



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

KITHINJI KIRAGUPETITIONER

VERSUS

MARTIN NYAGA WAMBORA.....1ST RESPONDENT

DAVID KIAMBI (COUNTY

RETURNING OFFICER).....2ND RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

This is an election petition against the 1st, 2nd and 3rd Respondents pursuant to the National General elections conducted on 4th March 2013 in which the 3rd Respondent (I.E.B.C) declared the 1st Respondent (Martin Nyaga Wambora) as elected Governor in the gubernatorial election in the county of Embu.

The 3rd Respondent proceeded to gazette the results of the elections as follows; Adrian Kinyua Nduma **2,723**, Peter Njagi Kumantha **5,371**, Kithinji Kiragu **82,825**, Martin Nyaga Wambora **94,703**, Sylvester M Gakumu Karucu **4,944** and declared the 1st Respondent as duly elected.

The Petitioner being dissatisfied with the outcome of the election results has petitioned the High Court in which he seeks the following orders:

- i. **A DECLARATION that the 1st Respondent MARTIN NYAGA WAMBORA was not duly elected as the Embu County Governor on 4th March 2013 and his election was invalid, null and void.**
- ii. **A DECLARARTION that the Petitioner Kithinji Kiragu was the duly elected candidate for the position of Governor of Embu County during the general elections held on 4th March 2013.**
- iii. **Subject to the foregoing prayers (i) and (ii), the 1st Respondent be ordered to reimburse to**

- the Embu County all the emoluments and allowances paid out by the said Embu County to the 1st Respondent as the purported Governor elect.**
- iv. **That an order to issue for the scrutiny or recount of Ballots from Runyenjes and Manyatta Constituencies to ascertain and authenticate the votes garnered by the 1st Respondent.**
 - v. **The costs of the petition to be borne by the Respondents.**

A. The Petitioner's case

The petition was supported by the Petitioner's affidavit and further affidavits filed in Court.

It is the Petitioner's case that the elections were fundamentally flawed, as they were not conducted professionally in accordance with the laid down principles in the Constitution, the Elections Act and the Elections (General) Regulations 2012 and as such, they were not transparent, fair and democratic. He cited Manyatta and Runyenjes as the Constituencies where true and accurate results were not declared as there were various forms of mis-tallying and mis-recording to the effect that his votes were understated whereas the 1st Respondent's (Martin Nyaga Wambora) were inflated.

He averred that the 2nd Respondent (County Returning Officer) failed to follow the law as envisaged by **Regulation 83(1) (a)** of the Elections (General) Regulations of 2012, in that he failed to invalidate the results from polling stations where aggregate valid votes were well over the valid votes cast, citing Kianjokoma Primary School Polling Station and Miandari Tea Buying centre in which the 1st Respondent garnered 513 votes well in excess of the 433 votes cast.

He also faulted the 2nd Respondent for replicating the results in Embu County Primary School –stream 1 thereby collusively giving the 1st Respondent an undue advantage and also including invalid results from Kathunguri Primary School from Runyenjes Constituency which were transported in an unsealed ballot box.

He further averred that the 2nd Respondent included fictitious results from Kithiruri Tea Buying centre, Polling Station (075) in Runyenjes Constituency yet the same was not opened at all. He contended that before the results were declared, he had requested the County Returning Officer to have the results verified and he had promised to do so but he proceeded to declare the results.

It was his case that the law was further breached since results from 39 polling stations of Manyatta constituency were not announced as required at the Constituency tallying centre at Kangaru Boys High School. He averred that results for the Manyatta and Runyenjes Constituencies were not announced at the respective tallying centres and that the forms 36 from the various Constituencies bear anomalies and misstatements which go to the root of the election. He averred that the preset template and formulae was interfered with leading to summation errors in the petitioner's results.

B. The 1st Respondent's Response.

The 1st Respondent in opposing the petition filed his response on 10th April 2013. He contended that he had been nominated and validly elected after vigorous campaigns by the people of Embu, which was manifestly borne out by the results of the outcome of the election, which reflected the will of the people.

He denied colluding with anyone to mismanage the election results. He contended that the Petitioner had at all material times sought to blame the failure of the electronic system for his loss in the election and countered that it was common knowledge that the transmission system faced numerous challenges during that electoral period, and that the 3rd Respondent had explained the measures it took to mitigate the same. He further asserted that no candidate suffered any prejudice as a result in the sense that the results of the elections were tallied and announced in compliance with the Election Laws.

He contended that voting took place at Kithiruri Tea Buying Centre (075) contrary to the Petitioner's

avermment. He further averred that the centre had been gazetted for that purpose, and the Polling Station remained open until 5pm as envisaged by law upon which the counting of votes commenced. He reiterated that the allegations that voting did not take place are false as the same are premised on dishonest and suspicious accounts by the Petitioner's agents.

He averred that the results from 39 polling stations in Manyatta constituency were properly announced as required by law by the Constituency Returning Officer contrary to the assertions of the Petitioner.

In response to the issue of the unsealed ballot boxes emanating from Kathunguri Primary School, he asserted that it was only one ballot box that concerned the gubernatorial elections and that at the behest of the 3rd Respondent swift action was taken culminating in the arrest of the Presiding officer and his deputy.

He contended that nobody benefitted from the incident as the same was fully dealt with to the fullest extent of the law.

He denied that votes cast were in excess of the registered voters and that any such allegation was false and bent on misleading the Court.

He further denied allegations that the anomalies in Forms 35 and 36 inflated results in his favor. He contended that the Petitioner relied on data from his agents which was neither accurate nor reliable.

He asserted that the true documents to be relied on were the statutory documents as opposed to the Petitioner's documents which were without merit. All in all he contended that it was the Petitioner who conducted himself without decorum as he sought to impose his will on the 2nd Respondent completely disregarding the due process laid down.

He averred that the elections were conducted in accordance with the laid down principles in the Constitution and that **Section 83** of the Elections Act provides that no election shall be avoided by non compliance with any written law if the same was conducted in accordance with the principles governing it.

He contended that the clerical errors that occurred were within the human realm and the same could not affect the result of the election. He further asserted that the orders sought in the election were incapable of being granted as the same would breach the rights of another Constitutional office holder and thereafter result in a Constitutional crisis. He therefore asked the Court to dismiss the petition.

C. The 2nd and 3rd Respondents Response.

The 2nd Respondent and the Returning Officers for Manyatta and Runyenjes filed replying affidavits. They opposed the petition contending that the results of the election were free, fair and transparent as they were conducted in accordance with the laid down principles in the Constitution asserting that the 1st Respondent was validly elected and as a result the 3rd Respondent gazetted him as the Governor of Embu County.

It was their case that the allegations made by the Petitioner were false and intended to mislead the Court. In particular they asserted that there was no single Polling Station that recorded results in excess of the votes cast to warrant striking out. They cited Kianjokoma Primary School in Runyenjes constituency where the total number of registered voters was **1020** while the votes cast were **899**. They conceded that with the exception of the results from Embu County Primary School polling station, where the same were replicated in Form 36, the results from Manyatta constituency were accurate and all the results were announced in accordance with the law. They further contended that as the results were announced on 4th March 2013, there were no agents in the tallying hall.

They conceded that there were errors which were not deliberate or intended to benefit any candidate.

They cited Miandari Tea Buying centre Polling Station (077) where the correct figure was **313** for the first Respondent as opposed to **513** as recorded in Form 36.

They averred that the results from Kathunguri Primary School were not invalid as only one ballot box was for the gubernatorial elections and that in any case the ballot boxes were at all material times guarded by security personnel.

It was their case that the results from Kithiruri Tea Buying centre were not fictitious as alleged by the Petitioner as the station was opened in the presence of five agents and closed at 5pm whereupon counting commenced and results recorded in Form 35. It was their case that the agents left early and that is why they did not sign the Statutory Form 35.

They averred that the gubernatorial election was correctly captured with the exception of an error in the calculations that gave the Petitioner **1519** votes as opposed to **8126** in Runyenjes constituency and that the same was detected late. They further contended that the error was negligible as the Petitioner would still have lost, as the overall results reflected the true will of the people.

They further averred that all agents were issued with Forms 35 and in instances where the same fell short, a copy was issued to the agents to make copies there from. They contended that there was no fixed template for the Forms 36 and only dummies were sent from the headquarters to be customized according to each returning officers preference.

D. EVIDENCE IN COURT.

i. The Petitioner's Case

The Petitioner called a total of 7 witnesses him included. All of them had filed their affidavits. The Petitioner's evidence was that the results availed in Court for Manyatta and Runyenjes did not have accompanying Forms 36. He contended that he investigated and confirmed the claims that no voting took place at Kithiruri Tea Buying centre no (075). He denied having garnered **1519** votes in Runyenjes. He also doubted the results in a number of polling stations in Runyenjes constituency and 39 polling stations in Manyatta constituency. He contended that the said results were fictitious, as his agents were denied access to the forms 35.

He pointed out that he had issues with the following polling stations:

- a. Kianjokoma Primary School.
- b. Kithiruri Tea Buying Centre.
- c. Miandari Tea Buying Centre.
- d. Kibugu Tea Buying Centre.

His personal secretary **Ambrose Muchangi (PW1)** took the Court through the tallies he did for various polling stations where he found extra, unaccounted for and missing votes. He denied the fact that the results in Runyenjes showed that the streams had been collapsed unlike the other 3 Constituencies.

He cited an example of Embu Municipal Council, Kianjugu Tea Buying centre. Also cited was the case of Kithimu Primary School where the Forms 35 in both streams were signed by one Presiding Officer and his/her deputy.

This witness told the Court that there were a total of **6604** missing votes of the Petitioner. According to him, there had been tampering with the Runyenjes results template as it was only the columns of the Petitioner and the 1st Respondent which kept on changing in the summation. This witness told the Court that the Forms 36 showed different figures for registered voters. He however admitted that the transposition from Forms 35 to Forms 36 was properly done.

PW3 (Stanley Hannington Mbogo) was an APK agent at Mbuinjeru Primary School, which had two

streams. He stated that in stream 1, the Petitioner garnered **83** votes while the 1st Respondent garnered **446** votes whereas in stream 2 the Petitioner garnered **41** votes while the 1st Respondent garnered **326** votes, bringing the total for the Petitioner to **124** votes and for the 1st Respondent to **772** votes.

James Nyaga Kibathi (PW5) was the APK County Chairman and was also the tallying agent for Embu County. He was at Kangaru Tallying centre from 4th March 2013 to 6th March 2013 at 2pm. While there, the 2nd Respondent announced that the Petitioner had garnered **1,519** votes while the 1st Respondent had garnered **47,085** votes. After a protest by the Petitioner, it was reflected on the screen that the Petitioner had **4,167** votes while the 1st Respondent had **23,153** votes. The 2nd Respondent then promised that once the Returning Officer returned there would be verification. **James Nyaga Njoka (PW6)** was at Kyeni Girls on 4th March 2013 in his capacity as the APK chief constituency agent for Runyenjes.

On 5th March 2013, he witnessed the arrival of four unsealed ballot boxes and saw some two men filling forms. He approached them and was shouted at by the 2nd Respondent. Police officers were called and he was arrested together with the presiding officer and his deputy. He was later released but the presiding officer and the deputy were charged in Court. They were later acquitted. He however confirmed that while the boxes were at Kyeni Girls, he did not see anybody interfering with them.

ii. The 1st Respondent's Case.

The 1st Respondent called a total of seven (7) witnesses him included. All of them filed affidavits. It was the evidence of the 1st Respondent that he won the elections freely and fairly. In his assessment, the human errors cited by the Petitioner were not just confined to the two Constituencies, i.e. Runyenjes and Manyatta but to all the four Constituencies within Embu County. He too relied on party agents during the election. His position was that voting took place at Kithiruri Tea Buying Centre. He conceded to the errors at Kibugu and Miandari.

Francis Ndwiga (RW1) was a TNA agent at Kithiruri Tea Buying Centre where he also voted. He was at the station before 6am when the station opened. Counting of votes started at 5pm. The centre had 35 registered voters all of whom voted.

Catherine Kaari Njagi (RW4) was a TNA agent at Mbuinjeru Primary School. Her evidence was that she was in stream 1 while **Stanley H Mbogo (PW3)** was in stream 2. She did sign the Form 35. She further said the total votes for the Petitioner were **83 (42+41)** while those of the 1st Respondent were **772 (446+326)**.

Stephen Murungaru (RW5) was the 1st Respondent's chief agent in Manyatta Constituency. He was at Kangaru Boys constituency tallying centre on 4th March 2013 from 6pm and stayed there throughout. He introduced himself to the Returning Officer and did not see any other chief agent that night. There were however agents in the hall at the gallery. During his stay at the centre, there were no issues concerning any polling station. **Gicovi wa Munyi (RW6)** was the 1st Respondent's chief agent at Kangaru Girls. He was there from 4th March 2013 9pm throughout the entire exercise save for the short breaks. On the night of 6th March 2013 the 2nd Respondent announced the results he had received from Runyenjes constituency which caused uproar. The results for the rest of the Constituencies came in on 7th March 2013.

The Petitioner and his supporters wanted the verifications done before the results could be announced. The TNA side was of the view that the 2nd Respondent was only to tally the results from the Constituencies. The 2nd Respondent then announced the results and issued a certificate to the 1st Respondent, this agitated the already tensed crowd.

The Petitioner in his evidence had also explained the happenings of 6th and 7th March 2013 through a clip

that was replayed to the Court. The Court saw the Petitioner address the 2nd Respondent on the issue of the verification.

iii. The 2nd and 3rd Respondents case.

Adam Harrar Noor (RW1) was the Returning Officer for Manyatta Constituency. He explained the procedure of receiving results and final announcement. On 4th March 2013 at 10.30pm as he started announcing results there were few people in the hall and he did not see any agents save for one chief agent. He also stated that he received no report of any agent who had not been given a Form 35 and neither was he requested for the forms for verification. He explained why the polling stations were split into streams, and why some Forms 35 had to be borrowed. He told the Court that the 3rd Respondent had given them a template which they were to customize to suit their circumstances.

Paul Kamwocere Gakiavi (RW2) was the Presiding Officer at the Kithiruri Tea Buying Centre code 075. His evidence was that the agents did not sign the Form 35 as it was getting late, but they instead signed the polling day diary. He conceded that there was another Kithiruri located between Rukuriri and Kanja, and that the correct Kithiruri was in Kianjokoma at Kamucere, which was 25 kilometers away.

Joseph Kingoo Mukewa (RW3) was the Constituency Returning officer for Runyenjes. He testified that he never came across a case in his constituency where the votes cast exceeded the number of the registered voters. He explained that the 3rd Respondent had registered voters in the Poll book, Principal register, Green Book and the Special register. The Green Book remained at the tallying centre while the others were sent to the polling stations. He too explained the process of receiving results, ballot boxes e.t.c. He announced the results aloud as the computer clerks entered the same in Form 36. He stated that no one requested him for Forms 35 for verification.

He explained that as he took the results to the National Tallying Centre, he was notified by the 2nd Respondent that there was an error in the tally. He was not able to detect it on that day (6th March 2013), but he returned to Embu and embarked on the exercise of trying to trace the error which he did capture at 3pm on 7th March 2013. He called the 2nd Respondent to inform him of his findings, but he was notified that the results had been announced.

He filed another Form 36 (S/No 319) to reflect the correction. When he called agents to sign the first Form 36, only two agents were present. He conceded that the number of registered voters in the various Forms 36 differed i.e. S/No 316, 317, 318 and 319. He further conceded that there were challenges in the polling stations which required prompt decisions to be made e.g. instances where they had one register and aligned streams.

This witness went through a number of polling stations and Forms 36 to confirm the registered voters. He averred that the Form (DKKI) was a true copy of the original Form 36 (S/No 317) which he submitted to the 3rd Respondent. He admitted that there was overlapping on (DKKI) which occurred during printing. He was aware of the confusion about Kithiruri and the incident of Kathunguri. He explained that the results of Mbuinjeru were consolidated because only one register had been brought and had to be manually split. Finally he stated that the Petitioner did not request him for any verification from him.

The 2nd Respondent was the County Returning Officer for Embu County. He conceded that there was an error in the summation of the Petitioner's results in Runyenjes Constituency. The Petitioner was shown to have garnered **1519** votes instead of **8126** votes. He alerted the **Returning Officer (RW3)** who was later able to identify the error but this was after the results had been announced on 7th March 2013.

The crowd had become impatient since the previous day hence the announcement of the results by the 2nd Respondent. He further indicated that even with the error corrected the 1st Respondent was still leading. After the announcement he issued the 1st Respondent with a certificate. He admitted having sent the Petitioner a list of the registered voters (KK8) which was not updated. He also talked of challenges they

faced when the electronic system failed. They had a challenge in printing the results which were in soft copy. The witness explained why he announced the results even before the returning officer arrived with the corrected results. And that the Petitioner attempted to assault him and he had to run away. The witness regretted having had to announce the results before the error was corrected.

At the close of the entire hearing this Court did order for scrutiny, recount and re-tally limited to very few polling stations in both Runyenjes and Manyatta constituencies. The Deputy Registrar (Mrs. Wachira) filed a detailed report on the exercise which formed part of the Court record.

A summary of the report shows that there were random errors such as;

- i. A mix up of entry of results at Kianjokoma Primary School code (002) stream 2 for the Petitioner, 1st Respondent and Sylvester Gakumu, the figures however remained the same.
- ii. There was no form 35 inside or outside the ballot box for Kapingazi Factory stream 1, where form 36 showed valid votes as 578.
- iii. The unaccounted for votes were 601 inclusive of the 578 for Kapingazi.
- iv. The general trend was that in the recount, both the Petitioner and the 1st Respondent were randomly winning or losing with 1 or 2 votes. However, most of the results tallied with what was on the forms 35 and later transposed to form 36.

E. Contested issues for determination by the Court were framed by the Court and adopted as follows:

1. Whether the 1st Respondent was validly elected as the Governor of Embu County.
2. Whether the results were properly announced as required by the law.
 - a. Whether the results in 39 polling stations in Manyatta constituency were announced in accordance with the law.
3. Whether the elections were free and fair.
 - a. Whether the results as amended on Forms 35 by the presiding officers were countersigned and if not the effect of the failure to countersign.
 - b. Whether the Petitioner was allowed to verify the results (as required by the law before the announcement).
 - c. Whether voting took place at Kithiruri Tea Buying Centre and/or whether the results were fictitious.
 - d. Whether the votes were cast in excess of registered voters.
 - e. Whether the Petitioner's agents were given copies of Statutory Forms to sign.
 - f. Whether the unsealed ballot box incident in Kathunguri Primary School was explained and if not, what happens to the votes?
 - g. Whether there were anomalies in the conduct of the elections; and if so, did they materially affect the outcome of the elections/the will of the people?
4. Who shall bear the costs of the petition?

F. The Petitioner's Submissions.

Mr. Njagi, Counsel for the Petitioner submitted that the 3rd Respondent had violated **Article 86** of the Constitution by not furnishing accurate, verifiable and transparent results.

He said the irregularities and anomalies were borne of the evidence on Kithiruri Tea Buying Centre (075-Runyenjes) where the agents did not sign Forms 35 and varied reasons were given for the failure. He wondered why the Polling Station was not closed when voting ended at 3pm in line with **Regulation 66**.

Counsel also cited Mbuinjeru Primary School (066-Runyenjes) where he stated that the original Forms 35 signed by Catherine Kaari Njagi and Stanley H. Mbogo were substituted for the unsigned ones found in the ballot boxes.

On Kathunguri Primary School (104-Runyenjes) where the ballot boxes were ferried unsealed, he submitted that there were **22** unaccounted for votes. He described this as electoral fraud. Mr.Njagi submitted that a total of **200** missing votes complained of had not been explained. Counsel pointed out that Kianjugu Tea Buying Centre had donated its Forms 35 to Embu Urban Primary School, stream 3 (122) and Embu Social Hall, stream 1(123). However, the scrutiny revealed that the said two polling stations had used unsigned papers to write the results. On Kithimu Primary School, stream 2, he found **85** ballot papers unaccounted for.

It was submitted that no Form 36 in respect of Runyenjes Constituency was filed in Court as is fundamentally required under **Rule 21(b)** of the Election Petition Rules 2013. And that the copy of Form 36 (S/NO 317 DKK-1) was not the one that was submitted to IEBC. He referred to the evidence of the Returning Officer and the 2nd Respondent on the signing of the forms 36 “317” and “318” and the varied number of registered voters.

He further submitted that the Forms 36 series 317-319 were false documents prepared for the purpose of fraudulently adjusting the figures of registered voters at the polling stations complained about and related anomalies.

Finally, he submitted that the Petitioner had proved that the subject election was not fairly and transparently conducted as required by the Constitution and the Elections Act. On costs, he submitted that the 3rd Respondent should bear the costs of the proceedings.

G. The 1st Respondent’s Submissions.

M/s Wairimu Rugaita in her submission stated that the scrutiny ordered by the Court *suo moto* did not reveal any undue advantage as alleged by the Petitioner and nothing had been shown to have been so fundamentally wrong so as to affect the ultimate result of the election. She cited the cases of:

- i. **Wavinya Ndeti v IEBC & 4 others EP NO. 4/13 –MACHAKOS.**
- ii. **Raila Odinga v IEBC and 3 others EP NO. 5/13 –SUPREME COURT.**

She submitted that the Supreme Court case had espoused a broad test which ought to be applied in determining the issues herein.

On the burden of proof she submitted that in an Election Petition the standard of proof is higher than on a balance of probabilities save for the allegations which are of a criminal nature. She cited the cases of;

- i. **John Kiarie Waweru Versus Beth Wambui Mugo and 2 others (2008) EKLR**
- ii. **Raila Odinga v IEBC and 3 others (supra)**

She submitted on the issue of registered voters saying that the 3rd Respondent had ably explained the use of the various registers. She also cited **Article 38 (3)** of the Constitution and **S10 (1)** of the Election Act.

She further submitted that the Regulations set out the process of voting and counting at the Polling Stations, and that **Regulation 80** of the Election Regulation provides for a recount. She said there was no evidence that the Petitioner sought for any recount at the Polling Stations, and that the 2nd Respondent could only tally and announce the results. She submitted that he did so due to the mounting pressure at the Tallying Centre. In doing this he was covered by **Article 259 (3) (a)** of the Constitution and it was further submitted that the 3rd Respondent did tally, verify and announce the results, the subject of this petition.

Relying on **S 83** of the Election Act, she cited the following cases :

- i. **Josiah and 4 Others v Ogutu and another (2001) 1 KLR (EP) 73**
- ii. **Mbogori v Kang'ethe and another (2008) 1 KLR (EP) 168**
- iii. **Morgan and others v Simpson (1974) 3 ALLER 722**
- iv. **Mnene v Kubo and another (2008) 1 KLR (EP) 336**
- v. **Joho v Nyange and Another (2008) 3 KLR (EP) 500**
- vi. **Hawa Ng'humbi v The Honourable Attorney General and Two others Misc. Civil Cause NO. 107/10 (TANZANIA HIGH COURT)**

What runs through all the above cases is that the Court has to exercise great restraint on the question of irregularities if the same does not affect the outcome of an election. It was submitted that the non-joinder of the Embu Deputy Governor to this petition rendered this petition void *ab initio*. The reasoning is pegged on **Article 180 (5) and (6), Article 182 (1) (e) and 182 (2)** of the Constitution. The case of **Aboub Ali v The IEBC and 2 Others [2013] EKLR** was referred to. In it the Court found that non-joinder of a successful party in a petition seeking to overturn his election is fatal.

Counsel submitted on each of the issues for determination. She said the evidence adduced by the Respondents had substantively dealt with the said issues. And that it had been clearly shown that:

- i. Any errors made were not motivated by ill will.
- ii. The case of Kathunguri Primary School was one out of 512 polling stations.
- iii. Agents present signed Forms 35 and the Petitioner himself did not have agents in polling stations.
- iv. No evidence had shown any case of excess registered voters.
- v. Voting indeed took place at Kithiruri Tea Buying Centre.
- vi. Results were verified and properly announced.
- vii. Instances of unsigned/amendments to Forms 35 were not endemic. They were also explained.
- viii. She therefore submitted that the petition ought to fail and costs be paid to the 1st Respondent.

H. The 2nd and 3rd Respondents submissions.

Counsel for the 2nd and 3rd Respondents M/s. Omuko associated herself with the submissions by Counsel for the 1st Respondents which I will not repeat here. She submitted that on the issue of the 39 polling stations in Manyatta, the Petitioner failed to avail evidence to prove the allegations. No agent who was at the centre testified. It was submitted that the principles for ensuring free and fair elections as envisaged in **Article 81** of the Constitution were complied with. She referred to the case of **Gideon Mwangangi Wambu v IEBC & 2 Others [2013] EKLR**. On verification it was submitted that the 2nd Respondent was willing to go out of his way and have the Petitioner verify the results. However the prevailing circumstances at the Tallying Centre made it difficult for him to wait any longer. On Kithiruri Tea Buying Centre, she submitted that **Regulation 66 (1)** did not allow the presiding officer to close a Polling Station for counting before 5pm. She therefore submitted that it had been shown that voting had taken place at Kithiruri. It was further submitted that the Petitioner had the burden of proving the allegations he had made. She cited the following cases:

- i. **Raila Odinga Vs IEBC & 4 Others (supra)**
- ii. **Col De Kizza Besigye Vs Museveni Yoweri Kaguta & Electoral Commission EP. NO 1/01 Uganda Supreme Court.**
- iii. **Opitz Vs Wrzensnewkyj [2012] SCC 55-2012-10-256**
- iv. **Buhari Vs Obasanjo [2005] CLR 7K (Nigeria)**

She further submitted that the Petitioner had failed to show the Court that the 2nd and 3rd Respondents did not comply with the above provisions in **Article 81, 38 (2) and 86** of the Constitution. She finally submitted that the 1st Respondent garnered the highest number of votes and so was validly elected. On the issue of costs, she submitted that the 2nd and 3rd Respondents should be granted costs. Besides the written submissions, counsels for the Respondents highlighted their submissions. The Petitioner's Counsel was also able to respond to their oral submissions.

I have considered all these submissions and the evidence adduced. This is now the case before this Court for determination.

The law applicable in Kenya in respect of election disputes is the Constitution of Kenya 2010, the Election's Act 2011 (the Act), Elections (General) Regulations 2012 (the Regulations) made under **S 109** of the Elections Act and the Election (Parliamentary and County Elections) Petition Rules 2013 (the rules) made under **S 96** of the Elections Act. Election petitions are no ordinary suits. They are unique and attract public attention. They have been made more unique by the **Elections Act** which provides under **Section 2** that a question as to the validity of a county election shall be determined within six (6) months from the date of lodging the Petition. The reason for all these is that an election involves political rights of the citizens and in this case it not only involves the Petitioner and 1st Respondent, but also the people of Embu County at large.

Before making any analysis of the evidence adduced, it would be important for this Court to address itself on the issue of the **Burden and Standard of proof**. The position in our own country relating to the burden and standard of proof in an election petition is settled. The burden is on the Petitioner to prove the allegations he or she makes. In the case of **Raila Odinga v IEBC & 3 Others** (*supra*) the Supreme Court held thus:

“Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the laws but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, Omnia praesumuntur rite et solemniter esse acta, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws. ”

Further in the case of **John Kiarie Waweru Vs Beth Wambui Mugo & 2 Others** [2008] EKLr it was stated:

“This Court will not therefore interfere with the democratic choice of the voters of Dagoretti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. 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 a magnitude that it substantially and materially affected the outcome of the electoral process.”

Looking beyond our own jurisdiction we have the Ugandan case of **Col Dr Kizza Besigye v Museveni Yoweri Kaguta & Electoral Commission** (*supra*) where majority of the Supreme Court Bench held,

“The burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court”

In the Canadian case of **Opitz v Wrzesnewskyj** (*Supra*) it was thus stated:

“An applicant who seeks to annul an election bears the legal burden of proof throughout.....”

From these cited cases and others not cited, it's clear that the Petitioner has the burden not only to prove that irregularities did occur but to prove further that the said irregularities and breaches did in fact affect the result of the election.

This burden of proof is higher than that of a balance of probabilities which is the standard in civil cases. Refer to **Bernard Shinali Masaka v Bonny Khalwale & 2 Others** [2011] eklr and **Raila Odinga Vs IEBC & 4 Others** (*supra*).

Counsel for the 1st Respondent had in the course of the cross examination of the Petitioner asked him a question on the issue of the non-joinder of the Deputy Governor in this petition. The Court advised her to raise it in submission as it was a point of law. She did raise it in the submissions. She relied on **Articles 180 (6) and 182 (1) and (2)** of the Constitution. Mr. Njagi for the Petitioner and M/s. Omuko for the 2nd and 3rd Respondents did not respond to this submission. Non-joinder of a party who ought to have been joined to a proceeding is fatal ab initio. Was the Deputy Governor of Embu County such a party? Correctly stated, the Deputy Governor is not an elected member but a nominee of the Governor. And that nomination is pegged on the valid election of the nominating Governor. This Court's view is that the provision of **Article 181 and 182** concern a validly elected Governor. If the election is challenged and the Governor is found to have been unlawfully elected, then it means he/she has to vacate office alongside his/her deputy. The Deputy Governor could not therefore be enjoined as a party as his/her nomination is not in question. The question concerns only the election of the Governor. I therefore find the issue of non-joinder to have no basis.

This Court will now address the issues that emerged for determination. I propose to deal with issues number 2, 3, 1 and 4 in that order.

Issue no 2: Whether the results were properly announced as required by the law.

The Petitioner at paragraph 5 (IX) of his petition pleaded that the results for 39 polling stations of Manyatta were not announced at Kangaru Boys High School tallying centre. The said stations are outlined in paragraph 32(VI) of his supporting affidavit.

The Petitioner told the Court that he was not at the Kangaru boys High School tallying centre. He was only given this report of non-announcement of the results by people who were at the centre. None of these people appeared before this Court as witnesses. The Returning Officer for Runyenjes **Mr. Adan Noor (RW1)** said when he started announcing the results there were no agents present save for the 1st Respondent's chief agent.

In the scrutiny ordered by this Court, **9** out of the **39** polling stations were randomly picked by the Court for that exercise. The report by the Deputy Registrar did not reveal any major irregularities in respect of the **9** polling stations. The recount revealed randomly one vote more or less for all candidates. In that category it was only at Kapingazi Coffee Factory Polling Station that no Form 35 was found in the ballot box or outside the box. The Forms 35 in respect of these **39** polling stations among others were presented to the Court by the 3rd Respondent and no issues were specifically raised about them.

There having been no direct evidence by any of those present at Kangaru Boys Tallying Centre to confirm that the results of the **39** polling stations were not announced, the evidence of the Petitioner on this remains an allegation which is hearsay evidence and cannot be relied on by the Court, by virtue of **S 63** of the Evidence Act. My finding on this issue is that the Petitioner failed to prove that the results of the said **39** polling stations were never announced.

Issue no 3: Whether the elections were free and fair

It was an admitted fact that there were cancellations/alterations in some Forms 35. Some were countersigned while others were not. A perusal of the results from all the four (4) Constituencies confirmed that. The perusal also confirms that the un-countersigned cancellations/alterations were in only eight (8) forms.

The process of verification is provided for under **Regulation 79**. The first one is at the Polling Station where either the candidate or the agent signs the form 35. The results are then publicly announced at the Polling Station before they are communicated to the Constituency Returning Officer. Each party/candidate/agent is presented with a copy of the declared results i.e. Form 35. One such copy is affixed at the public entrance to the Polling Station or any other public place accessible to the polling station.

From these arrangements it is clear that an absentee candidate/agent will not personally get a copy of the Form 35. Secondly, the absentee candidate/agent will easily access the information from the copy affixed at the public place. **Regulation 80 (1)** provides for rechecking and recounting on request or by the Presiding Officer on his own initiative. This is still at the polling station. Once this exercise is through the ballot boxes are sealed and delivered to the Tallying Centre.

The 2nd verification is by the Returning Officer at the Tallying Centre under **Regulation 83**. This officer actually deals with the Forms 35 and results that are not disputed. This means that if there are any issues about Forms 35 and/or the ballots the same should either be raised at the polling stations or at the Constituency Tallying Centre.

The Constituency Tallying Centre for Manyatta was at Kangaru Boys while the one for Runyenjes was at Kyeni Girls. James Nyaga Njoka (PW6) was at Kyeni Girls. The only evidence he gave was on the issue of the unsealed ballot boxes. In his affidavit at paragraph 6, he explained his mandate which included co-ordinating the activities of all the Alliance Party of Kenya (APK) Polling Station agents in Runyenjes Constituency. This is the witness who ought to have told the Court the following:

- a. The experiences/challenges if any that his agents faced at the polling stations.
- b. Whether indeed his agents were not able to access Forms 35.
- c. What reports his agents gave him from the polling stations.
- d. What actions he took when the results started arriving at the Tallying Centre.

The issues I have outlined above are what would form his mandate of co-ordinating activities. Did he really undertake any coordinating activities as envisaged? My answer is NO.

It is noted that he was arrested and apparently not replaced. Adan Noor and Mukewa Joseph (RW1 and RW3 respectively) for the 3rd Respondents said in their evidence that they did not receive any reports of Forms 35 not having been availed to candidates or agents. The Petitioner did not also complain to any of the Presiding Officers and/or Constituency Returning Officers of the failure to be provided with the Forms 35.

The 3rd verification is at the County Tallying Centre. The County Returning Officer receives the results from the Constituency Returning Officers in Form 36 only. These are Constituency results and not Polling Station results. These are tallied and the winner announced. The evidence before this Court is that the results for Runyenjes Constituency were received and announced by the 2nd Respondent on 6th March 2013 at Kangaru Girls. **PW1 (Ambrose)** immediately noticed that **6,604** votes for the petitioner were missing in the announced results.

The 2nd Respondent also noted an error in the summation of the Petitioner's result. He contacted the Returning Officer (PW3) who had already left for the National Tallying Centre. When he returned the next day, (7th March 2013), a meeting was held between PW3, 1st and 2nd Respondents, Petitioner and others. It was agreed that since the Forms 35 for Runyenjes were many, **PW3** would be given time to go through them and correct the error. He eventually did but before he could relay the information to the 2nd Respondent, the latter announced the results and declared the 1st Respondent as the winner. The 2nd Respondent said he did so because the tension at the Tallying Centre was unbearable and he was sure that even with the error corrected, the results would not change. The Court watched a clip of the scenario at the County Tallying Centre. It was not very healthy/friendly. It has also been admitted that indeed the Petitioner did write to the 2nd Respondent (DKK-1A and B) complaining of malpractices in Runyenjes during the election process. He was therefore requesting for the election to be repeated. Was the 2nd Respondent in a position to order for a recount and/or call for the Forms 35 for verification? He could neither order a recount of votes nor call for a repeat of the elections because the law gives him no such powers. The 2nd Respondent did ask **PW3** to verify the results with the Forms 35 and the answer he got was that the correct summation for the Petitioner in Runyenjes was **8,126** votes and not **1,519** (a difference of **6607** votes). This error has been admitted by the 2nd Respondent in the response to the

petition.

I. Would it then be found that the Petitioner was not allowed to verify the results?

The Petitioner and his party agents did not utilize the open provisions at the polling stations and Constituency Tallying Centre to effectively carry out verification. The verification at the County Tallying Centre is so limited. What may have seriously contributed to this complaint was the Petitioner's failure to have a chief agent present at Kyeni Girls Tallying Centre. The fact that PW6 was arrested over the issue of unsealed ballot boxes did not bar APK (The Alliance Party of Kenya) from immediately sending another agent to the centre to coordinate its activities. They have themselves to blame for this serious omission.

J. Whether voting took place at Kithiruri.

A lot was said about this polling station. The scrutiny and recount confirmed that indeed voting took place. The Petitioner did not present any voter/voters who had been registered at Kithiruri and did not vote for the reason of failure by the 3rd Respondent to open it. In this instance as well, what the Petitioner relied on was pure hearsay evidence. He mentioned a Mr. Silas Fundi who was not called as a witness. **Regulation 66** does not allow for any Polling Station to close and start the counting of votes before 5pm. The regulations only provide for extension of the voting time. Therefore even if the voting exercise ended at 3pm or earlier, the Presiding Officer could not close the station.

K. Whether votes cast were in excess of registered voters.

This is contained in paragraph 32 (XII) of the Petitioners supporting affidavit to the petition. He has listed ten (10) polling stations in Runyenjes Constituency which were affected. He has also mentioned others in paragraph 32 (XV) of his affidavit.

How were the registered voters determined?

PW3 explained that at the polling stations were three registers i.e.

- a. EVID- or poll book, which had the list of those registered.
- b. PRINCIPAL REGISTER- which is the manual register.
- c. SPECIAL REGISTER- for voters without biometrics.
- d. Green Book- which was at the Tallying Centre and would be used to trace the names of those who had been registered but their names could not be found in any of the registers at the polling stations.

The primary data document is Form 35, which contains the number of registered voters, the number of votes cast, rejected votes and valid votes. With all these registers, it was a bit of a challenge to know which in deed was the principal register that captured the names and details of all the registered voters. The 3rd Respondent must seriously work on this challenge.

The Supreme Court of Kenya in the Case of **Raila Odinga v IEBC & 4 others** (*supra*) while faced with similar circumstances held thus:

“In the light of the provisions of the Constitution (Articles 38 (3) & 83 and S 2, 3 & 4 of the Elections Act 2011 and of the evidence adduced in Court, we must conclude that such a register is not a single document, but is an amalgam of several parts prepared to cater for diverse groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country's population. The register can also take several forms, as contemplated by S2 of the Elections Act which stipulates that such a register ‘includes a register compiled electronically.’ The multiplicity of registers is a reality of Kenya's voter registration system which is recognized in law and widely acknowledged in practice. The register once developed and finalized is disaggregated and dispersed to various

electoral units, to facilitate the process of voting. ”

From this finding by the Supreme Court and the evidence that is before this court, it would be difficult to pick up any one register and flash it claiming it contains the number of all the registered voters. **PW1 (Ambrose)** in cross examination by the Respondent’s counsels was taken through the Forms 35 & 36 in respect of all the polling stations mentioned in paragraph 32 (xii and xv) of the Petitioner’s affidavit. His response was that except for Miandari and Nyangari polling stations, there was no other Polling Station where the number of votes cast exceeded that of registered voters. This witness indicated clearly that the figures in the Forms 35 had been properly transposed into Forms 36.

The case of Miandari Tea Buying Centre was explained by **PW3**. The Form 35 (JKM-3) showed that the 1st Respondent had garnered **313** votes which was wrongly transposed as **513** in Form 36. PW1 also explained that at Kibugu Polling Station the Petitioner garnered **207** votes which was wrongly transposed as **7** votes in the Form 36. The issue of Miandari and Kibugu were admitted by the 3rd Respondent in their responses. **PW1** was the star witness in the Petitioner’s case as he is his personal secretary and did the tallies for the Petitioner. He did not and neither did any other witness adduce any evidence showing that any single Polling Station in Manyatta and/or Runyenjes constituencies recorded the number of votes cast or valid votes in excess of registered voters. This was a serious allegation and it was for the Petitioner to prove it. Even in cases where it was shown that there were extra votes in the cumulative totals, these totals never at any time exceeded the number of registered voters or even the votes cast. My finding on this is that the allegation was not proved.

The Petitioner testified that his agents were denied access to the Forms 35. **PW4** is the only witness who said she was not given a Form 35. The **Personal secretary (PW1)** and the **Chief agent (PW6)** were the ones who were directly dealing with the agents and should have given evidence on this issue. Unfortunately, they did not. The Petitioner did not request for these Forms 35 at the Polling Stations and at the Constituency tallying centres. There are some Forms 35 which were not signed by any agent. And for those that were signed by agents it’s not indicated to which party they belonged or whose agent they were. It is therefore not clear if it was TNA, APK or NARC agents who signed because the Petitioner did not know who the party agents were. Provision must be made for this by the 3rd respondent in case of a contention.

Regulation 79(6) provides:

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

Regulation 79 (7) provides:

“The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results announced.”

PW1 and **PW6** should have explained what led to the failure by their agents to have the Forms 35, they should have also confirmed to the court if there were any Forms 35 displayed at the polling stations as is required by the law. Since no evidence was led on this, the only inference this Court makes is that the Forms were displayed and in the event that the agents were not given the Forms, they still had access to the required information.

In the Kathunguri Primary School Polling Station incident, there is no dispute that there were four (4) unsealed ballot boxes from Kathunguri which were brought to Kyeni Girls. The explanation given to **PW3 (Mr. Mukewa)** by the presiding officer was that the officers ran short of gas for the lamps. This was a challenge yes, but the **Rules** are that **each** ballot box is sealed as soon as counting is finalized. There was no laudable explanation as to why there were four (4) unsealed ballot boxes. Had it been that they came with only one unsealed box, their explanation would have had some weight. I am alive to the provisions of **Section 83** of the Elections Act, but theirs was a serious breach of **Regulation 81 (3)**,

whether the results of that Polling Station have been challenged or not. Their act of negligence makes this Court to question the credibility of the results from that polling station. This is in spite of the fact that the Presiding Officer and the Deputy were acquitted of the electoral charges they faced. The result is that the said results shall be cancelled.

Issues were raised on polling stations like Kithimu Primary School, Kianjugu Tea buying Centre, Mbuinjeru Primary School, Kianjokoma Primary School etc. A witness **Nina Tumaini (PW4)** who was a Deputy Presiding Officer at Kithimu Polling Station Stream 2 explained how she had gone for extra Forms 35 but at the end of the day they ended up having none. This Court found this witness to be untruthful. She had simply rehearsed what she came to tell the Court, and avoided answering straight forward questions under the pretext that she was being harassed.

Stanley Hannington Mbogo (PW3) and **Catherine (PW4)** were both agents at Mbuinjeru Primary School Polling Station. Their evidence contradicted each other concerning the signing of Form 35s. It's on account of such inconsistencies that the Court decided to have a scrutiny and recount carried out in the said Polling Stations, among others.

This is the report on the polling stations that prominently featured:

	POLLING STATION	PETITIONER'S IEBC RESULTS	RESULT ON SCRUTINY & RECOUNT	1ST RESPONDENT'S IEBC RESULTS	RESULT ON SCRUTINY & RECOUNT
1	KITHIMU PRIMARY SCHOOL				
	STREAM 1	157	156	156	156
	STREAM 2	191	190	181	181
2	KITHIRURI TEA BUYING CENTRE	0	0	34	34
3	KIANJOKOMA PRIMARY SCHOOL				
	STREAM 1	124	124	310	309
	STREAM 2	9	130	130	304
4	UGWERI PR. SCHOOL				

	STREAM 1				
	STREAM 2				
		38	32	491	490
		33	35	492	488
	GIKUURU PR. SCHOOL				
5	STREAM 1				
	STREAM 2				
	STREAM 3				
		50	52	477	474
		36	36	425	427
		63	63	462	462
6	GITARE PR. SCHOOL				
	STREAM 1	48	48	520	419
	STREAM 2	42	42	504	478
7	KANJA PR. SCHOOL				
	STREAM 1	64	74	394	399
	STREAM 2	74	66	399	510
8	MBUINJER U PR. SCHOOL				
	STREAM 1	83	41	772	328
	STREAM 2	83	43	772	445
9	KIANJUGU TEA BUYING CENTRE	123	123	16	16
10	EMBU URBAN PR. SCHOOL				
	STREAM 1	218	217	315	315

	STREAM 2	238	239	312	312
	STREAM 3	246	244	303	304
11	EMBU MINICIPAL COUNCIL STADIUM				
	STREAM 1	386	386	595	604
	STREAM 2	264	306	289	473
12	EMBU MUNICIPAL COUNCIL TOWN HALL	264	263	289	290

From this report, there is a clear indication that the results from Mbuinjuru were replicated in that the total results for each candidate i.e. the Petitioner and 1st Respondent were doubled in Form 35. In spite of this replication, what was transposed to Form 36 was the correct result i.e. Petitioner **83** votes and 1st Respondent **772** votes. An overview of the results on scrutiny and recount in the rest of the eleven (11) Polling Stations cited reveals the following:

The Petitioner lost **20** votes and gained **177** votes. The total gain is **157** Votes. The 1st Respondent lost **141** votes and gained **487** votes. The total gain is **346** votes.

This further confirms that there was no particular candidate who was persistently losing or gaining from these errors. It was again upon the Petitioner to prove that the irregularities were made deliberately with the sole purpose of denying him victory, and benefitting the 1st Respondent.

The Petitioner filed before this Court an unsigned Form 36 (S/NO 316 KK2) as containing the results for Runyenjes. Subsequently, the 2nd Respondent filed a signed Form 36 (S/NO 317 DKK1) and an unsigned Form 36 (S/NO 319 DKK3). Later on, upon the request of counsel for the Petitioner, Form 36 (S/NO 318) was produced by the 3rd Respondent. I should mention that all these four Forms 36 relate to the results of Runyenjes Gubernatorial election. Again the Petitioner's Counsel asked for the original copy of the Form 36 (S/NO 317). In spite of the order and the time given by the Court, M/s Omuko for the 3rd Respondent did not produce it. She told the Court that she was not able to trace it in her custody. She later filed an affidavit explaining her failure to avail the document. This affidavit was filed after the parties had closed their cases and it was without the leave of the Court. I will therefore expunge it from the record.

The Form 36 (DKK1) is certified by a commissioner of oaths and unless proven otherwise, it's taken to be a true copy of the original. These two documents KK2 and DKK1 originated from **Mr Mukewa's (RW3)** docket. **Mr Mukewa** has not denied having issued this copy (KK2) to the Petitioner or his representative soon after the results had been announced. It is not therefore clear why he again prepared DKK2.

The Court has evaluated the evidence adduced in respect of these Forms 36. There is no doubt that the Form 36 (KK2) though not signed was issued by **Mr Mukewa (RW3)** soon after announcing the results on 6th March 2013. Besides the issues raised over the number of registered voters in the disputed Polling

Stations, it is generally agreed that the transposition of results from Forms 35 to Form 36 was accurate. Under **Regulation 83**, the **Returning Officer (RW3)** is required to fill one Form 36 setting out the results of the various Polling Stations. There is no provision for a Returning Officer to prepare more than one Form 36. And if for any reason he is not ready with the details there is no need of releasing a Form 36 and later on amending it. The reason for the provision that only one original Form 36 be made is to cushion against manipulation of results by a Returning Officer. The Court therefore finds that **Mr. Mukewa (RW3)** breached **Regulation 83** when he prepared more than one Form 36.

Mr. Njagi for the Petitioner has imputed fraud in the preparation of the extra Forms 36. To him they were meant to fraudulently adjust the figures of registered voters at the Polling Stations complained about.

What is relevant here is the fact of the fraud and the effect it had on the outcome. As shown above, the changed figures on the registered voters did not affect the number of votes cast, valid votes and the votes garnered by each candidate. Above all, the number of votes cast remained much lower than the registered voters. There was no evidence of overcasting of votes.

PW1 also testified that there had been interference with the Form 36 template and hence the errors in the summation which only affected the Petitioner's totals in Runyenjes. What could have been the main errors in the summation could only be explained by an IT expert. **PW1** did not state that he was such an expert. Secondly, when **Mr. Mukewa (RW3)** came up with the corrected figure of **8126** instead of **1519** total votes for the Petitioner in Runyenjes the said enhanced figure was not contested. It's therefore taken that in the absence of any proof of the alleged manipulation of the template, the error is viewed as a human error.

The Petitioner's total votes after the correction of the summation came to **89,432**. At Miandari, the 1st Respondent got **200** votes more; these votes are therefore reduced by **200**, which brings it to **94,503**. At Kibugu, the Petitioner was denied **200** votes which when added brings his total to **89,632**.

Their votes from Kathunguri are reduced from what their totals are following the cancellation order:

Petitioner : 89,632-101= 89,531

1st Respondent : 94,503-333= 94,171

I will also add their gains from the scrutiny;

Petitioner 89,531+157=89,688

1st Respondent 94,171+346=94,517

The difference in votes between the Petitioner and 1st Respondent comes to **4,829** votes.

This Court has evaluated the evidence and come to the conclusion that there are some irregularities that have been established by the Petitioner. The issue is whether these irregularities or any of them materially affected the outcome of the election/will of the people of Embu County.

S 83 of the Elections Act provides thus:

“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”.

Further, in the case of **John Fitch v Tom Stephenson & 3 Others** QBD [2008] EWHC 501, which followed **Morgan v Simpson** (supra) it was stated as follows:

“The decided cases, including those which Lord Denning considered in Morgan V Simpson established that the Courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the Courts seek to give effect to the will of the people”

The 2nd Respondent and **Mr. Mukewa (RW3)** explained that the errors that occurred were human and were owed to the fact that the officers had been working endlessly without sleep. The element of fatigue had also set in he said. It is not also lost on the Court that the electronic transmission system did not work as expected during the 4th March 2013 elections and the 3rd Respondent had to resort to manual operations again. An allowance for all these shortcomings must be made.

It is not correct to submit that the 2nd Respondent regretted in Court the way the Petitioner’s results were blunderingly, inaccurately and unverifiably computed, collated, announced and declared. He did explain that he noted an error in the summation which he wanted corrected before he announced the results. But the tension in the tallying centre made him announce the results without the correction and that pained him otherwise, he knew the correction as it was him who pointed it out to Mr. Mukewa. Its therefore the announcement before the receipt of the correction that made him regret and not what has been submitted here by the counsel for the Petitioner.

I entirely agree with Majanja J in the case of Wavinya Ndeti v IEBC & 4 Others E.P 4/13 (MACHAKOS) where he stated at paragraph 21

“One of the principles governing the electoral process under Article 82 of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowances must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors which were admitted were bound to occur particularly in tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise, it is important that the ultimate will of the electorate is ascertained and upheld at all costs”

The purpose of an election contest is to ascertain the will of the people at the polls, fairly, honestly and legally expressed. In the case of Camsell v Rabesca [1987] N.W.T.R 186 (S.C), it was held thus:

“It is clear that in every election, a fortiori those in urban ridings with large numbers of polls, irregularities will virtually always occur in one form or another. A Federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days, or in many cases, a single 14 hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical on the job experience.”

It is given that those working for the IEBC were indeed tired after working for a couple of days. And indeed they made errors as human beings.

The view of this Court is that a Court should only exercise its discretion to annul an election where there is serious reason to believe that the results would have been different but for the irregularities shown.

There was no evidence laid before this Court showing that the irregularities established were made with the approval and/or participation of the 1st Respondent. Collusion was therefore not established.

It is upon the Petitioner not only to prove that there were irregularities and errors but that the said irregularities and errors were substantial and did affect the outcome of the results. This is what the Court stated in the case of Mbowe v Eliufoo [1967] E.A 240 on the phrase ‘affected the results’.

“In my view the phrase affected the result, the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proven 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.”

Even with the admitted errors and the adjustments following the scrutiny, the margin between the Petitioner and 1st Respondent is **4,829 votes**.

This Court finds that the irregularities that the Petitioner was able to establish were not of such a nature as to affect the outcome of the results of the entire Embu County. I therefore find that the people of Embu County exercised their will as provided for, under **Article 81** of the Constitution and elected the 1st Respondent as their Governor.

The petition therefore lacks merit and the prayers sought cannot be granted. The same is dismissed with costs. It is accordingly declared that Mr. Martin Nyaga Wambora was validly elected and that determination is certified to the IEBC pursuant to the provisions of S86 (1) of the Elections Act.

Under **Regulation 36(1) (a) (b)** of the Elections (Parliamentary and County Elections) Petition Rules 2013, the Court is empowered to make an order specifying the amount of costs payable and by who and to whom. In awarding costs, I have considered that the petition proceeded well and within the required time frame. There were no interlocutory applications by any of the parties save for one that was filed after the close of the hearing. All counsels put in their best in terms of time, material and finances.

In my opinion, a maximum of Kshs. 1.5 Million is sufficient for costs. The 1st Respondent will get a maximum of Kshs. 750,000 while the 2nd and 3rd Respondents will get a maximum of Kshs. 750,000.

The deposit paid in court will remain as such awaiting the outcome of the taxation by the Deputy Registrar.

This court wishes to thank all the learned counsels appearing for the parties for the considerable assistance which their knowledge, research and industry afforded to this court in this very demanding litigation.

My gratitude also goes to all the parties and the people of Embu for their patience as this matter proceeded.

Finally my appreciation goes to the staff of Embu law Courts who have been very supportive.

DELIVERED, SIGNED AND DATED THIS 22ND DAY OF AUGUST 2013 AT EMBU.

H.I ONG’UDI

JUDGE

In the presence of ;

1.Mr. Njagi for the Petitioner.

2.Mr. Marete and M/s Wairimu for the 1st Respondent.

3.M/s Omuko for the 2nd and 3rd Respondent.

4.Parties.

5.Mutero c/c.

6.Kirong c/c.