



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**NAIROBI ELECTION PETITION NO. 5 OF 2013**

**KAKUTA MAIMAI HAMISI .....PETITIONER**

**VERSUS**

**PERIS PESI TOBIKO.....1<sup>ST</sup>RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**RETURNING OFFICER KAJIADO EAST CONSTITUENCY... .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner is Kakuta Maimai Hamisi. He was nominated by the Orange Democratic Party (ODM) to contest the seat for member of the National Assembly for Kajiado East constituency. The elections were slated for 4<sup>th</sup> March 2013. He was cleared to run by the 2<sup>nd</sup> respondent, the Independent Boundaries and Electoral Commission (IEBC). There were 6 candidates in the election. At the conclusion of the polling, the IEBC declared that the 1<sup>st</sup> respondent, Peris Pesi Tobiko, had won with 23,645 votes. The petitioner was second with 22,771 votes. The margin was only 874 votes. By the petitioner's version of electronic results, the chasm was narrower: he got 22,640 against the 1<sup>st</sup> respondent's 23,381 votes. The difference was 741 votes.
2. In either scenario, he was the first runners up. In our *first-past-the-post* electoral system, being second does not count for much: the winner takes all. The petitioner alleges that the election was marred by serious irregularities and malpractices. His case, in a nutshell, is that the results do not reflect the will of the people. He has thus brought proceedings seeking three key reliefs: first, for a declaration that the poll was not credible, free and fair. Second, for nullification of the election of Peris Pesi Tobiko. Lastly, he prays for costs.
3. At the pre-trial conference, the petitioner was allowed to call 4 witnesses. The trial was fixed for 4 days with specific time allotments for all parties and their respective witnesses. Those timelines were agreed upon by all parties. They were also dictated by the requirements of article 105 of the Constitution and section 85 of the Elections Act 2011: An election court must determine an election petition within 6 months from the date of its presentation to court. The petitioner frittered away his time by seeking an adjournment on the first day of the trial ostensibly to negotiate an out of court settlement. It was vigorously opposed by the other parties. For reasons in a considered ruling by the court on 14<sup>th</sup> June 2013, the adjournment was granted for a day. There was an intervening weekend. The settlement was not forthcoming which cost the petitioner time for trial. In the end, the petitioner relied on his evidence and that of one other witness.
4. The petitioner (PW 1) relied substantially on his affidavit in support of the petition sworn on 8<sup>th</sup> April 2013. He produced his party's nomination certificate as well as the clearance certificate from the IEBC. There were 6 candidates as pleaded at paragraph 5 of the petition. He testified that

- initially, the 3<sup>rd</sup> respondent announced that the 1<sup>st</sup> respondent, Peris Pesi Tobiko, had won the election by garnering 23,381 votes against the petitioner's 22,640 votes. He stated that the elections were not free and fair. The petitioner's case is that the election was rigged. In his view, the figures were incorrect and did not add up. He elaborated on the matter as follows. The preliminary tally or table of results annexed to the affidavit of Richard Saoina (DW 2) marked "RSP II" is an *unofficial* and *false* document: it bears no IEBC seal and is not approved by any party agent. The petitioner stated that the signature of the petitioner's agent John Ketorah is forged. Yet that is the document used to announce the results.
5. The petitioner then gave examples of manipulation of votes. The results of Noonkopir polling station stream 018-6 were published 5 days later after declaration of final results. The witness referred to paragraph 245 of the replying affidavit of Jennifer Mugambi (DW 4), showing the total registered voters in the stream were 762 with a 48% turn out. He said the 1<sup>st</sup> respondent was given an extra 200 votes. The final tally shows she got 228 votes. At St Monica, polling centre 016 stream 1, the recorded votes for the 1<sup>st</sup> respondent were 322 against the petitioner's 280 votes. The 1<sup>st</sup> respondent was added 10 votes to make it 332 votes. At Korrompoi primary school, centre 007, the petitioner testified that there was electronic transmission of results. He referred to a document marked "H3" in his affidavit. As per that document, he got 175 votes while the 1<sup>st</sup> respondent got 4 votes only. In the final results in form 36, one candidate, Margaret Matee, is now shown to have 7 votes while the 1<sup>st</sup> respondent was given 153. The petitioner stated that 153 votes were shifted from Margaret Matee to Peris Tobiko.
  6. The total votes cast for the member of National Assembly as per the IEBC were 58,842. As per the petitioner's edition of form 36 marked "H4" in his affidavit, the total votes cast in the presidential election were 58,457. The petitioner testified that the mismatch was not explained. To the petitioner, the votes should match for all the 6 seats in the general elections as every voter was receiving six ballots. At page 55 of the affidavit of Jennifer Mugambi, the total votes cast at Ereteti Primary School, centre 015, are 398. The correct number of votes should total 395, a difference of 3 votes. He referred to form 35 at page 97 for St. Monica nursery stream 18. It is signed but not dated. No seal or signature of IEBC appears. The reverse does not have details of the presiding officer or signatures of party agents
  7. The petitioner then referred to form 36 at page 245 of the affidavit of Jennifer Mugambi reflecting the total votes cast for 1<sup>st</sup> respondent as 23,381 against his 22,640 votes. He testified that those figures differed from the actual figures used to declare the winner by IEBC. He said the IEBC was either negligent or incompetent. The petitioner also testified that some forms 35 annexed to the affidavit of Jennifer Mugambi were altered or illegible for example at pages 1, 3, 5, 7, 9, 11, 13, and 15 to 29. The reverse of forms 35 appearing at pages 65, 97, 99, 155, 193, 197, 213 and 221 are not signed by agents. There are also no statutory comments by the presiding officer. Forms at pages 23, 33, 63, 85, 89, and 127 have either one or two signatures from the agent from the National Alliance (TNA) party. Forms 35 at pages 73, 101, 111, 115, 121, 123, 125, 129, 131, 141, 157, 161, 197 and 217 have alterations. In some cases there is no seal by IEBC or authenticating signatures of agents. It was the petitioner's case that the documents were unreliable.
  8. The petitioner testified that some IEBC officials in charge of the elections in the constituency were relatives of the 1<sup>st</sup> respondent. They included Bruce Likama (DW 6) who was a presiding officer. The petitioner said that Bruce was also a chief campaign agent of the 1<sup>st</sup> respondent. He produced the document marked "H 4" in his affidavit, an extract from a page in social media in which Bruce expressed direct support for the 1<sup>st</sup> respondent. Bruce could not thus be expected to act impartially. There was also a sister of the 1<sup>st</sup> respondent Sinkiyian Nkini Tobiko. She was the presiding officer at Naserian polling station number 011. The petitioner testified that he had made formal complaints to the Returning officer before the elections but nothing was done about it.
  9. The witness referred to paragraph 15 of his affidavit. He alleged that at some point, the presiding officer, Bruce Likama (DW 6), left in a *Toyota Rav 4* car with the 1<sup>st</sup> respondent. They went to Miamis restaurant. The vehicle returned later with the presiding officer. He testified that that is where the alterations were taking place. He said he raised the issue with the returning officer as detailed his affidavit.
  10. Lastly, the petitioner testified that his agents were denied entry at polling stations and were harassed. At St. Monica, his agents were bullied and prevented from signing or verifying the entries in forms 35. They were also not present at the counting of ballots. They did not sign

- the final results. In the final analysis, the petitioner asserted that the elections were far from free and fair. As the vote difference between him and the winner was less than 900 votes, and considering the discrepancies above, the petitioner prayed that the election of the 1<sup>st</sup> respondent be nullified.
11. The petitioner's final witness was Maximilla Osambla (PW 2). She was the petitioner's ODM chief agent at St. Monica nursery school polling center. She testified that she was in charge of 22 other agents. She arrived at the station at 6.00a.m. on 4<sup>th</sup> March 2013 and left the station on 5<sup>th</sup> March at 8.00. There were 22 streams, hence the 22 agents. She posted the agents in streams 1 to 7, 9 to 13, 19, 21 and 22. She did not post any to streams 8, 14 and 20. She alleged that the presiding officers refused her to do so on grounds that there were other agents from Wiper Party already posted to those streams. She stated that in the remaining streams, the agents were not allowed to supervise or oversee anything. In stream 11, where she stayed largely, there were 8 ODM agents. She said she was not allowed to sign form 35 for stream 11 appearing at page 77 of the 3<sup>rd</sup> respondent's affidavit.
  12. She however conceded that the results in the form were correct. Only 3 agents from URP and TNA parties signed it. She said that at around 5.00 p.m. on election day, there were about 500 people still queuing at St. Monica but they were told to go home. Of all her agents, only 17 remained at work. Most of them did not sign forms 35. The witness stated that counting of votes was irregular because the presiding officer placed the ballots on a table and it was the agents who were counting the votes. There was no verification by her agents. That is why she refused to sign. She testified that her agent in stream 5, one Esau Okuku, alerted her that *everyone* there was asleep. She went there and confirmed it. In her view, the sleep was not *natural*. The persons looked confused when they were woken up. She found ballot papers were on the table and others on the floor. The tent was not secured. She made a complaint to the presiding officer but nothing was done.
  13. Lastly, the witness stated that there was a suspicious power black-out at the polling center. It lasted 40 to 45 minutes. The power failure was "*selective*" because it did not affect the nearby Catholic Church. She produced two annexures to her affidavit, some small slips of paper or notes, showing that lights went off. In sum, her evidence was that the elections were conducted in an irregular, partisan and opaque manner. That marked the close of the petitioner's case.
  14. The 1<sup>st</sup> respondent Peris Pesi Tobiko was elected the member of the National Assembly in the disputed poll. She relied on her affidavit sworn on 25th April 2013. She was nominated to contest the elections by the TNA party. She was cleared to run by IEBC. At the conclusion of the poll, she was issued with a certificate by IEBC declaring her the winner. She did not experience or witness any irregularities in the elections. In her view the elections were free and fair. She denied any relationship with Bruce and Joshua Likama. She conceded however that the two are members of her clan. She would not categorize clans as a relationship. She testified that a clan is like a sub-tribe in Maasai land. She did not deny that her sister presided over a polling station. She only saw her on the morning of 5<sup>th</sup> March 2013 at the tallying centre in Isinya. She testified that she only learnt in court that her sister's station was at Naserian. She denied that her sister was partial. She explained that at Naserian, the petitioner got 131 votes against her 113 votes. He was leading by 18 votes. She denied that Bruce Likama was her supporter or that he accompanied her in the *Toyota Rav 4* vehicle to a restaurant in the town.
  15. The witness then turned to the contested forms 35 and 36. At page 60 of her affidavit is the form 35 for Noonkopir Secondary School polling centre stream 6. She got 228 votes while the petitioner got 202. There is no alteration on the form. She said the form was filled out after finalization of counting. At page 61 is another form 35 for St. Monica Nursery stream 1. She got 332 votes there. The petitioner got 280 votes. She said there were no alterations in the document. At page 141 of the 2nd respondent's bundle is form 35 for G.K. Athi River prison primary school stream 8. She got 276 votes against Mr. Kakuta's 212 votes.
  16. Regarding the allegation that 153 votes at Korrompoi belonging to another candidate were switched, the witness responded thus: Page 56 of her affidavit contains form 35 for Korrompoi primary stream 1. She insisted that she got 153 votes while Margaret Matee got 7 votes. She took up cudgels on the electronic version of results exhibited by the petitioner. She said that the electronic transmission (BVR) system failed in the whole country. The petitioner's annexure

- marked "H3" showing she garnered only 4 votes at Korrompoi stream 1 differs with the form 35 and should be disregarded.
17. On the evidence of Maxmilla Osambla (PW 2), the 1<sup>st</sup> respondent's view was that the witness was untruthful. Lastly, the witness said that on 6<sup>th</sup> February 2013 she attended a meeting for all aspirants for the seat. It was called by IEBC as per minutes in the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's affidavit. Neither she nor the petitioner raised any issues on the impending elections. Her position is that she won the election fair and square. She thus prayed that the petition be dismissed with costs.
  18. The 1<sup>st</sup> respondent's second witness was Richard Saoina Parmereta (DW2). He voted at Oloorsirkon primary school polling station number 23. He was the chief agent for the National Alliance party (TNA). He relied on his affidavit sworn on 25<sup>th</sup> April 2013. In the afternoon of the election day, he went to St. Monica polling station. He saw some ODM agents including the chief agent Mr. Jonathan Koin and Mr. John Keterah who were both known to him. He stayed there until midnight. He said that ODM agents were not chased out. He never heard of such a complaint. He left Isinya the following day at about 1.00 p.m. Mr. Koin was there with other chief agents. The last annexure to his affidavit marked "RSP II" shows the aggregate results or provisional results. He signed that document. Mr. Koin did not sign it. He did not know why. There is an IEBC stamp and signature of the IEBC official. John Keterah also signed it.
  19. He denied that the picture on the social media page marked "H4" produced by the petitioner was his. He stated that forms 35 exhibited in the 1<sup>st</sup> respondent's deposition are duplicates from the IEBC. He said the IEBC was making many copies; for the agents, for pasting on the ballot boxes, for the returning officer and so forth. To the witness, the elections went on smoothly and were free and fair.
  20. The last witness for the 1<sup>st</sup> respondent was James Mutuku Muthoka (DW3). He voted at St. Monica stream 13. He swore an affidavit on 25<sup>th</sup> April 2013. He was an agent for TNA. He reported in at 5.00 a.m. on election day and left at 5.00 a.m. the next day. He testified that there was no power failure. The polling station had alternative power from gas lamps supplied by IEBC. They were lit at dusk notwithstanding availability of electric power supply.
  21. He signed form 35 at the end of the exercise as per his exhibit marked "JMM 11". He also knew some other agents such as Esau Okuku for ODM party. The latter also signed the first slot on the reverse of the form 35. It was his evidence that no one was forced to sign the form or refused to sign. In that stream, Kakuta got 297 votes while Peris Tobiko got 320 votes. He stated that the form 35 has not been altered. That marked the close of the 1<sup>st</sup> respondent's case.
  22. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents called 3 witnesses. The first to take the stand was Jenniffer Wanja Mugambi (DW4). Although she is not identified in the petition by her name, she was the returning officer described as the 3<sup>rd</sup> respondent. She was the constituency elections coordinator, Kajiado East constituency. She managed the disputed elections. She relied on her affidavit sworn on 30<sup>th</sup> April 2013. She was posted to Kajiado East in October 2012. She testified that employees for the positions of polling clerks were to be drawn from Kajiado East Constituency. It made logistical sense. The employees attended interviews before an IEBC panel. At the time the employees were interviewed in February 2013, IEBC could not tell whether they were related to candidates because nominations had not been held.
  23. She stated that there were 124 polling stations, 124 presiding officers, and 124 deputy presiding officers. In addition, there were 8 presiding officers at the Isinya tallying centre. Polling clerks were almost 800. In some polling stations there were 4 or 6 clerks. She organized the meeting for aspirants held on 6<sup>th</sup> February 2013. From the minutes at page 250 of her affidavit, no candidate raised an objection. She testified that she did not receive any complaint about refusal of any agent to enter a polling station. St. Monica station had over 21,000 voters and 22 polling streams with 965 to 973 voters. The presiding officers had the following materials: ballots, ballot boxes, seals, gas lamps, tamper-proof envelopes, indelible inks, stationery, oaths of secrecy to assist voters (forms 32), and forms 35 for entry of results for that station. Forms 35 were issued in several sheets – one to be placed inside the ballot box, another to be pasted on the box, one to be pasted on the door, a copy for the agent(s) and so forth.
  24. The witness explained the procedures on close of poll and counting of votes. At closing time and

- once all voters on the queue at closing time have voted, the presiding officer personally ensures that the boxes are sealed. The ballots are then placed on a table in the presence of clerks, observers and agents. Candidates are not allowed to remain at the polling station. The presiding officer then sorts out the ballots by unfolding them, and placing them upside down. They are then read out in favour of candidates and tied up in bundles of 25. There is also a bundle of rejected votes. The votes are then recorded in form 35. The presiding officer then fills section 1 to 7 of part A and sections 1 to 22 of part B of the form as appropriate. The total valid votes for candidates should equal the aggregates for candidates. The presiding officer then gives the form to the agents to sign. If an agent refuses to sign, the presiding officer will still proceed to sign. She testified that she was unaware that Maxmilla (PW 2) had refused to sign form 35.
25. In her view, the column titled “reasons for refusal to sign” does not affect the validity of form 35. The presiding officer also has a poll diary showing details of agents. The results and sealed ballot boxes are then delivered by presiding officers to the returning officer at the tallying centre. The witness testified that she received Kajiado East results in form 35 and the sealed ballot boxes at the tallying centre. She cross-checked the results and announced them loudly to the public. She did not open the boxes. The tallying clerks were there, as well as the presiding officers. Part A of form 35 was counter-checked for total registered against the votes cast.
  26. Her evidence was that at the tallying centre, the returning officer or presiding officer is authorized to make certain changes. However, only part A numbered 1 to 7 on form 35 can be altered but not part B on the votes of candidates. After reading aloud the results from forms 35, the data clerks recorded them on a tally sheet which became form 36. It is a manual process to transpose data from forms 35 to form 36. She said it could result in clerical errors due to the speed and flow of information. She gave the following examples: There were wrong entries on the form at page 245 of her affidavit which were rectified in form 36 at page 247. At St. Monica, stream 016/1 (page 59), the form 35 showed votes for Peris Tobiko were 332. At page 245 she made an entry less 10 votes. At page 247, she corrected the votes to read 332. She said that that change affected the total valid votes so that at page 245 the indicated votes are 759. That was then corrected to read 769 at page 247. It also affected total votes cast of 762 which she corrected to read 772. Her evidence was that those were the correct and genuine votes.
  27. She gave similar examples for Noonkopir polling centre 018/6 (page 111) and G.K. Athi River prison primary school polling centre to explain the discrepancies pointed out by the petitioner. At Noonkopir, Peris Tobiko had 228 votes but the provisional form at page 243 indicated 28 votes instead. That was 200 votes less which she corrected to read 228. At GK Athi River primary school station, Peris got 276 votes against Kakuta’s 212 votes. In the initial form 36, she had been given 278 votes (2 more). The witness corrected it at page 248 to read 276. No other candidates were affected by those changes.
  28. She testified that she did not receive any electronically transmitted results. She said the document produced by the petitioner marked “H3” would be an electronic transmission of provisional results after presiding officers were through with the counting at their polling stations. She said that exhibit “H3” in the petition is a sample of provisional electronically transmitted results for Korrompoi primary school stream 1. In that document Mr. Kakuta had 175 votes, Ms. Matee 153, while Peris had 4 votes. She stated that the true results were that Margaret Matee had 7 votes while Peris garnered 153 votes as reflected in form 35 for that station (page 23). That form is signed and dated by the presiding officer and the agent. She testified that the forms at pages 245 and 248 were made the same day and not 5 days as alleged by petitioner. She denied that she prepared a “ghost” form.
  29. Regarding the exhibit marked “PPTIV” in the 1st respondent’s affidavit, she stated that it is a provisional hand-written document that she used to announce the results. That was due to failure of a printer. It reflects the total votes for all the 6 candidates and agrees with form 36 at page 246. The totals on the initial form 36 had also omitted the results for all candidates at Isara primary school station 029. She stated that the 1st candidate had been denied 12 votes, the petitioner had been denied 131 votes, Margaret had been denied 2 votes, Peris had been denied 56 and so forth. She referred to form 35 for Isara at page 171. The entries in form 36 were corrected at page 248. The form is signed by agents. She said the petitioner has not complained about entries for Isara primary school polling centre.
  30. The witness stated that the Petitioner got 22,771 votes while the 1st respondent got 23,645. The

- total valid votes were 58,548. Total votes cast were 59,294. She testified that those were the actual results. The changes in form 36 did not affect the declaration in favour of the petitioner. She said that figures at paragraph 11 of the petitioner's affidavit are not the final results and are incorrect. The exhibit "J1" in the affidavit of Jonathan Koin (who did not testify) are not genuine documents from IEBC and do not correspond with official documents. She said that the other figures cited by the petitioner in paragraph 11 (23,381 votes for 1<sup>st</sup> respondent and 22,640 for the petitioner) were incorrect.
31. The witness stated that she came to know Bruce Likama (DW 6) in November 2012. He was recruited by her predecessor. The 3<sup>rd</sup> respondent posted him to St. Monica stream 13 on 3<sup>rd</sup> March 2013. The form 35 for that stream by Bruce Likama is also signed by his deputy, Tirati, and 6 agents including one Esau Okuku for ODM. She never received any complaint from St. Monica polling center. At that station, Peris got 320 votes while the petitioner got 297 votes. It agrees with the form 36. She testified that the presiding officer called Sinkiyani Tobiko was in charge of Naserian polling station. The witness did not receive any complaints there. The witness said that the total tallies for presidential, gubernatorial and parliamentary votes can differ. In the end her view was that the results were accurate and that the elections were free and fair.
32. The next witness was Risper Makui (DW 5). She relied on her affidavit sworn on 30<sup>th</sup> April 2013. She was the "master presiding officer" at St. Monica polling station. She was coordinating 22 streams. She said that 12 streams were housed in temporary tents while streams 13 to 22 were in permanent classrooms. She stayed at St. Monica on voting day until the next day. There was electricity supply in the classrooms but gas lamps were also available. She said that no agent was refused entry. However all agents were supposed to have letters of accreditation, IEBC badges and oaths of secrecy. She said that the polling streams closed at 5.00 p.m. She testified that all the voters in the queues by 5.00 p.m. were allowed to vote. She saw some agents sign forms 35. She did not receive complaints that ODM agents were refused to sign form 35. She did not witness a power blackout or the suspicious slumber mentioned by Maxmilla (PW 2). Upon cross-examination, she conceded that she knew one Nancy Tobiko, a sister of Peris Tobiko. Nancy is married to her brother Ronald Mukui. She said that that did not raise any conflict.
33. The last witness was Bruce Likama (DW 6). He relied on his replying affidavit sworn on 30<sup>th</sup> April 2013. He was the presiding officer at St. Monica nursery school stream 13. He was employed as a presiding officer in February 2013. The jobs had been advertised. He knows Peris Tobiko as a candidate or member of National Assembly but not in her personal capacity. He said they are not related. He denied being her chief campaigner. He denied that he ejected any agent from stream 13. He however enforced the rules and requirements for such agents. Some of the requirements were for an IEBC badge and letter of appointment for agents. Mr. Esau Okuku was an agent for ODM and signed the poll diary at item number 3. The witness saw him first at 6:00 a.m. He had no accreditation letter of IEBC. He went for it. It is only then that he allowed him in. He said Esau remained in the centre throughout the day and signed form 35 which the witness prepared. The form has no alterations.
34. He said that he assisted illiterate voters but in the presence of agents. Voting started at 6:16 a.m. and ended at around 6.00 pm. Counting was done in the presence of party agents. He testified that Ms. Tobiko got 320 votes while Mr. Kakuta got 297 votes. He said there was no power blackout in the stream. The stream was in a classroom. He also had 2 gas lamps which were lit at 5.00 p.m. until the end of the exercise. That was per IEBC regulations requiring the lanterns to be lit irrespective of electricity power supply. At 7.00 p.m. on 5<sup>th</sup> March 2013, he left for the tallying centre at Isinya. He said that he did not ride with Peris in a *Rav 4* car or any other vehicle to Miami's restaurant. He handed over the form 35 to the returning officer, Jennifer Mugambi. In his view the voting and counting went on smoothly. That marked the close of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case.
35. At the close of oral evidence, the Court considered the remainder of a notice of motion dated 10<sup>th</sup> May 2013 seeking scrutiny of election materials. I delivered a ruling on 25<sup>th</sup> June 2013 allowing partial scrutiny of votes cast in 4 contested stations. The scrutiny was conducted by the Deputy Registrar in the presence of the agents of the candidates and the other parties in this petition. A detailed report on scrutiny by the Deputy Registrar of the Court was filed. As per the directions in the ruling, it became part of the record. The report was given to the parties on 8<sup>th</sup> July 2013. The

- parties have submitted on it. I will analyze the results of that scrutiny shortly.
36. I have considered the evidence and the pleadings. I have also paid regard to the written and oral submissions by learned counsel for the parties. The parties settled on the following broad issues for determination:
- i. *Was the 1<sup>st</sup> respondent validly elected as member of the National Assembly for Kajiado East constituency in the election held on 4<sup>th</sup> March 2013?*
  - ii. *Did the 2<sup>nd</sup> and 3<sup>rd</sup> respondents conduct a free and fair election and in consonance with the constitution, Elections Act 2011 and the Regulations thereunder?*
  - iii. *Did the respondents declare the true or accurate results of the elections?*
  - iv. *Should the election of the 1<sup>st</sup> respondent as member of the National Assembly be nullified and fresh elections ordered?*
  - v. *Who will meet the costs of this petition?*
37. The petitioner seeks to overturn the election of the 1<sup>st</sup> respondent. The principal grounds are set out at paragraphs 2, 3, 4, 5, 6, 7 and 8 of the petition. In a synopsis, those grounds were: that the entire election was riddled with serious irregularities, malpractices and glaring inconsistencies; that the election was not free and fair and thereby trumped the wishes of the electorate; that the integrity of the election data was cast into doubt; that forms 35 and 36 were altered, incomplete or contradictory; that the agents of the petitioner were either harassed, locked out of polling stations or denied an opportunity to verify the results; that some IEBC officials were relatives of the 1<sup>st</sup> respondent, or were biased and aided the malpractices; and finally, that the election, in the totality of those circumstances, cannot be said to have been transparent and fair. The evidence of the petitioner buttressed those matters. The respondents have in their pleadings and evidence largely denied all those allegations.
38. The statutory and evidential burden of proof rests with the petitioner. The statutory underpinning is at section 84 of the elections Act which provides as follows:
- “83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election”.*
39. It is implied by that provision that elections are not perfect. Consequently, not all malpractices will lead to nullification of the result. See *Morgan and others Vs Simpson and another* [1974] 3 ALL ER 722. The court must however endeavour to uphold the democratic rights and choices of the voter enshrined in the Constitution. See *Steven Kariuki Vs George Mike Wanjohi and 2 others Nairobi* High Court election petition 2 of 2013 [2013] e KLR. Regard must be had to the political rights enshrined in article 38 of the Constitution; and the general principles of electoral design enumerated by articles 81 and 82 of the Constitution. Lastly, the Court must pay heed to the Elections Act 2011 and the Elections (General) Regulations 2012.
40. Hand in hand with that is the cardinal precept of the law of evidence: that he who alleges must prove to the required standard of proof. See *Abdulreheman Hassan Halkamo Vs Abdi Nassir Nuh & others* Mombasa, High Court election petition 6 of 2008 (unreported), *Onalo Vs Ludeki and another* [2008] 3 KLR 614. The standard of proof in election petitions is higher than a balance of probabilities in ordinary civil cases but not beyond reasonable doubt as required in criminal cases. See *Muliro Vs Musonye* (2008) 2 KLR (E.P.) 52, *Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 3 others*, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR, *John Lokitar Lodinyo Vs Mark Lumunokol and 2 others* Kitale, High Court election petition 5 of 2013 (unreported), *Wilson Mbithi Munguti Kabuti and others Vs Patrick Makau King’ola and others* Machakos, High Court election petition 9 of 2013 (unreported), *Rishad Amana Vs Independent Electoral and Boundaries Commission and 2 others* Malindi, High Court election petition 6 of 2013 (unreported), *Richard Kalembe Ndile and another Vs Patrick Musimba Musauetal* Machakos, High Court election petition 1 (consolidated with petition number 7 of 2013) (unreported), *Bernard Shinali Masaka Vs Bonny Khalwale & 2 others* [2011] e KLR,

Mbowe Vs Eliufoo [1967] E A 240.

41. Where the petitioner alleges commission of election offences such as corruption, bribery, oath-taking, alteration of results and so forth, the burden of proof is even higher. See Wilson Mbithi Munguti Kabuti and others Vs Patrick Makau King'ola and others Machakos, High Court election petition 9 of 2013 (unreported), *Halsbury's Laws of England* 4<sup>th</sup> edition Vol 15 para 695, Simon Nyaundi Ogari and another Vs Onyancha and others [2008] KLR
42. The burden of proof was explained well by our Supreme Court in Raila Odinga and others Vs Independent Electoral and Boundaries Commission et al (supra):

*“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 from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to 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”.*

43. The Supreme Court was restating a view long held by the High Court in election dispute settlement. See Munyao vs Munuve et al (2008) KLR (E.P) 20. In Ole Lempaka Vs Komen and others (2008) 2 KLR (E.P.) 83, the learned judges stated that each paragraph of the petition alleging breach of law, rule or regulation or which complains of any malpractice must be proved by evidence. Those then are the legal beacons and clear parameters within which to determine the allegations in this petition.
44. A key allegation in the petition is that the integrity of the forms and records of the election are called into question: that they were inaccurate, had errors, they were altered and did not represent the true vote. From the evidence at the trial, there were various discrepancies in forms 35 for the following polling centres: Noonkopir secondary school, G.K. Athi River prisons primary school, Korrompoi primary school and Emamparisuai primary school. It was thus necessary to examine the voting materials to verify the accuracy of the results. On 25<sup>th</sup> June 2013, the court ordered a partial scrutiny of all the votes cast at those stations. The scrutiny was to extend to a recount and an examination of the forms 35 and the final form 36 for the constituency. Some of the copies of forms 35 annexed to the affidavit of the 3<sup>rd</sup> respondent were illegible. In the course of the trial, and with concurrence of the parties, the IEBC presented to court the original forms 35 for all the polling stations. They were examined by all counsel and a fresh bundle filed in Court.
45. Section 109 of the Elections Act 2011 gives power to IEBC to make subsidiary legislation or regulations for the better carrying out of the purposes of the Act. The Elections (General) Regulations 2012 flow from that power. Regulation 83(1) is relevant in many respects. I will set it out *in extenso*:

*83. (1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present –*

- a. *Tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;*
- b. *In the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75 (2);*
- c. *Complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the –*
  - i. *Name of the respective electoral area;*
  - ii. *Total number of registered voters;*

- iii. Votes cast for each candidate or referendum side in each polling station;
- iv. Number of rejected votes for each candidate in each polling station;
- v. Aggregate number of votes cast in the respective electoral area; and
- vi. Aggregate number of rejected votes; and

d. Sign and date the form and –

- i. Give to any candidate, or agent present a copy of the form; and
- ii. Deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.

46. It is important to demystify those forms. Form 35 is a record of the votes of each parliamentary candidate in a polling centre. In Kajiado East, there would then be 124 forms 35 for all polling stations. Form 35 records the total votes cast, the valid votes, rejected votes and the total registered voters. It is a *snapshot* of the materials in the ballot box. However, it is *not* a *single* form. As many as eight sheets of the forms were given by the returning officers for each polling center. The polling station number is printed at the top of all the forms. As they are torn from a serialized booklet, the serial number of each sheet is different. The reason was well explained by the 3<sup>rd</sup> respondent: one form is inserted in the ballot box, one is pasted outside the box, one is affixed on the door of the polling centre, while one is returned to the returning officer. Regulation 83(1) (i) provides that candidates or their agents are also entitled to a copy. From the evidence, the form is not prepared or filled in duplicate copies: rather the forms were filled by hand independently. The forms are meant to be signed by all the agents. The reasons for refusal to sign are also noted. The presiding officer can also make remarks at the bottom of the form. The presiding officer and/or his assistant also execute the form. Under regulation 79(7), refusal or failure by an agent to sign or failure by the presiding officer to make remarks do not invalidate form 35. It is thus not surprising that all the editions of the forms 35 are not signed by all the agents for example. There could be some copies where all have signed but the one ending up with the returning officer or an agent may not.

47. That said, there are sacrosanct parts of that form that are not amenable to amendment or alteration. The form has two key parts: the first which I can call *part A* is numbered 1 to 7 and has entries for registered voters, total votes cast, spoilt votes and so forth. That part is a mathematical reconciliation. It is thus in order to amend it if necessary to agree with *part B*. That is the part that the returning officer cross-checks. It is important because under regulation 83(1) (a) of the Elections (General) Regulations 2012, if the number of total valid votes cast exceeds the number of registered voters, the returning officer must disregard that count in that polling centre when announcing the final result and also make a relevant statement.

48. *Part B* of that form which is numbered 1 to 22 captures the individual votes of all the candidates. In this case the votes of all the 6 candidates in Kajiado East are indicated. Part B is thus numbered 1 to 6 only. Items 7 to 22 are cancelled out by the printer. That part in my view is sacrosanct and not amenable to alterations after counting and signatures by the presiding officers and agents. The presiding officer and returning officers cannot thereafter alter it at the tallying centre. The reason is self-evident: the votes will have been counted and returned to the sealed ballot boxes. Those boxes are delivered to the tallying center and can only be opened by an order of the Court. All that should take place at the tallying centre is transposition of the results into a document which evolves into form 36.

49. Form 36 in this case was a computer spreadsheet. The first column has a list of all the 65 polling centres and the candidates. The rows contain the scores for each candidate. The bottom row has the aggregate totals. It also reflects the total valid votes, rejected votes, total votes cast, total registered voters and percentage of voter turn-out. After the returning officer reads aloud the results from forms 35, the data clerks record them on a tallying sheet. The final tallying sheet becomes form 36. It is thus a manual process of transferring data from forms 35 to form 36.

50. I am satisfied that the process can result in clerical errors due to the speed and flow of information. What is material is whether the final form 36 corresponds in all particulars with entries in part B of all the forms 35. It is not a static form: it is built as more and more entries are filled. That is the primary duty of the returning officer at regulation 83(1) (a) of the Elections

(General) Regulations 2012. It is thus not entirely true that there were *two* forms 36. In reality, there is only *one* final and valid form 36 for Kajiado East constituency that evolved from forms 35 and which appears at page 248 of the 3<sup>rd</sup> respondent's deposition. See Richard Kalembe Ndile and another Vs Patrick Musimba Musauetal Machakos, High Court election petition 1 (consolidated with petition number 7) of 2013 (unreported)

51. The edition of form 35 by the petitioner marked "H3" is clearly labeled *provisional results* for Korrompoi primary school. It is an electronic transmission of results showing that the petitioner garnered 175 votes, Margaret Matee got 153 while the 1<sup>st</sup> respondent received 4 votes. The petitioner contended that the 153 votes for Matee were switched to the 1<sup>st</sup> respondent to now reflect 153 votes. That version was disowned by the IEBC. The *true* version emerged from the partial scrutiny ordered by the Court. I will deal with the matter shortly on the final entry in form 36 and the results of that partial scrutiny.
52. At the conclusion of the tallying exercise, regulation 87 requires the returning officer to do the following:

*87 (1) The returning officer shall, as soon as practicable, forward to the county returning officer, in the case of –*

- a. *A presidential election, a certificate in Form 37 showing the total number of votes cast for each candidate;*
- b. *A member of National Assembly, county woman representative, Senate, county assembly, county governor or county assembly election, a certificate in Form 38 set out in the Schedule showing the total number of votes cast for each candidate.*

*(2) The returning officer shall after tallying of votes at the constituency level –*

- a. *Announce the results cast for all candidates;*
- b. *Issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and*
- c. *Electronically transmit the provisional results to the Commission.*

53. The edition of form 36 at page 245 had patent errors that I will deal with. It had omitted an entire row of results for *all* candidates at Isara primary school polling centre 029: there were 131 votes for the petitioner, who was leading, 56 for Peris Tobiko, 6 for Timpaine Kirisia and so forth. At paragraphs 27 and 28 of the 3<sup>rd</sup> respondent's deposition, she deposes that the first of the forms 36 was a *preliminary form*. This is consistent with my earlier analysis that the computer spreadsheet was not a static document: it kept evolving as it was loaded with new data or legitimate corrections. It is not also true that the amendments in the final form 36 benefitted or affected the 1<sup>st</sup> respondent only. That theory is debunked, for example, by the initial omission and final correction of scores in form 36 for all candidates for Isara polling centre 029. Again, 2 extra votes awarded to the 1<sup>st</sup> respondent at G.K. Athi river prison primary school stream 8 were corrected and removed from her tally.

54. The handwritten version of final results exhibit "PPTIV" in the 1<sup>st</sup> respondent's deposition (which is similar to the document in Parmereta's deposition marked "RSP II") showed the petitioner had 22,640 votes to the 1<sup>st</sup> respondent's 23,381. The 3<sup>rd</sup> respondent explained that the printer had malfunctioned. There is no evidence in rebuttal. She announced the results on the basis of that form. It is a simple handwritten table showing the total votes for the 6 candidates. The initial results announced by the returning officer had omitted the 200 votes for the 1<sup>st</sup> respondent at Noonkopir secondary school polling station. It does not invalidate the eventual form 36 in the computer spreadsheet. I have reached the conclusion that the handwritten version of results used to announce the election was not the form 36 or the certificate of results known as form 38.

Fundamentally, it did not reverse the lead by the 1<sup>st</sup> respondent.

55. It is also important to keep in mind that the last general election was unique. Six elections for the president, governor, senator, women's representative, member of national assembly and member

- of county assembly were all conducted on one day. Every polling centre and stream was thus conducting 6 elections simultaneously. In Kajiado East there were 124 polling stations, 124 presiding officers, and 124 deputy presiding officers. In addition, there were 8 presiding officers at the Isinya tallying centre. Polling clerks were almost 800. In some polling stations there were 4 or 6 clerks. There were agents for parties and candidates. There were observers. To gauge the gargantuan task for IEBC, I would turn to polling centre 016, St Monica nursery school: it had over 21,000 voters and 22 polling streams with 965 to 973 voters per stream. In *Raila Odinga and others Vs Independent Electoral and Boundaries Commission et al* (supra) the Supreme Court acknowledged that the election was a challenge for a young institution like the IEBC. That is a fundamental context within which to gauge the conduct of the elections and to determine this petition.
56. I would then return to the partial scrutiny. Did the recount disclose a variation from the total votes of candidates entered in forms 35 and the final form 36? I will start at Korrompoi where the petitioner alleged 153 votes were switched. The recount from ballot box serial number 120135 established that Peris Tobiko got 153 votes, the petitioner got 175 votes while Margaret Matee got only 7 votes. That in turn agrees with form 35 for that polling station and the final form 36 at page 248 of the affidavit of Jennifer Mugambi. True, the form 35 from IEBC had cancellations on part A from 577 valid votes cast to 563. That in fact is the correct number from the recount. And I have already said that that reconciliation part of the form is amenable to alteration.
57. The forms 35 affixed to the box, the one inside and the one to the returning officer have different serial numbers for the exact reason I highlighted above: they were separate forms and not duplicate or original copies of each other. The claim by the petitioner that 153 votes were switched from Margaret Matee to Peris Tobiko falls flat on its face. The impugned form 35 for that station and the entry in the eventual form 36 bear an accurate and true record. The electronic version of results by the petitioner in the document marked "H3" is not borne out by the recount of the votes. At paragraph 57 of the 3<sup>rd</sup> respondent's deposition and from her oral testimony, I am satisfied that electronic transmission devices failed country wide. In the case of Kajiado East constituency, the final results were *not* announced on the basis of electronic results. The petitioner himself conceded that his agent informed him that at Noonkopir polling centre, there was no network for mobile or electronic transmission of results.
58. The petitioner alleged that at Noonkopir, the 1<sup>st</sup> respondent was added 200 votes. The basis of that allegation is a tallying form marked "H4" to the petitioner's affidavit showing that in stream 6 the 1<sup>st</sup> respondent got 28 votes. That was also reflected in the initial form 36 appearing at page 245 of Jennifer Mugambi's deposition. First, it was well explained by the 3<sup>rd</sup> respondent that there was an error in the initial tally that had denied the 1<sup>st</sup> respondent 200 votes. Upon the recount ordered by the Court, ballot box serial number 121469 for the stream confirmed that Peris Tobiko got 228 votes. The petitioner got 202 votes. The form 35 for that station is executed by 10 agents. It agrees with those results. Some of the forms 35 affixed to the box and the one inside the box are signed by 8 and 11 agents respectively. They bear different serial numbers. I explained earlier the nature and genesis of such discrepancies. They are irregularities. But they are minor alterations or variations that do not deviate from the actual count. I am then unable to sustain the claim that the 1<sup>st</sup> respondent was added 200 votes at Noonkopir.
59. One reason for ordering a recount at Emamparisuai primary school centre 001 was that part B of form 35 had some white-out and new figures for candidates inserted. It is instructive that the petition itself had not pleaded any malfeasances at the station. When the ballot box serial number 121032 was opened, it transpired that the only form 35 with white-out was the one furnished to the returning officer. It was signed by 4 agents. The ones inside the box and affixed on it have no white-out. They correspond fully with the results in the final form 36 by IEBC. True, the latter forms have not been signed by agents. The deputy presiding officer has not also signed them. The presiding officer has. Those irregularities do not go to the root of the poll. In the end the results announced there were accurate.
60. At G.K. Athi river prison primary school 019/2 and 019/8 streams 2 and 8, the following emerged from the recount: in stream 2, a seal was missing from ballot box 121039. I will deal below with the effect of a missing or broken seal. The petitioner got 215 votes whereas the 1<sup>st</sup> respondent got 279 votes. The final form 36 gave the petitioner 5 more votes (220 votes). The 1<sup>st</sup> respondent's

- votes on recount agree with those in the form 36. Another candidate William Kirrinkai actually got 44 votes and not 43 indicated in form 36. There were cancellations and white-out in some of the forms 35 affixed to the box and inside the box and differing numbers of agents who signed. That supports the assertion by the petitioner of inconsistencies and lack of details in forms 35. In my considered opinion, and taking into account that the editions of forms 35 were not duplicate copies of each other, those are minor deviations that do not discredit the final result.
61. In stream 8 at G.K. Athi river primary school, one seal for ballot box number 121094 was broken. The records however show it was intact when delivered. It is perfectly possible that it was broken in the course of transportation. It is also important to keep in mind that the ballot boxes have multiple seals. Under regulation 83(3) of the Elections (General) Regulations 2012, candidates or agents are allowed to place their *own* seals on the ballot box. The missing or broken seals must be viewed in that wider context. Upon scrutiny, Kakuta got 212 votes while Peris had 276 votes. She had thus been added 2 votes in the preliminary form 36. It was corrected in the final form 36. The total valid votes were 595 and not 593 as indicated in form 36.
62. The petitioner pleaded that there were sharp variations between the votes cast for the president, governor, senator, women's representative, county representative and those of member of the National Assembly. It was the petitioner's submissions that all the votes for those offices should be largely equal. His thesis was that since all voters were receiving six ballots for the respective offices, there is no good reason why there were discrepancies in the votes cast. This he submitted should have been the case in a cosmopolitan area like Kitengela. This was elaborated at paragraphs 19 to 23 of his affidavit. He gave some figures. They were drawn from a form showing results of the presidential poll marked "H4". He said he got the figures from the Daily Nation newspapers. He gave examples: at St Monica 016/6 the votes for member of National assembly were 749 while those of president were 750. At Kitengela centre 017, it was 490 for Parliament against 487 for the presidential race.
63. Looking at the petitioner's examples, the difference between the votes in the parliamentary race and other elections was only 1 at St Monica and 3 at Kitengela. It was not such a wide fissure as to cast serious doubt on the integrity of the parliamentary election. Secondly, this Court is ill-placed to make meaningful comparisons. The Court is not seized of jurisdiction or all materials used in those other elections. Thirdly, the 3<sup>rd</sup> respondent explained that voters may have spoilt their ballots for certain elections or cast them into the wrong ballot boxes. She suggested that some may have even left with ballots for certain offices. That would be an election offence. But she was theorizing. I will examine this issue a little more.
64. The truth for this Court emerged from the partial scrutiny. The scrutiny for Korrompoi stream 1 had 14 rejected votes. 9 of them were for National Assembly elections: 4 were for governor and 1 for county ward. Those votes for the county and gubernatorial elections were all cast into the ballot box number 120135 for the member of National Assembly. As a logical corollary, they were listed as spoilt ballots for the National Assembly election. They would not appear as spoilt ballots in the election of governor or ward representative. I can give a further example: at G.K. Athi River primary school stream 8, the scrutiny by Court revealed that there were 3 rejected votes for governor, senator and county ward elections. They were all in the ballot box number 121094 for the member of National Assembly. Those findings partly support the theory of the 3<sup>rd</sup> respondent. In a word, the variations or discrepancies between the total votes cast in all the 6 elections provides a very shaky platform for the petition.
65. In a nutshell, the partial recount brought down the petitioner's votes by 5. It did not obliterate the 1<sup>st</sup> respondent's win or grant the petitioner any new gains. In fact, the petitioner's votes decreased. The partial recount generally confirmed that the entries in form 36 did not have "*serious and glaring contradictions, inconsistencies, discrepancies and irregularities*" as urged by the petitioner. True, there were alterations or white-out in some editions of forms 35. White-out is not one of the official materials given by IEBC to its presiding officers. It is not on the list of materials of polling diaries signed for by the presiding officers. In sum, there were irregularities in filling out certain details in the forms. There is however no compelling evidence revealing deliberate conduct of poll officials to fiddle with the numbers to defeat the peoples' franchise.
66. On 19<sup>th</sup> June 2013 the Court upon consent of parties examined the *original* forms 35 in IEBC's custody. A new and legible bundle was supplied to court and all parties. The white-out on the original form 35 for Emamparisuai centre 001 made the court order a partial scrutiny there. The

- actual ballots in the box corresponded with the form. In an ideal setting, the documentation of results should be clean and devoid of alterations or cancellations.
67. The conditions here are then different from the decisions cited by the petitioner in William Kabogovs George Thuo and 2 others Nairobi, High Court election petition 10 of 2008 [2010] eKLR and Bernard Chege Mburu Vs Clement Kungu Waibara and others Nairobi High Court election petition 24 of 2008 [2011] eKLR. In both cases the High Court found cancellations, alterations and irregularities that were not well explained and which could not be wished away. In an appeal against the latter decision, the Court of Appeal in Clement Kungu Waibara Vs Bernard Chege Mburu and 2 others Civil Appeal 205 of 2011 [2011] e KLR faulted the superior court Judge for two reasons: first for relying on alleged copies of forms 16A and 17A without examining the originals which were available in court; and second, for concluding that there were irregularities on the basis of unreliable witnesses. As stated, I have seen the *original* forms that were produced before this court. The cancellations or alterations have been largely explained. The Court has examined the results of the partial scrutiny and recount.
68. The crux of the matter is whether all the grounds raised by the petitioner sufficiently challenge the integrity of the poll. The court has to weigh the impact of the alleged irregularities on the outcome of the election. See James Omingo Magara Vs Manson Nyamweya and others Kisumu, Court of Appeal, Civil appeal 8 of 2010 [2010] eKLR. In the context of a general election for six electoral offices, it would be impractical to demand or expect mathematical precision. What is critical is to ensure that the will of the electorate is largely carried. The partial scrutiny and recount of the votes cast showed that the results announced and captured in the final form 36 were largely accurate. I have no evidence that the minor arithmetical errors were deliberate. Some errors of that nature are expected human failures in the context of a large and hotly contested poll.
69. Article 1 of our Constitution emphasizes the supremacy of the people. The political power of the people finds its force in article 38 of the instrument; it enshrines political rights to make choices of leaders in free, fair and regular elections. The Elections Act 2011 is meant to midwife the process of free and fair polls. The importance of elections was succinctly captured by D.S. Majanja J, in Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al Machakos, High Court election petition 1 (consolidated with petition number 7) of 2013 (unreported). The learned Judge delivered himself thus:

*“Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”*

70. I alluded earlier to the complex matrix of the last general election, the first major undertaking by the IEBC as presently constituted in the new Constitution. In cross-examination, the petitioner conceded that the final figures in paragraph 11 of his affidavit were erroneous. In whatever edition of results that one picks, the 1<sup>st</sup> respondent, Peris Tobiko remains on top. The margin is thin. I stated earlier that our electoral system is a *first-past-the-post* system. Our constitution requires the winner to garner a majority of votes: even a tantalizingly razor-thin margin of 1 vote is good enough for our democracy. The court should not give undue regard to such minor lapses. I have not received cogent evidence appealing forcibly to my mind of deliberate conduct by poll officials to manipulate the numbers in favour of any candidate. See Mbowe Vs Eliufoo [1967] EA 240, Joho Vs Nyange et al (No. 4) (2008) KLR E.P 500, Thomas Malinda Musau et al vs IEBC and others Machakos High Court election petition 2 of 2013 [2013] eKLR, James Omingo Magara vs Manson Nyamweya et al Kisumu, Court of Appeal, Civil appeal 8 of 2010 [2010] eKLR.
71. It is also telling that the petitioner did not avail himself of the right to a recount at any polling centre at the close of the poll. Regulation 80 of the Elections (General) Regulations 2012 under the Elections Act 2011 provides as follows:

*“80. (1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted:*

*provided that the recount of votes shall not take place more than twice.*

*(2). No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation”.*

72. My answer to issue number iii) in this petition is thus in the affirmative: from the totality of the evidence including the report on partial scrutiny, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents declared true and accurate results of the elections.

73. A key pleading by the petitioner is that his agents were harassed, kept out of polling centres or denied the right to verify the results. He testified that parts A and B of forms 35 were altered and new figures inserted. He said only 17 of forms 35 were signed by party agents at St Monica. Out of those, 8 were signed by only one or two party agents. Maxmilla (PW 2) had said her party had 17 agents at St Monica. First, it is instructive that the petitioner was nominated by ODM. The court takes judicial notice under section 60(1)(o) of the Evidence Act, as a matter of general or local notoriety, that ODM and Wiper parties formed the CORD alliance. That alliance was one of two major alliances or coalitions contesting various seats in the election. The polling day diaries show that some agents were identified as ODM, Wiper or CORD Agents. A good example is at page 379 of Mugambi's deposition. It is a polling day diary showing that Charles Ratemo and Moses Nyangena were agents for ODM and Wiper at St Monica, stream 4. Their counterpart from TNA party was Sikampe Sompol. At page 458 of the same document, Eunice Mutua is listed as an agent for CORD in stream 20. To my mind, the agents of either party were a good bulwark to the agents of the 1<sup>st</sup> respondent belonging to the Jubilee Alliance. St Monica had 22 streams. Maxmilla admitted there were 17 party agents for the petitioner. It is not a poor number. There were other 4 candidates running on different party platforms. The candidates were also entitled to retain independent agents at the polling centres. From the evidence, some polling stations were in classrooms. Others, like in St Monica nursery school were in tents. The demands for space by all these agents, polling clerks and observers could not be accommodated in all cases.

74. It is then important to look at regulation 74 which provides as follows:

*74. (1) No agent shall be deemed to be an agent for the purposes of counting unless, at least forty eight hours before the close of the poll in that election, the candidate or political party, as the case may be, has submitted to the presiding officer –*

- a. The name and address of the agent; and*
- b. A letter of the appointment of the agent.*

*(2) A presiding officer shall not allow a person whose name, address and authorization has not been so submitted to attend at a counting of votes notwithstanding that the appointment of that person is otherwise in order.*

*(3) A presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee, as the case may be, to the counting venue.*

75. The right of a presiding officer to limit persons in a polling centre was well explained by Kimaru J in Rishad Amana vs IEBC and others Malindi, High Court election petition 6 of 2013 [2013] Eklr. Even where an agent is fully accredited, he could be denied entry to the counting session unless his details had been notified at least 48 hours before the poll. Due to constraints of space, sub regulation 3 above limits a political party to one agent. The claims by the petitioner must be viewed against that backdrop.

76. The petitioner did not present direct or cogent evidence to show his agents were denied entry into polling stations. He did not see any agent being turned away, bullied, harassed or refused to sign a statutory form. I am alive that the Elections (General) Regulations do not allow candidates to remain at a polling centre. That rule is well intended. It thus behoved the petitioner to bring forth a witness or agent to prove those allegations. The person proffered was Maxmilla Osambila (PW 2). She made some stunning allegations: that agents were turned away in stream 12 and told “not to

- set foot in the polling stations*". She said that the petitioner did not have an agent in stream 5; that there was a deliberate electric power cut; and that agents in stream 5 had gone into an induced deep slumber leaving ballot papers strewn all over a table.
77. I have noted that Maxmilla does *not* however appear on the *formal* list of ODM agents. The list provided by the ODM chief agent, Jonathan Koin, appears in the third schedule (oaths of secrecy) at pages 479 to 481 of Jennifer Mugambi's deposition. Maxmilla presented no letter of accreditation or IEBC badge to Court. She did not annex any such document to her deposition either. In paragraph 3 of her affidavit, she states that she voted at a different polling centre, Noonkopir polling station. I can then infer that she was not at St Monica throughout election day: she must have stepped out to vote. There is no record by any presiding officer of the events of suspicious or induced slumber at stream 5. The agent who drew her attention to the matter did not testify. Maxmilla testified that she reported the events to the presiding officer who did nothing. It is then *possible* that agents and polling clerks went into a deep suspicious sleep, but I find it *highly improbable*.
78. I will revisit the serious allegation that the petitioner's agents were denied their rights. Agents were supposed to carry authenticating documents: a letter of appointment, accreditation by IEBC and a badge. Bruce Likama, the presiding officer at stream 13 at St Monica nursery, said he sent away an agent of the petitioner or ODM, Esau Okuku, who had no authenticating letter or IEBC badge. I would not label a demand for compliance with regulation 79 as harassment or bullying. When the agent returned with proper identification documents, he was allowed into the polling centre, he stayed there throughout and signed the relevant form 35. I heard no first hand evidence of witnesses being denied to sign forms. Form 35 has a section for an agent to indicate reasons for refusal to sign. It has a portion for statutory comments by the presiding officer. Under regulation 79(6) failure to sign or indicate reasons for refusal does not invalidate form 35. In short, the petitioner made a generalized allegation. He could have referred for example to a specific agent in a specific polling centre who was denied entry, was bullied or denied the right to verify or execute forms 35 or 36.
79. In further cross examination, the petitioner made the following concessions: that Edna Ouma was his agent; the form containing particulars of agents in the polling day diary at page 327 of Jennifer Mugambi's (DW 4's) affidavit is signed by his agent Esau Okuku. At page 347 Steven Omondi, his agent has signed. At page 359, John Kioko his agent has signed. At page 378 Jeffrey, his agent, has signed. The other forms at pages 392, 398, 411, 442, 447, 448, 452 and 458 of the affidavit were signed by his agents James Ogoro, Daniel Solaton, Pauline Olum, Paul Kitheka and Eunice Mutua. From the evidence at the trial, it was established that the following ODM agents were at St Monica nursery polling centre: Daniel Solaton stream 12, Felix Omondi, Moses Nyangera and Beatrice Olilo in streams 8, 14, and 20. It contradicts Maxmilla's evidence. From the details of other agents that I cited and who signed forms 35, it does not paint a picture of a candidate who did not have sufficient party agents or who were denied their rights.
80. I would then turn to the claims of an orchestrated power outage. There are two notes or small slips of papers marked "N1" annexed to the affidavit of Maxmilla Osambla (PW 2). The originals were in possession of the petitioner's counsel. He showed them to the Court. They were meant to confirm the power outage. However, they are at variance with Maxmilla's evidence. For example, one note states there was an outage in stream 9. From the evidence, stream 9 was in an outdoor tent with no electricity power supply. I agree with the evidence of Bruce Likama (DW 6) and Jennifer Mugambi (DW4) that all the polling centres had gas lamps which were lit at dusk. The IEBC regulations required them to be lit throughout irrespective of electric power supply. It was to obviate the shenanigans of yester years where ballots disappeared or reappeared in stage-managed or accidental power black-outs.
81. The power outage at St Monica nursery was alleged to have occurred between 1.30 a.m. and 2.15 a.m. However, the notes are completely silent on alternative power sources. From the poll diaries or declarations by the presiding officers appearing at pages 259 to 475 of the affidavit of the returning officer, all the presiding officers were given gas lamps, mantles and match boxes. They signed for them. James Muthoka (DW 3) did not witness a power outage. The allegation that there was a deliberate power black-out is thus another red herring. Fundamentally, the petitioner did not assign any blame to any candidate or IEBC as the masterminds of the unproven black-out. Maxmilla herself did not lead evidence of any malfeasances that occurred in the dark. She had

- deposed at paragraph 12 of her affidavit that the “*selective*” power outage was stage managed “*to sneak in ballot papers or steal the election*”. She led no such evidence. She conceded in cross examination that she did not see any ballot papers being sneaked in. By citing such electoral offences, the burden of proof rose to an even higher standard that I detailed earlier in this judgment.
82. Maxmilla had also alleged that about 500 voters on the queue at 5.00p.m. were sent away from St Monica polling centre. This was not corroborated by any other witness. Bruce Likama, a presiding officer in stream 13 said everyone on the queue at 5.00 p.m. voted. The returning officer deposed at paragraph 67 that all voters on the queue in all polling stations by 5.00p.m. were allowed to vote. She received no such complaint from the chief agents. But even assuming that those 500 voters were turned away, it would be to turn logic onto its head to say they were voters of the petitioner. Regulation 66 sets the time for the poll between 6.00a.m. and 5.00 o’clock in the afternoon. Every person on the queue at 5.00 o’clock should be allowed to vote. Regulation 64 allows for extension of time in consultation with the returning officer. In the end I am unable to find on the evidence that 500 or any other number of voters were denied to vote.
83. I agree with Maxmilla’s testimony that there was a commotion in the morning of 4<sup>th</sup> March 2013. But it was outside the polling centre when security agents fired to contain a surging group of voters. Bruce Likama (DW 6) confirmed there was such a commotion. Surprisingly, it was not noted in the polling diaries. I however received no tangible evidence of intimidation or violence visited upon voters. The petitioner in cross examination testified that the voting was orderly. He said he registered as a voter at Meruish primary school polling station. He voted there at 6.00 a.m. on 4<sup>th</sup> March 2013. He queued for about half an hour. He returned to Kitengela after passing through a number of polling stations. By large, he said, the voting was peaceful. I have formed the concrete impression that Maxmilla’s evidence was a little embellished, partial and unreliable.
84. Another major complaint in the petition was that the votes cast in some stations exceeded the number of registered voters. That is a serious matter. Regulation 83(1) of the Elections (General) Regulations 2012 requires the returning officer to disregard the results of such a station when announcing the results. The petitioner stated that in some polling stations, the votes cast were in excess of registered voters. He gave no clear examples. That statement is thus not founded on any direct or compelling evidence. None of the forms 35 or the final form 36 produced by the 3<sup>rd</sup> respondent showed that the votes cast in any polling centre burst the dam of registered voters.
85. There are then the serious allegations of parity and bias. Bias is defined as an inclination; prejudice; or predilection. See *Black’s Law Dictionary*, 9<sup>th</sup> edition, West Publishing Company, Minnesota. It also means a predisposition or prejudice against a party unconnected with the merits of the issue. See *Porter vs Magill* [2001] UKHL 67, [2002]2 AC 357, *Kenya Pipeline Company Limited vs Kenya Oil Company Limited and another* Nairobi High Court Civil Appeal 13 of 2010 [2012] eKLR. There is an overarching principle that a person shall not act as a judge in his or her own cause. In short, justice must not only be done but must be seen to be done. Those precepts of natural justice have found the pride of place in our Constitution. You find them, for example, in the concept of a fair trial in article 50. A more relevant example is the electoral design and values enunciated by article 81(e) of the Constitution: it decrees as follows;

“81. *The electoral system shall comply with the following principles-*

*(e) free and fair elections, which are-*

*(i) by secret ballot;*

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

*(iii) conducted by an independent body;*

*(iv) transparent;*

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

86. An election presided over by relatives of a candidate, *prima facie* projects an unfair political terrain. It is then critical to examine the evidence of parity or bias. The 1<sup>st</sup> respondent conceded that her sister, Sinkiyian Nkini Tobikowa was a presiding officer at Naserian polling centre. The 1<sup>st</sup> respondent said she did not know it and did not speak to her sister until the day after the polls when they met at Isinya tallying hall. She testified she has a large family of thirteen. The 1<sup>st</sup> respondent was a candidate nominated by a major political party or alliance. I find it a little odd that she or her sister would be unaware of their roles in the election. But the key question is at IEBC's doorstep: was it aware of the conflict of interest? Did Sinkiyian, as an official of IEBC, disclose such a conflict? The poll officials were hired well before candidates were known or nominated. The candidate's relatives, as any other Kenyan, were entitled to employment at IEBC. The presiding officers had no advance notice of their stations until the day before the poll. It was the 1<sup>st</sup> respondent's case that her sister must have been hired fairly.
87. The 3<sup>rd</sup> respondent, who was the returning officer for the constituency, testified that the IEBC hired the poll officials from residents of the constituency for logistical reasons. Granted that scenario, there were bound to be conflicts of interest. At Naserian, where Sinkiyian was a presiding officer, the petitioner in fact led in the poll. That is not foolproof: the petitioner submitted he may as well have garnered more votes. However, the petition itself does not plead specific allegations of malpractices at Naserian. Form 35 for the station was not called into question. Parties are bound by their pleadings. In the context of a petition, it must succeed or fail on the grounds pleaded.
88. I would be the first to concede that close relatives of candidates present a serious conflict of interest. But they are Kenyans entitled to work for national institutions. In cross examination, the petitioner himself conceded that his relatives were also employed by IEBC. This is then a classic case of the kettle calling the pot black. There was also a complaint that another sister of the petitioner was working for IEBC in another constituency in Limuru. Regarding the latter, the possibility of interference in Kajiado East was far-fetched and quite remote. Rispah Makui (DW 2) a chief agent at St Monica nursery school polling centre was also a relative of the 1<sup>st</sup> respondent. On the face of it bias may be inferred of such officials. But whether or not there is *actual bias* is a matter of proof. From what I have stated, there is no such evidence. But it paints a poor portrait of IEBC as an impartial arbiter. The situation could have been easily cured by requiring such officials to make an early disclosure and to be employed in other areas.
89. The 3<sup>rd</sup> respondent stated in paragraph 56 that the list of all presiding officers was posted on notice boards at the constituency office. The petitioner claimed that he raised objections on conflict of interest for relatives of candidates working for IEBC. That was at the preliminary meeting of aspirants called by the IEBC coordinator on 6<sup>th</sup> February 2013. However the petitioner's claims are not supported by the minutes of the meeting. Neither the returning officer, who conducted the meeting, nor the petitioner recalls him making such comments or allegations. He had no evidence of a letter that he claims to have written to IEBC. It was not annexed to his deposition or produced at the trial. He said he deposited it at the IEBC local office at Isinya. The 3<sup>rd</sup> respondent said that that was her IEBC coordination office. She had one secretary who was the sole employee. It is thus doubtful that such a letter was done or that it escaped her attention. If such evidence had been tendered, I would have been much more inclined to impeach the conduct of IEBC for failing to remove such officials.
90. There was another allegation that Bruce Likama (DW 6) was a campaigner for Peris Tobiko. The petitioner relied on an excerpt from a social media page marked "H4" in the deposition of Kakuta Hamisi. Bruce Likama disowned the *facebook* page. Parmereta (DW 2) said that the item attributed to one Richard Pasha and the adjacent picture were not his. The document has obvious alterations on the first paragraph. It has explanatory or additional text. The font size in that paragraph is different from the rest of the document. Being secondary evidence from an electronic site, it is capable of electronic manipulation and is unreliable evidence.
91. The petitioner had also alleged that Bruce Likama and Peris Tobiko left the polling station in a blue *Toyota Rav 4* vehicle to Miamis restaurant where alterations of documents occurred. It was denied by the 1<sup>st</sup> respondent. She does not have such a vehicle. Bruce has no vehicle. He does not even know how to drive. That again is an allegation of an election offence. The standard of proof required is very high. I have already dealt with the legal parameters of burden of proof and

- standard of proof. The petitioner did not raise a complaint to the returning officer or police that Bruce and one candidate had left together or were committing election offences at Miamis restaurant in town. I have formed the impression that the claims are a red herring. Certainly, they fall far below the standard of proof for election offences.
92. Although the petitioner raised grievances over the conduct of Bruce Likama, he conceded that the form 35 appearing at page 81 for stream 13 at St Monica nursery had no alterations. That stream was presided over by Bruce. It was not specifically impeached in the pleadings by the petitioner. The agents for the parties including the petitioner's agent, Esau Okuku, have signed it. The petitioner had also alleged that Bruce and the 1<sup>st</sup> respondent are relatives by virtue of belonging to one Maasai clan. From the evidence, a Maasai clan is not a small cluster of people. The 1<sup>st</sup> respondent said it is like a *sub-tribe*. The connection between Peris Tobiko and Bruce Likama on the foundation of a clan is rather strained. I think that is a little farfetched. In the very end I am unable to find that Bruce Likama was an undercover agent or a campaigner for the 1<sup>st</sup> respondent or was biased against the petitioner.
93. My answers to the remaining issues numbers i), ii) and iv) in the petition are as follows: the petitioner has failed to discharge his *onus of proof* to the required *standard of proof* for the allegations of irregularities, misconduct by electoral officials or commission of election offences. The evidence proffered has not reached the threshold for nullification of the poll. The results of the election were fair and generally accurate. As a logical corollary, they largely reflect the will of the people of Kajiado East constituency. The margin between the candidates was a narrow divide, but our Constitutional design remains a *first-past-the-post* system. The majority, even though by a razor-thin margin and in a tantalizingly close contest, must carry the day. Accordingly, from the analysis of the evidence, the law and authorities above, issue number i) is answered in the *affirmative*. The 1<sup>st</sup> respondent Peris Pesi Tobiko was validly elected as member of the National Assembly for Kajiado East constituency in the elections held on 4<sup>th</sup> March 2013.
94. From the totality of evidence and my earlier answer to issue number iii) in paragraph 72 of this judgment, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents conducted a *free* and *fair* election in *consonance* with the Constitution, the Elections Act 2011 and the Regulations thereunder. That answers issue number ii) in the *affirmative*.
95. Issue number iv) is answered in the *negative*: the election of the 1<sup>st</sup> respondent Peris Pesi Tobiko should *not* be nullified. In the result, the entire petition is hereby dismissed.
96. That leaves issue number v) on costs. Costs ordinarily follow the event. They are also at the discretion of the Court. Section 84 of the Elections Act 2011 provides that an election court shall award the costs of and incidental to a petition and that costs shall follow the cause. Rule 36 (1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 on the other hand provides as follows:

*“36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –*

- a. *the total amount of costs payable; and*
- b. *the person by and to whom the costs shall be paid”.*

97. If the Court does not determine the costs, then the Registrar of the Court is required by Rule 37 to tax such costs. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are entitled to costs. I grant them costs. Those costs shall be paid by the petitioner. Successful parties have in the past abused the taxation process to exaggerate their costs to the chagrin and detriment of the losing party. That is the genesis of the rule requiring this election Court to set a ceiling on costs. Accordingly, and as per Rule 36 (1)(a), I will cap the costs to the 1<sup>st</sup> respondent at Kshs 2,000,000 and to both the 2<sup>nd</sup> and 3<sup>rd</sup> respondents jointly at Kshs 2,000,000 to the intent that the total costs to be paid by the petitioner to all the respondents *shall not* exceed Kshs 4,000,000. The Registrar of this Court shall tax the separate bills of costs under Rule 37. Lastly, under Rule 37 (3), I direct that part of those costs shall be paid to the respondents, upon the taxation and *pro rata*, from the money deposited by the petitioner as security in Court.

98.A certificate of determination of this petition required under section 86 of the Elections Act 2011 shall issue forthwith.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **NAIROBI** this 30<sup>th</sup> day of August 2013.

**G.K. KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:***

Mr. F.I. Omino for the petitioner instructed by Abuodha & Omino Advocates.

Mr. L.P. Koin with him Mr. P. Anam for the 1<sup>st</sup> respondent instructed by Sichangi & Partners Advocates.

Mr. T.T. Tiego for the 2<sup>nd</sup> & 3<sup>rd</sup> respondents instructed by Onsando, Ogonji & Tiego Advocates.

Mr. C. Odhiambo, Court Clerk .