



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. 8 OF 2013

BENJAMIN OGUNYO ANDAMA.....PETITIONER

V E R S U S

1. BENJAMIN ANDOLA ANDAYI..... 1ST RESPONDENT

2. SALLY CHESANG,

(RETURNING OFFICER)..... 2ND RESPONDENT

3. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION 3RD RESPONDENT

J U D G E M E N T

1. The Petitioner **Benjamin Anguyo Andama** was one of the eight candidates for the position of member of the National Assembly of Khwisero Constituency in the general elections held on 4th March 2013.
2. On the 5th March 2013, the 3rd respondent, the Independent Electoral and Boundaries Commission through its Returning Officer the 2nd respondent Sally Chesang, announced the election results
3. In the said results, the 1st respondent **Benjamin Andola Andayi** was declared the winning candidate of the said elections, with 10,600 votes against the petitioner's 10,048 votes, which was a margin of 552 votes. Other candidates garnered fewer votes.
4. The petitioner has now come to court through this petition challenging the declaration that the 1st respondent was the winner of the said elections.
5. The petition was filed on 10th April 2013. The petitioner claimed that the election was not carried out in accordance with the provisions of the Constitution, the Elections Act and Regulations; that counting and tallying of votes was not accurate and correct; that Regulation 35 was breached by the 2nd respondent aided and abetted by the 1st respondent; and that the petitioner's agents were wrongly excluded during tallying and counting, and that though the said agents requested the 2nd respondent to recheck and recount the votes cast for each candidate, the 2nd respondent wrongly and unlawfully refused to do the same.

6. The petitioner listed the particulars of his dispute (complaints) under paragraph 12 of the petition. The said particulars are as follows –

- (i) The 3rd respondent's presiding officer at Emakuche Primary school did not indicate the votes received for each individual candidate on form 35.
- (ii) The 3rd respondent's presiding officer did not sign Form 35 for Mwikalikha Primary School as required and thereby rendered the results in the polling station invalid
- (iii) The results were never projected on the projector at the Constituency tallying centre Khwisero Primary School thereby making the whole process opaque and intended to manipulate the results thereby irreparably undermining the entire process and the results announced on 5th March 2013 at 10.20 p.m.
- (iv) The returning officer unreasonably delayed the announcement of the results of the March 4th 2013 elections in Khwisero Constituency and when she finally announced the results from all the 76 polling stations, the results as aggregated and noted by the petitioner indicated that he had emerged the winner by obtaining 10,361 votes as opposed to 10,299 votes obtained by the 1st respondent who was runner up.
- (v) However, the 2nd respondent announced a wrong tally as the results of the election that is 10,600 votes for the 1st respondent and 10,048 for the petitioner.
- (vi) During tallying, the 1st respondent's chief agent by the name Vivian Ayuma was seated with the 3rd respondent's officials an action that was intended to manipulate the results and/or influence the 3rd respondent's officials final tally of the votes.
- (vii) The petitioner was denied access to all Form 35s in all the polling stations within the Constituency and therefore could not verify the accuracy of the results declared.
- (viii) The petitioner had been able through his own efforts to obtain form 35s for certain polling stations some of which contain various anomalies and discrepancies as stated and shown in the petitioner's affidavit in support of the petition.
- (ix) On 4th March 2013, there was a confrontation between the petitioner's agent and the 3rd respondent's officials when the latter attempted to bar the agent from entering the polling station.
- (x) On 4th and 5th March 2013 the 1st respondent attempted to use violence and force against Francis Maende Omukuba, an agent of the petitioner, thereby intimidating him and causing him to abandon his duties accusing him of being a spoiler of his votes.

7. Consequently, the petitioner sought the following reliefs -

- a. There be a scrutiny of the votes recorded as having been cast as well as the counterfoils in the Parliamentary Election for Khwisero Constituency.
- b. There be a scrutiny of the rejected, void and spoilt ballot papers.
- c. There be retallying of all the votes cast in Khwisero Constituency.
- d. The Parliamentary election held on 4th March 2013 in the said Constituency be determined and declared null and void.

- e. The said election of the 1st respondent as the member of the National Assembly for Khwisero Constituency be determined and declared null and void.
- f. There be a declaration of the petitioner as the elected member of the National Assembly for Khwisero Constituency.
- g. The respondents be condemned to pay the petitioner's costs of and incidental to this petition.
- h. Such further, other and consequential orders as this honourable court may lawfully make.

8. The petitioner also filed his own and other witness affidavits, as evidence in support of the petition.

9. In response, the 1st respondent filed his answer to the petition, with his own supporting affidavit and also an affidavit sworn by Vivian Ayuma Asiachi. The 2nd and 3rd respondents filed a joint answer to the petition and several supporting affidavits.

10. Before tendering of evidence started, counsel for the petitioner indicated that his client was experiencing problems in getting some of his witnesses attend court to testify. These were Habert Swaka, Peter Okama Samwel and Arthur Mulema Mamboleo.

11. On application, the court ordered the issuance of witness summonses to these three witnesses, but declined to issue warrants of arrest to compel them to attend court. The court also ordered that, in case the said three witnesses did not attend court to testify, their affidavit evidence would be admitted without them being cross-examined, provided that those adversely mentioned in their affidavits would have the liberty to respond to the allegations.

12. The first witness of the petitioner was the petitioner himself, who testified as PW1. He adopted the contents of the petition and his affidavit. He acknowledged the figures of votes announced in the election results for the member of the National Assembly for Khwisero Constituency whereby, among eight contestants, he emerged second with 10,048 votes against the 1st respondent's 10,600 votes, with a vote margin of 552 votes.

13. It was his evidence that his agents were excluded from the tallying exercise and that though they requested the 2nd respondent to recheck and recount the individual votes cast for each candidate, she wrongfully and unlawfully refused to conduct the recount.

14. It was also his evidence that tallying and counting and the announcement of results was done in a manner which was contrary to law. That the 3rd respondent's presiding officer at Emakuche Primary School did not indicate the votes received by each candidate on Form 35. That the 3rd respondent's presiding officer did not sign Form 35 for Mwikalikha Primary School.

15. He contented that election results were not screened on the projector at the Constituency tallying centre, thus irreparably undermining the results announced on 5th March 2013. In addition, the Returning Officer unreasonably delayed announcement of results, and when she ultimately announced the same, the petitioner noted that the aggregated results indicated that he had in fact emerged the winner of the election by obtaining 10,361 votes against 10,299 votes for the 1st respondent. It was his evidence that during tallying, the 1st respondent's agent Vivian Ayuma sat next to the 3rd respondent's officials in order to manipulate or influence the results and final tally of votes.

16. The petitioner further stated that he was denied access to forms 35 in all polling stations which denied him the chance to verify the accuracy of results declared. He stated that, even a written request by his advocates to the 3rd respondent to be availed the said forms bore no fruits.

17. It was his evidence that the few forms 35 he obtained through his own efforts, showed various anomalies and discrepancies. These were as follows -

18. Emakuche Primary School (026) – where valid votes cast for each candidate were not indicated in Form 35 and the total number of valid votes was tampered with without countersigning.
19. Emaene Nursery School (059) – where the number of votes cast should have been 331, but the number of valid votes cast was indicated in Form 35 as 333.
20. Shirali Primary School (072) – where though the number of votes cast in form 35 is 258 and rejected votes were 3, the rejected votes were not subtracted thus leaving the number of votes cast to stand at 258. Emalindi Primary School (025) – where Form 35 does not show either the number of votes cast or valid votes cast.
21. That there was tampering with the number of votes cast for candidates without countersigning. At Mwikalikhha Primary School (008) – Form 35 shows votes cast as 207 and rejected votes as 1. However, valid votes were shown as 203 instead of 206, in effect 3 votes were missing. In addition, the Presiding Officer, Deputy Presiding Officer, and agents did not sign form 35.
22. At Ibinda Primary School (058) – the rejected votes were not subtracted from valid votes on form 35. At Elukanji Primary School (015) the number of total votes cast shown on form 35 was 628, and the number of rejected votes was 10 and the spoilt vote was 1. However, the total number of valid votes was reflected as 617, meaning that the spoilt vote was not subtracted. In addition, the Presiding Officer, Deputy and agents did not sign form 35 yet it bore the stamp of the 3rd respondent's Presiding Officer.
23. At Mulwanda Primary School (63), the total number of valid votes was not shown, while at Emanyata Tea Buying Centre (032) form 35 showed 1 rejected vote, but the total number of votes was indicated as 242.
24. With regard to Shiongo Primary School (057) which was only 2 kilometres away, the ballot papers arrived at the tallying centre late at midday on 5th March 2013, while results from other stations arrived the previous night.
25. As for Enyanya Primary School – the Presiding Officer assisted illiterate voters without the presence of agents. In addition, there was a confrontation between the petitioner's agent and the 3rd respondent's officials when the latter attempted to bar the agent from the polling station.
26. That on 4th and 5th March 2013, the 1st respondent attempted to use violence and force against the petitioner's agent Francis Maende Omukuba accusing him of being a spoiler of his votes, thus causing the said agent to abandon his duties.
27. It was his evidence that the 3rd respondent violated Article 86 of the Constitution by conducting elections in which it failed to establish systems which were accurate, secure, verifiable and accountable or transparent and declared election results which, in many cases, had no relation to votes cast at the polling stations.
28. He was cross-examined at length and re-examined.
29. PW2 was Margaret Ameyo Bukachi. Her evidence was that she was an agent for Wiper Democratic Party at Eshivinga Polling Station (No.025). That on 4/3/2013 at around 3p.m., they were brought form 35 to sign before the voting and tallying process was complete.
30. That on 5/3/2013, the 3rd respondent's official announced the results for the election for Khwisero Constituency after much delay. It was her evidence that though the official announced the 1st respondent as winner, she commented that she had confused the names of the petitioner and that of the 1st respondent.

31. She was cross-examined and re-examined.
32. PW3 was Janerose Ayuma Ashiono. Her evidence was that she was a personal assistant of the petitioner overseeing the voting process. That the 3rd respondent had a Constitutional and statutory obligation to conduct free and fair elections – under Article 81 and 82 of the Constitution.
33. She stated that on 4/3/2013, she was informed by Mr. Cardimo Maywaka, an agent of Wiper Democratic Party, that there were instances of bribery at Shirali Polling Station (072). That the petitioner's agents pretended to be voters, and one of them was given a bribe of Kshs.100/= to vote for the 1st respondent. That two agents of the petitioner apprehended the briber and took him to Khwisero Police Station where the incident was recorded in the Occurrence Book as No. 17/4/3/2013.
34. It was also her evidence that on 5/3/2013, Vivian Ayuma, a relative of the 1st respondent working for the 3rd respondent as assistant co-coordinator, was seated next to the Returning Officer. That the said sitting arrangement amounted to a conflict of interest which might have had a bearing on the validity of election results.
35. She was cross-examined and re-examined.
36. PW4 was **Francis Maende Omukuba**. It was his evidence that he was the overall supervisor of Wiper Democratic Party in Ebukhala Polling Station (No.055). That he got information of bribery and witnessed Daniel Opati being bribed at Ebukwara Primary School.
37. It was his evidence that he and others arrested the briber. However, on their way to Khwisero Police Station, they met former MP Mr. Arunga who persuaded them to release the briber, claiming that he was his supporter.
38. It was also his evidence that the 1st respondent threatened to run him down with his car at Shiongo Primary School, because he was a spoiler of his votes. That on 4/3/2013 he reported the said threats to Khwisero Police Station and the same was entered in the Occurrence Book as No.16/4/3/2013.
39. It was his evidence that on 7/3/2013 he received similar threats from the 1st respondent's supporter one Mr. Nahashon Omuyunji and reported the same to Khwisero Police Station, which was entered as OB No. 13/7/3/2013.
40. He was cross-examined and re-examined.
41. PW5 was Stephen Maloba. It was his evidence that he was an aspiring candidate as County Ward Representative for Kisa East Ward, in the CORD Coalition. That after losing in the nominations, he became an agent of the petitioner.
42. It was his evidence that on 9/12/2012, he noted 20 people being ferried from Bunyore in Emuhaya Constituency for registration as voters in Khwisero Constituency. He called Emanyatta Tea Police station and the said 20 voters were detained by the police, only to learn later that they were released.
43. He also learnt that some of the 3rd respondent's presiding officers were relatives of the 1st respondent, and it was therefore apparent that there was an intention to influence or manipulate the voting process.
44. It was his evidence that on voting day, he noted some voters being assisted by agents without supervision of the 3rd respondent's officials. Consequently, there was a high possibility that the said voters were influenced or misdirected to vote for the 1st respondent.

45. He stated that at Eshibinga Polling Station (No.026), though there was a complaint that ballot papers were issued to voters without being stamped, the said complaint was not acted upon by the 3rd respondent's Presiding officer.
46. In addition, the Presiding Officer did not indicate the number of valid votes cast for each candidate on Form 35 at Emakuche Polling Station (No.026). That the CORD agents were made to sign form 35 in the said polling station (025) without verifying the valid votes cast for each candidate.
47. He contended that the results announced by the 3rd respondent's returning officer at the tallying centre, did not match the results announced at the polling stations.
48. He complained to a Presiding Officer about the discrepancies, but he was thrown out of the polling station contrary to the provisions of Article 81 of the Constitution.
49. He was cross-examined and re-examined on his evidence.
50. PW6 was Habert Swaka.
51. His affidavit evidence was admitted with leave of the court, though he did not appear in court. It was his evidence that he was the Chief agent for Wiper Democratic Party in Khwisero Constituency. He observed some Wiper party agents being thrown out of some polling stations on 4/3/2013.
52. He stated that he was denied access by the 3rd respondent's officials to verify results at all polling stations. Though he had been told that the 3rd respondent's officials would be back to allow the verification, he was convinced that these were delaying tactics to facilitate the announcement of the results, which cast doubt on the validity of the results announced.
53. It was his further evidence that he heard the 3rd respondent's official stating that she confused the names of the 1st respondent and that of the petitioner, while announcing the results, which meant that the returning officer was not sure who the winner of the election was.
54. He was not available for cross-examination.
55. PW7 was Peter Okama Samwel. His affidavit evidence was admitted by leave of court in his absence. It was his evidence that he was a CORD supporter. That though there was voter bribery, a complaint to the 3rd respondent's returning officer bore no fruits.
56. He was not available for cross-examination.
57. PW8 was Arthur Mulema Mambleo. His evidence was admitted with leave of court, though he did not appear. It was his evidence that he was an agent and campaigner for Chama cha Mapinduzi an affiliate of CORD. That he was aware that the 1st respondent had prepared a party for the 3rd respondent's clerks after registration of voters.
58. He stated that at Emalindi Primary School Polling Station (No.024), Mushikongolo Polling Station (No. 027) and Munjiti Polling Station (No. 018), the 3rd respondent's Presiding Officers were relatives of the 1st respondent.
59. It was also his evidence that he neither received nor signed form 35 as required by law at Emalindi Polling Station (No.024).
60. He was not available for cross-examination. That closed the evidence for the petitioner. The 1st

respondent had two witnesses, Vivian Ayuma Asiachi and himself.

61. RW1 was Vivian Ayuma Ashiachi. It was her evidence that she was the Orange Democratic Movement Party agent in Khwisero Constituency for the March 4th 2013 elections.

62. That before the start of tallying, the Returning Officer invited all chief agents to take their positions and only herself, Rita Aloyo and Adam Okali were present. The petitioner's team was not present at the tallying centre then, and when they arrived in the early hours of 5/3/2013, they did not raise any objection to any of the activities going on or the sitting arrangement.

63. In response to the evidence of Ashiono Auma Jane Rose, she stated that she did not work for the 3rd respondent at the material time. She however admitted that she was a Deputy Registration Officer of the defunct Interim Independent Electoral Commission in Khwisero Constituency in 2010 during the referendum for four months. She denied being a relative of the 1st respondent.

64. She denied being guilty of conflict of interest and maintained that she had no association with the 3rd respondent prior to, during and after the elections held on 4.3.2013.

65. She was cross-examined and re-examined.

66. RW2 was the 1st respondent himself. It was his evidence that he was a candidate for member of the National Assembly in Khwisero Constituency, nominated by Orange Democratic Movement Party (ODM). That, other than making sweeping allegations of irregularities, the petitioner had not provided cogent evidence to rebut the presumption that the elections were conducted in a regular manner.

67. That he was at the tallying centre. That before tallying commenced on 4/3/2013, the Returning Officer invited all chief agents present to take their positions at the tallying table and only three agents were present, that is Vivian Ayuma (ODM), Rita Aloyo (KNC), and Adams Okal (TNA).

68. That the petitioner and his agents or team were absent until the early hours of 5/3/2013, and thus missed the instructions of the Returning Officer to the agents. That when they ultimately arrived, they did not raise any issue regarding the sitting arrangement.

69. That the petitioner had not demonstrated how the sitting of Vivian Ayuma next to the Returning Officer affected the results of the elections.

70. That from the information from agents which had been tendered in court, it was evident that all forms 35 with clerical errors were rectified, and countersigned. The said forms were from Emakuhe, Emaene Nursery School (059), Shirali Primary School (072), Emalindi Primary School (024), Mwikalikhha Primary School (008) and Mulwanda Primary School polling stations.

71. That the allegations of unreasonable delay in announcement of the results were made in bad faith, as there were logistic challenges such as distances and bad roads – resulting in delays of receipt of results from Shiongo Primary School (057), Mulwanda Primary School (063), and Enyanya Primary School (047) polling stations.

72. That contrary to the contents of the evidence of Stephen Maloba, the said Maloba was a County Assembly election candidate who lost the election on 4/3/2013, and could not therefore have been an election agent.

73. That the said Mr. Maloba did not produce any evidence of ferrying of voters or of anyone voting in Khwisero Constituency who did not live there.

74. That there was no evidence that Francis Maende was an agent, and that if Mr. Maende released

a bribery suspect on the request by Mr. Arunga, then that briber must have been doing so on behalf of Mr. Arunga. In addition, by releasing the suspect, Mr. Maende became an accomplice to an offence.

75. That it was not true that he threatened to run down Mr. Maende with his car.

76. On the evidence of Peter Okama Samwel, it was his evidence that no particulars of bribery were given. He also stated that his relationship with Vivian Ayuma was only that she was his agent, contrary to what was stated by Ashiono Auma Jane Rose.

77. On the evidence of Margaret Ameyo Bukachi, he stated that there was nothing on record to prove that she was an agent of Wiper Democratic Party. He further stated that contrary to the evidence of Arthur Mulema Mamboleo, he did not hold a party before, during or after the elections.

78. He denied that the Presiding Officers of Emalindi, Mushikongolo and Munjiti polling stations were his relatives.

79. It was his evidence that the said Arthur Mamboleo signed Form 35 for Emalindi Polling Station. According to him, it was not true, as alleged by Harbert Swaka, that the Returning Officer confused the names of the petitioner and the 1st respondent, when announcing the results at the tallying centre.

80. He was cross-examined and re-examined.

81. The 2nd and 3rd respondents called 4 witnesses.

82. RW3 was Omungala Gerry. He was the Presiding Officer at Eshibinga Primary School polling station (025).

83. In response to the evidence of Margaret Ameyo Bukachi, he stated that no form 35 was given to anybody to sign before conclusion of voting and counting.

84. He stated that he was present at the tallying centre and that the election results announced were from form 35s signed by party agents. He admitted that Vivian Ayuma sat together with other party agents at their designated table.

85. He stated that no electoral malpractice, including voter bribery, was brought to his attention at his polling station.

86. He was cross-examined and re-examined.

87. RW4 was Roselyne J. Chapia. She was the Presiding Officer at Shirali Primary School polling station in charge of stream 1. Her evidence was that there was no complaint or report made about any electoral malpractice or voter bribery.

88. That though Vivian Ayuma was present during tallying, she merely sat in the place designated for party agents.

89. That although there were some clerical errors in data entries into forms 35, she corrected them in the presence of the agents and that the total votes garnered by candidates reflected the valid votes cast.

90. It was her evidence that though one IEBC (3rd respondent) seal No.1654535 on one ballot box broke, she immediately replaced it in the presence of the Deputy Returning Officer and that issue

did not in any way affect the results of the election.

91. RW5 was Henry Otuma Seka. He was the Presiding Officer of Enyanya Polling Station. His evidence was that there was an incident at the polling station (047), in which the petitioner stormed the polling station and caused voting to stop for approximately one hour alleging that illiterate voters were being influenced to vote in favour of the 1st respondent.

92. That he reported the incident to the Returning Officer who sent the Deputy Returning Officer one Joel Okwayo together with security officers, who came and listened to the grievances before voting resumed.

93. That after conclusion of voting, they embarked on vote scrutiny in the presence of all party agents who raised no concerns on how the voting process was conducted and signed form 35.

94. That Vivian Ayuma, sat with other party agents at the designated table during the tallying process.

95. That he was not aware of any bribery or other electoral malpractice issue raised against himself or any other electoral officials which could have compromised the elections.

96. That the delay in announcing the final results was not caused by bad faith, taking into account distances of polling stations from the tallying centre.

97. That he was aware that the petitioner had demanded a re-tally of the entire results at the tallying centre, but the same could not be done without compromising the integrity, safety and security of the elections materials, as the petitioner's supporters had stormed the tallying centre and caused a breach of the peace resulting in the evacuation of all election officials by security officials.

98. He was cross-examined and re-examined at length.

99. The last witness was RW6 Sally Jematia Chesang, the Returning Officer of Khwisero Constituency.

100. It was her evidence that no agent appointed by a political party was excluded during voting, counting and tallying.

101. That agents signed the relevant forms as evidence of their presence and approval of the process.

102. That she was not aware of the petitioner's request for recount and scrutiny of votes at polling stations. That the petitioner was represented by agents who signed forms 35 without any reservations.

103. She stated that the forms 35 annexed by the petitioner to his petition were spoilt forms serially different from the completed, signed and witnessed forms used for the tallying.

104. That though the technology deployed for the relaying of provisional results had failed, no prejudice was caused to any candidate as all forms 35 were scrutinized and verified in the presence of party agents.

105. That the election results were announced at the earliest time possible, considering the number of voters, distances from polling stations, and the six individual elections carried out simultaneously.

106. That the actual form 35 used for results of Emakuche Primary School polling station (026) was witnessed and signed by the petitioner's agent Carolyne Kweti.

107. That there was no over voting at Emaene Nursery School Polling station (059), and that the erroneous entry in form 35 was counter-signed and corrected in the presence of the petitioner's agent.
108. That the error of an entry at Shirali Primary School polling station (072) was duly corrected and witnessed by the petitioner's agent.
109. That the erroneous entry of valid votes entered against candidates at Emalindi Primary School polling station (024) was duly corrected and countersigned in the presence of the petitioner's agent Peter Mbale and Anyangu Severings.
110. That the error in the number of rejected votes at Mwikalikha Primary School polling station (008), was corrected and countersigned in the presence of the petitioner's agent Sultan Akhasubini.
111. That there was no error at Elukanji Primary School (015) and Ibinda Primary School (058) polling stations, and that the single spoilt ballot paper was lawfully not included in the counting.
112. That form 35 in Mulwanda Primary School polling station (063) was completed and duly filed, and that the error in the entry of rejected votes was corrected and countersigned in the presence of all agents present.
113. That there was no error at Emanyatta Tea Buying Centre polling station (032) to suggest over voting.
114. That there was no bad faith in the delay of arrival of election results from Shiongo Primary School (063) and Mulwanda Primary School polling stations, as the two stations shared a transport bus which delayed overnight and the Presiding Officer was taken ill, necessitating his being taken to hospital after voting and counting and tallying was done.
115. That in any event, form 35 was filled and witnessed by the petitioner's agents James Ashioya and Nancy Malesi.
116. That at Enyanya Primary School polling station (047), there was a disruption of voting caused without any lawful reason by the petitioner, which was only resolved after the Deputy Returning Officer came and intervened.
117. That the names of all electoral officials appointed by the 3rd respondent were displayed at the 3rd respondent's polling stations, the District Officer's and Chiefs notice boards, two weeks to the elections and no complaint or conflict of interest was raised by anybody.
118. That no election official was appointed or posted to work in his or her home area, and that there was therefore no probability of conflict of interest or bias.
119. That the evidence of Stephen Maloba contained falsehoods as he was not a CORD agent but a County Representative candidate who lost the elections on 4/3/2013.
120. That she was not aware of ferrying of voters for registration. In any case, it was too late to raise such allegations after registration had long been concluded and elections conducted. That the allegations in paragraphs 8, 9, 10, 11, 12, 13 and 14 of the affidavit of Stephen Maloba were speculative and mere conjecture as they were not brought to her attention nor pleaded in the petition.
121. With regard to the evidence of Ashiono Auma Jane Rose, it was her evidence that she was not aware of any bribery allegations.

122. She admitted that Vivian Ayuma was her assistant during the 2010 referendum, but denied that that fact gave rise to a conflict of interest in the election exercise. In any event, she maintained that no complaint was made to that effect.

123. With with regard to the evidence of Francis Maende – it was her position that he was neither an agent nor an electoral official and that his allegations of bribery were never brought to the attention of any election official.

124. She stated that the allegations of bribery in the evidence of Habert Swaka and Peter Okama Samwel were strange and were not raised to any election officials.

125. On the evidence of Arthur Mulema Mamboleo, she stated that the list of election officials at Mushikongolo (029), Emalindi Primary School (024) and Munjiti (018) polling stations were pinned on the Constituency, District Officer's and Chiefs' notice boards two weeks before the elections and no complaint was raised in regard to the same.

126. With regard to the evidence of Margaret Ameyo Bukachi, it was her evidence that no forms 35 were presented to anyone to sign prior to the completion of vote counting and tallying at any polling station.

127. It was her evidence that all forms 35 were forwarded to the headquarters (of the 3rd respondent), for safe keeping and further scrutiny and that the petitioner was at liberty to apply, follow up and collect all forms he required at his own expense. She maintained that no incidences of violence were reported to her.

128. She stated that, though the petitioner disputed the final announcement and declarations of the 1st respondent as the winner at the tallying centre, it was impossible to address his concerns without compromising the integrity, security and safety of the elections, as the petitioner and his agents and supporters had stormed the tallying centre and caused extreme chaos, confusion and a breach of the peace and all election officials had to be evacuated by police officers, therefore a retallying could not be done.

129. She was cross-examined and re-examined at length.

130. That was the close of the evidence of the parties.

131. Just before the close of tendering of evidence for the parties, the petitioner's counsel on 26th June 2013, filed a formal application for scrutiny, recount and retally of votes. The application was disallowed by the court for reasons given in its ruling. Thereafter, with the permission of the court, parties counsel filed written submissions and subsequently made highlights of the same in court.

132. The petitioner's counsel pointed out irregularities in the entries in forms 35 and 36 which in his view, denied the petitioner a declaration that he was the winner of the elections.

133. Counsel also submitted that the petitioner was not availed forms 35 by the 3rd respondent, even after his counsel requested for them in writing, thus denying him the right to verify the results announced.

134. Counsel attached calculations which indicated that the petitioner had garnered 10,692 votes against the 1st respondent's 10,612 votes, meaning that the petitioner was the winner of the elections.

135. Counsel attacked a purported unilateral reconciliation or correction of results exercise conducted by the 2nd respondent on behalf of the 3rd respondent, after announcement of results,

which reduced the margin of the votes announced between the petitioner and the 1st respondent from 522 votes to 212 votes.

136. Counsel also submitted that, when the ballot boxes were handed over to the Deputy Registrar of this court on 13th June 2013, there were discrepancies such as broken seals and torn forms 35. In counsel's view, the said broken seals and torn documents, which were admitted by the 2nd and 3rd respondents, meant that elections offences had been committed by the respondents.

137. Counsel urged that the entire election be nullified.

138. Counsel for the 1st respondent submitted that the petitioner had not discharged the burden and standard of proof, required in an election petition. Counsel also contended that evidence could not be tendered on matters or complaints which had not been specifically pleaded in the petition, as the petitioner did.

139. Counsel contended further that the elections herein were conducted in accordance with the Constitution, the Elections Act, Regulations made thereunder and the common law, and that counting and tallying of votes was accurate, as the noted minor errors had been corrected.

140. Counsel argued that the petitioner and his agents were not excluded from the process of counting and tallying of votes, and denied that the 1st respondent was guilty of election offences or corrupt practices.

141. Lastly, Counsel submitted that the petitioner was not entitled to the orders sought, as the alleged irregularities did not materially affect the outcome of the elections and asked the court to award the 1st respondent costs for two counsel.

142. Counsel for the 2nd and 3rd respondents submitted that the petitioner had not been able to discharge the burden and standard of proof required in election petitions.

143. Counsel submitted that there was no election that would be 100% compliant with all election laws and regulations, due to the many and various activities involved.

144. Counsel argued that there were no malpractices, or irregularities proved, and that the alterations on the forms 35 were done and countersigned to correct errors within the confines of the law. Such mistakes having been properly and lawfully corrected, the election could not be nullified on that account.

145. Counsel also took issue with the cross-examination beyond the scope of the petition. In his view, the cross examination by counsel for the petitioner, especially on the 2nd respondent was meant to illegally expand the scope of the petition.

146. Finally, counsel submitted that the petitioner had committed election offences by stopping the process of voting for one hour at Enyanya Polling Station without any lawful reason. In addition, together with his supporters, the petitioner had caused chaos at the tallying centre after the results were announced. Counsel urged that offences be reported to the Director of Public Prosecutions, the Independent Electoral Commission, and the Speaker of the National Assembly.

147. This is an election petition. The burden of proof is always on the petitioner to establish through tangible evidence that there were irregularities in the conduct of the elections, which rendered the elections null and void. The legal principle that he or she who alleges must prove has been enacted under **Section 107** of the **Evidence Act (Cap. 80)** which provides –

107 (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 the existence of any fact it is said that the burden of proof lies on that person.

148. In election petitions, the above statutory position has been consistently applied and explained by courts. In **Joho –vs- Nyange & Another (4) [2008] KLR 507** the court stated –

“..... I concur with the election court’s decision in Wanguru Nganga & Another –vs- George Owiti & Another – Election Petition No. 41 of 1993 that election petitions should not be taken lightly. Generalized allegations as the one made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence.”

149. In the more recent Supreme Court case of **Raila Odinga –vs- IEBC & Others – Petition Nos. 3, 4 and 5 of 2013**, the Supreme Court had this to say on the burden of proof in election petitions –

[195] There is, apparently, a common thread in

the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an election cause is established much in the same way as a civil cause; the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls on the court to determine whether a firm and unanswered case has been made.

150. From the above, it is clear to me that the legal burden is always on the petitioner or petitioners to prove. The evidential burden could shift depending on how the petitioner discharges his burden of establishing his case. It is also clear that the petitioner is required to state the specific complaints or violations he relies upon, and tender firm and credible evidence to prove the same. Generalized allegations will not suffice in discharging the burden of proof.

151. This leads me to the standard of proof. Courts in the Commonwealth jurisdictions have severally dealt with the standard of proof required in election petitions. Decisions from countries such as India, Canada and Nigeria have been consistent on this issue. The same standards have been applied in Kenya. In this regard, I can do no better than restate the words of the Supreme Court in the **Raila Odinga & Others -vs- IEBC & Others** case (supra) on the standard of proof required in election petitions. The Supreme Court stated as follows –

[203] The lesson to be drawn from several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution and its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the national values and principles of governance declared in the Constitution, [Article 10], judicial practice must not make it burdensome to enforce the principles of properly conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of the – specific electoral requirements (such as those specified in Article 38 (4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must

discharge it beyond any reasonable doubt.”

152. In my view, aside from the special requirements to determine an outright win in Presidential election under Article 38 (4) of the Constitution which is not applicable herein, the standard of proof in all election petitions in Kenya, falls into two categories. Firstly, for alleged irregularities which are not criminal in nature, the standard of proof is above the balance of probabilities, but not as high as beyond any reasonable doubt. Secondly, for all allegations or irregularities that could amount to criminal offences, the burden of proof is beyond any reasonable doubt.

153. During the pre-trial conference, the parties counsel filed a joint statement of thirteen agreed issues, as well two contested issues. Having now heard the evidence tendered and considered the submissions of counsel for all the parties, I am of the view that the issues for the court’s determination are four, as follows –

1. Whether the election of the member of the National Assembly for Khwisero Constituency held on 4th March 2013 was conducted according to the law and was free and fair under the circumstances;
2. Whether the 1st respondent was validly elected as the member of the National Assembly for Khwisero Constituency in the elections held on 4th March 2013.
3. What remedies, if any, should the court grant arising from what was pleaded in the petition and the respondent’s responses, and evidence tendered.
4. What should be the order with regard to costs?

154. I must state straight away, that some of the reliefs sought in the petition have already been spent. These are the request for a scrutiny of the votes recorded as having been cast as well as counterfoils in the Parliamentary election in Khwisero Constituency; scrutiny of the rejected, void and spoilt ballot papers; and the request for retallying of all the votes cast in Khwisero Constituency. These three prayers were declined by the court for reasons given in a ruling herein. These three prayers have thus been spent, and are consequently not for consideration in this judgment.

155. The second point I must make at the outset, is that the pleadings of the parties herein are specific. The complaints in the petition are also specific. The affidavit evidence relied upon by the petitioner however, sought to expand the scope of the petition by adding complaints which were not pleaded in the petition. It is trite, in my view, that parties are bound by their pleadings. A party cannot be allowed to come to court and attempt to prove complaints which are not pleaded, unless a request for amendment of pleadings is considered and granted by the court.

156. In the Nigerian Supreme Court case of **Comrade Adams Aliyu Oshiomole –vs- Charles Ehigie Aishia Ubere Maj. Gen. (Rtd) & Ors – Suit No. SC. 473/2012** the Court stated –

“The long laid down position of the law is that a party should be consistent in stating his case and consistent in proving it. See Ajide –vs- Kelami 1985 3NWLR Pt. 12 p.125. That is the importance of pleading. A party must confine himself to his pleadings pleaded facts must have nexus with the grounds. There is no nexus with the sole ground and the averments on non-qualification of the appellant. The petition is thus irredeemably defective and cannot be considered on the issue of non-qualification.”

157. Here in Kenya, in **Mwakileo -vs- Mwamzandi & Another – Election Petition No. 25 of 1979** – the point with regard to the connection between pleadings and evidence was hammered home, when the court emphasized that –

“Of course any attempt to give evidence of allegations not pleaded or not considered to be within the ambit of the petition will not be allowed.”

158. In my view, the evidence, whether by affidavit or otherwise, is meant to support what is

contained in a party's pleadings and not to expand the cause of action. Affidavits being evidence, cannot attempt to bring evidence of allegations or complaints not contained within the ambit of the petition, or the answers to petition as the case may be.

159. Consequently, I will limit this judgment to the allegations in the petition and the answers to the petition, and the relevant evidence to prove or disprove the same. Any allegations made in evidence outside the complaints or particulars in the pleadings, are not admissible. I will therefore ignore the evidence on complaints not pleaded.

160. I now go to the first issue, as to whether the election was conducted according to the law and was free and fair.

161. The petitioner complains that the Presiding Officer of Emakuche Primary School polling station did not indicate the votes received by each individual candidate in form 35. He annexed to his affidavit a form 35 marked as "BOA2". Indeed the space marked for inserting the number of votes for each candidate is blank.

162. The 2nd respondent, in response to the complaint, stated that the actual form 35 used was signed by Carolyne Kweti, the agent of the petitioner. She annexed a copy of a form 35 which had the number of votes per candidate indicated. It was signed.

163. The petitioner did not bring the said Carolyne Kweti to testify as a witness nor did he give reasons for the failure to do so. He did not deny that she was his agent. He did not state where he got the form which he attached. He did not therefore, in my view, prove to the required standard, the irregularity complained of.

164. The second complaint of the petitioner is that the 3rd respondent's Presiding Officer did not sign form 35 at Mwikalikha Primary School polling station, thereby rendering the results at the polling station invalid. He annexed a form 35 which did not have the signature of the Presiding Officer, Deputy or agents as "BDA6".

165. In response to this complaint, the 2nd respondent stated that the corrected form 35 was signed in the presence of the petitioner's agent Shelton Akhajibini. She annexed a copy of the said form 35 to her affidavit.

166. I note that the said Shelton Akhajibini signed the form as an agent. Again, the petitioner did not bother to call him as a witness nor give an explanation for the failure to do so. Nor did he deny that he was his agent. I find that the petitioner has not proved this allegation.

167. The third complaint of the petitioner was that the election results were never projected on the projector of the Constituency tallying centre Khwisero Primary School, thereby making the whole process opaque and intended to manipulate the results thereby irreparably undermining the entire process and the results announced on 5th March 2013 at 10.20 p.m.

168. The fact that the election results were not screened on the projector was admitted by the 2nd respondent, who gave the reason that the technology deployed in relaying provisional results failed. The complaint on the failure to project the results electronically was therefore proved.

169. The petitioner did not however, tender any evidence to back his complaint that the failure to project the results was intended to make the process opaque and intended to manipulate the results. This part of the complaint was therefore not proved.

170. The fourth complaint of the petitioner was that the Returning Officer unreasonably delayed the announcement of the results, and that when she finally announced the same from all the 76 polling stations, the results as aggregated by the petitioner indicated that the petitioner had

emerged the winner by obtaining 10,361 votes as against 10,299 votes obtained by the 1st respondent, who was the runner up.

171. The allegations were denied by the 2nd respondent who stated that the delay in announcing results was due to logistic issues such as distances and means of transport, and that the results were announced after scrutiny, verification, and tallying of all results contained in forms 35.

172. With respect to the number of votes garnered, the 2nd respondent annexed the copy of the form 36 used in announcing the results wherein the petitioner garnered 10,048 votes against the 1st respondent's 10,662 votes.

173. In addition, the 2nd respondent annexed another form 36 which, she described as a "reconciled" or "dummy" form 36 unilaterally completed after the announcement of the results, in which the votes garnered by the petitioner and the 1st respondent are reflected as 10,370 and 10,582 respectively, reducing the margin between the two from 522 votes to 212 votes.

174. The allegation that the announcement of the results were unreasonably delayed, was not proved by the petitioner. Indeed, there was a delay of more than 24 hours from the completion of voting to the announcement of results at the tallying centre. However, the cause of the late arrival of some ballot boxes from some polling stations was adequately explained by the 2nd respondent.

175. The allegation by the petitioner that he was the winner was not proved. His source of information that he garnered 10,361 votes against the 1st respondent's 10,299 was hearsay. Though he stated that he got the information from his agents, none gave evidence in court on the same. He also stated that his aggregation was done from information in his ipad. No evidence was tendered in court, regarding that ipad and the information or data contained therein. This allegation was not proved.

176. However, as admitted by the 2nd respondent, an irregularity was committed by the 2nd respondent in attempting to correct or reconcile results after announcement of the results. In my view, this was an irregularity as the action was contrary to the law and the regulations made thereunder.

177. The fifth complaint of the petitioner was that the 2nd respondent announced a wrong tally as the results of the election, that is, 10,600 votes for the 1st respondent and 10,048 for the petitioner. The petitioner did not establish the correct results through evidence. Therefore he did not prove this complaint.

178. The sixth complaint of the petitioner is that, during the tallying, the 1st respondent's chief agent by the name Vivian Ayuma, was seated with the 3rd respondent's officials with the intention of manipulating the results and/or influencing the 3rd respondent's officials final tally of the votes.

179. The 2nd respondent and Vivian Ayuma admitted that the said Vivian Ayuma sat at the table in the tallying hall near the 2nd respondent, like other agents. They stated that the petitioner and his agents were not initially present in the hall. They arrived later but did not complain. They denied that there was an intention to manipulate the results.

180. The petitioner himself, admitted in cross-examination that he came to the tallying center late with his people, and gave the reason that he was not given prior information about the start of tallying by the Returning Officer (the 2nd respondent).

181. Having reviewed the evidence, I find that other agents present sat on the same table with

Vivian Ayuma. There was no evidence of undue influence or manipulation of results. There is no evidence that the petitioner or his people raised a complaint regarding the sitting arrangement. The complaint was not proved.

182. The seventh complaint of the petitioner was that he was denied access to all forms 35 in all polling stations within the Constituency, and could not therefore verify the accuracy of the results declared. That his advocate applied for the same in writing but was not availed the same. This allegation was denied by the 2nd and 3rd respondents.

183. There was no evidence tendered by either the petitioner or his agents, to support the complaint that the petitioner was denied forms 35. Though the petitioner has annexed a letter from his advocate requesting for forms 35 from the 3rd respondent after the results were announced, in my view, that action by the petitioner or his advocate was irregular.

184. In my view, form 35 and 36 could only be provided to the petitioner (candidate) or his agent at the polling station or tallying centre respectively, on request. After the results were announced at the tallying centre, inspection of any documents in the custody of the 3rd respondent could only be done through an application to the High Court – see Regulation 93 (2) of the Elections (General) Regulations, 2012 – Legal Notice No. 128 of 2012. The petitioner has therefore failed to prove the alleged irregularity, as he did not request for supply of the forms through the court. The 3rd respondent had no obligation to provide him with forms in contravention of the law.

185. The eighth complaint of the petitioner is that the petitioner was able through his own efforts, to obtain forms 35 for certain polling stations, some of which contained various anomalies and discrepancies as deponed in the petitioner's affidavit. Indeed, some of the forms 35 annexed to the affidavit of the petitioner show a number variations from those relied upon by the 2nd and 3rd respondents. However, it is not clear, from the evidence tendered by the petitioner and his witnesses, when, where and how the petitioner got these forms 35. Since he had the burden of proving the validity and evidential value of the forms he relied on, his failure to demonstrate when, where and how he obtained the said forms 35 means that they cannot be relied upon to prove irregularities. The complaint was not proved.

186. The ninth complaint of the petitioner is that on 4th March 2013, there was a confrontation between the petitioner's agents and the 3rd respondent's officials when the latter attempted to bar the petitioner's agents from entering the polling station. The said agent or agents were not named in the petition. The particular polling station or stations were not mentioned. Since the petitioner failed to give relevant particulars and evidence to support the same, the generalized allegations herein are not sufficient to prove an irregularity.

187. The tenth and last complaint of the petitioner was that on 4th and 5th March 2013, the 1st respondent attempted to use violence and force against one Francis Maende Omukuba, an agent of the petitioner, thereby intimidating and causing him to abandon his duties, by accusing him of being a spoiler of his votes. This allegation was strongly denied by the 1st respondent.

188. The petitioner did not tender evidence to prove the allegation, which is of a criminal nature beyond reasonable doubt. Though the said **Francis Maende** testified as PW4, he merely talked of a threat to be run over with a vehicle by the 1st respondent at Shiongo Primary School polling station because he was a spoiler of votes. He also gave evidence of another threat on 7.3.2013 from a supporter of the 1st respondent called Nahashon Omuuyunji. Both complaints were said to have been reported to the police and entered in the OB. Though OB numbers were given, no documentary evidence was tendered and no police or independent witness testified on the same. No reason was given for that failure. The allegation was therefore not proved.

189. In addition to the particularized complaints, the petitioner generally complained that his

agents were excluded from the tallying centre, and that 2nd respondent wrongly refused to recheck or retally the votes as requested by his agents. The evidence on record is that the petitioner and his supporters were late in arriving at the tallying centre. They were not excluded. With regard to rechecking of votes, the evidence on record is that the petitioner's agents created a situation at the tallying centre that prevented the exercise. The complaints were therefore not proved.

190. This court is aware that relevant acts or facts disclosed to the court during proceedings, should be taken into account. In particular irregularities, even of a criminal nature, can occur during or after the election, and even during the court proceedings.

191. The report on election materials received by the Deputy Registrar of this court and filed in court, and the evidence from all sides was that deficiencies were noted in the conditions of the election materials handed over by the 3rd respondent to the Deputy Registrar. There were, for example, some broken seals on ballot boxes. Some seals were breaking even during the movements of ballot boxes and handover. Some forms 35s attached to the ballot boxes were also missing or torn.

192. In my view, the discrepancies noted did not interfere with the integrity of the election materials, as each ballot box had several seals. The discrepancies did not affect the election results announced on 5/3/2013 as they occurred after the event. Nor was there evidence of any criminal act committed by anybody.

193. I now turn to the issue as to whether the 1st respondent was validly elected as the member of the National Assembly for Khwisero Constituency.

194. Under Article 38 and 81 of the Constitution of Kenya 2010, the 3rd respondent have an obligation to conduct free, transparent and fair elections. They have to ensure that no voter is disenfranchised, and that no contestant is unfairly denied a win. The will of the people or voters has to be respected and upheld. The Elections Act 2011 and Regulations made thereunder, were intended to facilitate this noble obligation of the 3rd respondent.

195. The purpose of the law is to ensure that citizens should be enabled to exercise their right to freely elect representatives of their choice, in order that democracy thrives and the rule of law prevails.

196. The question that will ultimately have to be asked and answered in determining that the 1st respondent was validly elected is whether the elections herein were free and fair and transparent.

197. In addressing the above question, the court must start from the position that the presumption is always that an election was conducted properly. It is for the petitioner to demonstrate that irregularities occurred, which rendered the election null and void. It is not every minor irregularity that will render an election null and void.

198. The above has been the position held consistently by courts in the Common Law jurisdictions for a longtime. The English case of Morgan

-vs- Simpson [1974] 3 All E R 722 supports the above position. In a recent case of Opitz –vs- Wrzesnewsky, 2012 SCC 55, [2012]; 3SCR, the Supreme Court of Canada had this to say –

“At issue in this appeal are the principles to be applied when a federal election is challenged on the basis of “irregularities”. We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the job experience, and the short

time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

199. The above principle has been aptly captured under **Section 83** of the **Elections Act No. 24 of 2011** which provides –

83. No election shall be declared to be void by reason of non compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law or that the non compliance did not affect the results of the election.

200. Indeed, irregularities occurred herein, as I have found above. Errors of entries of votes in forms 35 were established. The results were not displayed on the projector at the tallying centre. Additionally, the 2nd respondent made a “reconciliation” or “correction” of results, after the announcement of the election results, in the absence of any candidate or agent.

201. With regard to the errors of entries in forms 35, I find that the same were corrected. The petitioner did not bring evidence from any of his agents to challenge the corrections made.

202. The requirement for transmitting and projecting results electronically at the tallying centre is grounded on the provisions of Regulation 82 of the Elections (General) Regulations, 2012. The Regulation states as follows –

82. (1) The Presiding Officer shall before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

(2) The results submitted under sub regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73.

203. The provisional results were to be captured and transmitted electronically to the returning officer. This method was envisaged as a measure of transparency and accountability. Explanations were however given that the electronic transmission system failed, and the results were therefore not displayed electronically. Since the said electronic results were provisional and had to be confirmed against the manual entries in documents under Regulation 73, in my view, the failure to electronically display the results was not mandatory, nor did it affect the integrity of the election results herein.

204. In my view, the only major irregularity disclosed is the attempt by the 2nd respondent to reconcile or correct errors in form 36 unilaterally, after announcement of the election results. This possibly arose from the anxiety caused by the request by the petitioner’s supporters for a recount or retallying at the tallying centre, which could not be done because of chaos caused by the same petitioner’s supporters.

205. In my view, the 2nd respondent did not have any legal authority to reconcile or correct errors in the number of votes in any document, after the announcement of the election results.

206. Article 86 of the Constitution of Kenya 2010 provides –

86. At every election, the Independent Electoral and Boundaries Commission

shall ensure that –

(a)

(b) the votes cast are counted, tabulated and the

results announced promptly by the presiding officer of each polling station.

(c) the results from the polling stations are openly

and accurately collated and promptly announced by the returning officer.

(d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

207. It follows therefore that Constitutionally, the Presiding Officer has a duty to openly announce the results at the polling station. The returning officer has to do the same at the tallying centre. In addition, the 3rd respondent is required to keep all election materials safely.

208. Though the Constitution confers wide powers on the 3rd respondent under Article 88, sub-article 4 (e) specifically excludes the settlements of disputes after declaration of election results.

209. Only the court has jurisdiction to determine the issues as to whether a person has been validly elected as a Member of Parliament. *see* Part VII of the Elections Act No. 24 of 2011, especially section 74, and the provisions of Article 105 of the Constitution.

210. If the 2nd & 3rd respondents had their own internal administrative reason to reconcile results, they should not have done so before the 28 days window for filing election petitions, and if a petition has been filed as in this case, they should await the directions and decision of the court.

211. The purported “dummy” or “reconciled” form 36 was therefore illegal and is not admissible in court. The irregularity did not affect the election results announced. In my view, the results remain the same as announced at the tallying centre. Though the margin of 522 votes appears small, this case is different from the case of **Thomas Malinda Musau & 2 others –vs- IEBC & 2 others – Machakos High Court Petition No. 2 of 2013** wherein ballot papers from eight polling stations were not validated by counterfoils, and forms 35 from five polling stations were missing. That case is distinguishable. In my view, the 1st respondent herein was validly elected.

212. The issue as to what remedies the court should grant follows from the above. Based on the above findings, this petition will fail and I will dismiss the same. There is also no crime established to the required standard to be reported.

213. With regard to costs, the 1st respondent has asked the court to award costs for two counsel. His counsel relied on **Section 84** of the **Elections Act 2011**, and two cases, that is, **Pollo K. House Ltd. –vs- Nairobi Wholesalers Ltd. [1992] EA 172** and **Atsango –vs- David Morton Silvestein [2009] eKLR.**

214. Though **section 84** of the Elections Act provides that costs will follow the cause, it does not address the issue of awarding costs for two counsel. **Section 96** of the Act allows the Rules Committee to make rules on costs of and incidental to filing and the trial of election and referendum petitions. Subsection 4 thereof confers on the High Court powers to make fit and just orders regarding costs.

215. **Rule 34** of the Election (Parliamentary and County Elections) Petition Rules 2013, provides that the court should, *inter alia*, decide the amount of costs payable or order the Deputy Registrar to tax the costs for confirmation by the court.

216. Costs in elections petitions should be fair and not prohibitive. Other than the preliminary applications which were dealt with herein, parties and their counsel did not get into technical and time consuming engagements such as retallying, recounting, verifying or scrutinizing of votes and election materials. I therefore find no basis for awarding costs for two counsel.

217. In the result I order as follows –

1. The election petition is hereby dismissed.
2. The petitioner will pay the respondents costs of the petition not exceeding Kshs.3,000,000/= which will be divided equally between the 1st respondent on the one side, and the 2nd and 3rd respondents on the other side as the 2nd + 3rd respondents were under one institution and represented by one counsel.
3. The Deputy Registrar will tax the costs and determine the amount due to the respondents as above, for confirmation by this court.

218. Lastly, I wish to thank Mr. Simiyu, counsel for the petitioner, Mr. Omwanza, Mr. Mamba and Mr. Kiarie for 1st respondent and Mr. Ouma for 2nd and 3rd respondents for their industry in prosecuting the petition. I also wish to thank Ms C. Kendagor, the Deputy Registrar, my researcher Sophie Kaibiria and the court clerk Polycap Mukabwa, together with my secretary Fridah Asamba, for their tremendous input in facilitating the timely finalization of these election proceedings.

Dated and delivered at Kakamega this 29th August, 2013.

George Dulu

J U D G E

In the presence of –

Mr. Simiyu for petitioner

Mr. Kiarie & Mr. Mambo for 1st respondent

Mr. Ouma for 2nd and 3rd respondents

Ms. C. Kendagor – Deputy Registrar

Mr. P. Mukabwa -Court clerk

Ms. S. Kaibiria - Legal Researcher

George Dulu

J U D G E

