REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Election Petition No.2 Of 2013

IN THE MATTER OF THE ELECTIONS ACT NO.24 OF 2011 AND THE REGULATIONS

AND

IN THE MATTER OF THE ELECTION FOR MEMBER OF THE NATIONAL ASSEMBLY FOR WEBUYE EAST CONSTITUENCY

AND

IN THE MATTER OF AN ELECTION BY

MOSES WANJALA LUKOYE…......................... PETITIONER

Versus

BERNARD ALFRED WEKESA SAMBU…..... 1ST RESPONDENT

JOYCE WAMALWA

RETURNING OFFICER,

WEBUYE EAST CONSTITUENCY ……...... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC)…....... 3RD RESPONDENT

THE FUND MANAGER,

WEBUYE CONSTITUENCY

DEVELOPMENT FUND…………………...... 4TH RESPONDENT

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JUDGMENT

INTRODUCTION

Unique Constitution, Unique Elections

[1] On 4th of March, 2013, the people of Kenya went to the Polls, a general election, to elect their representatives in the various elective positions under a new Constitution. That election was quite unique for; a) it was the first general election to be held under the Constitution of Kenya, 2010; and b) six elections were held in a single day.

[2] All the previous general elections were also held under the Constitution in force then. But there is a marked difference between the Constitution of Kenya, 2010 and the previous ones, which was subtly captured in the magnificent words of J.B Ojwang J (as he was then) in **LUKA KITUMBI & EIGHT OTHERS V. COMMISSIONER OF MINES AND GEOLOGY & ANOTHER**, **MOMBASA HCCC NO. 190 OF 2010,** that:

> *"…the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010."*

[3] That uniqueness of the Constitution of Kenya, 2010, makes the 4th March, 2013 elections unique. Armoured with the Constitution, renewed hope and self-awareness as a people, the citizens of Kenya were eager to express their ultimate sovereign power by electing their leaders in such a defining constitutional dispensation. They were already confident that sufficient quality safeguards had been enacted in, and credible institutions to conduct the elections had been established under the Constitution, thus guaranteeing free, fair and verifiable election results.

Access to Justice: Election Disputes

[4] But, like all political elections anywhere in the world, the elections of 4th March, 2013 were seen by some people to have had flaws. Some contestants or citizens felt those electoral flaws needed scrutiny through the judicial process. The aggrieved parties who were vigilant to test the integrity of those elections came to court in exercise of the right to access to justice-a right that is the enabler of public vindication of actions taken, processes used in, and decisions made on public matters by state organs. And, invariably, this petition is one of the efforts in the exercise of the right to access to justice to question not only the election of the 1st Respondent but also the integrity of the electoral process employed in the elections held on 4th March, 2013 by Independent Electoral and Boundaries Commission (hereafter IEBC).

PETITIONER'S GRAVAMEN

The petition

[5] This petition was filed on **3/4/2013** by Moses Wanjala Lukoye through Sifuna & Sifuna Advocates. The Petitioner paid court fees of Ksh.30, 805/= vide receipt no.2421917 of 3/4/2013 and made a deposit of Ksh.500, 000/= as security for costs as required by the law.

[6] The specific prayers sought in the petition are;

a) An examination of the voters registers used in all polling stations in Webuye

East Constituency in the General Election held on 4th March 2013 to determine the exact number of voters who cast their votes.

b) A scrutiny of the ballot boxes with their seals and votes cast in the General Election of 4th march 2013 for the seat of Member of the National Assembly for Webuye East Constituency be done as well as a recount of the said votes.

c) The Election of member of the National Assembly for Webuye East Constituency held on 4th March 2013 was void.

d) An order nullifying the Election of the 1st Respondent herein BENARD ALFRED WEKESA SAMBU as a member of the national Assembly for Webuye East Constituency.

e) A finding that the 1st Respondent Bernard Alfred Wekesa Sambu has in the General Election of 4th march 2013 committed election offences

f) A finding that the INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) the 3rd respondent herein and it's agents/servants among them the 2nd respondent, whose act in the course of-duty it is vicariously liable for, conducted the election and indeed the electoral process in Webuye East Constituency in a manner that was irregular, improper, reckless and contrary to the relevant electoral law and regulations.

g) An order that a fresh election for the seat of Member of the National Assembly for Webuye East Constituency be held.

h) The respondents be jointly and severally be liable to pay the Petitioner's costs of this petition.

I. Any other or further relief(s) as this Honourable court may deem fit to grant.

[7] The Petitioner’s gravamen is that the 1st Respondent was not validly elected as the Member of the National Assembly for Webuye-East Constituency during the general elections held on 4th March, 2013. The Petitioner made the following broad allegations in the petition and made averments in his Supporting Affidavit filed sworn on 2nd April, 2013. He also made allegations of malpractices against the 2nd, 3rd and 4th Respondents.

ALLEGATIONS AGAINST THE 1ST RESPONDENT

Bribery

[8] According to the Petitioner, the 1st Respondent by himself and/or through his agents bribed voters both before and on the voting day, for instance at Muji FYM Primary School Polling Station No.56, at Misikhu Girls' Boading Primary School Polling Station No.23. He also bribed Voters by delivering CDF (Constituency Development Fund) Cheques during the campaign period to Misemwa Secondary School Polling Station No.25., Friends Muji Secondary School. The issuance of the said CDF cheques to those schools and their personal delivery by the 1st

Respondent during the election campaign period was calculated to and did actually influence voters in the areas around the schools..

Transportation of voters

[9] The Petitioner made further allegations that the 1st Respondent by himself and/or through his agents transported voters to the Voter Registration Centres during Voter registration and on the voting day to the Polling Stations. That he used school buses in his election campaigns which are public resources.

Treating voters

[10] The 1st Respondent also treated and entertained voters by hosting them for a feast at his home in Misikhu in Webuye East Constituency both during the campaign period and soon after the results were announced by the returning Officer declaring him the winner.

Dual party membership

[11] The 1st Respondent, at the time he offered himself for election, was a member of two Political Parties namely, Orange Democratic Movement (ODM) and the United Democratic Forum (UDF), contrary to the law regarding elections.

Use of violence

[12] On the voting day, the 1st Respondent sponsored by himself and/or through his agents allowed, caused, and/or condoned his supporters to unleash violence on the voters during voting e.g. Wabukhonyi Primary School Polling station No.024.

ALLEGATIONS AGAINST THE 2ND AND 3RD RESPONDENTS

Irregular conduct of elections

[13] The Petitioner accused the 2nd and 3rd Respondents of conducting the elections and the Electoral process in a manner that was irregular, improper and reckless and which rendered the election for the election for Member of the National Assembly a Sham. He cited examples; that the 3rd Respondent cleared the 1st Respondent to contest in the said election on the ticket of United Democratic Forum (UDF) while he was still a member of another political party, namely the Orange Democratic Movement (ODM).

[14] The 3rd Respondent's agents/servants engaged in several electoral malpractices and prohibited acts and/or contravened the electoral law. For instance: Issuing two sets of ballot papers to a Voter at Wabukhonyi Primary School Polling (024) Stream 2; Issuing voters with un-stamped Ballot papers only to later declare them as rejected votes: Unduly and wilfully delaying of counting of votes; Wilfully failing to light lamps at some Polling Stations hence conducting the process in darkness; Preventing or failing to allow the agents of the candidates to witness the voting by voters who were being assisted by the IEBC election officials; Failing and/or neglecting to conspicuously display the ballot papers to the Agents during counting; Failing to allow agents to escort or accompany ballot boxes from the Polling Stations to the Constituency Tallying Centre; Failing to publicly display the results in some Polling stations; Declaring results on Form 35 which had not been signed by agents and posting non- existent and false results; posting conflicting figures of votes cast for the six different seats; After the counting, failing to seal some Ballot Boxes with the tamper proof seals; Failing to submit the original registers used in the election to the IEBC and instead placing them in ballot Boxes; using manual voting instead of Electronic voting despite having procured Biometric Voter Registration (BVR) for voter registration, prepared Electronic Voter Registers, mounted a Mock Voting exercise and trained

Election officials; the procured technology failed nonetheless.

Other malpractices

[15] The 3rd Respondent created streams which were contrary to the law as the lowest voting unit were the polling stations that were gazetted. Over-voting in some stations was witnessed. low:

ALLEGATIONS AGAINST 4TH RESPONDENT

Issuance of CDF cheques

[16] The 4th respondent as the FUND'S Bank Accounts processed CDF cheques when CDF activities had been frozen during the campaign period.

The election should be nullified

[17] For the reasons above the Petitioner asked the court to declare the election a sham; nullify the election and declare that the 1st Respondent was not validly elected as the Member of the National Assembly for the County of Bungoma. In his testimony he insisted that the he was a public-spirited person, a defender and enlightener of public right to vote. He was no-partisan in politics; he is neither a holder of any political office nor affiliated to any political party. His intention of filing the petition was to vindicate public rights to a free and fair election. He did not file the petition in collusion with any other person. He called witnesses to support his claims for the nullification of the election of the 1st Respondent as the Member of the National Assembly for Webuye-East Constituency. The entire evidence adduced in respect of the various allegations will be evaluated later.

THE RESPONDENTS' CASES

Response by the 1st Respondent

[18] The 1st Respondent filed a response on 26th April, 2013 together with affidavits of persons they intended to call as witnesses. He generally and in seriatim traversed all the allegations contained in the petition and more specifically that:

a) He did not commit any election offence at any time;

b) He did not bribe any voter;

c) It was not his duty to give out CDF cheques neither did he personally deliver any such cheque to any person or entity;

d) He did not use any public resources for election campaign;

e) He did not treat or entertain any voter at his home during the campaign period or any other time;

f) He contested the elections in dispute under the UDF Party and he was not at the time a member of any other party;

g) The elections were conducted democratically and in a peaceful; and

h) He was validly elected.

[19] He reinforced in his evidence that he was elected validly and the petition should be dismissed with costs.

2nd and 3rd Respondents' response

[20] The 2nd and 3rd Respondents' filed their response on 26th April, 2013 and denied all the allegations made in the petition against them. More specifically they stated that:

a) They conducted the general elections including the one for Member of National Assembly for Webuye East Constituency and declared results in accordance with the law. The results were as follows;

Bernard Wekesa Sambu....................................16,692

Chebai Charles Wanjala..................................... 4,101

Job Wafula Chelongo.. 5,237

Martha Wekesa Chetekai.................................... 295

Masoni Isaac Wafula.. 490

Mike Makhakha Chetekei..................................... 411

Patrick Mabelle Fuchaka....................................... 135

b) The allegations of bribery made by the Petitioner were never reported to them and or they have never received any complaints of bribery from the Petitioner or any other person

c) They were not made aware of any of the use of CDF as a means to influence voters but in any event the operations of the CDF were never halted during election time and issuance of CDF cheques could not constitute a malpractice or an election offence

e) The allegations on transportation of voters and use of school buses are unsubstantiated

f) The pictures and the newspaper cutting annexed in the petition are inadmissible

g) The allegations of electoral offences need be proved beyond reasonable doubt

h) The allegations on the validity of nomination of the 1st Respondent to vie for election are a preserve for the IEBC under Article 88(4) of the Constitution and section 74 of the Elections Act

i) The allegations of malpractices in Wabukhonyi and other stations were never reported to them, and indeed John Savana RC Primary School was well lit with gas lamps

j) All seals, ballot papers and other election materials were accounted for and secured appropriately

k) All polling stations were gazetted but streams were created administratively to expedite voting process and enhanced right to vote

l) No polling station that recorded a number of voters higher that the registered voters

m) No agent who recorded protest or remarks that the results in Form 35 were incorrect

n) The agents signed all Form 35 which was a declaration that the results were correct and accurate

0) Party agents were supplied with Form 35

p) The Petitioner has not made out a case for scrutiny and in any case, he did not specify the polling stations where scrutiny is necessary

q) Even if there were error, they are insignificant and could not affect the results

r) The petition should be dismissed and a declaration be issued that the 1st Respondent was validly elected.

[21] The 2nd and 3rd Respondents relied on the evidence of **JOYCE WAMALWA** who was a duly appointed and gazetted Returning Officer for Webuye East Constituency for the election in dispute. Her overall appreciation is that the elections in Webuye East Constituency were free, fair, verifiable and credible. There were no specific complaints that negated that fact. Ten (10) political parties were involved in the election but not all parties who presented agents. But the agents who participated in the election returned good recommendations on the elections. IEBC conducted voter education and trained agents. It also employed accountability mechanisms and processes of election. Form 36 was also signed and no complaint that arose out of Form 36. For those reasons, the 2nd and 3rd Respondents pleaded with the court to dismiss the petition with costs.

Response by 4th Respondent

[22] The 4th Respondent filed his response on 26th April, 2013. It was a short one. His main contention was that the petition is based on ignorance of the operations of and procedures in the allocation and disbursement of CDF. To him, purchase of a school bus could not amount to bribery. In his testimony, he argued that he was improperly enjoined in the suit. He also pleaded that he did not issue any cheques as claimed as he was not the accounting officer for CDF. In his evidence he said that in law CDF was mandated to disburse funds to the respective beneficiary projects at any time, and CDF activities were not prohibited during campaign time. He prayed for the petition to be dismissed with costs.

SOME IMPORTANT DEVELOPMENT DURING THE HEARING

Petitioner abandoned evidence

[23] Some important interpositions during the hearing need be settled preliminarily and for purposes of clarity. **PROF. SIFUNA** informed the court that the Petitioner will not rely on the CD marked MWL-CD. The court noted that the CD will not be considered in the judgment of the court. That position stands.

Documents declared inadmissible

[24] There was yet another development; documents marked MWL 2A, MWL3, MWL5, MWL6, MWL7 and MWL8 were declared inadmissible after an objection by the Respondent. MWL2A, MWL5, MWL7 and MWL8 were photographs; MWL3 was a photocopy of some cheque in the sum of Ksh.2, 000,000/= purportedly issued by the 4th Respondent; and MWL6 was a newspaper cutting. These documents will not, therefore, be considered in making the court’s decision herein.

COURT'S ANALYSIS OF THE ISSUES, EVIDENCE AND SUBMISSIONS BY PARTIES

Issues

[25] The issues for determination by the court herein are:

> *a) Whether there were election malpractices committed by the 1st, 2nd and 4th Respondents and whether those malpractices affected the results of the election.*
>
> *b) Whether the 1st, 2nd and 4th Respondents committed electoral offences during the election held on 4th March, 2013.*
>
> *c) Whether the 1st Respondent was validly elected as the Member of the National Assembly for Webuye-East Constituency in the election held on 4th March, 2013.*
>
> *d) What orders does the court make on costs?*
>
> *e) Other minor issues include; whether the court should consider evidence of witnesses who were never called as witnesses; and whether the 1st Respondent's numerous signatures amount to prima facie fraud. I will also give my reasons for the decision regarding unauthorized alteration of the petition, which had been reserved.*

[26] I will invert the order of the issues above and start with the minor issues. Not because they do not matter, but for good order and setting the path for the determination of the main issues in controversy.

COURT RESERVED REASONS; UNAUTHORIZED ALTERATION OF PETITION

[27] **PROF. SIFUNA** had been accused of un-procedurally altering page 2 of the petition. The court rendered itself on the matter as follows;

Reason reserved

> *[2] I have reached a decision, but I reserve the reasons thereof to be rendered in the final judgment in this petition. The matter arose late in the evening and I do not consider it would be prudent to prattle over such an important matter. At least, a court of law worth its name, I think, must provide proper reasons for the decision.*
>
> **The decision**
>
> *[3] Although it is regrettable that Professor Sifuna, who is an excellent scholar and an advocate of considerable experience should fall into error of the nature we have observed in this matter, in the wider interest of the people of Webuye East Constituency, and in the interest of substantial justice, I accept the explanation offered by the Professor on the issue. I will spare the petition and order the good Professor to make enough copies of the correct version of page two (2) of the petition, and accordingly serve on all the Respondents forthwith. I direct that the hearing to proceed as scheduled.*

[28] As I promised below are my reasons for the decision I made on 19th June, 2013:

a) The lapse was a careless act of counsel for the Petitioner, for he ought to have served the

amended version of the petition on all the parties. The said counsel owned up the lapse and termed it as human error. He also apologized profusely about it. I could also not find anything to show that the Petitioner had any hand in the lapse. Therefore, in election disputes which I have repeatedly said, carry remedies of a public character and should be decided not only between the parties but with reference to the wider interest of the people of Webuye-East Constituency, I considered it a negation of the Constitution to strike out the petition on the reason of default on the part of counsel. If any chastisement was to be meted out, surely, it would have befallen the good Professor for the undignified method he applied in amending the petition.

b) Secondly, I did not consider the lapse to be prejudicial to the essential substratum of the cause before the court or to the Respondents and their defences. I hold the view that the omission to state results of the election in the petition is curable by amendment. Except, in so far as the law would require, all parties should be afforded ample time to consider and make rejoinder to an application for amendment of any pleading filed in an election petition.

c) I should, however, note that the court confirmed that the initial petition filed in court did not have the results stated at any of the pages of the petition. The initial petition that was filed is the same as the one that was served on the Respondents. The confirmation was done through the safeguard mechanism that the Judiciary designed in order to prevent and detect, if at all, any unauthorized interference with pleadings in a petition. The design required copies of all documents filed in an election petition to be immediately transmitted to Nairobi for safe custody and to act as reference point in case of a dispute on the pleadings.

d) For those reasons, I spared the petition and allowed it to proceed. However, I must reprimand Professor Sifuna, in the strongest terms possible, for interfering with court documents without following the correct procedure in law. I do not wish to speculate how the alteration was done or how the amended page found its way to the court file, but I should say that, an astute legal practitioner should know that such practice is what I would call ‘sharp practice’, deplorable conduct and may found a disciplinary action against the concerned advocate. In all fairness, nothing would have been easier than for the Professor to have applied for leave to amend the pleadings. That notwithstanding, I reckon that this becomes a permanent record of the trial on the unfortunate events and would be sufficient chastisement for the Professor. I will not, therefore, make any recommendation to the appropriate authorities for any further action on the matter lest I should cause him double jeopardy. I let the matter to rest there.

EVIDENCE OF WITNESSES WHO ARE NOT CALLED TO TESTIFY

[29] This issue arose in this petition and in others. The court delivered several rulings on the matter in this petition and others. The specific ruling delivered in this case was in the following terms;

Ruling

> **I have delivered enough rulings on this matter in other petitions. Their gist thereof is that the affidavit evidence of a witness who has not been called for cross-examination is worthless and remains on record as a dead appendage of the record of the trial, except where parties by consent accept not to cross-examine the witnesses and to have the evidence admitted as presented in the affidavits.**

[30] The Petitioner has raised concerns over the view taken by this court on the fate of affidavit evidence which had been filed in court but the deponent was never called upon to testify by the party in whose favour the affidavit had been filed. The Petitioner submitted that, although the position of the court is that affidavit evidence whose maker has not been called to testify should not be considered, that should not operate as a blanket rule and the court may for sufficient

reasons elect not to ignore the evidence. He cited three reasons for taking that view. One, the affidavit is part of record; two, the hearing was by way of affidavit evidence not oral testimony; and three, the sudden withdrawal of witnesses by the 1st Respondent was suspect as it comes after the Petitioner had alerted the court that the signatures in those affidavits were a fraud. I have decided to deal with this matter straight away before I consider the other issues for good reasons; 1) it kind of bears a preliminary connotation for it will determine whether the evidence will be considered or not; and 2) there is need to re-state the position of the law as I know it on the matter.

[31] The court took the view that, where the Respondents have applied for witnesses who have filed affidavits in an election petition to attend court for purposes of cross-examination, and those witnesses are not produced in court, then the affidavit evidence filed in court by those witnesses remain dead appendages of the record of the trial. I must, however, add two other considerations; 1) that such evidence, where the deponents have not been called to testify, could still be considered by the court where the parties expressly record in court that they do not wish to cross-examine the witnesses or where the matters they deposed to have been agreed upon by parties; and 2) the court still reserves the power to summon such witnesses under section 80(1) and (2) of the Elections Act, although that power is to be exercised sparingly and in deserving cases. Deserving cases would include; where in the interest of justice, the witness should be summoned; or where the omission of the witness by the party for whom the affidavit had been filed, is contrived to cause injustice and fraud on the due process of the law and cause. The court stated its position on this issue fully conscious of, and did not at all obliterate the exceptions in law that I have mentioned immediately above. In spite of the fact that the Respondents signified their intentions to cross-examine the witnesses, the Petitioner insisted that he does not intend to call them to testify. After perusal of the evidence of those witnesses, there was nothing which could have impelled the court to exercise the power under section 80(1) and (2) of the Elections Act. In the circumstances, the court cannot resort to evidence which had not been tested in cross-examination without causing extreme injustice to the parties, especially the Respondents. This court is aware that there has been a dichotomy in approach by courts on the matter, but it will not be difficult to understand that there are plausible legal and policy considerations underpinning the position the court has taken. The issue becomes even more robust when one stops to think a situation where parties file affidavits with damaging evidence then they do not call the deponent to testify. The only safeguard design of the law is either the court does not consider such evidence at all or exercises its discretion under section 80(1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the Elections Rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the Petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the Petitioner does not call the deponents to testify; their evidence should not be considered unless the court exercises its jurisdiction under section 80(1) and (2) of the Elections Act or the parties have given consent to the admission of the affidavit evidence without calling the maker. The issue rests there. The court will not consider the evidence of witnesses who were not called to testify.

1ST RESPONDENT'S NUMEROUS SIGNATURES

[32] The other issue I should determine at the onset is the submission by the Petitioner that the 1st Respondent having too many signatures is an act of fraud. I agree a signature is as important as it identifies the person signing and binds him to the contents of the document. But there is nothing in law which requires that a person should have a single signature at a given time. Or put in another way; there is no legal prohibition of one having numerous signatures. Except, in some fields, say, banking industry, an account holder should have a specimen signature to a particular account and he may not be allowed to sign a different one unless he applies to change his earlier one. If you sign differently for different purposes, that cannot be equated per se to fraud. Some fraudulent intentions and acts must be established. The 1st Respondent identified the signature on

his affidavit as being his signature. A signature need not be a scribbled sign. It could be a name or some mark. The Petitioner did not establish any intention on the part of the 1st Respondent to commit fraud. That argument fails.

BURDEN AND STANDARD OF PROOF

Burden of proof: Legal burden of proof and evidential burden

[33] In any judicial proceeding, the question of burden of proof and standard of proof must be squared out first which is the legal scale of measure for evidence tendered. Then, a decision is made.

[34] The two terminologies, the burden of proof and standard of proof are closely related subjects, albeit distinct, they have been wrongly used interchangeably. More trouble is found in understanding that burden of proof entails legal burden of proof and evidential burden. The legal burden of proof in an election petition rests with the Petitioner; for he is the party desiring the court to take action on the allegations in the petition. The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See *HALSBURY'S Laws of England*, 4th Edition, vol. 17. Therefore, where the Petitioner has laid *prima facie* evidence against the Respondent including the Electoral Body which as a matter of law must be a Respondent in an election petition, the law says that evidential burden has been created on the shoulders of the Respondent who would fail if he does not adduce evidence in rebuttal. These incidents of legal burden and evidential burden were clearly enunciated in the case of **RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013** when the Supreme Court rendered itself thus;

> *''…a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden''.*
>
> And also that:
>
> *Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter asse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law''.*

[35] It is, thus, not in doubt that at the point where the Respondent would fail without further evidence, the Respondent should discharge the evidential burden through offering evidence in rebuttal. If the Respondent offers no evidence in rebuttal, judgment may be entered against him on the basis of the preponderant evidence adduced by the Petitioner. The Petitioner will not, however, succeed because the Respondent has not offered evidence in rebuttal but because the Petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the Respondent only sanctifies the confidence of the court to enter judgment in favour of the Petitioner. Of the essence is that the evidential burden is the obligation of the Respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the Respondent with the result that he fails and the Petitioner succeeds.

Standard of proof

[36] The standard of proof refers to the level or degree of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond-reasonable-doubt. However, where the Petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt. Judicial authorities on this subject are legion and I need not multiply them except to cite a few; **RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013, BERNARD SHINALI MASAKA V BONNY KHALWALE & 2 OTHERS [2011] eKLR,** and **JOHO V NYANGE & ANOTHER (NO 4)(2008) KLR (EP) 501.** The ultimate test that the evidence must satisfy, thus, is;

> *''Did the Petitioner clearly and decisively show the conduct of the election to have been devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? (RAILA ODINGA V IEBC & 3 OTHERS SEPREME COURT OF KENYA ELECTION PETITION NO 5 OF 2013)"*

[37] The preliminaries have been tackled. I now wish to state the issues and then proceed to make the overall impression on the evidence and submissions by the parties and place the evidence tendered in court on the threshold set by law to see if it supports the issues herein. That way, there will be a complete determination of the issues in controversy herein.

THE FRAMEWORK

[38] The Petitioner relies heavily on breaches and non-compliance with the law in the conduct of the election in dispute. He also pleads that the election was not conducted in accordance with the constitutional principles on free and fair elections. That should set the framework and approach the court should engage. The General Principles for the Electoral System are provided in Article 81 of the Constitution that-

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, ccurate and accountable manner.

[39] Parliament then enacted the Elections Act and other subsidiary legislations to provide for a robust legal framework for the conduct of elections. By law, the duty of the Election Court is to inquire and examine whether the election in dispute complied with those Constitutional principles, and the Laws and Regulations governing the conduct, management and supervision of Elections. Then, reaches a decision on the basis of the relevant law, in this case, Section 83 of the Act which provides;

> *"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."*

[40] In the circumstances of this case, in construing section 83 of the Elections Act, the court will adopt the approach in the words of Lord Denning in **MORGAN VS SIMPSON [1974] 3ALL ER 722** where he said at page 728-

> *"Collating all these cases together, I suggest that the law can be stated in these propositions (1) If the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or not … (2) If the Election was so conducted that it was 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 mistake at the polls and it did affect the result then the Election is vitiated."*

A) WHETHER THERE WERE ELECTION MALPRACTICES AND OFFENCES COMMITTED BY THE 1ST, 2ND AND 4TH RESPONDENTS, AND WHETHER THOSE MALPRACTICES AND OFFENCES AFFECTED THE RESULTS OF THE ELECTION

[41] The Petitioner in his submissions reduced the electoral malpractices he wishes the court to inquire into five as follows:

Against the 1st and 4th Respondents

a. Bribery
b. Treating of voters
c. Using public resources for election campaigns

Against the 2nd and 3rd Respondents

a. Preventing agents from verifying ballots and their authenticity at polling stations and presenting for tallying and declaring results without Agents' signatures on Form 35
b. Preventing Agents from witnessing voting by assisted voters

BRIBERY CLAIMS

Dishing out money-Muji FYM Primary School and Misikhu Girls Boarding Primary School

[42] The offence of bribery of voters is established under section 64 of the Elections Act. The major considerations are that the person gave, or promised to give, money or some other form of

consideration to induce and influence the voter to vote for a particular candidate or political party or to refrain from voting for a particular candidate or political party. This is a criminal offence and, therefore, as set out under burden and standard of proof above, must be proved beyond reasonable doubt when it is alleged in an election petition. The Petitioner is imputing a criminal charge on the 1st and 2nd Respondents, and under section 87 an election this court is obliged to make a report to the DPP on commission of the offence. The Respondent runs a risk of criminal prosecution, hence the high standard of proof. In bribery as an offence, some or all of the material acts such as; promise; offering; giving; solicitation; acceptance; and receipt of bribe must be proved. The intention or purpose of the bribe must also be proved, and in our case, it is alleged it was to obtain a benefit, undue advantage and exert undue influence on voters.

[43] A necessary detour; without making a decision, section 87 of the Elections Act may invite legal arguments. The words used in the section...***proved at the hearing to have been guilty of an election offence*** gives room for an argument that, by virtue of that section, the election court also sits as a trial (criminal) court. But that argument will be oblivious of; 1) that an election proceeding is a proceeding ***Sui generies***; it is not a criminal proceeding; and 2) that an election proceeding is not clothed with the staple criminal protections available in a criminal proceeding. This court is aware of the requirement under section 87(1) of the Elections Act that the person cited, in the petition, for allegedly having committed electoral criminal offences should be afforded ***an opportunity to be heard and to give and call evidence to show why he should not be reported.*** However, that requirement alone is not a sufficient protection as is provided in a real criminal trial. That is not the end of the discourse. More trouble is found in a rogue imagination that the words in section 87(1) of the Elections Act assigns the decision of the election court the vitality of a finding of guilty as in a criminal trial. If that thinking prevails, the requirement to make a report to DPP does not make any sense in law. Yet another critical matter; the person so found to have committed an offence may rightly raise a defence of double jeopardy in the subsequent criminal prosecution by the DPP.

[44] That is not all. Conceptually, the subordinate court before which the person will be being prosecuted for an offence based on a finding by the High Court under section 87(1) of the Elections Act, will not avoid to ponder at least two things; 1) that the matter had been proved before a higher court; and 2) that proof was on a standard of beyond any reasonable doubt; that the person ***have been guilty of an election offence.*** Take for instance a practical example in **KIMILILI PMCCRC NO 365 OF 2013 R V PATRICK WANJALA SIKETI** where an IEBC official was arrested and charged with an election offence; which is also an issue before the election court. The two proceedings-the petition and the criminal trial-are proceeding contemporaneously. Many questions abound which I suppose should re-ignite a critical rethink on the way the section should be couched in a manner that reconciles all these concerns. My own view is, however, that the finding by the election court should be understood as a finding within a petition for purposes of a decision in that petition. Which in turn means; the record of the petition and the report to the DPP on commission of election offences, become sources of information which may found a criminal investigation and or prosecution of the person concerned. That way, any legal contradiction in or objection to the section may be avoided. Invariably, a legislative recast of the words ...***proved to have been... guilty of an election offence*** may be necessary. At the moment, courts of law are experienced in dealing with such statutory situations by assigning an interpretation that cures the mischief, removes any serious legal objection and gives effect to the intention of Parliament.

[45] Back to the substantive analysis. The Petitioner testified and submitted that the acts of bribery by the 1st and 4th Respondents consisted in dishing out of money to voters and using CDF cheques to bribe voters. He finds support in paragraphs 3 and 12 of the petition and supporting affidavit respectively. He claims that through the evidence he has tendered in court he demonstrated that the 1st Respondent dished out money to voters in polling stations and in the voting queues. The evidence the Petitioner was relying upon was a photograph purportedly taken at Misikhu Girls Boarding Primary School Polling Station. That photograph was declared inadmissible and cannot be used to prove bribery claims at Misikhu Girls Boarding Primary

School. There was no or other evidence tendered to prove bribery claims at Misikhu Girls Boarding Primary School and that claim fails flat.

[46] The Petitioner further testified and submitted that he reported the incident of bribery to the police officer manning the gate to the polling station. He submitted further that, the said police officer cautioned the 1st Respondent and quoted the words that *''Mheshimiwa tafadhali wacha kufanya hivyo''* (Please sir, stop doing that). I find that to be quite strange. A crime had been reported and all that the police officer could do is to caution the 1st Respondent to stop giving the bribe.

[47] The 1st Respondent made specific submissions on the allegations of bribery at Muji FYM Primary School. In cross-examination, the Petitioner agreed that he did not make a report of bribery to the police officer who was manning the polling station. It is during re-examination when he said that he had reported the incident to the police officer at the polling station. That notwithstanding, in his affidavit the Petitioner did not state that he reported the matter to the police officer manning the polling station. He also did not, during his evidence, identify the particular police officer to whom he made the report of bribery of voters by the 1st Respondent. His submissions that the 1st Respondent was cautioned in the words *''Mheshimiwa tafadhali wacha kufanya hivyo''* (Please sir, stop doing that) above cannot be true. The court notes that in the entire proceedings, the Petitioner did not make any attempt toward the calling of the concerned police officer to testify. One would have expected the Petitioner to have sought the court to exercise its discretion under section 80(1) of the Elections Act and summon the said police officer. On perusal of the record, and after hearing the Petitioner and his witnesses, there was really nothing substantial which could have impelled the court to move suo motu and summon the said officer as a person who was concerned with an election offence. The claim that the Petitioner also made a report to the Presiding officer was just in his word without any cogent evidence in support of that claim. He did not identify the Presiding officer to whom he made the report. That was necessary because there were two voting streams for Muji FYM Primary School. The submission by the Petitioner that failure by IEBC to call the particular Presiding Officer reinforces his claim that he made a report about the bribery is, at best, a wild and untenable in an adversarial system of justice. There has to be some evidential burden raised on the shoulders of the Respondent before he is asked to prove the contrary. In law, the Petitioner could only claim that the 1st Respondent did not discharge his evidential burden, after the Petitioner has established a prima facie case such that the other party would fail in the absence of evidence in rebuttal. That is not the case here. Indeed the Returning officer, Joyce Wamalwa denied any report of bribery had been lodged with IEBC. I am convinced, therefore, that there is merit in the submissions by the 1st, 2nd and 3rd Respondents that there was absence of any complaints of bribery by the party agents at Muji.

[48] Apart from the foregoing, at least specific details should have been provided about those who received the bribe and the general surrounding of corrupt transaction to prove that bribery took place. That demonstration and specificity is needed for a party to satisfy the high standard of proof-beyond reasonable doubt. The evidence tendered must be of a stature that leads to an inescapable conclusion that the 1st Respondent committed the offence of bribery. Eventually, I find that the Petitioner did not establish to the required standard of proof that the 1st Respondent bribed voters at Muji FYM Primary School.

Use of CDF cheques as a form of bribery

[49] The Petitioner alleged that the 1st Respondent used CDF cheques to influence voters to vote for him. He did so by personally delivering the cheques to schools. He gave two examples, Muji Secondary School and Misemwa Secondary School. In cross-examination he admitted that he did not witness the 1st Respondent delivering the cheques. He also accused the 4th Respondent of issuing two CDF cheques each of Kshs 2, 000, 000, which were then delivered by the 1st Respondent to Muji Secondary School and Misemwa Secondary School. He termed that an act of

bribery of voters. The reason the Petitioner is convinced it was bribery is that those cheques were issued on 19/2/2013 and delivered on 21/2/2013 which was within the campaign period that ran from 8/2/2013 to 2/3/2013. According to the Petitioner, the 1st Respondent held a political rally at Muji on 21/2013 and asked voters to vote for him so that he can give more CDF cheques to them. According to the Petitioner, that fact was acknowledged by the 4th Respondent in his affidavit and the letter dated 26/2/2013 annexed to his affidavit. Further reinforcement of this issue is found in the evidence of Peter Wanabisi Mbinga, Petitioner's witness NO 4 who told the court that he attended the rally where the 1st Respondent delivered the CDF cheque to the Deputy Principal of Muji Secondary School. He testified that on 21st February, 2013, he was at Muji Friends Church attending a youth meeting when he was informed that the 1st Respondent was to address a campaign rally-cum-public meeting at Muji Secondary School and deliver a CDF cheque to the School. At Muji Secondary School, the 1st Respondent addressed a rally and handed over a CDF cheque to the Deputy Principal of the School. According to him, the 1st Respondent asked the voters to vote for him so that he can assist them more.

[50] In cross-examination, the witness said he was the only recognized famer in tissue culture agriculture at Maraka Ward. Other than saying that he did not carry out the teaching on banana growing due to the rally, he could not give any plausible reason why he abandoned the earlier mission of teaching the youth to following the rally convoy allegedly headed for Muji Secondary School. Although he claimed he saw the 1st Respondent giving a cheque to the deputy principal of the School, he did not know the name of the said deputy principal. The witness agreed that the Petitioner comes from the same ward with him and was his relative. He did not report the matter to the police as he did not know it was a mistake. He could not give any details regarding that cheque for he said he was at a distance. The court noted that the witness was evasive in answering questions and seemed not to be telling the truth.

[51] The 1st Respondent testified and also submitted that he never delivered the cheques as alleged. The 2nd and 3rd Respondents equally denied any report had been made concerning the delivery of the CDF cheques by the 1st Respondent. He further submitted that the Petitioner accepted in cross-examination by Mr OJURO that there was nothing illegal in disbursement of CDF to constituencies or to the respective beneficiaries. The 4th Respondent also testified and submitted on this issue. The 4th Respondent argues he was merely a technical member of the CDF Committee as an employee of the CDF Board with defined functions. He also submitted that if the Petitioner had any issue or dispute he ought to have raised it with the CDF Board which he did not do. More importantly, the claim of bribery was a serious matter and should have been raised at earliest possible time i.e. by making a report to the 2nd, 3rd and 4th Respondents. Finally, the 4th Respondent denied in the letter he annexed to his affidavit that the 1st Respondent delivered the CDF cheques as alleged by the Petitioner.

[52] Upon deep consideration of the evidence and the submissions of the parties on this issue, I am of the view that every essential element of bribery must be proved in relation to the use of CDF cheques' to bribe and influence voters. The standard, it is worth restating, is beyond reasonable doubt. It is quite high and specific details of bribery must be provided. The intention to bribe and the act of bribery is needed present. I say so because issuance of cheques is a statutory obligation and mandate of CDF Committee. Discharge of that function can never be illegal *per se* simply because it was during a campaign period declared by IEBC. Without doubt, operations of CDF activities are not affected by an electoral cycle or election. I therefore, agree with counsels for the Respondents that the bona fide activities of CDF are not limited or affected by the election campaign period declared by the IEBC. Much more than simple issuance of CDF cheques during a campaign period is needed. There was no evidence that the 4th Respondent was responsible for the issuance of those cheques in person. His role was technical and he was not even an accounting officer for CDF in the Constituency. The allegation that he was a relative of the 1st Respondent was not proved either. What was critical was to demonstrate to the required standard that he issued

the cheques and the intention was to induce or influence voters to vote for the 1st Respondent or particular political party, or to induce or influence voters to refrain from voting for a particular or particular candidates or political party. That was not done. It is not true that the 4th Respondent admitted that the 1st Respondent delivered the cheques. It is not possible even with great ingenuity to make an inference of admission from the words **''...The two cheques though were to be issued by the MP the event never took place...''** That kind of inference is not possible given the set of facts and evidence before the court. Those words are a straight denial. In his evidence, the 1st and 4th Respondents told the court that then MPs had been prohibited from dealing with CDF matters and a formal communication was issued by the Chief Executive of CDF Board in the letter dated**.........** the explanation they gave was plausible and uncontroverted.

[53] As regards the 1st Respondent, the evidence of Petitioner's witness NO 4 was not as conclusive. The witness did not provide cogent evidence connecting the 1st Respondent with delivery of CDF cheques in question. He could not even tell whether the cheque allegedly delivered to the school was a CDF cheque or any other cheque. He could not see the cheque he claimed the 1st Respondent delivered to the Deputy Principal of Muji Secondary School. I observed the demeanour of the witness. He was not truthful and hesitated to give crucial information on the alleged meeting with the youth and the alleged rally on 21/2/2013. He basically relied on what he claims the 1st Respondent announced. What was expected of the Petitioner was to provide information from the school to show the existence of the occasion and those who were in attendance. That is not the work of the 1st Respondent for it is the Petitioner who was alleging existence of those facts and ought to have proved them to the standard. That ground also falls flat. It is not of any use to determine the probative value of the campaign schedule since the Petitioner did not prove there was a rally at Muji Secondary School and the 1st Respondent presided over it and delivered a CDF cheque. But it is sufficient to state that, although the document was signed and the maker was called to testify on it, the document was prepared in the most amorphous manner; undated; without specific basic details of date and year and the election to which it related. The document does not reflect the standing of IEBC as a state organ.

USE OF PUBLIC RESOURCES IN ELECTION CAMPAIGN

[54] Under section 68 of the Elections Act, a candidate who uses public resources for purposes of campaign in an election commits an election offence. It is a grave matter with criminal connotation and one that should be reported for criminal prosecution under section 87(1) of the Elections Act. It should, therefore, be proved beyond reasonable doubt. The Petitioner alleged that the 1st Respondent used school buses owned by Ndivisi Boys High School, St Mathews Secondary School, Sipala Secondary School, Lutacho Secondary School and Mihuu Secondary School to transport voters during the registration of voters and the voting day. The Petitioner did not produce search documents from the Registrar of Motor Vehicle to establish ownership of those buses. The Petitioner however argues that as a resident of Webuye Town he knew those buses belonged to the schools he has mentioned. The buses are also christened with the names of the schools they belong to. The Petitioner further testified and submitted that he annexed letters which he wrote to the concerned schools and the 1st Respondent cautioning them on the illegal use of school buses for purposes of campaigns. I agree with the Petitioner that if he delivered the letters as he claimed, there was no need of a certificate of posting. However, there should have been some acknowledgement of receipt by the school and the 1st Respondent, or where they refused to acknowledge, at least some note or averment to that end would be useful. I will come back to that issue when I will be making final analysis on the issue.

[55] The 1st Respondent submitted that the alleged use of school buses by the 1st Respondent for purposes of campaign in an election was never reported to the Board of Governors of those schools or to IEBC. There was no any independent evidence to support those claims of use of school buses for campaign purposes. On the other hand, the 1st Respondent testified that he used his own as well as hired vehicles for his campaigns. I note the Petitioner did not also state the

names of the people who were transported and the particular polling stations' to which they were transported.

[56] As I stated earlier, the claim for use of public resources for purposes of campaigns in an election is a criminal offence which must be proved beyond reasonable doubt. More cogent evidence is needed to specifically prove that the 1st Respondent committed the offence. The Petitioner must show by way of evidence; that indeed the buses used were school buses and, therefore, public resource; that they were used by the 1st Respondent; that they were used for campaign purposes of the 1st Respondent. Proof of ownership of those buses is a critical matter. No formal document that was tendered to prove ownership of those buses by public schools stated in the petition. Likewise, there was no evidence to show that the buses were used by the 1st Respondent for campaign purposes except that the Petitioner wrote protest letters and he saw the buses ferrying voters. Those voters were not identified or called as witnesses in this case. There was no evidence that the passengers in those buses were being ferried at the behest of the 1st Respondent to register as voters or to vote. The particular registration centres and polling stations to which the alleged voters were transported were not stated in the Petition, supporting affidavit or in his evidence during the hearing of the petition. In sum, the allegation has not been proved at all beyond reasonable doubt. It fails and is rejected.

Treating of voters

[57] The other offence the Petitioner levelled against the 1st Respondent is treating of voters contrary to section 62 of the Elections Act. That offence requires that the Petitioner should prove that the candidate corruptly, for purposes of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election, gave or undertook or promised to reward, or provided any food, drinks refreshment or provision of any money, etc. to any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or to refrain from voting, for a particular candidate, at the election. The Petitioner called **EDWARD WEKESA MULONGO** who told the court that he attended a party at the home of the 1st Respondent on 2nd February, 2013 at around 2.00pm where he ate delicious food and a soda. He however, missed out on cash which he says had already been distributed by the time he arrived. The Witness caused some laughter when he said that he is not used to free things but he likes free things when they are offered. Other than the Petitioner, he did not name any other person who was at the feast at the home of Alfred Sambu's home during the feast. He did not say the purpose of the feast or who was dishing out money and to whom. He confirmed that he was not influenced by the meals he took there as he had already decided whom to vote for. He could not tell whether what happened at Sambu's place was wrong. So he did not report to the police or IEBC about the feast. He considered it as one of the occasions during campaign time and people looked out for the politicians.

[58] The evidence of **EDWARD WEKESA MULONGO** does not prove there was a party in the first place let alone any treating of voters as required by law. Corrupt intention to induce and influence voters to vote for a particular candidate or political party or to refrain from voting for a particular candidate or political party was visibly missing in that evidence. The Petitioner's evidence was also of a general nature on that matter. In fact the witness said that he did not consider the party at Sambu's home to be a bribe. The allegation was not proved beyond reasonable doubt and it fails.

Issuance of two sets of ballots

[59] The procedure of issuance and the number of ballots to be issued to a single person is regulated by law and issuance of more than one set of ballots is an offence. It is Mr **SIMON SITATI NYONGESA** who claimed that that a Polling Clerk at Wabukhonyi, one Edith, gave a voter more than one set of ballot papers. He reported the matter to the PO **Mr NELSON KHAEMBA** who promised to take action on the concerned Polling Clerk after profuse apologies

on the incident. .

[60] In cross-examination, he said that he did not know the name of the voter who was issued with more than one set of ballot papers. He neither asked the voter to provide his name nor to come and testify in court. He did not also report the incident to the police. He could not produce a letter of appointment to prove he was an agent he claimed to be, or any accreditation note or badge by IEBC. He admitted that, without a letter of appointment, budge or accreditation it is impossible to prove one was an agent. His evidence fell short of the essential elements needed to prove the allegation. He did not identify the particular voter who was issued with two sets of ballot papers. The voter was not a witness neither was the PO to whom he made the report. His evidence remains quite general and without much and specific details required in law. That allegation fails.

CLAIMS OF MALPRACTICES BY IEBC AND ITS AGENTS

Petitioner's choice

[61] The Petitioner chose to submit on only two grounds with regard to the alleged careless and reckless manner, in which IEBC conducted the elections of 3rd March, 2013. His reasons for taking that course were that; 1) the court disallowed some of the Petitioner's exhibit; and 2) also the Petitioner's evidence. I wish to state categorically that the ruling of the court was specific to particular evidence and did not exclude the Petitioner's evidence generally as the Petitioner has portrayed in his submissions. But, as I have persistently stated, election petitions are public-election disputes and they ought to be determined not only as between the parties but with reference to the wider interests of the residents of Webuye East Constituency. Thus, notwithstanding the approach adopted by the Petitioner, the court is under an obligation in line with the overriding objective of the court and the demands of the Constitution, to consider all the allegations made in the petition so as to determine the issues in controversy effectually and completely. It is the only way there could be a just and proportionate resolution of disputes. The Petitioner and witnesses spoke to the issues before the court and their evidence has not been recanted.

[62] I will start with the broad grounds formulated by the Petitioner as below:

a) Preventing agents from verifying ballots and presenting for tallying and declaring results without agents' signatures; and

b) Preventing agents from witnessing voting by assisted voters.

Preventing agents from verifying ballots and presenting for tallying and declaring results without agents' signatures

[63] The Petitioner submitted that IEBC officials prevented agents from verifying and counting of ballots, and presented for tallying and declaring results without agents' signatures on Form 35. That violated Regulation 76(2) (b) of the Elections (General) Regulations which requires that ballots be displayed to agents and or candidates during counting of votes. The IEBC officials also violated Regulation 79(2), (3), (4) and (5). According to the submission of the Petitioner, his witnesses NO 5 & 6 **HELLEN WASIKE** and **SIVALA NALIANYA MUNYOLE,** respectively, testified that they were prevented from discharging their duties as Polling Agent for New Ford Kenya for Mukhuyu Primary School Polling Station NO 055 and Makuselwa Primary School Polling Station NO 029, respectively. **SIVALA NALIANYA MUNYOLE** in particular told the court that his major complaint was that there was a high turnout of illiterate voters who needed assistance but he was prevented from witnessing how those voters were assisted. When he insisted to be allowed to witness how those voters were being assisted, the PO threatened to kick him out of the voting hall. Both witnesses told the court that they then refused to sign Form 35 but were

denied an opportunity to state the reasons for refusal to sign Form 35. Another Petitioner's witness NO 2 **SIMON SITATI NYONGESA** also claimed that he was refused an opportunity to sign Form 35 and the refusal to sign was never recorded by the Presiding Officer.

On the opportunity to sign Form 35

[64] The fact that not all agents signed the particular Form 35 does not invalidate the Form under Regulation 79 of the Elections (General) Regulations. I agree with the submissions by the 2nd and 3rd Respondents that it is incumbent upon the agent to sign the Form or record reasons for refusal to sign. After the filling of Form 35, the agents are supposed to sign although under Regulation 79 an agent may refuse to sign the Form if dissatisfied with results. But, where agents have refused to give reasons the P.O should record the fact for refusal to sign. But the 2nd Respondent testified that according to her all agents signed. I also agree with the Petitioner that the agents should be given an opportunity to sign the Form 35. But where the Petitioner is alleging that the agents were not afforded an opportunity to sign or record reasons for refusal to sign the statutory Forms, it is still incumbent upon the agents and their parties to raise the issues with IEBC at the earliest opportune time, and in an official and indelible manner; in that case, written complaint will most suffice. It is that kind of evidence that the Petitioner will need to adduce in court to show indeed they were denied an opportunity to sign or record reasons for refusal. The Petitioner did not call evidence of that type or of any other type with such probative value to prove that indeed the agents were denied the opportunity to sign or to record reasons for refusal to sign Form 35. Equally, I reject the argument by the Petitioner that Form 35 only reflects what was happening inside and not outside the polling rooms. The Form is designed to take into account all happenings in the election- inside and outside the polling rooms. The comments are by the Presiding Officer of the station who is expected to have full supervision of the election in the polling station. The statutory comments should, therefore, cover the whole range of events which attend to that election as those comments are to be used to gauge whether the election was conducted in accordance with the principles set out in the Constitution. For instance, claims of bribery are grave matters and should be specifically noted on the Form.

Lack of statutory comments

[65] Further submission were made by the Petitioner that it is notable that many Form 35 for most Polling Stations did not have Statutory Comments by the Presiding Officers. To him, the statutory remarks by Presiding Officers are mandatory and lack thereof impugns the credibility of the elections for those Polling Stations. The Petitioner listed a host of Polling Stations whose Form 35 do not bear the Statutory Comments.

[66] The foregoing arguments are quite nascent and require consideration by the court in a deep sense. Form 35 is the statutory tool through which the results of the election for the seats of Member of National Assembly, Women Representative, Senator, county Governor, and Member of County Assembly are declared at the polling station as required under Regulation 79 (2) (b) of the Elections (General) Regulations. The prescribed Form 35 is provided for in the SCHEDULE to the Elections (General) Regulations. Doubtless, the Form 35 carries the requisite legal force and so the part in the Form requiring Statutory Comments by the Presiding Officer embodies a statutory requirement. In my own view, those comments serve useful purposes. The major purposes, broadly stated include; 1) to give information on the general conduct of elections in the particular Polling Station; 2) helps IEBC, the court and the public to observe from the recorded comments what transpired in that election in the particular Polling Station; 3) enables the court, IEBC and the public to assess the impact of any impropriety recorded therein, especially when questions on the integrity of the electoral process are raised. Some may argue that where there are no adverse happenings worth recording, the Presiding Officer need not record any comment. That kind of argument is simplistic. It should be noted that any positive comments should be recorded as part of the assessment of the integrity of the process and also as a way of eliminating unnecessary speculations that there were adverse happenings but were not recorded. It is most desirable, therefore, that the statutory Comments are not only stated but accurately stated by the

Presiding Officer.

[67] Scarcely will lack of Statutory Comments, by itself, invalidate an election per se. Nevertheless, failure to make the statutory comments in Form 35 would, in a properly argued case, derive some factual benefit to the Petitioner. First, the court will take judicial notice of the fact that the comments were absent in Form 35. Secondly, it is not untrue that the absence of statutory comments on the Form does not necessarily mean there were no irregularities or malpractices in the election. That advantage is, however, ephemeral unless it is coupled with concrete evidence of malpractices or irregularities. That is why, it will forever be incumbent upon the Petitioner to identify and give particulars of all such adverse incidents which occurred but were never recorded. And of course, the Petitioner should prove those incidents which impugn the election. Eventually, what really determines the petition is the court's findings based on a proper analysis of the allegations in the petition and the evidence tendered in support of the allegations or of evidence that may become available to the court through other legal processes, say, scrutiny and re-count. I repeat, that the advantage accruing from failure to record statutory comments would only be of value where there is evidence adduced in support of the insidious irregularities in the election or ineptitude or improprieties on the part of the IEBC Officials.

[68] Back to the substantive issue. Were the agents for New Ford Kenya prevented from discharging their duties? And were they denied an opportunity to record reasons for their refusal to sign Form 35 in their respective polling stations? First of all, were the witnesses' agents of New Ford Kenya as required by law? None of the witnesses produced letters of appointments as agents for New Ford Kenya in the election in dispute. I note that although **HELLEN WASIKE** and **SIVALA NALIANYA MUNYOLE**, mentioned a Form for Oath of Secrecy in their affidavits, they did not annex those documents to their affidavits. That omission will cast doubt as to whether the witnesses were duly appointed agents as required in law. As such they were not expected to be present in a polling station and discharge duties in an election as agents. In the absence of other compelling evidence that they were party agents in the election, the court finds that the allegations that they were prevented from discharging their duties as agents in a polling station were not proven. I am guided by **WAMBUA V GALGALO & ANOTHER (2008) KLR (EP) 43.**

Preventing agents from witnessing voting by assisted voters

[68] The Petitioner submitted that there were many assisted voters in Makuselwa Primary School Polling Station but IEBC did not produce Form 32 to show that those voters were assisted in accordance with the law and the reasons for assisting them. The procedure for assisting voters is set out in Regulation 72 of the Elections (General) Regulations. The Presiding Officer prevented the agents from witnessing voters being assisted. According to the Petitioner, Petitioner's witness NO 6, **SIVALA NALIANYA MUNYOLE** was the one who was prevented from witnessing the assisting of voters who turned out in large numbers.

[70] The other parties did not address this issue in their submissions or in cross-examination. The court, however, noted that the witness did not state in his affidavit or during the hearing whether those voters were assisted by the Presiding Officer or by a person who had accompanied the voter who needed assistance. These two instances are attended by different procedures under the Regulations. Regulation 72(1) provides that a voter shall be assisted by a person accompanying the voter and who is of the voter's choice. The person assisting the voter, however, should not be an agent or a candidate. Regulation 72(2) allows the Presiding Officer to assist a voter in need of assistance where such voter is not accompanied by a person of own choice. That is the only time when the agents would be involved. Therefore, where a witness makes a claim that he was refused to witness the assisting of voters must first confirm that the voter was not accompanied and that the Presiding Officer assisted the voter. That aspect did not come out at all from the witness. It is not, thus, possible to determine whether in the first place he ought to have been involved in the exercise. For those reasons, the allegation is not proved.

Re-count and scrutiny

[71] The Petitioner abandoned these prayers as he was convinced no basis had been laid for them. I agree that there was no sufficient reason that was shown in the entire evidence that would warrant a re-count or scrutiny of ballots. I will not, therefore, analyse the submissions by the 2nd and 3rd Respondents on that limb. I will also find that the prayers were not supported by any evidence and so they fail. They are denied.

Allegations on issuance of unstamped ballot papers to voters

[72] The Petitioner seems to have abandoned this ground in his submissions. But it was one of the grounds cited in the petition and I should decide on it. The 2nd and 3rd Respondents submitted that there was no evidence whatsoever that was adduced in support of this allegation. The court finds no evidence to support the ground and is therefore, not proven to the standard required. It, therefore, fails.

Allegations of unduly and wilfully delaying the counting of votes

[73] The Petitioner alleged that there was deliberate delay in the counting of votes in Nabuyole Pefa Primary School and Ondoti Primary School. The registered voters in those stations were 146 and 110 respectively yet counting of votes and announcement of results took over eight hours. The allegation is contained in paragraph 13(e) of the petition. The 2nd and 3rd Respondents gave an explanation for the delay; that it was caused by late closure of polling stations, various objections raised during counting, making entries in the relevant statutory forms, signing for and re-sealing of the election materials, and the fact that Presidential votes were to be counted first. From the record, there was no evidence that was tendered by the Petitioner to prove this ground. I find it was not proven to the required standards and it fails.

Willingly failing to light lamps at some polling stations

[74] This allegation is contained in paragraph 13(d) of the petition. The Petitioner alleged that lamps were not lit until 9.00pm in St. Johns Savanna Primary School, and the electoral business was conducted in darkness which factor completely impugned the integrity and credibility of the whole electoral exercise. The 2nd and 3rd Respondents answered the allegation in paragraph 14 of their Response that, lamps were lit in all polling stations including St. Johns Savanna Primary School. After perusing the record, the Petitioner did not tender evidence in support of the allegation. He alluded to it in his evidence but he did not provide cogent evidence thereto. I agree with the submissions by the 2nd and 3rd Respondents that the only evidence on the matter is from **CHRISTOPHER SIKUKU WANJALA** but who, although he filed an affidavit was never called to testify. Accordingly, the allegation was not proved as required in law.

Allegation of failing to display ballot papers to agents

[75] The allegation largely concerned Mukhuyu Primary School. No evidence was tendered by the Petitioner in support of the ground and it therefore fails.

Failure to; display results, allow escort of ballot boxes, seal election materials with tamper proof seals

[76] The Petitioner did not submit on these allegations. He seemed to have abandoned them. But, the truth of the matter is that there was no evidence that was tendered in support of the allegations. They were therefore, not proven to the required standards and thus fail.

On comparison among Presidential, Senatorial, County and Woman Representative

[77] I do no better than to find and hold in the step of the ruling by E. Ogola J in **KK HC EP NO 6 OF 2013 JUSTUS GESITO V IEBC & 2 OTHERS** that;

''It is possible that a voter chooses to vote for only one elective position, say Presidential, and leaves the rest. The outcome is that the results of the six elective posts will not tally. For that reason alone, the Court cannot delve into the results of other elective posts in comparison to that of the Member of National Assembly, for doing so will be setting a dangerous precedent''.

Allegations of votes cast exceeding the registered voters

[78] This allegation was visible in the pleadings particularly the petition and was even presented in a tabular form. The various polling stations where the irregularity emerged are identified in the table provided in the petition. The question is; was there evidence in support of the allegation as required by law? The Petitioner gave his testimony on the alleged votes cast exceeding the registered voters. He referred to documents at page 81-82 of his petition as being the source of his information. He claimed those documents were issued by IEBC to him at a meeting of political parties' agents. But in cross-examination he confirmed that the said documents were not the Principal Register of Voters, they did not bear any mark or feature of a Principal Register of voters. The Principal Register of Voters was produced in court as earlier ordered by the court and agreed among the parties. It was the document appearing at pages 31-130 of the documents filed by IEBC.

[79] Nothing could be further from the truth; the documents presented by the Petitioner and which he relied on as the source of information he brought before the court were not the Principal Register of Voters for the Webuye East Constituency. The Principal Register of Voters was presented in court by IEBC. It could be quite unfortunate if IEBC could have issued out the documents the Petitioner relied upon as the Principal Register of Voters. But, it was upon the Petitioner to prove that those documents were indeed issued by IEBC, the purpose for which they had been issued and that they were the documents that were used in the election in dispute. That is the only way the Petitioner will prove that the votes cast exceeded the registered voters. The kind of evidence that the Petitioner needs to prove that fact was to be tendered by him. From the record, the court finds that those documents provided by the Petitioner are not the Principal Register of Voters under the Elections Act. The Petitioner did not demonstrate by way of evidence that the votes cast exceeded the number of registered voters. The official Principal Register of Voters produced in court clearly showed that the votes cast were less than the registered voters in the polling stations identified by the Petitioner. That ground was, therefore, not proved to the legal standards. It fails.

FINDINGS AND ORDERS

[80] The above analysis of the evidence and the submissions of the parties need be fitted within the legal requirements to determine whether or not the election of the 1st Respondent should be nullified. The major contestations are:

1) That electoral offences were committed by the Respondents; and

2) That there were electoral malpractices and irregularities committed by the Respondents.

[81] Were the electoral malpractices proved to the required standard? And even those that were established, were they of a nature that would affect the results? The alleged electoral offences committed by the Respondents were not proved beyond reasonable doubt. The Petitioner, however, established some irregularities in some Form 35 and Form 36 on the results in dispute. For instance, in Form 35 for Makuselwa Primary School (029) it is indicated that the election was done on 3.3.2013 instead of 4.3.2013. The Returning Officer explained that to have been an error which did not affect the results. Indeed all agents signed the Form 35 to show that the results were alright. Further, the front part of Form 35 for Makuselwa shows the correct date for the election to be 4th of March, 2013. The date at the back of that Form 35 was, therefore, an error. As for Sinoko Primary, the Presiding Officer signed Form 35 on 5th March, 2013; the Deputy Presiding

Officer did not sign the Form; there are no statutory comments but agents signed the Form. Once the Presiding Officer or the Deputy Presiding officer has signed the Form 35, that Form is valid for purposes of the election. That irregularity will not therefore yield much in supporting a claim for non-compliance with the law envisaged in section 83 of the Elections Act unless it is amplified by other serious malpractices apparent on the Form or related to the declaration of results. With regard to Murumba Primary School and Lugulu Boarding station, there was some overwriting which had not been counter-signed. In Bakisa PAG there was a correction which the Returning Officer explained and termed as an honest correction that does not affect the results. He also established that Form 36 which declared the final results for the election in dispute was signed by four (4) out of the ten (10) agents. These irregularities which were established by the Petitioner in some Form 35 and Form 36 were not widespread or fundamental or shown to be of a nature that would constitute non-compliance with the law which would compel the court to hold that the elections were not conducted in accordance with the principles laid down in the Constitution and in that the non-compliance affected the results. As I stated earlier, Section 83 of the Elections Act is the measure on the matter. The section provides;

> *''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 results of the election''*

[82] The expression ''non-compliance affected the results of the election'' has received sufficient interpretation by courts of law. Contemporary jurisprudence from Uganda in the case of **BISIGYE V MUSEVENI ELECTION PETITION NO 1 OF 2001** offered guidance and was adopted with approval by election courts in Kenya. In that case the court held that:

> *''...the expression ''non-compliance affected the results of the election in a substantial manner''...can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that, to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt''.*

[83] Accordingly, those irregularities were not widespread, multiple, fundamental in a sense to make them of the kind of non-compliance that would affect the results or put the victory of the 1st Respondent in doubt. Such errors are expected in any process which is being handled by human beings. On this persuasion, see the decision by Maraga J (as he then was) in the case of **JOHO V NYANGE (2008) 3KLR (EP) 500.**

<u>CONCLUSIONS: FINDINGS AND ORDERS</u>

[84] The court is alive to and is accordingly guided by the dictates of the Constitution, especially Article 82; to uphold the right of citizens to elect leaders of their choice. That is what should be protected at all costs in an election petition. The people of Webuye East Constituency elected the 1st Respondent as their Member of the National Assembly on 4th of March, 2013. The court will only make a decision on each case depending on the merit and evidence. From the evidence provided and court's assessment of the same, the opinion of the court is that he was elected in a free, fair and transparent election. The results declared by IEBC reflected the will of the people of Webuye East Constituency. The court cannot interfere with that expression of the will of the people unless there grounds proven in accordance with the law. The Petitioner has not established irregularities or non-compliance with the electoral laws of Kenya to the required standard of proof which would entitle the court to nullify the election of the 1st Respondent as the Member of National Assembly for Webuye East Constituency. Therefore, the petition lacks merit and is hereby dismissed with costs to the Respondents.

On costs

[85] Costs follow the event. The court awards costs to the Respondents. The court is empowered under rule 36(1) (a) of the Elections Rules to specify the total amount of costs payable; and the persons by and to whom the costs shall be paid. The court is aware that counsels for the 1st, 2nd and 3rd Respondents travelled from Nairobi while counsel for the 4th Respondent travelled from Kisumu for the occasions they were required to appear before the court. The court, therefore, holds that costs to the 1st Respondent shall not exceed Kshs 1,500,000. Costs to the 2nd and 3rd Respondents shall also not exceed Kshs 1,500,000 while those to the 4th Respondent shall not exceed Kshs 1,000,000. The security deposited in court shall remain so deposited pending the taxation of costs in accordance with Rule 37 of the Elections Rules. It is so ordered.

Quite exhilarating proceedings

[86] Before I close, I feel I should state that these proceedings were characterized by innumerable objections by counsel for the Petitioner, Professor Sifuna or by Mr ONSANDO for 1st Respondent or by Mr MUTUBWA, counsel for the 2nd and 3rd Respondents or by Mr OJURO, counsel for the 4th Respondent. Those objections were forcefully argued and supported by ample judicial decisions. In some arguments, I saw a deliberate effort by counsels to push the law from where it currently seems to end; leap-frog development of the law as envisaged in Article 259 of the Constitution. The objections related to a variety of areas in law, some were emergent and others were quite nascent, which I must admit granted the court an occasion to ascertain the law on the various subjects of the objections. It was a splendid experience where eminent legal arguments were urged before the court; it was quite a listening. I am convinced the legal fraternity will not lack persons to always occupy the chairs of great legal practitioners.

Dated, signed and delivered in open court at Bungoma this 30th day of September, 2013

F. GIKONYO

JUDGE

30/9/2013

Before: Hon. F. Gikonyo, Judge

Khisa: CC

APPEARANCES

Petitioner represented by Prof. Sifuna

Respondents represented by Lubulelah for 2nd and 3rd Respondents

Onsando for 1st Respondent

Ojuro for 4th Respondnet

COURT: Judgment delivered in open court.

F. GIKONYO

JUDGE

LUBULELAH: We record our appreciation to court.

PROF. SIFUNA: We thank the court for listening to us. We apply for copies of judgment and

proceedings for appeal purposes.

ONSANDO: I hope electoral laws would be amended as petition has revealed flaws.

OJURO: We are grateful.

F. GIKONYO

JUDGE