



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 8 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ACT NO. 9 OF 2011**

AND

**IN THE MATTER OF THE ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY OF
KITUTU MASABA CONSTITUENCY (NO. 270)**

BETWEEN

**PAUL GITENYI MOCHORWA
PETITIONER**

-VERSUS-

**TIMOTHY MOSETI E. BOSIRE 1ST
RESPONDENT**

**FREDRICK HEZEKIAH OWINO ODENGE (RETURNING OFFICER) 2ND
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

JUDGMENT

Introduction

1. The Petitioner presents this petition against the declaration of the 1st respondent as the Member of the National Assembly for Kitutu Masaba constituency by the 2nd Respondent, the Returning

Officer of the 3rd respondent Electoral Commission, following the General Election of the 4th March 2013, whereupon the 2nd Respondent certified that the 1st Respondent had received the highest number of votes in the said parliamentary election, as follows:

<u>Candidate</u>	<u>Votes</u>
a. Samson Atati Mose Kengere	624
b. Daniel Mogesi Otero	213
c. Hezron Nyangau Omwenga	337
d. Joash Okinyi Longisha Onyonka	904
e. Mark Nyaberi	1,170
f. Meshack Ngare Ondieki	344
g. Philip Nyauncho Bosire	1,579
h. Rueben Motari Okibo	127
i. Shadrack John Mose	14,663
j. Timothy Moseti E. Bosire	23,303
k. Tom Nyayiemi Mogaka	510
l. Victor Swanya Ogeto	5,678
m. Walter Enock Nyambati Osebe	13,159
n. Zachary Mumbo Mosoti	265

2. The Petitioner's case is that the election was not conducted in accordance with the provisions of the election law and that the result of the election was affected to the detriment of the petitioner and, accordingly, that the 1st respondent should not have been declared as duly elected. The full particulars of the petitioner's case is set out at paragraphs 6 and 7 of the Petition as follows:

“6. THAT your petitioner states that the said parliamentary election for the said constituency was not conducted in accordance with the provisions of the Act and or Regulations and other provisions of the law nor in accordance with the principles laid down therein nor in any law relating to such election nor in accordance with the principles of natural justice and that as such the result of the said election was seriously affected to the detriment of your petitioner and your petitioner avers that the 1st respondent should not have been declared as duly elected on the following:

- i. ***THAT the 2nd respondent and or his subordinate electoral officers locked out and or denied the duly appointed agents of one Reuben Motari Okibo and Walter E. N Osebe access to the polling station and or tallying hall.***
- ii. ***THAT the 2nd respondent and or his subordinate electoral officers caused the arrest and detention of Reuben Motari Okibo.***
- iii. ***THAT the 2nd respondent and or his subordinate electoral officers omitted, neglected and denied the duly appointed agents of one Reuben Motari Okibo and Walter E. N Osebe from accessing and or signing Form 35 contrary to the Act and the Regulations.***
- iv. ***THAT the 2nd respondent omitted, neglected and intentionally manipulated the results from the polling stations in favour of the 1st respondent by inflating and or reducing the votes cast, rejected or spoilt and indicated them in (Form 36) the final results contrary to the Act and Regulations.***
- v. ***THAT the 2nd respondent and or the electoral officers under him refused to show and give copies to the agents appointed by Reuben Motari Okibo and Walter E. N Osebe, Form 35 which was the primary document in the said electoral process.***
- vi. ***THAT the 2nd respondent and or the electoral officers under him failed to indicate all the names of the agents appointed by each candidate at each and every polling station and failed to give reasons for refusal to sign Form 35 as well as give statutory comments.***
- vii. ***THAT the 2nd respondent and or the electoral officers under him neglected, failed and or refused to properly fill and sign form 35 and validate the results with IEBC stamp.***
- viii. ***THAT the 2nd respondent entered on the tally sheet results different from those indicated on***

- form 35 and announced at the polling stations.*
- ix. *THAT the 2nd respondent and or the electoral officers under him allowed more agents at the polling stations than the number of candidates.*
 - x. *THAT the 2nd respondent and or the electoral officers under him employed relatives of one of the candidates hence compromising the outcome of the results.*
 - xi. *THAT the 2nd respondent and or the electoral officers under him doctored and or altered results without countersigning them and without giving the duly appointed agents of the candidates an opportunity to know the reasons for the altering and doctoring.*
 - xii. *THAT the 2nd respondent announced unsigned results from some polling stations and included them in the tally sheet when the same were invalid.*
 - xiii. *THAT the votes cast at Rigoma DEB Primary School (025) polling station were more than the registered voters thus rendering the process null and void. There were only 993 voters but the votes cast were 1,808 as declared by the presiding officer.*
 - xiv. *THAT the 2nd respondent allowed wrong entries to be made on the tally sheet (Form 36) which were not indicative of the actual votes cast in a particular polling station thereby disenfranchising the voters for example:-*
 - a. *Riabore DOK Primary School Polling Station.*
 - b. *Rigoma DEB Primary School Polling station (025)*
 - c. *Nyagechenche DOK Primary School (049)*
 - d. *Riamoro DOK Primary School (055)*
 - e. *Amaiga Tea Buying Centre (057)*
 - f. *Bogwendo PAG Primary School (063).”*

7. In the holding of the said elections diverse breaches of the statutory rules governing conduct of the election were committed by the 2nd respondent as the returning officer and his election officials including the presiding officers at each polling station their servants or any or some of them and thus prejudicing the election results against your petitioner in that among others:-

- a. *The 2nd respondent in entering wrong entries in the tally sheet declared the 1st respondent as the winner which should not have been the case.*
- b. *The 2nd respondent in arresting and detaining Reuben Motari Okibo denied him the right to participate in the elections.*
- c. *The 2nd respondent denied the candidates the right to have the votes cast recounted inspite of oral request to do so contrary to the Act and Regulation.*
- d. *The 2nd respondent failed to take control of the tallying process and thereby allowed the clerks to enter into the tally sheet figures neither representative of the votes cast in particular stations and nor in agreement with Forms 35 and 36.*
- e. *The 2nd respondent having made many wrong entries in the tally sheet also failed to make the correct calculations so as to arrive at the correct totals.*

That, your petitioner says that by reason aforesaid, the elections for Kitutu Masaba Constituency were rigged, unfairly conducted, interfered with, unduly influenced and thereby became invalid elections and should be nullified.”

3. The petitioner consequently prayed for relief as follows: -

“(a) THAT it be ordered that there be a scrutiny of the votes recorded as having been cast in the parliamentary elections in the constituency.

(b) THAT it be ordered that there be a recount of the ballot papers cast at the elections in the constituency.

(c) THAT the said parliamentary elections in Kitutu Masaba Constituency be determined and declared null and void.

(d) THAT the said election of the 1st respondent to the National Assembly be declared null and void.

(e) THAT the respondents be condemned to pay your petitioner's costs of this petition."

4. The petition was supported by the affidavits the petitioner and 6 witnesses all of whom testified during the trial. The 1st respondent filed a Response supported by his affidavit while the 2nd and 3rd respondents filed their Response supported by affidavits of the 2nd respondent and three other deponents, two of whom were called as witness during trial.
5. The substance of the Respondents' composite case was that the Respondents were not in breach of the constitution or the Elections Act or any other law relating to elections; that the respondents had not committed any election offences and the 1st respondent had been validly elected and declared Member of National Assembly for Kitutu Masaba. The 2nd and 3rd Respondents admitted minor transposition errors at Riabore polling station (014) causing a gain of 76 votes to the 1st Respondent and a loss of 148 votes to the runner-up, which did not affect the final outcome of the final result of the election.
6. The prayers for scrutiny and recount of votes in the constituency sought in prayers (a) and (b) of the petition were urged through a Notice of Motion dated 20th May 2013, which, though filed early in the proceedings, was argued on 23rd August 2013 after all the evidence for the parties had been adduced before the court. The Court in its ruling of 30th August 2013 declined the application for scrutiny and recount on the principal grounds that no sufficient basis had been shown for the order and that the 8000 plus margin of votes between the winning candidate and the runners-up was big and there was not demonstrated any probability that the gap could be bridged upon recount.
7. The issues were agreed between the parties and these may be collapsed into four questions as follows:
 - a. **Whether there are proved irregularities or breaches of the election law asset out in the constitution and the Elections Act and rules and regulations made there-under;**
 - b. **Whether any irregularities of breaches of law, if proved, affected the results of the election;**
 - c. **Whether the Respondents committed any election offences as alleged;**
 - d. **Whether the irregularities or breaches of election law, if proved, were of such nature or magnitude as to amount non compliance with the constitution and election law.**

General constitutional principles

8. Before considering the evidence adduced by the parties, it is important to record the court's appreciation of its mandate as an election court and the applicable legal provisions. Under Article 105 of the Constitution, the High Court is mandated to determine questions as to the validity of the election of a person as a member of parliament in accordance with the Elections Act being the law enacted by parliament pursuant to Article 105 (2). Article 105 of the Constitution is in the following terms:

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

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

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

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

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

9. The criteria upon which to consider the question whether a person has been validly elected as a member of parliament [as indeed any other elective post] is set out in the standards of the constitutional political rights, the qualifications of the persons to be elected to the position and the compliance of the particular election with the election law set out in the Constitution, the Elections Act, the Rules and Regulations made there-under. The provisions for qualifications and disqualifications for election as a Member of Parliament are set out under Article 99 of the Constitution but nothing turns on that in this election petition.

10. The voting rights of the citizens of Kenya include the right to a free and fair election, which is defined in Articles 38 and 81 (1) as follows:

“38. (1) Every citizen is free to make political choices, which includes the right—

(a) To form, or participate in forming, a political party;

(b) To participate in the activities of, or recruit members for, a political party; or

(c) To campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for:-

(a) Any elective public body or office established under this Constitution; or

(b) Any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions:-

(a) To be registered as a voter;

(b) To vote by secret ballot in any election or referendum; and (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

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

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

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

(c) Fair representation of persons with disabilities;

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

(e) Free and fair elections, which are:

i. By secret ballot;

ii. Free from violence, intimidation, improper influence or corruption;

iii. Conducted by an independent body;

- iv. *Transparent; and*
- v. *Administered in an impartial, neutral, efficient, accurate and accountable”*

11. The characteristics of the voting methods to be used by the body charged with the conduct of elections are elaborated in Article 86 of the Constitution to require certain specifications as follows:

“86. At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- a. *whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- b. *the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- c. *the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- d. *appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”*

Criteria for validation or invalidation of Election

12. For a candidate’s election to be validated under Article 105 of the Constitution, it must appear to court that the person was duly qualified for election as a Member of Parliament and that he was elected in a free and fair election consistent with the set constitutional standards. Accordingly, for a petitioner to succeed in a petition challenging the declaration of a person as validly elected, he must demonstrate that the person was not qualified [where applicable], or that the election was not free and fair within the meaning and standards of the Constitution.

13. In addition to the constitutional provisions on voting requirements under Article 86 set out above, parliament is empowered under Article 82 of the Constitution to enact legislation for the conduct of elections, whereby the Elections Act, 2011 has been enacted. By Article 82 (2) of the Constitution, the legislation required for the conduct of elections is required to ensure that the voting at every election is (a) simple (b) **transparent** and (c) takes into account the special needs of persons with disabilities and others with special needs.

14. By its section 83, the Elections Act 2011 provides a threshold saving clause that an election shall not be invalidated unless it offends the constitutional standards and election laws, or it fails to comply with the written law in such a manner as to affect the result of the election. In its exact terms section 83 inuncts that:

“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

15. When considered together the provisions of the Constitution and the Elections Act on the voting rights and method or process of voting, the injunction in section 83 must mean that a valid election must accord to the **‘principles laid down in the Constitution and in that written law’** and deviations from the provisions must not be of a scale, nature or character as to affect the result of the election.

The primary object of the election Law

16. In my understanding, the primary object of election law is to uphold the will of the electors through the instrumentality of an election process designed in accordance with certain cardinal principles geared towards the discovery of electorate’s decision [there are also principles of 2/3

gender rule in elective positions and fair representation of persons with disabilities]. The principles, which are set out in the Constitution and are sought to give effect in the body of the Elections Act pursuant to Articles 82 (1) (d) and 105 (3) of the Constitution require that the elections will:-

- a. *Embody the right of people to vote in universal suffrage (Art. 81);*
- b. *be free and fair – that is to say,*
 - i. *by secret ballot;*
 - ii. *free from violence, intimidation, improper influence or corruption;*
 - iii. *conducted by an independent body;*
 - iv. *transparent; and*
 - v. *administered in an impartial, neutral, efficient, accurate and accountable; (Art. 81)*
- c. *be conducted in a system that is simple, accurate, verifiable, secure, accountable and transparent (Art. 86); and therefore*
- d. *be expressive of the will of the people (Art. 38)*

17. It follows that a valid election must in principle accord to these principles, and that in the case of non-compliance with the law enacted to give effect to these principles, such non-compliance must not affect the result of the election because then the will of the electors would be defeated rather than upheld, as required under Article 38 of the Constitution.

18. In considering a statutory provision in terms similar to our section 83 of the Elections Act, the Court of Appeal in England in *Morgan v. Simpson* (1974) 3 ALL ER 722 held that:

“(i) Under section 37 (1) an election court was required to declare an election invalid:

- a. ***If 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 elections”, or***
- 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 to 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 the election had been affected.”

19. Section 37 (1) of the Representation of People Act 1949 under consideration in the case provided that:

“No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of local election rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.”

20. After considering the case law on the issue, Lord Denning MR concluded as follows:

“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 was 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 a mistake at the polls and it did affect the results – then the election is vitiated...*”

21. Similarly, Stephenson L.J. in the same case examined the law on invalidation of elections and said:

“Nothing that I can find in Woodward v. Sarsons touches on election which is affected in its result by errors which are not substantial but are all in the day’s work of fallible human beings inevitably prone to ordinary human mistakes. The judgment does not reveal what the court’s view was of such an election either at common law or under the Ballot Act 1872.

If substantial breaches of the law are, as I think, enough to invalidate an election though they do not affect its results, it follows that contrary to the opinion of the Division Court, trivial breaches which affect the result must also be enough. I cannot hold that both a substantial breach and an effect on the result must be found in conjunction before the court can declare an election void. There does not appear to be any decision which binds this court to hold so; and I am glad to find my view of the section confirmed by the opinions expressed by the editor of Halsbury’s Laws on Woodward v. Sarsons, and by the editors of Atkin’s Encyclopaedia of Court Forms on the law laid down by ss. 16(3) and 37(1).

I now answer my four main questions as follows: (1) (2). Any breach of the local election rules which affects the result of an election is by itself enough to compel the tribunal to declare the election void. It is not also necessary that the election should be conducted not substantially in accordance with the law as to local elections. As such a significant breach of rules is admitted, the appeal must be allowed on that ground. (3) and (4). For an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some illegal ground or disfranchising a substantial proportion of qualified voters, but not such an irregularity as was committed in this case....”

22. In a subsequent case of *John Fitch v. Tom Stephenson & 3 Others*, QBD (2008) EWHC 501 emphasis was laid in upholding the will of the people when it was held:

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

23. The Supreme Court of Kenya in the *Raila and Others v. IEBC and Others*, Presidential Petitions Nos. 3, 4 and 5 of 2013 has adopted a similar standard that non-compliance must affect the results when the Court held:

“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 of compliance did affect the validity of the elections.”

24. Save for the omission of the word ‘substantially’ in our section 83 of the Elections Act, 2011 the terms of the provision are materially similar to the English Act and there is good cause to read the word ‘substantially’ into section 83 of the Elections Act not for any reason of symmetry but for purposes of ridding our provision of a glaring internal contradiction. As it stands, section 83 of the Elections Act has a contradiction in its terms in that it purports to excuse non-compliance with the any written law subject to compliance with the principles of the Constitution and the law: if there were full compliance with the Constitution and the law, then there would be no non-compliance to be excused! I think the word ‘substantially’ must be read into the section to make it intelligible.
25. Accordingly, the petitioner must to succeed demonstrate either that the election was so badly conducted as to be substantially in contravention of the Constitution and the Election law or that deviations from the election law is such as to affect the result of the election.

Burden and standard of proof

26. As regards the **Burden of Proof**, this court is bound by the guidance of the Supreme Court that the legal burden lies with the petitioner with the evidential burden shifting from time to time in the course of the petition proceedings upon proof by firm and credible evidence. The Court held:

“195. There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.”

“196. We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. 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 of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been 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.”

27. The Supreme Court set the **standard of proof** to be higher than the civil law standard of balance of probabilities and below the criminal law standard of beyond reasonable doubt, save for matters which manifest themselves in criminal offences. The court said:

*“203. The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. **The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question.** In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the Constitution, for an outright win in the presidential election), the party bearing the legal burden*

of proof must discharge it beyond any reasonable doubt.”

Validity of Forms Relied on by the Petitioner

28. Before setting to examine the discharge or otherwise of the plaintiff's onus of proof set out above, the court must make a determination as to the validity of various Forms 35 attached to the Petition by way of annexures to the supporting affidavit of the petitioner. The documents were attached to the petitioner's affidavit to demonstrate the various claims made by the petitioner as regards their due execution, completion by the election officials and attestation by agents for the candidates as well as the data entries thereon regarding the record of the election. The petitioner claimed during his testimony in court that he obtained the set of purported Form 35s from unnamed agents of his political party and other parties. The respondents objected to the documents as fabrications of the petitioner to support his petition.

29. As the Supreme Court has found in the case of ***Raila v. IEBC***, supra, the IEBC must enjoy the presumption of validity of action: -

“197. IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfillment to the people's political rights [Article 38 of Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”

30. The documents presented by the petitioner were incomplete and not signed by the presiding officers of the polling stations concerned and they invariably contained entries and information inconsistent with the official documents presented by the 2nd respondent save for the Form 35 on Rigoma Polling station of which the official IEBC (3rd respondent) form had similar entries with the petitioner's form except with regard to the item on votes cast. Being the official body charged with the conduct of elections under the constitution, the IEBC's documents presented by the 3rd respondent through its officer the 2nd respondent must be taken to be the official record of the elections and in the event of conflict with any other documents purporting to be the IEBC documents the ones presented by the IEBC and its official set of documents must prevail.

31. The petitioner indeed admitted on cross examination that authentic Form 35s would be from the Commission, and further confirmed that the Forms presented by the Commission were complete and signed by the presiding officers. The Presiding Officer for the Rigoma polling station (DW4) confirmed that the Form 35 purported to record the data on election at the polling station did not emanate from him. In addition, the presiding officer in charge of receipt of results from the polling stations testified that he would not have accepted Form 35s which were not signed by the presiding officers for the particular stations and whose results on the votes scored by the respective candidates did not tally with the entry on valid votes cast. When cross-examined on his set of Forms, the petitioner was unable to state and name the agents who had given him the forms, and none of the alleged agents were called as witnesses to confirm that they obtained the incomplete forms from the presiding officers of the polling stations.

32. Accordingly, I am unable to hold that the petitioner has with regard to the Form 35s attached to the supporting affidavit to the petition presented credible evidence to demonstrate any irregularities to warrant the shifting of the evidential burden to the Respondents to rebut the petitioner's evidence. The petitioner's set of documents purporting to be Form 35s are rejected as invalid. The examination of the petitioner's case with regard to irregularities respecting the results entries will therefore fall to be determined on the basis only of the Form 35s presented by the 2nd and 3rd respondents as the lawful custodians of the official results form.

The specific claims by the petitioner

33. In seeking to demonstrate that the conduct of election in the constituency was contrary to the Constitution and election law, the petitioner presented his case under the following rubrics, and I find it convenient to consider the petition under the same headings.

34. Arrest and Intimidation:

The petitioner claimed as an act of intimidation that the respondents caused the arrest and detention in police custody at Keroka Police Station of the petitioner and the petitioner's witness PW2 for varied periods between the 4/3/13 and 6/3/13. PW1 (the Petitioner) and PW2 who was one of the candidates for the Member of Parliament seat the subject of this petition were allegedly arrested by police at Omoti Road Junction in the Constituency where the two had met for the hand over by PW2 for distribution by the petitioner (PW1) of identification badges and oaths of secrecy for their party's agents in the election to enable them participate in the election. The election materials for the agents had allegedly been brought from the petitioner's party headquarters in Nairobi late in the night before the election and the PW2 required the assistance of the petitioner to distribute the materials to the agents in the constituency to enable them access the polling stations.

35. The Petitioner and PW2 had allegedly been arrested upon being found buying or illegally obtaining national Identity cards from would be voters and were later charged with the offence of "preventing a person from voting contrary to section 59 (1(d) of the election act no. 24 of 2011" with particulars of the offence being that "1. *Reuben Motari Okibo* 2. *Paul Gitenyi Mochorwa*: *On the 4th day of March, 2013 at Riamisi Polling Station in Masaba North District within Nyamira County, jointly being an aspirant vying for Member of the National Assembly under National Vision Party for Kitutu Masaba Constituency and County Assembly Ward for Gachupa ward respectively, unlawfully had in possession one National Identity Card Number 30304637 of Justine Aroni Achuka suspected to have been unlawfully obtained, preventing the said Justine Aroni Achuka from voting at Riamisi voting centre, knowing that she was entitled to vote using the registration document.*"

So far as this court is aware, the matter is still pending trial before the criminal court at Kisii Law Courts.

36. The only nexus shown between the 1st respondent and the arrest and detention of the petitioner and PW2 was the belief by the PW2 that 'I think he feared I was winning the election'. As regards the 2nd respondent returning Officer, the petitioner and PW2 believed that because the 2nd respondent was, in accordance with the election regulations in charge of the administration police during the polling exercise, he must have instructed the police to arrest them. PW2 further surmised, inconsistently with the explanation given for the 1st respondent's interest in his arrest, that 'the fear was that I would stop the elections', ostensibly on the ground of the misspelling of his first name on the ballot paper. During cross-examination by counsel for the 2nd and 3rd respondents, PW2 said:

*"I blame the 2nd respondent because he caused my arrest. **The 2nd respondent feared that I was going to stop the exercise. I consider that my name was missing. The name was misspelt.** I was going to the tallying centre to tell the 2nd respondent that my name was missing. I called him with a complaint before the arrest after I finished voting...*

*The person shown as **Rueben** Motari Okibo was not me. I was arrested at a road side. **The fear was that I would stop the elections.** I called the 2nd respondent because I knew he was the authorizing officer and I asked him to come to my rescue. I told him that I had been arrested and I did not know why I was being arrested. **I sought for his assistance to have me released. I was confident that***

he would help me get released.”

37. PW2, moreover, gives contradictory testimony that he had called the 2nd respondent seeking his help to have them released on the reasoning that the 2nd respondent had authority over the police at the time. If it was the 2nd respondent who had ordered their arrest and detention, how would they seek assistance for their release from the same person who caused their arrest.
38. First, it is not true as pleaded in Paragraph 7 (b) of the petition that the arrest and detention of the PW2 denied him the right to participate in the elections as the witness confirmed in testimony before the court that he had already voted by the time of the arrest. Second, such allegation of intimidation of any voter by a private person or a member of the Electoral Commission is a criminal offence, respectively, under sections 63 (3) and 59 (d) of the Elections Act, which must be proved to the required standard of beyond reasonable doubt. The petitioner and PW2 must demonstrate that the respondents were responsible for their arrest in having ordered or instigated the arrest. Mere suspicion or allegation that the 2nd respondent must have caused the arrest of the two because under the regulations the administration police were during the polling exercise under the authority of the 2nd and 3rd respondents is not sufficient.
39. Third, that the 1st respondent might have had a motive to cause the arrest and detention of the PW2 who claimed to have been winning the election is no proof of the offence, for under section 9 of the Penal Code the motive for an act or omission constituting an offence is irrelevant. While the 2nd Respondent had supervisory authority over the administrative police at the polling stations, he did not have any authority over incidents taking place outside the polling stations and the Petitioner and PW2 confirmed that their arrest had taken place at a road junction and not at any polling station. Hence the call for assistance from the 2nd respondent Returning Officer. I do find that the petitioner has proved that the Respondents caused his arrest and that of the PW2, and therefore the allegation of intimidation has not been established.
40. **PW2 sought to create a cause – effect linkage of his arrest and his agents being locked out for want of badges when he said in cross-examination by counsel for the 1st Respondent that** - *“My agents were locked out from the polling stations because they did not have the election materials such as badges which were in the custody of Administration Police at Keroka Police Station. They were locked out because they did not have the badges.”*
41. However, the clear line of causation is broken by the petitioner’s and PW2 failure to prove that their arrest and detention was authorized or instigated by the Respondents. They did not for instance call for the Occurrence Book at the Police station to show who the complainant was or the person who authorized the arrest. To be sure, the delay in delivery of the party badges according to the evidence was caused by late delivery of the badges from the party headquarters in Nairobi on the night before the election and the failure by PW2 to arrange for their distribution to the agents until 11.00am when he was arrested on the aforesaid allegations, despite the polling stations opening at 6.00am.
42. PW3 did not prove that he had been beaten by agents of the 1st respondent for his failure to support the candidate as alleged. He was not able to demonstrate that the persons who assaulted him were truly agents of the 1st respondent. He only said they were his supporters. He did not prove the assault by any medical examination record such as the Police Form P3 which he said he had taken out. He also did not produce the Occurrence Book record of the incident at the Polling station. I do not find that the act of assault by agents or supporters of the 1st respondent was proved.

43. Missing Name

The Petitioner’s witness No.2 **Reuben Motari Okibo** in his affidavit in support of the petition deposed

as follows:

“7. THAT the third respondent without any colour of right unlawfully misspelt my name as Reuben Motari Okibo instead of Reuben Motari Okibo and this misled voters during election day.

He then testified that the 2nd and 3rd respondents failed to include his full names and photo in the ballot paper; that his first name Reuben had been misspelt as Rueben so that it appeared as Rueben Motari Okibo. PW2 complained that by failing to notify the electorate of the missing name and photo it gave the 1st respondent undue advantage over PW2 and other candidates and that the acts of the 2nd and 3rd respondents contravened the Elections act, the regulations and the Constitution of Kenya. It was not shown how the misspelling of a name could have given the 1st respondent an advantage over PW2. On cross examination the witness confirmed that his photograph, and his party symbol were shown on the ballot, that he voted for himself and, in reexamination, that his constituents were well educated. He said:

On cross-examination by counsel for the 2nd and 3rd respondents:

Before the election the candidates were gazetted. I saw the gazette and my name was clearly spelt. There was also the party symbol properly appearing and my photograph was correctly carrying my face. The ballot paper carried the passport size photo of me correctly. The party symbol was also correct but my names were not okay. I was called before I noted that my name was misspelled. I went to the polling station to confirm. I voted after confirming that they were in a mess. I confirm that I voted for myself.

On re-examination by counsel for the petitioner:

My names were misspelt. It created a good impact on the electorate. My constituents are well educated. When they came to the polling station, they found out the names on the ballots were not clear. I expect that arising from the misspelling; some voters may have been swayed to vote for my competitors.

44. Considering a similar claim of mix up in names of candidates, in ***Charles Maywa Chedotum & Another v I.E.B.C & 2 Others*** Election Petition No.11 of 2013 at Kitale, J.R Karanja, J held:

“Most importantly, no evidence was provided by the petitioners that the mix-up of their names was a deliberate act by the first and second respondents with a view to aiding the third respondent or any other candidate unfairly. Most likely than not, the mixup was as a result of typographical or print error. In any event, the mixup could not have prevented the voters or the petitioners exercising their constitutional rights. This was because, the name of the candidate was not the only means of identification in a ballot paper. There were other means which included the candidates' political party's name, symbol and colour. In fact, in areas where a majority of voters are assisted voters they would more likely than not identify their preferred candidates by his party's symbol, colour or name. It cannot be true that voters at certain polling stations refrained from voting or voted for wrong candidates due to the alleged mixup of the petitioners' names in the ballot papers.”

45. **In the present case, the witness PW2 Reuben Motari Okibo confirmed that the electorate in his constituency were well educated and it must therefore be taken that they could not easily be misled into not voting for the witness on account only of misspelling of his first name Reuben as Rueben, particularly where the witness confirmed his photograph and party symbol were on the ballot paper. Moreover, as noted by JR Karanja J. in the Chedotum case, supra, the illiterate assisted voters were more likely to rely on the party symbol and photograph of the candidate than the spelt name. I do not find that the irregularity in the misspelling of the PW2s name was substantial non compliance with the election law or that it in any way affected the result of the election.**

46. Agents

The allegation was that the 2nd and 3rd respondents, their subordinate staff denied the duly appointed agents for one Reuben Motari Okibo PW2 and one Walter E. N. Osebe from accessing the polling station and or tallying hall. PW1 and PW2 testified that they were arrested before they could distribute identification badges and other documents to their party's agents. If the purpose of the badges and letters of appointment and oaths of secrecy were for purposes, as conceded by the petitioner, of gaining access to the polling and or tallying station, how could their agents who did not have these documents be allowed in the polling stations and tallying hall?

47. The only agent who claimed to have been an agent of the petitioner's party and locked out of a polling station was PW7 David Okero Obonyo who on cross-examination by counsel for the 2nd and 3rd respondents said:

"I voted in the morning. I did not participate as an agent. I was locked out. I was outside the polling station waiting for letter of appointment and badge to be able to participate as agent. I even spent the night and at the polling station. This information is not in the affidavit."

Clearly, if person could not show his appointment as an agent by means of letter of appointment, badge and oath of secrecy as a means of demonstrating that he was an authorized agent under regulation 62 of the **Elections (General) Regulations, 2012** he could not lawfully be admitted into the polling station or tallying centre. I therefore do not find any merit in this complaint.

48. Strangers signed form 35

It was submitted for the petitioner that -

"We submit that the persons who were not agents and or strangers and or unknown to candidates, political parties and or independent candidate unlawfully participated in the counting and announcement of the results and appended their signatures in form 35s. In fact the strangers participated in nearly all the polling stations and the 2nd and 3rd respondents have not given an explanation as why this took place. These unauthorized people affected the election result in favour of the 1st respondent."

49. In breach of the petitioner's burden under section 107 and 109 of the Evidence Act, other than the bare statement that the unauthorized people affected the election result in favour of the 1st Respondent no evidence was adduced in proof. No evidence was called to show that the persons signing the particular Form 35s were not agents for any of the political parties and candidates participating in the 6 elections of the General Elections 2013. DW4 explained the phenomenon of 'strangers' participating as agents in that they were agents who having come in late after the commencement of polling, could not sign the Polling station's list of agents which is signed in before the opening of the polling and therefore were not shown on the list. He said:

"The presiding officers were trained on whom to allow to the tallying station. They were supposed to record the agents in the poll day diary. The agents who were present at the polling station were supposed to participate in the full exercise. The list of agents shown as FH001. Those agents who were duly appointed by their parties or candidates and who came late may have been allowed into the polling station without their names being recorded in the poll day diary. I am not aware of any of the situations where this occurred. I am not aware that in 95 stations some strangers took over the process including declaration of results."

50. I find this explanation a reasonable answer to this complaint. The question is whether in these circumstances, the agents who came in late but could demonstrate that they were properly

appointed by their agents in accordance with the rules could be refused participation. I do not think so as that would infringe on the candidates' right to be represented in the election exercise.

51. **No agents; Not all agents signed form 35; More agents signed form 35**

Relying on Regulation 62 (2) which provides “*notwithstanding sub regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party*” it was contended for the petitioner that there should have been no more and no less than 14 agents signing Form 35s. It is true that at Nyamare SDA (084) six agents signed yet the polling station had not recorded any particulars of agents. In other stations more or fewer agents than the number of candidates participating in the parliamentary election signed the Form 35s and the respective presiding officers did not give any reasons as to why more or less agents signed the forms.

52. I agree with counsel for the 2nd and 3rd Respondents that it is duty of the candidates and agents to ensure that they sign the Forms or to give reasons for their refusal or default. It is really not helpful for the presiding officers to be required to state, as happened in some of the polling stations, that agents left early or they were too tired to sign the forms. It is, however, clear that an election result will not be vitiated by reason of failure or refusal by candidates or agents to sign the statutory form or to give reason for refusal or default, in view of the saving clause of **Regulation 79 of the Election (General) Regulations, 2012** made under the Elections Act in the following terms, so far as material –

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

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

53. If non-signing of the forms by the agents cannot invalidate an election, the signing of the forms by agents whether in more or less than the number of the candidates in the particular election should invalidate the election. It is an issue of first principles: the object of agents signing the Form 35 is to confirm the results contained therein. If it is signed by agents in other elections taking place alongside the particular election, there cannot be a valid objection to such ‘over-confirmation’ unless it can be shown to have affected the result adversely in some way.

54. The Returning Officer DW4 testifying in court gave the purpose and practice of agent signature in elections and said:

“Those agents who were duly appointed by their parties or candidates and who came late may have been allowed into the polling station without their names being recorded in the poll day diary....

There were 14 candidates, each party or candidate was supposed to include one agent at any given time because on the only one agent would be allowed to replace the other. At any given time, there were supposed to be more than 14 agents because of the various elective positions. It is not correct that the signing of form 35 was restricted to the 14 agents. Any agent present representing any party or any candidate present at the time of signing of form 35 could have been signed by any candidate or agreement in the elective positions without discriminating as to the elective post. If there was any reason for not signing form 35 the agents were allowed to give the reasons. It is the agent who would give the reason for refusal to sign....

The purpose of signing form 35 by agents is to authenticate the contents of the forms as agreed by all who have signed. It should be signed after all the entries have been made on the forms. The entries are made after the counting and tallying at the polling station. Those who sign are those who are present at the stage of concluding the exercise.”

55. I would agree that if the purpose is to confirm the contents of the Form 35, all accredited agents present at the time the results are announced, whether representing the candidates in the particular election or other candidates in other elections may sign the Form 35. It must be observed that the 2013 General Election involved election for 6 positions with some elections as here having over 10 candidates. If all the political parties appointed agents and the various candidates also appointed their personal agents as they were entitled to there would be over 20 agents per election. If the both agent for the candidate and the agent for the party signed to express their concurrence with the result there would understandably be a huge turnout of agents signing the Form 35. This would still accord with the Regulation 62 (2) that *“the presiding officer shall admit to the polling station not more than one agent for **each candidate or political party.**”* I do not therefore find that any irregularity has been proved in this regard.

56. Alterations on Form 35

The petitioner has proved that there were alterations in the Form 35s, the primary result documents in some polling station, some of which were not countersigned by the presiding officers and or the agents. The petitioner submitted that the form 35s should not have been interfered with since they were the primary documents. DW3 Jones Bitange Nyabio, the presiding officer in charge of receiving the Form 35s from the presiding officers in the polling stations admitted that there were alterations in 39 polling stations, **14** of which were counter-signed.

57. There is no requirement that the entries on Form 35 or any other form be without alteration. The constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavor; accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and it necessarily imports corrections by alterations, whether countersigned or not.

58. **As I observed in *Eng. Peter Kimori and Anor. v. Joel Omagwa Onyancha***, Kisii Petition No. 7 of 2013 Ruling of 13th September 2013 –

*“Although there is no legal requirement for the countersigning, DW3 Returning officer confirmed that the residing officers were trained that they should countersign against every change or alteration that they made. I agree with Kimaru, J in **William Kabogo Gitau v George Thuo & 2 Ors** Nairobi Election Petition no. 10 of 2008, that common sense approach requires the counter-signing of alterations and cancellations especially in electoral documents in view of the need for verification of the results. The counter-signing works in two ways to assure the reader of the authenticity of the figures in the documents and as confirmation by the author that the changes in the document are intended and his, and not subsequent changes made by other persons after his signature. I do not however agree, in view of human fallibility in the circumstances of elections which do not afford much time for meticulous preparation of numerous documentation, that the statutory forms invariably be required to be written without any alterations. The test, in my view and in keeping with the terms of section 83 of the Elections Act, must always be the effect of the changes on the results of the candidates and therefore on the outcome of the election.”*

59. DW2 and DW4, respectively the Presiding Officer in charge of receiving the Form 35s and the Returning Officer, testified as to how they checked the forms for accuracy by comparing the totals of scores by candidates against the valid votes cast and confirmation that the figure was below the figure of registered voters for the Polling station. The witnesses gave a formula that the votes cast

is equal to the rejected votes plus the valid votes cast the latter which is in turn equal to the total of the votes for each of the candidates, which one could use to establish the accuracy of the entries in the statutory Forms.

60. In analyzing the evidence before the court by way of official Form 35s presented by the Commission, the court has established that in all the polling stations where there were alterations, the same did not affect the candidates and the totals of votes garnered by the candidates as shown in the lower table of Form 35 was equal to the amount of valid votes cast as shown on upper table of the Form which records the total figures. There is only one error in polling station **No. 001 Rikenye DEB** where the votes cast is shown as **396** rather than the correct **395** with a difference of one (**1**) vote which may be explained by error in arithmetic computation. The schedule below shows the result of the analysis:

ANALYSIS

1. RIKENYE D.E.B [001]

The over writing and alterations show the votes cast as 396 and the valid votes as 393. The number of valid votes cast in favor of each candidate correctly adds up to 393. But when you calculate for the votes cast, that is the valid votes cast added to the rejected votes 02 the figure is $(393 + 02) 395$ whereas it is shown with alteration as 396, a difference of 1 vote.

2. EMBARO D.O.K [002]

The overwriting and alteration do not have an effect on the total number of valid votes cast $507-1=506$. This figure is the same as the totals of the number of valid votes cast in favor of each candidate and will not affect the results.

3. KEROKA FARMERS [003] Stream 1

The overwriting of the figure 5 on the valid votes cast in favor of WALTER ENOCH NYAMBATI OSEBE does not affect the total number of valid votes cast which is equivalent to the total number of valid votes cast in favor of each candidate and will not affect the results.

4. KEROKA FARMERS [003] Stream 2

The cancellation on number of rejected votes and the cancellation on number of valid votes cast in figures and in words does not affect the total number of valid votes cast which is equivalent to the total number of valid votes cast in favor of each candidate.

5. NYANCHONORI [007] Stream 2

The cancellation on the total number of votes cast does not affect the total number of valid votes cast which is $453-1=452$. 452 is the same figure you find after adding the totals of valid votes cast in favor of each candidate.

6. MONGONI D.E.B [008]

There is an alteration on the figure 6 on the total number of votes cast and figure 5 on the total number of valid votes cast which does not affect the total number of valid votes cast $662-9=653$ which is equivalent to the total valid votes in favor of each candidate.

7. MATANGI D.O.K [016]

The cancellation on the figure 433 and the words therein do not affect the total number of valid votes cast which is **433**. When you subtract the rejected votes from total number of votes cast you get $434-2=432$ but calculating the total valid votes cast in favor of each candidate you find **433 votes** in this polling station 1 vote is not accounted for.

8. NYAGANCHA [024]

Overwriting of figure 2 on total number of votes cast and figure 7 on number of rejected votes does not affect the total number of valid votes cast $822-7=815$ which is equivalent to the total of valid votes cast and is the same as the total of valid votes cast in favor of each candidate.

9. SENGERERI D.E.B [027]

The overwriting of figure 6 and 8 and the overwriting of the words eight on the total number of valid votes cast does not affect the number of valid votes cast when you subtract number of rejected votes from total number of votes cast $649-1=648$ which is equivalent to the total number of valid votes cast for each candidate.

10. KEBERICHI D.E.B [029]

Overwriting of figures for SHADRACK JOHN MOSE, TIMOTHY MOSETI BOSIRE, TOM NYAYIEMI MOGAKA and VICTOR SWANYA does not affect the total number of votes cast which is $410-3=407$ same as the total number of valid votes cast for each candidate.

11. GIRANGO D.O.K [030]

The alteration of figure 8 on number of rejected votes and the overwriting of figure 8 on the total number of valid votes cast does not affect the total number of votes cast which remains as $606-8=598$ which is less by **1 vote** to the number of votes cast in favor of each candidate which comes to 597.

12. GETENI D.O.K [031]

The overwriting of figure 8 on total number of votes cast does not affect the total number of valid votes cast $518-32=486$ which is equivalent to the number of votes cast in favor of each candidate.

13. GIRANGO FARMERS [036]

The cancellation on number of rejected votes and overwriting on the figure on total number of valid votes cast does not affect the number of valid votes cast which is $600-7=593$ which is equivalent to the total number of valid votes cast in favor of each candidate.

14. NYAIBASA D.O.K [037]

The overwriting of figure 4 in number of rejected votes does not affect the total number of valid votes cast which is $424-4=420$ equivalent to the number of valid votes cast in favor of each candidate.

15. RIAMISI T.B.C [038]

The alteration on total number of votes cast and number of rejected votes does not affect the total number of valid votes cast $454-5=449$. 449 is equivalent to the number of valid

votes cast in favour of each candidate.

16. KERONGO D.O.K [043]

The overwriting of figure 7 on total number of votes cast does not affect the total number of valid votes cast which is $467-10=457$ equivalent to the total number of votes cast for in favour of each candidate

17. MOKORONGOSI [044]

The cancellation on the figures of total number of votes cast does not affect the total number of valid votes cast $559-5=554$ which is equivalent to the number of valid votes cast in favor of each candidate.

18. KIENDEGE D.E.B [046]

The alterations on total number of votes cast and number of rejected does not affect the total number of valid votes cast $584-20=562$ which is equivalent to the number of valid votes cast in favour of each candidate.

19. IRIANYI D.E.B [047]

The alteration of figures on total number of votes cast and number of rejected votes does not affect the total number of valid votes cast which is $345-4=341$ which is equivalent to the number of valid votes cast in favor of each candidate.

20. IKONGE S.D.A [048]

The cancellation of nil and altering with figure 0 does not affect the total number of valid votes cast which is $673-11=662$. The overwriting on figure 4 of PHILIP NYAUNCHO BOSIRE and figure 1 on VICTOR SWANYA OGETO does not affect the total number of valid votes cast in favor of each candidate which is 662.

21. MOITUNYA S.D.A [052] Stream 2

Overwriting of figure 8 on total number of votes cast and figure 2 on number of rejected vote does not affect the total number of valid votes cast which is $428-2=426$ equivalent to the total of number of valid votes cast for each candidate.

22. MOTEMBE D.O.K [054]

The cancellation on the total of valid votes cast does not affect the total number of valid votes cast which is $495-4=491$ which is equivalent to the number of valid votes cast in favor of each candidate.

23. AMAIGA T.B.C [057]

There is overwriting of figure 2 on the number of rejected votes and cancellations on both the words and figures on the total number of number of valid cast but the said cancellation do not affect the total number of valid votes cast $431-2=429$. The alteration of figure 7 of SHADRACK JOHN MOSE's votes does not affect the total of number of valid votes cast in favor of each candidate. The total number of votes cast is equivalent to the total number of votes cast in favor of each candidate which is 429

24. RIONG'UTI D.O.K [059]

The alteration of figure 3 on the number of rejected votes has not affected the total number of valid votes cast $599-3=596$ which is equivalent to the total number of valid votes cast in favour of each candidate.

25. SIRATE D.O.K [060]

The alteration on figures in total number of valid votes cast does not affect the total number of valid votes cast which is $315-4=311$ which is equivalent to the number of valid votes cast in favour of each candidate.

26. BOGWENDO P.A.G [063]

The alteration of figure 2 on the total number of votes cast does not affect the total number of valid votes cast $632-2=630$ which is equivalent to the total of number of valid votes cast in favor of each candidate.

27. NYAMBARIA D.E.B [065]

The overwriting of the word EIGHT on the total number of valid votes cast SIX HUNDRED AND EIGHTEEN has not affected the total therein $625-6=619$ which is equal to the total of the number of valid votes cast in favor of each candidate.

28. RIARANGA D.O.K [066]

The alterations on the number of rejected votes figure 10 and the total number of valid votes cast figure 2 does not affect the total number of valid votes cast which is $629-10=619$ which is equivalent to the number of valid votes cast in favor of each candidate.

29. KENYAMWARE D.E.B [071]

The overwriting of the figure 0 on the number of spoilt votes does not affect the total number of valid votes $446-3=443$ which is equal to the number of valid votes cast in favor of each candidate.

30. GEKANO [072]

The overwriting of the figures has not affected the number of valid votes cast which is $597-7=590$ which is equivalent to the number of valid votes cast in favor of each candidate.

31. OGANGO [077]

The overwriting of figures for TIMOTHY MOSETI E. BOSIRE and TOM NYAYIEMI MOGAKA does not affect the total number of votes cast which is 474 which is equivalent to the number of valid votes cast in favor of each candidate.

32. KIOGUTWA S.D.A [079]

The alterations on the total number of votes cast which figure in words is different does not affect the total number of votes cast which is $669-16=653$ which is equivalent to the number of valid votes cast in favor of each candidate.

33. NYAMWARE S.D.A [084]

The overwriting of figure 3 on the number of rejected votes does not affect the total number of valid votes cast $202-3=199$ which is equivalent to the total number of valid

votes cast in favor of each candidate.

34. GESONSO COFFEE FACTORY [089]

The alteration of figure 1 on the total number of votes cast does not affect the total number of valid votes cast $591-5=586$ which is equivalent to the total number of valid votes cast in favor of each candidate.

35. RIAMONI D.E.B[092]

The alterations on total number of votes cast does not affect the figure on total number of valid votes cast which is $644-3=641$ which is equivalent to the number of valid votes cast in favor of each candidate.

36. ESANI D.E.B [098]

The alteration on the number of rejected votes does not affect the total number of valid votes cast which is $583-11=572$ which is equivalent to the number of valid votes cast in favour of each candidate.

37. KARANTINI S.D.A [100]

The alteration of figure 1 on the number of rejected votes does not affect the total number of valid votes cast which is $343-1=342$ which is equivalent to the number of valid votes cast in favor of each candidate.

38. RISA D.E.B [102]

The alteration on the number of rejected votes figure 0 does not affect the total number of valid votes cast which is $369-05=364$ which is equivalent to the number of valid votes cast in favor of each candidate.

39. RIAKWORO S.D.A [105]

The overwriting on the number of disputed votes does not affect the total number of valid votes cast which is $468-05=463$ which is equivalent to the number of valid votes cast in favor of each candidate.

There are only 39 polling stations where there are alterations, cancellations or overwriting. They do not affect the total number of valid votes cast which are equivalent with the number of valid votes cast in favor of each candidate.

61. Failure to Fill form 35s and Statutory comments

All the Form 35s presented by the 2nd and 3rd Respondents were duly signed dated and stamped by the Presiding Officers. However, not all contained comments in the space reserved for “statutory comments”. Save that there is provision on the Form 35, which records the results of an election, for a space for inserting ‘statutory comments’, there is no statutory requirement that the presiding officers must make comments on the form. It is of course a useful provision for the presiding officer to state his view on the polling exercise general or in particular references to notable occurrences at polling station that may explain the vote, turnout or other matter relevant to the election. The failure to give statutory comments cannot affect the election, the result of which is already captured in the foregoing sections of the Form 35. Indeed in many of the Forms 35 where the presiding officers have made comments entries like ***‘free and fair’, ‘high turnout’, ‘results accepted by candidates and agents’, ‘N/A’, ‘voting went well’, ‘well done,’ ‘agents left early’***. Such comments, while giving some subjective perspective on the election exercise cannot be taken influence the result of the election. It would not stop a petitioner from

challenging an election merely because the presiding officer gave it a clean bill of health in his statutory comments, and the court is never bound by the 'statutory comments'. I do not therefore find that the failure by the presiding officers to give statutory comments in some named stations is an irregularity that amounts to substantial non-compliance with the constitution and law or one that affects the result of the election.

62. **Improvised Form 35**

It was contended, indeed an exaggeration, that the 2nd and 3rd respondents contravened regulation 79 (2) (b) of election (general) regulations, 2012 in that they failed to use the standard and prescribed Form 35 at three named polling stations. The correct position is that for some three stations the forms had cancellation of the original name of the polling station to enable them be used by another station. The form remained the same Form 35 with the same particulars only the name and code of the station was changed to correspond with the polling station for which the details were inserted. There was however no countersignature either by the respective presiding officers or the agents.

63. The petitioner lamented the 2nd and 3rd respondent had adduced no documentary evidence to show that there were inadequate form 35 for the affected stations and or whether the original form 35 were supplied to the said station but were inadequate, and that they had failed to call the presiding officers for the affected stations to adduce evidence on what really happened to the original form 35s. It was submitted that these improvised form 35s were used to rig the election.

64. The Returning Officer DW4 explained in respect of one of the three stations that it had run out Form 35s and it had to source from a nearby station. He said:

“[the witness is referred stations 28, 33 and 77]

028 – Miriri DOK Primary School: *My officers at Miriri DOK ran out of forms 35 so they had to source for the form from Guja which is a nearby station. The stations are about 5-8 minutes. The station is shown as station no. 28. Form 36 shows that 028 is the Guja DOK Primary not Miriri. Miriri is 026 and it is attached to my affidavit.*

033 – Kiomoso Primary School: *It is true that the form 35 is canceled to read Kiomoso Primary School and the code cancelled to read 33 instead of 032. In Miriri the officers omitted to cancel the code 028.*

077 Ogango DEB: *The original station is cancelled to read Ogango and the code changed from 029 to read 077.”*

No explanation was given for the two other stations. The court notes, however, that the Forms used are not different from the prescribed form; it is only that they had been pre-printed and issued in the names of other stations in the constituency which are crossed out and substituted the names of the stations in question. The stations for which the forms were preprinted have their Form 35s used intact as preprinted.

65. Most important is that it is the duty of the petitioner to prove that the forms were used for rigging the elections and this the petitioner did not do in any way. No evidence by agents at those stations was adduced to show that the results were different from those declared in the Form 35s for the polling stations.

Bribery by the 1st respondent

66. It was alleged that the 1st respondent committed an election offence by bribing voters. Bribery is an offence under section 64 of the Elections Act which is in the following terms:

“64. (1) A candidate who—

(a) directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter—

(i) To vote or refrain from voting for a particular candidate; ... commits the offence of bribery.”

67. **Further**, the offence of bribery under section 64 of the Elections Act is a cognizable offence for which the police officers at the polling stations could by virtue of section 67 (2) of the Elections Act and section 29 (a) of the Criminal Procedure Code arrest without warrant of arrest, or indeed any superior orders.

67. (1) A person who— (a) commits the offence of personation, treating, undue influence or bribery; commits an offence and is liable on conviction, in the cases specified in paragraph

(a), to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both, and in any other case, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.

(2) The offences specified in subsection (1) (a) shall be cognizable.

68. As held by the Supreme Court in the ***Raila v IEBC***, supra, the standard of proof for election offences which are of criminal nature must be proved to the same standard of beyond reasonable doubt applicable to criminal proceedings. I also agree with Musinga, J (as he then was) in ***Simon Nyaundi Ogari & Another versus Hon. Joel Omagwa Onyancha and 2 Others*** [2008] KLR that unequivocal proof is necessary to prove an allegation of bribery. The learned Judge said:-

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, more especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand”.

69. The seriousness of the charge of bribery as an election offence is underlined in the observation of ***Halsbury’s Laws of England*** 4th Edition Vol 15 at paragraph 780 which states:

“One proof of a single act of bribery or with the knowledge of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate an election. The judges are not at liberty to weigh its importance nor can they allow any excuse. Whatever the circumstances may be, as such they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established.”

70. The petitioner and his witnesses must prove to the required standard that the 1st respondent DW1 bribed voters. In their respective affidavits the Petitioner (PW1) and his witnesses PW2, PW4, PW5, PW6 and PW7 made allegations of bribery against the 1st Respondent as follows:

PW1 Affidavit of Paul Gitenyi Mochorwa:

“10. That the 1st respondent himself and his agents were openly bribing voters with Ksh 50 and Ksh 100 notes in denominations in Rigoma Market.

11. That at Mosobeti and Riakwaro area, the 1st respondent and his agent one Charles Ondari Bernado bribed voters with Ksh. 100 to vote for the 1st respondent”.

PW2 Affidavit of Reuben Motari Okibo

“26. THAT I also learnt that the 1st respondent spent money in buying votes and or bribing voters to vote for him for instance at Mosobeti, Riamoni, Iranya and Nyaikuro.”

PW4 Affidavit of James Bundi Nyakeri

“3. THAT I know that the 1st respondent and his agents bribed voters at Nyatiemo.”

4. THAT the 1st respondent was giving out 50 to kshs. 100 to people to vote for him.”

PW5 Affidavit of Reuben Mokaya Kebaso

“4. THAT I realized the bribery issue when I saw a group of about 20-30 people gathered together and when I ran towards them I found it was the 1st respondent dishing out money.”

PW6 Affidavit of Douglas Nyachieo Omwenga

“3. THAT I was a voter at Nyambaria DEB Primary School polling station.”

4. THAT I saw the 1st respondent and his agents bribe voters with kshs. 50 to kshs. 100.”

PW7 Affidavit of David Okero Obonyo

“3. THAT I was a voter at Kenyerere DOK Primary School polling station.”

4. THAT I saw the 1st respondent and his agents bribe voters with kshs. 50 to kshs. 100.”

71. It is true that some of the witnesses described how the 1st respondent dressed in a brown (dark tan) or grey jacket (rain coat) on the polling day when he is alleged to have bribed voters. However, the consistency in this type of evidence is not indicative much less conclusive that the 1st respondent bribed voters. It might be expected that voters at a polling station where one of the candidate at the election visited would recall how was dressed, without in any way reflecting what the candidate did or said at the station.

72. The Petitioner must therefore show more than just consistent dress of the 1st respondent in various polling stations in proving that he or his agents bribed voters to vote for him. That type of evidence is in this petition short in coming and of lower degree than the required standard of beyond a reasonable doubt. In view of the seriousness of the charge it would be expected that the petitioner and the witnesses would have reported the matter to the police and follow up with the arrest and prosecution of the 1st respondent for the election offence. One would also expect a police officer to whom such an offence is reported to take action immediately and arrest the perpetrator because the offence is by virtue of section 67 (2) of the Elections Act a cognizable offence for which he can arrest without a warrant.

73. Some of witnesses PW4 PW5 and PW6 claimed to have reported the bribery to either the presiding officer and or the administrative police officers who were manning the polling stations. An attempt to report the matter to 2nd respondent is alleged to have aborted when the returning officer was said by his secretary to be out of office and the witness PW4 did not want to tell anyone else!

74. The details as to how the 1st Respondent had bribed voters and the witnesses reports to the authorities were not set out in their respective affidavits and therefore the court had no benefit in assessing the consistency of the witnesses as contemplated by section 165 of the Evidence Act which is in the following terms:

“165. In order to show that the testimony of a witness is consistent any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”

75. Sample the testimonies in court of the Petitioner and his witnesses on the issue of bribery of voters by the 1st Respondent:-

PW1 Paul Gitenyi Mochorwa

*“At paragraph 9-11 of the affidavit alleges **bribery** at Rigoma and Mosobeti and Riakumo. The affidavit does not state the source of the information. **I do not have anything to show that the person named in paragraph 11 one Charles Ondari Bernado was an agent for the 1st respondent.**”*

PW2 Reuben Motari Okibo

*“Paragraph 26 of my affidavit on **bribery**. **I was not present. I did not indicate the source of the information.** When I voted, I went home to prepare, I then called the petitioner and asked him to meet at Omoti Junction. The petitioner told me that he was at his home. **I do not know where the 1st respondent was.**”*

PW4 James Bundi Nyakeri

I saw the 1st Respondent at the station at about 4.00-4.10pm on 4/3/13. He was inside the polling station, and he even entered the polling room. He was in the company of a small group of people of about 8 people including the 1st respondent. He entered the polling room leaving the rest outside. He was dressed in a rain coat which was grey in colour. He left the polling room by a water tank and some people went to him, and I was told by one young man named Richard Omari that the 1st respondent was giving out money. I saw the 1st respondent giving out the money in denominations of 50 and 100 shillings and I asked him what he was doing. He did not answer and he ran away. I told the presiding officer and the police officer at the station. [paragraph 4 of this affidavit is read out to him in Kiswahili]. I confirm the statement in paragraph 4. I did not include the detail that I have given today in court. I only wrote the affidavit in swearing. I also did not write out my complaint. I only made report to the presiding officer and the Askari verbally. The water tank was outside the polling room about one metre [witness demonstrates one metre distance correctly]. **We had more than 10 agents from the different parties at the polling station. I am not aware that anybody else saw the incident of bribery....**

*The police officer was armed. [It is put to the witness that the police officer should have been able to arrest the 1st respondent]. **By the time I reported the matter to the presiding officer and police officer, the 1st respondent had left the station....***

[Court enquires as to the time taken between witnessing the incident and reporting it]. I took about 2 minutes from the time that I spoke to the 1st respondent to the time that I reported the issue to the presiding officer because he was assisting a voter. I admit that I reported the incident to the police officer about 3-4 minutes after speaking with the 1st

respondent. **The whole incident between the time I witnessed and reported to the presiding officer and the police officer took about 04 (four) minutes.”**

PW5 Reuben Mokaya Kebaso

“I saw the 1st respondent followed by the supporters. At 9.15am there were queues. The people who followed him were hanging around the polling station. I cannot tell whether the people were voters or whether they voted. The 1st respondent and his followers left the station and proceeded to Manga Shopping Centre. From the station to Manga Shopping centre is 50 metres. The 1st respondent and the group of followers stopped at a shop belonging to Mr. Atambo Maina which is about 20 metres from the polling station. The shop is half-way the distance from the polling station to the shopping centre. It was in the same direction I was heading. The 1st respondent was with a certain man. I do not know whether he was his body guard. I reported the incident to the presiding officer and since he did not take action as I waited, I went to the office of the second respondent which is within Manga. I did not find the second respondent but I found the secretary who informed us that the 2nd respondent had gone to Nyambaria Tallying Centre. I did not make a report because the 2nd respondent was not in the office. My party had a chief party agent. He did not come to Manga. I did not know the name of the party’s chief agent. I am not able to tell whether he came to Manga. I state that the presiding officer did not listen to any complaint. I did not tell anyone else. In my affidavit, I have not stated that I reported the matter to anyone at all. I reported to my lawyer. I did not report the matter in writing to anyone.”

PW6 Douglas Nyachieo Omwenga

“I saw the 1st respondent bribing voters. I reported to the police officer inside the polling station outside the polling room. My affidavit does not show that I reported to anyone. I did not report to the presiding officer. The affidavit does not state where the bribery occurred. I was not near them and I did not recognize the agents. I was about 15 metres away. I was not close enough [witness estimates 15 metres to be from the witness box to the end of the court at the entrance]. The people ran away as they saw me. The people who were with the 1st respondent told me they were given 50 and 100 shillings. The people who told me this are not before the court and will not be witnesses.”

PW7 David Okero Obonyo

“I saw the 1st respondent at the polling station at about 2-3pm. The affidavit does not state where the 1st respondent was bribing voters. The affidavit does not state the time when the bribery happened. The affidavit does also not state the agents who were bribing voters. It also does not give the names. I reported the matter. The affidavit does not state that I reported the matter.”

76. The Petitioner PW1 and PW2 were in police custody for most of the time when it was alleged that the 1st respondent bribed voters and cannot have witnessed any of the alleged incidents. From the evidence, the Petitioner and his witnesses did not deal with the serious issue of alleged bribery as they could have – no formal reports to authorities and no follow-up for the prosecution of the offence including if necessary private prosecution. To date, no formal report has been made to the authorities and the 1st respondent has not been prosecuted for the bribery for which as a criminal offence there is period of limitation. Together with the fact that no proved first reports of the offence were made, this creates a doubt as to whether the alleged offence happened at all.
77. That PW4, as the only one of more than 10 agents from different parties present, witnessed the 1st respondent bribing voters at Nyatiemo polling station and he informed the presiding officer and a police officer who could not arrest the culprit because he had in the meantime ran away, all

happening inside 4 minutes is ludicrous! The Police officer could still had pursued and arrested the 1st respondent for the cognizable offence of bribery. One Richard Omari who allegedly told PW4 that the 1st respondent was giving out money was not called as a witness as with the people who allegedly told the PW6 that they were given money. All this evidence was hearsay.

78. In response Petitioner's allegation of bribery the 1st respondent obtained letters for the police officer of the respective areas where the bribery was alleged to have taken place attached to his affidavit in support of his Answer to the Petition at paragraph 19 of the Affidavit indicating that there had been no reports of bribery made to the police stations. Paragraph of the 1st respondent's affidavit is in these terms:

“19. THAT further I have been informed by the officer in charge of Gesima AP Division, Officer in charge Rigoma AP Division and Officer in charge of Magombo AP division, which information I take as true that no report was made to the said stations whether by the petitioner nor any member of the public regarding any alleged voter bribery nor commission of election officers by myself and as such, no such incidences occurred. (1 annex hereto and mark as TMB4 copies of letters from the said police stations).”

79. The petitioner's counsel raised doubts as to the authenticity of the letters pointing out that the letters were written in similar language used under consecutive references and even date indicating that they might have been written by one person. The 1st respondent (DW1) in his testimony in court explained that the police officers though working at different areas were based at the headquarters at the Manga and hence the common references in their letters. The Petitioner did not call the police officers who signed the three letters to deny they authored the said letters. Be this as it may, it remains the petitioner's burden to prove bribery to the standard of beyond reasonable doubt and it is not for the 1st respondent to prove his innocence. I do not find that the election offence of Bribery has been proved against the 1st Respondent.

80. Rigoma DEB Primary School (025)

The petitioner relied on Annexure marked PG4 which showed that valid votes cast as 1808 against a registered voter figure of 993 to support a claim at paragraph 22 of his affidavit and his testimony in court that those who voted were more than those registered at the station, that there was over-voting at Rigoma DEB Primary School. The presiding officer for the polling station DW2, however, testified that the Form 35 in the annexure PG4 was not his document. The court has already ruled as invalid the Form 35s in the petition having been disowned by the 3rd respondent as the body constitutionally mandated to oversee the elections and the petitioner not being able to point to a lawful source of the documents.

81. With particular reference to the Form 35 of the Rigoma polling station (025), the Presiding Officer DW2 said in re-examination that ***“[witness is shown PG4 form 35 exhibit by the petitioner]. I confirm that the PG4 form 35 did not come from me. The form is not signed and there are no comments. It is not dated. There is a stamp of the IEBC presiding officer. The stamp is for any presiding officer not particularly for the Rigoma Polling Station.”***

82. PW3 deponed in his affidavit that the presiding officer state the value of votes cast as 1808 and the registered voters 993, and during his cross-examination that he had seen the Form 35 at PG4 which showed the votes cast as 1808 at the station. He was not able to produce evidence of his registration at the polling station in question. Tested against the information in the 3rd Respondent Commission's Form 35 which has no alterations and whose figures for the total scored by the candidates equal the valid votes cast at 771 and the rejected votes at 37 to make votes cast at 808, the assertion by the PW3 as to votes cast at 1808 is not credible.

83. The Presiding Officer for Rigoma (DW2) also confirmed that the petitioner's wife who worked as a clerk at the polling station assisting the Presiding Officer had opportunity to secure forms 35 and the official stamp of the 3rd respondent (IEBC) and it was not inconceivable that the petitioner

could have obtained the Forms through his wife. During cross-examination by counsel for the petitioner DW2 said:

“The petitioner’s wife had access to the rubber stamp since the polling station opened as the stamps were on my desk and the wife was in charge of my desk. She was also in charge of my bag at the time of counting of the votes. [witness is referred to paragraph 8 of his affidavit]. It shows that I assigned the petitioners wife duties. Assignment of duties is done before the polling station starts. I said I was not aware of any theft of the materials....

The form 35 papers were under my table and we waited until we started using them. I had given the clerk my bag containing the forms and the rubber stamps while I sorted and counted the votes cast. My deputy assisted me in the counting and sorting the votes. After I finished counting I ask the clerk who had the custody of my forms to give me a form 35 where I would fill it with the details required and then give to the agents to verify as they write their names and sign. I was then to sign and rubber stamp, give my deputy to sign and then make the comments at the bottom back of the form. I would then ask the deputy to assist in making other copies for the signed original. I would then give the copies to the agents to sign and retain some copies and give the rest to the agents. I also posted them on the door to the polling room....

I do not know how many form 35s that I received from the returning officer. Some of them were sealed and other were loose. There were many forms. I could not easily tell if any of them disappeared. The clerk who carried the forms also had the rubber stamp in the bag that she carried for me....

The person who held my bag while I counted the votes was clerk no. 7 Agnes Onda who is the wife of the petitioner.”

84. Employment of relatives

It was alleged by the Petitioner (PW1) and PW2 that the 2nd and 3rd respondents employed relatives of DW1 Moses Ongera, Nancy Ongera, Eunice Okinyi and Maureen Okinyi as poll clerks. PW1 had deponed in his affidavit sworn on 9/4/13 at paragraph 43:

“43. THAT the 3rd respondent employed four relatives and supporters of Timothy M. E Bosire at Nyambogo SDA Primary School (064) namely, Moses Ongera, Nancy Ongera, Euniah Okinyi and Maureen Okinyi. Further Nancy Ongera and Euniah Okinyi did not apply and or altered interview and or were not trained by the 3rd respondent.”

85. PW2 also alleged in his affidavit sworn on 9/4/13 at paragraphs 21- 24 that clerks named Moses Ongera, Nancy Ongera, Euniah Okinyi and Maureen Okinyi who were related to the 1st Respondent and who did not apply to be employed as clerks and never attended interview conducted by the 3rd respondent had been employed by the 2nd and 3rd Respondent and stationed at Nyambogo SDA primary school (064).

86. It is not clear why the petitioner’s counsel thought that the evidential burden had shifted to the respondents to require them, as submitted by counsel, to produce the letters applying for vacancies the date when the four attended the interview and proof whether the four had been short listed for the positions, copies of their identity cards and letters of appointment. For the evidential burden to shift, the petitioner would have to adduce ***firm and credible evidence*** as held in the Supreme Court in ***Raila v. IEBC***, supra.

87. During cross-examination, PW1 confirmed that he was not personally aware of the relation to the 1st Respondent of the persons allegedly employed as poll clerks. He said:

*“At paragraph 6(x) of the petition, it alleges relatives were hired for the IEBC. It was the relatives of the 1st respondent. I was not party to the hiring of staff by the IEBC. I do not know in what capacity the relatives of the 1st respondent were hired. It was Nancy and Moses Ongera, Euniah and Maureen Okinyi, respectively are brother and sister of the 1st respondent and cousins of the 1st respondent. **I need to amend the information to state that I am aware that the four are relatives to the 1st respondent but I do not know of the nature of the relationship. My witnesses will clarify. At paragraph 43, I give the particulars of the hiring of the staff of IEBC. I do not have information to support the allegation in paragraph 43 of the affidavit.”***

88. When the PW2 sought to make a connection between the alleged clerks and the 1st Respondent during cross-examination by counsel for the 1st respondent, this is what he said:

*“I have deponed on certain relatives of the 1st respondent who were hired by IEBC. I was not involved in the hiring process of the IEBC. I was aware of the process of hiring agents. Moses Ongera was deployed at Nyambogo SDA primary no. 064 together with the other three agents as deponed in the paragraph 22 of my affidavit. I do not recall when the IEBC conducted training of clerks but it was before the elections. I did not attend the training of the clerks by IEBC. [witness referred to paragraph 23 of his affidavit of 9/4/13]. The affidavit does not state the source of the assertion that the named clerks did not apply and they were not trained as clerks. I do not have the list of the trained clerks. [The witness is shown the list of polling clerks]. One of the polling clerks named Moses Ongera appears on the list. There is no other document before the court showing the said polling clerks as alleged in my affidavit. **I do not have anything to show that the said Moses Ongera is related to the 1st respondent.”***

89. Again, during reexamination by counsel for the petitioner, the witness PW2 said:

*“At paragraphs 23 and 24 of my affidavit, Nancy and Moses Ongera are brothers and sister and Euniah and Maureen Okinyi are sisters. **The four are cousins. A sister to Okinyi and Ongera, the fathers of the four is married to the 1st cousin of the first respondent. I do not have the name. I do not have documents to prove this.”***

Looking at this relation, even if it is accepted to exist, the said clerks would be distant nephew- and nieces-in-law related to the 1st respondent only the 1st through their auntie who has married the 1st cousin of the 1st respondent! I do not think that it could very strongly argued that on the basis only of this distant degree of consanguinity, the said clerks could presumed to carry out their duties in a manner to favour the 1st Respondent or otherwise result in a conflict of interest between carrying out their statutory duties and any loyalty to their uncle. More importantly, no allegation is made and proved that the 1st Respondent benefitted in any way from the deployment of the said clerks at the Polling station. No matter how close the affinity or relationship of itself is not sufficient; it must be shown that it had an effect on the election, that the relative of the candidate was in a position to and did alter or otherwise influence the outcome of the election. This was not the case here.

90. Nimrod Obwocha Igenda, allegations of rigging

The Petitioner’s submission is that the affidavits of PW1 and PW2 at paragraphs 42 and 25 respectively aver that Nimrod Obwocha Igenda was caught rigging and instructing voters to vote for the 1st respondent and that the 2nd respondent intervened and sacked him, and that the 2nd respondent in his affidavit at paragraph 34 admits that he relieved the clerk of his duties for the reason that the clerk was colour blind.

91. In their affidavits, the petitioner and the PW2 deponed on the issue alleged rigging by the clerk Nimrod Obwocha as follows:

Affidavit of PW1 Petitioner (Paul Gitenyi Mochorwa):

“42. THAT at Riegechure DEB Primary School (073) the clerk employed by the 3rd respondent was found instructing voters to vote for Timothy M. E. Bosire but the returning officer intervened and sacked the clerk whose name was Nimrod Obwocha Igendia and replaced him with another clerk who was based at Nyagecheche DOK Primary School (049).”

Affidavit of PW2 Reuben Motari Okibo

“25. THAT at Riegechure D.E.B Primary School (073) the clerk employed by the 3rd respondent Nimrod Obwocha Igendia was caught rigging and or instructing voters to vote for 1st respondent and was transferred and or sacked by the 2nd respondent.

92.The Returning Officer DW4 in his testified as to those events during cross-examination by the counsel for the petitioner as follows:

“I relieved the clerk at Riegechure (073) because I received an anonymous call that there was a clerk who appeared to be campaigning for one of the county representative candidates. I reported to the station to find out what was happening. On arriving, I inquired and it was shown clerk no. 7 Nimrod Obwocha whose assignment was to direct the voters to cast or put the ballot papers in the ballot boxes. When I spoke to him he said he was colour blind and he was unwell and on some occasion he had been unable to correctly identify the colour of the ballot papers vis a vis the ballot boxes. It was corrected by agents who pointed out the anomaly. As the agents did not have confidence in him. I relieved him of his duties. I took his confession by his word. I did not get any medical certificate.”

93.The Petitioner PW1 confirmed before the court in cross-examination by the counsel for the 1st Respondent that his allegation of rigging by this clerk was based on information from an undisclosed agent whose name he did not know. He said: **“I have no information on the allegations in paragraph 42. I got it from an agent. I do not know that name of the agent who gave me the information.”**

94.PW2 similarly disowned his affidavit evidence on the rigging clerk, in his testimony before the court when he said: **“Paragraph 25 of the affidavit of 9/4/13. I was not present when the alleged clerk was rigging. I have not disclosed the source of my information.”**

95.It is the duty of the petitioner to prove the allegations set out in the petition and affidavits in support; the burden did not shift. It was not the duty of 2nd Respondent to seek a medical certificate of the clerk’s colour-blindness to support his defence that there was no rigging. The petitioner has not adduced evidence from any agent present at the station as to the true conduct of the polling clerk.

96.In the absence of such evidence, the petitioner has not proved the allegation of rigging, and the court must accept as plausible the version given by the Returning Officer that the clerk, who claimed to be colour-blind had on two occasion almost misled voters but corrected by agents, was only involved in the polling line as a clerk to show voters, who had already voted [and therefore could be influenced as to how to vote], in which of the six coloured ballot boxes to place the particular ballots. In such circumstances, I do not accept that the clerk Nimrod Obwocha was assisting in rigging the election for the 1st respondent.

97.Wrong transfer of votes and Announcement of results

It was contended for the petitioner that the 2nd and 3rd respondents together with their agents and subordinate officers, failed in their mandate under Article 86 of the Constitution by wrongly posting the votes announced at the polling stations (Form 35) into the tallying sheet for the Constituency (known as Form 36). Consequently, the announcement of results made was incorrect in that the 2nd respondent

announced results which were not reflective of the presiding officers in their respective stations.

98. The counsel for the petitioner also complained about failure by the 2nd and 3rd respondents to call as a witness one **Dominic Onchwari** who had sworn an affidavit in support of their response indicating that he had been in charge of entering data on the computer after announcement by the Returning officer. I agree with counsel for 2nd and 3rd Respondents that no adverse inference can be drawn because the petitioner did not apply for cross-examination of the deponent. Having failed to call the deponent, the 2nd and 3rd respondents could not rely on his affidavit but the other parties in the proceedings were at liberty to seek to cross-examine him. See my ruling on the matter dated 28th August 2013 in **Eng. Peter Kimori Maranga and Anor. Joel Omagwa Onyancha and 2 Ors.** Kisii Petition No. 7 of 2013, where I cited **Halsbury's Laws of England** 4th Edition Vol. 17 at paragraph 310 as follows: -

“I am encouraged by the position in England with respect to cross-examination of deponents of affidavits as set out in paragraph 310 of Volume 17 of the **Halsbury's Laws of England**, 4th Edition, emphasizing the discretionary nature of the court's power as follows:

“Cross examination of deponents

A deponent may be ordered to attend for cross-examination on his affidavit before a judge, master or examiner of the court, and **the court may refuse to act on an affidavit where the deponent cannot be cross examined; but an affidavit may be allowed to be used in court where the cross examination is pending.** Where the deponent's good faith or motive is in issue, however, the court should not be asked to act without hearing cross-examination, leave to cross-examine will not be granted until evidence by affidavit is complete. **A person, whether a party to the proceedings or not, who has made and filed an affidavit cannot withdraw the affidavit when cross-examination is threatened, and a deponent can be cross-examined even where the affidavit has not been used by the party filing it.**

Where, after an order has been made for the attendance of a deponent for cross-examination, he fails to attend, his affidavit will not be admissible except by leave, but the fact that a deponent does not appear before an examiner for the purpose of being cross-examined is no ground for taking his evidence off the file before the hearing.”

99. As stated by Maraga J. (as he then was) in **Joho v. Nyange** (2008) 3KLR (EP) 500:

“Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetical mistakes are bound to happen.

100. The General Election of 2013 comprised elections to six different elective positions of the President, the County Governor, the Member of the National Assembly, the Member of the Senate, the Women Representative and County Ward Representatives, and this must be taken to have increased six-fold the probabilities of innocent human errors in computation of the figures entered as votes for the respective candidates, the tallying and subsequent record thereof in the Constituency Form 36. It is not inconceivable and therefore definitely not inexcusable that the election officials who conducted the six elections over a period of three days on the 4th, 5th, and 6th March 2013 would have in human probability made errors in their record of the elections.

101. The Respondents admitted that there were errors in transposition of the figures in Form 35 to Form 36 which were inadvertent and not calculated to benefit a particular candidate in the

election. DW4 the returning officer in the reconciliation carried out in court demonstrated that errors in transposition could be accounted for to a net difference only of 27 votes in Form 35 totals as against Form 36 which was shown as tallying error in Form 35. During cross-examination by counsel for the 1st Respondent, the witness testified:

“The discrepancies between form 35 and form 36. The total votes cast under form 36 63,454. The total votes cast under form 35 exceed the form 36 tallying by 200 votes. The total votes cast under form 35 was 63654. Ikonge polling station (048) total votes cast under form 35 is 673. Form 36 Ikonge SDA indicates 473 votes cast. The difference is 200 votes. Form 36 appears to have denied 200 cast votes. A comparison on form 36 and form 35 from individual candidates indicates:

	Form 35	Form 36
Samson Atati Mose Kengere	14	14
Daniel Mogesi Otero	2	2
Hezron Nyangau Omwenga	6	6
Joash Okinyi Longisha Onyonka	9	1
Mark Nyaberi	1	1
Meshack Ngare Ondieki	4	4
Philip Nyauncho Bosire	46	46
Rueben Motari Okibo	1	1
Shadrack John Mose	42	42
Timothy Moseti E. Bosire	207	207
Tom Nyayiemi Mogaka	2	2
Victor Swanya Ogeto	141	141
Walter Enock Nyambati Osebe	187	187
Zachary Mumbo Mosoti	00	00

The transcription was exact from the form 35 to 36. No candidate was denied their rightful votes. The difference between form 36 and form 35 totals did not affect any candidate. The correct total ought to have been 63,654. The total of rejected votes together with the individual votes for all the candidates was 63,627. This total ought to have been the same as the total in column no. 2 on total votes cast.

The difference between 63627 and 63454 on the form 36 is 173 votes. The correct figure of 63654 reduced by 63627 is 27 votes. The difference of 27 votes is in the tallying of form 35 against the reflection in form 36.

At Riabore 014, Victor Sagwe Ogeto in form 35 got 23 and Victor Sagwe Ogeto in form 36 got 02, a difference of 21 votes.

The 21 votes are a loss on form 36.

At Sirate 070, the figure for rejected votes is 06 votes. The figure of 06 on form 35 is not clearly written. I was not asked to cross reference with form 36. The indicated rejected votes under the station in form 36 is 02 votes.

The votes cast is 346 votes. The total number of valid votes is 344 votes. There is no cancellation on the signing. The total votes of rejected is 02 not 06 as I had read out earlier. The totals under form 35 had 4 more votes because of using the figure of 06 votes. The form 35 tallying is 4 votes. The totals for Walter Nyambati was stated by counsel for the petitioner as 1 less. 061 Nyamwanga – form 35 indicated votes as rejected votes is 01 votes. The figure on form 36 for the station is 00. **This analysis accounts for 27 votes.** 23 votes under Sirate (070); Nyamwanga rejected vote 1.

Riabore 014: The figure of candidates under form 35 against the form 36. The correct score for the candidates under form 35 is 275 votes. Under form 36 the total is 252. The difference is 23 votes. There are the votes for Victor Swaya under form 35 which were not captured under form 36.

The correct analysis therefore is as follows:

Victor Swaya Ogeto – lost 23 votes on the form 36; at Sirate (070) total taken in court exceeded by 4 because of the figure of rejected votes taken as 6 which should have been 02 votes; at Nyamwanga there was a missing vote under form 36 for rejected votes; and Walter Nyambati has an excess of 1 vote under form 36. **The net difference is 27 votes on form 35. The difference between the 1st candidate and the 2nd candidate under form 36 is 8,640. The addition of the 200 votes would not have altered the gap between the two candidates.”**

102. Although there were errors in transposition of values from Form 35s to Form 36, affecting four polling stations **Riabore (014), Ikonge (048), Nyamwanga (061) and Sirate (070)**, as shown above, the same had only minor effect to the election result leaving the margin of vote difference at over 8000 largely unaffected. Notwithstanding these errors, and the same having been rectified, the declared candidate remains the winner by a substantial majority votes. The Petitioner provided a table of the vote difference between the first top three candidates as shown in the respective Forms as follows:

<u>Candidate</u>	<u>Form 36</u>	<u>Form 35</u>	<u>Difference</u>
1. Timothy Moseti E. Bosire	23303	23227	76
2. Shadrack John Mose	14663	14811	148
3. Walter Enock N. Osebe	13159	13158	1

The transposition errors have therefore no effect on the eventual outcome of the election even though they do affect the results in the final figures of votes scored by the respective candidates.

103. As Georges CJ. said in the Tanzanian case of **Mbowe v. Eliufoo** [1967] EA 240 when considering the meaning of the phrase ‘*affected the result*’ in a provision similar to our section 83 of the Elections Act:

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

This was the situation in this case where the winning majority is so large that the errors shown to exist in the figures in the constituency Form 36 still leaves a wide margin of over 8000 votes between the declared winner and the runner-up.

104. It is clear that the addition of the 148 votes to runner-up's declared figure of 14663 makes his final figure as **14811** and the reduction of 76 votes from the winning candidate's declared figure of 23303 makes the final figure **23227** leaving the 1st respondent leading by **8,416** votes. While the result is affected by the reduction of the 1st Respondent winning margin figure, the final result remains that the 1st Respondent is in the lead by a wide margin of votes; the errors affect the result figures as declared but they do not change the result as regard the winning candidate.

105. In *Rishad Hamid Ahmed Amana vs Independent Electoral and Boundaries Commission & 2 Others* Election Petition No.6 of 2013 at Malindi, Kimaru J. considered a similar situation and cited *Mulenga JSC* delivering the decision of the majority of the Uganda Supreme Court in *Besigye –Vs- Museveni, Election Petition No.1 of 2001*, gave an interpretation to **Section 58(6)** of the Ugandan **Presidential Elections Act** which is similar to our section 83 of the Elections Act thus: *“To my understanding, therefore, the expression “non-compliance affected the result of the election in a substantial manner” as used in S.58(6)(a), can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the noncompliance 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.”* He then held:

“Our Section 83 of the Elections Act does not contain the words “substantial manner” like the Ugandan Act. However, this fact does not lessen the significance of what the Learned Supreme Court Judge stated in the above decision. A petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test.”

106. There was submission by counsel for the petitioner relying on some decisions of the Court that the Electoral Commission could not rely on the provisions of section 83 where they admit that there were errors. Such was held to be case in the majority decision of the Court of Appeal of **James Omingo Magara v. Manson Nyamweya and 2 Ors.** *Court of Appeal Civil Appeal No. 8 of 2010 Kisumu.* Delivering the majority decision Omolo, JA said:

*“The scrutiny and recount of the votes by the learned judge disclosed numerous irregularities, among them unsigned and, therefore, authenticated forms 16A, three missing ballot boxes, broken ballot seals and many others set out in the learned judge’s judgment. In my view these irregularities could not be cured under section 28 of the National Assembly and Presidential Election Act. That section cannot be used to cover a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. **Again to use that section to cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the missing boxes, would simply amount to encouraging vandalism in the electoral process.”***

With respect, my interpretation of the majority decision is not that the Court would ignore section 28 of the National Assembly and Presidential Act cap. 7 (now repealed by Elections Act but save for reference to the Constitution in *pari materia* with section 83 of the latter Act) but that unsigned statutory forms and three missing ballot boxes in that case were grave irregularities which could not be ignored. In effect, the majority of the Court (Omolo and Tunoi, JJA.) was saying that the irregularities must have affected the result.

107. The court also notes the powerful dissent of Githinji JA. in the decision and his application of section 28 of the former Act in finding that the irregularities in the case were not pervasive or

serious enough to affect the result, holding that: .

“On analysis, I have come to the conclusion that the election was conducted in accordance with principles laid down by the electoral law and that the anomalies found in some form 16A and 17A were not so pervasive or so serious as to affect the entire election. I am satisfied that those were post election procedural anomalies and were cured by both scrutiny and counting and by section 28 of the Act. I find, indeed that the election court misconstrued section 28 of the Act.”

108. Ultimately, the provisions of section 83 of the Elections Act 2011 require that a petitioner demonstrates that the irregularities complained of affected the outcome of the election, and I don't find that the majority decision in **Magara** decision, supra, held to the contrary. I have not found here any irregularities of the nature and magnitude found by the majority in **Magara**.

109. I agree with Kimaru J. in the **Amana** decision, supra, that for the non-compliance of the election law to be held to affect the result, it must affect the final outcome of the election: that an outcome substantially different from that declared would on account of the irregularities or breaches of the law result. This is also what the Supreme Court of Kenya in the **Raila and Others v. IEBC and Others**, Presidential Petitions Nos. 3, 4 and 5 of 2013 said of the matter:

“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 of compliance did affect the validity of the elections.”

That is the only way the court could be said to be giving effect to the will of the electors.

Conclusion

110. In answer to the questions before the court, I find that:

- a. **There were a few cases of irregularities relating to election documents by way of -**
 - i. **Misspelling of a candidate's (PW2) first name Reuben on the ballot paper;**
 - ii. **Failure of the Presiding Officers indicate statutory comments in some stations and to give reasons in the forms for candidates/agents default in signing Form 35;**
 - iii. **Corrections or alterations of figures and names of polling stations affecting 42 of the 127 polling stations in the Constituency, 14 of which were counter-signed by the Presiding Officers but in all of which the valid votes of the respective candidates were not affected;**
 - iv. **Errors of Transposition of figures from Form 35s to the Form 36 for constituency for three (3) polling stations; and computation error on the votes cast at one (1) polling station Rikenye DEB (001) with an error of 1 vote in the computation of the total votes cast.**
- b. **The irregularities proved in sub-paragraph (a) above did not affect the result of the election. All the figures for the valid votes in the affected stations agreed with the totals of the votes cast for the candidates and there was no evidence that votes garnered by the individual candidates were affected in any way.**
- c. **There was no proof of the election offences of bribery and intimidation as alleged in the Petition. These allegations were largely based on inadmissible hearsay by PW1 and PW2 who were in police custody at the time when the events allegedly took place and on evidence of PW5, PW6 and PW7 whose consistency could not be established as their oral testimony before the court was not reflected in the affidavit sworn in support the petition when their memory of the events would be expected to be fresh. On the whole, as discussed earlier in the judgment, the evidence of PW3, PW4, PW5, PW6 and PW7 was for the aforesaid reasons not credible.**

d. **The proved irregularities were not of such nature and magnitude to amount to non-compliance with the Constitution and the Elections Act, Rules and Regulations. The irregularities proved involved in the recording of the votes garnered by the candidates into the forms 35 and subsequent transposition onto Form 36 for the constituency as opposed to the process of voting and counting of the votes which was done in accordance with the Constitution and the Elections Act and witnessed by agents for the candidates. The errors in the mathematical processes leading to a few corrections and alterations mis-transpositions did not affect the constitutional requirement for accuracy because the figures were ascertainable and verifiable by the computation formulae on the relationship between the values in the statutory forms the total votes cast, the rejected votes, the valid votes cast and the total votes cast for each candidate in the election. I consider that the election complied with the principles of the Constitution and the Elections Act with regard to free and fair election and expressed the will of the electors in the Constituency.**

111. For the reasons set out above, I find that the proved non compliance with the election law did not affect the result, the final outcome, of the election in terms of section 83 of the Elections Act, the election cannot be invalidated. Accordingly, the Petitioner's Petition herein dated the 8th April 2013 is declined with costs to the respondents.

112. The party and party costs of the proceedings are assessed by the court as follows:

- a. Instruction fees at Kenya Shillings One Million (Ksh.1Million);
- b. Get-up fees at Kenya Shillings Two Hundred and Fifty Thousand (Ksh.250,000);
- c. Instruction fees for two interlocutory applications, for exclusion of electronic evidence and for scrutiny and recount, respectively, at Kenya Shillings One Hundred Thousand (Ksh.100,000) and Kenya Shillings One Hundred and Fifty Thousand (Ksh.150,000); and
- d. Court attendances for ten (10) full-day hearings at Kenya Shillings Fifty Thousand (Ksh.50,000) per day, to make a total sum of Kenya Shillings Two Million (Ksh.2M) only.

113. The Petitioner has succeeded in establishing that there were some irregularities in the election but which the court has held did not affect the result and did not amount to substantial noncompliance with the election law, with the overall preponderance of success going to the Respondents (see *Jabane v. Olenja* (1986) KLR 661). In accordance with the principle in section 84 of the Elections Act that costs shall follow the event and therefore reflect the outcome (see *R. v. Nairobi B.P.R.T. & Others ex parte Karasha* (1976-80) KLR 1263), I grant only 70% of the costs to the respondents. **There shall, therefore, be an order for costs in favour of each of the Respondents against the Petitioner in the sum of $(2,000,000 \times 70/100) = \underline{\text{Ksh.1,400,000/-}}$ (Kenya Shillings One Million Four Hundred Thousand Only).**

114. Counsel for the 1st Respondent asked the court to report the Petitioner (PW1) and his witnesses PW2 and PW3 to the Director for Public Prosecutions (DPP) for prosecution for perjury. I consider that the provisions for reporting under section 87 (1) of the Elections Act relate only to election offences, and I therefore decline the invitation.

115. The Court is grateful to counsel for the parties - **Mr. Jackson Omwenga for the petitioner, Mr. Lugunya with Mr. Juma for the 1st Respondent, and Mr. Ojiambo with Mr. Mukele and Mr. Mwihuri for the 2nd and 3rd Respondents** – for their diligence and clarity in researching and presenting their respective briefs with aid of statutory and case law authorities, by which the Court was well served.

116. In accordance with Article 105 of the Constitution, this court determines and confirms that **TIMOTHY MOSETI E. BOSIRE** was at the General Election of 4th March 2013 validly elected as a Member of Parliament for **Kitutu Masaba Constituency. Accordingly, the Certificate of the Court as to the validity of the election will, pursuant to section 86 of the Elections Act, issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly, forthwith.**

Dated, signed and delivered this 30TH day of SEPTEMBER 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Minda for Mr. Omwenga - for the Petitioner

Mr. Ligunya with Mr. Juma - for the 1st Respondent

Mr. Nyamorongi for Mr. Ojiambo - for the 2nd and 3rd Respondent

Mr. Edwin Mongare - Court Clerk