



No.66/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION NO. 9 OF 2013

WILSON MBITHI MUNGUTI KABUTI.....1ST PETITIONER

PHILIP MUTUA KILONZO.....2ND PETITIONER

STEPHEN MUTHOKA.....3RD PETITIONER

JOHN KALATA MALII4TH PETITIONER

JOSEPH MUTUKU MUSAU.....5TH PETITIONER

SOLOMON KIMUYU.....6TH PETITIONER

VERSUS

PATRICK MAKAU KING'OLA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

BOUNDARIES & COMMISSION2ND RESPONDENT

JUDGMENT

1. Parliamentary Elections for Mavoko Constituency were held on the 4th March 2013. The Petitioners herein were among the candidates who vied for the parliamentary seat in the election. The 1st Respondent, who was one of the candidates, was declared the winner and Member of Parliament by the 2nd Respondent, the Independent Electoral & Boundaries Commission whose responsibility was to conduct the elections.

Petitioners' case

2. In challenging the election of the 1st Respondent as the Member of Parliament, the petitioners seek a declaration that the 1st Respondent, **Patrick Makau King'ola** was not validly elected; the elections were fundamentally flawed and therefore void requiring the court to order holding of fresh elections.
3. The Petitioners pleaded that the 1st Petitioner's last name was missing and the passport photograph he forwarded to the 2nd Respondent was interchanged so as not to match what was

- posted in the system of the Independent Electoral and Boundaries Commission (IEBC). Consequently, the voters were confused thinking that his name was not on the ballot papers.
4. The petitioners noted anomalies, informed the Returning Officer who declined to make any rectification; the Returning Officer initially only allowed in agents from Jubilee and Cord Parties, denying them their rights to appoint agents. After protests they were allowed to have 40 agents who were not allowed into the polling stations. The petitioners' agents were chased out of polling streams/stations during casting of votes and were not allowed to participate in the process of counting votes and signing of Form 35.
 5. Further, the results were cancelled and/ or altered without prior consultation and consent of all parties involved. There were a lot of discrepancies following tallying of results that showed missing results and/or results omitted from the summary sheet at the time of declaration of the winner; some Forms 35 were unofficial while others lacked IEBC official stamp impressions.
 6. There was bribery and vote buying before and on the election date.
 7. The petition was supported by an affidavit sworn by the 1st petitioner on behalf of other petitioners. He deposed that the election was flawed as there were malpractices. Prior to the election date, he furnished IEBC with a deed poll for purposes of changing his name which they acknowledged and agreed to effect in their data system. Changes were effected but his last name was omitted from the ballot papers. The photograph appearing thereon was also different from the one supplied to IEBC. He notified the Returning Officer.
 8. Other anomalies included an omission of one of the candidate's name on the ballot paper; some forms used did not emanate from IEBC while others had no official rubber stamp. Petitioners were denied the rights to appoint agents and the few that were appointed were not allowed to participate in the process which made it impossible to adequately monitor all polling stations. Others were chased away from polling stations hence did not sign forms 35 as required by the law. Consequently, results were altered and/ or cancelled. Polling stations were opened at midday with no extension of time.
 9. The 1st Respondent bought votes and bribed voters which resulted into his arrest on the eve of the election date. He also campaigned on the voting day. The 2nd Respondent used motor vehicle registration number KBG 276C owned by **Mavoko Municipal Council** that was associated with the 1st respondent.
 10. Results from some polling streams were missing at the time of declaration of the winner and the Election results were not affixed on the door of each polling station as required by law.

1st Respondent's response

11. In his response the 1st Respondent averred that he was elected as member of **National Assembly, Mavoko Constituency**. Elections were fair, transparent and credible. He denied being aware of any anomalies having occurred as alleged by the petitioners. He refuted the allegation that there were discrepancies in tallying of results as all results were included in the summary sheet. He denied having bribed voters or bought votes.
12. He prayed for a declaration that he was the duly elected member of National Assembly for Mavoko Constituency and the dismissal of the petition.

2nd Respondent's response.

13. In response to the petition the 2nd respondent stated that the elections were conducted in accordance with the Constitution and relevant Elections Statutes. The elections were free, fair, transparent and credible. There were no irregularities.
14. It relied on the identity card and valid passport photograph provided by the 1st petitioner and eventually entered them in the data base. Prior to printing ballot papers each candidate was given an opportunity of perusing and rectifying anomalies if any.

15. It denied the allegation that Petitioners' agents were chased away and were not allowed to participate in the counting process and signing of forms 35. Results, according to it were not cancelled, altered or went missing. All forms 35 had official IEBC stamps. There was no bribery and vote buying.
16. The answer to the petition was supported by a replying affidavit sworn by the Returning Officer, **Faith Mugo**. She basically reiterated what was stated in the body of the response. And added that a total of 58,985 votes were cast. The results were as hereunder:-

- 1st Respondent - 19,724 votes
- 1st Petitioner - 2,426 votes
- 2nd Petitioner - 11,640 votes
- 3rd Petitioner - 8,117 votes
- 4th Petitioner - 606 votes
- 5th Petitioner - 1,989 votes
- 6th Petitioner - 641 votes

17. Per the requirements, the 1st Petitioner supplied the Returning Officer with his passport size photograph and name in both soft and hard copy. The deed poll was invalid for want of gazette. The petitioner could also be identified by his party symbol. Petitioners did appoint agents who participated in the election process as long as they were accredited. She denied having received any report of voter bribery. She denied the allegation that motor vehicle registration number KBG 276C was used by the 2nd Respondent for transportation. She dismissed documents annexed to the petition purporting to be forms 35 lacking IEBC official stamp as forgeries.
18. Further, she stated that all ballot boxes were sealed in the presence of party agents and all election results were affixed on the door of each polling station as required by the law. The protest letter by the petitioners dated 3rd March, 2013 was not received at the 2nd Respondents office as it bore neither a stamp impression nor signature by any IEBC official, as proof of receipt.

Evidence

19. Evidence was presented by way of affidavit pursuant to rules 12 and 15 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (Rules). The Petitioners called eight (8) of the witnesses who swore affidavits and were duly cross-examined by the Respondents' counsels and re-examined by their advocates. The 1st Respondent who deposed an affidavit in support of his answer to the petition was cross-examined by the Petitioners' advocates and re-examined by his counsel. The 2nd Respondent was represented by the Returning Officer Mavoko, **Faith Mugo** who deposed an affidavit in support of their answer to the petition. She was cross-examined by the Petitioners' advocates and re-examined by the Respondents' advocates. After the close of the Petitioners' case, the 1st Respondent filed an application pursuant to the provisions of Rule 17(2) of the Election (*Parliamentary and County Elections*) Petition rules, 2013; Section 80 (3) of the Election Act No. 24 of 2011 and Sections 34(f) and 31 of the Advocates Act, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The 1st Respondent sought to have the Petition, all proceedings and pleadings conducted and signed by **Raymond Janan Ogwe Advocate** dismissed. The reason given was that he did not have a practising certificate hence not qualified to practise as an advocate of the High Court of Kenya.
20. This court was seized of the fact that Petitions are *sui generis* matters where the court should be concerned with rendering substantial justice envisaged by the overriding objective of the Rules. It had a duty of hearing all parties. However, due to pertinent issues raised in the application, I opted to hear it and reserve the ruling to form part of the judgment. I will be addressing the issue shortly.

Submissions

21. Only the respondent filed submissions. **Mr. Mutinda** for the 1st Respondent submitted that the

- standard of proof required in proving election petitions was set out in the Supreme Court Case. **Raila Odinga & others versus IEBC and others- Petition No. 5 of 2013**. The standard of proof should be higher than a mere balance of probability. He argued that the Petitioners had not proved their case to the required standard.
22. On the issue of vote buying and campaigning out of time he argued that the allegations being criminal in nature, evidence adduced should be convincing, corroborated and unshaken.
 23. On the issue of campaigning out of the prescribed time he stated that the evidence produced of photographs did not show the locality and time for snapping them. Evidence of the photographer who took them was not adduced. Regarding use of the motor vehicle alleged to belong to **Mavoko Municipal Council** he said there was no evidence of use by the 1st Respondent, the registered owner of the motor vehicle, how and when it was used.
 24. He summed up his argument by stating that allegations of irregularities were not supported by any evidence and would not invalidate the results of elections of Mavoko Constituency. He faulted the petitioners for failure to seek recount and scrutiny of ballot papers to establish the issue of cancellation and alterations of the results.
 25. **Mrs Wambua** counsel for the 2nd Respondent submitted that the Petitioners had not disclosed a reasonable cause of action and had failed to prove their case beyond reasonable doubt. She dismissed the petition as an abuse of Court process, a waste of judicial time that ought to have been struck out.
 26. On the issue of failure to include the name **Kabuti** of the 1st Petitioner on the ballot of paper, she argued that it had been established that the 1st petitioner's name **Wilson Mbithi Munguti** had been reflected on his identity card for 50 years. The deed poll he had, had not been gazetted, and therefore could not be officially used. She faulted the 1st petitioner for failure to exercise due diligence of ensuring his documents were in accordance with his requirement prior to ballot papers being printed out. However, in her view the outcome of the results were not affected since candidates were identified by their party symbols. She clarified that IEBC is the only body that has access to its database and it follows alphabetical order of names which was different from the photographs shown as having been obtained from the IEBC.
 27. She said that voter buying and bribery had not been proved, the allegations of the 1st Respondent campaigning after the deadline for political campaigns was untrue and unfounded.
 28. On the alterations and cancellation of results, she submitted that correct forms 35 that emanated from IEBC had correct entries of contents of results and were signed by accredited agents. They had no cancellations. Alleged discrepancies in tallying were mere clerical errors in the tallying of forms 35 and form 36, which errors tilted in favour of the 1st petitioner. She concluded by stating that the entire elections were free and fair.

Issues for determination

29. By consent of all counsels for parties herein issues for determination were agreed on as follows:-
 - i. Whether the Parliamentary Election for Mavoko Constituency held on the 4th March, 2013 was conducted fairly; transparently and in accordance with the Constitution of Kenya, 2010 and all other laws governing elections.
 - ii. Whether there is sufficient evidence to invalidate the election of the 1st Respondent as the Member of Parliament for Mavoko Constituency.
 - iii. Costs of the petition.
30. Prior to determining issues as stated, I will address issues raised in the Notice of Motion dated 20th June, 2013.
31. The application was based on grounds that **Raymond Janan Ogwe** who conducted and signed pleadings did not have a practising certificate. According to the law he was not qualified to practise as an advocate. **Mr Mutinda** for the 1st Respondent based his argument on the answer given by the 1st Petitioner who stated during cross-examination that the advocate is the one who prepared and signed the petition. According to him the petition was void *ab initio*.

32. Annexure "AM2(a)" to the supporting affidavit to the application is a copy of a letter from the Law Society of Kenya which confirms that **Ogwe Raymond Janan** who was admitted to the Roll of Advocates on the 20th June, 2006 has never taken out a practising certificate. His practising status and continuous Legal Education (CLE) compliance is nil. (*vide annexure "AM3"*)
33. In a replying affidavit to the application **Mr. Raymond Ogwe** stated that after admission to the roll of advocates, he worked with **Sasat Contractors Limited** as a Company Secretary and only ventured into private practise in the year 2013. He is in the process of acquiring points required by CLE that are prerequisite to obtaining the practising certificate.
34. He averred in the affidavit, that the petition together with the respective supporting affidavits signed by respective witnesses was prepared by the firm of **Ombati Otieno and Opondo Advocates**. The letter written did not represent the authority of the rest of partners who have since appraised him.
35. It is not in dispute that **Mr Raymond Ogwe** one of the advocates who represented the petitioners herein had no practising certificate at the time of representing them. Therefore he did not qualify to practise. Section 34(1) of the Advocates Act provides thus:-

"No unqualified person shall either directly or indirectly take instructions or draw or prepare any document or instrument".

36. It has been argued by counsels for the respondents that the petition should be struck out on the grounds that it was drawn by an unqualified person. Case Law has been cited. In the case of **National Bank of Kenya Ltd Versus Wilson Ndolo Ayah, Civil Appeal No. 119 of 2002 the Court of Appeal** stated as follows:-

"It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality. A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act."

37. As a court, I should not condone the act of **Mr. Ogwe** representing the Petitioners while unqualified. This would be perpetuating illegalities. Having appeared before this court while unqualified, **Mr. Ogwe** was in contempt of this court. He must indeed be punished accordingly.
38. Unlike issues determined in most of the cases cited; on the face of it the petition herein was drawn by **Ombati Otieno & Opondo Advocates**. It has been submitted by counsel for the 1st Respondent that during cross-examination the 1st Petitioner admitted that the documents were drawn by **Mr. Ogwe**. The Petition as drawn has a signature. The signatory signed on behalf of **Ombati, Otieno Opondo & Company Advocates**. There is absolutely nothing to indicate it was drawn by **Raymond Janan Ogwe**. Similarly there is no suggestion that the signature appended thereon is for **Mr. Ogwe**.
39. In his affidavit in support of the application, at paragraph 8, **Mr. Alphonse Munene Mutinda Advocate** for the 1st Respondent states thus:-

"that I further wrote to the firm of Ombati Otieno Opondo Company Advocates on the 19th June 2013 inquiring whether the said advocate is a partner of the firm or an employee (annexed hereto is true copy of the said letter marked (AM4)'"

40. Paragraph 9 states:-

"That a partner of the firm of Ombati Otieno & Company Advocates Mr. Gerphas K. Opondo replied to my said letter on the 19th June, 2013 and confirmed that the said advocate is neither an employee nor a partner of their firm. And also stated that if the said Raymond Janan Ogwe filed any pleadings in their names, he did so without their knowledge (annexed herein marked "AM5) is a true copy of the

said letter”.

41. Annexure “AM5” is a letter written by one **Gerphas K. Opondo** Advocate for the firm of **Ombati Otieno & Opondo Advocates**. The letter is addressed to **Alphonse Mutinda** and Co. Advocates. It states thus:-

“...We wish to confirm that the said Raymond Ogwe is neither an employee nor a partner of our firm. Please note that our firm has only been engaging him to hold our briefs occasionally. We further wish to inform you that if he filed any pleadings in our names, he did so without our knowledge. We wish to thank you for being kind and considerate for calling on us to clarify the issue which would embarrass our firm finally.”

Yours faithfully,

For Ombati Otieno & Opondo Advocate

Gerphas K. Opondo Advocate.”

42. In his replying affidavit **Raymond Ogwe** stated that the petition together with the supporting affidavit were prepared by the firm of **Ombati Otieno** and **Opondo Advocates**. Further in paragraph 8 of the affidavit he depones thus:-

“That Mr. Ombati of Ombati Otieno and Opondo Advocates informs me which information I verily believe to be true that the letter from Ombati Otieno and Opondo Advocates relied on by Alphonse Mutinda” (though not annexed to the application) was authored by one partner of the said firm and do not represent the authority of the rest of the partners who have since appraised him”.

43. It is a general principle of partnership that every partner is an agent of the firm and his other partners for the purpose of the business of partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firms and his partners, unless so acting has in fact, no authority to act for the firm in that particular matter; (*see section 7 of the Partnership Act, Cap 29(K); Hasbury’s Laws of England, Fourth Edition Reissue, Page 32*).

44. In the letter, **Gerphas K. Opondo Advocate** does not specifically state he is indeed a partner in the firm of **Ombati Otieno** and **Opondo Advocates**. Even if it is assumed that he acted in his capacity as a partner at the firm, in order for his action to bind the firm, it was imperative for him to state that there was no limitation on the authority of other partners that would restrict him from writing such a letter on their behalf.

45. It has been averred that the letter written by **Mr. Opondo** did not represent authority from other partners. To counter such an averment the author of the letter ought to have sworn an affidavit stating that he had express authority from them to deny having filed the petition. Therefore, this court cannot act on the letter. It could only have acted on affidavit evidence. Without such evidence it cannot be concluded that the petition was not filed by **Ombati Otieno & Opondo Advocates**. On record we also have other firms of Advocates appointed by the petitioners to act for them. There is the firm of **Kinyua Mwaniki & Wainana Advocate** acting alongside **Messrs Ombati, Otieno Opondo & Co. Advocates** and the firm of **L.N. Ngolya & Company Advocates**. For reasons aforesaid, the petition herein cannot be struck out on that ground. However, on record it is evident that **Mr. Ogwe** was unqualified to practise as an advocate when he appeared before this court. He is guilty of an offence. (*see Sections 31 and 32 of the Advocates Act*).

46. With regard to the 1st issue – whether the parliamentary Elections for Mavoko Constituency held on 4th March, 2013 was conducted fairly, transparently and in accordance with the constitution of Kenya, 2010 and all other laws governing such elections, I will determine various sub-issues

- alluded to in evidence and submissions filed by counsels for the 1st and 2nd Respondents.
47. It was alleged that failure to include the 1st petitioner's last name in the ballot papers affected the outcome of the results. PW8, the 1st Petitioner herein, stated in his evidence that his last name "**Kabuti**" was omitted from the ballot papers; the omission confused his supporters; and the voters were not able to identify him.
48. The names in the ballot papers were not "**Wilson Mbithi Munguti Kabuti**" as he intended. PW4 **Sammy Mutua** who has known the 1st Petitioner since 1975 said the name he was familiar with, that is "**Kabuti**" did not appear on the ballot paper but he did vote for him because he knew his other names "**Wilson Mbithi Munguti**" and his photograph appeared on the ballot paper. He was also aware of his party's symbol, which was a sheep. The 1st petitioner however argued that the photograph on the ballot papers was not the one he submitted to IEBC. Therefore, failure to include his name and correct photograph adversely affected his chance of winning the elections.
49. The returning officer **Ms Faith Wambui Mugo** representing the 2nd Respondent testified that the 1st Petitioner supplied them with names during voter registration exercise. Thereafter he furnished them with two (2) copies of his passport size photos both in soft and hard copy. This was the information entered into their systems. Thereafter the 1st petitioner had a duty of verifying those particulars prior to printing of ballot papers.
50. 1st Petitioner conceded that indeed when he registered as a voter he used his National Identity Card. He supplied the IEBC with his identity card. He gave them a passport photograph as well. He however argued that he took a deed poll on change of name to IEBC on the date of nomination. **The question to be answered is whether IEBC could have acted on the deed poll on change of name?**
51. The 1st Petitioner annexed a certified copy of a deed poll on change of name dated 20th November, 2012. On being cross-examined he denied having caused it to be advertised in the Kenya Gazette. Change of name is effected through the use of deed poll. The 1st petitioner was required to register the deed poll at the Principal Registry. The Registrar was then supposed to cause the deed poll to be advertised in the Kenya gazette. If this procedure had been followed the general public would have been made aware of the change of name. It must be remembered that the Registrar has a discretion to decline to accept registration (*vide the Registration of Documents Act*). It is only after the Registrar accepts the registration that the applicant can be entitled to use the preferred name. Otherwise he cannot purport to use the new name.
52. In this petition the duty was upon the petitioner to prove that indeed the Registrar accepted the new names as spelled out in the deed poll. Thereafter it was gazetted, but IEBC declined to make the necessary changes. He however failed to do so. He cannot fault IEBC for a mistake he personally made. IEBC would not have been expected to flout the laid down regulations by acting on a document that was not gazetted. **This brings us to the question whether failure to include the name Kabuti on the ballot paper and the photo of the 1st Petitioner's preference affected the outcome of results.**
53. PW4, **Sammy Mutua** in his affidavit stated that he was not able to vote for the 1st Petitioner just like other people because of the anomaly of exclusion of his popular name. When cross-examined however, he said he voted for him because he had knowledge of his other names and he saw his photograph and a symbol of his party that guided him.
54. Each candidate was supposed to be nominated by a particular party which party was represented not only by name but also by a symbol. This was provided for by regulation 9 and 10 of the Elections (general) Regulations 2012 that states that:-

"1) The Commission shall by notice in the Kenya gazette and through electronic and print media of National circulation and other easily accessible medium notify the public of the distinctive symbol for use by each political party candidate at elections.

2) The political party symbol shall be the symbol by which the respective party is registered under the political parties Act.

3) Each political party in a coalition of political parties shall use its own symbol.

(10) (1) the commission shall by notice in the gazette and through electronic and print media of National Circulation and other easily accessible medium, publish the symbol approved for each independent candidate.

(2) The symbols published under sub-regulation

(1) shall be gazetted at the same time as the list of persons nominated to contest the election". (See section 24(1) (a) of the Elections Act.)

55. Rule 38 (a) of the Elections (general) rules 2012 provides that, nomination papers submitted by a political party candidate to the commission shall contain the candidate's name as it appears in the register of voters.
56. Having failed to gazette the deed poll on change of name, the 1st respondent should not have been expected to be accorded special treatment. He was required to comply with the law. The name in the register of voters as admitted was **Wilson Mbithi Munguti**. Procedurally it was the name that was expected to be on the ballot papers.
57. In an endeavour to prove their case, the 1st Petitioner annexed a printed document with names and photographs of all candidates who participated in the elections in the Mavoko Parliamentary Constituency, party symbols used and the total votes garnered. It was his evidence that the photograph of his image appearing therein is what he had submitted to IEBC. He however failed to establish how he obtained the said documents containing the photographs. The Returning Officer was categorical that the alleged data did not emanate from IEBC. She stated that to access such data one needed a password which was only within the knowledge of IEBC officers. The 1st Petitioner admitted that he did not have the password. It was also established that names of candidates were in alphabetical order per the arrangement of IEBC as opposed to the document annexed by the 1st Petitioner. The document therefore did not emanate from IEBC.

Vote buying before and on the Election day and bribery

58. The petitioners alleged that there was vote buying and bribery which were offences committed by the 1st Respondent contrary to the Second Schedule proviso (6) (h) of the Election Act which provides for the electoral Code of Conduct governing the candidates. They called witnesses to support their claim. PW2 and PW7 claimed they were given approximately 50 – 200/= to vote for the 1st Respondent. The two (2) were in different areas when the bribery supposedly took place that is, if indeed they were bribed and it was within their knowledge that the money received was a bribe meant to induce them to vote in a particular manner.
59. Where bribery is alleged, a high degree of proof is required. *Halsbury's, Laws of England, 4th Edition Vol. 15* on Elections, also gives an insight as to the nature of evidence required to prove bribery. Under paragraph 695 on proof of bribery, It is stated:-

“Due to proof of a single act of bribing by or with the knowledge and consent of the candidate or by his agents, however insignificantly that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances maybe, such as they can allow in certain conditions in cases of treating or undue influence by agent.

For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established, suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive”.

60. This position was well put in the case of *Simon Nyaundi Ogari & Another versus Hon. Joel Omagwa Onyancha and 2 others [2008] KLR D. Musinga, J* (as he then was) held:-

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, more especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand”.

61. PW2, **Justus Mutiso Makau** claimed that the 1st Respondent bribed him. He gave him Kshs. 50/= at **Muthwani Market**. When pressed hard during cross-examination he however changed the story and said he was given the money as a friend but the money was to entice him to vote for him. He however, did not report the incident to the authorities. PW7 **Joshua Musyoki** said he was among people given money by the 1st Respondent at Ndovoini. He received Kshs.200/=. These two (2) witnesses were in two (2) different areas. Each one of them was required to specifically prove the allegations. A confession of each witness was not enough. A person who receives a bribe is as guilty as the one who gives. A corrupt motive must be proved, not only in the mind of the person being bribed but also in the mind of the giver. Such a recipient’s evidence would therefore need to be corroborated. The witnesses claimed that more than 100 people were present when the bribery took place yet called no witness to confirm their allegations. The evidence adduced therefore falls short of proving the allegation of bribery. Such evidence is not sufficient to cause this court to invalidate the elections.
62. The Second Schedule of the Elections Act specifically provides that, any misconduct can and should be reported by any person to the Electoral Code of conduct enforcement Committee, which committee will liaise with Government Security Agencies in the constituency and report suspected malpractices. Failure therefore to report the campaigning out of time, alleged bribery and vote buying cannot be remedied by this court unless there is concrete proof.
63. The 1st Petitioner annexed to his affidavit purported photographs of the 1st respondent talking to people. It is alleged that in the photographs the 1st respondent was campaigning outside the polling station square. The photographs did not indicate the time and date when they were taken. No evidence was adduced in court as to who took them, how they were processed. The photographs shows the person said to be the 1st respondent talking to a few people. A close look of the photographs would not make one form an opinion that indeed it was the 1st respondent addressing a small group of people.
64. The petitioners alleged that the 2nd respondent used motor vehicle registration **No. KBG 276C** for transportation. The said motor-vehicle is alleged to be connected to the 1st respondent by virtue that it is Municipal Council vehicle used by him as he was previously a Mayor. The petitioners exhibited the said photographs as evidence. The photographs which were purportedly taken at **Joska Market Polling Station** opposite **stream 1**. The photographs are not dated. It is hard to tell from the photograph whether the allegation is true. The photographs only show the motor vehicle parked outside a building which one cannot tell whether it is a polling centre or not. It looks empty and stagnant. For this evidence and that of other photographs annexed to the affidavit of the 1st petitioner to have been admissible, a certificate of the person who processed them should have been adduced and produced. (*see section 65 of the Evidence Act; Moses Wanjala Lukoye versus Benard Alfred Sambu 3 others, , election Petition No. 2 of 2013*).
65. There were allegations that results were cancelled and/or altered without consent of all parties involved and without prior consultations. Further, that there were discrepancies in tallying including missing results and/or results which were not included in the summary sheet.
66. The 2nd Respondent and Petitioners had different sets of forms 35 so far as the format is concerned. The petitioners did not prove where they obtained the forms from. Given that the 2nd Respondent is the only entity that can be considered in elections by virtue of Article 88 of the Constitution to be the author of Form 35 and having supplied the court with the same pursuant to

the Rules, this court is bound to rely on the forms from the 2nd Respondent and analyse them accordingly.

67. In his affidavit, the 1st Petitioner at paragraph 9 (b) and (j) averred that some forms used were not the official IEBC forms. He pointed out that **Railway Nursery School at stream 3; Syokimau Borehole at stream 2 and 7; Makadara (Imani) Nursery at Stream 1 and 4; Mavoko Primary at stream 22; and Githunguri Primary at stream 2.**
68. A perusal of forms 35 in respect of the mentioned stations shows that polling stations **Code No. 003 Railway Nursery School stream 3; 041 – Syokimau Borehole at stream 2 and 7; and 006- Makadara (Imani) Nursery School stream 1 and 4;** have the IEBC rubber stamp impressions and the official logo. There was no **Mavoko Primary School stream 22.** There is however, **Mavoko Primary Polling Station – Code No. 007 stream 2.** The forms 35 filled in respect of that station have an official IEBC rubber stamp impression.
69. The form 35 filled in respect of **Githunguri Primary School stream 2** has the IEBC logo but is not stamped. The question to be posed is whether that discrepancy can affect the outcome of the elections in order to invalidate the elections? The 1st Respondent got **19,724 votes.** At the **Githunguri Polling Station** he garnered **49 votes.** Therefore, even if we were to subtract the **49 votes** cast in his favour he would remain with **19,675 votes** defeating the runner-up with **8035 votes.**
70. On the issue of missing results, the petitioners annexed a document, annexure “WM8” which they referred to as a summary sheet. These documents had some results missing. When cross-examined about the documents, PW8 said he got it from the Returning Officer immediately she declared the 1st respondent a winner. The Returning Officer denied having given him the document. The document does not have any stamp impression from IEBC or its logo. The official document, the summary sheet, Form 36 provided by IEBC bears its logo and stamp impression. It indicates results received and posted which is as follows;
- Kyumvi (what they referred to as Chumvi) has results from all five (5) streams posted.
 - Kyemutheke Primary School, Polling station No. 23 has results posted.
 - Makadara Imani Nursery School Polling station No. 006 has results from all 5 streams posted.
 - St Pauls Primary School, polling station No. 012 had only 5 streams and all results were posted
 - Syokimau Mlolongo Polling Station No. 042 had all results from the 3 streams posted
 - The petitioners alleged that results were not declared but appeared in the summary sheet it was not enough to state so in the affidavit. This had to be demonstrated. It had to be proved. The allegations were not proven.
71. It was stated that there was failure to comply with regulation 79 of the Elections (general) Regulation 2012 which provides for inclusion of the agents when tallying votes. According to Regulations 79 of the Elections (general) Regulation 2012, candidates or their agents ought to sign the declaration in respect of elections. The Returning Officer is expected to request those present to append their signatures.
72. The Petitioners claimed that some of their agents were not allowed in the polling stations. They did not sign the declaration. They called PW1, **Brian Opondo Odhiambo**, PW2, **Justus Mutiso Makau** and PW5, **Florence Mwende** to substantiate their claim. PW1 claimed that he signed form 35 for the Presidential Elections but not that of Member of Parliament, Senator, Governor, Women Representative and County Representative. He also claimed that he was an accredited agent as he had the badge and appointment letter; documents that he did not adduce in evidence. PW1 being an agent should have been well equipped with knowledge pertaining to elections. He should have known forms required to be signed by him were forms 35. Failure to prove that he was indeed an accredited agent leaves this court to doubt him. Without prove of having been one he must be dismissed as having not been an accredited agent. His evidence must also be disregarded.
73. PW3, **Richard Mwanzia Likui** and PW5 also stated that they were agents. Both of them did not produce IEBC badges for identification purposes. Infact they had none, they were not sworn in by the 2nd Respondent prior to the elections and their names were missing from the list of agents adduced by the 1st Petitioner as a list of all his agents, which list was forwarded to the 2nd

Respondent.

74. PW5 claimed that he was filling in for one Elijah who could not make it to the polling station. It emerged that there were no mechanisms put in place by the 2nd Respondent to accommodate agents whose names had not been forwarded to them and those that had not been sworn by them prior to the elections. Consequently, the testimonies of PW1, PW3 and PW5 cannot be relied on.
75. Regulations 62(4) of the Election (general) Regulations 2012, provides that:-

“every agent appointed by an independent candidate or political party for the purposes of those regulations shall at all times during the performance of the duties authorised by the independent candidate or political party display the official badge supplied by the Commission”.

76. Even if they were to be believed, their absence or failure to append signature on form 35 would not have invalidated the election. This position is expressly provided for in Regulation 79(6) of the Elections(general) Regulations 2012 which states thus:-

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

77. The regulations required affixation of results on the door of each polling station. The petitioners alleged it was not done. The respondents on the other hand argued that results were affixed on the doors. Other than making the allegation the petitioners failed to adduce evidence to prove that fact.

78. The petitioners in this petition had the responsibility of proving their case. Section 107 of the Evidence Act provides that:-

“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?”

2) When a person is bound to prove existence of any fact it is said that the burden of proof lies on that person.”

79. The burden of proof is normally on the party that alleges as stipulated by the Evidence Act proviso above. In the decision of the Supreme Court – ***Election Petition No. 5 of 2013, Raila Odinga & Others versus IEBC & Others***. It was held that ;-

“...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to beat the evidential burden. The threshold should in principle, be above the balance of probability, though not as high as beyond reasonable doubt...”

80. In order for the petitioners to be successful. In this Petition they had a duty of proving their case beyond a balance of probability but not beyond reasonable doubt. The allegations of corruption set out in the petitions which include vote buying and bribery had to be extensively proved this position was expressed in the Indian case of ***Rahim Khursid versus Khurshid Ahmed & Others 1975 AIR 290, 1975 SCR(1) 643*** , the Court stated thus;

“We have therefore to insist that corrupt practises, such as are alleged in this case, are examined in the light of the evidence with scrupulous care and merciless severity. However, we have to remember another factor; an election once held is not to be treated in a light hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing serious

elements of uncertainty in the verdict already tendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency courts naturally must respect this public expression secretly written and show extreme reluctance to set aside a declaration void election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practise alleged against the returned candidate is adduced...”

81. It is apparent that in this petition, after most candidates were defeated they ganged up and filed a joint petition. The nature of evidence adduced clearly shows that they were not serious. The electorate having spoken by electing a candidate of their choice must be respected. In a nutshell, the petitioners fell short of discharging their duty. They failed to offer clear and cogent evidence to convince this court to uphold their allegations set out in the petition.

This therefore brings us to the issue whether the elections were fair, transparent and credible?

82. The Uganda Supreme Court in the case of– *Rtd Co. Dr. Kizza Besigye versus Electoral Commission, Yoweri Kaguta Museveni (Elections Petition No. 1 of 2006* stated thus:-

“To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or Government Ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time

Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly”.

83. The Petitioners do not fault the 2nd Respondent for conducting the process unfairly at the stage of nomination. They however, fault them for malpractices during the campaigns and voting tallying process. The petitioners did not prove these allegations. Voters were given an opportunity of electing candidates of their choice and agents present signed forms 35. The Biometric Voter Registration Kits having failed to function in all polling stations countrywide, the 2nd Respondent reverted to manual system of voting. There was no evidence of any of the candidates having taken undue advantage over the others. The elections were therefore conducted fairly.

84. From the foregoing, it is apparent that the petitioners’ allegations of there having been election malpractices including alterations and cancellation of results; missing results; failure to display results outside polling station doors were to be proved to the required standard. I find that the elections were fair, transparent and credible.

85. The verdict of the electorate must therefore be respected. It cannot be interfered with. In the premises, I find the 1st Respondent having been validly elected as the **Member of National Assembly for Mavoko Constituency.**

86. In the premises, the petition dated 9th April, 2013 be and is hereby dismissed.

87. With regard to failure to take out a practising certificate by **Mr. Raymond Janan Ogwe**, I do hereby direct that the Law Society of Kenya takes up disciplinary measures against him.

88. Costs of the Petition shall be borne by the Petitioners in any event.

DATED, SIGNED and DELIVERED at MACHAKOS this 18TH day of JULY, 2013.

L.N. MUTENDE

JUDGE

In presence of:

Mr. Ngolya for the Petitioners

Mr. Mutinda for the 1st Respondent

Mrs Wambua for the 2nd Respondent

CC- Collins

Ann Legal Researcher

L.N. MUTENDE

JUDGE