, irregularities complained of constituted breach of the Election law and Constitution, the evaluation of the evidence tendered how the Court applied the law to them and many others. As was held in the **Mwashetani Case**, the issues of law can only be determined upon analysing the basis of the conclusions of law arrived at by the Election Court. I therefore rule that the appeal before me meets the threshold of Section 75 (4) of the elections Act and is therefore competent.

Substantive Issues:

16. In this appeal, I hold the view that it turns on four main issues:-

a) Whether the Court properly applied the principle of burden of proof and if so, whether the Petitioner had discharged the same;

b) Whether the Court disregarded the evidence on record;

c) Whether the judgment of the court was based on or took into consideration extraneous matters and evidence; and

d) Whether in the circumstances, the 1st Respondent was validly elected as County Representative for Misikhu Ward.

a) Burden of Proof:

17. As quite correctly submitted by the Respondents, the burden of proof in election petitions at all times rests with the Petitioner. It is the Petitioner who makes allegations and it is he/she who will fail if he/she does not call evidence to prove the allegations in the Petition. In this regard, that burden is always higher than in civil cases, that is balance of probability. Indeed, it is said to be higher than the balance of probability and slightly lower than beyond reasonable doubt. In **Joho -vs- Nyange(No.4) (2008) 3 KLR (EP) 500** Maraga J (as he then was) held at pg 508:-

> ***"the one seeking to nullify the election he has the burden of proof. as to the standard of proof, …....... like in fraud cases, i would say that the standard of proof required in election petitions is higher than on a balance of probabilities...... and where there are allegations of election offences having been committed …..... a higher degree of proof is required."***

18. I will add that, where there are allegations in the Petition of commission of election offences, since they attract criminal sanctions, the same should be proved to the standard of proof in criminal cases i.e beyond reasonable doubt, See **Raila Odinga & Others -vs- Ahmed Isaak Hassan & Others Pres. Pet. No.5 of 2013.** From the judgment of the trial Court, it would seem that the trial Court was alive to the burden and standard of proof required in the Petition before it. This is clear from the Court's reference to the Case of **Raila Amollo Odinga -vs- IEBC & Others.** The issue therefore is whether, in evaluating the evidence before it, the trial Court applied the principle properly. This can only be discerned from an examination of the evidence before Court and how the Court determined the same. This being a first Appellate Court, I will examine the evidence and evaluate the same to be able to arrive at a conclusion whether the trial Court was right in its determination but at all times warning myself that I did not have the advantage of seeing the witnesses testify and evaluate their demeanour.

19. The Petition in the lower court was poorly drafted. It contravened Rule 10 of the Election Act. It was sketchy, It did not set out the results of the election being challenged. However, since the trial Court excused that breach I will likewise do so as there was no cross-appeal by the Respondents on that excuse. Notwithstanding the sketchness of the Petition, one is able to discern the Appellant's complaints before the Election Court. Her complaints were; massive irregularities, voter bribery and violence; breach of electoral rules and regulations, results cast not agreeing with votes garnered by candidates that tallying and aggregations of results in Form 36 was improper; failure to apply indelible ink to voters and issuance of more than one ballot paper to a single voter; that the 1st Respondent was engaged in serious election malpractices and that the Presiding Officers and Returning Officer were biased, incompetent and partial. These were the allegations placed before the trial Court. Apart from her affidavit evidence and testimony in Court, the Appellant called four (4) other witnesses. I propose to examine each of the allegation, the evidence offered for and against; and evaluate the same and look at the trial Court's finding on the same.

i) Serious malpractices by the 1st Respondent:

20. The Appellant alleged in the Petition that the 1st Respondent threatened those who opposed him and that he transported voters and was involved in bribery. In her affidavit evidence, she repeated these allegations and testified that she reported the incidents of hijackings of her supporters by people alleged to be supporters of the 1st Respondent to the police. She gave OB numbers for the alleged reports. However, she did not produce any extracts of the alleged police reports. In her testimony, she was unable to prove any of these allegations against the 1st Respondent. None of her other witnesses testified on these allegations. The 1st Respondent denied these allegations. In its judgment, the trial Court quite rightly found that these allegations had not been proved to the standard required. The trial Court in my view was right in dismissing them. There was no credible evidence that the 1st Respondent was guilty of these allegations. I absolve the 1st Respondent of these allegations.

ii) Manipulation of Forms 35 and 36, votes cast not agreeing with total number of votes obtained by all candidates and that Form 36 contained improper results.

21. In her Affidavit evidence, the Appellant told the trial Court that there were serious manipulation, cancellations and alterations in Forms 35 and 36 to the extent that they did not agree in various polling stations including Misikhu FYM, Misikhu R. C, Sirende, Nambani and Manani. In her testimony, the appellant was able to demonstrate the discrepancies in the results in Forms 35 and 36. None of her other witnesses testified on these allegations. In paragraph 7 of his response to the Petition, the 1st Respondent admitted that there were few discrepancies in the results in Forms 35 and 36. He contended however, that the discrepancies were a typing error. In its response to the Petition, the 2nd Respondent admitted that there were some differences between Forms 35 and 36 and that a reconciliation done by the 3rd Respondent revealed that the 1st Respondent had obtained more votes than declared. That these alterations and cancellations did not materially affect the results. The 3rd Respondent testified that the differences in Forms 35 and 36 were occasioned by data entry errors. He produced a document dated 17th April, 2013 to show a reconciliation he had done of the results in the various Forms 35. He admitted in

cross-examination that contrary to the Election Petition Rules, he did not submit to Court with his response to petition Form 36 which should have contained the declared results for the Misikhu Ward.

22. In its judgment, the trial Court held that the appellant had not proved this allegation to the required standard. That her agents had signed the Forms 35 for the various polling stations. The Court agreed with the explanations offered by the 3rd Respondent on the discrepancies in the Forms 35 as contained in his audit report produced as *"BO3"* and dated 17th April, 2013.

23. With greatest respect to the trial Court, in his cross-examination, the 3rd Respondent had admitted that he did the reconciliation on 17th April, 2013. This was after the results had been declared and the Petition filed. He also admitted that the so called audit report was his own document and was not a document of the 2nd Respondent. He admitted that he did not deliver to Court the official Form 36 that contained the final results for Misikhu Ward. He admitted that various Forms 35 had alterations that were not countersigned by the Presiding Officers, that whilst the valid votes cast were 7503, he recorded on Form 36 total valid voted to be 7738 and was unable to explain the discrepancy.

24. Before the Court was a Form 36 marked *"MNM 1 (d)"* that was produced by the Petitioner. The subject Forms 35 with the aforesaid glaring errors were also before Court. The alterations and entries therein could only be explained by the makers of those documents, that is the Presiding Officers whom the 2nd Respondent decided not to call. To my mind, it was a serious error on the part of the trial Court to dismiss the Petitioner's allegations on the discrepancies in Forms 35 having in mind that these are the very primary documents relating to results whose unexplained alteration has a serious consequence on the overall result of an election. Form 36 is a secondary document which contain results collated from Forms 35.

25. Further, the trial Court erred when it made a finding that the Petitioner could not question the results in Forms 35 because her agents signed them and did not record their protestation at the back of the Forms. I have seen all the Forms 35 for the Misikhu Ward that were before the Election Court. They are sixteen (16) in number. They are signed by as few as 3 agents and as many as 9 agents. There was no evidence on record to show that the Petitioner's agents in all the polling stationssigned the Form 35 produced in court. It should be recalled that PW4, Mark Wekesa Simiyu had testified, which had not been denied, that at his polling station Bunjosi Polling Station, they had been made to sign, the Forms 35 at themorning in order to save time! The Form 35, Bunjosi Polling Station produced by the Petitioner and the 2nd Respondent did not have the back page to show if the agents ever signed it. But the one produced after scrutiny was signed by only 3 agents, PW4 included. To this end, the Court failed to properly apply the burden and standard of proof. To my mind, the Petitioner had proved to the required standard, that there was irregularities regarding how entries were made in Forms 35 and 36 which shifted the burden to the 2nd and 3rd Respondent who failed to discharge the same as they failed to call the makers of the alterations to those Forms 35 to explain the basis of the alterations and cancellations.

iii) <u>Biased, incompetent and partial electoral officers.</u>

26. The Petitioner did not give any testimony on this allegation. However, her witnesses testified on it. PW3 Jennifer Murumba testified that after the breakdown of the BVR kit, polling clerk No.3 at Nambami Polling Station started giving certain voters more than one ballot paper. She was firm in both her testimony and cross-examination that polling clerk No.3 who was handling ballot papers for the election of County Representative gave one voter six (6) ballot papers which were cast in the ballot box. Mark Wekesa Simiyu, PW4 told the Court that after the BVR machine broke at around 10.30 a.m at Bunjosi Polling Station, some polling clerks started issuing more than one ballot paper for one election. That at 2.00 p.m a voter complained that she had been given more than one ballot paper for the County Representative election. That one of the polling clerks snatched the ballot paper and cast it in the ballot box. That the presiding officer allowed the agent for New Ford Kenya Party to be the only one to assist the illiterate and disabled voters. A complaint by the other agents was met with threats of being thrown out of the station by the Presiding Officer with the assistance of the police officer present. That the New Ford Kenya agent took advantage of this scenario and directed the voters to vote for the 1st Respondent.

27. PW5 Janerose Wanyama testified that at Misikhu R. C. Primary School polling station, the BVR machines failed at around 2.00 p.m. The polling clerks started to give out more than one ballot paper for an elective position. That the New Ford Kenya agent took advantage of the quagmire and coiled the Presiding Officer who seemed helpless. That most polling clerks were relatives of polling agents of New Ford Kenya and they seemed to condone the malpractice. These witnesses remained firm under intense cross-examination on these allegations. PW5 was firm as to the relationship between certain agents and the polling clerks at her polling station. She actually named one Stella Mandu as one of the polling clerks issuing more than one ballot paper. That was the Petitioner;s evidence on the bias, incompetence and partiality of the electoral officials.

28. In his response, the 1st Respondent stated that the elections were conducted in a transparent, free and fair manner. He never specifically denied the allegation that the electoral officials were incompetent, biased and partial in their duties. In their response to the Petition at paragraphs 18 and 20 and the Affidavit of the 3rd Respondent at paragraph 19, the 2nd and 3rd Respondent stated that the complaint of issuance of wrong papers to voters does not have any merit since all a voter was issued with were six ballot papers. That the 2nd and 3rd Respondent did not know what the wrong papers referred to could have been. That the allegation that some persons were issued with more than one ballot paper for one elective position was not substantiated as they were not supported by the final results as reflected in Form 35 for Misikhu R. C. Polling Station. That all agents were treated with respect by the 3rd Respondent's Officers who allowed them to participate in the process unhindered. The 3rd Respondent admitted having received the Petitioner's letter of complaint dated 6th March, 2013 but did not respond to it. In that letter the Petitioner had complained that some polling stations clerk 3 (for County Representative) were issuing two ballot papers contrary to electoral rules and regulations.

29. The report of scrutiny and recount was adopted by the Court notwithstanding that the Respondents rejected the same. I will later in this judgment address the issue of the rejection of that report and its place in the election petition. That report disclosed that whilst the registered voters at Misikhu Ward are 8330, a total of 8534 ballot papers were issued for the Ward Representative. The total number of votes cast was 7825 meaning that there was over 700 ballot papers that could not be accounted. This however could have been accounted if the polling day diaries were produced to explain the discrepancies but were not. Further, the report disclosed that whilst the total number of names of

registered voters canceled in the register was 7743, the total number of votes cast were 7825. This showed that there was a likelihood that there were more votes cast than the number of voters who voted. This assumption would be correct if the officials of the 2nd Respondent are taken to have strictly complied with Regulation 69 (1), (d) and (e) of the Elections (General) Regulations, 2012 *"the regulations"*). That regulation requires that the name of the voter be crossed or marked in the register once he has been issued with a ballot paper. Once issued with a ballot paper, a voter is expected to cast his vote in the ballot box. If he does not cast that vote for any reason, the Presiding Officer is required to explain this occurrence. In the case before me, none of the Presiding Officers was called to testify and explain the discrepancies and irregularities found in the scrutiny report.

30. In its judgment, the Election Court made findings as follows:

> ***"The Petitioner's witnesses told the court that the BVR machines failed and that IEBC resorted to manual voting. The Elections Act envisages a situation or situations where manual voting may be resorted to. Infact the law does not outlaw manual voting. This is supported by the provision of the law under rule 59 (2)........ Manual voting was therefore lawful and there was nothing wrong with it........ after all there is no cogent evidence that the manual voting worked to the advantage of the 1st Respondent. <u>That means that if there were any disadvantages they affected all the candidates equally."</u>***
>
> And then:-
>
> ***"It is also worth noting that the totality of the Petitioner's evidence has tried to prove that the election offences had been committed by the Electoral Commission there is no evidence either that the 1st Respondent or his agents or supporters colluded with the 2nd and 3rd Respondents to give him the win that he got in the Misikhu Ward."***

31. What comes out is that the trial Court misapprehended the issue and evidence before it. The complaint was that with the breakdown of the BVR kit, the 2nd and 3rd Respondents resorted the use of manual voting whereby there was influx of people to the polling rooms who overwhelmed the officials of the 2nd and 3rd Respondents. That this caused confusion whereby the election officials resulted to giving voters more than one ballot paper as allowed by law. The election court clearly failed to deal with the issue of the confusion created by the introduction of manual voting and the ensuing melee. It also failed to address the complaint of issuance of more than one ballot paper and the testimony that the agents of New Ford Kenya were favoured.

32. On my part, I have already set out the testimonies of the Petitioner's witnesses on this complaint. I have already indicated that they remained firm even during intense cross-examination. Whilst in some instances, they may have been unable to identify the exact names of the persons involved, but nevertheless they were firm as to the polling station concerned, the party agent involved, the time and incident concerned. I have also found that the scrutiny report disclosed or proved the allegation that some voters were issued with more than one ballot paper for the election of the Ward Representative. That is why the number of issued ballot papers far exceeded not only the registered voters but the votes cast. Further, the votes cast exceeded the number of the registered voters whose names were cancelled in the register. It should also be remembered that although the Petitioner's witnesses remained firm under intense cross-examination, none of the Respondents called any evidence in rebuttal. Neither the Presiding Officers for the subject polling stations were called nor the New Ford Kenya party agents to deny the complaint. To my mind, the massive irregularities unearthed in the scrutiny report was but evidence of incompetence on the part of the electoral officers if not deliberate and fraudulent acts on their part to influence the outcome of the election. This complaint was clearly proved but the court either ignored it or through misapprehension, failed to properly address it.

iv) <u>Massive irregularities and breach of electoral rules:</u>

33. In paragraphs 1, 3 and 6 of the Petition, the Petitioner alleged that there were massive irregularities flagrant breach of electoral rules and regulations and deliberate failure by polling clerks to apply indelible ink to voters and check their names against the register. In their testimonies, PW3, PW4 and PW5 told the court that polling clerks issued more ballot papers to voters than allowed, that when the voters became impatient, they streamed into the subject polling rooms in large numbers thereby overwhelming the polling clerks who started to issue ballot papers randomly. That the agents of New Ford Kenya party took advantage of the confusion and started canvassing with voters to vote for the 1st Respondent. That in Bunjosi Polling Station, the New Ford Kenya party agent was the only one allowed by the Presiding Officer to assist the illiterate and those voters with disability. That he took advantage of the situation and canvassed votes for the 1st Respondent.

34. These witnesses were extensively cross-examined on these allegations, They did not change their position as to the occurrence of the alleged incidents. All the Respondents did not call any evidence from these polling stations to deny and rebutt that evidence. The outcome of the scrutiny revealed excessive issuance of ballot papers which exceeded registered voters. It also revealed that the votes cast exceeded the number of registered voters whose names were marked in the register. The Petitioner's witnesses testified in respect of Misikhu R. C. Primary School polling station, Bunjosi Polling Station, and Nambami Polling Station. These had a total of 2,150 registered voters. This constituted approximately 26% of the total number of registered voters of Misikhu Ward. In the three polling stations, the 1st Respondent garnered a total of 1536 out of 4079 total votes he garnered in the election. This constituted approximately 38% of his total vote.

35. In its judgment, the Election Court made the following finding:-

> ***"....... the alleged canvassing with voters as averred by MARK SIMIYU WEKESA did not materially affect the final results of Misikhu Ward. Even though JANEROSE and BENEDICT WALIAULA who were agents of UDF Party averred that the agents for New Ford Kenya canvassed with voters at the polling station to vote for their candidates and that the New Ford Kenya agent was the only person allowed to assist voters to vote. As earlier stated, I do find this averment is an afterthought and baseless and I will dismiss it accordingly because the Petitioner's witnesses who were cross-examined in this matter and who swore their affidavits herein had the opportunity to endorse such complaints on Forms 35 which they signed."***

And then:-

> ***"Because rule 62 (b) forbids any person to be allowed into a polling station wearing a badge, dressing a symbol or other indication of support for any political party or candidate, it is therefore not possible to know in advance or even afterwards which party a voter supported. This therefore absolves the Respondents or their agents or employees from allegations that they favoured the 1st Respondent by having voters to vote for him on the 04/03/2013."***

36. I have looked at the Forms 35 that were before the election Court produced by both the Petitioner and the 2nd and 3rd Respondent. Whilst PW4 and PW5 signed Forms 35 for Bunjosi and Nambami Polling Stations, PW3 Janerose Wanyama did not sign the Form 35 for Misikhu R. C. Primary School Polling Station. In none of the three sets of Forms 35 produced before court was it shown that she signed the Form 35 contrary to the holding of the election Court. There was no allegation that there were persons with badges or dressing with symbols of the party belonging to the 1st Respondent. The complaint by the Petitioner was about canvassing at a polling room by an agent known to be that of New Ford Kenya. By invoking Regulation 62 (6) of the Regulations as an answer to the complaint, was in my view a misdirection. There was no evidence that was tendered to rebutt the evidence of the Petitioner's witnesses. To reject the evidence on the ground that it was an afterthought because the witnesses did not indicate it in Forms 35 to my mind was wrong. It would seem however that the court admitted the evidence of PW4 about canvassing but was of the view that there was no evidence that it could have affected the final result.

37. Canvassing is contrary to Section 60 (s) of the Election Act. The failure by the Presiding Officers to control the number of voters entering the polling area after the breakdown of the BVR kit was in breach of Regulations 62 and 63 of the Regulations. It is alleged that influx of voters into the polling room led to general confusion resulting in malpractices complained of.

38. Having considered the complaints raised by the Petitioner, the evidence tendered and the way the Court evaluated the same, I have come to the conclusion that the election court erred in the way it applied the principle of the burden of proof. Once the evidentiary burden was discharged by the Petitioner through her witnesses and in particular the scrutiny report, the same shifted to the Respondents to rebutt. This, the Court failed to note. It failed to appreciate that upon failure by the Respondent to call any evidence in rebuttal, such evidence remained proved against them. Accordingly, the Court failed to properly apply the principle of burden of proof.

(b) Whether the Court relied on extraneous evidence and disregarded the evidence on record to arrive at its decision.

39. Learned Counsel for the Appellant submitted that the Court erred in ignoring the report of scrutiny and instead putting reliance on the report by the 2nd Respondent. That the Court failed to determine the issue of double crossing of the register, that the Court invoked the provisions of Regulation 62 (6) and 59 (2) of the Regulations to absolve the electoral officials of the complaints of bias and that manual voting had led to confusion. Professor Sifuna submitted that the application for recount and scrutiny was a fishing expedition. That the scrutiny report was discredited as it covered polling stations that were out of the scope contemplated by the law and that the court agreed that it had erred in its ruling of 14/8/13 by directing scrutiny and recount. That the report was exaggerated, misleading, inaccurate, clearly biased, skewed in favour of the Petitioner and did not reflect the true outcome of the exercise. That it was for these reasons that the Respondents' agents declined to sign the report. He concluded that the court was not bound by the said report. Mr. Mutubwa on his part, submitted that the Court actually relied on the scrutiny report; that in relying in that report, the Court accepted the testimony of the Returning Officer as opposed to the report, that the Court compared the reports of the scrutiny and that of the 2nd and 3rd Respondents and it accepted the Respondents explanations on the corrections, amendments, alterations and cancellations in Forms 35. That the scrutiny was a fishing expedition which could not be allowed.

40. This now brings this Court to the position of the scrutiny report and the other reports relied on by the 2nd and 3rd Respondents. Firstly, recount and scrutiny process in an electoral contest is a sacred process. It should not be ordered as a matter of course. A party who seeks scrutiny and recount, must lay a firm foundation for it. This can only be achieved by tendering cogent, consistent, credible and firm evidence that some irregularities took place during the election process which must have interfered with the will of the electorate. Evidence of double voting, voting by unregistered persons, failure to cancel, strike out or mark the register once a voter has been issued with a ballot paper, failure to apply indelible ink on voters who have voted, issuance of more ballot papers than one to a voter for one elective post, discrepancies in Forms 35 and 36 or claims of staffing of ballot boxes would be a firm foundation to invite an election court to order scrutiny and recount. A recount and scrutiny is but an indepth audit by an Election Court of an election. Indeed it is a proper and sure tool of a court giving an election a clean bill of health.

41. In this regard, I am in agreement with Professor Sifuna and Mr. Mutubwa learned Counsel for the Respondents that scrutiny and recount should not be used as a fishing expedition. Recount and scrutiny should only be ordered where there is firm, consistent and cogent evidence that the instances I have set out above must have interfered with the free will of the electorate. Indeed, I fully subscribe to the dicta of Tuiyot J in the Case of **Phillip Osore Ogutu -vs- Michael Onyura Aringo & 2 Others [2013] e KLR** wherein he delivered himself thus:-

> ***"An election Court is at the forefront in interrogating whether an election conforms to Constitutional Principles. This duty can only be carried out meaningfully if the Court leans towards freely receiving information about the conduct of an election. And scrutiny can give useful insights as to how an election has been conducted. This was appreciated by the Supreme Court of Kenya. That Court made suo motto orders for scrutiny in Supreme Court of Kenya Petition No.5 of 2013 Raila Odinga vs Uhuru Kenyatta & 3 Others and explained itself as to this …... the purpose of scrutiny was to understand the vital details of the electoral process, and to gain impression on the integrity thereof."***

42. In this regard, once scrutiny and recount has been undertaken at the direction of the Court, the same becomes part of the record. It becomes evidence before the Court by which the Court has to measure the compliance of the electoral process with the dictates of the Constitution and the Electoral Laws. Once undertaken, neither the Election Court nor the parties can run away from it. Unless it has been undertaken slovenly, capriciously or in a manner that is unacceptable, the results of the scrutiny and recount should not be overlooked and/or easily disregarded. The Court **MUST** consider the same and arrive at a conclusion as to whether the election whose challenge is before it was conducted in accordance with the Constitution and the Election Law. It is the scrutiny that preserves the integrity of the process. It is

for this reason that I hold the view that, recount and scrutiny should ideally be ordered after or immediately before the Petitioner has closed his/her case. This will enable the parties to interrogate the results of scrutiny by calling evidence to rebutt or confirm the results of the scrutiny. It will enable the Respondents, especially the electoral body to explain its decisions or actions of the Presiding Officers from the polling stations where irregularities are detected. Ordering scrutiny and recount after the close of the Respondents' cases, robs the Court the opportunity of having proper or any testimony or explanation on the result thereof. However, in any way one looks at it, a result of an audit of an electoral process by way of recount and scrutiny cannot be easily disregarded or dismissed on flimsy grounds.

43. In the case before hand, the court made a decision on 14/08/13 that there be a recount and scrutiny for all the polling stations. After delivery of that ruling, the record shows that the parties entered into a consent that they nominate 2 agents each to be present during the exercise, that the Advocates for the respective parties be at liberty to attend the exercise, that the marked register and the counter foils from all the polling stations be availed for the exercise. This was recorded as a consent order. Further, the court properly gave elaborate directions on how the recount and scrutiny was to be conducted. Direction number 12 provided, *inter alia* that:-

> ***"Upon scrutiny, forms 35 retrieved from the ballot boxes to be filed and kept in safe custody and shall form part of the court record in this proceedings.***
>
> ***…...***
>
> ***Any issue that may arise during the scrutiny shall be recorded and documents relating to it preserved and the disagreement shall be ruled and/or be determined by the Court at such time as the Court may direct.***
>
> ***Upon conclusion of the scrutiny and recount exercise, the executive officer shall record her findings to Court in a report on scrutiny and recount copies of which shall be supplied to the parties. Parties to indicate to Court after scrutiny if there is need to file submissions in respect of the exercise...... "***

44. The recount and scrutiny was carried out presumably in the presence of the agents of the parties. The same was concluded and the Executive Officer filed her report. On 30/08/2013, the Court adopted the report and directed the parties to submit on it. The Respondents rejected the report and gave their reasons in their submissions. Indeed the 2nd and 3rd Respondent filed a document setting out their reasons for rejection. I have looked at the reasons proferred by all the Respondents. I have also carefully considered the report of scrutiny and recount. With greatest respect to the Respondents, the reasons advanced cannot be a basis to reject the report of scrutiny. The ruling of the trial Court on scrutiny, the consent of the parties subsequent thereto and the elaborate directions given by the Court on scrutiny allowed the Executive Officer to do what she did. She never made absurd or determinations that were outside her mandate. The report could only be rejected if it exceeded the Court ruling, the consent of 14/08/2013, or the directions of the Court. The report did not and I hold that the same was within the parameters of the orders and directions given by the Court. None of the parties appealed against either the ruling or the directions of the Court. The same stood. On my part, I find the report to have been properly done and in terms of the orders and directions given of 14/08/13. Accordingly, the report of scrutiny which was adopted by the Court was properly so adopted and formed part of the record of the Election Court.

45. The Respondents have tried to discredit the report. There is no allegation that any of the agents or advocates of the parties were excluded from the exercise. There was no allegation that there were any disagreements on any issue regarding scrutiny which was reserved by the parties for determination by the court in terms of its directions. The Respondents only threw a blanket **<u>NO</u>** to the report they did not specify the parts of the report that violated the order of 14/08/13 or the law. I have already held that the report was within the orders and directions of the Court of 14/8/13. For the Election Court to have failed to either refer to it or make findings on it was a terrible misdirection on its part. It should be remembered that the scrutiny was an audit of the entire election for Misikhu Ward. It enabled the court to review what must have happened in all the 16 polling stations. It would be the most accurate and current review of what happened on 04/03/13 in all the polling stations by an impartial umpire using the trail of documents submitted to the Court by the manager of the elections, that is the 2nd and 3rd Respondents.

46. I have carefully considered that report. The same indicates that in some polling stations, both the original and duplicate registers were marked. There were several names of some voters which seems to have been cancelled in both the original and the duplicate. That it would seem that the original and duplicate registers were mainly used where there was more than one (1) stream in a particular polling station. The Petitioner contends that that was evidence of double voting. The Respondents deny that fact. They contended that voting is evidenced by the casting of the vote and not cancellation of the register. That cancellation of the register is not provided for in the law or regulations. I have considered the Judgment of the Election Court. It did not resolve this issue notwithstanding that this was an issue that was placed before it to make a determination. It is left for this Court to resolve it.

47. As held by the Supreme court of Kenya in the **<u>Raila Case</u>** there is a general presumption that a public body has undertaken a public action in the manner provided for in law. That ***<u>"OMNIA PRAESUMONTUR RITE ET SOLEMNITER ESE ECTA,"</u>*** That all acts by a public body are presumed to be done rightly and regularly. It is therefore incumbent upon a person alleging to the contrary to present strong and compelling evidence to overturn that presumption. Applying the same principle here; Regulation 69 of the Elections Regulations provides that:-

> ***"(1) Before issuing a ballot paper to a voter, an election official shall-***
>
> ***(a) …..***
>
> ***(b) …..***
>
> ***(c) …...***

(d) in case of an electronic register, require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter once the image has been retrieved;.

(e) mark the name of the voter to indicate that the voter has been issued with a ballot paper and retain the voter number of the voter as proof that a ballot paper has been delivered."

48. Since there was evidence that the BVR kit failed, the applicable regulation is 69 (1) (e). That the manual register would be marked by an election official to signify that a voter has been issued with a ballot paper. Supposing the 2nd and 3rd Respondents' officials fully complied with this regulation, what would be the conclusion where both the original and duplicate registers are marked or cancelled? As earlier stated, the 2nd and 3rd Respondents decided not to call any of the Presiding Officers to explain this mystery. The Election Court was faced with this issue but decided to ignore it. The only logical conclusion is that there may have been an irregularity whereby either the persons whose names were cancelled both in the original and duplicate registers voted twice or the electoral officials were engaged in an irregularity, may be fraud, which this Court cannot unravel. The only people who would have unravelled and/or explained the same would have been the Presiding Officers for the affected polling stations but they were shielded from doing so by the 2nd and 3rd Respondent. This may be explained by the fact that the scrutiny was ordered after the close of the Respondents' case. However, when the parties recorded the consent immediately after the ruling on scrutiny was delivered, the Respondents should have applied for leave to call a witness to explain any evidence that might have required clarification from the scrutiny. This they did not. Accordingly, it was a grave error on the part of the trial Court not to consider and resolve the issues raised in the scrutiny report. It was also a terrible misdirection on the part of the Election Court to accept the explanations of the 3rd Respondent using his *"audit report"* dated 17/04/13, which would seem to have been prepared for these proceedings, having in mind that it was prepared way after the election results had been declared and the Petition herein filed and served. It was also a grave error to consider the report annexed to the 2nd and 3rd Respondents' submissions after the trial to the exclusion of the scrutiny report.

49. I should state here and now that in an election Petition, an election Court should only be concerned with the election materials or acts done up to and including the time of the declaration of the election in terms of Form 36. Anything done thereafter is a mere supplassage and has no room in an Election Court. This however does not apply to written complaints by candidates or their agents made after the declaration of elections and the response thereto by the IEBC or its officials. In the Case before me, the audit report dated 17/04/13 and the report of scrutiny 20-23/8/13 by the 2nd and 3rd Respondent annexed to their submissions were mere supplassage devoid of any evidential value and should have been struck out as I hereby do to them. In this regard, to the extent that the election Court relied on them or preferred them to its own scrutiny report, it fell to serious error.

50. At pages 40 and 41 of the Judgment, the Election Court held:-

"I have considered submissions of all the learned Advocates on the aforestated issue and it is my considered finding that the Petitioner, her witnesses' evidence on record has not linked the 1st Respondent to the alleged massive irregularities and malpractices.

I will also proceed to warn myself thoroughly of the danger <u>there may be for relying on the evidence of all the parties on record plus all their submissions; which evidence is devoid of the evidence of the presiding officers and or polling clerks from the 16 polling stations of Misikhu ward.</u>

After warning myself as herein above stated, <u>I have found out that the explanation DW2 offered in his oral evidence regarding the errors and mistakes contained in the election document were due to computer error.</u> He also stated some were mathematical errors.

That being the position, I am duly satisfied that after warning myself, as herein above stated, I have found out though the evidence of the presiding officers of polling clerks from the 16 polling stations is not on record, the danger for relying on the evidence on record and the submissions is quite slight not to miscarry out justice to any party to this suit. I will also add that this Petition will not be determined on procedural technicalities and mere allegations."

51. It is clear from the foregoing that the court was alive to the fact that the evidence of the Presiding Officers of the polling stations in question was not on record. That it was important for that evidence to be before court before the Court could properly resolve the issues that had been placed before it. Instead of making a finding on that fact, the court made an escapist finding that it could not make a determination on technicalities. With due respect, there were no issues of technicalities before the court. The court should have made a finding whether it believed the evidence before it or not and the reasons for its decision. What was before court were substantive and significant issues of a democratic process that was being challenged. It was not alleged that it was impossible to obtain and present the evidence of the Presiding Officers for the issue of technicality to arise. To the extent that the court failed to consider the evidence before it and pronounce its findings on it, it fell into serious error.

52. This brings me to the issue raised by Professor Sifuna that the witnesses of the Petitioner lacked credibility and integrity and that they were thieves. Mr. Mutubwa also submitted that the failure to call the Presiding Officers for the polling stations by the 2nd Respondent should

not be held against the 2nd Respondent. I have on my part perused and carefully considered the testimonies of the witnesses who appeared before the Election Court. I have in this judgment deliberately avoided making any reference to the evidence of PW2, Benedict Wangila Ngati. This is because I believe his credibility was so shaken that his evidence was rendered worthless. However, as regards the other witnesses, their evidence remained firm, cogent and consistent. I am not satisfied that it was shaken, They never perjured themselves as was submitted by counsels for the Respondents. The theft alleged of PW5, Janerose Wanyama was not proved. She admitted that it had been committed by her husband and not her. She can not be held to have been guilty of that theft just because she was in a marriage relationship with the thief. As to the age of PW4, there was nothing to disprove that he did his Primary Examination at age 29. He insisted that he did his Examination in 1982 and there was no evidence that was produced to dispute that fact. One cannot make an adverse inference because of his age at the time he allegedly sat for his Examination. Whilst the election court was severally invited to note the demeanor of these witnesses, there is nothing on record or in the judgment to show that the court made any adverse finding on their credibility, character and demenour. It only made such note in respect of PW1 during her testimony noting that she looked calm and composed. The only reason the court gave why it did not believe their evidence was because they had signed Form 35 and that their testimonies was therefore an afterthought. If that was the case, was the outcome and irregularities unearthed by the scrutiny ordered by the Court itself an afterthought? To my mind, the results of the scrutiny bolstered or corroborated the evidence of the Petitioner's witnesses thereby making it more credible. In any event, when questioned why they did not protest in form 35 as required by the regulations, they gave their own reasons.

53. As regards Mr. Mutubwa's submission on the failure to call the Presiding Officers, the election court did not make any adverse inference on the same. But I will be failing in my duty as a Court not to do so. The general rule is that a party in whose possession there is evidence which evidence he fails to produce or fails to call a necessary witness, it is to be presumed that if such evidence is produced or witness is called such evidence shall be or witness shall give adverse evidence against such a party.

54. See the Case of **Odeyo -vs- Republic [2006] 2 EA 255.** This is a general principle of law applicable both in Criminal and Civil law. It also applies in constitutional matters such as the one before me. All the Respondents filed various affidavits purporting to deny the averments of the Petitioner's witnesses. When it came to trial, they decided not to call any of the eye witnesses to rebutt what the Petitioner's witnesses told the court they had seen. Of course the Affidavits of any witness who was not called to be cross-examined on it cannot be relied on as evidence. The same is but mere supplasage and of no effect. Having failed to call the Presiding officers to deny or confirm the allegations of bias, canvassing, issuance of more than one ballot paper, overwhelming entry or invasion of voters into voting rooms and the allegation of double voting, the evidence of the Petitioner remained unchallenged.

55. There was the issue raised by the Respondents that the Petitioner was raising new matters that were not in the Petition. That the evidence contained in the Affidavits and scrutiny report did not support the allegations in the Petition. I am in agreement with the Respondents that no new issue can be raised by a Petitioner unless it emanates from the Petition. The holding in the Case of **Ng'ang'a & Another -vs- Owiti & Another [2008] 1 KLR 749** is good law. At the beginning of this judgment, I set out what I considered to be the complaints raised by the Petitioner. I admit that the pleading was not one of the best, but none of the Respondents took issue with it either in the lower Court or before me. No one applied to have it struck out for being too general and incapable of being answered. All the Respondents did file their responses to it. At the pre-trial conference, if any was ever held, none of them either applied for particulars any of the particular of allegations or for the striking out of the Petition or any of its paragraphs. The trial Court excused the Petition with its flows and none of the respondents lodged a cross-appeal in respect thereof. Although the Petition made allegations of generalised irregularities, the evidence of her witnesses on those irregularities was crystalised and confirmed by the scrutiny report. In my view, the irregularities complained of and proved by PW3, PW4 and PW5 as well as the scrutiny report were anchored properly in paragraphs 1, 2, 3 and 6 of the Petition. There was therefore nothing new that the Affidavits introduced to the Petition. The issue of failure to apply indelible ink, double voting, canvassing were all pleaded in those paragraphs of the Petition.

Conclusion:

56. The foregoing being the case, what should be the conclusion of this appeal. Election Petitions are not contests between the Petitioner and the winner. They are not for individual gain. They are contests in public interest. Behind the combatants are their supporters who have keen interest in the outcome of the contest. Indeed, the combatants represent the interest of the thousands or millions of voters who voted for them. The election court is always called upon to uphold and respect the will of the people as expressed in the election result. Elections and by-elections are expensive to hold. It costs the public millions of money to hold an election or a by -election. It costs the public a lot of time to return an election. An election disrupts everyone's life and schedule. It is for this reason that Section 83 of the Elections Act decrees that no election should be upset lightly if the principles of the Constitution are generally adhered to. That Section provides:-

> ***"83. 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 the election."***

57. It is for this reason, that Election Courts are always reluctant to upset decisions made consciously by the electorate. The Court cannot substitute its decision for that of the electorate if the principles of the Constitution and the law are clearly observed.

This was well echoed in the English Case of **Morgan & Others -vs- Simpson & Others [1974] 3 AR 722,** whereat pg 728 it was held that:-

> ***"(i) If the election was conducted so badly that it was not substantial in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected or not .....***
>
> ***(ii) If the election was son conducted that it substantially was in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the poll – provided it did not affect the result of the election.***
>
> ***(iii) But, even though the election was conducted substantially in accordance with law as to elections, nevertheless if***

there was breach of the rules or a mistake at the polls- and it did affect the result, then the election is vitiated."

58. I am alive to the holding in the Case of **Nedhurst -vs- Lough and Gas guet [1901] 50 & H 120, 17 TLR 210, 230 that ;**

> ***"An election ought not to be held void by reason of transgressions of the l;aw without any corrupt motive by the Returning Officer or his subordinates in the conduct of the election where the court is satisfied that the election was, not withstanding these transgressions, an election was really and in substance conducted under the existing election law, and the result of the election, that is the success of the candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of the law by the officials being admitted, the court sees that the effect of the transgression was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void."***

59. Also, in the Case of **Optiz -vs- Wrzesnewsky [2012] scc 55, it was held that:-**

> ***"If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the elction and thereby undermine the intergrity of the elctoral process are grounds for overturning an election........."***

60. This long list of authorities show how courts guard against interfering with the free will of the electorate as expressed in the outcome of an election result. The court will only interfere if the irregularities proved are of such a magnitude that it cannot be said that the results of the election reflect the will of the people. However, the will of the people in my view, would not be reflected if the process is tainted with blatant, deliberate or negligent breach of the electoral rules and regulations. Further, however much the Court will refrain from interfering with a result of an election, if it is proved beyond reasonable doubt that an election did not conform with the Constitutional principles of a free and fair election as set out in Article 81 of our Constitution, that election will be set aside without much ado.

(c) Was the 1st Respondent validly elected?

61. The question that arises is whether the irregularities established in this case are so grave as to warrant the cancellation of the election of Misikhu ward of 4th March, 2013. Put in another way, was the will of the electorate of the Misikhu Ward affected by the irregularities complained of? The trial Court found that the 1st Respondent won the election in excess of 1,600. It held the view that the irregularities complained of could not have affected the results of the election. That the irregularities complained of were not proved as against the 1st Respondent and his victory therefore should not be upset. In my view, an Election Court considers an election on two levels. The quantitative and qualitative level. On the quantitative level, the Court will look at the mathematical aspect, the numbers. That is, who had the majority? The election court does not however stop there. It is the Returning Officer who stops there and declares the winner. An Election Court goes further, it audits the electoral process to find if the quantitative aspect is backed by the qualitative aspect i.e the quality or integrity of the process. Were the rules and regulations of elections followed? Was the conduct in terms of and/or in accordance with the principles of the Constitution? These principles are to be found in Article 81 of the Constitution of Kenya. The election must be:-

i) by secret ballot;

ii) free from violence, intimidation, improper influence or corruption;

iii) conducted by an independent body;

iv) transparent and

v) administered in an impartial, neutral, efficient, accurate and accountable manner.

If the Court finds that these principles and the election rules and regulations were flouted so much so as to make a mockery of the democratic process that an election is, the Court will disregard the quantitative aspect and nullify the election.

62. I have already set out what the Petitioner was able to prove. She proved that there was canvassing, there was bias and incompetence on the part of the electoral officials, that the electoral officials issued more ballot papers than one to the voters in the election of the Ward Representative, that there was confusion at the polling rooms brought about by the breakdown of the BVR kits and that there were cancellations and unexplained alterations in Forms 35. These irregularities were crystalised in the scrutiny report which showed that the number of ballot papers issued far exceeded not only the registered voters but also the persons showed as having voted in that election. The markings on the voter register did not match the number of votes cast and was not explained. In my view, all these did not mirror the election of the 1st Respondent as having been free and fair. The principles of the secrecy of the ballot transparency, impartiality, neutrality of the electoral officials, accuracy and accountability were gravely undermined by the canvassing that took place, the issuance of excessive ballot papers and the inaccurate marking of the register. With canvassing, how can the Court tell the effect it had in the overall result? How many voters double voted? To what extent did the bias, partiality and incompetence of the electoral officials affect the result? This cannot be quantified. These issues collectively compromised the integrity of the election. The election in Misikhu ward on 4th March, 2013 was not free and fair. It was not in accordance with the Constitution and election rules and regulations. The non-compliance of the rules and regulations and the Constitution, in my view, affected the result of the election.

63. In the circumstances, I will allow the appeal and set aside the entire judgment of the lower Court. The Petition is hereby allowed. The

election of the 1st Respondent as the Ward Representative for Misikhu Ward is hereby nullified. The 2nd Respondent is to hold a by-election for that elective post. On costs, both here and below, I will award the same to the Petitioner against the 2nd and 3rd Respondent against whom irregularities were proved . The total costs for the Appeal and Petition are hereby capped at Kshs.300,000/=. A certificate to that effect to issue accordingly.

Dated and **Delivered** at Bungoma this 26th day of March, 2014.

A. MABEYA

JUDGE