



No. 67/2013

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**ELECTION PETITION CASE NO. 2 OF 2013**

**THOMAS MALINDA MUSAU.....1<sup>ST</sup> PETITIONER**  
**STEPHEN NDAMBUKI MULI.....2<sup>ND</sup> PETITIONER**  
**JOHN NTHULI MAKENZI. ....3<sup>RD</sup> PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**LEONARD OKEMWA (RETURNING OFFICER) .....2<sup>ND</sup> RESPONDENT**  
**STEPHEN MUTINDA MULE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners filed a petition dated 19<sup>th</sup> March, 2013 challenging the election process and the declaration of the 3<sup>rd</sup> Respondent as the duly elected candidate for the Member of National Assembly, Matungulu Constituency. The petitioners were among the seven (7) candidates who contested the seat. In the said elections, the 3<sup>rd</sup> Respondent garnered 12,297 votes. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners got 9,940, 3,493 and 4,377 votes respectively.
2. The petitioners having been aggrieved by the outcome of the elections seek the following orders;-
  - i. Scrutiny of votes recorded as having been cast in the parliamentary election in Matungulu Constituency.
  - ii. Scrutiny of the spoilt, rejected, disputed and reflected and objected to votes.
  - iii. Scrutiny of the counterfoil of the votes cast.
  - iv. Recount of ballot papers cast at the said election.
  - v. The elections be declared null and void.
  - vi. A declaration that the 3<sup>rd</sup> respondent was not validly elected as the Member of the National Assembly for Matungulu Constituency.
  - vii. The election of the 3<sup>rd</sup> Respondent as the Member of the National Assembly for Matungulu Constituency be determined and declared null and void
  - viii. Election offences and Corrupt Practises on the part of the 3<sup>rd</sup> Respondent as disclosed be acknowledged by the court and reported to the speaker of the National Assembly.

- ix. Fresh elections be held in Matungulu Constituency
- x. The respondents be condemned to pay costs of the petition.

### **Petitioners' Case**

3. The petitioners averred that the election was not conducted in accordance with the law. The counting and tallying of votes was not accurate. The form 36, a summary of the results, was full of mistakes, tampered with and tailored to depict the 3<sup>rd</sup> Respondent as the winner. Final results did not tally with votes cast. In polling station code 040, Kyekoyo SA Primary School more than 80 out of 352 voters were assisted to vote by the Presiding Officer without involvement of the agents in the process as required by the law.
4. Petitioners and their agents were excluded from the polling stations and the tallying centres. The number of votes cast were falsified particularly those of Kanzalu Primary School (*Code 035*). At Kalandani Secondary School Polling Station, (*Code 077*) a Presiding Officer took away ballot papers before an illiterate voter was assisted to vote hence denying the voter a chance to vote.
5. At the tallying Centre the 2<sup>nd</sup> Respondent allowed the Chief Agent of the 3<sup>rd</sup> Respondent to connect his laptop computer to the IEBC system that was compiling results. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents used violence and intimidation to disrupt the counting and tallying process hence compromising the integrity of the said process. There was lack of transparency.
6. The 2<sup>nd</sup> Respondent flouted the general regulations, breached the law, declared, certified and published the 3<sup>rd</sup> Respondent as the successful candidate.
7. There was discrepancy between the total votes cast for the respective presidential candidates which totalled to 39,393 and the Parliamentary ones that stood at 40,576.
8. On request of recount by one of the candidates **Hon. Moffat Maitha** following discrepancies on forms 33 and 35 the 2<sup>nd</sup> respondent and the Officer Commanding the Police Division (OCPD) forced him out and used his officers to assault him.
9. The petitioners further averred that there was intimidation, threats of violence and bribery by the 3<sup>rd</sup> Respondent.
10. Polling Stations opened at 7.00 am and closed at 5.00pm whereby voters on the queue were denied the right to vote.
11. The 2<sup>nd</sup> Respondent used motor vehicle registration number KBG 541L Pajero Mitsubishi provided by the 3<sup>rd</sup> respondent.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' case**

12. In response to the petition the 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that the 3<sup>rd</sup> respondent was declared the winner after getting a total of 12,297 votes. He was subsequently gazetted in the special issue of the Kenya Gazette dated 6<sup>th</sup> March, 2013.
13. They averred that the Elections for Matungulu Constituency conducted by the 1<sup>st</sup> Respondent met the standards set out in Article 88(4) and 86 of the Constitution; the Elections Act and the applicable regulations. The Elections were free, credible and fair. The counting and tallying of votes was open, accurate, collated and promptly announced as required by the law.
14. They further averred that, after receiving all form 35<sup>s</sup>, the Returning Officer would tally the results in the presence of agents for the various candidates, publicly announce the results and record the results in form 36 then deliver to the County Returning Officer. The form 36 was not tampered with save that there were typographical errors and mistakes that occurred at various polling stations when the results were being keyed in and the Returning Officer rectified and/or corrected such errors as mandated by the law in the presence of agents.
15. With regard to polling station code 40 at Kyekoyo SA Primary School, they averred that the process of voter assistance was rendered by the Presiding Officer in the presence of various party agents who had undertaken the oath of secrecy and signed forms 35. They denied the allegations that agents were locked out or otherwise restrained from assisting illiterate voters.
16. At Donyo Ol Sabuk Polling Station- Code 017 it was admitted that there were typographical errors that occurred wherein the 3<sup>rd</sup> Respondent garnered 120 votes that were wrongly entered as

- 126 in form 36. They attributed the variance between the total number of votes cast for member of National Assembly and those of the Presidential Election to wrong entries made and the stray votes.
- 17.They denied having deterred any other voters the opportunity to vote and any violence intimidation of any kind having taken place. They denied having used the 3<sup>rd</sup> Respondent's motor vehicle.

### 3<sup>rd</sup> Respondent's case

- 18.In response to the petition, the 3<sup>rd</sup> respondent averred that the tallying process was transparent, accurate and correct. He denied having bribed voters, threatened or intimidated them. He denied allegation that his Chief Agent plugged his computer to the IEBC system. Denying that **Hon. Maitha Moffat** was beaten; he stated that he was only requested to avoid interfering with the tallying process by the OCPD.
- 19.Further, he stated that although polling stations opened at 6.00am, the Biometric Voter Registration Kits failed to operate and therefore it took the 1<sup>st</sup> Respondent a while to resort to manual voting though all voters cast their votes.
- 20.He denied being the owner of motor vehicle registration number KBG 541 L.

### Evidence

- 21.Evidence was by way of affidavit. The petitioners had six (6) witnesses who deposed affidavits pursuant to provisions of rule 12 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.
- 22.The 1<sup>st</sup> witness, **Paul Mutua Makenzie** deponed that he was an agent based at Donyo Sabuk Primary School. On Sunday, 3<sup>rd</sup> March, 2013, the eve of the election date, the Chief Agent of Wiper Democratic Party associated with the 3<sup>rd</sup> Respondent moved from house to house bribing people with Kshs. 500- 1,000/=. On reaching his house he chased him away.
- 23.On the 4<sup>th</sup> March 2013 **Mr. Peter Nzioka** and **Mr. Musembi** inhabitants of Kyeleni village were seen giving people money. The voting exercise started late at 7.00 am following the presiding officer's deliberate action. At about 5.00 pm he was one of the persons ordered out of the polling room, an act that resulted into most people not voting.
- 24.The 2<sup>nd</sup> witness, **Josephine Musembi Kisili** a voter at Donyo Sabuk Primary School was one of the people who were chased out of the polling centre as counting of votes was on-going. She confirmed that the voting exercise begun at 7.00am.
- 25.The 3<sup>rd</sup> witness, **Esther Mwende**, an agent of Matungulu West Ward was denied access to various polling station including Tala SA Primary School, Nguluni Township and Muusini Primary School Polling Centre.
- 26.The 4<sup>th</sup> **Witness Eliud Mwenda** the Chief Agent of CCU Party stated that he was denied access to various polling stations by the presiding officers , they included; Tala S.A Primary School, Nguluni Township, Ngonda Trading Centre, Kituluni Primary, Kyeleni and Muusini. At Syumbuni Primary School there was a high rate of assisted voters. The Returning Officer was the only one who was assisting the voters. Agents were denied the opportunity of verifying what kind of assistance he was giving them. He was ordered out of the polling station following orders of the Returning Officer. He averred that he saw the Returning Officer alighting from the 3<sup>rd</sup> Respondent's motor vehicle registration number KBG 541L.
- 27.The 5<sup>th</sup> witness, **Paul Mwanzia**, a Chief Agent of the New Democrats Party was denied access to several polling station including Ngalalya Primary school, Kwatombe Primary School and Mbuni Primary School. He was intimidated by the Returning Officer. He witnessed the 3<sup>rd</sup> Respondents Chief Agent's laptop linked to the IEBC's computer connections.
- 28.He averred further that results announced by the Returning Officer did not tally with those in forms 33 and 35. He did not sign form 35. At the tallying Centre other irregularities included a certificate issued to a County Representative being snatched from him and another one made and issued to a different candidate.

29. The 6<sup>th</sup> witness, **Daniel Munyamai** an agent at Kanzalu Primary School Polling Station witnessed failure of the network. The votes were counted. The 1<sup>st</sup> Petitioner got 170 votes. He was not given form 35 to sign. Thereafter the Returning Officer announced that the 1<sup>st</sup> petitioner had 70 votes instead of 170 votes.
30. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on affidavit evidence of **Leonard Okemwa** (2<sup>nd</sup> Respondent) who amongst other averments said that no reports were made to him on voter bribery, voter or agent intimidation, violence or any other Electoral Offences pleaded in the petition. He stated that the typographical errors in forms 35 and 36 occurred when the results were being keyed in due to human error and this was not substantial to be used as a basis of nullification of the election.
31. The 3<sup>rd</sup> Respondent had a total of 8 witnesses who swore affidavits in support of his response.
32. The 1<sup>st</sup> witness **Paul Kamau Kamiti**, an agent of Wiper Democratic Party, based at Tala Boys Primary School on the Election Day stated that voting started at 6.00am and ended at about 6.00 pm after all voters on the queue voted. All agents who had badges and appointment letters were provided with seats at the polling stations and they duly signed form 35<sup>s</sup> as required. There were no complaints. **Hon Moffat Maitha** who was drunk was ordered out because he wanted to disrupt the tallying process.
33. The 2<sup>nd</sup> witness, **Francis Mutisya Kiswili**, 3<sup>rd</sup> witness, **Nicholas Muli Mutua**, 4<sup>th</sup> witness, **Pascaline Mueke Mutisya**, 5<sup>th</sup> witness, **John Bosco Muasya**, 6<sup>th</sup> witness **Christopher Navo Kitonyi**, and 7<sup>th</sup> witness **John Bosco Ndinga**, were based in different polling stations. They were all agents for the Wiper Democratic Party. They stated that voting commenced at about 6.00am and ended at approximately 7.45pm after the last person voted. During counting process they noted that some people only voted for the President but not other candidates. They signed forms 35 presented to them. Voting was manually done since the Biometric voter technology Kit failed. Results were displayed in classes.

### Scrutiny and Recount

34. Following an application by the Petitioner an order for scrutiny and recount of votes was made. The exercise was supervised by the Deputy Registrar, Machakos, **Ms Rose Makungu**. Documents scrutinised included packets of counterfoils (*both used and unused*); copies of the results of each polling station in which the results were in dispute, packets of spoilt papers and packets of rejected ballot papers
35. The copy of the register used during the elections was not found in any of the parliamentary ballot boxes opened therefore was not scrutinized.
36. Comparisons were made against results in forms 35, 36 and the recount process. The results and the variations in the recount were recorded. The final results of each candidate after the recount as against the declared results were as follows:-

- John Nthuli Makenzi -4,366 votes
- Moffat Muia Maitha -8,767 votes
- Obadiah Mutisya - 187 votes
- Stephen Mutinda Mule -12,308 votes
- Stephen Ndambuki Muli -3,537 votes
- Thomas Malinda Musau - 10,042 votes
- Titus Kyalo Kativini, - 1,024 votes
- The total number of votes cast -40,646 votes
- The total number valid votes cast - 40,225 votes
- The total number of rejected votes was - 411 votes
- Total number of spoilt votes - 63 votes

### Submissions

37. Following consent of all the parties, this election petition was disposed of by way of written submissions.
38. **Mr. Laichena Mugambi** learned counsel for the petitioners submitted that the results as declared

- were not accurate. There were alterations in forms 35 and 36. The election process was not carried out in accordance with the Law. Errors admitted by the 2<sup>nd</sup> Respondent and attributed to fatigue in their view were deliberate. Failure to correct them interfered with the outcome of the results that were tailored to favour the 3<sup>rd</sup> Respondent.
39. Further, he submitted that forms 35 filed were not signed by agents by virtue of having been chased away by the Presiding Officers. The said conduct rendered the elections not transparent. The action of the presiding officer that included denial of agents' entry to various polling stations also rendered elections inaccurate. There was lack of efficiency as most of the forms 35 scrutinised were totally different from the ones supplied to the court.
  40. He stated that assistance of voters was done in contravention of the law and was meant to deny the constituents a fair and free election.
  41. The presiding officers having failed to make written remarks on forms 35, it was not possible for the court to tell which ballot papers had indeed been used in the process.
  42. Further, that failure to call the Chief Agent of the 3<sup>rd</sup> respondent as a witness to deny having connected a laptop to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' systems left the evidence uncontroverted. Allowing use of the gadget was in contravention of the law.
  43. He also submitted that voting at most polling stations started late and ended at 5.00pm. A fact that rendered the process a nullity as it was done in breach of the rules.
  44. He summed up by stating that a declaration of results having been made in favour of the 3<sup>rd</sup> Respondent following an election process that was in breach of Election Laws and Regulations; such a declaration was unlawful.
  45. Learned counsel, **Mr. Njoroge Nani Mungai** for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that the burden of proof lay with the petitioners who failed to discharge their duty. They failed to prove that the alleged non-compliance with the law affected the outcome of the elections; minor errors in the tallying process which were not deliberate or intended to fraudulently distort the elections were not material. He called upon the court to take judicial notice of the complexity of the elections held on 4<sup>th</sup> March, 2013 and general challenges with technology as matters of local notoriety.
  46. With regard to scrutiny of votes he submitted that the report showed some discrepancies which were minimal and not material to the outcome of results. The majority of discrepancies had been admitted in the response to the petition and explained satisfactorily. He stated that the discrepancies were not systematic or meant to target a particular candidate.
  47. With regard to alleged exclusion of agents from polling stations, he submitted that properly accredited agents of political parties were not denied access to the polling station. He however, alluded to an anomaly at polling station No. 48 where the presiding officer and agents omitted to sign forms 35 but argued that the results tallied with actual votes in form 36.
  48. At Katwanyaa polling station Code No. 34, where the two out of seven agents that did not sign form 35 but the presiding officer omitted to give reason for failure to sign on the copy that he retained, he submitted that form 35 in the ballot box indicated all agents signed and the errors were not designed to disenfranchise the petitioners.
  49. He submitted further that ejection of **Hon. Moffat Maitha** from the tallying centre by the police was justified as he was drunk and unruly.
  50. On the issue of assistance of voters, he submitted that the motive of assistance given was not supposed to be recorded on form 35 but on the marked register. The allegation that was generalised however did not prove any infringement of the law.
  51. He dismissed the allegation about a person connecting his laptop to the 1<sup>st</sup> respondent's system at the tallying centre as being baseless without any foundation as the counting was done manually at the polling station where results were announced. He also called upon the court to dismiss an allegation that the Returning Officer used the vehicle of a candidate as baseless.
  52. He summed his submissions by stating that no recount could have been done at the tallying centre for it would have been against the law, and that the court had no basis in law to compare results of this election with those of other elections. This court had no jurisdiction to reconcile presidential elections with those of other elections.
  53. **Mr. Kiugu** Learned Counsel for the 3<sup>rd</sup> Respondent submitted that the petitioners did not aver that their rights to be registered as voters were breached which was evidence that the registration

- process of voters in Matungulu Constituency was credible, free and fair; they neither proved that the respondent failed to comply with the law nor that failure of compliance affected the validity of the elections.
54. He stated that in Criminal elections charges and offences such as bribery, intimidation and violence as pleaded in the petition herein, the standard of proof had to be beyond reasonable doubt, but called upon this court to uphold the standard of proof set by the Supreme Court Decision in the case of **Raila Odinga vs Uhuru Kenyatta & others- Petition No. 5 of 2013** which was proof beyond a balance of probabilities.
55. He submitted further that the petitioners failed to point out in their pleadings what law and regulations the 3<sup>rd</sup> Respondent had contravened.
56. On the issue of voters being assisted to vote, the polling station alluded to No. 40 Kyekoyo SA Primary School where more than 80 voters were allegedly assisted to vote without an input of agents yet there was no evidence on voters being assisted to vote.
57. Regarding errors in some polling stations, he submitted that there were variations noted during scrutiny and recount of votes. The variation that he referred to as minimal as opposed to major, were spread out among candidates in his view, such that the petitioners had failed to show how the variations affected their chances of winning the elections. He argued that elections could only be invalidated if irregularities were major.
58. With regard to the 3<sup>rd</sup> Respondent's Chief Agent's laptop computer connected to IEBC system, he submitted that the petitioners failed to tender photographic proof of the same. Besides, the 2<sup>nd</sup> Respondent had denied any such connection to their systems having taken place. He stated further that tallying and counting of votes were correct and conducted in the presence of all agents. On the issue of forceful removal of **Hon. Moffat Maitha** from the polling station he stated that no evidence of the incident had been reported and recorded as OB No. 20/6/2013 was adduced.
59. On the issue of polling stations opening late he submitted that the 3<sup>rd</sup> respondent confirmed that though stations opened at 6.00am, voting started a little bit late due to failure of the BVR machine but all voters on the queue did cast their votes. No evidence of intimidation and threat of violence by the 2<sup>nd</sup> Respondent was adduced. He stated that there was no proof of ownership of motor vehicle registration no. KBG 541 L by the 3<sup>rd</sup> respondent.
60. Further, he submitted that failure by the petitioners to name persons who were allegedly bribed; report the matter to the police was evidence of no such occurrence.
61. He urged the court to find that the 3<sup>rd</sup> Respondent was validly elected as Member of the National Assembly, Matungulu Constituency.
62. When the matter came up for hearing on the 2<sup>nd</sup> May, 2013, parties agreed on three issues for determination, they included:-
- i. Whether the election of the Member of National Assembly for Matungulu Constituency held on 4<sup>th</sup> March, 2013 was credible, free and fair under the circumstances.
  - ii. Whether the 3<sup>rd</sup> Respondent was validly elected as the member of the National Assembly for Matungulu Constituency in the Election held on the 4<sup>th</sup> March, 2013.
  - iii. What other remedies, if any should this Honourable Court grant arising from the reliefs pleaded by the parties herein in the petition and the respondent's response.
63. With regard to the 1<sup>st</sup> issue, the question to be answered will be what is a free and fair election? A credible, free and fair election would depend on whether it was a representation of the will of people. The will of people would be established if people had confidence in the outcome of the elections. The outcome of an election ought to be as a result of the due process of the law. Where the law was indeed flawed as suggested in the instant petition, the question would be whether it was fatal such that it could not be envisaged to have been free and fair.
64. The Ugandan Supreme Court sought to define the meaning of free and fair elections in the case of **Rtd Col Dr. Kizza Besigye versus Electoral Commission, Yoweri Kaguta Museveni (Election Petition No. 1 of 2006)** it stated thus;

***“To ensure that elections are free and fair there should be sufficient time***

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

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

65. The burden of proof in the election petition lies with the petitioners. In the case of *Raila Odinga and Others versus Independent Electoral and Boundaries Commission and Others–Petition No. 5 of 2013 the supreme Court Judges held thus;-*

*“A petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. Threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt..”*

66. The Petitioners herein have not faulted the 2<sup>nd</sup> Respondent for failure to give them sufficient time for nomination and campaigns. Due process in respect of those two (2) stages of the electoral process was therefore democratic. The grievance is that the voting process was marred with malpractices and the counting of votes was not done according to the law. They claim that form 36 had mistakes and was tampered with and tailored to favour the 3<sup>rd</sup> Respondent while some forms 35 had errors.

67. A scrutiny of votes as provided for under Rule 33(4) of the Elections (Parliamentary and County Election) Petition Rules, 2013 (Rules) was carried out under the supervision of the Deputy Registrar. The scrutinised documents included;-

- Packets of counterfoil (*both used and un used*)
- Copies of the results of each polling station in which the results were in dispute.
- Packets of spoilt papers
- Packets of rejected ballot papers.

68. The only document that was not scrutinized was the register which could not be located in the ballot boxes under examination. It was alleged that the register had been placed in the presidential ballot boxes for the constituency. This court had no power to have it opened.

69. Comparisons were made against results in forms 35, 36 and recount process. The results and the variations in the recount were also recorded. However, during the recount there were various contentious issues on a number of ballot papers which parties disputed and could not agree whether they were valid votes or not. The same was referred to the court for verification. These were from the following polling stations.

- i. Code 015 – Tala Girls Primary School. The 1<sup>st</sup> Respondent had rejected 8 ballot papers. Counsels by consent intimated they should not have been rejected. This court confirmed that the ballot papers were rejected irregularly. As such **John Nthuli Makenzi**, the 3<sup>rd</sup> Petitioner had 3 more votes. **Stephen Mutinda Mule** the 3<sup>rd</sup> Respondent had 4 more votes and **Stephen Ndambuki**, the 2<sup>nd</sup> Petitioner had one (1) more vote.

- ii. Code 025 –Kithuluni Primary School. The 1<sup>st</sup> Respondent rejected 8 ballot papers. By consent of all advocates endorsed by the court, they were irregularly rejected. As such **Mr. Moffat Maitha** garnered 6 more votes while **Stephen Ndambuki** garnered 2 more votes.
- iii. Code 005, Tala Township stream 3 – there were 2 disputed votes. The two votes should not have been rejected therefore **Stephen Mutinda Mule** had 2 more votes in his favour.
- iv. Code 020 – Kisitimani Primary School, the one (1) vote rejected irregularly was in favour of **Hon. Moffat Maitha**.
- v. Code 002- Tala Boys stream 3 – 3 votes that were in favour of **Thomas Malinda Musau**, the 1<sup>st</sup> Petitioner were irregularly rejected.
- vi. Code 033 – Muthini Trading Centre Polling Station, one(1) ballot paper was properly rejected
- vii. Code 090 –Syumuni Primary School Polling Station – the one (1) ballot paper was properly rejected.
- viii. Code 082 - -Mukengesya Primary School, stream 1 – 1 ballot paper was properly rejected.
- ix. Code 069, Kisukioni Primary School, Stream 1 – 1 ballot paper was irregularly rejected. It had been cast in favour of **Thomas Malinda**, the 1<sup>st</sup> Petitioner.

70. In view of the foregoing the final results of each candidate after the recount as against the declared results were as follows ;-

- John Nthuli Makenzi -4,366 votes
- Moffat Muia Maitha -8,767 votes
- Obadiah Mutisya - 187 votes
- Stephen Mutinda Mule - 12,302 votes
- Stephen Ndambuki Muli -3,537 votes
- Thomas Malinda Musau -10,042 votes
- Titus Kyalo Kativini -1,024 votes
- The total number of votes cast -40,225 votes
- The total number of valid votes cast -40,248 votes
- Total number of rejected votes -411 votes
- Total number of spoilt votes - 63 votes

The results as declared by IEBC were as follows;-

- John Nthuli Makenzi -4,377 votes
  
- Moffat Muia Maitha -8,775 votes
- Obadiah Mutisya - 187 votes
- Stephen Mutinda Mule - 12,297 votes
- Stephen Ndambuki Muli -3,494 votes
- Thomas Malinda Musau - 9,940 votes
- Titus Kyalo Kativini - 1017 votes
- Total number of votes case - 40,576 votes
- The total number of votes cast -40,106 votes
- The total number of rejected votes - 462 votes
- The difference between the two(2) results for each candidate are as follows;-
  - John Nthuli Makenzi - 8 votes
  - Moffat Muia Maitha - 1 vote
  - Obadiah Mutisya - 0 votes
  - Stephen Mutinda Mule - 11 votes
  - Stephen Ndambuki Muli - 4 votes
  - Thomas Malinda Musau - 106 votes
  - Titus Kyalo Kativini - 7 votes

A reconciliation of the same would result into the 3<sup>rd</sup> Respondent still emerging as the winner, by

an additional 11 votes. The recount therefore still verifies that the 3<sup>rd</sup> Respondent was victorious in the Matungulu Elections with the runners up being **Thomas Malinda Musau**. The difference between them being some **2,262 votes**

72. This court cannot however, be oblivious of the fact that there were discrepancies that were noted during the scrutiny and recount. These included;-

73. There were no counterfoils found in the ballot boxes for the following polling stations.

- Code 007 - Kyamulande Primary School.
- Code 019 -Uamani Primary School
- Code 030 - Kiboko Secondary School.
- Code 068 -Kwatembe Primary School Stream 2
- Code 078 -Kisukioni Secondary School
- Code 086 -Tala High School
- Code 096 - Kasiuni Primary School Stream 1
- Code 096 -Kasiuni Primary School- stream 1
- Code 002 -Tala Boys Stream 1

I will come back to the counterfoil issue at a later stage.

74. The other discrepancies according to the report included defects in forms 35 that were signed. In nineteen (19) polling stations the forms 35 were signed but did not have the IEBC stamp impression. These were as follows;-

- i. Code 016- Mukala Primary School
- ii. Code 017 –Donyo Ol Sabuk Primary School
- iii. Code 028 – Donyo Coffee Primary School
- iv. Code 033 –Muthini Trading Centre
- v. Code 039 –Kinyui S.A. Primary School
- vi. Code 040 –Kyekoyo Primary School
- vii. Code 042 –Miseleni S.A. Nursery School
- viii. Code 049 – Kinyui Girls Secondary School
- ix. Code 051 –Muumoni Primary School
- x. Code 061 – Utooni Primary School
- xi. Code 068 Stream 2 –Kwatombe Primary School
- xii. Code 072 – Steam 2 – Nguluni Township Primary School.
- xiii. Code 076 - Kaumoni S.A Nursery
- xiv. Code 081 –Mbiiioni Primary School
- xv. Code 085 – Wendano Nursery
- xvi. Code 093 – Syumbuni Primary School.
- xvii. Code 094- Ngalalya Primary School.
- xviii. Code 100 –Kwale youth Polytechnic
- xix. Code 087 -Ndulya Primary School.

In other three polling stations, the forms 35 were not signed

by any agents. These were;-

- i. Code 002 – Stream 4 -Tala Boys. The form was not signed by any agent.
- ii. Code 079 – Koma Hill Kiamba Primary School. The form was only signed by the Presiding Officer but no agent.
- iii. Code 071- Kantafu Primary School-no agent signed. The form in all the 3 instances, no reasons were advanced as to why any of the agents refused or neglected to sign.

In the other eleven (11) polling stations, the forms 35 were not signed by some agents and no IEBC explanation was given by the Presiding Officers. These were as follows:-

- i. Code 013 – Sengani Girls – it was signed by ten agents, one agent did not sign and no reason was given. The name of another agent, one **Rosemary Malandi** was cancelled and no explanation was given as against such cancellation.
- ii. Code 015 – Tala Girls Primary- it was signed by 12 agents, but one Margaret Nthenya did not sign and no reason was given.
- iii. Code 034–Stream 2– Katwanyaa Primary School. Four agents signed, 3 other agents whose names were written were simply marked as absent and unsigned.
- iv. Code 047 – Kithayoni Primary School- 21 agents signed except 1 agent who did not. No reason was furnished.
- v. Code 048 – Kambuso Primary School. It was signed by 76 Presiding Officers only. No reason given why the other parties i.e agents and Deputy Presiding Officers did not sign.
- vi. Code 069 – Kisukioni Primary school- 6 agents signed. However, the Deputy Presiding Officer and 3 agents did not sign and no reasons were given for their failure/refusal to sign.
- vii. Code 077 – Kalandini Secondary- 12 agents signed, but 8 agents did not sign. No reasons were given on the form.
- viii. Code 089 – Stream 2 – Kyeleni Primary School. 7 agents signed but 2 Agents wrote their names but did not sign. No reasons given as to why they did not sign.
- ix. Code 084 –Joska A Trading Centre – it was signed by 6 agents, but 1 agent did not sign. The reason given on the form is that she disappeared.
- x. Code 075 –Nguluni AIC Primary School. It was signed by 12 agents. 4 agents did not sign. The presiding officer remarked that they left before closing of the exercise.
- xi. Code 038 – Uamani Primary School. 5 agents signed. 1 agent, **Daniel Mbaka** did not sign. The reason given on the form is that he left before counting was over.
- xii. Code 007 – Kyamulendu Primary School. Even though the form was signed by 9 agents and the Deputy Presiding Officer, there was no indication of votes spoiled, cast, rejected or disputed on the said form. The presiding officer only indicated the number of registered voters.

75. This brings us to the significance of Form 35 in an election. Regulation 79 (2) (b) of the Elections (General) Regulations, 2012 (hereinafter regulations) provides as follows ;-

***“The Presiding Officer, the candidates or agents shall sign the declaration in respect of the elections...for purposes of sub Regulation (1), the declaration form–(b) National Assembly...shall be in form 35 set out in the schedule”.***

76. Form 35 is essential as it is the official document that the presiding officer, the candidates or agents sign as the declaration in respect of the National Assembly winner amongst others. The form 35 indicates the number of registered votes in a particular polling station, the number of candidates and the votes that each secured. A reading of the regulations indicates that it is a mandatory requirement for the parties mentioned to append their signatures. However, that scope of obligation is limited by regulation 79(6) (7) of the Regulations which provides as follows:-

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

77. In view of the foregoing though it was crucial for the agents/candidates to sign the form 35, failure to do so does not necessarily nullify the elections.

78. In regard to the issue of intimidation, bribery and violence during the election, it must be noted that the entire election should have an atmosphere free of intimidation, bribery, violence, coercion or anything entered to subvert the will of people.

79. The Constitution of Kenya, 2010, sets out principles to be adhered to in an electoral process. Article 81 (e) (iii) of the Constitution states thus ;

***“The electoral system shall comply with the following principles. Free from violence, intimidation, improper influence or corruption...”***

80. The petitioners’ witnesses deposed that they were intimidated when they complained following illegalities at the tallying centre. **Paul Mwanzia** stated in paragraph 4 of his affidavit as follows;-

***“On the 4<sup>th</sup> March, 2013 I was at tallying centre and witnessed all that went on in the centre where we experienced a lot of intimidation from the Returning Officer making the process questionable”.***

**Eliud Mwenda** stated at paragraph 3 thus;-

***“...at the tallying centre we were thrown out and even mis-handled by the police officers who were ordered by the returning officer to throw us out.***

81. **Joseph Musembi Kisili** said;-

***“...the Presiding Officer incharge ordered some agents including me to be forced out of the polling centre during counting of votes.”***

The 2<sup>nd</sup> Respondent denied having condoned any intimidation of any kind at the tallying centre as alleged. In fact, he denied having received any report of that nature.

82. It is admitted that Hon. **Moffat Maitha** was excluded from the tallying centre. This is confirmed by the 2<sup>nd</sup> Respondents’ witness **Paul Makau Kumuti** and the 3<sup>rd</sup> Respondent’s witness **Nicholas Muli Mutua**. The petitioners stated that **Hon. Moffat Maitha** was assaulted and forcefully excluded from the tallying centre because he protested against use of a private laptop computer by an agent of the 3<sup>rd</sup> Respondent which was connected to the 1<sup>st</sup> Respondent’s system. He had also allegedly demanded a recount of the votes owing to discrepancies in forms 33 and 35. He purportedly reported the assault to Kangundo Police Station and the report was recorded in the occurrence Book No. 20/16/03/2013.

83. The Respondents on the other hand argued that the said **Hon. Moffat Maitha** was removed from the tallying Centre because he went there while drunk and was chaotic. His aim was to cause chaos, to disrupt the tallying process. This had to be averted.

84. The Petitioners had a duty of proving the allegations. It was imperative for them to tender proof of the report of assault made at the police station. This was not done. They also stated that **Maitha** was only removed from the polling centre for security purposes.

85. In the case quoted above **Raila Odinga & others versus IEBC and others- Petition No. 5 of 2013**;-

It was indeed stated that:-

***“...optimally in conditions of order, peace and security; and it is the first place the responsibility of the machinery of IEBC to ensure such conditions prevail...”***

Therefore if indeed he was ordered out for purposes of ensuring that peace prevailed that was in accordance with the law.

86. With regard to the subject of bribery, the petitioners relied on the evidence of their witness, **Paul Mutua Makenzi** who deposed that the Chief Agent of Wiper Democratic Party Associated with the 3<sup>rd</sup> respondent went round knocking on people’s doors and was giving them tokens of

between Kshs. 500/= and Kshs.1000/= to vote for the 3<sup>rd</sup> respondent. He went to his house on knowing his intentions; he declined to accept and asked him to leave.

87.**Halsbury's Laws of England, 4<sup>th</sup> edition Vol. 15 on Elections**, gives an insight on the nature of evidence required to prove bribery, under paragraph 695 on proof of bribery, it is stated;-

***“Due to proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be is sufficiently to invalidate the election, nor can they allow any excuse, whatever the circumstances may be, such as they can allow on certain conditions in cases of treating or undue influence by agents. For this reasons , clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. A corrupt motive must in all case be strictly proved. For this purpose a corrupt motive in the mind....”***

88.The witness made a vague assertion referring to a purported Chief Agent of wiper. It was not enough to simply assert, he should have tendered concrete evidence of what made him associate the person with Wiper Democratic Party. There was also need for confirmation of what allegedly transpired by another party. Further, in his evidence he says **“after realizing their intentions I asked them out of my house.”** The question to be answered is; how did he realise their intention. He should have stated what exactly they did to make him imagine they intended to bribe him.

89.It is also important to note that he did not report the mater to IEBC as required by the second schedule proviso (6) (h) of the Elections Act which specifically provides that, any misconduct can and should be reported by any person to the Electoral Code of Conduct Enforcement Committee; which committee will liaise with government security agencies in the constituency and report suspected election malpractices.

90.Failure therefore to report the alleged bribery, intimidation and violence of voters/agents cannot be remedied by this court. Similarly, it cannot be upheld. Consequently, I find the allegations baseless.

91. There was an allegation that the Chief Agent of the 3<sup>rd</sup> Respondent connected his laptop to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' systems. This allegation was denied by the respondents. The petitioners had the duty of proving the allegation. They tendered no iota of evidence to establish the allegation. In any case it is common knowledge that what was used was the manual register and not the Biometric voter technology.

92.It was alleged that the Returning Officer was carried in motor vehicle registration No. KBG 541L purported to belong to the 3<sup>rd</sup> Respondent. The respondents denied the allegation. Other than an allegation by the petitioners' witness, **Eliud Mwenda**, the Petitioners had a duty of proving that indeed the 3<sup>rd</sup> respondent owned the motor vehicle. A copy of records from the registrar of motor vehicles would have been sufficient proof. This was not done.

93.The election procedures used should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. With regard to this issue, the petitioners pleaded in paragraph 11 of the petition that at polling station Code number 40 Kyekoyo SA Primary School, more than eight (80) voters were assisted to vote out of the turnout of 352 voters while agents were not involved in the process. None of the petitioners witnesses who deposed affidavits alluded to this fact. **Eliud Mwenda** the petitioners' witness is the only one who made reference to voters being assisted to vote. He stated that there was a high rate of voters who were assisted by the Presiding Officer. Agents were denied an opportunity of seeing what kind of assistance he offered. This was however, at Syombuni Primary School.

94.The third respondent's witness who was at Kyekoyo S.A Primary School, **Christopher Nzivo** deposed that all old people who required assistance to vote were accorded the same in the presence of agents and there was no complaint whatsoever.

95.Be as it may, on the issue of the Presiding Officer, assisting voters, Regulation 72(1) of the Regulations provides that;-

***“On application of a voter who is, by reason of disability or being unable to***

***read or write, and therefore unable to vote in the manner prescribed in these regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voters own free choice, and who shall not be a candidate or agent.(emphasis mine). The Regulation further provides that, where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of agents. (see Regulation 72(2) of the Regulations)”***

96. Without evidence of the voters who were assisted this court is not able to tell who the said voters were. If the voters did not have people to assist them then the presiding officer was obligated to assist them in the presence of agents. The evidence relied on by the petitioners, of **Eliud Mwenda** having alluded to a totally different polling station from the one pleaded in the petition and the 3<sup>rd</sup> respondent's witness who was at the station must be believed when he says the Presiding Officer assisted them in the presence of agents.

97. I do agree with the 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel that the requirement under the law is that after the presiding officer assisted the elderly to vote, he was required to enter that information in the register and not form 35 as submitted by the petitioners' counsel. This is clearly provided under Regulation 72(6) of the Regulations that states that:-

***“Where a Presiding Officer grants the request of a voter under this regulation, the Presiding Officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.”***

98. The register was one of the documents that ought to have been scrutinized. It would have been imperative for this court to note the kind of remarks the Presiding Officer made in the register. This was the only way the court would have been informed as to what transpired.

99. It was alleged and not verified that the register was in the Presidential Ballot boxes. Due to lack of jurisdiction on the part of this court it could not be accessed.

100. It is therefore a recommendation of this court that the law be amended whereby the copy of the register should be kept in a separate ballot box or alternatively each election should have its own copy of the register.

101. After the recount and scrutiny of votes, it was established that indeed there were errors and irregularities in the tallying process.

102. There were allegations that polling stations were opened late and closed early. The 3<sup>rd</sup> Respondent's witnesses alleged that the polling stations were opened at 6.00am and voting started a bit late due to failure of the Biometric Voter Technology. The petitioners' witnesses however alleged that the stations were opened late and closed early and that voters on the queue were sent away before they could vote. These allegations were not proved by the petitioners. None of the witnesses deposed affidavits to indicate that they did not vote due to closure of the polling stations. The supporting affidavit to the petition also did not give detailed particulars of denied voting. The allegations were not proved to the required standard.

103. On the issue of comparison of the National Assembly results with those of the Presidential results, this court cannot entertain this argument for the simple reason that the scrutiny and recount exercise was carried out for the National Assembly ballot boxes. As correctly submitted by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:-

***“To undertake any meaningful comparison the court would require undertaking a detailed scrutiny of each and every ballot box for each and every election.”***

Suffice to add that this court lacks jurisdiction to reconcile the Presidential Elections with those of the National Assembly.

104. It has been alleged that the petitioners' agents were not allowed to access the polling stations and/or tallying centre. Some of the petitioners' witnesses stated that they were at the polling

stations and tallying centres. A scrutiny of most forms 35 is also proof that they were signed by some agents. The petitioners had a duty of proving to the required standard that their agents were accredited by the IEBC and their political parties as such but were excluded from the polling station and tallying centre. This was not done. Consequently, the allegation was not proved to the required standard.

105. The 2<sup>nd</sup> issue we therefore have to determine is whether the 3<sup>rd</sup> Respondent was validly elected as the member of the National Assembly for Matungulu Constituency in the elections held on the 4<sup>th</sup> March, 2013.

106. Whether or not the 3<sup>rd</sup> respondent was validly elected depends on whether the irregularities that have been found glaring affects the outcome of elections.

107. As aforefound, it is not in dispute that even after the recount, the 3<sup>rd</sup> respondent remained victorious in the elections. However, revisiting the issue of counterfoils, it was noted that there were ballot papers in respect of eight (8) polling stations which were not validated by counterfoils. Valid votes cast in those stations were as follows:-

- Code 002 – 557
- Code 007 – 503
- Code 019 – 442
- Code 030 – 104
- Code 068 – 400
- Code 078 – 440
- Code 086 – 91
- Code -96 – 143
- Total valid votes cast were 2,680. Total votes cast in favour of the 3<sup>rd</sup> Respondent were 897.

108. It is a requirement for a Presiding Officer to seal counterfoils of the used ballot papers in a tamper proof envelope for purposes of being delivered to the Returning Officer (*see Regulations 73(3) (4) of the Regulations*).

109. A counterfoil may be defined as the part of a document retained by the issuer as a record of a transaction. It is indeed an important document.

110. In the case of *Manson Onyongo Nyamweya versus James Omingo Magara and 2 Others [2009] eKLR, D Musinga J. (as he then was)* held that :-

***“If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voters register. Without the two there is no telling how it found it’s way in the ballot boxes”***

111. Lack of the counterfoils is therefore grave as the ballot papers in the ballot boxes cannot be ascertained and verified if indeed they were duly cast as votes or not. Missing counterfoils would basically mean that ballot papers in ballot boxes were not the ones used by the voters.

112. It is conceded by the respondents’ counsels that some forms 35 were missing in respect of some polling stations namely:-

- Code 006 – Kyaume Primary School
- Code 040 – Kyekoyo S.A. Primary School
- Code 041 – Katheka Primary School
- Code 056 – Komo Ranch Primary School
- Code 072 – Nguluni Primary School -Stream 2

113. Looking at Form 36 results in respect of the said polling stations were as follows, 521, 353, 450, 403 and 361 respectively being valid votes. This was a total of 2,088 votes. A Presiding Officer is required to deliver form 35 to the Returning Officer. The information on the said form is what

the Returning Officer declares as the results. He then delivers the original to the Commission. ( See Regulation 81 and 83 of the Regulations). These forms being non-existent, the question begging is where the Returning Officer got the information that culminated into declaration of the results in respect of the said polling stations.

114.The report filed by the Deputy Registrar, indicate some forms were not stamped. These included the following;- **Polling stations Valid votes**

- Code 016 -Mukalwa Primary School 394
- Code 017 Stream 1 Donyo Ol Sabuk 518

Stream 2 Donyo Ol Sabuk 532

Stream 3 Donyo Ol Sabuk 515

- Code 033-Muthini Trading Centre 136
- Code 039- Kinyui S.A. Primary School 653
- Code 040-Kyekoyo Primary School 353
- Code 042- Miseleni S.A. Primary School 237
- Code 051- Muumoni Primary School 251
- Code 061- Utooni Primary School 193
- Code 068- Stream 2 Kwatombe

Primary School 404

- Code 072 -Stream 2-Nguluni Township

Primary School 382

- Code 076 –Kaumoni S.A Nursery 326
- Code 081-Mbiioni Primary School 78
- Code 085- Wendano Nursery 134
- Code 093- Syumbuni Primary School 297
- Code 094-Ngalalya Primary School 412
- Code 100-Kwale Youth Polytechnic 274
- Code 087 – Ndulya Primary School 276

Total valid votes cast were indicated as 6,601.

Total valid votes in favour of the 3<sup>rd</sup> respondent were

1,741 votes.

115.This implies that following the irregularity identified during scrutiny, the 3<sup>rd</sup> Respondent had a total of 2638 votes. Having won by a margin of 2262. The difference was 376 votes.

116.The Presiding Officer is required to put form 35 into the ballot box seal and take it to the Returning Officer. The form completed, must be signed and dated. It is not specifically stated that the form should be stamped. However, a perusal of most forms supplied to this court show that they bear stamp impressions of IEBC. The question to be answered is; what is the significance of the stamp impression? A stamp impression on a document would be used to authenticate it. It would be interpreted that forms without stamp impression of the IEBC lacked approval from the Commission. Without the stamp impression its validity would be questioned.

117.Other discrepancies on the forms 35 were minor and could have resulted from fatigue due to the circumstances that prevailed at that time and could be overlooked, but the ballots that had no counterfoils and others that should indeed have been rejected having made their way into ballot

boxes cannot be dismissed as non-consequential to the outcome of the elections.  
118. In the case of *Morgan & Others versus Simpson & another* [1974] 3 ALL E.R. 722 the Court of Appeal laid down certain principles in relation to Election Petitions. They held thus.

***“An Election Court was required to declare an election invalid;***

- a. ***If the irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to election.***
- b. ***If the irregularities had affected the result.***

***Accordingly, where breaches of the election rules although trivial, had affected the result that by itself was enough to compel the court to declare the election void, even though it had been conducted substantially in accordance with the law as elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated – irrespective of whether or not the result of election had been affected”.***

119. It is apparent that the irregularities pointed out which occurred in the process were due to inefficiency and lack of accountability which was contrary to the provisions of Articles 81 (e) of the Constitution. The flaw was fatal to credible elections. This indeed affected the outcome.

120. In the result the 3<sup>rd</sup> respondent cannot be said to have been validly elected as the Member of Parliament, Matungulu Constituency. It calls for nullification of elections to give the people of Matungulu Constituency an opportunity of exercising their democratic right that will be representative of their will. I therefore nullify the Elections held. Fresh Elections shall be held.

121. A certificate shall issue forthwith pursuant to the provisions of Section 86(1) of the Elections Act.

122. It is evident that irregularities that have led to nullification of the elections were committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In the premises, costs to the Petitioners will be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

123. I wish to commend the Counsel for the Petitioners **Mr. Laichena**, The counsels for the Respondents **Mr. Mungai** and **Mr Kiugu** for their cooperation and due diligence that eased the job of this court.

I would also wish to appreciate our Deputy Registrar **Ms Rose Makungu** for supervising the recount and scrutiny exercise, my Legal Researcher **Hannah Githuku** for her relentless research, the Secretary **Mary Sila** for her unending commitment in preparation of all the Rulings and this Judgment and finally, **Collins Muthiani** my Clerk for his support.

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> day of JULY, 2013.**

**L.N. MUTENDE**

**JUDGE**

**In presence of:**

Mr. Laichena for the Petitioners

Mr. Mungai for the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents

Mr. Kiugu assisted by Miss Kioko for the 3<sup>rd</sup> Respondents

CC- Collins

Hannah -Legal Researcher

**L.N. MUTENDE**

**JUDGE**