



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELECTION PETITION NO.2 OF 2013

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ACT, 2012

AND

IN THE MATTER OF THE ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS,
2012

AND

IN THE MATTER OF THE ELECTIONS(PARLIAMENTARY AND COUNTY ELECTIONS,
PETITION RULES, 2013

AND

IN THE MATTER OF THE ELECTION FOR GOVERNOR FOR SIAYA COUNTY

WILLIAM ODHIAMBO ODUOLPETITIONER

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION1ST RESPONDENT

BENSON MUGATSIA.....2ND RESPONDENT

CORNEL RASANGA AMOTH3RD RESPONDENT

J U D G E M E N T

On 4/3/13 Kenyans participated in the general election to elect its leaders. It was during that exercise that the electorate in Siaya County voted for the contestants for the gubernatorial position. When the exercise was concluded, the 3rd respondent was declared to be duly elected as the governor with 142,901 votes. The petitioner was runner-up with 133,900 votes. The difference was 9,001 votes. On 8/4/13 the petitioner filed this petition seeking, among other prayers, a declaration that the 3rd respondent was not constitutionally, lawfully and validly elected. He sought that the result be nullified and he be declared to be the one who had been validly elected. The petition was grounded on alleged fraud, malpractices, irregularities and breaches of electoral law during nomination, campaign, voting, counting and tallying.

The respondents denied the claims put forth by the petitioner. Their case was that the election was conducted in a free and fair manner and in strict compliance with the Constitution and electoral law. They contended that the 3rd respondent was validly elected as the governor for Siaya County. They asked that the petition be dismissed with costs.

The petitioner was represented by **Mr. Kwach** and **Mr. Wakla**, the 1st and 2nd respondents by **Mr. Gumbo** and the 3rd respondent by **MR. Ochieng** and **Mr. Kopot**. During the pre-trial conference held on 10/5/13 counsel agreed that the petition be heard and determined based on the following four issues:

- a. whether or not the gubernatorial election for Siaya County was conducted substantially in accordance with the Constitution and the relevant electoral laws;
- b. whether or not the said gubernatorial election was fundamentally and irreparably flawed;
- c. whether or not the gubernatorial election was substantially affected by the alleged electoral offences; and
- d. what reliefs/remedies should the court grant?

From the written submissions filed, and after I listened to counsel during the oral presentations, I find that there is general agreement on the salient Constitutional and legal principles that govern the conduct of elections in Kenya. The starting point is Article 38 of the Constitution of Kenya 2010 which provides as follows:

“38(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.

(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.”

Under Article 81(e) the electoral system should comply with the principle of free and fair elections that bear the following characteristics:

- a. secret ballot;
- b. free from violence, intimidation, improper influence

or corruption;

- c. conducted by an independent body;
- d. transparent; and
- e. administered in an impartial, neutral, efficient,

accurate and accountable manner.

In **Presidential Election Petition No.1 of 2001, RTD COL DR. KIIZA BESIGYE .V. YOWERI KAGUTA MUSEVENI AND ELECTORAL COMMISSION, ODOKI CJ** defined “free and fair elections” in the following terms:

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

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

The independent body to conduct and supervise referendum and elections is the 1st respondent. It was created under Article 88(1). Its mandate is in the Constitution but also in the Elections Act (Act No.24 of 2011) and the Regulations made thereunder and in the Independent Electoral and Boundaries Commission Act (No.9 of 2011) and the Regulations thereunder. Article 86 requires the 1st respondent to ensure that:

“(a) whatever voting method is used, the system is simple,

accurate, verifiable, secure, accountable and transparent;

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

announced promptly by the presiding officer at each

polling station;

(c) the results from the polling stations are openly

and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractices are put in pace, including the safekeeping of electoral materials.”

When an election court is considering allegations of fraud, malpractices, irregularities and breaches of electoral law, it has to bearing mind the provisions of section 83 of the Elections Act which are as follows:

“83. No election shall be declared to be void by reason of

non-compliance with any written law relating to that

election if it appears that the election was conducted in

accordance with the principles laid down in the Constitution

and in that written law or that the non-compliance did not affect the result of the election.”

An election, by its very nature, is a fiercely competitive exercise in which each contestant wants to win. In the campaign, the various parties and candidates concentrate their resources – financial, political and personnel – on producing a victory on the election date. The last general election was actually six elections in one, all conducted in one day at the same time by the same officials. Extreme pressure was placed on the electoral officials, the candidates, their agents and even the electors, to deliver a credible election. The Electoral officials remained awake for long hours to be able to produce the results. It should also be borne in mind that, an election is not an event but a process. It begins with the registration of voters up to the time the results are declared. Lastly, the players are many. Given this scenario, things can, and sometimes, go wrong. Mistakes and errors, some honest and others not, will be made. There will be non-compliance with the law and/or regulations. There will be malpractices and breaches. Section 83 foresees all these, and asks the court dealing with a petition to always look at the bigger picture. The court would always consider whether the election, with all its imperfections, was substantially conducted in accordance with the principles enshrined in the Constitution and the electoral law. The court will determine whether the imperfections compromised the process so much that an ordinary man cannot say that the win as declared was a valid one.

In **RAHIM KHURSID .V. KHURSHID AHMED & OTHERS, 1975 AIR 290, 1975 SCR (1) 643** it was observed as follows:

“However, we have to remember another factor;

an election once held is not to be treated in a light

hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing serious elements of uncertainty on the verdict already tendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the longest practice alleged against the returned candidate is adduced.”

Section 83's precursor was section 28 of the National Assembly and Presidential Elections Act (now

repealed). The section (28), or its equivalent, have discussed in various previous decisions. In **JOHN KIARIE WAWERU .V. BETH WAMBUI MUGO & 2 OTHERS [2008] eKLR**, the High Court observed that:

“It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur; he must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process....”

In **JOHO .V. NYANGE & ANOTHER [2008] 3 KLR (EP) 500**, Justice Maraga (as he then was) stated as follows:

“The law is therefore clear as to when an election can be nullified. An election will be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of the election.”

As to when an election can be said to be non-compliant with the law as to elections, the Judge cited with approval the opinion of Stephenson J. in **MORGAN .V. SIMPSON [1974] 3 All ER 722** at page 731 as follows:-

“For an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified voters candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters.”

In **Presidential Election Petition No.102 of 2011 RTD COL. KIZZA BESIGYE .V. YOWERI KAGUTA MUSEVENI & ELECTION COMMISSION (supra) MULENGA JSC** explained the meaning of the phrase **“ affected the result of the election in a substantial manner”** as follows:

“To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in section 58(6)(a) can only mean that the votes candidates obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have

been reduced. Such reduction however would have to be such as would have put the victory in doubt.”

In **MBOWE .V. ELIUFOO [1967] EA 240**, at page 242, **GEORGES CJ** in the Court of Appeal of Tanzania said:

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

The Court of Appeal in **JAMES OMINGO MAGARA .V. MANSON ONYONGO NYAMWEYA AND OTHERS, Civil Appeal No.8 of 2010** at Kisumu had occasion to consider the implications of section 28 in a case where three ballot boxes were inexplicably missing, some ballot boxes had broken seals and there was no explanation; some ballot boxes had only the votes of two of the seventeen candidates and the returning officer offered no explanation, there had been attempt to burn down the building in which the ballot boxes were being kept; and the process of scrutiny and recount had disclosed numerous irregularities, among them unsigned, and therefore, unauthenticated Forms 16A. The appellant had won with 9832 votes and his argument was that that represented the will of the electorate. Justice Omolo read the majority decision in which he stated as follows:

“In my view these irregularities could not have been cured

under section 28 of the National Assembly and Presidential

Elections Act. That section cannot be used to cover a situation

where even the source of the votes in the ballot boxes

cannot be conclusively determined. Again to use the section to cover the disappearance of ballot boxes, irrespective of the number of ballot papers in the missing boxes, would simply amount to encouraging vandalism in the electoral process. Our experiences in Kenya following the 2007 elections part of which we are discussing herein, show us that no Kenyan whether as an individual or as part of an institution, ought to encourage such practices. Section 28 cannot be used to white-wash all manner of sins which may occur during the electoral process and for my part I have no doubt that Parliament did not design the section for the purpose of covering serious abuses of the electoral process.”

Justice Githinji wrote a dissenting judgment in which he stated as follows:

“On analysis, I have come to the conclusion that the election was conducted in accordance with principles laid down by the electoral

law and that the anomalies found in Form 16A and 17A were not so pervasive or serious as to affect the entire election. I am satisfied that those were post-election procedural anomalies and were cured by both scrutiny and counting and by section 28 of the Act.”

The next issue around which submissions were made was in regard to the burden and standard of proof in election petitions. Counsel cited various authorities on the matter. The petitioner's counsel acknowledged that because his client was the one seeking to nullify the election, he had the burden to prove every act of electoral fraud, malpractice, irregularity and breach which had been alleged in the petition. As to the standard of proof required the decisions in **JOHO .V. NYANGE (supra)**, **BENARD SHINALI MASAKA .V. BONI KHALWALE & 2 OTHERS[2011] eKLR**, **WILLIAM KABOGO GITAU .V. GEORGE THUO & 2 OTHERS [2010] eKLR**, all state (and I agree with them) that the

standard is beyond what is required to prove a civil case but lower than what is required to prove a criminal case. In other words, the standard is higher than the balance of probability but lower than proof beyond all reasonable doubt. Where, however, an election offence is alleged, a higher degree of proof is required. The petitioner must call evidence that is exact, cogent and unequivocal in proof of the offence.

In dealing with the questions of the burden and the standard of proof in election petitions the court has to bear in mind what the Court of Appeal in **BENJAMIN OGUNYO ANDAMA .V. BENJAMIN ANDOLA ANDAYI & 2 OTHERS, Civil Application No.24 of 2013 at Kisumu** reiterated about the special nature of election petitions.

“In our view, as has been said time and again, Election Petitions form their own category and are neither controlled by the Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither Criminal nor Civil in nature. We may say there is an element of Public law in them but even that is not all correct. They are a class of their own.”

The third issue regards the scope of the jurisdiction of this court in regard to the complaints made in the petition. Mr. Gumbo for the 1st and 2nd respondents submitted that this court does not have jurisdiction to deal with whatever acts of fraud, malpractice, irregularity and breach that may have occurred during nominations and campaigns; that the jurisdiction of the court is limited only to the acts that may have taken place during voting, counting, tallying and declaration of results. He relied on Article 88(4)(e) that deals with settlement of electoral disputes and sections 74, 75 and 109 (cc) of the Elections Act. He further relied on the decisions in **DIANA KETHI KILONZO & ANOTHER .V. IEBC & 2 OTHERS, Constitutional Petition No.359 of 2013** at Nairobi and **FRANCIS PARIMEI GITAU & 3 OTHERS .V. THE NATIONAL ALLIANCE PARTY & 4 OTHERS, Petition Nos.356 and 359 of 2012** at Nairobi. Mr. Ochieng and Mr. Kopot for the 3rd respondent took the same position. Mr. Wakla agreed that the court did not have jurisdiction to deal with nomination issues as that was the forte of the 1st respondent. He submitted that the petitioner had led evidence on his tribulations during nominations to show that his electoral problems at the hands of the respondents began that early. Counsel, again relying on Article 88(4) and sections 74 and 75, contended that the court had jurisdiction to deal with issues of campaign.

Now that the parties agree that the jurisdiction of the court does not include matters of nomination I will not consider the issue. The contest, however, is on whether it can deal with issues around campaigns.

Article 88(4)(e) provides that the 1st respondent's mandate includes the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and dispute subsequent to the declaration of election results. Section 74(1) of the Act reproduces the mandate of Article 88(4)(e) but goes on to say in subsection 2 that where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of nomination or election, whichever is applicable. In **DIANA KETHI KILONZO'S** case, the Court was dealing with two complaints:

- (a) whether she was a registered voter; and
- (b) whether she had been validly nominated to vie for the election of Senator of Makueni County.

The issues had gone before the 1st respondent's Dispute Resolution Committee and had been determined against her and this is what caused her to move to the High Court. The court found that the Committee, whose mandate was Constitutionally and statutorily underpinned, had performed its function in hearing and determining the dispute and that mandate could not be impugned in the manner it was being done in the petition.

In **FRANCIS GITAU PARSIMEI** case, the applications concerned allegations of rigging in political parties nominations for the presentation of candidates to the Commission for the Kangema and Kajiado North by elections. The court, in dismissing the applications, held that Article 88(4) and now section

74(1) had conferred jurisdiction to hear and determine the disputes to the Commission and that dispute resolution mechanism had to be used.

Section 109 (cc) and (dd) empowers the 1st respondent to provide for the manner of enforcing the electoral code of conduct and to provide for the conduct of campaigns during referendum and elections.

From the marginal note of section 74(1) the 1st respondent can only settle **“certain disputes.”** The rest of the disputes can only be handled by the election court, in my view.

Once again, an election is a process and not an event. Sections 56 to 72 of the Act create election offences. It is clear that some of the offences relate to what happens during voting but others deal with what happens during campaigns. For instance, under sections 67(1) it is an offence to print, publish, distribute or post up or cause to be printed, published, distributed or posted up, any advertisement, handbill placard or poster which refers to any election and which does not bear upon its face the name and addresses of the printer and publisher. Under section 67(1)(g)(iii) it is an offence to create a material disruption with the intention of preventing a political party from holding a public political meeting. It follows that what happens during campaign is the legitimate business of a court hearing a petition concerning that election.

In the Court of Appeal of Uganda case of **TOOLIT SIMON AKECHA .V. OULANYAH JACOB L'OKORI AND ANOTHER, Election Petition Appeal No.19 of 2011** at Kampala the court was dealing with the effect of non-compliance with election law when it cited the case of **KIIZA BESIGYE .V. MUSEVENI & ANOTHER**, (supra) in which **ODOKI CJ** at page 156 stated as follows:

“In order to assess the effect the court has to evaluate the whole process of election to determine how it affected the result, and then assess the decree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions, which produced those numbers, are useful in making adjustment for the irregularities.”

The Court of Appeal went on to observe as follows:

“As we all know, a lot of activities take place before polling day. The evidence of what malpractices occurred if any during the campaign period was not adduced. There is no police report indicating violence or intimidation of voters during the campaign period. In the absence of such evidence it would be safe to conclude that the period prior to voting day was generally peaceful.”

I hope I have said enough to show that the contention that what happens during campaigns does not concern an election petition court is without any legal basis.

In any case, what I have said in the foregoing in relation to what constitutes a free and fair election, and the meaning of section 83, clearly show that what happens prior to actual voting can affect the integrity of the election and therefore a court dealing with a challenge to that election can deal with issues prior to the voting.

What remains is the analysis of evidence to determine whether the petitioner has proved the alleged fraud, malpractices, irregularities and breaches during the campaign period; during voting, counting, tallying and declaration of results; and thereafter.

It is important to point out at this stage that, following application by the petitioner, the court on 3/7/13 ordered the recount of all votes cast in all polling stations in Bondo, Gem and Rarieda constituencies; Awelo primary school polling station in Alego Usonga constituency; and Nyasanda Primary School polling station in Ugunja constituency. The purpose was to ascertain the votes garnered by each of the six candidates, including the 3rd respondent and the petitioner, for the gubernatorial election held on 4/3/13. The recount was undertaken by the Deputy Registrar M/S P. L. Shinyada who returned the results on 17/7/13. The results for Gem and Rarieda constituencies were materially at variance with what had been

declared following the election. How the court should treat that results was subject of extensive submissions from counsel. The respondents' counsel took the position that the ballot boxes were the subject of post-election interference and therefore the court should not rely on the results. The petitioner's position was that the material difference was further proof that infact the declared results did not reflect the will of the people; that the 2nd respondent had not been validly elected; and that, he was the one who had been validly elected. I will seek to resolve this controversy after discussing the alleged transgressions during campaigns, voting and the declaration of results.

During evidence, the petitioner testified and called Mathews Omondi Oluoch (PW2), Mary Achieng Agunda (PW3), Monica Aoko Obare (PW4), Edwin Otieno Otieno (PW5), Augustine Ogaye Adhola (PW6), Charles Omondi Owiti (PW7) and Kevin Odhiambo Dooso (PW8) to testify. The 2nd respondent testified, having been the County Returning Officer who had the overall conduct and supervision of the elections. He called Magwanga Jumah Kalory (DW3) (returning officer for Gem Constituency), Benson Esuza (DW1) (returning officer for Alego Usonga Constituency), Hilda Akumu Imbo (DW3) (returning officer for Rarieda Constituency), and Rose Obari (DW4)(returning officer for Bondo Constituency). The 2nd respondent testified and called Esther Akinyi Odhiambo alias Esther Omondi (DW6).

Subsequently, on application by the petitioner, the evidence and affidavits of PW6 and PW8 were expunged from the record. The 3rd respondent withdrew William Ohonde and Douglas Otiato Owino as witnesses. They had sworn affidavits which were expunged from the record.

So that the evidence in this petition should be placed in perspective, it is important to point out that prior to nominations the petitioner was a member of the Orange Democratic Party (ODM) who was campaigning to be nominated to contest the gubernatorial seat for Siaya County. ODM nominations were conducted on 17/1/13. The petitioner was running against Oburu Odinga who was then Assistant Minister for Finance and the elder brother of the then Prime Minister Raila Amolo Odinga, the leader of ODM. The nominations were chaotic and each of the two claimed to have won. There was a stalemate as to who would get the nomination certificate. The party disqualified both from running for the seat. On 18/1/13 the petitioner defected to the National Agenda Party of Kenya (NAP-K) which gave him a certificate to contest. He, however, still supported RAILA for Presidency. This did not go down well with ODM which had given a certificate to the 3rd respondent. The 3rd respondent had otherwise not participated in the nominations.

There are acts that the petitioner complains about which he says happened during the campaigns and which he blamed on the 3rd respondent, his agents and supporters, and the general ODM campaign brigade. The brigade, he stated, included Honourable James Aggrey Orengo, Hon. Jakoyo Midiwo, Hon. Oburu Odinga and Dr. Christine Ombaka. The petitioner stated that:

- a. the 3rd respondent and his group went round the entire

Siaya County during the campaigns saying (which

was not true) that he was a murderer and a

person of ungoverned temperament, who had shot at

his wife; that he had consequently been painted in bad light to the voters and had to campaign in the company of his wife and children to try and undo the damage;

- b. they went round the County saying that he was a mole for the National Alliance Party (TNA) and the Jubilee Coalition, which was not true, which they knew would alienate him from voters in the County where both TNA and Jubilee Coalition were not viewed favourably;
- c. they went round saying (which was not true) that the petitioner was anti-Raila;
- d. on 29/2/13 the 3rd respondent's supporter William Ohonde came to Ahindi Gardens in Siaya town where the petitioner had just held a rally and attempted to distribute TNA head caps to the petitioner's supporters but was repulsed;

e. on 2/3/13 they printed and circulated in Gem, Alego Usonga

and Ugenya Constituencies posters of the petitioner's

portrait with both HON. Uhuru Kenyatta and HON.

William Ruto, Jubilee running mates, in effort to show that the petitioner was a TNA mole who was campaigning for Jubilee Coalition;

- f. on 25/1/13 they destroyed and defaced the petitioner's banners and posters at Ajigo market in Bondo Constituency;
- g. on 22/1/13 they destroyed and defaced the petitioner's banner and posters at Nyamonye market in Bondo Constituency;
- h. on 28/2/13 the petitioner's campaign rally at Luthehe market in Ugenya Constituency was forced to be cut short when it was intruded by the ODM brigade that included the 3rd respondent;
- i. on 6/2/13 RAILA had a campaign rally at Siaya Municipal Stadium where, while lifting the hand of the 3rd respondent whom he said was his preferred candidate, referred to other candidates, the petitioner, included as "wild cats".

The petitioner testified about these incidents. His chief campaigner (PW2) also testified about the same. I will deal with the incidents but not necessarily in the order in which they appear in the foregoing.

The petitioner and PW2 testified that the former was addressing their campaign rally at Luthehe market in Ugenya Constituency when a large convoy of vehicles carrying ODM supporters came. In the convoy were the 3rd respondent, Oburu Odinga, Orengo, Christine Ombaka and David Ochieng. PW2 stated that he had booked this venue for their rally and had notified the 1st respondent. The ODM speakers were more powerful than the ones the petitioner was using to address his rally. The petitioner was forced to cut short his address. He abandoned the rally and withdrew from the market. The 3rd respondent admitted during his testimony that indeed they came to the market and found the petitioner holding a rally. This is what he told the court

“ We went to the shade where petitioner's rally was. At the market this was the only venue on which rally could be held. Honourable Orengo decided to address the same rally from a distance. There were two speakers on. The incident took a short time before petitioner came down from the dais and decided to leave with his entourage. We were left to continue with the rally. It is true this was a scene that could have degenerated into a scene. It is true had the petitioner and entourage not left the situation could have degenerated.”

The 3rd respondent testified that he had been invited to the rally by David Ochieng who told him that he was the one who had a permit to hold a rally here. According to David Ochieng, the 3rd respondent stated, it was the petitioner who had intruded their rally.

It is admitted that the 3rd respondent and his ODM entourage found the petitioner holding a rally on the market and that they forced him to abandon it. It is admitted that had the petitioner not withdrawn the incident could have degenerated into a security situation. PW2 was the petitioner's chief campaigner and stated that he booked the venue for their rally and had alerted IEBC. The 3rd respondent cannot, on his own, know if David Ochieng had booked the venue for ODM rally. David Ochieng did not testify. IEBC did not testify to say that this was not the petitioner's rally, or that they had David Ochieng's booking for the venue. I accept the evidence of the petitioner and PW2 and find it proved to my satisfaction that this was the petitioner's rally which the ODM brigade invaded. This material disruption of the campaign of the petitioner was an offence under section 67(1)(g)(iii) of the Elections Act.

The next complaint related to the events of 2/3/13. The petitioner and PW2 testified that on this day they found posters circulated in the whole County (but mainly in Gem, Alego Usonga and Ugenya constituencies) bearing the former's portrait upon which the portrait of Honourable Kenyatta and Honourable Ruto had been superimposed. The petitioner reported to the area OCPD. In the meantime, he

instructed PW2 and the other agents to go round the entire County to collect and mop up all these portraits. PW2 testified that in course of doing this, he came by the vehicles which were circulating these portraits. They were vehicles of known supporters and/or agents of the 3rd respondent. He knew the vehicle and their owners. He gave their registration numbers as KBK 406T Nissan matatu, KBR 057F and KBU 652T all belonging to Honourable Yinda then out going M.P. for Alego Usonga constituency, and UAE 398C belonging to Aggrey Onyango, ODM leader and supporter of the 3rd respondent. It should be recalled that during evidence, the 3rd respondent stated:

“I know Raila. He campaigned for me. Dr. Oburu, Orengo, Midiwo, Yinda all supported me and I supported them. I know Aggrey Onyango. He was running for Ward Rep Central Alego. I come from the Ward. He was ODM candidate. I have known him for about 45 years.”

In the official campaign portrait of the petitioner he had his photo and that of Raila. The petitioner and PW2 testified that following this circulation, one Joseph Oluoch Onyango was arrested and charged in **Criminal Case No.128 of 2013** at the Senior Principal Magistrate's Court at Siaya with having forged campaign material contrary to section 67 (1)(N) of the Elections Act that:

“On the 3rd day of March 2013 in Township Ward in Alego Usonga Constituency in Siaya District within the Siaya County forged campaign poster of being an opposing candidate.”

The certified record of the proceedings that the witnesses produced shows that the facts narrated by the prosecutor after the accused pleaded guilty to the charge were as follows:

“On 3.3.2013 at around 6.30 p.m., the accused was within Dondi market where he was campaigning against the Gubernatorial William Oduol. He was trying to convince voters that William Oduol was working for Jubilee candidate Uhuru and William Ruto and he had a poster which had a photo of William Oduol and on the background had a picture of William Ruto and Uhuru Kenyatta which had been superimposed using a computer. The area Assistant Chief was called by members of public. He proceeded there and with assistance of one AP by the name Philemon Kimei arrested accused and recovered the poster being the picture of William Oduol with Uhuru and Ruto – Jubilee candidates on the background with writings Governor Siaya County on the top and at the bottom Siaya Manyien meaning new Siaya.”

He accepted the facts, was convicted and sentenced to a fine of Kshs.250,000/= in default 3 years jail. Another person, Peter Otieno Awuondah, was also arrested on the same day at the same township and charged with a similar offence, but denied the charge.

The 3rd respondent testified that he was unaware of the posters issue. He stated that he knew nothing about the vehicles mentioned above. The fact that persons were arrested with having these posters and that one of them pleaded guilty offers material corroboration to the evidence of the petitioner and PW2. PW2 testified that he knew the vehicles and their owners and found the vehicles distributing the posters. This evidence was not controverted. I find it proved to my satisfaction that people who were against the candidature of the petitioner forged his portrait on which they superimposed the portraits of Uhuru Kenyatta and William Ruto who were presidential and deputy presidential candidates on Jubilee Coalition ticket. The Jubilee Coalition main opponent was CORD Coalition whose presidential candidate was Raila. Siaya is Raila's home county and there was evidence that he had a fanatical following here. To be depicted as supporting Jubilee Coalition in Siaya County was something going to affect the petitioner's candidature. In short, I find that an election offence was committed against the petitioner by his opponents.

PW2 testified of several meetings (at Bondo, Wagae and Yala) where Jakoyo Midiwo told the crowd that the petitioner was a murderer who had shot his wife and produced photos at the rallies. Earlier on, PW2 said, Midiwo had called him and told him as follows:

“Uncle, that your tough-headed friend called

**WILLIAM ODUOL, he has refused our advise,
and counsel, now watch this place and see what
will happen to him.”**

He said these words in dholuo The petitioner stated that he was forced to go to rallies with his wife and children to try and undo the claim that he had shot his wife. I know that the burden was on the petitioner to show that these words were spoken of him by Midiwo in the campaigns. I, however, consider that the only person who could have denied the allegation was Midiwo. He was therefore a material witness for the 3rd respondent who was, without explanation, not made to swear an affidavit, or called to testify. I find the evidence of PW2 and the petitioner not controverted and accept it to be true. The 3rd respondent had admitted that Midiwo was supporting him. Under section 67(1)(m)(ii) of the Elections Act it is an offence to publish, repeat or disseminate information with the intention to create hostility or fear in order to influence the process or the outcome of an election.

PW2 testified about an incident at Ugunja when the 3rd respondent, Orengo and Aggrey Onyango (then Chairman of Siaya County Council) addressed and each said:

“forget about Oduol. He is a TNA mole.”

Orengo did not swear affidavit or testify. Aggrey Onyango attended the hearing of the petition on many occasions. Witnesses kept pointing at him. He neither swore an affidavit nor testified. The 3rd respondent denied the claim by PW2. I accept the evidence of PW2. To refer to the petitioner as a TNA mole was meant to alienate him from the electorate in Siaya County, and such claim breached the law in regard to campaigns.

PW2 and the petitioner made reference to an incident at Ahindi Gardens in Siaya town on 29/2/13 where the 3rd respondent's supporter William Ohonde allegedly came carrying TNA head caps to the petitioner's rally. I agree with the respondents that **“29th”** is not a date known to February 2013. I suppose there was a mistake as to dates, and may be that is why the respondent withdrew the affidavit of William Ohonde. I will ignore that allegation

On 6/2/13 Raila held an ODM rally at Siaya stadium where he asked voters to vote **“6 piece”** for ODM candidates. The 3rd respondent was present as did all ODM candidates of the area. Raila called the candidates to the front. He held their hands up to say these were his candidates. The evidence about the rally was given by PW2 and the petitioner. PW2 stated that he attended. The 3rd respondent acknowledged the rally and his endorsement by Raila. The petitioner complained that because Raila had a fanatical following in Siaya, these actions were going to unfairly disadvantage him. Raila, however, was the leader of ODM and had every right to campaign for ODM candidates. He had every right to identify such candidates in ODM rallies and to ask that only ODM candidates be elected. This what is being referred to as **“six piece vote.”** At that point, I find, the petitioner could only admire the ODM machine. He stated that Raila went on to call candidates (like him) who had defected from ODM as **“wild cats”** and then went on to say in dholuo:

**“when a cat turns wild you put in a
sack and banish it. The election is about
six piece voting, we are not interested in a mix
and match union.”**

That may have not gone down well with the petitioner, but I do not think that RAILA crossed the line.

There was a claim that the petitioner's campaign materials were destroyed by the 3rd respondent

and/or his supporters and agents. Evidence on this point came from PW2. PW2's evidence was that following reports he visited Nyamonye market on 22/1/13 in Bondo where he found the petitioner's banners and posters destroyed and defaced. He went to Ajigo market in Bondo on 25/1/13 and found the petitioner's banners and posters destroyed and defaced; and Mahaya and Wan'garot markets in Rarieda where he found the petitioner's shade and banners, respectively, damaged. In respect of the incident at Ajigo, Collins Onyango Aketch and Emmanuel Ouma Oyoo were arrested and charged in **Bondo PM Criminal Case No.230 of 2013**. The petitioner sought to link these incidents to the 3rd respondent and/or his supporters and agents, but that claim was not substantiated by calling evidence in that regard. I find that the petitioner's campaign materials were destroyed during the campaigns, and that this was done by unknown people. In respect of the incident at Ajigo market two suspects were arrested but their case has not been determined. On this issue, I bear in mind the submission by counsel for the 3rd respondent who stated as follows:

“The petitioner appreciates that in terms of Kenyan political speak, Siaya was an “ODM zone”, by which we simply (mean) a place where the ODM party was the most dominant. It may even be true that the people who destroyed – if they were destroyed – the petitioner's posters were ODM supporters. But, surely, they were not agents of the 3rd Respondent.”

With profound respect to counsel, the two dominant contestants for the gubernatorial election were the 3rd respondent and the petitioner. The 3rd respondent was the ODM candidate and, from the evidence, the petitioner posed the greatest challenge. All ODM guns, as it were, were aimed at him. It follows, and it is reasonable to conclude that, the people who destroyed the campaign material belonging to the petitioner were followers of ODM.

To sum up, the ODM campaign machine ran a dirty campaign during the gubernatorial election in Siaya County. Everything was done to depict the petitioner as a candidate who was running against the grain. The elections were constantly being bombarded with malicious propaganda against him. The propaganda was beyond what was ordinarily expected from opponents in an election campaign. When this was not considered enough, forged posters sprung up late in the campaign showing, falsely, that the petitioner was supporting the Jubilee candidacy, and not ODM or Raila. From the evidence, the County was basically an ODM and Raila zone. I find that the propaganda that the petitioner was supporting Uhuru and Ruto was not only offensive but also a blow below the belt, as it were. Taken together with the election offences as outlined in the foregoing, one cannot say that a fair chance was given to the petitioner to campaign, or that the electors were given a fair chance to pick a candidate of their choice. To put it bluntly, the campaign was not free and fair. The campaign was perverted to the extent that it fundamentally compromised the integrity of the election.

The next set of evidence was about alleged fraud, malpractices, irregularities and breaches during polling day. The first incident referred to bribery at Boro primary school polling station in Alego Usonga constituency; Kametho primary school polling station, Sangla primary school polling station and Rarieda primary school polling station in Rarieda Constituency. PW3 was the presiding officer at Boro and PW4 was the NAP-K agent at the station. PW4 testified that she was outside the voting room and found people had surrounded one Gerphas Odhiambo Obado (a chairman of ODM) saying that he was bribing voters. He was arrested and 4000/= found on him. He was taken away and later charged in **Siaya SPM Criminal Case No.123 of 2013**. PW3 testified that she was in the voting room when PW4 was rung to go out over the incident. She (PW3) did not herself go out but sent a police officer there who arrested Gerphas. He was charged with interfering with free political canvassing and campaigning contrary to section 67(1)(g) of the Elections Act. Neither PW3 nor PW4 saw Gerphas giving money to any voter. No voter testified to say he was bribed by Gerphas. The evidence of PW3 and PW4 was insufficient to prove bribery. There was no evidence called to prove bribery at Kametho, Sangla, Itabo, Nyabera and Rarieda.

The second issue related to alleged canvassing and interference with secret voting in several polling stations in Rarieda Constituency and Yimbo East Ward in Bondo Constituency. PW6 and PW7 were responsible for the allegation. PW6 stated that he went to all polling stations in Yimbo East Ward and found various malpractices and breaches as follows:

a. at Pala (stream 11) the presiding officer

and deputy presiding officer were luring voters to vote

“six piece” and allowed an ODM agent to sit at the door to tell voters to vote “six piece”;

b. at Othach an ODM agent George Omondi Ondiwo

was picking voters from the que and leading them

into the polling room with instructions to vote “six piece”;

c. at Got Ramogi the chief campaigner for ODM was allowed to canvass for voters along the queues;

d. at Bar-Kanyango the presiding officer picked an ODM agent

to assist old and illiterate voters without permitting the

petitioner's agent to witness the marking;

e. at Nyamonye an ODM agent (one GAUNYE) was helping

the election officials with their work on claim that there

was shortage of manpower and another ODM agent was

allowed to sit at the door to tell incoming voters to vote “six

piece”; and

f. at Abidha the presiding officer was forcefully marking

ballot papers for illiterate voters and that the marking was for the ODM candidate. There was also vote buying by named ODM officials.

This witness was the petitioner's campaign coordinator for the Ward. The stations had each the petitioner's agents and none of them was called to confirm or corroborate the allegations. He said he was alerted about these incidents by the agents. They would have been the best evidence. No voter came to say he was influenced in the alleged way, or at all. No voter came to say he was given money to vote for ODM. I find PW6's evidence not sufficient.

PW7 testified that he caught an IEBC clerk who was just about to stuff marked ballot papers into gubernatorial ballot box. This was at Ujwanga polling station. The OCS of Aram Police Station and the officer were called to the scene. The ballot papers were six and were as follows: WR41-000313265, PA237-0020964, SN41-00313264, CA118-00006864, GV41-003133264, and PR 12466341. This station is in Rarieda constituency whose returning officer was DW3. She testified that she was called to find a man arrested with these ballot papers. The members of public who had gathered here wanted to beat the man saying he wanted to stuff them into a ballot box. The man who had the papers was not a clerk. PW7 stated that the ballot papers were with their agent Zacharia who said he had snatched them from the clerk. Zacharia did not testify. DW3 stated that the ballot papers were in the hands of PW7. Whether the ballot papers were with PW7 or with Zacharia, none of them was supposed to have them outside the voting hall. Secondly, the serial numbers of the papers show that they were not all for gubernatorial election. Only one was. It is most likely that one voter had been given the 6 ballot papers (for Presidential, gubernatorial, senatorial, member of parliament, women representative) to vote and put each in its respective ballot box. DW3 marked the six ballot papers as spoilt and did not use them in the court. No candidate therefore benefited from the alleged stuffing. Regarding this incident, I agree with the

respondents that the attempt to stuff ballots not proved.

I find the allegation of bias by the officials of 1st and 2nd respondents against the petitioner during the voting day to have been unsubstantiated.

There was alleged over-voting at stream 1 at Awelo polling station in Alego Usonga and stream 1 at Nyasanda polling station in Ugunja. DW1 (returning officer for Alego Usonga) acknowledged that in Form 35 of stream 1 of Awelo station it appears that the registered voters were 587 whereas the total votes cast were 620, a case of over-voting. The returning officer for Ugunja Constituency did not testify, and neither did the presiding officer for steam 1 at Nyasanda in the constituency. The Form 35 that was prepared showed that the registered voters were 420 when the votes cast were 439. In respect of Awelo the presiding officer, who did not testify remarked as follows in Form 35:-

**“There was a difference between the
number of voters and the votes cast.”**

The presiding officer of Nyasanda remarked as follows in Form 35

**“The anomaly is explained in the
field note book.”**

The court did not see the field note book to be able to see the explanation. To allow more people to vote than those that appear in the register as voters is irregular. Whatever the final tally for Siaya County therefore, has to be less 620 votes for Awelo and 439 votes for Nyasanda.

The next set of complaints related to alleged fraud, malpractices, irregularities and breaches during voting and tallying of votes. The allegations related to:

- (a) faulty, biased and fraudulent tallying
of votes in favor of the 3rd respondent; and
- (b) massive alterations of entries in Forms 35.

Evidence was tendered to show that during the transmission

of results from Form 35 to Form 36 the petitioner lost 655, but the 3rd respondent also lost 340 votes. The affected polling stations were Mageta, Nyabondo and Sanda in Bondo; Mur Malanga in Alego Usonga; Ndigna in Rarieda; Lela and Nalenda in Ugenya; and Sidindi in Ugunja. The respondents witnesses told court, and I agree with them, that the problem affected both the petitioner and the 3rd respondent; that its effect was at the end of the day minimal; and was attributed to errors in postings, or arithmetical problem. No fraud can be inferred from the case, I find..

By the close of the hearing, it had been demonstrated by the petitioner that a number of Forms 35 had alterations and/or overwriting regarding election data and that such alterations and over-writings had not been countersigned or stamped by the presiding officers who had made them. They were 35 Forms in Gem, 17 Forms in Bondo, and 29 Forms in Rarieda. The written submissions by the petitioner's advocates had more of such Forms, but submissions cannot be used to introduce evidence. The petitioner's case was that such Forms cannot be authentic and that they were evidence of manipulation of results. The evidence by the witnesses for the respondents was that neither the law nor the regulations provided for counter-signing and stamping of such alterations or cancellations. They stated that the results were eventually not affected by the incidents. Further that, in any case, each Form had been confirmed by the signature of agents; that such signing was the last thing to be done on the Form. No agent, they said, had testified to disown any of the Forms. Lastly, that the alterations, cancellations and

over-writings had been honestly done by the officers who were working under difficult circumstances. I was asked to consider that Siaya County had 573 polling stations and only 79 stations had the incidents complained of.

I agree with the petitioner, and as was conceded by DW3, that it was desirable for each alteration, cancellation or over-writing to be counter-signed and stamped by the maker as a way of owning the same and saying the Form was authentic. In **WILLIAM KABOGO GITAU .V. GEORGE THUO & 2 OTHERS [supra]** Justice Kimaru said the following about such Forms.

“In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties; including the members of public; should be written without any alterations or cancellations. The cancellations or alterations in Forms 16A produced in this court raised question regarding the veracity and authenticity of the said results. The said Form 16A cannot in the circumstances be said to contain valid results of the polling stations in questions.”

With respect to the Judge, I would not go that far. Each petition has to be decided on its own merits. It would depend, for instance, on the number of the Forms in question in relation to the total Forms in the petition. It would also depend on the explanations given by the electoral officials, whether or not the agents signed the Forms, or what questions they (the agents) raised about them. But the correct thing should always be that every alterations and/or cancellation be counter-signed and stamped by the maker. I don't find that these 79 Forms should be disregarded.

PW5 gave evidence that he witnessed one Chiambe and one Chris Owino making alterations to various documents and filling others. This happened at Bondo Constituency Tallying Centre. The exercise was being supervised by the returning officer (DW4). All was in effort to manipulate the votes to favour the 3rd respondent (who together with Aggrey Onyango and Dan Odhiambo had called PW5). The exercise took about three hours. DW4 was now ready to take the results to Siaya County Tallying Centre. On the way, PW5 continued, DW4's convoy stopped and the culprits (together with Aggrey Onyango) were involved in vote stuffing. The ballot boxes that were being stuffed were in vehicles which had stopped at River Yala. DW4 denied that evidence. There was delay in taking her results to the County Tallying Centre but she blamed this on the intelligence report she had received which made her seek enhanced security before going to Siaya in four vehicles. A lorry was in the convoy, but she said it had security personnel and not ballot boxes. It was conceded by the petitioner and his witnesses that no counting was done at the County Tallying Centre. It is inconceivable how, in the presence of members of public, the events being described by PW5 would have happened at Bondo Tallying Centre. But more important, the involvement of PW5 in the alleged shenanigans would make him an accomplice whose evidence would require material corroboration. No such corroborative evidence was called. I find the allegation of vote stuffing or manipulation of votes as stated by PW5 was not proved.

I have stated in the foregoing that there was a recount of votes in respect of all polling stations in Bondo, Gem and Rarieda constituencies; Awelo primary school polling station in Alego Usonga constituency; and Nyasanda primary school polling station in Ugunja constituency. The purpose was to ascertain the votes garnered by each of the six candidates, including the 3rd respondent and the petitioner, for the gubernatorial election for Siaya County held on 4/3/13. The recount was undertaken by the Deputy Registrar who filed her report on 17/7/13. The results for Gem and Rarieda constituencies were materially at variance with those declared by the Commission following the election. The recount showed that in Gem Constituency the 3rd respondent had 19,757 votes and the petitioner had 23,248 votes, compared to the declared results which showed that the 3rd respondent had 25,047 votes and the petitioner had 23,301 votes. This showed that the 3rd respondent had 5,290 votes less than the declared results, and the petitioner had 53 votes more than the declared results. In Rarieda constituency, the recount showed that the 3rd respondent had 23,314 votes and the petitioner had 19,316 votes. The declared results showed that the 3rd respondent had 26,191 votes and the petitioner had 19,285 votes. This showed that the 3rd respondent had 2,837 votes less on recount and the petitioner had 21 votes more. For Bondo constituency the recount showed that the 3rd respondent had 37,183 votes and the petitioner had 16,287 votes. The declared results were that the 3rd respondent got 37,120 votes and the

petitioner got 16,593 votes. The recount showed that the 3rd respondent had 63 votes more than what had been declared and the petitioner had 306 votes more than what had been declared. Awelo polling station had three streams. The recount showed that the 3rd respondent had a total of 483 votes and the petitioner had 1059 votes. The declared results showed that the 3rd respondent had 486 votes and the petitioner had 1,152 votes. For Nyasanda polling station which had two streams, the recount result was 411 votes for the 3rd respondent and 353 votes for the petitioner. The declared results showed 415 for the 3rd respondent and 355 votes for the petitioner. In total, the 3rd respondent garnered 80,254 votes according to the recount for Bondo, Gem and Rarieda constituencies, compared to 88,358 votes according to the declared results. The difference was 8,104 votes. If it is considered that the Commission declared that the 3rd respondent had won the election by 9,001 votes, the recount reduced the margin between him and the petitioner to 897 votes.

Following the recount, the 1st, 2nd and 3rd respondents contested the results which they said were as a result of “possible post election malpractices, including the tampering with the election materials and results.” They asked for an order for scrutiny and also as in depth investigations into the alleged malpractices. In the application, DW3 (returning officer for Rarieda constituency) and DW2 (returning officer for Gem constituency) swore affidavits in support of the contention that the recount results did not reflect the results that they had declared following the election. They stated that following the announcement of results at the respective polling stations, the presiding officers in the presence of agents and in the open, sealed the ballot boxes in which the votes were. The seals numbers were recorded in the poll day diaries. The ballot boxes were handed to the returning officers while intact. DW2 stated that the boxes were kept at the Commission's warehouse in Siaya. DW3 stated that she handed the ballot boxes for storage in the National Cereals and Produce Board warehouse as the two constituencies, Rarieda and Gem, did not have warehouse facilities. It is clear that the two returning officers were not in agreement as to whether the Commission had a warehouse or not. They did not agree on whether the election material were kept at the Commission warehouse or at the NCPB warehouse. Whatever the case, the two witnesses stated that from the time the ballot boxes were warehoused they ceased to have physical custody of the same. It was from the warehouse that they later collected the ballot boxes and presented them to the Deputy Registrar (in accordance with rule 21 (a) of the Elections (Parliamentary and County Elections) Petition Rules 2013).

There is no dispute that at the beginning of the recount the witnesses did not make any observation regarding the condition of the ballot boxes that was different from when they handed them to the Deputy Registrar. When the boxes were opened for recount, DW2 and DW3 stated that they observed the following anomalies:

- a. some of the boxes had broken seals;
- b. some had seals which were different in serialisation from those used to seal the boxes and which seals had been recorded in the poll day diaries;
- c. a significant number of ballot papers did not have

corresponding counterfoils for the ballot books used during the election, yet all counterfoils had been sealed in the boxes by the respective presiding officers; and

- d. a significant number of the ballot boxes had counterfoils of the ballot papers used in the election that did not correspond in number with the ballot papers.

The effect of these alleged anomalies was summarised in paragraph 9 of DW3's affidavit and in paragraph 4 of DW2's affidavit. They stated that these were post-election malpractices which had produced the recount results that were substantially different from the results announced and declared in respect of the candidates. The recount results had drastically reduced the 3rd respondent's votes, and materially benefited the petitioner. The recount results had, it was alleged, drastically reduced the voter turnout in the constituencies from an average of over 70% to as low as about 40%.

As to what had possibly happened to the ballot boxes while in the legal custody of the Commission, DW3 swore as follows:

“21. On the day of verification of the ballot boxes and before their handover to the custody of the Honourable Court, the warehouse Assistant, Lillian, brought to my attention the fact that there was an opening caused by a missing iron sheet on the side of the warehouse which fact we have since reported to the police for investigations.”

It is material that Lillian was not made to swear an affidavit to complain that she suspected that the warehouse in which the ballot boxes had been stored had been broken into. Whatever Lillian told DW3 does not appear to have been brought to the attention of the respondents, at least at the time. Neither the Deputy Registrar nor the court was informed that the ballot boxes may have been tampered with. This hearsay evidence, as Lillian swore no affidavit, was being brought to the attention of the court at the conclusion of the hearing and at the conclusion of the recount. It is also material that each ballot box had been sealed by a presiding officer, and not by DW2 or DW3.

It should be recalled that the application for scrutiny and recount was presented by the petitioner after the conclusion of hearing. The application was opposed by all the respondents on the basis, among other things, that the election was free and fair and that the results declared were accurate and verifiable. At that point there was no indication at all that the ballot boxes may have been interfered with, or that the court should not rely on their contents.

Counsel addressed the court at length on what the court should do with the alleged post-election tampering and the results of the recount. Mr. Gumbo's position was as follows:

“(j) In view of the foregoing, it is our respectful submission that since the 1st respondent who is the legal custodian of the electoral process has itself impeached the results of the recount, it should naturally follow that the credibility of the ballot boxes have been questioned.

(k) It will be wrong for the court to turn a blind eye to these obviously very grave issues and apply the results of the recount in the determination of the petition,. The use of such would amount to a mechanical application of the law and which will obviously taint the character of the judgment itself.

- We submit that the actions of interference with the ballot boxes amounts to a post-election malpractice intended to affect the results. The overall effect of allowing the results from a compromised ballot box to be applied in a petition amounts to allowing a party to abuse the court process with an election process which we ask the court to discourage.**

(m) If for arguments sake the court was to apply the results of the recount in determining the petition and it turns out that the petition is allowed then it should not be lost that the actions of a third party after the elections would have resulted into unsettling the will of the people and this would for all intents and purposes be considered to be a victory for the petitioner. We ask the court to read into the scheme and nip it in the bud and disregard the results of the recount in determining the petition.”

Counsel referred the court to a number of cases to support his submission that the results of the recount be ignored and that the court proceeds on the basis of the results as declared in Forms 35 and 36. I will highlight some of these cases in the following analysis. In **HENDERSON .V. MALEY [1991] OK 8** the Supreme Court of Oklahoma stated as follows in paragraph 23:

“A central reason for protecting the actual physical ballot after an election is because when properly preserved the ballot itself is the best, primary and controlling evidence of votes cast by the electorate..... Under our law when evidence is presented to suggest a reasonable probability of tampering by unauthorised persons or the trial court determines there is reasonable doubt as to the integrity of the ballot boxes.... no recount is had and the returns of the precinct officials prevail.....

.....”

The court determined, based on the facts presented, that the ballots for Oklahoma County should not be considered the best evidence of the election results because of the manner in which they were preserved. In addition, the court relied on the failure to secure the ballot boxes with locks and the fact that the ballot boxes had been handled by numerous people for a period of time which presented a reasonable opportunity for tampering with or changing the ballot boxes.

In **FRAZIER .V. WRIGHT** the Court of Appeals of Kentucky in 1950 held that in a recount proceeding where it was found that ballots in one or two boxes had been tampered with and the integrity of the others had been maintained, rather than disenfranchise the electorate, the court would reject the tampered ballots or the empty box and accept as the best evidence of the will of the people the returns certified by the election officers where it was not proved they had failed in their duty or that the certificate is erroneous.

In **TOOLIT SIMON AKECHA .V. OULANYA JACOB L. OKORI & ELECTORAL COMMISSION, (supra)** the Court of Appeal of Uganda upheld the election as having reflected the will of the people and disregarded the recount exercise when it noted as follows:

“The appellant and his counsel relied heavily on the aborted recount exercise to show that there was massive ballot stuffing. Whereas I agree that the recounting exercise was stopped due to tampering with ballot boxes, the tampering was due to many factors including carelessness on the part of the officials of the 2nd respondent. The officials were required to seal the ballot boxes and keep them intact and safely until election litigation was over. The recounting exercise shows clearly that this was flouted. The Chief Magistrate found some boxes empty, others contained votes which belonged to a woman member of parliament. There was also evidence that ticked ballot papers were found dumped on rubbish pits and some in a classroom at Lakwana Primary School.”

In the case of **JOHO .V. NYANGE & OTHERS (supra)** the ballot boxes and the election documents were grossly tampered with after the election. The 1st respondent (NYANGE) was able to present evidence to court to prove that indeed there had been tampering and was able to demonstrate the actual results in face of that tampering. The court held as follows:

“I have already held that the few incidents of violence did not interfere with the voting process and no significant number, if any, of voters was disenfranchised by that violence or any other factor. I have also held that the mistakes of the ECK officials in the conduct of the

election were minor and of no consequence. It follows therefore that the election was conducted substantially in accordance with the law as to elections.”

Having looked at all these decisions, the jurisprudence that emerges from them is that, the votes in the ballot boxes following an election contain the best, primary and controlling evidence of the votes cast by the electorate. The Commission has, therefore, the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until any litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don't agree the Commission has to explain the discrepancy. When the Commission is handing over the ballot boxes to court it should reasonably anticipate that scrutiny and recount may be ordered, at which time the handling of all the election materials may be inquired into. It is the responsibility of the Commission, at the earliest possible opportunity, to indicate to the court hearing the petition any instance of interference or tampering, or suspected interference or tampering, so that appropriate action or inquiry can be undertaken. All the time, the Commission should bear in mind that it is the custodian of the results as declared in the forms and as evidenced by the votes in the ballot boxes. Indeed Article 86(d) of the Constitution commands the Commission to put in place structures and mechanisms to eliminate electoral malpractices, including the safe keeping of electoral materials. The Commission cannot seek to denounce the contents of the Forms or the ballot boxes and seek that the court should not rely on any of them, without leading evidence to show that they did their best to safeguard them but that a third party tampered with them.

Once again, when the ballot boxes were delivered to the Deputy Registrar by the respective returning officers, who included DW2 and DW3, there was no indication that they had been tampered with in any way. There was no indication when the Deputy Registrar gathered the parties, their agents and counsel to begin the process of recount that anything was noted on the ballot boxes to show that they had in any way been interfered with. It was not noted that, for instance, that any seals were missing on the boxes or that some seals had been replaced. The court was not told at what point the police were informed that there had been possible breaking into the warehouse where the ballot boxes were kept.

The respondents have asked that the results of the recount should be ignored by the court. It should, however, be remembered that recount was pleaded in the petition. The petitioner successfully applied for a recount. It would be difficult to ignore the consequences of such a recount (**RICHARD KALEMBE NDILE AND ANOTHER .V. PATRICK MUSIMBA MWEU AND OTHERS, Election Petition Nos. 1 and 7 of 2013** at Machakos). In the case, Justice Majanja made reference to the Court of Appeal decision in **JAMES OMINGO MAGARA .V. MANSON ONYONGO NYAMWEYA & 2 OTHERS (supra)** in which the High Court had, despite the recount which showed the appellant as having the highest votes, nullified the election because of irregularities. In upholding the verdict, the Court of Appeal observed as follows:

“It is true that on the scrutiny and recount of the votes, the appellant still had the largest number of votes. But as I have pointed out that was not all the learned Judge was supposed to go by though it was important consideration to bear in mind. I quote the remarks of BARRY, J in Canadian case of [1997](MPLR R (2d) Nfld SC) cited in DOROTHY E. BROWTON VS. JEAN HART KANGAS & OTHERS, suit No.C1 98--01-10265, Queens Bench Division, Manitoba:-

“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have a free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.”

In the instant case the recount results showed that the wide margin of 9,001 votes in favour of the 3rd respondent that the Commission had declared following the election conducted on 4/3/13 had been reduced to 897 votes only, and when the recount was in respect of three constituencies out of six constituencies. I consider that the recount was at the instance of the petitioner who was questioning the conduct of the election and the credibility of the results as returned by the Commission. I have considered all the circumstances of the petition and have come to the conclusion that the credibility of the

results of the election was severely and materially tainted by the recount to the extent that I am unable to find that the results as declared by the 1st and 2nd Respondents were either accurate or verifiable.

In conclusion, I return the verdict that the 3rd respondent was not validly elected as the governor for Siaya County during the general elections held on 4/3/13. A certificate to this effect shall issue to the Commission in accordance with section 86(1) of the Elections Act, 2011. The consequence, of course, shall be that a fresh election shall be conducted for the gubernatorial seat for Siaya County.

The petitioner has succeeded in his petition and, under section 84 of the Elections Act, he will be paid his full costs by the respondents. The 1st respondent and the 3rd respondents shall equally bear such costs which, considering the amount of work in the petition, shall be capped at Kshs.3 million. This capping has been done to comply with rule 36(1) of the Rules. Lastly, the security that the petitioner deposited shall be released to him.

Dated, signed and delivered at Kisumu this 23rd day of August, 2013

A. O. MUCHELULE

J U D G E

