



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**ELECTION PETITION NO. 6 OF 2013**

**RISHAD HAMID AHMED AMANA.....PETITIONER**

**-VERSUS-**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**STEPHEN KITSAO KARANI.....2<sup>ND</sup> RESPONDENT**

**JULIUS NDEGWA KARIUKI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

In the 2013 General Elections, the Petitioner Rishad Hamid Ahmed Amana and the 3<sup>rd</sup> Respondent Julius Ndegwa Kariuki, among others, sought to be elected as the Member of National Assembly of the Lamu West Constituency (the constituency). The Petitioner was sponsored by Democratic Party (DP) political party while the 3<sup>rd</sup> Respondent was sponsored by Kenya National Congress (KNC) political party. After the conclusion of the elections, the 2<sup>nd</sup> Respondent, Stephen Kitsao Karani, the Returning Officer of the constituency, declared the 3<sup>rd</sup> Respondent to have been duly elected as the Member of the National Assembly of the constituency. The 2<sup>nd</sup> Respondent declared that 3<sup>rd</sup> Respondent had won the seat by garnering 11,560 votes. According to the Petitioner, he was declared to have obtained 10,639 votes. The Petitioner was second in the poll tally.

After the declaration of the results, the Petitioner challenged the declaration of the 3<sup>rd</sup> Respondent as the duly elected member of the National Assembly seat of constituency. In the petition lodged on 27<sup>th</sup> March 2013, the Petitioner contends that the 2<sup>nd</sup> Respondent failed to put his proper name in the ballot paper. The Petitioner averred that in the nomination certificate that was issued to him by his political party, and which certificate he presented to the 2<sup>nd</sup> Respondent, his name appeared as Rishad Hamid Ahmed Amana. He complained that his surname “**Amana**” was omitted from the ballot paper. It was his contention that by reason of this omission, voters who would have otherwise voted for him were prevented from voting for him because they did not find the name “**Amana**” in the ballot paper. He averred that the deletion of his surname from the ballot paper greatly disadvantaged him in that voters were not able to identify him in the ballot paper. Some of the voters did not vote for him, or failed to vote completely when they did not see his name “**Amana**” in the ballot paper. It was his case that this omission prejudiced him.

The Petitioner complained that the results announced by the Returning Officer were not in compliance with the **Election Regulations**. In particular, he averred that the Returning officer had generated two

different Form 36s whose results did not match with each other. He averred that the regulations did not provide for a situation where a Returning Officer would issue two Form 36s with different results. In his view, this brought to question the integrity of the results that were announced by the Returning Officer because it was not certain from which Form 36 the results were announced. In particular, he noted the difference between the two Form 36s was that in one form, it was indicated that he had obtained 10,639 votes while in another form he was declared to have obtained 10,939 votes. Having analyzed the two Form 36s, the Petitioner contends that 621 votes that were cast in his favour were excluded from the tally.

The Petitioner averred that there were irregularities in the manner in which the votes that he had obtained were entered in the Form 36 in respect of two polling stations, Mukomani Girls Primary School Polling Station, where it was indicated that he had obtained 33 votes yet in actual fact he had obtained 333 votes, and Lamu Boys Primary School Polling Station where it was indicated that he had obtained 12 votes when in actual fact he had obtained 312 votes. The Petitioner complained that in respect of the two polling stations, his tally in the Form 36 was reduced by 600 votes.

The Petitioner averred that after scrutinizing the Form 35s of the entire constituency that were supplied to him by his agents, he noted a discrepancy between the results that were actually announced by the Returning Officer and the one that he had obtained from the various polling stations. He explained that he obtained 11,114 votes as compared with the 3<sup>rd</sup> Respondent who had obtained 11,551 votes. He stated that when he confronted the Returning Officer with these figures, the Returning Officer promised to retally the votes. The promise was not kept. The Petitioner listed eleven (11) polling stations which he complained the results announced by the Returning Officer did not tally with the actual results that were announced in the particular polling stations. In that regard, the Petitioner requested the court to order scrutiny of the votes cast, recount and retallying of the votes in the polling stations referred to in his petition.

The Petitioner complained that his agents were unlawfully barred from representing him in six (6) polling stations. He listed the polling stations in his petition. He averred that the persons who were alleged to have been his agents in the said polling stations were unknown to him and as such they could not have represented his interests in the said polling station.

For the above reasons, the Petitioner prayed for the court, firstly, to order a scrutiny, recount and retallying of the votes as pleaded in the petition and secondly, issue a declaration that the 3<sup>rd</sup> Respondent was not duly elected or validly elected as a Member of the National Assembly for the Lamu West Constituency seat. He further prayed that the court issues a declaration to the effect that the certificate issued by the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent that he was validly elected, be invalidated as it was null, void and of no legal effect. The Petitioner prayed that he be declared to have been validly elected as the Member of the National Assembly of the constituency or in the alternative, an order be made that fresh elections be held in respect of Lamu West Constituency National Assembly seat. The Petitioner prayed to be awarded costs of the petition.

Pursuant to **Rule 14(1) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (the Election Petition Rules)**, the Respondents filed responses to the petition. They both opposed the petition. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their response filed on 16<sup>th</sup> April 2013 denied the allegation made in the petition which was to the effect that the elections of the constituency had been marred by irregularities that it rendered the results declared thereof to be invalid. In particular, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that the complaint by the Petitioner that his surname was not included in the ballot paper had no basis in law because the name that appeared in the ballot paper was the Petitioner's name as appeared in the register of voters and in his national identity card. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that they could not put a name in the ballot paper that was not the name of a candidate as appeared in the register of voters and in the national identity card. In any event, they contend that there was dispute resolution mechanisms provided by the law where if the Petitioner was aggrieved with the manner in which his name appeared in the ballot paper, he would have sought appropriate redress. In the case of the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that apart from the name, the voters were able to identify their preferred candidate by a passport size photograph of the candidate and the symbol of the political

party the candidate stood.

In respect to the complaint by the Petitioner that there were irregularities in the tallying process, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that they had substantially complied with the law in collating and declaring the results from the various polling stations. The said Respondents averred that there was only one Form 36 which was used to declare the results. The other Form 36 which the Petitioner refers to as the second Form 36 was in actual fact a draft Form 36 that was used before the results were announced. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents conceded that in respect of Lamu Boys Primary School polling station, the draft Form 36 indicates that the Petitioner had obtained 12 votes instead of 312 votes. This error was noted and was subsequently amended in the Form 36 that the results were declared. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that even if all the errors complained of by the Petitioner were taken into account, the 3<sup>rd</sup> Respondent would still have emerged the winner. They averred that there were no errors in any of the Form 35s that were brought to the tallying centre for collation of the results.

As regard the complaint that the agents of the Petitioner had been prevented or barred from accessing the polling stations, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that due to constraints of space, it was impractical to allow the candidates to have more than one agent in each polling station. They stated that in the polling stations referred to by the Petitioner, the Petitioner's agents were allowed to access to the polling stations. The said agents even signed the Form 35s. They denied the claim by the Petitioner that his agents were prevented from accessing the said polling stations.

In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that the Elections in Lamu West Constituency were conducted substantially in compliance with the Constitution, the statutory provisions and the election regulations. They averred that the declaration of the 3<sup>rd</sup> Respondents as the duly elected Member of the National Assembly of the constituency was valid and credible. There were no grounds placed before this court that would persuade this court to nullify the said results. In the premises therefore, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged the court to find that the election of the 3<sup>rd</sup> Respondent as the Member of the National Assembly of Lamu West Constituency reflected the will of the people of the said constituency. They urged the court to dismiss the petition with costs.

In response to the petition, the 3<sup>rd</sup> Respondent stated that the allegations made by the Petitioner against his election had no basis in law. He averred that he was elected in a free and fair election. His election reflected the will of the people of Lamu West Constituency to be represented by a person of their choice. The 3<sup>rd</sup> respondent put the Petitioner to strict proof thereof in respect of all the averments that he made alleging electoral irregularities and malpractices. The 3<sup>rd</sup> Respondent urged the court to dismiss the petition with costs.

At the pre-trial conference, the Petitioner informed the court that he would call eight (8) witnesses. All these witnesses were to be cross-examined by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that they would avail three (3) witnesses that were requested by the Petitioner for the purpose of cross-examination. On his part, the 3<sup>rd</sup> Respondent told the court that he was the only one who was going to testify on his own behalf.

Before evaluating the evidence and rendering its decision, this court will address the question of the burden and standard of proof. It is now accepted that in Election Petition the burden of proving the allegations made in the petitions lies with the Petitioner. In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013**, the Supreme Court held thus:

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for 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 be done rightly and regularly. So, the petitioner must set out by***

***raising firm and credible evidence of the public authority's departures from the prescriptions of the law."***

It is therefore clear that in an election petition such as the present one, where the Petitioner makes allegation or alleges that there has been breach of law by the 1<sup>st</sup> Respondent, he must lay evidence before the court to support the allegations. It is not enough for the Petitioner to point out irregularities that took place during the elections. The Petitioner must establish that the irregularities were of such nature that it affected the exercise by the voters of the particular electoral area of their will to choose a candidate of their choice.

As regards the standard of proof, this court agrees with the holding by Lenaola J in **Bernard Shinali Masaka –Vs- Bonny Khalwale & 2 Others [2011] eKLR** where he held that:

***"Further, I agree with the proposition grounded on the decision in Mbowe –Vs- Eliufoo [1967] EA 240 that any allegations made in an election petition have to be proved to the "satisfaction of the court". Like Rawal J in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election petitions, it almost certainly on a high degree than merely on a balance of probabilities, the latter being the standard in civil cases."***

So, the Petitioner is required to prove the allegations of electoral malpractices to the standard that is higher than that of a balance of probabilities that is applicable in civil cases but lower than that applicable in criminal cases *i.e.* that of proof beyond any reasonable doubt.

Upon the conclusion of the hearing of the case, and upon considering the submission that was made before this court by counsel, the following are the issues for determination:

- I. Whether the Petitioner was prejudiced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' failure to include the name "**Amana**" in the ballot paper in terms of the certificate of nomination issued by DP political party.
- II. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prevented or barred the Petitioner's agents from accessing certain polling stations and thereby denying the Petitioner the opportunity to assess the credibility of the said elections.
- III. Whether the Petitioner established that there were irregularities in the tallying of votes at the Tallying Centre which therefore vitiated the entire results.
- IV. What was the outcome of the scrutiny that was ordered by the court in the course of the hearing of the petition, and did the scrutiny disclosed any irregularities?
- V. Whether there were irregularities established by the Petitioner and whether the said irregularities affected the outcome of the results.
- VI. What orders in terms of the prayers sought in the petition should the court issue after the conclusion of the case?
- VII. What are the orders as to costs?

This court will now address the issues that emerged for determination during the hearing of this petition. The first issue for determination is whether the 1<sup>st</sup> Respondent prejudiced the Petitioner by failing to include the name "**Amana**" in the ballot paper in terms of the certificate of nomination which was presented to the 2<sup>nd</sup> Respondent by the Petitioner as the Returning Officer of Lamu West Constituency. According to the Petitioner's testimony, his name is Rishad Hamid Ahmed Amana. The name "**Amana**" was his family name which he was known by the voters of Lamu West Constituency. He testified that

when his party, the Democratic Party of Kenya (DP) issued him with the nomination certificate, the name that appeared in the said certificate was Rishad Hamid Ahmed Amana. The Petitioner testified that he presented his nomination certificate to the 2<sup>nd</sup> Respondent pursuant to **Regulation 22 of The Elections (General) Regulations, 2012** (the **Election Regulations**) which required a political party upon nominating a candidate to issue such candidate with a certificate.

The Petitioner stated that he signed a statutory declaration pursuant to **Regulation 41 of the Election Regulations** which he presented to the 2<sup>nd</sup> Respondent. The said declaration was in terms of Form 19 of the **Election Regulations** which contained the following statement at the bottom of the page:

***“The declarant names must be written in the order in which he or she wishes them to appear on the nomination statement and the surname must be underlined.”***

In the above statutory form, the name of the Petitioner appears as Rishad Hamid Ahmed Amana. It was the Petitioner’s case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no choice but to have the name of the Petitioner in the ballot paper as it appeared in the nomination certificate issued by DP and in the statutory declaration referred to above. The Petitioner recalled that when he presented the two documents to the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent declined to register the name as appeared in the two documents but instead chose to exclude the surname **“Amana”** on the ground that the nomination form did not have sufficient space for all the names. The Petitioner complained that because of this failure to include his surname, he was prejudiced when the name **“Amana”** did not appear in the ballot paper.

The Petitioner called four witnesses, PW2 Faisal Mohamed Salim, PW3 Mohamed Bwana Ahmed, PW4 Mohamed Selo Musa and PW7 Rukia Abdulahi Lugumba who testified that although they were minded to vote for the Petitioner, when they did not see the name **“Amana”** in the ballot paper, they gave up and did not vote for the Petitioner. The three witnesses were illiterate and therefore testified that when they appeared at the polling station, they told the election officials that they desired to vote for **“Amana”** and were told that a candidate by the name **“Amana”** was not on the ballot paper, they were disheartened and did not vote for anyone in the parliamentary election.

In response to this allegation, the 2<sup>nd</sup> Respondent testified that he could not register the name **“Amana”** in the ballot paper because **Regulation 38(a)** of the **Election Regulations** required that a candidate could only be registered in the name that appeared in the register of voters. The 2<sup>nd</sup> Respondent testified that the name of the Petitioner as it appeared in the register of voters and in his national identity card was Rishad Hamid Ahmed. The name **“Amana”** was neither in the national identity card nor in the register of voters. The 2<sup>nd</sup> Respondent recalled that the Petitioner had requested him to include the name **“Amana”** in the nomination paper, but he had declined because of the fact that the name **“Amana”** appeared to be a nickname or a pseudonym and not the official name of the Petitioner.

The 2<sup>nd</sup> Respondent further testified that if the Petitioner was aggrieved by his decision to exclude the name **“Amana”** from the nomination paper, the Petitioner should have lodged a complaint with the 1<sup>st</sup> Respondent pursuant to **Article 88(4)(e)** of the **Constitution** which mandated the 1<sup>st</sup> Respondent to settle electoral disputes, including disputes arising from nominations. It was the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents’ case that the Petitioner was not prejudiced by the non-inclusion of the name **“Amana”** in the ballot paper because the ballot paper, apart from his name contained, his passport size photograph and also his party symbol. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that if the Petitioner wanted the name **“Amana”** to appear in the ballot paper, he should have changed his official name by deed poll.

This court has carefully considered the opposing evidence that has been put forward by the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Certain facts are not in dispute in this petition: It is not disputed that the Petitioner registered himself as a voter using his official name Rishad Hamid Ahmed. This name is the one that appears in his national identity card. The Petitioner has testified that although his official name is Rishad Hamid Ahmed, in the 2013 elections for Lamu West National Assembly seat, he desired the name Rishad Hamid Ahmed Amana to appear in the ballot paper. This is because the name **“Amana”** is his

family name which is widely recognizable and recognized in Lamu West Constituency.

Does the Petitioner have the choice of choosing the name that will appear in the ballot paper other than his official name? For this, the **Constitution**, the **Elections Act** and the **Election Regulations** made thereunder provide an answer. **Article 99** of the **Constitution** sets out the qualifications and disqualifications for a person seeking to be elected as a Member of Parliament. **Article 99(1)(a)** provides that a person shall not be qualified to be eligible for election as a Member of Parliament unless such person is a registered voter. **Article 83(1)(a)** of the **Constitution** provides that a person shall be qualified to be registered as a voter at an election if such person is an adult citizen. In Kenya, proof of citizenship is the national identity card or a passport issued by the Government of Kenya. **Section 24(1)(a)** of the **Elections Act** basically reproduces the provisions of **Article 99(1)(a)** of the **Constitution** in regard to the qualification of a person who offers himself as a candidate in an election. It includes the requirement that such person must be a registered voter.

Under **Regulation 22**, where a political party nominates a candidate for a National Assembly seat, such a party is required to present to the Returning Officer an application for nomination in terms of Form 15 set out in the schedule. Form 15 requires the candidate *inter alia* to present his or her passport size photograph, give his name in full, the national identity card number or passport number and the voter's card number. This is in addition to the clearance certificate that such candidate would have secured from his nominating political party. **Regulation 39(a)** requires that such candidate shall present a nomination paper to the Returning Officer containing the name of the candidate as appears in the register of voters.

It is apparent from the foregoing that the requirement that a candidate presents the name to the Returning Officer that appears in his national identity card and that appears in the register of voters is mandatory. A Returning Officer has no choice in the matter. He can only issue a nomination certificate to a candidate in the name that he registered himself as a voter. A political party is under obligation to present to the Returning Officer a certificate nominating a candidate in the name that appears in the register of voters. Therefore, when a political party decides to issue a nomination certificate to a candidate in the name other than that which appears in the register of voters, the Returning Officer in such circumstances will be bound to follow the law by issuing the Electoral Commission's nomination certificate in the name of the candidate that appears in the register of voters.

In the present case, it is therefore clear that the Returning Officer had no option but to issue the Petitioner with a nomination certificate in the name that appears in the register of voters and which coincidentally is the same name that is in his national identity card. **Regulation 41** of the **Election Regulations** is of no help to the Petitioner. This is because the presumption of the said **Regulation** is that the name of the candidate would appear as registered in the register of voters. The purpose of **Regulation 41** is to enable the Electoral Commission to list the name, among the names of the candidate that such candidate wishes to give prominence. This is as it should be because most people are popularly known by a single prominent name. **Regulation 41** was not designed to enable a candidate introduce another name in the ballot paper. The only name that can appear in the ballot paper is the name of the candidate as appears in the register of voters. The Petitioner's complaint therefore has no basis in law. If the Petitioner desired the name "**Amana**" to be included in the ballot paper, he was required first to change his name by deed poll and then request the Electoral Commission to change the name as appears in the register of voters before such a name can be presented during the nomination to the Returning Officer. The Petitioner's complaint in that regard has not been established.

The second issue for determination is whether the Petitioner established that his agents were prevented or barred from accessing certain polling centres. In his petition, the Petitioner averred that his agents were denied access to Mikinduni Primary Polling Station, Hongwe Primary Polling Station, Bahari Primary Polling Station, Lake Amu Polling Station and Lake Kenyatta ATC Polling Station. In his testimony before court, the Petitioner reiterated his claim. He testified that his agents were prevented from accessing the above polling stations by presiding officers of the said polling stations on the grounds that other polling agents were already in the said polling stations. On being cross-examined by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Petitioner testified that although the Form 35s of the said polling stations indicated that there were agents appointed by DP political party, he did not know some of the said agents. In Lake

Kenyatta Primary Polling Station, he denied knowledge of a person by the name Simon Kamande as his agent. He however admitted that he knew Zakayo Mutua and Daniel Ndichu. He also knew John Kukyama who was his agent at Mikinduni Primary Polling Station. He did not know Bethwel Ndichu. Neither did he know Martin Mukinya who purported to be his agent at Hongwe Polling Station. He did not know Francis Ndwiga Njiru who purported to be his agent at Bahari Primary School. At Lake Amu Primary School he was represented by Teresia Nyaguthi.

In respect of this aspect of his testimony, the Petitioner was corroborated by PW5 John Kukyama Mwangangi who testified that although he signed the Form 35 at Mikinduni Polling Station, he was denied access to the polling station on the entire polling day until late in the evening when he was allowed access. He was emphatic that DP was not represented by any agent at the said polling station. In that regard, PW6 Rosemary Njoki Mugo also testified that she was denied access to the Bahari Primary Polling Station although she had a letter of appointment from DP. She was told that there was already another agent representing DP at the said polling station.

When the 2<sup>nd</sup> Respondent testified, he told the court that none of the agents of the Petitioner were barred from accessing the respective polling stations. He explained that the reason why some of the agents may have been prevented from accessing the said polling stations was because the Petitioner may have appointed more than one (1) agent in that particular polling station. He however testified that from the Form 35s in respect of the polling station that are the subject of complaint, it was evident that the Petitioner was represented by agents who in fact signed the Form 35s. In that regard, the 2<sup>nd</sup> Respondent was corroborated in his testimony by DW2 Zebedayo Yawa Zealot, the Presiding Officer of Kenyatta ATC Polling Station and DW3 Simon Mungai Mburu, the Presiding Officer of Bomani Primary Polling Station. They both testified that DP was represented by agents in their respective polling stations.

This court has considered the evidence in regard to the second issue for determination. **Regulation 62** of the **Election Regulations** mandates the Presiding Officer of a polling station with power to regulate the number of persons who can be admitted into a polling station. **Regulation 62(1)** lists the persons who are allowed access to the polling station. The persons include authorized agents of candidates. **Regulation 62(2)** provides thus:

***“Notwithstanding sub regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.”***

From the evidence adduced by both the Petitioner and the 2<sup>nd</sup> Respondent, it was apparent that the Petitioner’s political party appointed more than one agent for each polling station. The agents were not agents of the Petitioner but rather the agents of DP, the political party that nominated him. The Petitioner’s assertion to the effect that his agents were locked out of the polling stations as pleaded in his petition is not supported by evidence because persons claiming to have been appointed as agents of DP political party signed the Form 35 after the conclusion of the counting of the votes in the particular polling stations.

This court understood the thrust of the Petitioner’s testimony to be that the persons who signed the Form 35 on behalf of DP in the particular polling stations were unknown to him. The Petitioner however conceded that in some of the polling stations, agents whom he knew were allowed access to the polling stations and in fact signed the Form 35s after the completion of the vote counting exercise. While the Petitioner has established that indeed some of his agents were barred from accessing some of the polling stations, the explanation given by the 2<sup>nd</sup> Respondent is reasonable. Due to the number of candidates that were contesting the various elective posts, and taking into consideration that most of the polling stations were standard classrooms, it would have been impossible for voting to take place in the manner prescribed by the law if the Presiding Officer allowed more than one agent from each political party or candidate access to the polling station. The allegation by the Petitioner that his agents were barred from accessing the polling stations was therefore not established to the required standard of proof.

Even if the Petitioner was able to establish that some of his agents were prevented from accessing the respective polling stations, the Form 35s in respect of the particular polling stations did not support the

Petitioner's claim that none of his agents were granted access to the particular polling station. It was clear that some of its agents were indeed allowed access to the said polling stations. The claim by the Petitioner that he did not know some of the agents who signed the Form 35s on behalf of his political party can be explained by the fact that it was not possible for the Petitioner to have personally known all the agents who were recruited by his political party to man the various polling stations.

The third issue for determination is whether the Petitioner established that there were irregularities in the tallying of the votes at the tallying centre that vitiated the entire results. According to the Petitioner, the 2<sup>nd</sup> Respondent failed to properly tally the results from the various polling stations as a result of which a substantial number of his votes were not included in the final tally. In his testimony before court, the Petitioner testified that although he had received 333 votes at Mkomani Girls Polling Station, the Form 36 which was generated by the 2<sup>nd</sup> Respondent reflected that he had obtained only 33 votes. He further testified that at Lamu Boys Polling Station, he had obtained 312 votes yet the Form 36 reflected that he had obtained only 12 votes.

The Petitioner complained that as a result of this discrepancy, the final tally did not reflect the correct votes that he had obtained. The Petitioner further testified that the tallying exercise was marred by irregularities because the 2<sup>nd</sup> Respondent generated two (2) Form 36s. It was his case that the 2<sup>nd</sup> Respondent had declared results from the Form 36 that had errors and not the Form 36 that contained the rectifications. The Petitioner explained that from the tally that he conducted with his agents from the various polling stations, it was clear that he had obtained more votes than what was reflected in the Form 36 that was filled by the 2<sup>nd</sup> Respondent.

In response to these allegations, the 2<sup>nd</sup> Respondent admitted that he had in fact prepared two (2) Form 36s. He referred the first Form 36 as the draft Form 36 while the second Form 36 was the one that he used to declare the results. He testified that after the completion of the tallying process, and before he announced the results in respect of the constituency, he noticed an error in the entry of votes that were obtained by the Petitioner in respect of Lamu Boys Polling Station. Instead of an entry of 312 as votes obtained by the Petitioner being made in the Form 36 in respect of Lamu Boys Polling Station, the draft Form 36 indicated that the Petitioner had obtained 12 votes. He explained that when he discovered this error, he immediately rectified the error and entered the correct figure.

At that time, in the draft Form 36, he had indicated that the total number of votes obtained by the Petitioner was 10,639 votes. After the correction, in the final Form 36, he indicated that the Petitioner had obtained 10,939 votes. He denied the claim by the Petitioner to the effect that a wrong entry had been made in respect of the votes that he (the Petitioner) had obtained at Mkomani Girls Polling Station. He told the court that the correct figure of 333 votes in favour of the Petitioner was entered in both the draft Form 36 and the final Form 36. He testified that apart from the error in respect of Lamu Boys Polling Station, there was no other error in the entry of the results that he noted. He denied the allegations made by the Petitioner that he had announced the results after compiling the draft Form 36 and not the final Form 36. He told the court that he announced the results on the basis of the final Form 36.

The 2<sup>nd</sup> Respondent explained the circumstances under which he engaged with the Petitioner after the announcement of the results. He testified that he gave the Petitioner the draft Form 36 because the Petitioner insisted that he wanted to be given a Form 36 immediately after the announcement of the results. He made the decision to give the Petitioner a copy of the draft Form 36 and requested him to collect the final copy of Form 36 at a later date. Regarding the tally that was done by the Petitioner and his agents, the 2<sup>nd</sup> Respondent testified that when the Petitioner met him after he had announced the results, he told him that he would consult with the Electoral Commission's headquarters for directions whether a retally could be done. After consulting the headquarters, he learnt that a retally could not be done.

This court has evaluated the evidence adduced in respect of this third issue for determination. It was common ground between the Petitioner and the 2<sup>nd</sup> Respondent that the information contained in the Form 35s were more or less accurate. The Petitioner testified that, other than the polling stations whose

results he challenged, he had no dispute with the majority of the results contained in the Form 35s. The 2<sup>nd</sup> Respondent admitted the Petitioner's claim that indeed there was an error in the transposition of the results from Lamu Boys Polling Station in what he refers to as the draft Form 36. The results in the said Form 36 indicated that the Petitioner had obtained 12 votes instead of 312 votes. Whereas the Petitioner attributes this to the negligence of the election officials, the 2<sup>nd</sup> Respondent testified that it was on account of human error in the entry of results in the Form 36.

This court, having evaluated the facts of this case agrees with the 2<sup>nd</sup> Respondent that the entry made by the election officials at the tallying centre in the Form 36 in respect of Lamu Boys Polling Station was an arithmetical error which could be attributed to human error. The issue of concern to this court is what the 2<sup>nd</sup> Respondent did after he noted the error. According to the 2<sup>nd</sup> Respondent, after he noted the error, he corrected the same in the final Form 36. From the evidence of the Petitioner, it was not clear if the 2<sup>nd</sup> Respondent actually announced the results from the Form 36 that he refers to as a draft or what he refers to as the final Form 36.

At this juncture, it is important to point out that under **Regulation 83** of the **Election Regulations**, the 2<sup>nd</sup> Respondent was required to fill one Form 36 setting out the results of the various polling stations. There is no provision for a Returning Officer to prepare a draft Form 36 before preparing a final one. It is this court's view that the reason for the requirement that only one Form 36 be filled (subject to copies being made from the original) is to prevent the abuse of process where more than one Form 36 may be prepared by a Returning Officer in respect of a particular electoral area. The regulation requires one Form 36 to be prepared to obviate disputes by contestants. This court holds that the 2<sup>nd</sup> Respondent breached **Regulation 83** of the **Election Regulations** when he prepared two (2) Form 36s. This was an illegality which the Petitioner has established to the required standard of proof. However, this court holds that in preparing what he referred to as the final Form 36, the 2<sup>nd</sup> Respondent acted in good faith and had no intention of subverting the democratic exercise by the voters of Lamu West Constituency to elect a person of their choice.

As regard whether the Petitioner established that his votes in respect of Mkomani Girls Polling Station were not correctly entered in the Form 36, having perused the two Form 36s, and also having added up the totals in the column in which the Petitioner's votes appear in each page, it was clear to this court that the number of votes that the Petitioner obtained that were tallied by the 2<sup>nd</sup> Respondent was 333 votes and not 33 votes as alleged by the Petitioner. What is however not in dispute is that in what is referred to as the draft Form 36, the figure 333 appears as 33. The last figure 3 is faint. When one casually looks at the entry, one may be persuaded that the figure entered is 33 instead of 333. In the final Form 36, the figure 333 is clear.

What is not in doubt is that even if the figure of 600 votes was added to the then total votes of 10,639 that the Petitioner is said to have obtained, that would add up 11,239 which will still be less than 11,560 votes that the 3<sup>rd</sup> Respondent obtained. It may well be argued, as was submitted by the Petitioner, that this was an irregularity that vitiated the entire results. This court is not persuaded that an arithmetical error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take into consideration as being a material factor, in the absence of other evidence of the irregularity, which would lead to the nullification of an election result.

In the course of the hearing of the petition, the Petitioner made an application for scrutiny, recount and retallying of the votes. The court considered the application after the close of the hearing of the respective cases of the Petitioner and the Respondent. In its Ruling delivered on 12<sup>th</sup> June 2013, the court made the following observations in respect of the application:

***“42. The Petitioner testified that after the declaration of the results, he met with his agents and was able to collate the results from the various polling stations. In the said results, there was a significant difference between the results that were declared by the presiding officers of the various polling stations, and the results that were collated by his agents. The***

**results collated by the agents are annexed to the Petitioner’s affidavit at pages 12 -15. These results were admitted into evidence. What is of interest about the said results is that the Petitioner presented the same to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent received the same and wrote the following note:**

*“I note issues raised in the above tally and I reiterate that I will confirm with your chief agents and candidates in a meeting to retally the votes in under 7 days.”*

**When the 2<sup>nd</sup> Respondent testified before this court, he admitted that he had indeed been availed a copy of the said tally undertaken by the agents of the Petitioner. He could not however give a satisfactory explanation why he gave the undertaking that he would retally the votes even after he had declared the final results.**

**43. In this court’s assessment, it was either that the 2<sup>nd</sup> Respondent did not know the law relating to the tallying and the announcement of the results or had doubts about the integrity of the results that he himself had declared. Upon perusal of the said tally presented by the Petitioner’s agents, it was clear to this court that there was a significant difference in the results announced in respect of some of the polling stations. It was in some of these polling stations that the Petitioner claimed that his agents were prevented from accessing the particular polling stations.**

**44. This court is of the considered view that the Petitioner established a case for this court to order scrutiny and recount in respect of polling stations that had results declared that were different from the tally of the agents of the Petitioner. There shall only be one caveat: The scrutiny and recount shall be restricted to the following polling stations;**

- I. Witu Primary School polling station**
- II. Majembeni Primary School polling station**
- III. Ziwani Primary School polling station**
- IV. Bahati Primary School polling station**
- V. Uzida Primary School polling station**
- VI. Sese Primary School polling station**
- VII. Lake Kenyatta ATC polling station**
- VIII. Ocean View Primary School polling station**
- IX. Bomani Primary School polling station.**

**45. The scrutiny and recount in these polling stations in addition to the other two (2) polling stations referred to above shall be restricted to the ascertainment of the number of votes that each candidate obtained as compared with the results that were announced in the Form 35s that were later collated in Form 36 by the 2<sup>nd</sup> Respondent. This exercise will enable the court to ascertain the integrity of the results that were announced by the 2<sup>nd</sup> Respondent.”**

The two (2) additional polling stations that this court referred to in the Ruling were Mkomani Girls Polling Station and Lamu Boys Polling Station.

After the close of scrutiny, the Deputy Registrar of the court, Liza Gicheha, presented to the court the findings of the scrutiny. The findings are contained in a report which forms part of this court’s record. The Petitioner and the Respondents participated in the scrutiny. The parties were supplied with copies of the report after the close of scrutiny. The said scrutiny, revealed the following:

	<b>POLLING STATION</b>	<b>PETITIONER IEBC RESULT</b>	<b>RESULT ON SCRUTINY &amp; RECOUNT</b>	<b>3<sup>RD</sup> RESPON IEBC RESUL</b>

	WITU PRIMARY SCHOOL			
	STREAM 1		301	
	STREAM 2	233	228	62
	STREAM 3	237	238	67
2	MAJEMBENI PRIMARY SCHOOL	34	34	369
3.	ZIWANI PRIMARY SCHOOL	12	12	161
4.	BAHATI PRIMARY SCHOOL	5	5	138
5.	UZIDA PRIMARY SCHOOL	6	6	154
6.	SESE PRIMARY SCHOOL	1	1	134
7.	LAKE KENYATTA ATC	14	14	100
8.	OCEAN VIEW PRIMARY SCHOOL	5	5	118
9.	BOMANI PRIMARY SCHOOL	8	8	395
10.	MKOMANI GIRLS' PRIMARY SCHOOL	333	333	24
	LAMU BOY'S PRIMARY SCHOOL			
11.	STREAM 1	312	312	38
	STREAM 2	350	349	26

As is evident from the above results of the scrutiny, it was clear that there was no material discrepancy between the results declared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the respective Form 35s of the polling stations that were under scrutiny and the finding made by this court on scrutiny. The minor differences of nine (9) votes in favour of either candidate is accounted for by either the objections that were raised by the agents of the Petitioner and the 3<sup>rd</sup> Respondent during recount in respect of a particular vote or the inclusion of a vote that was rejected but established to be valid. The results of the scrutiny did not support the contention by the Petitioner that there were irregularities in the particular polling stations that would lead this court to impeach the results that were announced from the said polling stations by the respective presiding officers.

From the foregoing, it is apparent that the Petitioner was able to establish that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents committed some irregularities in the tallying of the results. The issue that remains for determination by this court is whether such irregularities materially affected the results. **Section 83** of the **Elections Act** provides thus:

***“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.”***

This section has been given judicial interpretation by various courts. In **Besigye –Vs- Museveni, Election Petition No.1 of 2001**, the Uganda Supreme Court gave an interpretation to **Section 58(6)** of the Ugandan **Presidential Elections Act** which is similar in material respect to the above. Mulenga JSC reading the decision of the majority of the court stated thus:

*“To my understanding, therefore, the expression “non-compliance affected the result of the election in a substantial manner” as used in S.58(6)(a), can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the noncompliance substantially. That means that, to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt. This is the view the learned Chief Justice of Tanzania Georges C.J., stated differently in MBOWE vs ELIUFOO (supra) when he said at p.242 D-E.*

*“In my view in the phrase “affected the result” the word ‘result’ means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”*

Our **Section 83** of the **Elections Act** does not contain the words “**substantial manner**” like the Ugandan Act. However, this fact does not lessen the significance of what the Learned Supreme Court Judge stated in the above decision. A petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test.

Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetical mistakes are bound to happen. This was the decision of Maraga J (as he then was) in **Joho –Vs- Nyange (2008) 3KLR (EP) 500**. What **Section 83** of the **Elections Act** simply provides is that in any election, because it is conducted by human beings, there bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitutes non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.

In the present petition, the irregularities that the Petitioner was able to

establish are not of such a nature that this court can reach a finding that they were so material as to affect the outcome of the results. As earlier stated in this judgment, even if the court were to agree with the Petitioner and uphold his claim that 600 of his votes were not included in the final tally, the Petitioner would still not garner sufficient votes to raise doubt in the mind of the court that elections were not conducted in a free and fair manner. The results of the scrutiny did not support the Petitioner’s assertion that there were massive irregularities that would lead to a court of law to reach a finding that the results obtained from the said elections ought to be nullified. Infact, what the scrutiny ended up establishing was that the electoral officials substantially did their work in compliance with the law.

In conclusion, this court has been guided by the Constitution in determining this petition. **Article 81** of the **Constitution** upholds the right of the citizens to exercise their political rights as set out under **Article 38** to elect leaders of their choice. The voters of Lamu West Constituency elected the 3<sup>rd</sup> Respondent in an election that in the opinion of this court was free, fair, and transparent and whose results reflected the

will of the electorate of Lamu West Constituency. This court cannot interfere with the right of the voters to elect their representative to the National Assembly, unless it is established that the particular election was marred with irregularities to an extent that a tribunal reviewing the conduct of the said election is unable to reach a finding that the results reflected the will of the electorate. The Petitioner has failed to establish that there were irregularities of such a nature that negated the expression of the will of the electorate of Lamu West Constituency. The petition therefore lacks merit and is hereby dismissed.

What remains for this court to do is to thank Mr. Buti, learned counsel for the Petitioner, Ms. Muraguri, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Mr. Kahindi learned counsel for the 3<sup>rd</sup> Respondent. The said counsel exhibited diligence in their research and presentation of the clients' respective cases in court. They showed courtesy to each other and to the court during the entire hearing of the case. This court appreciates their conduct. For Mr. Buti, the fact that the Petitioner was unsuccessful in this petition is no reflection whatsoever on his competence. In fact this court learnt a lot from the style of his advocacy and manner of presentation in court which is obviously borne out of long positive experience in the bar. This court also wishes to thank my Researcher, Caroline Menin, my Court Clerk, Dennis Mungai and my Secretary Alice Muchungu. Without them, this court would not have been able to hear and conclude this election petition in the record time that it did.

On the issue of costs, costs usually follow the event. This court will award the cost of the petition to the Respondents. Pursuant to **Rule 34(1)(a)** of **The Elections (Parliamentary and County Elections) Petition Rules 2013**, this court is granted power to specify the total amount of costs that shall be paid in a petition. This court has noted the type of input, in terms of time, research, preparation of pleadings and the time spent in court during the actual hearing of the case. This court is not oblivious of the fact that counsel for the parties travelled from their usual places of business to attend the hearing in this case at Malindi. This court therefore holds that the maximum amount of costs that shall be paid to the Respondents is Kshs.4 Million. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall be paid a maximum of Kshs. 2.5 Million while the 3<sup>rd</sup> Respondent shall be paid a maximum of Kshs.1.5 Million. In that regard, the sum that was deposited in court, shall remain so deposited pending the taxation of their costs by the Respondents. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF JULY 2013**

L. KIMARU

**JUDGE**

**In the presence of:**

1. Mr. Buti and Mr. Abubakar for the Petitioner
2. Ms. Muraguri for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents
3. Mr. Kahindi for the 3<sup>rd</sup> Respondent