



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**ELECTION PETITION NO. 1 OF 2013**

LENNO MWAMBURA MBAGA .....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .....RESPONDENT

AND

AMASON JEFFA KINGI .....INTERESTED PARTY

AND

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI ELECTION PETITION NO. 3 OF 2013**

FRANCIS BAYAH .....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .....1ST  
RESPONDENT

AND

AMASON JEFFA KINGI .....2ND RESPONDENT

**JUDGMENT**

**INTRODUCTION**

1. The background to this dispute is a matter of public record. On 4th March 2013 a General Election (the election) was held throughout the Republic of Kenya. It was the first since the promulgation of a new Constitution in August, 2010 and the subsequent enactment of new electoral laws.

The electorate in each of the 47 Counties were required to exercise their right to vote by electing their preferred candidates for the President, Governor, Senator, Member of Parliament, Women Representative and County Representative. The voting process for the six electoral positions was carried out simultaneously.

2. Kilifi County had 338,862 registered voters. Nine candidates offered themselves for the position of County Governor. These are Amason Jeffa Kingi, Anthony Kingi Kazungu, Francis Baya, Gabriel Katana Gona, Geoffrey Charo Kahindi Katsoleh, John Mwapaha Lenga, John Safari Mumba, Lenno Mwambura Mbagha and Michael Jefwa Tinga. Apart from Lenno Mwambura Mbagha who was an independent candidate, the other candidates were sponsored by different political parties, namely, the Orange Democratic Movement (ODM), Republican Congress Party of Kenya, United Republican Party (URP), KADU Asili, Shirikisho Party of Kenya, Chama Cha Uzalendo, Party of Independent Candidates of Kenya and the The National Alliance (TNA), respectively.
3. At the conclusion of the elections, Amason Jeffa Kingi was declared the duly elected Governor, Kilifi County with 94, 868 votes, and was subsequently sworn in to assume office. Other candidates obtained the following votes: Anthony Kingi Kazungu 8063; Francis Baya 38,391; Gabriel Katana Gona 37,346; Geoffrey Charo Kahindi Katsole 5082; John Mwapaha Lenga 7700; John Safari Mumba 6669; Lenno Mwambura Mbagha 3803; and Michael Jefwa Tinga 12,439.

### **THE PLEADINGS**

4. On 14th March, 2013 one of the unsuccessful candidates Lenno Mwambura Mbagha (hereinafter the 1st Petitioner) through his advocates Messrs Michira Messah filed a petition challenging the election of Amason Jeffa Kingi (Petition No. 1 of 2013). He named the Independent Electoral and Boundaries Commission (IEBC) and Amason Jefwa Kingi as the 1st Respondent and the Interested Party (sic) respectively. In summary his complaints were as follows:

- a) That his rights under Article 27 and 38 of the Constitution were infringed.
- b) That the voting exercise was not simple, accurate, verifiable, secure, accountable or transparent thus violating Article 86 of the Constitution.
- c. Threats of violence and actual violence perpetrated by the “outlawed secessionist MRC Group” prior to the election date curtailed the electorate's chances of voting as some polling stations were opened late and closed early.
- d. That at Mtwapa chief's office polling station and other polling stations the returned results were in excess of registered voters, which is evidence of rigging.
- e) In some polling stations the 1st Petitioner's agents were not allowed to observe the election or to perform their duties.
- f) “Widespread” bribery and undue influence exerted upon his supporters to induce them to vote in favor of the ODM candidate.

5. In support of the Petition were affidavits sworn by the 1st Petitioner and his witnesses Jilani Mwambao Mwangolo, Walter Mwaruwa Ngoro, Maitha Masha, (the latter who testified as PW4); John Ngala Wanje and Maurice Mwangolo Mwatua. A supplementary affidavit was later sworn by the 1st Petitioner. By and large the affidavits repeat the complaints pleaded in the Petition. The 1st Petitioner's sole prayer is that ***“Whereof your petitioners pray that it be determined that Amason Kingi Jefwa was not duly elected and election was void and pray for fresh elections in Kilifi County” ... (sic)***

6. In response to the Petition of the 1st Petitioner, the 1st Respondent through the firm of Mohamed Muigai Advocates took issue with the generalized manner in which the alleged infringement of

constitutional articles 27, 38 and 86 was pleaded. In addition the 1st Respondent denied the averments contained in the Petition, save to concede, that a few polling stations opened late due to security challenges. The 1st Respondent relied on affidavits sworn by election officials including Swaleh Ramadhan Shokoa (RW1), Raymond Kaingu (RW2) and 25 others, as filed in response to Election Petition No. 3 of 2013 to which I will turn shortly.

7. The 2nd Respondent (erroneously referred to in Petition No. 1 of 2013 as the Interested Party) filed a brief answer on 11th April, 2013 through the firm of Aoko Otieno & Associates. Therein it was averred that the 1st Petitioner's Petition does not lay any reasonable grounds or disclose the alleged infringement of the Constitution. The said Respondent, in the alternative, pointed to the wide margin of votes garnered by the said Respondent compared to his nearest competitor. The 2nd Respondent took issue with his joinder as an Interested Party. Affidavits sworn by Charles Charo Karisa (RW3) and Alphonse Mkanyi Katana were attached, in addition to reliance being placed upon affidavits sworn in response to Petition 3 of 2013.
8. The second Petition (Petition No. 3 of 2013) was filed by Francis Baya, another unsuccessful aspirant (the 2nd Petitioner) on 25th March, 2013. The Petition is brought against the IEBC (1st Respondent) and Amason Jeffa Kingi (2nd Respondent), through the firm of E. W. Njeru & Co. Advocates acting for the 2nd Petitioner.

9. The 2nd Petitioner seeks six prayers as follows;

**“1. The election conducted on 4th day of March, 2013 in Kilifi County is void and a declaration be so issued.**

2. **The said Amason Jeffa Kingi was not duly elected as Governor of Kilifi County and a declaration be so issued.**

3. **A fresh election should be held in Kilifi County and an order be so issued.**

4. **The candidate for Governor known as Amason Jeffa Kingi committed and is guilty of an election offence and or offences and a declaration be so issued.**

5. **Officers of the 1st Respondent committed and are guilty of an election offence and or offences and a declaration be so issued.**

6. **The Respondents pay the costs of the Petitioner.”**

**10.** The thrust of paragraphs 1-3 of that Petition is that the governor's elections failed to attain the threshold of a free and fair election and was a sham; that the results thereof lack credibility, due to the violent events that took the form of murder of police officers, abduction of election officials and destruction of poll venues and materials, as well as alleged widespread intimidation of voters in Kilifi North, Kilifi South, Kaloleni, Ganze and Rabai Constituencies.

**11.** The violence was allegedly orchestrated to appear as if caused by the secessionist Mombasa Republican Council (MRC) but was in reality a scheme to rig the election. The 2nd Petitioner averred that the affected areas constitute his political “strongholds”, and he faulted the IEBC for not taking the decision to cancel or postpone the election in the face of a situation where it was allegedly “virtually impossible” to observe full compliance with regulations regarding the integrity of ballots and ballot boxes.

**12.** Paragraphs 4 and 5 of the Petition allege bias by IEBC officials against the Petitioner and their partiality towards candidates in the CORD coalition, especially the ODM, and its candidate the 2nd Respondent, as demonstrated by *inter alia*:

- a) harassment of agents of URP

b) badgering of voters to vote for ODM candidates

c) electoral falsification to give advantage to the 2nd Respondent.

d) unjustified and forced early closure of polling stations to create opportunity for tampering with boxes

**13.** The 2nd Petitioner also alleged unlawful actions by the IEBC officials including: failure to seal ballot boxes or to give opportunity for verification of results, issuing of excess ballots in “perceived strongholds” of the 2nd Respondent and fewer ballots at his own strongholds, delayed opening and premature closure of polling stations in such places, and failure to count votes at polling stations, *inter alia*. The Petition was accompanied by an equally detailed affidavit sworn by the 2nd Petitioner and other affidavits sworn by 52 witnesses, which were marked FBI – FB 52, and in this judgment will be referred to as such.

**14.** Responding to the 2nd Petition, the 1st Respondent filed a response on 19th April, 2013. Therein the 1st Respondent reiterated its mandate under Article 81 and 88 of the Constitution especially in the conduct of free and fair elections, that are devoid of violence, intimidation, improper influence or corruption. It was further averred that state security officers were charged with the duty of maintaining law and order, and stability “necessary for the conduct of an election”, and that the presiding officer has discretion to adjourn elections under Section 64 of the Elections (General) Regulations, 2012 (the regulations).

**15.** The 1st Respondent further admitted the violent incidents complained of by the 2nd Petitioner. It was averred that as a consequence, the 1st Respondent was compelled to take “necessary measures” in consultation with candidates and agents including:

a) Proper and transparent transfer of ballot boxes from polling stations before counting but that counting was carried out properly and transparently, in the presence of security and political agents available.

b) Late opening (with compensation of time lost) of polling stations and early closures of others due to insecurity.

**16.** The 1st Respondent avers that the challenges occasioned by violent incidents affected all candidates equally, but that in any event the voter turn out in some constituencies ranged between 62% and 70%. The 1st Respondent disputed allegations of bias on the part of IEBC officials. Two Returning Officers (RO) and 28 Presiding Officers (PO) swore affidavits on behalf of the IEBC. Of these officials, Swaleh Ramadhan Shokoa (RW1) a PO, and the Kilifi North Constituency RO, Raymond Kaingu (RW2), were called to testify as witnesses during the trial.

**17.** The response of the 2nd Respondent was filed on 25th April, 2013. Therein the 2nd Respondent disputed the assertion that Articles 38 and 81 of the Constitution were infringed by either Respondent. The 2nd Respondent averred that the sporadic threats of insecurity were duly contained and that the electorate turnout was high. And further that the election was free, fair and credible and conducted in accordance with the Constitutional principles and the Elections Act (the Act). It was denied that any form of rigging was perpetrated in favor of the 2nd Respondent.

**18.** The 2nd Respondent filed affidavits sworn by Charles Charo Karisa (RW3) who described himself as the ODM agent, Kilifi County; and 30 other agents appointed by the said party for purposes of the election. Included were affidavits by Alphonse Mkanyi Katana, Patrick Kahindi Kalama and Kondi Tsui Konde, Chief constituency agents of ODM in Kaloleni, Kilifi South and Rabai respectively.

**19.** On 14th May, 2013 the court ordered that petitions No. 1 and 3 of 2013 be consolidated for purposes of hearing. Thereafter, during the pretrial conference the parties agreed *inter alia* to treat all affidavits filed as part of the record, on the number of witnesses to be called and the time frames of the trial.

Regarding the issues going for trial it was agreed that the court would draw these based on the individual statement of issues filed by each party. Directions were also given regarding the application filed by the 2nd Respondent in respect of the prayers in the first Petition, to the effect that it be canvassed in the course of the trial.

20. The trial commenced on 10th June, 2013 closing with submissions on 2nd July, 2013. In the course of the trial, the 1st Petitioner was represented by Mr. Michira while Mr. and Mrs. Kibe appeared with Mr. Kenga for the 2nd Petitioner. The 1st Respondent was represented by Mr. Wetangula. Miss Otieno and Mr. Bryant represented the 2nd Respondent.

### **THE PETITIONERS' CASE**

21. Through his pleadings, evidence and submissions, the 1st Petitioner presents the following case. That the governor's election in Kilifi County was conducted in an atmosphere of violence and fear. That voters were intimidated. That as a result of the violence some polling stations did not open, while others opened late and closed early. Additionally, that there were incidents of voter bribery, partiality by IEBC officials who denied his agents access to polling stations, allowing voters without election cards to vote and, subsequently denying his agents copies of relevant result forms such as forms 35 and 36.

22. He listed some of the polling stations allegedly affected by the violence and irregularities as follows:

1. Kidutani Primary
2. Bembo Primary
3. Ziani primary
4. KARI tallying centre
5. Mnyenzi primary
6. Mtepeni primary.

23. Other irregularities complained of include the alleged mishandling of ballot papers after voting, and an incident at Pwani university tallying centre where it is claimed that counterfeit ballots were found in a dump site. Two bribery incidents were allegedly perpetrated, the first one, near St. Lukes Hospital Kaloleni. Voters were allegedly instructed to vote for “*chungwa sita*” or ‘*six oranges*’ representing ODM candidates for all six positions.

24. The second incident allegedly occurred at Mtwapa chief's office polling station and was perpetrated by three occupants of a vehicle **KBJ 965S** who urged voters to vote for the 2nd Respondent. The 1st Petitioner asserts that the violence, malpractices and irregularities affected the election exercise and results. Hence it is the 1st Petitioner's contention that the election did not meet the legal threshold anticipated by the Constitution and statute and must be vitiated.

25. The 2nd Petitioner's case is primarily premised on similar grounds. With regard to the violence, it is the 2nd Petitioner's case that it was a deliberate perpetrated “masquerade” of typical MRC attacks. But in reality it was a rigging tactic targeted at his strongholds in Ganze, Kilifi North, Kilifi South, Kaloleni and Rabai Constituencies. This, he asserted, was intended to deny him votes in those areas through intimidation of the electorate. He cited incidents of actual violence in Kilifi North and Kaloleni Constituencies among them the killing of police officers at Chumani tallying centre, abduction of the PO and DPO assigned to Mkunguni Primary polling station, petrol bombing of the vehicle ferrying IEBC materials at Hademu Primary Polling Centre and an arson attack on the Jibana chief's camp polling station.

26. Regarding Kilifi South, the 2nd Petitioner cited the murder of two security officers and destruction of property. He claims that as a result of the violence, Rabai Constituency polling stations opened early, but soon closed prematurely only to reopen at 11.00am and thereafter close early without due notification to the public, or compensation for lost time.

27. The 2nd Petitioner particularized a total of 19 polling stations in four of the Constituencies which

were allegedly affected by the violence. Two of these, Mkunguni and Chumani (Kilifi North) allegedly did not open at all after the incidents of abduction of officials and murder of policemen, respectively, whilst Hademu (in Kaloleni) was open very briefly due to a petrol bombing incident.

**28.** The polling stations which opened late and closed early were listed as follows:

#### Kaloleni Constituency

1. Mtendani church and Nursery
2. Mariakani Dairy
3. Viragoni Primary
4. Miyani primary

#### Kilifi South Constituency

1. Jila primary
2. Kidutani primary
3. St. Martins primary
4. Kadzinuni primary
5. Mwarakaya primary

#### Kilifi North Constituency

1. Roka Maweni primary
2. Kaoyeni primary
3. Jeza Zhomu primary
4. Fumbini primary
5. Mkeringini primary
6. Bahati primary

#### Ganze Constituency

Palakumi primary

**29.** It is the 2nd Petitioner's case that the violence compromised the integrity of elections as due procedures for the handling/counting of ballot boxes and ballots such as sealing and the participation of agents could not be complied with in the obtaining circumstances, and that IEBC officials exploited the situation to create false alarms in order to disrupt proceedings.

**30.** According to the 2nd Petitioner, ballot boxes prematurely removed before counting from Kilifi North Constituency polling stations were taken to dark and unattended venues near the IEBC offices in Kilifi, as Chumani tallying centre had been destroyed. Also while the tallying centre for Kilifi South Constituency was moved to KARI centre where counting was carried out in the open and without adequate lighting. He named Kizurini, Pingilikani, Kolongoni, Majaoni, Fudumulo, Kafitsoni, Mwanzabu and Lugwe polling stations as venues from which ballot boxes were moved prematurely and transported in the night in the absence of his agents.

**31.** He complained that IEBC officials were biased against his agents, denying them access to polling stations and, badgering voters to vote for CORD candidates. And in particular, that at Kibaoni primary polling station the 2nd Respondent disrupted the voting exercise as he engaged the PO in a meeting on the election day. Biased officiating allegedly happened in thirteen (13) polling stations, namely; Imani, Kilimo, Bamba (Kilifi North), Mwapula, Dida, Mwarandida (Ganze); Ngomeni, Kibaoni, Majengo (Magarini) and Mwadondo, Batani, Kaliang'ombe and Bwagamoyo (Rabai).

**32.** The 2nd Petitioner contends that the effect of the violence and irregularities was to disfranchise the voters who failed to turn up to vote out of fear, and therefore the election results were not an expression

of the will of the majority. Secondly, that the elections do not pass the test of free, fair, transparent and credible elections as envisaged in the electoral law. He strongly urges that the election results should be vitiated and a determination be made to the effect that the 2nd Respondent is guilty of an election offence.

### **THE RESPONDENTS' CASE**

33. The 1st Respondent admits that incidents of violence erupted on the eve of the election day, the epicenter of which was Kilifi North Constituency. As a result, several security agents were killed at Chumani Primary tallying/polling centre, in addition to the abduction of IEBC officials and destruction of electoral material. These incidents allegedly led to the closure of Chumani Primary tallying centre and Chumani primary polling centre as well as Mkunguni nursery polling centre on the election date. The 1st Respondent asserts that despite the violence and resulting atmosphere of tension, the 1st Respondent endeavored to conduct proper elections in the County, even though the voting hours in some poll centres were reduced due to late opening and early closures. That party/candidate agents were allowed free access into polling and tallying centres. However, in some cases counting could not be done at polling centres due to fear of insecurity and the proceedings were moved elsewhere. That this was done in consultation with the RO in exercise of the discretion of concerned POs.

34. For Kilifi North Constituency, the counting/tallying was done at Pwani University instead of Chumani Primary. That the transfer was done upon consultation with agents and candidates. It was further asserted that the transfer was properly conducted with ballot boxes sealed and guarded by security officers. The 1st Respondent denied any malpractices on the part of its officials and described the voter turn-out as high in the entire County. It is the 1st Respondent's contention therefore that the insecurity experienced did not in any way affect the election exercise or results and even if it did, every candidate was equally affected.

35. The 2nd Respondent while asserting that there was a high voter turn out denies the allegation that the 2nd Petitioner has any strongholds in the cited Constituencies, referring to election results therein. Like the 1st Respondent, the 2nd Respondent takes the position that the incidents of violence did not hinder any persons from voting although some polling stations opened late and closed early.

36. The bribery allegations were disputed by the 2nd Respondent who also insisted that all agents present were allowed into the polling/tallying centres and given necessary forms by the elections officials at the end of the counting/tallying. That the proceedings were properly conducted. Specifically, it was admitted that the 2nd Respondent did visit Kibaoni primary polling centre and consulted with the PO and DPO. However, the consultations did not disrupt the voting process or create any commotion as asserted by the 2nd Petitioner. The 2nd Respondent urged the court to find that the election was conducted in accordance with the law.

### **COMMON GROUND**

37. Some basic facts related to this case are not in dispute at all. Kilifi County is made up of seven Constituencies namely, Kilifi North, Kilifi South, Kaloleni, Rabai, Ganze, Malindi and Magarini. Kilifi County had about 548 polling stations or centres spread across the seven constituencies, with a total population of 338,862 registered voters. Nine candidates offered themselves for the governor's position in the election.

38. It is common ground that a few days to the elections there had been instances of violent attacks on police officers in the County, specifically in Malindi Constituency. Prior to this during election campaigns, was an attack which carried out at Mtwapa targeting the current governor. In the course of the attack his aide was killed. It was generally suspected that the MRC which has for some years been agitating for the secession of Coast Province, was involved, and that the group was determined to ensure that the general election was not conducted in the Coast Province. Their rallying call was "*Pwani si Kenya*" or roughly, that Coast Province is not a part of Kenya. The political agitation and violence was feared to have escalated in the run-up to the elections.

39. It would seem that security agents and IEBC officials were the targets of the attacks mounted on the eve of the election day. The worst of these attacks occurred in Kilifi North Constituency at Chumani primary school and Mkunguni Nursery. At the former, which had been designated as a polling centre and the constituency tallying centre, an armed gang who, according to the 1st Petitioner are MRC militia, but to the 2nd Petitioner a 'masquerade', thereof killed five police officers. At Mkunguni Nursery the presiding officer and his deputy were abducted and robbed of their election materials. The two centres, with 1766 registered voters between them did not open on the election day.

40. There were other relatively minor incidents in Kaloleni and Ganze constituencies, including the petrol bombing of a vehicle ferrying electoral material at Hademu Primary. As is usually the case, news of these attacks spread rapidly in the County, causing anxiety among not just voters, but also the security and IEBC personnel. Some polling stations opened late and closed early.

41. People did come out to vote at a majority of polling centres, but as the evening drew near, some IEBC officers and security personnel, especially in Kilifi North and South constituencies, flocked to the tallying centres out of fear of getting stranded at the various polling stations. This was precipitated by the alleged threat by contracted transporters to withdraw their vehicles due to fear of attacks. Consequently, counting in the affected polling stations was transferred to the tallying centres. At the conclusion of the election exercise, the 2nd Respondent was declared to be the duly elected governor of Kilifi County. The foregoing is a summation of the uncontested issues.

### **DISPUTED ISSUES**

42. At the pretrial conference, the court framed eight contested issues for determination. These were largely drawn from the individual lists submitted by the respective parties, and are:

- “1. Whether the election was conducted in a free, fair, transparent and credible manner in compliance with the Constitution and Elections Act; OR;**
- 2. Whether there was general insecurity, acts of violence and thuggery prior to, and during the election which adversely affected the conduct of the said election, to what extent, and whether any of the candidates gained any unfair advantage therefrom;**
- 3. Whether the 1st Respondent's conduct of the elections in the alleged volatile situation was reasonable, adequate and within the law;**
- 4. Whether the 1st Respondent co-operated with and allowed all the candidates' agents access to all the polling stations during the election;**
- 5. Whether the elections were rigged and in what manner; and,**
- 6. Whether any election offences were committed by the 2nd Respondent in collusion with agents of the 1st Respondent with a view of giving the former undue advantage.**
- 7. Based on the court's findings on the above, what declarations, in law or reliefs should the court grant; and**
- 8. Whether costs are payable and by whom.”**

43. It is apparent that the answer to the first issue being the ultimate question is related to the 2nd, 3rd, 4th, 5th and 6th issues. I propose to deal with issues Nos. 2 and 3 together and issues 4, 5 and 6 as a cluster before returning to issue no. 1, and finally to deal with issues 7 and 8 together. In so doing I will make use of summary headings that capture the key issues.

### **THE LAW**

44. Article 38 of the Constitution recognizes and protects political rights of every citizen. Article 38(1) and (2) state:

**“(1) Every citizen is free to make political choices, which includes the right—**

**(a) to form, or participate in forming, a political party;**

**(b) to participate in the activities of, or recruit members for, a political party; or**

**(c) to campaign for a political party or cause.**

**(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—**

**(a) any elective public body or office established under this Constitution; or**

**(b) any office of any political party of which the citizen is a member.”**

45. Further accentuating the political rights of the citizen Article 38 (3) provides:

**“(3) Every adult citizen has the right, without unreasonable restrictions—**

**(a) to be registered as a voter;**

**(b) to vote by secret ballot in any election or referendum; and**

**(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”**

46. Chapter 7 of the Constitution provides the framework for the electoral system and process, including the resolution of electoral disputes. The Elections Act, (and the Regulations and Rules made thereunder) are enacted pursuant to Chapter 7 of the Constitution. Hence electoral disputes must be heard and determined in accordance with the foregoing stipulations.

47. It is trite that electoral disputes belong to a special category. In Joho v Nyange & Another (2008)3 KLR(EP) Maraga J. as he then was, stated:

**“Election Petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance – Kibaki v Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the election court's decision in Wanguhu Nganga & Anor vs George Owiti & Anor, Election Petition No. 41 of 1993 that *“election petitions should not be taken lightly.”*”**

### **Burden and Standard of Proof**

48. The Supreme Court of Kenya has settled the question of who bears the burden of proof and the standard thereof, in an election petition. In Petition No. 5 of 2013 Raila Odinga vs IEBC and others [2013]e KLR which arose from the same general election as the present Petition, the Supreme Court, after considering judicial approaches in various jurisdictions on this issue, laid down the law, in the following words:

**“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 have been 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.”

49. Further on with regard to the standard of proof the Supreme Court stated:

*“The threshold of proof should, in principle, be above the balance or 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 **Joho Case**, the court expressed the opinion that in a petition “where there are allegations of election offences a very high degree of proof is required.” With these principles in mind, I now turn to deal with the specific issues for determination in this petition.

## **ANALYSIS OF THE EVIDENCE**

### **Issues 2 and 3**

#### **The violence: whether it affected the conduct and results of the election**

50. That there were several incidents of violence prior to and particularly on the eve of the election date is not in dispute. The epicenter of the latter appears to be Kilifi North constituency where it is confirmed that:

a) At Chumani primary polling and tallying centre:

Five police officers were killed and centre did not open.

b) At Mkunguni Nursery polling centre: The PO and DPO were abducted and robbed of all electoral materials.

The centre did not open.

c) Unknown persons razed down Nyalani chief's camp polling centre. Voting started at 11.00am. Nyalani is also referred to as Jibana or Kaloleni chief's camp (see **FB2**).

51. Another polling centre which undeniably experienced first hand violence by unknown gangs is Hademu Primary (Kaloleni constituency): an explosive device suspected to be a petrol bomb was hurled at the IEBC vehicle injuring the DPO. Although no election material was destroyed polling started at 11.00am. And according to the 2nd Petitioner, there were attacks at Mwembekati trading centre (Kilifi South) and Mutsangamali (Ganze). It was also claimed that a prisons' warden was killed in the former and in the latter police officers allegedly harassed people in retaliating attacks on colleagues.

52. Having combed through the affidavits of the 2nd Petitioner's witnesses, I cannot find any evidence to support these latter claims (on Mwembekati and Mutsangamali). However, the 1st Respondent did also admit incidents or reports of incidents in other places such as Mwanzabu and St. Martins centres but there is no evidence linking the violence with the election. Neither are the alleged events associated by any witness with the late opening/early closure in any of the stations on the election date.

53. On the issue of violence, the 1st Petitioner gave no particulars in the Petition or affidavits filed. The affidavits generally refer to “rampant incidences of violence” (sic) on the eve of the election, and threats of violence allegedly associated with the MRC. Only one area, Kidutani, is specifically identified

regarding actual violence but it is not clear who killed or injured the victims and destroyed property or the motivation.

54. No evidence was led by any of the witnesses that any violence occurred on the election day itself. Kilifi North Constituency Returning Officer Raymond Kaingu (RW2) told the court that he had called for reinforcement of security after the incidents of the night before the election. These included the burning of houses witnessed near St. Martin's Primary polling centre by one of his POs Swaleh Ramadhan Shokoa (RW1). This notwithstanding, the station was opened the next day as did Hademu and Nyalani. People turned out to vote in those polling stations.

55. What I think is readily conceded is this:- that the attacks on the eve of the elections caused fear among election officials, police officers and members of the public alike. The 2nd Petitioner contends that the attacks were orchestrated to “masquerade” as or mimic MRC attacks and were specifically designed to deny him votes in his strongholds encompassing five constituencies. This thesis appeared to be based on the fact that the constituency from which the current governor hails, Magarini, was not affected, while Malindi was only partially affected by the violence. His evidence to the court however only proves actual violence at three spots in two Constituencies, namely Kilifi North and Kaloleni, affecting about 1700 registered voters. His second complaint and also that of the 1st Petitioner, was that, the violence spawned widespread fear and resulted in late opening and early closures of polling stations, which affected the voting exercise. Evidently news of the attacks spread across all constituencies. Polling time on the election day is prescribed in Regulation 66 of the Election (General) Regulations, 2012 (the Regulations).

Regulation 66(1) and (2) provide:

***“(1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.***

***2. Notwithstanding subregulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock”***

56. The 1st Petitioner stated that polling time at Ziani, Bembo and Kidutani school centres was curtailed as these stations opened late and closed early. He also helpfully annexed a list of all poll stations and registered voters. For his part the 2nd Petitioner listed a number of polling stations which opened late and closed early as a result of the violence or news of the violence which had occurred on the eve of the elections and attendant anxiety. Through affidavit evidence the 2nd Petitioner cited the specific polling stations which included the three cited by the 1st Petitioner and respective hours of opening/closure. The stations and the respective registered voters are listed in the table below.

|    | <b>POLLING STATION</b>  | <b>CONSTITUENCY</b> | <b>OPENING</b> | <b>CLOSING</b> | <b>REGISTERED VOTERS AS PER 1ST PETITIONER'S ANNEXTURES</b> |
|----|-------------------------|---------------------|----------------|----------------|---|
| 1. | Mtendani Trading Centre | Kaloleni            | 10.30am        | 4.00pm         | 274   |
| 2. | Nyalani Chief's Camp    | Kilifi North        | 10.00am        | 5.00pm         | 376   |
| 3. | Mariakani Dairy         | Kaloleni            | 10.00am        | 8.30pm         | 5100  |
| 4. | Viragoni                | Kaloleni            | 9.00am         | 9.00pm         | 469   |

| Primary |                                  |  |                  |  |           |
|---------|----------------------------------|--|------------------|--|-----------|
| 5.      | Miyani Primary Kaloleni          |  | 9.00am           | 6.00pm                                 | 242       |
| 6.      | Jila Primary Kilifi South        |  | 9.00am           | 4.00pm                                 | 490       |
| 7.      | Mtomodoni Primary Kilifi South   |  | 7.30am           | 5.30pm                                 | 5576      |
| 8.      | Kidutani Primary Kilifi South    |  | 7.30am           | 3.30pm                                 | 745       |
| 9.      | Bembo Primary Kilifi South       |  | late             | early                                  | 726       |
| 10.     | Ziani Primary Kilifi South       |  | late             | early                                  | 948       |
| 11.     | St. Martins Primary Kilifi South |  | 9.00am           | 3.00pm                                 | 930       |
| 12.     | Roka Maweni Primary Kilifi North |  | 7.00am           | 2.20pm                                 | 1116      |
| 13.     | Kaoyeni Nursery Kilifi North     |  | 10.00am          | 11.00am                                | 445       |
| 14.     | Jeza Zhomu Primary Kilifi North  |  | Hardly<br>6.00am | Only<br>people<br>voted<br>5<br>7.00am | 274       |
| 15.     | Fumbini Primary Kilifi North     |  | -                | 4.00pm                                 | 1234      |
| 16.     | Mikiringini Primary Kilifi North |  | -                | 3.30pm                                 | 794       |
| 17.     | Bahati Primary Kilifi North      |  | -                | 3.00pm                                 | 968       |
| 18.     | Mwapula Primary Ganze            |  | 6.30am           | 4.00pm                                 | 224       |
| 19.     | Palakumi Primary Ganze           |  | 10.00am          | 3.00pm<br>4.00pm                       | or<br>569 |
| 20.     | St. Michael Primary Kaloleni     |  | 9.00am           | -                                      | 701       |
| 21.     | Kilimo Primary Kilifi North      |  | About<br>7.30am  | 5.30pm                                 | 582       |
| 22.     | Bamba Primary Ganze              |  | 8.15am           | -                                      | 842       |

|     |                          |              |         |        |      |
|-----|--------------------------|--------------|---------|--------|------|
| 23. | Dida Primary             | Ganze        | 8.30am  | -      | 387  |
| 24. | Mwarandida Primary       | Ganze        | 6.30am  | -      | 649  |
| 25. | Ngomeni Primary          | Magarini     | 7.30am  | -      | 4819 |
| 26. | Kibaoni Primary          | Kilifi North | 6.20am  | -      | 1607 |
| 27. | Kaliang'ombe Primary     | Rabai        | 6.30am  | -      | 770  |
| 28. | Majaoni Primary          | K. South     | 6.30am  | 5.15pm | 1607 |
| 29. | Fudumulo Primary         | Ganze        | 11.03am | -      | 770  |
| 30. | Kafitsoni Primary        | Ganze        | 7.45am  | -      | 109  |
| 31. | Mwanzangu Trading Centre | Rabai        | 6.30am  | -      | 115  |
| 32. | Lugwe Primary            | Rabai        | 6.30am  | 6.00pm | 731  |
| 33. | Basi Primary             | Kilifi North | 10.00am | 4.30pm | 804  |
| 34. | Mwarakaya Primary        | Kilifi South | -       | 5.30pm | 1111 |

57. Additionally, the 2nd Petitioner in his Petition listed Kadzinuni primary (Kilifi South) and Mukombe & Nzowerani Primary (Kilifi North) as polling stations that opened late and closed early. However, none of his affidavits refer to these centres. At any rate affidavits by the 1st Respondent indicate regular polling hours for Kadzinuni. For purposes of this judgment the said centres were not included among those which opened below the requisite hours.

58. Similarly, the 2nd Petitioner's affidavit contains allegations that unspecified polling stations in Kaloleni Constituency opened nearer to the proper time but were soon ordered closed by IEBC officials, only to reopen between 11.00am and 5.00pm, without due notice to voters, many of whom returned home without voting. That where the stations opened late or re-opened after closure, the PO did not compensate for time lost. This latter generalized allegation is not supported by the affidavits filed, especially with regard to compensation of time. Viragoni and Miyani polling centres, for example, both in Kaloleni Constituency seem to have gone on for extra time after the official closing time.

59. Secondly, of the thirty four (34) polling stations he alleges opened late/closed early in the County, only four are in Kaloleni Constituency. It is also apparent that in eight (8) of the thirty four (34) polling

stations the opening time is not stated in the evidence while the closing time in nine (9) of the polling centres is not given. This makes it difficult to establish the total period the centres were opened for voting.

**60.** Be that as it may, the 1st and 2nd Respondents admitted that several polling centres were not open for the requisite eleven hours. These include centres in the following primary schools:

1. **Mtendani**
2. **Majaoni**
3. **Jila**
4. **St. Martins**
5. **Fudumulo**
6. **Jeza Zhomu**
7. **Roka Maweni**
8. **Kaoyeni**
9. **Palakumi**
10. **Mariakani Dairy**
11. **Mwapula**
12. **Bamba**
13. **Dida**
14. **Lugwe**
15. **Bahati**
16. **Mwarandida**
17. **Mwandondo**
18. **Kaliang'ombe**
19. **Imani**
20. **Kidutani**
21. **Viragoni**
22. **Hademu**
23. **Nyalani**
24. **Mwarakaya**
25. **Miyani**
26. **Fumbini**
27. **Kafitsoni**

**61.** The 1st Respondent's explanation was that in many cases the POs were advised against spending the night at polling centres for fear of attacks and had to travel there on the election day, and left early. Secondly, some POs became fearful as evening drew close on the polling day and left early.

The 1st Respondent's evidence was that despite opening late and closing early the centres, recorded a high turn out. Kafitsoni for example recorded a voter turn out of 82%.

**62.** Upon comparing the centres named in the two lists it is evident that the above list agrees with the 2nd Petitioner's list, save for a few centres namely Mtomodoni, Bembo, Ziani, St. Michael, Kilimo, Ngomeni and Kibaoni and the variance of precise hours that affected centres remained open. The distribution of the affected centres in the County also remains roughly the same. In both lists, Kilifi North Constituency had the most (about 13) polling centres open for shorter periods on the voting day, while Rabai had the least number of affected centres.

**63.** Kilifi South, Ganze and Kaloleni Constituencies each had roughly 4-5 centres affected. Malindi and Magarini hardly any. Even assuming that 100% of registered voters could have turned out to vote in these centres if open for longer hours, there is nothing to suggest that the majority of the votes would have gone exclusively to either Petitioner, in contrast to the trend in centres where normal voting hours were kept, eg. in Malindi Constituency, which the 2nd Petitioner cited in his testimony as one of his strongholds.

64. Remarkable claims were made by Alice Kai Yawa a URP agent at Kidutani primary polling centre [FB11] to the effect that 300 people who were queuing there failed to vote following the premature closure of the polling station. According to the PO Rachel Bahati, although the voters had fled the polling centre by 430pm “for fear of insecurity”, the Form 35 (and the 1st Petitioner's own records) show that out of 753 registered voters, 391 had already cast their vote. Roughly 51.9 per cent. It is unlikely that almost all registered voters (i.e 391 plus 300) had turned up to vote, as the agents' evidence suggests. Or that all the 300 voters who went away would all have exclusively voted for either Petitioner.

65. On the other hand, at Hademu Primary polling centre only 180 of the 419 registered voters had turned up and voted before closure (42%). The 2nd petitioner claims in his affidavit that Hademu never opened after the petrol-bomb attack described by his witness Evans Karisa Kithi (FB1). He was the driver of a private vehicle hired to ferry electoral materials to Hademu from Kaloleni Tallying centre. This witness however never returned to Hademu on the day of voting as his employer declined to have his vehicle return on a similar mission. Instead Evans was assigned to drive to Mtendani Church where he spent the day. Hence the evidence of Ngome Chisambo Ngome (the PO Hademu) to the effect that Hademu opened partially remains unchallenged. It is the polling centre at Jeza Zhomu Primary which closed after only 5 people had voted.

66. I have also looked at percentages cast in Form 35 in respect of several other polling centres which were opened late or closed early. A sample thereof suffices to show that the turn out was relatively high in the circumstances obtaining:

|     | <b>Centre</b>                 | <b>Turn out</b> | <b>Registered voters</b> | <b>Percentage</b><br>% |
|-----|-------------------------------|-----------------|--------------------------|------------------------|
| 1.  | Mariakani Dairy Stream 7      | 466             | 732                      | 64%                    |
| 2.  | Viragoni Primary School       | 329             | 405                      | 71%                    |
| 3.  | Miyani Stream 1               | 221             | 397                      | 55%                    |
| 4.  | Majaoni primary stream 1      | 555             | 792                      | 70%                    |
| 5.  | Kaliang'ombe primary stream 3 | 355             | 538                      | 66%                    |
| 6.  | Roka Maweni stream 2          | 199             | 233                      | 85%                    |
| 7.  | Mwapula                       | 255             | 325                      | 78%                    |
| 8.  | Bamba stream 1                | 267             | 471                      | 57%                    |
| 9.  | Fumbini primary stream 2      | 357             | 619                      | 58%                    |
| 10. | Jeza Zhomu stream 1           | 5               | 274                      | 1.8 %                  |

67. Both Respondents have asserted that the voter turn out was high, and looking at the available Form 35, that appears to be the case. The 1st Respondent has offered the following average percentages:

|                           |        |
|---------------------------|--------|
| Kilifi South constituency | 66.4%  |
| Kaloleni constituency     | 62%    |
| Ganze Constituency        | 69%    |
| Rabai constituency        | 70.32% |

68. The 2nd Respondent stood by the following statistics in respect of the remaining Constituencies:- Malindi 66%, and Magarini 60%. These figures may not be 100% accurate but are they generally indicative of the trend. On the face of it the areas not affected by violence (i.e Malindi and Magarini according to the 2nd Petitioner) did not witness a dramatically different turnout or higher vote yields for the Petitioners. Ironically, Kaloleni & Rabai which were said to have been targeted by the violence had fairly high turn outs. According to the Form 36 submitted by the 1st Respondent the County average is about 63.25%. In the circumstances, it is difficult to agree with the Petitioners' contention that the violence affected the election exercise and results, or as suggested by the 2nd Petitioner, was designed specifically to suppress the turn out of his supporters in his strongholds.

69. Despite the proven actual violence, that undoubtedly created fear and tension in the region, the late opening and early closure of polling stations, the records show a positive voter turn out in the County. The 1st Respondent argued that under Regulation 64, the PO has discretion to adjourn proceedings and even transfer them elsewhere in the event of riot, violence etc, and to extend the voting hours in consultation with the RO. The records tendered by the Respondents show that in some of the centres that opened late, voting was extended beyond 7.00pm. That cannot excuse the failure by certain polling centres to compensate for time lost. The ultimate question however, is whether the result returned would have been any different if they did. It does not seem so, there being no evidence that those who did not vote were without exception all petitioners' supporters.

70. The 2nd Petitioner during cross-examination by Mr. Wetangula was hard pressed to explain the high turn out in the County in view of his assertions that, the violence was mounted specifically to dissuade his supporters in his strongholds – Ganze, Kaloleni, Kilifi North, Kilifi south and Rabai - from voting. He did not tender evidence of any such supporter who either abstained from the vote or voted for his opponent out of fear or who missed the opportunity to vote for him due to irregular voting hours.

71. In the same breath he admitted that the majority of the victims targeted by of the violence were security personnel and IEBC officials. Confessing that he did not know if some of his supporters were members of the MRC, he stated;

***“I do not know who precipitated the violence. I am not familiar with violence tactics of the MRC...the designers of the violence wanted it to look like an MRC affair but the pattern and areas and manner...shows it was selective and not an MRC activity...by analysing areas of attack I can tell what is by MRC or not...incidents I have highlighted relate to members of police and the IEBC. It was more than an attempt to stop the elections from taking place.”***

72. Clearly, the 2nd Petitioner's allegation of an MRC “masquerade” targeting his supporters especially appears based on speculation and does not stand up to scrutiny, especially in light of the numbers voting, some of whom voted for him. The high numbers appear to negate the 2nd Petitioner's proposition that many abstained from or missed a chance to vote due to fear and the irregular hours. Ironically, only through the election results can his alleged strongholds be determined. The results presented by IEBC clearly do not show that he had strongholds in the alleged five (5) constituencies. Besides only about 30 or so polling stations out of about 548 polling stations (including Chumani and Mkunguni Primary) in the county were affected by the violence.

73. The above represents about 5.5% of total polling stations. There being no evidence of violence or disruptions in the remaining 510 or so polling centres, it should follow naturally that the Petitioners' showings would reflect marked improvement. That is not the case for example, in Malindi Constituency. It is difficult to justify vitiating the entire election exercise involving over 540 polling centres in the County because three of them were closed on polling day due to actual violence and about 27 others disrupted but stayed open to voters for limited hours.

74. From the pleadings the Petitioners' challenge to the accuracy of the record of the results was vague,

and muted. Neither the 1st nor the 2nd Petitioner had specifically any “rigging” attempts through falsification of the statutory forms, or manipulation of records. At paragraph 5(iv) and 6(ix) of the Petition, the 2nd Petitioner alleged “electoral falsification” and declarations allegedly “based on unsigned Form 35” but gave no particulars. Similarly his affidavit evidence did not specifically refer to alteration of Form 35. His complaint in the course of the evidence in chief was that his agents did not get a chance to verify Form 35, and not that the Forms themselves were altered. When the 2nd Petitioner was challenged concerning the allegation of “electoral falsification” in favor of his opponents contained in his Petition, he referred to the evidence of Zainabu Salim (RW2) which, basically dwells on the transfer of Kilifi North ballot boxes to IEBC offices, and thereafter to Pwani University, the latter which was substituted as a tallying centre after the attack at Chumani.

75. Thus the allegation of “falsification” appear to lack any evidential support or particulars. So too the allegation of issuance of double ballots to voters. The foregoing is also true of the initial pleadings and evidence of the 1st Petitioner. It would seem that only as the trial progressed did the accuracy of the results as reflected in records become an issue, for the Petitioners. During cross-examination by counsel for the 2nd Respondent the 2nd Petitioner stated:

***“Occurrence (violence) at Chumani caused great fear. Impact was huge. From Gede to Mtwapa. So if the records show there was 62% turn out we dispute that...No. I am not aware that voter turn out was quite high. I say it was quite low”***

76. When confronted with figures in the Form 36 for Ganze Constituency he said that registered voters were over 30,000 and the turn out was 69%.

Immediately after, during re-examination by his counsel he said:

***“I do not consider these the figures genuine. Out of the targets and patterns of attacks(which) were intended to affect the outcome of the election. The violence was widespread. I do not accept the form 35. Form 35 here have many alterations...information transferred to Form 36 (cannot) be accurate.”***

77. For this part, the 1st Petitioner had averred at paragraph 29 of his Petition that “rigging” caused over 100% turn out in some polling centres through “rigging of marked ballot papers into ballot boxes” (sic). No particulars were given. His affidavit does not specifically allege the alteration of Form 35 either, save to state that there was “rampant rigging of election and/or results” at some tallying centres.

78. Notably the 1st Petitioner testified after the second Petitioner had been extensively cross-examined on the election results. It was while testifying about several unsigned Form 35s for Ganze Constituency that he claimed for the first time that “rigging involved alterations” of Form 35 and declared in cross-examination that the Form 36 were unreliable as figures therein were transferred from the “altered” Form 35s. This arose in cross-examination because in the course of his evidence in chief, he emphasized upon the alleged alterations on Form 35 at Mirihini, Katendewa, Ganze, Vilwape, Jira, Rima Raperera and Bamba Police station polling centres, all of Ganze Constituency and asserted:

***“This is true in almost all constituencies. All the Forms 35 contain alterations and whiteouts.”***

79. It appeared that the Petitioners adopted this new direction in the course of the trial to introduce doubt concerning the electoral results figures in the records tendered by the IEBC. None of them however applied for scrutiny of votes which would have helped to clarify the results on the forms in question. The 1st Petitioner was granted leave prior to the trial to file a further affidavit in respect of Form 35s, whose originals he claimed not to have had at time of filing the petition. What was annexed in the said further affidavit appears to be a copy of a Form 36 and alleged counterfeit ballots allegedly found at Pwani University dumpsite. In respect of the former, the supplementary affidavit vaguely stated at paragraph 4:

***“THAT the general elections 2013 results of Governor – Kilifi County show the extent of***

*the votes I had garnered which was later doctored” (sic)*

80. I do agree in principle with the Respondents' submission that a party is bound by their pleadings. Alleged alterations in form 35 and 36 should have been specifically pleaded. While I do not accept the 1st Respondent's assertion that the court should not peruse the Forms 35 and 36 produced in the trial pursuant to Rule 21 “because they are not exhibits” I am convinced that the decision of Kimaru J. in **Mahamud Muhamed Sirat v Ali Hassan Abdirahman & 2 Others in Nairobi Petition No. 15 of 2008** is good law: a court should decline the invitation to make determinations upon matters not pleaded.

81. The Respondents also attacked the failure by the Petitioners to plead results as required by Rule 10. In the case of **Richard Kalembe Ndile v Patrick Musimba Mweu & 2 Others [2013]e KLR**, Majanja J. declined to follow the dicta in **Mututho v Kihara & 2 others [2008]e KLR** that failure by a Petitioner to plead results in an election Petition is fatally defective, and I agree with him and therefore overlook the defect herein. However, it is not generally open for such a party in the course of the trial to set his case on an entirely new path not contained in initial pleadings.

82. That in my view is what the two Petitioners herein have attempted to do by inserting new claims about alterations in the Form 35s thereby also making a case to challenge the results in the Form 36. To my mind, that was not part of their original complaint, and it seems to have become belatedly necessary to prop up the violence - affected elections – proposition which appeared to have come under challenge due to the significant voter turnout recorded in statistics presented by the Respondents.

83. The Respondents however, raised no objection to these claims especially when raised by the 1st Petitioner in his evidence in chief. Counsel for the 2nd Respondent cross-examined him on these aspects. The Respondents' witnesses also led evidence on the entries in some Form 35s (see RW1 & 2). They were cross-examined by the Petitioners' advocates on the same. Submissions by both Petitioners referred to the alterations. The Respondents belatedly reacted by contending in their final submissions that it was not open to the Petitioners to rely on matters not pleaded. The horse had already bolted from the stable, bringing the case within the exception described by the Court of Appeal in **Chumo Arap Songok v David Kibiego Rotich [2006]e KLR**

**“...parties to a suit are bound by the pleadings and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties...and made an issue in the suit through the evidence adduced and submissions of the parties.”** (emphasis added)

84. Obliquely pleaded, the matter of alteration of the Form 35 became an issue in the trial, albeit without strong supporting evidence being led by the Petitioners. They handled the matter in a rather half hearted manner as I have shown earlier. Mindful of the role of the Petition court to inquire into the overall propriety of an election which is an exercise of great public importance, the court has scanned through the Form 35s availed by the IEBC to the court. It was the evidence of Charles Charo Karisa (RW3) that there were 523 polling centres with 727 streams in the County. The latter figure appears tenable as Kilifi North Constituency with the highest number of registered voters in the County (69417, per County Form 36) had about 216 streams, majority of polling centres with a maximum of two streams (81 centres had single streams and 29 had two streams).

85. Therefore the results captured in the table below in respect of the 693 Form 35s could well be a representative sample of the general picture.

| CONSTITUENCY | No. of availed F.35 | Altered signature | without signature | Total altered with | Total altered |
|--------------|---------------------|-------------------|-------------------|--------------------|---------------|
| Ganze        | 123                 | Ganze             | 33                |                    | 49            |

|              |            |              |           |            |
|--------------|------------|--------------|-----------|------------|
|              |            | 14           |           |            |
|              |            | Kilifi South |           |            |
| Kilifi South | 59         |              | 6         | 26         |
|              |            | 20           |           |            |
|              |            | Kilifi North |           |            |
| Kilifi North | 119        |              | 32        | 59         |
|              |            | 26           |           |            |
|              |            | Malindi      |           |            |
| Malindi      | 101        |              | 15        | 54         |
|              |            | 39           |           |            |
|              |            | Magarini     |           |            |
| Magarini     | 129        |              | 3         | 32         |
|              |            | 29           |           |            |
|              |            | Rabai        |           |            |
| Rabai        | 72         |              | 0         | 27         |
|              |            | 27           |           |            |
|              |            | Kaloleni     |           |            |
| Kaloleni     | 90         |              | 0         | 35         |
|              |            | 35           |           |            |
| <b>TOTAL</b> | <b>693</b> | <b>192</b>   | <b>89</b> | <b>281</b> |

86. As tabulated, out of 693 Form 35s availed to the court by IEBC 281 were altered and 192 of these without countersigning. Hence 412 of the Forms were not altered at all while 89 were altered and countersigned. The total not altered and those altered with countersigning is therefore 501 out of 693. These alteration totals are almost evenly spread out in the seven constituencies, the highest being Kilifi North. Most of the alterations involve changes to vote figures and are generally minor – see for example Form 35s for Viragoni, Mwanzabu, Miyani, Mtomodoni (stream 4), Kaliang'ombe and Batani polling centres. However, some of the alterations are difficult to assess due to application of white-out on original figures.

87. As irregular as they are there is no evidence that these alterations were fraudulent or deliberate rather, than the result of usual human fallibilities. The mere existence of alterations by itself, if not shown to be deliberate and designed to affect the results will not suffice to impeach results. Of course such alterations should ideally be countersigned by the PO concerned. Elections officials however are also prone to human error, careless mistakes especially under onerous conditions. In the case of **James Omingo Magara vs Manson Onyango Nyamweya & 2 others (2010)e KLR**, there were instances of Form 16A and 17A (equivalent of Form 35 and 36) not having been signed by the POs. This was a serious breach as is the failure to countersign alterations in this case. Githinji J.A. described the former as a 'procedural anomaly' whose impact on results must be demonstrated.

88. Regarding the High Court's finding in the **Omingo Magara** case that the failure by the presiding officer to sign Form 16A (current Form 35) invalidate the results announced, Githinji JA stated:

***“Reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard considering procedural matters.....Secondly, it is my view that the mere failure by a presiding officer to sign Form 16A is a procedural anomaly which does not invalidate the results announced in a polling station...the complaint by the appellant that the election court relied on generalities regarding Form***

***16A and 17A without quantifying the gravity of those anomalies is valid. In my view, the election court should have addressed itself to specific Form 16As and 17As, examined the anomalies and ultimately determined what impact the anomalies had in the overall results of the elections...those anomalies were in counting or rather in the reconciliation or tallying process. They are post-election anomalies which, in my view, did not affect the vote.*** (emphasis added)

Githinji JA concluded that the High Court had misconstrued Section 28 of the old Act. The foregoing principles have wide applications to electoral anomalies, errors, and the likes.

89. It is apparent too that there is another procedural error in the Form 36 for Kilifi County respecting the calculation of total votes cast and valid votes. The former figure ought to be higher. But considering the nature of the evidence tendered by the second Petitioner on this score, it is not available to his counsel to throw the gauntlet at the 1st Respondent as he did in the words of his submissions:

***“We submit in reply that, rather than choosing instead to claim, that there was a 65% turnout without offering any factual proof or explanation as the authenticated copy of Form 36, the document containing the county results shows different results, the respondents were required to prove, that the results, if correct, could not have been better or different, regardless of the situation on the ground, and...nobody other than the 2nd respondent, would have benefited from the large basket of the uncast 35% registered votes amounting to 122,474...more than the 94,868 votes, which 2nd respondent is declared to have garnered... This shows the magnitude of the uncast votes”***

(emphasis added)

90. With respect, this line of reasoning is faulty on two grounds. The first is the latent assumption that the accuracy of the forms was always an issue herein and that somehow the burden of proof had shifted to the 1st Respondent. Secondly, that the election could have achieved a 100% voter turnout, which, is a practical impossibility. And corollary to the above, that the 35% “basket” of uncast votes were in fact those of the 2nd Petitioner's supporters (presumably kept away from voting by the violence or fear or late opening/ early closure of polling centres). For all the foregoing I am not persuaded that anything turns on the question of alterations of Form 35. They generally represent the true outcome of the election.

91. The final matter I wish to address with regard to the issue of the violence preceding the election and the subsequent pervading tension characterizing the election is this: Whether section 83 of the Elections Act can be called up in aid by the Respondents. Section 83 is in the following terms:

***“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.”***

92. In my view, for the purposes of the issue of violence, this section must be read together with Section 73(1) in order to gather its full purport in the circumstances of this case. And section 73 is clearly designed to cater for postponement in a situation where it is impossible to conduct elections due to reasons including the occurrence of election offences such as electoral violence (see Section 65) or natural disasters. Notwithstanding the postponement of such an election, under subsection (4) of Section 73, it is provided *“that the commission may, if satisfied that the results of the election will not be affected by voting in the area in respect of which the election date is postponed, direct that a return of the election be made.”*

93. In some respect, this subsection echoes the materiality test principle in section 83 and limited qualification of rights in Article 38 and by extension 81 of the Constitution. And in determining the true purport of the former section, I am not attracted to the decision in **Kajembe v Nyange & 3 others E.P**

**No. 38 of 1993 (UR)** urged upon me by the 2nd Petitioner for several reasons: the source of the violence in that case was traced to a candidate, unlike the situation before us, and, secondly the margin between the candidates was a mere 1500 votes unlike in this case where the margin between the declared winner and his nearest rival is over 55,000 votes. In addition, in the instant case there was no violence on the election date itself.

94. If I understood the initial argument of the 2nd Petitioner, it is that section 83 in its present form, unlike the old version, incorporates compliance with the higher principles of the Constitution in addition to written law on elections. Mr. Kibe submitted that Article 81(e)ii was not complied with in the subject election and therefore the election must be vitiated on that account. He was later to submit in closing that Article 83 has nothing to do with compliance, it being an embodiment of Constitutional principles. Article 81(e) reads:

*“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 and*
- v. administered in an impartial, neutral, efficient, accurate and accountable manner.”*

95. Article 82 proceeds to provide for the enactment of legislation regarding the creation of and delimitation of electoral units and the conduct of elections *inter alia*. Article 81 is concerned with the electoral system principles while Articles 82 and the remainder of part 1 of Chapter 7 deals with the process. These Articles are given effect in the provisions of the Elections Act, *inter alia*. Hence for example, the provisions proscribing electoral violence, and granting discretion to the commission to postpone an election, and where satisfied to proceed to have returns made, notwithstanding such postponement.

96. In my humble view therefore, section 83 should be read with a positive though not necessarily permissive accent on the words;

*“...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.”*

In assuming this approach, I am guided by the words of Lord Denning MR in **Morgan v Simpson (1974)3 ALL ER 722**. He stated:

*“That section (37(1) of the Representation of the People Act 1949, equivalent to our Section 83) is expressed in the negative. It says when an election is not to be declared invalid the question of law in this case is whether it should be transformed into the positive so as to show when an election is to be declared invalid. So that it would run: A local government election shall be declared invalid (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules) if it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to elections or that the act or omission did affect the result. I think that the section should be transformed so as to read positively in the way I have stated. I have come to this conclusion from the history of the law as to elections and cases under the statutes....”* (underlined words supplied).

97. And Stephenson LJ said of the Section; citing **Levers vs Morris [1971] ALL ER:1300**

***“It is negatively stated to limit occasions when an election must be declared invalid. In other words it is an enabling section setting out circumstances in which, despite irregularity, a new election need not be held.”***

98. And in the case of **Fitch vs Stephenson & Ors [2008] EWHC 501(QB)** where the petitioner proved failure by election officials to count 45.8% of votes cast, the court quoted Colman J in **Marshal vs Gibson, 1995 Divisional Court (unreported)** as follows:

***“The effect of Section 48(1) of the 1985 Act is that an election will not be declared invalid merely because there has been a breach of official duty in connection with the election or of the Rules by the returning officer or any other person. There cannot be a declaration of invalidity unless it appears either that the election was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of official duty or of the rules which affected the result. It is clear how that the “result” means the question which person or persons are elected as distinct from the number of votes cast for each person. Thus, if the consequence of a breach of the Rules is that one or more of the candidates would have polled more or less than were recorded at the count, but the same candidate or candidates would still have been elected, the result will not have been affected and the election can only be declared invalid if it appears to the court that the election was not so conducted as to be substantially in accordance with the laws as to elections.”***

99. The constitutional principles, must be viewed as supplying the over arching legal framework while the written law made thereunder provides the practical prescriptions. There must be implied presumption that section 83 is constitutional and in harmonious accord with all relevant constitutional principles. It is equally true that Section 83, as its former equivalent, should not be used to 'cleanse' any and every electoral sin as stated in the case of **James Omingo Magara**. I have however not found any direct and substantive discussion of this decision in the **Raila Case** hence Mr. Kibe's proposition that the (majority) decision therein was “not departed from...or distinguished” is largely circumstantial. If anything, the statement of the Supreme Court concerning the burden and standard of proof asserts that two essential elements must be proved , namely, failure of compliance and its effect on the validity of the election.

100. What can also be gleaned from the **Raila case** is an exhortation to uphold the discretion of the IEBC and other independent commissions. One of the complaints in that case concerned the removal or eviction of political agents from the National Tallying Centre. Stating that the IEBC was responsible for maintenance of conditions of good order, peace and security to facilitate optimal operations of the tallying centre, the court asserted:

***“Discretion is of the essence, in the exercise of such responsibility; and it follows, as the basic evidence of the state of affairs at the National Tallying Centre was not contested, that IEBC, indeed, had an obligation to resolve any kind of impasse afflicting the tallying of presidential election votes. This court has had occasion...to pronounce itself on the proper functioning of the various independent commissions and agencies established under the Constitution.”***

101. After setting out the purpose of the constitutional independence clause as being to ensure that commissions and independent offices “*in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit,*” the court concluded by finding that in light of the said principle and evidence the tallying complained of was “*Conducted in accordance with the law*”.

102. Thus in considering the otherwise novel and attractive submissions by Mr. Kibe it must be borne in mind that in addition to the principles of the electoral system articulated in Article 81, there are other interwoven constitutional principles bearing upon the electoral process such as the constitutional independence of the IEBC, upon which the discretion in Section 73 of the Election Act is clearly anchored. Important as every article of the Constitution might be, it is prudent in attempting constructions to consider the Constitution as a whole. To completely isolate one article and run with it in

absolute terms could easily result in absurdity akin to the error of heresy. For example Article 38(3) as read with Article 81(e) do not envisage the kind of absolute rights proposed by counsel for the 2nd Petitioner.

**103.** While addressing the controversy as regards what constitutes “votes cast” under Article 138(4) of the Constitution the Supreme Court adverted to the mandate of the judiciary under Article 259 which states:

***“(1) This Constitution shall be interpreted in a manner that—***

***(a) promotes its purposes, values and principles;***

***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***

***(c) permits the development of the law; and***

***(d) contributes to good governance.”***

**104.** The Supreme Court also took into account the progressive character of the Constitution, and in particular the “national values and principles of governance”. For purposes of this case I would emphasize all of a, b, c, d, of Article 259(1) in interpreting Article 38 and 81 of the Constitution, as well as adopting harmonious approach in considering the latter Article as engraved in Section 83 of the Elections Act. As essential as peace, security and stability are to holding of free and fair elections, it is inconceivable that the intention of Parliament in enacting Article 81(e) (ii) was to provide that any and all acts of violence, regardless of the magnitude and effect, are sufficient to vitiate an entire election whether conducted in accordance with the electoral law, by secret ballot, by an independent body and administered in an otherwise transparent and proper manner.

**105.** That unfortunately appeared to be Mr. Kibe's proposition when he submitted that: “Section 83 is not available where there is violence. Violence is violence.” Upon a proper construction of Articles 38(3) and 81(e) of the Constitution, the qualitative question relevant to the instant case would be: whether the proven violence and anxiety and the conduct of IEBC officials imposed “unreasonable restrictions” to the right of the people of Kilifi County to vote by secret ballot. Rather than the bare quantitative question whether there was a violence at all. The first question would arguably drive us back to the discretion of the IEBC in Section 73 of the Act and the materiality test in Section 83. I cannot say that with certainty for the second question. Neither am I able to accept on a plain reading of Section 83 the final submission by the 2nd Petitioner that constitutional principles have nothing to do with the compliance limbs of Section 83 of the Elections Act. In my view the inclusion of “Constitutional Principles” in Section 83 of the Act without more cannot be read as enlarging or creating new/strict instances when elections must be voided. That seems to be Mr. Kibe's thesis.

**106.** In the post 2007 election debacle which the 2010 Constitution and new electoral laws were designed to address, parliament in its wisdom retained a semblance of section 28 of the repealed National Assembly and Presidential Elections Act in Section 83 of the Elections Act. Returning to the **Omingo Magara** case I am more inclined in the present context to follow the dissenting opinion of Githinji JA. in the matter primarily because it aspires, in principle to the present Constitutional Order, and is in keeping with the purposive interpretation of similar sections in other jurisdictions. In that appeal as in this case, there were complaints about the anomalies in Form 16A and 17A (similar to present Form 35 & 36) and the proper construction of Section 28 of the National Assembly and Presidential Elections Act.

**107.** Githinji JA stated that a similar provision appears in electoral laws in many jurisdictions. He quoted Lord Denning in the case of **Morgan vs Simpson [1974]3 ALL ER 722 at p.728** in construing Section 37(1) of the English Representation Act, 1949 which was in *pari materia* with our former Section 28 as follows:

***“Collating all these cases together I suggest that the law can be stated in these propositions:***

- ***If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not.***
- ***If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls.....***
- ***But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or mistake at the polls and it did affect the result, then the result is vitiated....”***

**108.** Githinji JA went on to adopt that construction in respect of our old Section 28 and to further state:

***“...the overriding objective of the Act is to promote the right to vote and this requires that the Act, (and I would also include the Constitution) should be liberally and broadly interpreted so as to provide citizens with every opportunity to vote. The primary duty of the Election Court is to give effect to the will of the electorate.”***

(underlined words supplied)

(see **Keefe v Pukanich 2007 NWTSC 90**).

**109.** Githinji JA. also reviewed **Fitch v Stephenson & 3 others (2008) EWHT 501 (QB)** where 45.8% of the votes cast in an election had mistakenly not been counted. The English court while construing section 48(1) of the Representation of People Act said:

***“These cases clearly show that the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules, or of the duties of the election official providing that the result of the election was unaffected by those breaches. The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous election to stand.”***

## **CONCLUSION**

**110.** Mr. Kibe's main submission is on point as far as it stresses that violence has no place in an election but when overstretched, it falls out of step with existing precedent and the law. It is my considered view that the additional words referring to constitutional principles in Section 83 do not necessarily create new mandatory categories for vitiation of elections and must be read with other relevant Articles and principles in the Constitution. Secondly, the Section must be given a purposive interpretation as is required by the Constitution itself in Article 259. The IEBC was clearly faced with a dilemma between postponing the entire elections and possibly denying a sizeable number of voters the chance to exercise their right to vote, or to go ahead. The dilemma presented itself on the eve of the election when all was set for the General Election. In exercise of its discretion the IEBC settled for the latter option and in addition called for security reinforcement.

**111.** There is no evidence of violence on the day of voting itself. The aftermath of the violence on the eve of the election affected about 30 of the 548 polling stations and was mainly confined to Kilifi North Constituency. In this matter none of the Petitioners tendered affidavit evidence of their supporters who remained at home on polling day out of fear of violence or who were forced to vote for a candidate other than their preferred choice. In the circumstances, the court cannot assume that the 35% who stayed away did so due to fear of violence. The IEBC recorded a relatively high turn out of voters in the county, notwithstanding. In retrospect therefore, the IEBC exercise of its discretion appears vindicated. Indeed it

does seem that in terms of Section 73 of the Elections Act it was “not impossible” to hold elections.

**112.** It was admittedly a difficult and tensed up situation not just for the IEBC officials conducting elections but also for the security officers, all candidates, their agents and the general populace who were constantly inundated with rumors of imminent attacks, and possibly, propaganda from those elements who intended to stop the election. These conditions were far from ideal. It is my considered view however, that the fact that voters turned out and voted for their preferred candidates by secret ballot is a demonstration of a courageous exercise of their rights under Article 38 of the Constitution by the majority voters of Kilifi county who refused to allow the violence or fear to disfranchise them. These citizens too are entitled to an application of Article 38 that is consistent with Article 20(1) of the Constitution. (See **Ruwa & 2 others vs Internal Security Minister & Anor [2012]e KLR-** 2nd Petitioner's authority).

**113.** Secondly, that IEBC officials, some of whom like Raymond Kaingu (RW2) and police officers, who though traumatized after experiencing first hand the atrocities at Chumani, proceeded with their duties represents a triumph in commitment to their constitutional mandate.

**114.** On Issues 2 and 3 therefore, the court's finding is that the violence did not substantially or unreasonably curtail the exercise of the voters' right under Article 38 of the Constitution or affect the lawful conduct or results of the election. Evidently, the court has gone into detail regarding the 2nd and 3rd issues. This is because they form the key plank of the two petitions. And in a sense they have a bearing on other issues raised by the petitioners to which I now turn.

## **IRREGULARITIES AND MALPRACTICES**

### **Issues**

***“4. Whether the 1st respondent cooperated with and allowed all the candidates' agents access to all the polling stations during the elections.***

- ***Whether the elections were rigged and in what manner.”***

**115.** It appears to me that issue no. 4 and 5 cannot be separated as they generally relate to complaints of irregularities alleged by the two Petitioners. I propose to combine them under one general head of irregularity and malpractices. I concluding, I will deal with the issue of election offences under the same cluster.

### **Bias**

**116.** The most prevalent complaint in regard to malpractices e.t.c is bias, allegedly shown against the agents of the Petitioners at polling stations, where they were allegedly denied access or opportunity to conduct their duties. These duties include witnessing assistance of illiterate voters, verification of forms 35 and accompanying ballot boxes to the tallying centre. The Petitioners also alleged that illiterate and other voters were badgered to vote for the ODM candidate, the 2nd Respondent.

**117.** Concerning the 1st Petitioner these allegations as pleaded in the Petition are generalized and did not particularize the polling centres concerned except for Mtepeni Primary polling centre and KARI Mtwapa tallying centre. That is contained in the affidavit of Maurice Mwangoloh Mwatua, chief agent of the 1st Petitioner. Even then the actual agent allegedly disallowed access into Mtepeni – Kombo Luya Gede – has himself not sworn an affidavit. Nor is there evidence that he was an agent appointed to that polling centre.

**118.** As for the chief agent himself the 1st Petitioner could not tender any appointment letter in his name, as annexure JRM 1 which was proffered in that regard is in the name of an agent called John Mcharo Riri and is in respect of Kilifi County. It is therefore doubtful that he was duly authorized to be permitted into the proceedings at KARI tallying centre. In the course of the trial the 1st Petitioner was hard pressed to display a list of his alleged 269 agents and their appointment letters.

119. Under section 60(1) of the Elections Act, every authorized agent is required to take the oath of secrecy prescribed in the Third Schedule, before attending to poll proceedings. In this case no such oath has been demonstrated in respect of the chief agent. Regulation 61 and 62 grant authority to the PO to regulate admission into and to maintain order in a polling station. Although the PO may not exclude an agent except for misconduct, use of political party attire or symbols, Regulation 62(3) states that:

***“The absence of agents shall not invalidate the proceedings at a polling station”***

Regulation 74(1) requires candidates to specifically appoint agents for counting purposes and in default no access is granted in respect of counting proceedings.

120. Prior to the trial the Petitioners had requested to scrutinize the Poll Day Diaries (PDD) for the County. These diaries are used to record events of poll proceedings, including the names of party agents present at a polling station. A good number of those poll diaries were displayed to the court by RW2, the RO Kilifi North in the course of his testimony. It is clear that in several instances- (See the PDDs for Tezo, Zowerani, Bofa, Kibaoni, Kaoyeni, Fumbini, Bahati) – there were many agents present at the start of the process but the number diminished as the day wore on. He stated, and this was admitted by the Petitioners, that governor candidates shared party agents with parliamentary candidates. This begs for the Petitioners to provide clarity as to the identity of each candidate's agents and their authority.

121. As regards the 2nd Petitioner, it was alleged that bias played out in Batani, Kaliang'ombe where his agents were mistreated by POs, and in Imani, Kilimo, Mwapula, Dida, Bamba, Mwandondo Majengo, Kibaoni and Mwarandinda. His agents allegedly observed voter badgering as his agents were kept at bay and denied a chance to verify the form 35s or to accompany ballot boxes to tallying or counting centres.

122. Similarly, the 2nd Petitioner did not tender a list of his appointed agents in the County. Those who swore affidavits in such capacity did not annexe authority letters or requisite oath of secrecy. During cross-examination the 2nd Petitioner was shown several form 35s signed by party agents, some of them URP in respect of Bwagamoyo, Kidutani, Mwarakaya as well as the admission by his agents at Dida to have signed the form 35s.

123. It soon became apparent that he did not know who his agents were and whether they were some of those who are shown on the reverse of many of the form 35 to have signed as such. Such signatures negate his assertion that his agents did not get access to polling stations. He stated:

***“My agents had letters been signed by...you see letters authorizing agents were done by members of parliament and as individuals we were not allowed to send our agents. The party appointed agents I do not have the said letters here.”***

124. I have studied the available form 35s in respect of the poll stations about which the 2nd Petitioner complained of denial of access to his agents. These are in respect of Mwarakaya, Batani, Kaliang'ombe, Bwagamoyo and Bamba. There are signatures of agents on the reverse thereof and in the case of Batani, Bwagamoyo, and Bamba, the names of URP agents are indicated alongside their signatures. The 2nd Petitioner's allegations that voters were badgered in certain polling stations to vote for the ODM candidates by the election officials point to an election offence under section 59 of the Elections Act. A high degree of proof is required beyond mere allegation. Not a single badgered voter swore an affidavit to confirm the allegations of badgering.

### **Rigging**

125. The court has already addressed rigging allegations associated with “altered” Form 35 under the head dealign with violence (Issues 2 and 3). There was no evidence whatsoever adduced by the Petitioners to prove excess issuance or under issue of ballot papers in certain areas in order to disadvantage them, and to accord the ODM candidate an edge. Despite the First Petitioner citing Mtwapa chief's camp as an example of such manipulation, no tangible evidence was tendered. The allegation by

the 1st Petitioner through Walter Mwaruwah and others that the failure of the electronic system enabled, or may have facilitated abuse of the voting exercise at Mnyenzi in Kaloleni Constituency was generalized.

126. The names of persons other than Walter Mwaruwa, who were allowed to vote irregularly were not provided. At any rate, the RO Kaloleni, John Mwawasi denied the allegation. Again there was no demand for scrutiny by the Petitioners. The failure of electronic technologies (BVR, BVI, EVID) in the last general election was a key issue in the **Raila Case**. The Supreme Court concluded in its judgment at paragraph 237:

***“From case law, and from Kenya's electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since technology has not achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the petitioner's case, in so far as it attributes nullity to the presidential election on grounds of failed technological devices, is not sustainable”***

(emphasis supplied)

The foregoing in my view is also true of the Petitioners' complaints herein as to failure of technology during the gubernatorial election.

127. That alleged counterfeit ballots for the Women's Representative position were allegedly recovered in a dump site at Pwani University was a hearsay statement which in any event was not shown to have any bearing on the governor's election. Maitha Masha (PW4) the chief agent of the 1st Petitioner claimed that the said Petitioner had garnered 8936 votes at Kaloleni tallying centre but this figure was subsequently altered to reflect 822 votes on the IEBC website.

128. During cross-examination it turned out that he was hardly literate, did not know what a website is, or how the Form 36 looks like even as he claimed to have demanded one from the RO at Kaloleni tallying centre. The witness relied on an appointment letter and oath in respect of Muznongo or Mtsengo and Mwanamwinga polling stations respectively.

### **Transfer of Ballot Boxes Before Counting**

129. The 2nd Petitioner complained of “hurried” removal of ballot boxes before counting at the following polling stations:

Pingilikani, Kolongoni, Majaoni (in Kilifi North), Kafitsoni (Ganze), Fudumulo (Kilifi South) and Mwanzabu and Lugwe in Rabai constituency. He alleged that the removal was “stage-managed” to create opportunity for tampering with the ballots and that ballot boxes were neither sealed nor accompanied by agents to the new venues. That the transfers especially with regard to Kilifi North were characterized by chaos as ballots were strewn in an open compound at the IEBC offices at night in Kilifi while an alternative tallying centre to Chumani was sought.

130. That when eventually the Kilifi North ballot boxes were moved to Pwani University, counting was conducted irregularly outdoors, in darkness using phone/lamp light. At KARI tallying centre where counting for some stations in Kilifi South was conducted, more chaos and irregularities were allegedly observed. That in all cases the ODM agents were given priority to accompany transferred ballot boxes but not those of the URP.

**131.** All the foregoing serialized allegations of irregularities, save for transfer of polling process, were denied by the presiding officers of the respective cited poll counting centres through affidavits. That is to say; bias, rigging, and other cited electoral malpractices. Suffice to say that the quality of the Petitioners' evidence on this score is wanting. Had these allegations been established, the next question would have been whether the breach of duty or rules by the RO constituted substantial non-compliance with the law which affected the results – (see **Fitch vs Stephenson; Githinji JA in Omingo Magara Case**)

**132.** As regards the transfer of the counting process to venues other than the polling station, the POs and ROs concerned have explained that this was due to rising fear of insecurity especially as the day drew to an end. In addition to admitting that five of the seven polling centres cited by the 2nd Petitioner were affected, namely, Pingilikani, Kolongoni, Majaoni, Kafitsoni and Mwanzabu, the 1st Respondent disclosed that other centres such as Mtendani, Hademu, Kadzinuni, St. Martins, Kidutani, Mwarakaya and Jila were similarly affected. The presiding officers stated that in these centres the action was taken after consulting with agents, some of whom had no means to travel to the new venues. This is regrettable.

**133.** As submitted by Mr. Wetangula on behalf of the 1st Respondent, the PO is empowered under Regulation 64 to transfer proceedings to another polling station or public facility upon giving sufficient notice. There is no evidence that the transfer of the process in this case was “stage-managed” or deliberate as claimed by the 2nd Petitioner. The transfer was necessitated by the fact that night was approaching and even security officers were anxious to leave.

**134.** Besides vehicle transporters were threatening to withdraw their vehicles (see FB1). In Kilifi North Constituency which bore the brunt of the violence, the RO (RW3) said the POs “flocked” to the tallying centre in apprehension and were reluctant to go back to conduct counting at polling centres. Upon consulting the candidates the RO gave directions to proceed to Pwani University. The 2nd Petitioner did not dispute the consultation. It is not in coincidence that a degree of chaos characterized the transfer. And I am not convinced that the POs had transfer. And I am not convinced that the POs had the presence of mind in this situation to post notices as they allege.

**135.** Regarding Kilifi South Constituency, the RO, Aisha Abubakar, allowed counting of votes from three polling stations (Kidutani, Mwarakaya and St. Martins) to proceed at KARI, the tallying centre. Like the RO Kilifi North she denied that the process of transfer and counting was marred by irregularities such as boxes being left unattended and strewn all over the centres, and/or counting being conducted in darkness.

**136.** It would appear that vote counting in respect of Kaloleni Constituency was conducted at Kizurini Primary for the same reasons. It may not be true that the transfer of proceedings was done in the transparent and orderly manner provided in the Regulations. But as a minimum transport arrangement should have been made by IEBC officials for party agents to accompany ballot boxes. The failure to do so cannot be excused.

**137.** Reviewing the entire evidence however, I do not see a deliberate pattern of transferring the ballot boxes in circumstances designed to facilitate tampering. And no specific evidence of tampering was tendered.

What I see is a situation where election officials and the police officers became increasingly fearful as the day wore on and decided to transfer the proceedings. The fact that some of the form 35s in respect of the affected polling stations are signed by different party agents does not support the insinuation of tampering made by the Petitioners.

**138.** Although it is true that in most cases the signatures are accompanied only by the agent's name and not his party, under Regulation 62(2) only one agent is allowed for each party/candidate into a polling centre for purposes of attending proceedings. The presence of several agents must, in the absence of other evidence to the contrary, be deemed to equate representation of different parties/candidates. With regard to the particular polling centres about which the 2nd Petitioner complained the distribution of the agents (of undisclosed parties) who signed the form 35 at the end of counting was as follows:

| <b>Centre</b> | <b>Number of Agents</b> |
|---------------|-------------------------|
| Majaoni       | 4                       |
| Kolongoni     | 6                       |
| Pingilikani   | 4                       |
| Lugwe         | 7                       |
| Kafitsoni     | 10                      |
| Mwanzabu      | 8                       |
| Fudumumulo    | 5                       |

**139.** In my considered view, it is unlikely that these agents, representing different competing parties/candidates would close their eyes to irregularities observed in the transfer and counting of ballots and willingly proceed to sign the form 35s at the end of the proceedings. This logic also applies to votes counted at KARI and PWANI University, Kazurini or wherever else the process was transferred. The burden lies with the Petitioners to prove that such irregular transfer though objectionable in itself affected the results of the elections.

**140.** And while it is true that the situation obtaining at the Kilifi IEBC offices prior to the decision to move the ballot boxes to Pwani University may have been less than ideal, and perhaps chaotic the court must reject the invitation to assume that this aberration, whose cause was clearly explained by RW3, resulted in tampering of votes and affected the results. RW3 told the court, and it was not denied by the Petitioners, that he consulted them and all candidates agreed to move the process to Pwani University.

**141.** I found it striking that the 1st and 2nd Petitioners themselves candidates who also visited the Kilifi IEBC offices on the material evening prior to the decision to relocate do not comment on this issue or give as much detail as Zainab (PW2) of the alleged chaos and irregularities at the IEBC offices or even Pwani University. Or even any alleged protest to the IEBC officials on duty. When PW2 was tasked about the situation described, she stated in cross-examination:

***“I did not see any pattern of rigging. I have training as an electoral observer”***

**142.** Equally, one of the 2nd Petitioner's witnesses Silvestus Mtsonga Chamanga (**FB 51**) claimed that at KARI tallying centre the counting of St. Martins votes was conducted in darkness with only a few agents present. He was a county representative candidate. He claimed to have been able to tell (in the darkness) that ballot boxes for certain five polling stations which he named were missing from the Mwarakaya ward batch. However, two other URP agents also present with him at KARI, Boniface Chiro Mumbo and Gladys Mrima Tsuma neither repeat his allegations of extreme chaos at KARI or missing ballot boxes.

**143.** Notably, only a handful of polling stations had to transfer the counting process to other venues, and despite the petitioners' insistence that the transfer compromised the process, they did not demand a scrutiny and recount as it was their right to do.

**144.** Finally, it has been repeated by many of the Petitioners' agents that the IEBC officials did not allow them to accompany the transferred ballot boxes to tallying centres. Although it contributes to transparency, there is no legal requirement for IEBC to provide transport for political party/candidate's agent. But the IEBC officials owed a moral duty to agents in the circumstances of the case if only for the sake of upholding transparency as anticipated by the law. Some agents have stated they took private means to the new venues and the fact that many of the agents concerned signed off the relevant forms at

the end of the process, puts to doubt the suggestion of impropriety in the handling of ballot boxes. It is also undisputed, that on all occasions security agents accompanied the ballot boxes during transfer.

145. The above situation is compared to the facts in **Marshal v Gibson** where there were serious breaches of the Rules including failure to seal ballot papers, to count over half of the votes cast and later on attempt to carry out an unofficial recount. The court having found that there were minimal chances of tampering with the ballots held that the election was conducted substantially in accordance with the law.

## **ISSUE 6: ELECTION OFFENCES**

### **Whether any election offences were committed by the 2nd respondent, in collusion with agents of the 1st respondent with a view to giving the former undue advantage....**

146. Two election offences were pleaded against the 2nd Respondent, one directly, namely disruption of election proceedings, the indirect one being bribery of voters. The former allegedly occurred at Kibaoni Primary Polling centre in Magarini Constituency, where the 2nd Respondent is alleged to have convened a meeting with the PO, Ms. Salama his alleged relative, thereby disrupting the voting. The two incidents of alleged bribery were pleaded by the 1st Petitioner, as having occurred at Mtwapa Chief's camp and near St. Lukes Hospital at Kaloleni (see affidavits of Maitha Masha and John Ngala Wanje).

147. In both incidents it is alleged that voters were being bribed by unidentified persons to vote for Amason Kingi the 2nd Respondent and other ODM candidates, respectively. Without more, this evidence falls short of the high standard of proof required in respect of election offences, in particular bribery contrary to section 64 of the Elections Act. The admitted fact that the 2nd Respondent visited Kibaoni polling centre and had a discussion with the PO and the allegation that the PO is his relative does not constitute disruption of an election. None of the fifty (50) voters who, according to Florence Ndanu and Esther Mupe Mzungu (FB 37 & 38) were heckled out of the polling centre by the PO at Kibaoni has sworn an affidavit.

148. The duration of the “meeting” is unclear even though it is stated that the meeting occurred outside the polling area and that voters who had been waiting for “three hours in the hot sun” left, frustrated. It is therefore unlikely that the meeting took long under the same hot sun. Be that as it may, a candidate is allowed to access any polling station by Regulation 62. Further, an exception on secrecy is provided by Section 60(3) of the Act in favor of candidates in the following terms:

***“A presiding officer may, upon request, divulge to a candidate or to the agent of a candidate the total number of voters who have voted in the station at any time before the poll is closed.”***

149. A candidate is therefore allowed by the law to visit a polling centre and to consult with the presiding officer during voting and there is no evidence in this case that the intention, nature and effect of the alleged “meeting” was to disrupt the voting. It beats logic too that the 2nd Respondent would set out to disrupt election proceedings in a polling station located in his “home-ground.” I also think that this is an appropriate place to justify my summary ruling in the course of the trial declining the Petitioner's request to disqualify Charles Charo Karisa (RW3) from testifying on grounds that he had remained in the court while previous witnesses testified.

150. It is true as argued by Miss Otieno that the regular practice by trial courts to exclude potential witnesses from the court room during the evidence of other witnesses is not anchored in any legal provision. Is disqualification the sanction for breach of this rule of practice? Such disqualification was ruled out by the Court of Appeal in the case of **Kenga Kaingu Mweni and 2 others vs Republic Cr. Appeal. No. 42 of 1997** where it was held that:

***“The fact that a prospective witness was in court while others gave evidence did not disqualify that person but went only to the credibility or weight to be given to their evidence. The judge thus erred in disqualifying one of the defence witnesses for having***

***been in court.”***

**151.** In my view under the new constitutional order ushered in with the promulgation of the 2010 Constitution, more transparency and disclosure of evidence is anticipated between parties in advance of trials. This is now a reality in electoral disputes where parties are now required to file their evidence alongside the pleadings. This minimizes opportunities for trial by ambush and unnecessary delays. Practical as it may be, the value of the rule on excluding potential witnesses during the trial may gradually diminish as more open judicial processes are embraced. Mr. Wetangula's submissions on the the issue pointed in this direction.

## **CONCLUSION**

**152.** Upon a careful review of the evidence and the law relating to issues 4, 5 and 6 and considering the conduct of the elections in the County as a whole, I must answer all the questions in the negative. Consequently, my overall finding in respect of the 1st Issue is this: that although the governor's election process in Kilifi County was fraught with a degree of apprehension arising from several ugly incidents of actual violence, some malpractices, irregularities and was far from perfect, it was substantially conducted in a free, fair, transparent and credible manner and in compliance with the Constitution and the Elections Act.

**153.** The expression of the will of the people of Kilifi County as demonstrated in their high turn out in that election must be upheld. In the circumstances Petition No. 1 and 3 of 2013 must fail and are hereby dismissed with costs to the Respondents. Considering the level of research, input and effort demanded by this dispute, the costs are capped at a total of Kshs. 3 Million to be shared equally by the Respondents. The two Petitioners are jointly and severally liable for the said costs.

**154.** The security deposits made under Rule 11 will be retained by the court pending taxation of bills by the Deputy Registrar in view of the foregoing, the 2nd Respondent's application filed on 14th May, 2013 as a challenge to the 1st Petitioner's prayers is a moot point. I also direct that all election materials such as ballot boxes, Forms 35 and 36 (originals) and PDDs be handed back by the Deputy Registrar into the custody of the Returning Officer.

**155.** Lastly, I commend all counsel and the parties they represent for the robust and thorough presentation of their respective cases. Counsel placed at the court's disposal a trove of legal resources, especially authorities. The fact that not all such authorities are directly mentioned in this judgment is not intended to impute redundancy thereon. All counsel demonstrated outstanding co-operation with one another and with the court. In particular, I appreciate their patient understanding, when, on two occasions I postponed delivery of this judgment on short notice, on account of to pressing official and personal engagements.

**Delivered and signed at Malindi this 28th day of August, 2013.**

**in the presence of:**

**Mrs. Kibe with Mr. Kenga in Petition No. 3 of 2013, for the 2nd Petitioner, Mr. Kibet holding brief for Mr. Wetangula for the 1st Respondent in both Petitions, Miss Otieno for the 2nd Respondent in both Petitions and Mr. Michira in Petition No. 1 of 2013 for the 1st Petitioner.**

**Court clerk – Evans**

**C. W. Meoli**

**JUDGE**

