



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 1 OF 2013
consolidated with
ELECTION PETITION NO. 7 OF 2013
AND IN THE MATTER OF THE
NATIONAL ASSEMBLY ELECTION
FOR KIBWEZI WEST CONSTITUENCY

BETWEEN

RICHARD KALEMBE NDILE 1ST PETITIONER

CAROLINE MWELU MWANDIKU 2ND PETITIONER

AND

DR PATRICK MUSIMBA MWEU1ST RESPONDENT

RETURNING OFFICER,

KIBWEZI WEST CONSTITUENCY2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

JUDGMENT

Introduction

1. The two consolidated petitions for consideration relate to the 4th March 2013 National Assembly election for Kibwezi West Constituency. The election was contested by nine (9) candidates who garnered the following results announced by the Returning Officer;

Caroline Mwelu Mwandiku 4,111

Dominic Mbevi Matheka	1,306
Mutuse Ecomas Mwengi	3,031
John Kiema	590
John Mutiso Mutuse	278
Michael Masaku Ndambuki	141
Patrick Mweu Musimba	17,174
Richard Kalembe Ndile	16,975
Stephen Masoo Mwanzia	1,964

2. The 1st respondent, Patrick Musimba Mweu (“Musimba”) was returned as the duly elected member of the National Assembly for Kibwezi West Constituency.
3. Aggrieved by the election results, two candidates, Richard Kalembe Ndile (“Kalembe”) and Caroline Mwelu Mwandiku (“Mwelu”), filed ***Petition No. 1 of 2013*** and ***No. 7 of 2013*** respectively to challenge Musimba’s election.

Petition No. 1 of 2013

4. Kalembe’s case is set out in the petition dated 19th March 2013. The petition is supported by the petitioner’s affidavit sworn on 19th March 2013 and the affidavits of his polling agents; Alfred Mutua Nyamai, Alfridah Ngemi Nzuki and Justine Kithome Munyao which are all sworn on 19th March 2013. Kalembe’s complaint is against the conduct of the election by the Returning Officer and the Presiding Officers. His case focuses on the manner in which the votes were counted and tallied.
5. Kalembe avers that his agents were not allowed to sign any declaration in respect of the election by the Presiding Officers of the 164 polling stations. He further avers that his agents were not requested to append their signatures on Form 35 and that they were not provided with copies of the declaration of results by the Presiding Officers. Kalembe accused the Presiding Officers of failing to fill and issue him or his agents with a copy of Form 36 as required under **rule 83** of the ***Elections (General) Regulations, 2012 (“General Regulations”)***. He also contended that the Presiding Officers did not record any fact of refusal to sign or reasons for refusal or failure to sign as required by **rule 79** of the ***General Regulations***.
6. The 1st petitioner complained that counting of votes at most polling stations was done at night on 4th March 2013 and after midnight in extremely dim light in most polling stations with some stations such as Wiviva Primary School (062) and Kyandulu Primary School (065) using mobile phone light and motor cycle head light hence there was an extremely high likelihood of committing grave mistakes which he avers were indeed committed in counting of votes. He avers that the ultimate tally did not reflect the correct result.
7. Kalembe also complained that two different copies of Form 36 were issued by the Returning Officer. The first one was stamped and signed by the Returning Officer on 5th March 2013. In this one, Musimba garnered the highest number of votes which were announced as 17,174 with Kalembe being the second highest having 16,975 giving a difference of only 199 votes. A second Form 36, which the 1st petitioner claimed had doctored figures, is certified by the Returning Officer on 8th March 2013. It showed that Musimba had garnered 17,196 votes and the petitioner 16,976 votes giving a difference of only 220 votes. He avers that the Returning Officer refused to

hear and or entertain complaints by the petitioner and or his agents in the face of glaring tallying errors.

8. In his petition, the petitioner enumerates a total of 21 polling stations which he states that he and his co-agents discovered discrepancies wherein the valid votes cast for the petitioner were decreased while those of the 1st respondent were increased from the actual count at the respective polling stations. According to his calculations, he lost a total of 97 votes while Musimba undeservedly gained 227 votes. These polling stations are Soto, Mukameni, Kaunguni, Kwa Kyai, Kisingo Primary, Vololo, Katulani, Mweini, Kikumini, Mbukani, Masamukye, Ndundune, Mulala, Kimboo, Kibwezi Town, Kiiano, Matinga, Ikungu, Kalima, Boma 4 and Ikoyo. In addition, he states that there was evidence of interchange of vote tallies for Kitende and Mukame A Mbeu Polling Stations.
9. In light of these errors the petitioner stated in the petition that he did not require any other determination except a recount of the votes and examination of the tallies, a determination that the 1st respondent was not validly elected and a declaration that he was validly elected as the member of the National Assembly.

Petition No. 7 of 2013

10. In her petition dated 10th April 2013, Mwelu contended that the elections were not conducted in a fair, transparent and democratic manner as required by the Constitution and election laws. She avers that the results announced by the Returning Officer differed from those recorded by her agents at 14 polling station which she highlighted as follows;

	Polling station	Number of votes garnered by the petitioner	Results announced by the 2nd Respondent
1.	Mulangoni Primary School	51	0
2.	Matinga Primary School	169	144
3.	Sekeleni Primary School	19	0
4.	Tunguni Primary School	94	5
5.	Yikisemei Primary School	46	0
6.	Muundani Primary School	66	7
7.	Soto Primary School	22	0
8.	Mikuyuni Primary School	89	0

9.	Katulani Primary School	61	8
10.	Makumeni Primary School	83	10
11.	Ilatu Primary	78	22
12.	Syumile Primary School	48	6
13.	Yieni Primary School	49	27
14.	Ilingoni Primary School	8	1

11. Mwelu averred that the Returning Officer showed open impartiality, bias and hostility towards her and openly favoured Musimba. She accused the Returning Officer and the IEBC of opening polling stations late and closing them early thereby denying her supporters the opportunity to vote. She avers that at some polling stations, the Presiding Officer turned away voters in areas she considered her strong holds.

12. Mwelu further averred that in some polling stations counting of votes did not start until late in the night thereby compromising the integrity of the exercise. She stated that this was done with the sole intention of making candidates agents give up. She alleged that the counting of votes was done under very dim light making it difficult for party agents and candidates to verify results. She further accused the Returning Officer of deliberately failing to provide lighting during the counting exercise to the extent that in some instances motor cycles head lights were used to illuminate the tallying halls.

13. The petitioner also accused the Presiding Officers and the Returning Officers of forcing the candidates' agents to sign forms 34, 35 and 36 without giving them an opportunity to scrutinize and verify the details entered therein and also refusing to supply them with copies of these statutory documents. During the counting, Mwelu asserted that the Returning Officer added about 8000 votes to Musimba's tally which he did not deserve. The petitioner pleaded that the 2nd respondent's agents at various polling stations did not properly seal ballot boxes which led to interference with the votes cast before they were resealed at the Tallying Centre. On the whole she contended that the Returning Officer's tally of votes was not proper as it showed discrepancy between the total tally and individual tallies from the polling stations.

14. Mwelu also levelled several accusations against Musimba. She stated that he used services of the Officer Commanding Station ("OCS") of Kibwezi Police Station to intimidate and threaten majority of the voters who were the petitioner's supporters. That he campaigned on the polling day at several centres like Kibwezi Township and Kisayani Primary School contrary to election laws. He was also accused of bribing voters by giving money at Kisayani.

15. As a result of the matters outlined in her petition, Mwelu requests the court to declare that Musimba was not validly elected. She also seeks orders that there be a re-count, re-tally and scrutiny of votes cast in Kibwezi West Constituency.

16. The petition is supported by the petitioner's own affidavit sworn on 10th April 2013 and the

affidavits of Jackson Nzembei Mwai, Dennis Wambua Musava and Peter Muasa Samuel Nguku which are all sworn on 10th April 2013.

1st Respondent's Case

17. In response to **Petition No. 1 of 2013**, the 1st respondent filed a Response to Petition dated 3rd April 2013. He contended that the petition was frivolous and did not disclose an infringement of the petitioner's rights and that the entire election was conducted in a free and fair manner according to the principles laid down in the law. He avers that if there was non-compliance with the law it did not affect the overall results.
18. The 1st respondent also accused the 1st petitioner of having committed an election offence by meting out violence on the 1st respondent's supporter, one Robert Kimunyi Katio ("Katio"). In the circumstances, he averred that he would not be entitled to be declared the winner of the election in the event of a recount.
19. Apart from his own affidavit sworn on 4th April 2013, Musimba relied on the affidavits of Dennis Muli Mulwa and Robert Kimunyi Katio sworn on the same day.
20. In response to **Petition No. 7 of 2013**, the 1st respondent filed a response to the petition dated 24th April 2013 in which he denied all the allegations in the petition and averred that the election was carried out in a free and fair manner and in accordance with the law. The petitioner relied on his own affidavit sworn on 24th April 2013.

2nd and 3rd respondents' Case

21. The 2nd and 3rd respondents oppose the petition through the Replying affidavit sworn by Noor Gedi Arale, the duly appointed Returning Officer for Kibwezi West Constituency.
22. On behalf of the 2nd and 3rd respondents, a response to the petition was duly filed in **Petition No. 1 of 2013** in which the respondents denied the allegations made against them in the petition. The Returning Officer swore an affidavit on 4th April 2013 to which were attached the Form 35 for all the polling stations in the Constituency and the Form 36 together with the Polling day diaries for the specific polling stations that were the subject of complaint in the petition.
23. In **Petition No. 7 of 2013**, the respondents answered the allegations by the petitioner through the affidavit of the Returning Officer sworn on 30th April 2013. The Returning Officer denied the allegations made by the petitioner in the matter. There was filed a Response to the Petition by the 1st respondent dated 24th April 2013.

Preliminary Issues

24. In **Petition No. 1 of 2013**, the petitioner filed a Notice of Motion dated 10th April 2013, in which he sought to be supplied with copies of the Form 36, Form 35 for all the polling Stations in the Constituency and the register of all registered voters. The application was settled by the Returning Officer providing all the statutory forms through the replying affidavit.
25. The 1st respondent, by an application dated 24th April 2013, applied to strike out the petition in **Petition No. 1 of 2013** on the grounds of non-compliance with **rule 10(1) of the Elections (Parliamentary and County Election) Petition Rules, 2013 ("the Rules")** and that the petition did not disclose a cause of action. I heard the application and by a ruling delivered on 28th May 2013, I dismissed the application.

26. The 1st respondent also applied to strike out **Petition No. 7 of 2013** on the ground that the petition was filed out of time in contravention of **Article 87(2)** of the Constitution, that there was non-compliance with **rule 10(1)** of *the Rules* and that the petition did not disclose a cause of action. I heard the application dated 24th April 2013 and dismissed it on 28th May 2013.
27. At the pre-trial conference, the two petitions were consolidated in accordance with **rule 18 of the Rules** as they contested the same election. The parties agreed that the deponents of the affidavits on all sides would be cross-examined. The parties also agreed on timelines for each witness.
28. Kalembe called three witnesses Alfred Mutuku Nyamai, Justin Kithome Munyao and Alfred Ngeri Nzuku while Mwelu called three witnesses; Peter Muasa Samuel Nguku, Jackson Nzembei Mwai and Dennis Wambu Musagwa. Musimba called two witnesses for cross examination, Robert Kimunyi and Dennis Muli.

Issues for determination

29. Having read the pleadings filed by the parties in support of and in opposition to their respective positions and having considered the evidence that was adduced by the witnesses and the counsel's submissions, the following are the issues that emerged for determination;
- a. Whether the 1st respondent is guilty of election malpractice as alleged by the 2nd petitioner.
 - b. Whether the 1st petitioner committed an election offence.
 - c. Whether the Returning Officer and the IEBC conducted the election in accordance with the Constitution and the law.
30. Before I proceed to consider the evidence marshalled by the parties for and against the petitions I will set out briefly, the principles that guide the Court in adjudicating election petitions. All the parties alluded to these matters in their written and oral submissions.

General Principles

31. The golden thread running through the Constitution is one of sovereignty of the people of Kenya articulated in **Article 1** of the Constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information which are to be found in **Articles 33, 36 and 35** respectively of our Constitution. In addition, **Article 38** articulates political rights which are given effect through the electoral system set out in **Chapter Seven** titled, **"Representation of the People."**
32. Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.
33. In establishing their case, the petitioners are bound by the matters which they have set out in the petitions. In this respect I adopt the sentiments of Justice Kimaru in ***Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi Petition No. 15 of 2008 [2010]eKLR*** where he stated that, *"From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition."*

34. In cases of allegations of election malpractices and other irregularities, the petitioner is not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election. The petitioner should for instance establish that the number of votes affected by the irregularities was sufficient to change the result of the election or that there were substantial violations of the requirements of the statute that render the reliability of the result of the election seriously in doubt. The primary consideration in an election contest therefore is whether the will of the electorate has been affected by the irregularities. Did the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election? This principle was distilled in the famous case of ***Morgan and Others v Simpson and Another* [1974] 3 ALL E.R. 722, 728**, Lord Denning stated as follows; “(1) If the election was conducted so badly that it was not substantially in accordance with the law as to election, the election is vitiated, irrespective of whether the result is affected, or not... (2) If the election was so conducted that it substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. ... (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.”
35. The principle in ***Morgan and Others v Simpson and Others (Supra)*** is firmly set in **section 83** of the ***Elections Act, 2011 (“the Act”)*** which states 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.*
32. Another important principle is that of burden and standard of proof. Every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that the irregularities and electoral malpractices complained of render the said elections invalid.
33. Our courts have had the opportunity to deal with the standard of proof which ought to be applied in determining whether a petitioner established the allegations made in respect of electoral irregularities and malpractices. In ***Onalo v Ludeki & 2 others (No.3) (2008) 3 KLR(EP) 614, 675*** Rawal J., held as follows, “in any event, our court in Election No.1 of 2005 between ***Hassan Ali Joho and Hotham Nyange*** has adopted the standard of proof held in Tanzanian case of ***Mbowe vs. Eliafoo [1967] EA 240*** to the effect that the election offence has to be proved to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt. It went further to state on page 10 of the Judgment and I quote: “where a reasonable doubt exists then it is impossible to say that the court is satisfied.” The court in the said case also referred the case of ***Joseph Wafula Khaoya v Eliakim Ludeki & Lawrence Sifuna Nairobi EP No.12 of 1993 (Unreported)*** where it was held that a very high degree of proof is required. In short, our courts have been so far, reluctant to put in certain terms the standard of proof required in the election petition. However, it is certain that the standard of proof is not, in any event, the balance of probability. (See also ***Bernard Shinali Masaka v Boni Khalwale and 2 Others Kakamega EP No. 2 of 2008 [2011]eKLR*** at para. 38)
34. The requirement on the burden and standard of proof underlies the fact that election petitions are not ordinary suits. In ***Joho v Nyange & Another (2008) 3 KLR (EP) 500, 507*** Maraga J., held that, “Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance ***Kibaki v Moi, Civil Appeal No.172 of 1999***. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt

*the constituents' social and economic activities. It is for these reasons that I concur with the election court's decision on **Wanguhu Ng'anga & Another v George Owiti & Another, Election Petition No.41 of 1993** that election petitions should not be taken lightly."*

35. In the same vein, the Supreme Court of India in **Rahim Khan v Khurshid Ahmed AIR 1975 SC 290** observed thus; *"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 unsubstantiated grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered 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 corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded."*
36. The Supreme Court stated, after reviewing several local and foreign decisions, in the recent case of **Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others Nairobi Petition No. 5 of 2013 [2013]eKLR** observed as follows, *"[203] The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."*
37. The principles I have outlined above provide the milieu for consideration of the issues framed for determination.

Whether the 1st respondent is guilty of malpractice

38. Mwelu alleged several instances of malpractice against the 1st respondent. The first indictment against Musimba was that he used the services of the Kibwezi Police Station OCS to intimidate and threaten majority of the voters who were the petitioner's supporters. **Section 63(1)** of the **Elections Act, 2011 (No. 24 of 2011)** ("**the Act**") makes it an offence for a person either directly or indirectly in person or through another person to use or threaten to use any force or violence in order to induce or compel a person to vote or not to vote for a particular candidate or political party at an election or for the purpose of impeding or preventing the free exercise of the franchise by a voter.
39. This allegation as pleaded on its face is vague and lacks particularity. Mwelu did not state where the intimidation took place and how the threats were effected. She does not even state how Musimba used the services of the Kibwezi Police Station OCS.
40. Mwelu stated in cross examination that she was informed by her supporters that the OCS assisted Musimba's supporters to jump queues to vote. She stated that voting was stopped and many people were denied the right to vote. She did not know anyone who was denied the right to vote. She also admitted that she did not know the name of the OCS.
41. In my view, this evidence is threadbare and does not meet the standard required to implicate

- Musimba in using the Kibwezi Police Station OCS to influence votes by threats and intimidation. I find and hold that the evidence does not disclose the offence of undue influence as alleged by the 2nd petitioner.
42. The second charge is that Musimba campaigned on the polling day at several centres like Kibwezi Township and Kisayani Primary School contrary to election laws. Pursuant to **section 109(1)(dd) of the Act**, the IEBC, by a notice dated 11th February 2013 notified the public that, “*The Campaign period for purposes of the 4th March, 2013 General Election SHALL CEASE ON 2ND MARCH, 2013 BEING 24 HOURS before the Election Day which is 4th March, 2013.*”
43. The allegation accusing Musimba of campaigning is vague and lacks particulars. What time was Musimba campaigning and in what manner. Mwelu admitted in cross-examination that she did not see him campaign and she did not know of anyone who saw him campaign. She only stated that she was called by her supporters, who she could not identify and who informed her that Musimba was campaigning.
44. I am afraid that the second complaint relating to campaign lacks the evidence necessary to make a finding that Musimba was implicated in any infraction. I therefore dismiss it.
45. Musimba is also accused of bribing voters by giving money at Kisayani. In **Mohamed Ali Mursal v Saadia Mohamed and Others Garissa EP No. 1 of 2013 (Unreported)**, Mutuku J., described bribery in the context of an election petition as follows; “*Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under Section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof. The penalty found under Part VIII – General Provisions of the Act, specifically Section 106 (1) of the Act is a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.*”
46. Bribery is a serious charge to make against someone and in this respect the petition is vague and lacks particulars as against the Musimba. When cross-examined by Mr Mari, learned counsel for the 1st respondent, Mwelu readily admitted that she had heard that Musimba’s agent at Kisayani, a lady by the name Mutindi, was dishing out money.
47. Dennis Wambua Masavu, the 2nd petitioner’s witness, testified that he heard that money was being given by a lady called Mutindi. He was called by Mwelu to go to Kisayani to find out what was happening. Upon arrival, he found Mutindi talking to people. He knew Mutindi because they had met two weeks prior to the election when she tried to persuade him to support Musimba. He testified that at the time she was addressing people wearing a Musimba T-shirt and that the people in the crowd were holding voters cards and being given money and when he approached, the crowd dispersed. He stated that he did not know the names of these persons and no one told him that they were being bribed to vote. On cross-examination he admitted that he did not hear what was being said. It was his testimony that he knew those people were being bribed because they were holding voters cards.
48. Dr Musimba confirmed that Mutindi was his agent at Kisayani but denied knowledge of the event alleged.
49. Evidence of bribery needs to be reasonably precise and capable of being quantified if it is to be considered to affect the results. For instance, how many votes were procured as a result of the bribery, were they two, ten, or a whole polling station or what number? If it were even to be assumed that such amorphous ‘crowd’ was bribed to either vote in a particular way or abstain

from voting, aside from the criminal aspect of it, what number is the court to attribute to such illegal conduct in order for it to say that such conduct affected result of the election? This is crucial because if such evidence is proved, then such vote is liable to be excluded in a scrutiny exercise by virtue of **section 82(2)(b)** of *the Act*.

50. Accordingly I find that the allegation of bribery against Musimba lacks any basis. There is nothing in the conduct of Mutindi that implicates him either. Nor do I find the evidence sufficient to disclose any election offence on the part of Mutindi quite apart from the serious concern that she was not given an opportunity to contest the evidence of these very serious allegations of illegal practices.
51. The 2nd petitioner has not proved any malpractice or offence against the 1st respondent and all the allegations against him are dismissed.
52. The 2nd petitioner also alleged that about 8,000 votes were wrongly given to Musimba. This allegation from the 2nd petitioner lacked material particulars. No evidence was adduced to show or demonstrate how the staggering number of 8,000 votes was given to Musimba. There is also no evidence the ballot boxes were tampered with. These incredible allegations are dismissed. As regards the issue of the discrepancies in the 14 polling stations enumerated by the 2nd petitioner, the issues raised were resolved by the recount exercise which I shall deal with later in this judgment.
53. Finally, the allegations of hostility, lack of neutrality or impartiality made by Mwelu against the Returning Officer and the Presiding Officers have not been proved and are also dismissed.

Whether the 1st petitioner committed an election offence

54. The issue whether the 1st petitioner committed an election offence has been raised specifically by the 1st respondent. In his Response to Petition filed on 5th April, 2013, the 1st respondent alleges at para. 8 that: *“The Petitioner committed an election offence by meting out violence on the 1st respondent’s supporter, one Robert Kimunyi Katio, hence would not be entitled to prayer 3 of the petition in any event.”*
55. The issue is important because under **section 80(4)** of *the Act*, the Court cannot declare a person a winner if the person is found to have committed an election offence. Consequently, the burden of proving the offence is on the 1st respondent and it is to be proved beyond reasonable doubt.
56. Katio testified that he hails from Emali Market and is involved in community policing. He stated that on 25th February 2013 while on his rounds with a few other persons he arrived at Mambo Bar, Emali at about 1 am. At the bar, he met a group of about thirty people who included Kalembe and Mutie, a candidate for the County Representative seat and a supporter of Kalembe. He alleges that Kalembe then stood and asked who was wearing a Musimba cap. Katio states that he responded that he was the one. It was his testimony that Kalembe did not assault him but pushed him whereupon the mob descended on him and assaulted him. It was Katio’s further testimony that he reported the incident of assault to the police and that the perpetrators of the assault were arrested and charged.
57. Kalembe testified that he did not know Katio. He denied the allegation of assault or that he had been charged with any offence relating to the said assault.
58. From this evidence, it is not conclusive that violence was meted by Kalembe. Although Katio reported the incident to the police, he did not make any allegations against Kalembe. A copy of an extract of the occurrence book annexed to Katio’s affidavit shows that when the complaint was made on 25th February 2013, Kalembe was not mentioned rather, the assault was attributed to his

supporters. A letter from the OCS, Emali dated 25th March 2013 to the OCS, Makindu requesting assistance in arresting the persons who occasioned the assault does not name the perpetrators. In my view, Kalembe as a candidate would not have been difficult to identify as he is a well-known personality. The evidence in my view does not establish beyond reasonable doubt that Katio was assaulted by Kalembe.

59. Having considered the evidence, I find that the 1st respondent has not established that the 1st petitioner has committed an election offence and this allegation is accordingly dismissed.

Whether election conducted in accordance with the law

60. The second issue is focused on the responsibility of the IEBC to carry out a free and fair election. The basis of this contention relates to the manner in which the votes were counted and tallied and the results announced.

Conduct of Election officials

61. Before I deal with the Deputy Registrar's Report on the recount, I think it would be important for the completeness of this determination to deal with the issues raised by the parties in relation to how the election was conducted by the IEBC agents. The Constitution and the election laws vest the IEBC with the primary responsibility of carrying out and administering the election. The decisions and conduct of the IEBC and election officials are subject to review in a judicial process such as the present one.

62. From the pleadings several issues were raised; the condition of lighting in polling stations, that the 2nd respondent did not fill and issue the petitioners' agents with Form 35, that the Form 35 were not signed by agents and that agents were forced to sign Form 35, that some polling stations opened past the regulated time and lastly that there were two sets of Form 36.

Inadequate lighting in polling stations

63. Kalembe's case is that the counting of ballots in most polling stations was done at night and in extremely dim light that in some polling stations light had to be provided by motor cycle lamps. The petitioner cited two polling stations Wiivia Primary School and Kyandulu Primary School. Kalembe testified that he went to both polling stations and took video footage which he presented through a recorded DVD.

64. The recorded DVD footage is no longer than a minute and it is not clear that votes were being counted or could not be counted at the material time due to the lack of sufficient light. A hurricane lamp can be seen and some voices can be heard in the background. I asked the parties' counsel to collectively agree and sign the translated version of the words emanating from the video clip and which could perhaps assist anchor the evidence. The translated version from Kikamba to English a copy of which is signed by all counsel for the parties does not clearly set out the tenor of what was being discussed. What is clear, though, is that votes were being counted.

65. The DVD footage lacks probative value and does not assist the court to make a proper determination regarding the effect of lack lighting as alleged. I have examined the Forms 35 for the two polling stations; Wiivia Primary School and Kyandulu Primary School. Only Form 35 for Masalani Primary School (013) had the following remark, "*There no lighting in the room thus the signing process was interfered with.*" The other Forms 35 do not indicate that in fact there was any difficulty in counting of votes in statutory comments. The Returning Officer testified that the IEBC supplied all polling stations with adequate lighting to ensure that the polling stations could work at night. It is apparent from the Form 35 that the votes were counted and recorded as required by law.

66. Even assuming that there was inadequate lightning, the petitioner did not prove by a

preponderance of evidence that this was a scenario duplicated in a substantial number of polling centres to the extent that it affected the overall election result. In short, one cannot draw the inference from this evidence that counting of votes in all centres was affected in a manner that would invalidate the franchise.

67. On the whole, the petitioners have not proved that the lighting conditions as alleged affected the manner in which ballots were counted so as to affect the overall outcome of the results.

Signing of Form 35 by candidates agents

68. The allegation by Kalembe that the Presiding Officers did not fill and issue the petitioner or his agents with the Form 35 as required by **regulation 83** of the **General Regulations** is not borne out by the evidence. I have examined all the Forms 35 and all of them were signed by candidates agents save for four which were not signed by any agent, namely Yimwaa Primary School(011), Masalani Primary School(013), Utini Primary School(124) and Ndwaani Primary School(149). I dismiss this allegation.

69. I also dismiss that allegation by Mwelu that her agents were made to sign the statutory forms without giving them the opportunity to verify details. This allegation is vague, does not identify specific polling stations and agents who were “made” to sign. In any case, the fact that a substantial number of the statutory forms are signed by several agents is inconsistent with the petitioner’s case. Furthermore, failure to sign the declaration forms does not by itself invalidate the election results. **Regulation 79(6)** of the **General Regulations** provides that, “*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).*”

Opening stations past regulation time

70. Mwelu’s allegation is that some polling stations opened late and closed early thereby denying her supporters an opportunity to vote. She also stated that some of the polling stations opened beyond regulation time. The petitioner did not particularize the stations that were affected and the specific times each station opened late, closed early or stayed open beyond regulation time.

71. **Regulation 66** of the **General Regulations** stipulates that voting is to commence at 6 o’clock in the morning and end at 5 o’clock in the afternoon on the polling day save that a person who is on a queue for the purposes of voting before 5 o’clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o’clock. **Regulation 64** however gives leeway for extension of time beyond 5 o’clock by the presiding officer. **Regulation 64(3)** permits a presiding officer in consultation with the returning officer to extend the hours of polling at the polling station where polling has been interrupted or for other valid cause, and where polling in that polling station has started late by the amount of time which was lost in so starting late.

72. The petitioner did not identify which of the 164 polling stations opened late and closed early. Although counsel pointed to polling diaries which showed that some polling stations opened beyond regulation time, this fact of itself, does not prove that the polling stations were irregularly opened or closed. In any case there is no evidence that persons who were not entitled to vote did vote as a result of the extended opening hours or that such opening of the polling station created an opportunity for electoral malpractice. It is the petitioner’s burden to demonstrate this fact which she failed and the allegation is consequently dismissed.

Two Form 36

73. The petitioners complained that there were two Form 36. According to the petitioners the first Form 36 bears the stamp of the Returning Officer and is signed on 5th March 2013. The second one bears the stamp of the Returning Officer and is certified on 8th March 2013. Both forms are

different. The earlier form shows that Musimba garnered 17,174 votes while Kalembe garnered 16,975 votes while the latter form shows Musimba having garnered 17,196 votes while Kalembe garnered 16, 976.

74. In my view, only one Form 36 can be issued and it would be irregular to issue two forms. This confusion was aggravated by the fact that the Returning Officer annexed the Form 36 certified on 8th March 2013 as the Form 36 duly issued in Replying Affidavit in **Petition No. 7 of 2013**.
75. Regarding the allegation of the two Form 36, Gedi Noor, the Returning Officer, testified that he only declared results once on 5th March 2013 and not on the 8th March 2013. He admitted to having mistakenly certified the Form 36 on 8th March and given it to one of the petitioner's agent. He had mistakenly picked a rough draft copy of the Form 36 that had earlier been prepared and certified it and handed over to the agent. He testified that the draft contained some errors which he had noticed, which included the replication of results for Kitende Primary School(122) and Mukame A Mbeu(123) which he rectified by reference to the Form 35s. He printed the corrected version which is the one he used to announce the results. He insisted the correction was made prior to the announcement of results.
76. I accept the Returning Officer's explanation and I find that the valid Form 36 is the one dated 5th March 2013 signed by the Returning Officer.
77. The 1st Petitioner also annexed a list of several polling stations showing discrepancies in the valid votes displayed in the Form 35 and the Form 36 of the Returning Officer's affidavit of 5th April 2013. The respondents attempted to explain that these were human errors caused in transposition and which in any case did not affect the overall outcome of the results. These concerns regarding discrepancy in valid votes though relevant did not prove that these discrepancies favoured any one specific candidate. It is these errors and discrepancies that formed the basis of my decision to order a recount.

Errors, mistakes and irregularities on statutory forms 35 and 36

78. During the hearing it emerged that there were several errors, alterations and omissions on the Forms 35 and 36, which in my view and taking into account the narrow margin of votes between Musimba and Kalembe would have affected overall result. This issue was resolved by the recount of votes which I ordered after hearing the evidence of all the parties.
79. In my **Ruling No. 3** which I delivered on 17th June 2013, I concluded that, “[25] *The petitioners' case is founded on alterations, errors and miscalculation which are evident from Form 35. A fully scrutiny is unnecessary in my view and I think it is proper to order scrutiny limited to a recount of the vote to confirm the number of votes are consistent with what is stated in the Form 35. As this is not a final judgment, it is not necessary for the petitioners to prove their case to the requisite standard. As the decided cases demonstrate, all that is necessary is for the petitioner to establish sufficient basis for the court to be satisfied that it must engage time and resources to ascertain the validity of the vote through scrutiny. The scrutiny exercise is part of the forensic process available for the court to do justice in the case. [26] I have taken into account the alterations and errors in Form 35 and those reflected in Form 36 and I am convinced that the interests of justice would be served if a recount is ordered for all the 164 polling stations. I am particularly persuaded that the errors made, whether by mistake or deliberate, and which the respondents have admitted exist, are sufficient to possibly affect the result given that the margin of votes between the first two candidates is less than 250 votes. [27] I have considered the desirability of a partial scrutiny limited to the polling stations identified by the petitioners as the respondents have contended. Such a course, in my view, would be unfair to the 1st respondent as the errors and miscalculations appear to be random and affect all the candidates since no votes can be attributed to any one candidate.*”

80.I therefore directed that, “[30]There shall be scrutiny of the votes limited to a recount and ascertainment of the number of votes each candidate obtained in each of the 164 polling stations in Kibwezi West Constituency.”

81.The Deputy Registrar of this Court conducted a recount of all the ballots cast in the Constituency in order to ascertain the veracity of the votes and confirm what was tallied in Forms 35 and 36. The recount was duly conducted between 20th and 27th June 2013. Apart from the votes which were recounted, 55 ballots were marked as disputed and reserved for this Court’s consideration. I considered the ballots on the basis that those that express the intent of the voter must be counted. Out of the 55, 12 were counted as spoilt votes. The result of the vote recount and the final results is shown in the table hereunder:

<i>Name of candidate</i>	<i>Results announced</i>	<i>Total votes from Recount</i>	<i>Disputed ballots from recount</i>	<i>Final tally</i>
Caroline Mwelu Mwandiku	4,111	4,148	2	4,150
Dominic Matheka	1,306	1,340	2	1,342
Ecomas Mwengi	3,031	2,873	0	2,873
John Kiema	590	591	2	593
John Mutuse Michael	278	272	0	272
Michael Masaku	141	133	0	133
Patrick Musimba	17,174	16,909	14	16,923
Kalembe Ndile	16,975	16,930	22	16,952
Stephen Masoo	1,964	1,947	1	1,948

82.During the recount exercise, it also emerged that the votes recorded in the Forms 35 in favour of Musimba in three polling stations could not be accounted for. These were 409 votes comprising 200 votes from Ngelenge Primary School (134), 97 votes from Kiuani Primary School (140) and 112 votes in Itiani Primary School(115). Upon completion of the recount, Musimba moved the Court by a Notice of Motion dated 27th June 2013 seeking certain orders that the contents of the ballot boxes for County Assembly, Women representative, Senator and Governor and unstrategic election material for three the polling stations be examined.

83.During the hearing of the application, I directed, *suo moto*, that the three Presiding Officers of the Polling Stations who had sworn affidavits in support of the applicant’s case be cross examined. This application was subject of my **Rulings No. 4** and **5** in which I dismissed the application for reopening other ballot boxes for other elections.

84. The Presiding Officers testified on oath confirming that the ballot papers were available during the counting process and they entered Form 35 entries based on the counted votes. The IEBC took the position that the Form 35s are statutory documents which speak for themselves and the court should accept the evidence of the missing votes. Musimba contended that had the 409 missing votes been taken into account he would be leading with 17,318 votes against Kalembe's 16,930 votes and Caroline Mwelu would garner 4,148. I shall return to this issue later in the judgment.

85. After the recount, it is clear that Kalembe emerged winner with the most votes. Consequently, the germane issue for this court's determination is whether Kalembe should be declared the duly elected member of the National Assembly for Kibwezi West Constituency in view of **section 80(4)** of *the Act* which permits this court to direct the electoral body to issue a certificate of election if upon recount of the ballots cast, the winner is apparent and has not committed an election offence.

Section 80(4) of the Elections Act

86. I directed parties to submit on the application of **section 80(4)** of *the Act*. On 9th July 2013, the parties made their oral submissions which I now summarise.

1st Petitioner's Case

87. Mr Makundi, learned counsel for the 1st petitioner relied on the written submissions dated 9th July 2013. Kalembe's case is that this court ought to declare him the winner of the elections. According to Kalembe, this court had through its **Ruling No. 3** ordered a recount and Mr Kalembe emerged winner and it was this court's duty to uphold the will of the electorate in view of the fact that the results had been agreed upon.

88. Mr Makundi submitted that Kalembe had not committed an election offence and that therefore this court was under a duty under **section 80(4)** of *the Act* to declare him the winner after a conclusive recount.

89. Regarding the 409 votes that were attributable to Musimba, counsel stated that these were not in the ballot boxes. According to counsel, the essence of the recount of ballot papers was to demonstrate that the Form 35 was correct by ascertaining the actual votes cast. Counsel further submitted that the existence of other missing ballots in the three polling stations was not proved as there was no evidence that ballot boxes were tampered with and that if any election offence was committed, it was committed by the 1st respondent who had in his possession polling diaries.

90. Mr Makundi further submitted that the ambit of the petition does not go beyond the recount and that what was questioned was the entry of Form 35 and tallying in Form 36 and the recount had confirmed the 1st petitioner's case through the recount.

2nd Petitioner's Case

91. The 2nd petitioner, represented by Mr Musyoki, took a different stance. Her position is that the Court ought to call a fresh election as opposed to declaring Kalembe the winner. It was her case that **section 80(4)** of the Act is *ultra-vires* the Constitution in as far as it went beyond the provisions of **Article 105** by permitting the court to declare a candidate validly elected.

92. Mr Musyoki submitted that the elections did not comply with **Article 81** in so far as they were not transparent and accurate. He further noted that the IEBC was not neutral or impartial as one of the candidates had in his possession election materials. He argued that due to the very narrow margin of votes, the will of the people of Kibwezi West Constituency could not be ascertained and the only option was to call for a fresh election.

1st Respondent's Case

93. The 1st respondent's case is that the petitioners' case cannot stand scrutiny as they have not met the threshold required of proof. Mr Mari submitted that the parties had veered of their pleadings and relied on events in the scrutiny and the outcome of the recount.
94. Mr Mari contended that Forms 35 from the polling station had not been impugned, as they were signed by agents and no issues were raised at the polling station. Counsel submitted that taking into consideration the 409 votes captured in favour of Musimba, he had in fact won the elections and therefore the petition should be dismissed.
95. Mr Mari submitted that by and large, the process was accurate and scored it at about 95% terming the few errors as mere human error. Counsel cited **section 83 of *the Act*** for the proposition that no election shall be declared void as long as there is substantial compliance with the law. In a nutshell, Musimba contends that he was properly elected and therefore the election of 4th March 2013 ought to be upheld.

2nd and 3rd Respondents Case

96. Ms Wambua and Dr Abuya argued the case on behalf of the IEBC and the Returning officer.
97. Ms Wambua submitted that the petitioners have not made a case as they had failed to discharge the burden imposed on them. She pointed to the provisions of **section 107 of the *Evidence Act (Chapter 80 of the Laws of Kenya)***, section 83 of the ***Elections Act, 2011*** and the case of ***Raila v IEBC and Others (Supra)*** on burden and standard of proof and urged that the petitioners had not discharged this burden. She argued that the petitioners had failed to prove non-compliance affected election substantially as the errors observed during recount did not favour or disadvantage a particular candidate and that mere error cannot be the basis for interference with the declared result of the election.
98. In reference to the three polling stations that were subject of **Ruling No. 5**, Counsel submitted that Form 35 was the primary document whose entries brought out the number of votes cast in favour of each candidate. Hence, she urged that election results are declared, not on the basis of ballot papers but on the basis of Form 35. She further submitted that the court should not turn a blind eye to the Form 35 on record and more particularly that the missing votes were cast in favour of 1st respondent and that the Presiding Officers confirmed that the votes were cast.
99. As regards the issue of a fresh election, Ms Wambua submitted that the relief was not indicated in the petition and that **rule 10 of *the Rules*** requires the petitioner to stick to his pleadings hence that issue cannot be raised at a late stage in the proceedings. She submitted that the elections were credible, free and fair and the court should not impose someone on the electorate.
100. Dr Abuya, counsel for the IEBC in the 2nd petitioner's case, submitted that the petitioner has failed to establish her case. In his view, **section 84(4) of *the Act*** is discretionary and it is premised on the assumption that the scrutiny process had no problem. The issue of missing ballots could not be addressed by the Deputy Registrar as her jurisdiction was limited to counting the votes in accordance with the directions issued by the Court. Counsel submitted that the court ought to take into account the results of the three polling stations in determining the final outcome of the election.
101. Counsel urged the court to consider the intention of voters and in so doing consider whether in conducting the election the 2nd and 3rd respondents complied substantially with the law. Counsel urged the court to dismiss the petition.

Analysis and Determination

102. From the submissions by the parties, the Court is left with three choices, which the parties submitted on as follows;

- a. Whether to dismiss the petition.
- b. Whether the 1st petitioner should be declared duly elected Member of Parliament.
- c. Whether the court should set aside the election by declaring that the 1st respondent was not duly elected.

103. The question revolves around the interpretation and application of

section 80(4) of the *Elections Act, 2011* which provides;

80.(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if

—

(a) upon recount of the ballots cast, the winner is apparent; and

(b) that winner is found not to have committed an election offence.

104. Is this provision mandatory in the sense that the Court is required to declare a person duly elected if the conditions of **section 80(4)** of *the Act* are satisfied? Before I proceed to consider this issue, I will dispose of the issue of constitutionality of **section 80(4)** which was raised by the 2nd petitioner.

105. It was argued that **section 80(4)** of *the Act* is inconsistent with **Article 105** of the Constitution which provides as follows;

Determination of questions of membership.

105. (1) The High Court shall hear and determine any question whether—

(a) a person has been validly elected as a member of Parliament; or

(b) the seat of a member has become vacant.

(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

(3) Parliament shall enact legislation to give full effect to this Article.

106. **Article 105** of the Constitution grants the High Court jurisdiction to hear election petitions. It does not spell out the procedures and reliefs which the court may give. **Sub-Article (3)** thereof, empowers Parliament to enact legislation to give effect to the Article. Pursuant to this provision, Parliament has enacted the *Elections Act, 2011* to regulate the manner in which the jurisdiction is exercised. *The Act* provides for powers and procedures for the Court and reliefs the court may grant. Furthermore, the fact that the court is granted jurisdiction to hear and determine election petition does not exclude the power of the court to grant the appropriate relief where it finds that the election is invalid. Parliament is entitled to define the scope of relief that the court may issue under **Article 105(3)** and such relief includes declaring that a person has been duly elected if it is so proved. I therefore find and hold that **section 80(4)** of the *Elections Act, 2011* is not unconstitutional.

107. Closely related to the 2nd petitioner's argument is the argument raised by the Ms Wambua, counsel for the IEBC, that the 1st petitioner ought to have specifically pleaded that he seeks to be

declared the duly elected member of Parliament. In my view, this is not necessary. Once the issue of recount was pleaded and allowed upon application, the consequences of such recount are to be dealt with by the court. In this case, **section 80(4)** empowers the court to declare a winner once the conditions therein are satisfied. A pleading seeking to be declared the winner is unnecessary since **section 80(4)** itself specifies that such a declaration is one of the consequences of a recount.

108. Turning back to the question of whether **section 80(4)** is mandatory, I think the decision of the Court of Appeal in **James Omingo Magara v Manson Onyongo Nyamweya and 2 Others, Civil Appeal No. 8 of 2010 (Unreported)** is instructive. The Court considered **section 28** of the **National Assembly and Presidential Elections Act (Repealed)** which is equivalent of **section 83** of the **Elections Act**. In that case, the High Court had despite recount which showed the appellant as having the highest votes still nullified the elections because of irregularities. In upholding the verdict, the court observed that a scrutiny and recount was not an end in itself noting 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 an important consideration to bear in mind. I quote the remarks of BARRY, J in the Canadian case of **[1997] MPLR (2d)(Nfld.SC)** cited in **DOROTHY E. BROWTON VS. JEAN HART KANGAS & OTHERS**, Suit No CI 98 – 01 – 10265, Queen’s 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.”

109. Although the court did then not have power to declare the apparent winner duly elected, what the court emphasised is that the election is a process that must be seen to be free and fair and the fact that a person achieved the highest number of votes is not necessarily decisive of the result of the election petition. The Court is obliged to consider the quality of the election and see whether it comports with the principles of elections articulated in **Article 81** of the Constitution. **Article 81** provides as follows;

General principles for the electoral system.

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

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections, which are—

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and

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

110. The power granted to the Court under **section 80(4)** is a new provision introduced by the ***Elections Act, 2012***. Its foundation is that the Court should be able to, in an appropriate case, declare the intent of the voters which is established once the ballots are counted as it is the duty of the election court to give effect to the will of the electorate. The intent of voters is established by the number of votes cast in favour of the winning candidate in an election that is conducted in compliance with the principles set out in **Article 81**. Since Kenya has the first past the post system, the intention of the voters is determined by reference to the person who garners most votes. It matters not that he or she won by one or two votes as long as the person is a winner. The duty of the court is to strive to preserve the election held in accordance with the Constitution and the law. In ***John Fitch v Tom Stephenson and 3 Others [2008] EWHC 501(OB)*** it was stated as follows; “ ... *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 electorate...*”
111. In my view, the application of **section 80(4)** of **the Act** requires the court to exercise great restraint and caution so that it declares a winner in the clearest of circumstances that leaves no doubt as to what the will of voters on the material polling day was; otherwise, the court risks disenfranchising the voters by substituting the will of the electorate with that of itself and imposing a leader on the electorate. The court must also satisfy itself that the process of election is one that meets the standards of **Article 81** of the Constitution.
112. On the other hand, declaring the election result invalid and ordering a fresh election is not a matter to be taken lightly and the opinion expressed by the Supreme Court of Connecticut in ***Steven Bortner v Town of Woodbridge et al 250 Conn. 241, 736 A.2d 104*** is apposite in this regard. The court stated as follows; “*An election is essentially—and necessarily a snap shot. It is preceded by a particular election campaign, for a particular period of time, which culminates on a particular date, namely, the officially designated election day. In that campaign, the various parties and candidates presumably concentrate their resources—financial, political and personal—on producing a victory on that date. When that date comes, the election records the votes of those electors, and only those electors, who were available to and took the opportunity to vote... Those electors, moreover, ordinarily are motivated by a complex combination of personal and political factors that may result in particular combinations of votes for the various candidates who are running for the various offices. The snapshot captures, therefore, only the results of the election conducted on the officially designated election day. It reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that date. Those results, however, although in fact reflecting the will of the people as expressed on that day and no other, under our democratic electoral system operate nonetheless to vest power in the elected candidates for the duration of their terms. That is what we mean when we say that one candidate has been “elected” and another “defeated.”... Moreover, that snapshot can never be duplicated. The campaign, the resources available for it, the totality of the electors who voted in it, and their motivations, inevitably will be different a second time around. Thus, when a court orders a new election, it is really ordering a different election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day.*”
113. Therefore a court in deciding whether to order a fresh election ought to bear this in mind and be guided by certain factors unique in the particular set of circumstances before it. It ought to balance the various sensitive interests at stake in the electoral process. In the ***Steven Bortner case (supra)***, the court further noted that; “*[The Court], in determining whether to order a new election, to arrive at a sensitive balance among three powerful interests, all of which are integral to our notion of democracy, but which in a challenged election may pull in different directions. One such interest is that each elector who properly cast his or her vote in the election is entitled to have that vote counted. Correspondingly, the candidate for whom that vote properly was cast has a legitimate and powerful interest in having that vote properly recorded in his or her favor. When an election is challenged on the basis that particular electors’ votes for a particular candidate*

were not properly credited to him, these two interests pull in the direction of ordering a new election. The third such interest, however, is that of the rest of the electorate who voted at a challenged election, and arises from the nature of an election in our democratic society... That interest ordinarily will pull in the direction of letting the election results stand....”

114. **Article 105** of the Constitution vests in this court the mandate to determine whether a person has been validly elected as a Member of Parliament and in order to do so, the court must interrogate the entire process to ascertain the will of the voters in this case of Kibwezi West Constituency on 4th March 2013 when they cast their votes. Such a determination cannot be ascertained by rejecting evidence that comes to the purview of the Court in the course of hearing. This was also my holding in **Ruling No. 5** as such, any evidence properly tendered and that is bound to assist the Court towards this determination must be considered.

115. Whereas the 1st petitioner emerged with the most votes after the recount, can this court shut its eyes to the evidence that may affect the authenticity of the ballot and say; *“Well, the numbers say it all. It’s a done deal!”* This approach is not consistent with the general principles that underlie a free and fair election. Elections are not about simple arithmetic (*See James Omingo Magara v Manson Onyongo Nyamweya and 2 Others (Supra)*). They are also about embracing standards and values that our Constitution has ordained.

116. I now return to the issue of the missing 409 votes from Ngele Primary School Polling Station (No. 134), Kiwani Polling Station (No. 140) and Itiani Polling Station (No. 115). Taking into account the 409 ballots which could not be accounted for and which the evidence on record is supportive of their existence including the testimony by the respective Presiding Officers, I find that the issue of the ballots that could not be traced is a relevant issue which though not decisive, this court is entitled and ought to bear in mind in making a finding on the appropriate relief.

117. In **Ruling No. 5**, I concluded as follows; *“[8] The evidence in the respective Form 35 for each polling station and the agent’s tallies which I have alluded to corroborate the fact that there were votes counted in the 1st respondent’s favour but which cannot be accounted for after the recount. The agents of the candidates were also present during the counting and tallying and did not raise any issues about stray votes and on their face, the Form 35 for each station is signed by the agents of the candidates. During the hearing, the issue of stray ballots was not raised by any party.”*

118. I am particularly troubled by the position taken by the IEBC in the matter in support of the 1st respondent case. It takes the position that Form 35 is the primary document reflecting the votes cast and from which the results at the polling station are declared hence the court should declare the result based on the Form 35 rather than the results of the recount. No explanation has been provided by the IEBC for this glaring discrepancy despite the fact that all the election material remains in its custody after the election is conducted.

119. Consideration of these facts leads me to conclude that it is not, in the language of **section 80(4) of the Act**, ‘*apparent*’ who the winner of the election is. Though it is attractive to declare the winner, it is not possible to declare the ‘*apparent*’ winner for Kibwezi West Constituency as there is none in the circumstances. Musimba contends the seat is his and he ought to be confirmed winner on account of the 409 ‘missing ballots.’ Kalembe likewise insists he won the election and should be so declared as the recount of actual votes confirmed his victory. Both candidates have on the face of it valid grounds. According to Musimba, were it not for the missing ballots from the three polling stations which cannot now be traced, he would be leading while for Kalembe, the recount of the ballot papers in the 164 polling stations undoubtedly revealed he was ahead of Musimba with 29 votes.

120. This scenario also leads me to conclude that the will of the voters cannot be established with the requisite degree of certainty. Furthermore, an election cannot be declared where the process on which it is founded remains in serious doubt as this would undermine the public faith in electoral

process. I think the correct verdict is not one that risks substituting the will of the people for Kibwezi West National Assembly parliamentary seat expressed on the 4th March 2013 and whatever that will was, it is not one that is based on presupposition or one clouded in a shadow of missing votes, it is one that will allow in no uncertain terms the will and voice of Kibwezi West Constituency to be manifestly seen and heard.

121. The only appropriate relief in these circumstances is for this court is to return the matter back to the people of Kibwezi West Constituency to determine who will represent them in the National Assembly.

Costs

122. Under **section 84 of the Act**, “An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.” The costs in an election petition are to follow the event and the Court has broad jurisdiction to determine who bears the costs and to what extent. (See **Charles K. Waibara and Another v Francis Kigo and Others Nairobi EP No. 15 of 2013 [2013]eKLR** and **Kituo cha Sheria v John Ndirangu Kariuki and Another Nairobi EP No. 8 of 2013 [2013]eKLR**).

123. **Rule 36 of the Rules** elucidates further the court’s power in regard to costs. It provides as follows;

36. (1) The court shall, at the conclusion of an election petition,

make an order specifying—

(a) the total amount of costs payable; and

(b) the persons by and to whom the costs shall be paid.

(2) When making an order under subrule (1), the court may —

(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and

(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

124. In the circumstances of this case, it is evident that the IEBC as the body responsible for the conduct of election was responsible for the irregularities in the electoral process from the discrepancies which prompted an order for a recount. The failure to explain the missing ballots has now occasioned uncertainty in the conclusiveness of the recount process and the validly elected winner. It shall shoulder the parties’ costs.

125. The 1st Petitioner has succeeded in his petition and deserves the full costs of the suit. The 2nd petitioner’s allegations were mostly unsubstantiated but she nevertheless to some degree assisted the court in conducting the inquiry of the election at hand. She will get a third of the total costs. The 1st respondent, the incumbent was simply forced to defend the petition where no allegations were levelled and proved against him. He therefore deserves to be awarded full costs.

126. The petition was heard in full and I think the costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining

the principle of access to justice enshrined in **Article 38** of the Constitution. The 1st petitioner alleged that he was represented by four advocates but I do not consider this matter so complex to the extent that it required four advocates. The issues in contest were fairly straight forward as manifested by the pleadings and submissions tendered in court and the number of witnesses on record. I am not oblivious of the time spent on research, preparation of pleadings, witnesses and in court during the actual hearing of the case.

127. I have considered other cases where the court has capped costs. In *Ismail Suleman and Others v Returning Officer, Isiolo County and Others Meru EP No. 2 of 2011 (Unreported)* and *Mohammed Ali Mursal v Saadia Mohamad and Others (Supra)*, the amount was capped at Kshs. 2 million and Kshs. 1 million for each respondent respectively. Both cases involved the Gubernatorial elections which covers a more extensive area than a constituency. In *Rishad Hamid Ahmed Amana v IEBC and Others Malindi EP No. 6 of 2013 (Unreported)*, the maximum capped costs was Kshs. 2.5 million. In my view the total costs for each party shall be capped at Kshs. 1.5 million would be reasonable.

128. The costs shall be taxed and certified by the Deputy Registrar.

Disposition

129. Before I dispose of the matter, I would like to thank all the counsel who ably presented their clients' cases in the best traditions of the bar. I also compliment the court staff here in Machakos who have assisted in ensuring that the determination of this matter proceeded smoothly. Special mention must be made of Ms Makungu, the Deputy Registrar who ensured that the recount was conducted efficiently.

130. These then are the final orders:-

- a. I hereby declare that Dr Patrick Mweu Musimba was not validly elected as the member of National Assembly for the Kibwezi West Constituency.
- b. I direct that fresh election be held for Kibwezi West Constituency National Assembly Seat.
- c. The Certificate in accordance with **section 86** of the *Elections Act, 2011* shall issue.
- d. The 3rd respondent shall bear the costs of the petition as follows;
 - i. The 1st petitioner and the 1st respondent shall get full costs of the suit
 - ii. The 2nd petitioner shall get one-third of the costs of the suit.
 - iii. The total costs for each party are capped at Kshs 1,500,000.00.
- e. The security deposit shall be released to the petitioners.

DATED and DELIVERED at MACHAKOS this 15th day of August 2013.

D.S. MAJANJA

JUDGE

**Mr Makundi and Mr Kituku instructed by Andrew Makundi and Company Advocates with him
Mr Kamolo instructed by Kamolo and Associates Advocates for the 1st petitioner.**

Mr Musyoki instructed by B. M. Musyoki and Company Advocates for the 2nd petitioner.

Mr Mari instructed by Wachira Ndung'u and Company Advocates for the 1st respondent.

Ms Wambua instructed by Anne M. Kiusya and Company Advocates and Dr Abuya instructed by J. Louis Onguto Advocates for the 2nd and 3rd respondents.