



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
THE ELECTION PETITION NO.3 OF 2013

HON. BASIL CRITICOSPETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST
RESPONDENT**

ISAIAH SAHA MADZUNGU.....2ND RESPONDENT

NAOMI NAMSI SHABAN.....3RD RESPONDENT

JUDGMENT

On 4th March 2013 the people of the Republic of Kenya went through the process of elections for their political leaders.

The Petitioner, HON. BASIL CRITICOS, was a candidate for the position of Member of the National Assembly for TAVETA CONSTITUTENCY. He vied for that position on the RESTORE AND BUILD PARTY OF KENYA (RBK). However, he was not declared the winner.

The 1st Respondent, THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) declared the 3rd Respondent, NAOMI HAMSIS SHABAN, as the duly elected member of the National Assembly for Taveta Constituency.

The Petitioner herein challenged the election of the 3rd Respondent. And the 2nd Respondent, ISAIAH SAHA MADZUNGU was enjoined to the Petition because he was the Returning Officer at the elections which are in issue.

The results which were declared by the IEBC, for the Taveta Constituency, were as follows:

NONAME OF CANDIDATE	VOTES
1. BASIL CRITICOS	6251
2. DAVID C. KIMENZU MULI	654
3. HAMISI MIKE BANTON	4190
4. JERRY KIMARU FOLONJA	302

5. NAOMI NAMSI SHABAN 6357
6. PATRICK NGOTO MWAMBURI 105
7. RAPHAEL NXUKI CHEMA 179
8. RUTH MKUMBULU LELEWU 1180
9. STEPHEN ODDIAGE OKWEMBA 1396

According to the Petitioner, the results, above, were declared in gross contravention of the Constitution, the Elections Act and its appurtenant Regulations. That argument was based on the petitioner’s contention that the agents of most of the candidates were denied entry into a number of polling stations, during the voting exercise, for several hours.

The Petitioner also asserted that the agents were ejected during tallying of votes, and also that in several instances, Forms 35 were not signed by the agents.

The Petition sets out four (4) grounds upon which it is founded. Those grounds were as follows:

“Pre-Election Malpractices and Breaches of the Law.”

- a. The 3rd Respondent was accompanied by the 2nd Respondent and other officials and/or employees of the 1st Respondent.
- b. The 2nd Respondent was partial towards the 3rd Respondent, by giving her preferential treatment during the nomination exercise for Member of National Assembly.
- c. The 3rd Respondent used her ministerial position by using state resources during her campaigns prior to 4th March 2013 and intimidating the police.
- d. The 3rd Respondent through her agents, used the Taveta CDF motor vehicle GKA 911U to carrying foodstuff such as packets of sugar and maize meal to bribe voters on the night of 3rd March 2013 and early morning of 4th March 2013, at about 1a.m. The vehicle was impounded by the police on 3rd March 2013.
- e. The 1st Respondent refused to act on the various oral and written complaints made by the Petitioner since January 2013 regarding the bias and lack of impartiality of the 2nd Respondent.

“Election Date Malpractices and Breaches of the Law”

- f. At Msengoni Polling Station, all the agents were ordered out of the polling station by official of the 1st Respondent who locked the doors and shut the windows before the polling boxes were sealed. A complaint was made to the officials of the 1st Respondent by phone call but no action was taken.
- g. The Petitioner's agents were not allowed in 9 of the following polling stations in three wards at the instigation of the 2nd Respondent who alleged that they did not have 'oathing of secrecy letters' which had previously been promised.

Name of polling station	Votes of	
	Basil Criticos	Votes of Naomi Shaban
Lumi Primary School	82	151
Njukini Primary School	265	211

Chokaa Primary School	275	107
Ulawani Primary School	77	60
Uthiani Primary School	12	6
Taveta Primary School	232	53
Madarasani Primary School	91	144
Riata Ndogo Nursery School	162	22
Kisimani Nursery School	9	149

- h. At the Tallying Center, only the 3rd Respondent's agents were allowed in while the Petitioner's agents were kicked out.
- i. No action was taken by the police on the complaints about voter bribery by agents of the 3rd Respondent. At Chala market, agents of the 3rd Respondent were handing out money to voters to influence them to vote for the 3rd Respondent. When the police were called the agents drove away.
- j. At Kasokoni Primary School, agents of the 3rd Respondent were actively campaigning for the 3rd Respondent by urging voters in the lines to vote for her. No action was taken by either the police or the officials of the 1st Respondent following the complaints about the open campaigning by the 3rd Respondent's agents.
- k. No verification of the voters was carried out at Kasokoni Primary School after the BVR machine failed. During counting of votes in the evening, the officials of the 1st Respondent ensured that the lighting was very poor such that no agent could see what markings were on the ballot papers when the officials held each ballot paper in the air for verification.
- l. No action taken by the 1st Respondent to investigate and charge the 3rd Respondent with night time campaigns and electoral malpractices.
- m. At various polling stations, the Petitioner's agents were asked by the officials of the 1st Respondent to fill in their names and National Identity Card Numbers in the Forms 34 and 35 documents during the voting exercise in the course of the morning prior to the start of voting.
- n. Out of 59 polling stations, the Petitioner's agents were only given 17 Form 35 documents. The 17 Form 35 documents that the Petitioner obtained were not all signed by the 1st Respondent's employees, servants or agents and failed to show that the Petitioner's agents were not allowed in to witness the opening of the ballot boxes, the witness of the voting process, the sealing of the ballot boxes and counting of votes at the polling station.

Points of Law

The Petitioner raises the following point of law in support of the Petition:

10.1. The 1st and 2nd Respondents, by their agents, servants and employees were at all material times bound to respect, uphold and defend the Petitioner's political rights and those of his supporters as protected and recognized by **Article 38 of the Constitution**, including but not limited to, securing that the said election in Taveta was based on universal suffrage electors for the position of Members of Parliament.

10.2. The 1st and 2nd Respondents, by their agents, servants and employees failed in their obligations under **Article 20(1) of the Constitution** to safeguard the Bills of Rights of both the Petitioner and the citizens of Taveta.

10.3. The 1st and 2nd Respondents, by their agents, servants and employees were at all material times bound by **Article 10 of the Constitution** to observe, respect and uphold and defend the national values and principles of governance in relation to the Taveta Election.

10.4. The ejection of the Petitioner's agent from the various Polling Stations and the Tallying Center constituted gross and widespread electoral irregularities and/or malpractices which fundamentally impugned the results of the election as declared by the 2nd Respondent. This was in flagrant breach of **Regulations 62(1)(c) of the Elections (General) Regulations, 2012.**

10.5. The Petitioner's agents were not allowed to inspect the ballot boxes in several polling stations before the commencement of the poll, witness the sealing the ballot boxes or witness the voting procedure until after 11a.m., in various Polling stations contrary to **Regulations 66,67 and 70 of the Elections (General) Regulations, 2012.**

10.6. The Presiding officers of the 1st Respondent at the various Polling Stations generally contravened the provisions of **Regulation 79 of the Elections (General) Regulations, 2012,** by failing to provide Form 35 to each of the agents of the Petitioner and record reasons for the refusal of any candidate or agents to sign Form 35.

10.7. The 1st Respondent's commissioners failed to act on the various written complaints by the Petitioner since 14th January 2013 regarding the lack of political neutrality and the partiality of the 2nd Respondent towards the 3rd Respondent contrary to the provisions of **Section 16 of the Public Officers Ethics, 2003, Elections Act and the Electoral Commissioners' Code of conduct and Ethics”**

On the basis of the grounds set out above, the petitioner asked this court to declare that NAOMI NAMSI SHABAN was not validly elected as the Member of the National Assembly for Taveta Constituency.

The Petitioner asked that he be declared as the validly elected Member of the National Assembly for Taveta Constituency.

In the event that the court was not able to declare the Petitioner to be the validly elected member of the National Assembly for Taveta Constituency, the Petitioner asked the court to order that a fresh election be held for that constituency.

If fresh elections were to be held, the Petitioner asks the court to order that all the Presiding Officers and the Returning Officer be replaced.

The Returning Officer and Naomi Shaban are said to have committed election offences; and this court was asked to so declare.

Because of the alleged election offences, this court was asked to bar the 3rd Respondent from contesting in any future elections.

As regards the IEBC, the court was asked to declare that it infringed on the Petitioner's fundamental rights under the constitution, by failing to act on the complaints lodged against the 2nd Respondent.

Finally, the Petitioner asked the court to order the Respondent to pay the costs of the petition.

In answer to the petition, the IEBC and the Returning Officer state that the process of elections was undertaken in compliance with the Constitution, the Elections Act and the Elections (General) Regulations, 2012.

It was their case that the results which they declared were accurate, verifiable and accountable; and that the said results reflected the will of the people of Taveta constituency.

The IEBC and the Returning Officer said that no agents were denied entry into polling stations, and also that no agents were ejected from the Tallying Centre.

In a nutshell, the IEBC denied all the grounds upon which the Petition was founded, as well as the

alleged breaches of the law.

Meanwhile, the 3rd Respondent also denied the allegations leveled against her in the Petition. In her view, the elections were conducted in substantial compliance with the law.

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In support of the Petition, the Petitioner filed his affidavit together with 13 other affidavits.

In addition to those affidavits, the Petitioner sought and was granted authority to have two police officers testify.

The 1st and 2nd Respondents filed their joint Response to the Petition. Alongside that Response, they filed the affidavit of the 2nd Respondent.

Meanwhile, the 3rd Respondent filed 22 affidavits to back her own affidavit, and also to back her Response to the Petition.

The Petitioner, BASIL CRITICOS, testified as **PW1**. By his affidavit, **PW1** said that in a number of polling stations, the agents of the majority of the candidates were denied entry during the actual voting exercise, for several hours.

He also said that the agents were ejected during the tallying of votes.

His other complaint was that in several instances, Forms 35 were not signed by the agents, of the candidates, or that the presiding officers did not insert statutory comments.

PW2 then provided details of five (5) letters which he wrote to the IEB.

In the first letter, dated 14th January 2013, **PW1** complained that Naomi Shaban was accompanied by the Returning Officer to public barazas and to all designated polling centers.

That conduct was said to demonstrate the lack of neutrality and impartiality, on the part of the IEBC.

The second letter, dated 11th February 2013, was described as a follow-up to the first letter. By that second letter, **PW1** complained about the fact that only members of the Pokomo community had been appointed as Returning Officers in Taveta constituency. Considering that Naomi Shaban was married to a Pokomo, **PW1** reasoned that unless the Returning Officers, clerks and other electoral staff were from all the tribes in Taveta Constituency there would not be fairness and impartiality.

The third letter was dated 5th February 2013. Through that letter, **PW1** complained that Naomi Shaban held night meetings; dished out money to bribe voters; traversed the constituency at night, using the CDF vehicle, distributing sugar and maize flour; and gave out cash to voters when she was campaigning during day-time.

That third letter concluded by asking that Naomi Shaban should be disqualified from vying.

Basil Criticos notified the Returning Officer that unless Naomi Shaban was disqualified from vying, Criticos would neither respect nor accept the results.

The fourth letter was dated 4th March 2013. By that letter, Criticos complained to the Returning Officer that;

“It was witnessed in the morning that our polling agents were refused entry in some of the polling stations due to lack of oathing of secrecy letters which you (IEBC) had

promised to provide to all party agents on Monday, this was well articulated on the Friday briefing in Timbila High School. We therefore, as an aggrieved party, we wish to demand for an explanation.”

The fifth, and last, letter was dated 8th March 2013. It sought explanations why the IEBC had failed to take any actions in response to the four (4) letters which Criticos had written earlier.

In that letter, **PW1** also complained about “open rigging” at Msengoni Nursery School.

When **PW1** was cross-examined, he reiterated that his complaint was that Naomi Shaban went with IEBC officials who were conducting voter education.

PW1 did not participate in the said voter education exercises. However, he admitted that voter education was critical.

PW1 added that he was not aware whether or not an MP was barred from voter education.

On the question of agents being denied entry into polling stations, **PW1** testified that at Lumi Primary School, his agents were Bernard Mutisya Sammy and Doris Ndambuki.

When **PW1** was shown the Form 35 which was signed by Sammy, he said that he had no personal knowledge whether or not Sammy had been denied entry to that polling station. Indeed, **PW1** explained that he was not present at the Lumi Primary School polling station at 6.00a.m. on polling day.

Fredrick Lukanga, one of the petitioner’s agents at Njukini Primary School, also signed the Form 35.

At Chokaa Primary School polling station, neither of the petitioner’s two agents signed the Form 35. But as **PW1** confirmed to the court that he never visited that polling station, he was unable to swear, of his own personal knowledge, whether or not the agents were at the polling station.

At Ulawani Primary School polling station, Joseph Kitambuka Guto, who was an agent of **PW1**, signed the Form 35.

Even at Taveta Primary School, **PW1** confirmed that his agent signed the Form 35.

It is therefore evident that the petitioner could not personally vouch for his assertion that his agents were barred from the polling stations.

When **PW1** was asked if the Returning officer was a Pokomo, he said that he did not know.

It was therefore very curious that in his letter dated 11th February 2013, Criticos had complained that;

“only the Pokomo tribes are appointed as the Returning Officers at Taveta Constituency.”

As regards the night meetings which Naomi Shaban was holding, **PW1** said that he did not personally witness any of them. He had just been informed about those meetings.

On the issue of the “Oaths of Secrecy” letters, the petitioner said that his agents did not have the same. But he explained that on 28th February 2013, at the Challa Hotel, Mr. Sang had told all the candidates that those letters were not required.

But when the rule requiring the “Oaths of Secrecy” letters was applied, the Petitioner confirms that it was applied to all parties, except TNA. However, when asked if he had evidence that the TNA agents were not subjected to that rule, the Petitioner said that he had none.

As regards the alleged misuse of state resources, **PW1** confirmed that the only instance he cited was the one involving the CDF motor vehicle. He added that in that respect the complaint in his Petition was related only to the use of the vehicle on 3rd/4th March 2013. He made it clear that he had no other dates when the CDF vehicle was used.

However, when his attention was drawn to the fact that as early as 5th February 2013, he had already written to complain about the misuse of the CDF vehicle, the Petitioner said that the date on that letter was an error.

The petitioner did not know the agents of Naomi Shaban who had allegedly used the CDF vehicle.

He also said that he could not identify the voters who have been allegedly bribed on the night prior to the polling day.

And although the Petitioner said that the misuse of government vehicle, and night meetings were criminal offences, he had not recorded any statements with the police. He had also not recorded any statement on the issue of the alleged bribery of voters, even though that was also a criminal offence.

PW2, HAJI ATHUMANI MOZE, testified that he was an agent for the RBK political party, at the Taveta primary School polling station.

In his affidavit, he said that he got to that polling station at about 5.30a.m. However, he and all other agents were denied entry into the polling station. When **PW2** inquired why they were denied entry, the Returning Officer informed him that it was because their forms were not commissioned.

According to **PW2**, the agent of a candidate named MIKE BANTON was allowed into the polling station, after Banton had talked to the Presiding Officer.

However, **PW2** confirmed that he did not know if Banton's agent had a letter of appointment.

PW2 said that he found the two agents of RBK outside the MCHEGHESHENI NURSERY SCHOOL polling station. He was not aware if any of those agents signed the Form 35.

But he was then shown the Form 35 which had been signed by JUMANNE MAGARE, who was an agent for RBK.

When **PW2** visited MSENGONI polling station, he found all the agents outside the polling station. It was his testimony that all windows and all doors were closed.

They pushed open the door and found, inside the hall, that the IEBC officers and the security personnel were seated together. **PW2** testified that he did not see either the IEBC officers or the security personnel do anything.

As far as he was concerned;

“It was wrong for them to be seated with the ballot boxes. But I admit that I do not know the law.”

During cross-examination, **PW2** confirmed that previously he had been very close to Naomi Shaban. He used to be her agent, but he stopped being her agent because of party differences.

PW2 was a member of RBK. In fact, he said that he was the Organizing Secretary for RBK.

When PW 2 was asked why the agents at Msengoni were outside the polling hall, he said that they told him that it was because the rooms were small.

PW3, JAMES WASIKE MAYABI, said that he was a pastor and also a lecturer at Sebastian Kalowa University.

He woke up early on the morning of elections and moved around various polling stations

“just to observe how people had turned up for voting during that day.”

However, during cross-examination, **PW3** confirmed that he was not an accredited observer. He said that he was simply observing the polls on his own behalf.

PW3 was aware that, under the law, only certain people could be allowed into polling stations.

As a registered voter, **PW3** knew that he had a right to enter the polling station where he had registered to vote but he still insisted that as a citizen he could also enter all polling stations.

It was worthy of note that **PW3** agreed that he could be described as a busy-body.

Although **PW3** said that some agents were blocked from entering the polling rooms, he did not have the names of any of the agents who were denied entry.

On the issue of alleged voter bribery, **PW3** said that he had no personal knowledge of the same, although he insisted that he could confirm that there was bribery.

On the incident at Msengoni, **PW3** said that the security officers and the IEBC officials were having tea. At that time, the ballot boxes had no seals, and the agents were outside. That set-up was unconstitutional, said **PW3**.

However, **PW3** confirmed that he did not see anything being removed from or being put into the ballot boxes.

PW3 said that the IEBC officials were compromised: but he did not know who compromised them!

Finally, **PW3** said that his affidavit was sworn before a magistrate in Nairobi. The said magistrate was not in court. He was in Githurai. That statement was baffling because the affidavit of **PW3** indicates that he swore it at Taveta.

PW4, KELLY OCHIENG ADUOUF, told the court that he swore his affidavit before an advocate named Martin, in Mombasa.

It was however noted from the face of the affidavit of **PW4**, that it was sworn at Taveta.

PW4 said that he was an Observer in the elections. He worked with MUHURI as a Senior Human Rights Officer.

Although **PW4** said that accredited observers were supposed to give their reports to the IEBC, he did not hand over his report to the IEBC. Instead, he handed over his report to MUHURI.

PW4 was unable to confirm whether or not MUHURI submitted his report to the IEBC.

When **PW4** was asked if he had carried a copy of his report to the court, the answer was in the negative.

PW4 testified that on 3rd March 2013, at 11.00p.m, his “connection” named EVANS WAITIKI MUCHIRI, phoned him. Mr.Muchiri told him about a motor vehicle registration GK A 911U which was distributing food in Langata.

Immediately after getting that information, **PW4** went to Langata.

In his affidavit, **PW4** said that;

“the pick-up was double cab vehicle, which was full of maize flour and rice. We took pictures, which I have in my mail.”

When asked why he linked the incident to Naomi Shaban, **PW4** said that;

“Dr. Shaban was an MP as at March 2013. She was the patron of CDF. That is why I linked her to the incident involving the vehicle. I know that Dr. Shaban ceased to be an MP in January 2013, when Parliament was dissolved.”

Therefore, by his own reasoning **PW4** by his own reasoning **PW4** must be presumed to have known that if Dr. Shaban had ceased to be an MP in January 2013, she cannot have continued to be the patron of the CDF.

When **PW4** reached the scene, he saw packets of maize flour and packets of rice, in the vehicle.

PW4 was categorical that if a witness said that there was; *maize meal and sugar*,

“maize meal and sugar, *“that is what he saw. I saw rice and maize flour. It depends on what part of the vehicle the witness looked.”*

Of course, that suggests that the various items which were in the vehicle, were in different parts of the vehicle. It also means that the sugar was not in the same place where **PW4** saw the maize flour and rice.

PW4 left the scene at 12.00midnight. Whilst he was at the scene, he had seen **PW1**.

Meanwhile, **PW1** had said that he saw the vehicle at Lang’ata at 2.30a.m. He then escorted the vehicle to Taveta Police Station at 3.30a.m.

Whilst **PW1** was at the scene, he saw maize flour and sugar. It is for that reason that when he wrote to the Returning Officer, on 5th February 2013, **PW1** complained that the CDF vehicle was distributing sugar and maize flour.

Considering that **PW1** made it clear that it was only the 3rd/4th of March 2013 that the CDF vehicle was used, that implied that **PW1** and **PW4** were making reference to the same incident.

But somehow, the two witnesses saw different items, and did so at different hours.

PW1 got to the scene at Lang’ata, at about 2.30a.m, whilst **PW4** had left that scene at about midnight. It is not possible for them to have met at that scene, when **PW4** had left some two-and-half hours before **PW1** arrived. Yet the two of them met, somehow.

There were a total of six photographs which were annexed to the affidavit of the petitioner.

PW4 testified that he took all those photos, except the one which showed packets of sugar. He said that the photo which showed the packets of sugar was taken by MR. WAITIKI.

PW4 emphasized that if **PW1** had said that it was Mike Banton who had taken those photos, then **PW1** would be lying.

When **PW4** was reminded that none of the photos showed any rice, yet he had seen rice in the vehicle, the witness said that he was not lying about the incident.

In my considered opinion, the evidence tendered by the Petitioner, in relation to the CDF vehicle, is very muddled up. It is not clear when the incident took place, or who took photos at the scene. It is not even clear which items were inside the vehicle.

PW1's affidavit said that the photos were taken by Mike Banton, whilst **PW4** that if **PW1** said so, then **PW1** would be lying.

PW7, CHIEF INSPECTOR DUNCAN NJAU, testified that the CDF vehicle was already at the Central Police Station at about midnight. He later changed to say that the vehicle was taken to the police station after midnight, but did not specify the time.

According to **PW7**, the items in the vehicle were 37 packets, each of ¼ kilo of sugar, and 2 packets of maize flour.

PW7 was clear in his mind, that he did not see any rice.

He also added that the 1 kilogram packet of sugar, which was in the photo annexed to **PW1's** affidavit, was not what he (**PW7**) had seen in the vehicle.

PW8, INSPECTOR PATRICK KITTONY confirmed that the police opened an Inquiry File to investigate the matters revolving around the CDF vehicle. The inquiry was necessary because there were two reports. In the one report, the driver of the vehicle reported that the vehicle had been stolen from him. And in the second report, there was a report that the CDF vehicle as being misused.

As at the time those 2 police officers testified, the police had not yet concluded their investigations.

Therefore, their evidence did not advance the Petitioner's case at all.

PW5, STEPHEN MWANIA MUTHOKA, voted at Lesesia Primary School polling station. He testified that he had no difficulty when casting his vote.

His testimony was brief. He was assaulted by Joshua Muia Ngenya. That incident did not involve the IEBC.

PW5 said that he did not belong to any party, and also that he did not know the party to which his assailant belonged.

That evidence of **PW5** was wholly inconsistent with the contents of his affidavit.

In the said affidavit he had alleged that Joshua Muia Ngenya assaulted him when he (**PW5**) took a photo of the assailant, whilst the said assailant was receiving a lump sum of money from Naomi Shaban.

The affidavit in question shows, on the face thereof, that it was sworn in Taveta. But **PW5** stated quite categorically that he swore his affidavit in Mombasa. He emphasized that he did not swear his affidavit in Nairobi, Voi or Taveta.

In the light of that, I can only conclude that the affidavit annexed to the Petitioner's petition was not sworn by **PW5**. And that therefore means that the evidence tendered by **PW5** had no bearing on the Petition.

PW6, MATHENGE RAMADHAN KAMUZU, swore his affidavit in Mombasa, but the affidavit bearing names closely resembling those of **PW6** was sworn at Taveta.

PW6 received a phone-call from Wambua Salehe, who told him that he had seen people who were giving money to voters.

Neither **PW6** nor Wambua Salehe had the incident recorded in the O.B. According to **PW6**, the incident was important, but he forgot to have the same recorded in the O.B.

PW6 testified that those who were giving out money were members of TNA. His said conclusion was derived from the fact that “they associated with TNA candidates.”

Interestingly, **PW6** said that if he had been given money, he would not have complained! He went on to add;

“I was not reached by those people on that day.”

When **PW6** was asked if the Presiding Officer inside the polling station could have known about the bribery which was outside, he answered in the negative.

PW6 also said that neither he nor Wambua Salehe were influenced by money, when they cast their votes.

When the 1st and 2nd Respondent were called upon to answer to the petitioner's case they did so through the 2nd Respondent, ISAIHAH SAHA MADZUNGU (**RW1**)

RW1 testified that he, as the Returning Officer for Taveta constituency, declared NAOMI NAMSI SHABAN the elected Member of the National Assembly after she had garnered the majority votes.

RW1 said that he tallied all the results from all the polling stations in Taveta Constituency, and then prepared the Form 36, which reflected the aggregate results for the election of the Member of the National Assembly.

In regard to agents who were denied entry into polling stations, **RW1** deponed that the reasons cited by such agents were valid.

Whilst admitting that the Petitioner complained that Naomi Shaban was holding night meetings, **RW1** said that his investigations revealed only a prayer meeting at Timbila Primary School.

And although that was a prayer meeting, **RW1** reported the matter to the police, for further investigations.

Allegations of lack of neutrality and of impartiality were denied.

RW1 said that he never accompanied Naomi Shaban to any voters' education forum. But he said that if the Petitioner had attended any such forums, **RW1** would have been happy, as the number of voters would have increased.

The 3rd Respondent, NAOMI NAMSI SHABAN (**RW2**), said that she never accompanied **RW1** to any voter education exercise. She said that she only engaged in voter education, alongside acknowledged voter educators.

RW2 said that because of voter apathy, all leaders were encouraged to participate in the voter education exercises.

She added that the voter educators were contracted by the IEBC, whilst the Provincial Administration called for the barazas, at which voters were educated.

Having now given due consideration to all the evidence touching on the question of voter education, I have come to the conclusion that the Petitioner has not proved any irregularity or violation attributable to any of the respondents.

Meanwhile, as regards the issue of agents who were denied entry into polling stations, I note that the Respondents do acknowledge that there were instances where agents were kept out.

Basil Criticos and Naomi Shaban both confirmed that some of their agents were kept out due to their not having the “Oaths of Secrecy” letters.

But **RW2** expressed the view that the absence of agents could not have affected the voting because there were IEBC officials and other people who were observing the exercise.

As regards the alleged misuse of the CDF vehicle, **RW2** said that she read in the newspapers that the Ombudsman was reported to have said that he was investigating the matter. But **RW2** denied misusing the said vehicle.

RW3, FLEMON BERUBE, was the driver of the CDF vehicle. He testified that on the material day, he had a work ticket in the vehicle, and that he never used the vehicle to distribute foodstuffs to any voters. He also said that he never ferried any sugar or maize meal on the material day.

RW3 said that he was on official duty, having dropped-off Mr. Mwinyi Mwendapole. He was then accosted by people who took away the car keys from him. It was for that reason that he reported the incident to the police.

RW4, BARNABA MAIMBO LEZENI, and **RW5, MOSES ONYANGO OTIENO**, both testified that they were at the scene where the CDF vehicle was “arrested.”

RW5 testified that he saw the vehicle when it was blocked by another vehicle. A man named KAMANDA, got out of the other vehicle and then took the car keys and a mobile phone from **RW3**.

Indeed, **RW5** alleged that it was after **RW3** had run away that he saw some men put some items inside the CDF vehicle. But **RW5** did not identify those men.

RW6, JOHN SALERI MTAWA, arrived at the scene after the CDF vehicle had stalled. He saw ¼ kilo plastic packets of sugar inside the vehicle. He also saw some maize meal.

In the reasoning of **RW6**, the items must have been placed in the vehicle after it had stopped. He said so because the vehicle had come to a stop after climbing up a slope, from a valley.

In those circumstances, **RW6** believed that the items in the vehicle would have moved towards the back of the vehicle, whilst the vehicle moved from the valley.

RW7, LOICE MBULULU MAGHUWA, was the TNA agent at Msengoni Primary School.

RW7 was allowed into the polling station at 8.00a.m, after the IEBC official verified her documents.

After the last person had voted, the IEBC officials took a tea break, at about 5.10p.m.

According to **RW7**, Basil Criticos arrived at that polling station, speaking in an agitated voice. Criticos was complaining that his agents had been chased away from the polling station.

During cross-examination, **RW7** said that when she was not yet inside the polling station, there were agents of other parties inside the said polling station. She also said the the security officers and observers were also inside the polling station.

When **RW7** entered the polling station at 8.00a.m, none of those who were inside the station told her of anything unusual that had taken place in her absence.

RW7 said that the agent for Basil Criticos, at Msengoni Primary School, was EVERLINE

MANGOMDO WAMBUA.

When Basil Criticos arrived at the polling station, his said agent went out to meet him.

RW7 said that nobody forced the agent to move out of the polling station.

RW8, CORNEL SALUNDIE LOMWATU, was the ODM agent at Msengoni Primary School polling station.

He arrived at the polling station at 5.00a.m. He remained outside for about 30 minutes, when the IEBC officials were verifying his documents.

RW8 testified that he entered the polling station before 6.00a.m. By that hour, **RW8** found the agents of RBK and of URP, already inside the polling station.

When the IEBC officials had a tea break, after the voting ended, **RW8** was one of those who was with them.

According to **RW8** when Criticos complained to the Presiding Officer about agents having been thrown out, the Presiding Officer pointed at the agents who were inside the polling station, to show that the complaint was factually incorrect.

RW8 said that Everline Wambua, the agent for RBK, also returned into the polling hall before the counting started.

RW9, JOEL MERIGHA TUMNA, was the URP agent at the Msengoni primary School Polling Station. He reached the station at 5.00a.m.

As his papers were all in order, **RW9** was allowed to enter the polling station.

He was present when the IEBC officials displayed the empty ballot boxes before voting started.

RW 9 also said that when there was a tea break, after the voting ended, he was inside the polling station.

RW10, PASCAL MWANGANGI NGOLEA, was the TNA agent at Kasokoni Primary School.

His recollection was that 289 votes were cast at Kasokoni. He then signed the Form 35.

But when **RW10** was shown the Form 35 which was exhibited by the IEBC, he noted that the votes cast were 290.

As regards the source of lighting which was present in the counting hall, **RW10** said it was one gas lamp. However, he insisted that that lamp provided sufficient lighting all through. The lamp never went off.

RW10 then pointed out that on the Form 35 exhibited by the petitioner, and the Form 35 exhibited by the IEBC, all the candidates were given the exact same votes in both forms.

RW10 also pointed out that the Forms 35 were signed by the agent of RBK, Mr. Julius K. Kimondio.

After **RW10** testified, all the parties filed their respective submissions.

It is the Petitioner's contention that because the IEBC did not bring evidence from the Presiding Officers, to counter the assertions that party agents were denied entry for many hours, at various polling

stations, the said assertion is deemed to be admitted, for failure to controvert the same.

In my considered opinion that submission cannot stand. I say so because in the case of **RAILA ODINGA Vs IEBC & 3 OTHERS, ELECTION PETITION NO. 5 of 2013**, the Supreme Court of Kenya made it clear that;

“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 guaranteed 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 called upon to bear the evidential burden.”

In my understanding, that implies that even if the respondents had not responded to any issue which had been raised by the Petitioner in the election petition, the Petitioner would still need to discharged his initial burden of proof.

Therefore, if a petitioner failed to discharge that initial burden of proof, the respondents would not need to be called upon to bear the evidential burden.

The first question that needs to be addressed is about the assertions which the Petitioner put forward, coupled with the question whether or not he discharged the burden of proof.

If any of those assertions were proved by the petitioner, did the respondents discharge their evidential burden?

But what does it mean when the petitioner is required to provide proof to the satisfaction of the court?

In the Tanzanian case of **MBOWE Vs ELIURFOO [1967] E.A. 240**, the court held as follows;

“There has been much argument at the meaning of the term ‘proved to the satisfaction of the court’ In my view, it is clear that the burden of proof must be on the Petitioner rather than the Respondents, because it is he who seeks to have the election declared void.”

Assuming that the Petitioner has proved any of his assertions to the satisfaction of the court, he would then need to prove that the act or omission affected the validity of the elections.

In the **RAILA CASE (above)**, the Supreme Court made it clear that;

“where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.”

That holding by the Supreme Court of Kenya was informed by the express provisions of **Section 83 of the Elections Act**, which provides as follows;

“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.”

The Petitioner submitted that **Regulation 62(1) (c)** enjoins the Presiding Officers not to exclude,

inter alia, authorized agents.

The said Regulation actually reads as follows;

“The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except-

(a)

(b)

(c) authorized agents.”

In this case, the IEBC has stated that agents needed to have “Oaths of Secrecy” letters, before they could be admitted into the polling stations.

And agents of all parties or candidates were accorded the same treatment by the IEBC, in that respect.

The Petitioner has therefore submitted that;

“One can only speculate if this was not a conspiracy between the Respondents to lock out agents and ensure that no one observed how the voting took place if any tampering occurred.”

Nothing could be clearer than that! The petitioner could only speculate about some conspiracy between the Respondents. That is a far cry from the required credible evidence.

In any event, **Regulation 62(3)** makes it clear that;

“The absence of agents shall not invalidate the proceedings at a polling station.”

I will now have a look at the grounds cited in the Petition, one-by-one.

- a. The 3rd Respondent was accompanied by the 2nd Respondent in voter education: I find that no evidence was led to prove that allegation.
- b. The 2nd Respondent gave preferential treatment to the 3rd Respondent during the process of nomination; No evidence was adduced on that allegation.
- c. The 3rd Respondent used her ministerial position by using state resources during her campaigns prior to 4th March 2013, and intimidating the police: Again, the petitioner did not lead evidence to prove that allegation.
- d. The 3rd Respondent, through her agents used the Taveta CDF motor vehicle to carry foodstuff such as packets of sugar and maize to bribe voters: The evidence of the petitioner was so jumbled up that it did not prove the allegations. No evidence was led to connect the actions of the driver of the vehicle, to the 3rd Respondent
- e. The 1st Respondent refused to respond to various oral and written complaints made by the Petitioner, since January 2013, regarding the 2nd Respondent’s lack of impartiality: The petitioner did not prove that the letters, save for that dated 11th February 2013, were received by the IEBC.
- f. At Msengoni Polling Station all the agents were ordered out of the polling station: Some agents testified that no agents were ordered out, and that the RBK agent left the room at her own instance, to receive the petitioner.
- g. The Petitioner’s agents were denied entry into nine polling stations, namely:

(i) Lumi Primary School.

(ii) Njukini Primary School

(iii) Chokaa Primary School

(iv)Ulawani Nursery School

(v)Uthiani Primary School

(vi)Taveta Primary School.

(vii)Madarasani Primary School

(viii)Riata Ndogo Nursery School

(ix)Kisimani Nursery School

The Petitioner did not cite Rekeke Primary School polling station as one of the polling stations at which the agents of the Petitioner were barred. That would imply that when the petitioner moved the court, he had no issue arising from that polling station.

Consequently, the Respondents would have had no reason to respond to something which the petitioner had not raised.

However, when the Returning Officer was being cross-examined, the petitioner asked him questions about the Form 35, relating to Rekeke Primary School. Mr. Lubullelah, the learned advocate for the 1st and 2nd Respondents objected to that line of questions. His objection as based on the fact that no issue was raised in the Petition, in relation to Rekeke Primary School.

This court overruled that objection because the witness was being interrogated about materials which he and the IEBC had placed before the court.

Thereafter, the Returning Officer confirmed that the Form 35 for Rekeke Primary School had an alteration. The said alteration was in respect to the votes allocated to Naomi Shaban. The first figure was 250, which was cancelled and was then replaced with 310.

Of course, that meant that Naomi Shaban had 60 more votes than the figure originally allocated to her.

The Returning Officer explained, during re-examination, that Naomi Shaban actually got 310 votes. According to him, those votes were verifiable.

The Petitioner did not say that he or any of the other candidates were allocated fewer votes than was allocated to them on the Form 35.

But even more significantly, the petitioner's agent, JOHN KWELE MASAIRO, signed the Form 35, thus confirming the accuracy of the contents.

Therefore, the simple fact that there was a cancellation of the figure 250, which was replaced by 310, as the votes cast for Naomi Shaban, does not, of itself, advance the petitioner's case at all.

This is a petition in which the difference in the votes cast for the winner and those for the runner-up is very small; 106 votes.

At the start of the trial, I thought to myself that there would almost definitely be a need for, at least, a recount of the votes.

However, when the Petitioner took to the witness box, he said that although he disagreed with the

results that had been announced;

“In my considered view, I am unable to speculate as to the exact nature of votes I got.”

The Petitioner told the court that he had 106 agents, which translates to 2 agents per polling station. But notwithstanding the said agents, the petitioner went on to testify as follows;

“At Mahoo Primary School I got 20 votes. I do not know how many votes I got at that centre. I had agents at Mahoo Primary, but they did not tell me how many votes I got.

At Kasokoni I had agents. They told me I had garnered votes; but I do not have the particulars here in court.

I also do not have the particulars of the votes which my agents told me I got at Msengoni and Rekeke.”

In a nutshell, although the petitioner had agents, he did not make available to this court such evidence as would have demonstrated that the votes allocated to him or to any of the other candidates were not accurate.

In **JOHN KIARIE WAWERU Vs BETH WAMBUI MUGO & 2 OTHERS, ELECTION PETITITON NO. 13 of 20087**, Kimaru J. said;

“I accept the explanation given by the 1st Respondent that any diligent candidate was expected to have tallied the results from the various polling stations before the results were finally officially announced by the 2nd Respondent, as a returning officer, at the tallying centre. The petitioner could not give a single figure of the votes that he secured in any of the 28 polling centres. It was therefore, incomprehensible that the petitioner could expect the court to arrive at a decision in his favour.....”

Having given due consideration to all the evidence adduced together with all the submissions made by the parties I have come to the conclusion that the Petitioner failed to satisfy the court that the Respondents committed any election offence, or that there were any significant breaches of the Regulations or the laws governing elections.

I have found no widespread electoral irregularities or malpractices that would have impugned the results of the elections.

The margin by which the 3rd Respondent won the election was small, but that is no reason to upset it. Indeed even if the margin had been reduced to 45 votes, that would still have constituted a recognizable majority.

I find no merit in the Petition. It is therefore dismissed.

I declare that **NAOMI NAMSI SHABAN** was the validly elected member of the National Assembly for Taveta Constituency.

I further declare that HON. BASIL CRITICOS was not the validly elected Member of the National Assembly for Taveta Constituency.

There is therefore no reason in law, and in fact, to order that a fresh election be conducted for the Member of the National Assembly for Taveta Constituency.

The Petitioner is ordered to pay the costs of this Petition to all the 3 Respondents Pursuant to **Rule**

36(1) of the Election Petition Rules, I further direct as follows;

- a. The Taxing Master will tax the Bills of Costs, unless the parties will have agreed on the same;
- b. The costs payable to the 1st and 2nd respondents, jointly, shall not exceed KShs.1,500,000/-
- c. The costs payable to the 3rd Respondent shall not exceed KShs.1,500,000/-
- d. The money which the Petitioner had deposited in court, as security for costs, will be utilized towards the settlement of the Respondents' costs.

The sum will be shared equally between the 1st and 2nd Respondents on the one hand; and the 3rd Respondent on the other hand.

It is further ordered, in compliance with **Section 86(1) of the Elections Act** that a Certificate do issue forthwith to the Independent Electoral and Boundaries Commission, notifying it that this Election Court determined the Petition by returning a declaration that DR. NAOMI NAMSI SHABAN was validly elected as the Member of the National Assembly for Taveta Constituency.

I direct that a report do issue, in accordance with **Section 87(1) of the Elections Act**, to inform the Director of Public Prosecutions, the IEBC and the Speaker of the National Assembly, that nobody was found, in these proceedings, to have committed any election offence.

Finally, I do sincerely thank the following persons for the support they accorded to the Court in this case;

- a. The Parties
- b. **Mr. Tengo Madara** and **Mr. Allan Gichuhi**, the learned advocates for the Petitioner.
- c. **Mr. A.M. Lubullelah**, the learned advocate for the 1st and the 2nd Respondents.
- d. **Mr. Assa Nyakundi**, the learned advocate for the 3rd Respondent.
- e. **Ms Milka** and **Ms Christine**, who worked tirelessly as my secretaries during these proceedings.
- f. **Mr. Willis Oluga**, a solid and industrious Researcher.
- g. **Mr. Ibrahim**, a reliable Court clerk who also acted as the interpreter.
- h. **Mrs. Lucy Maruga**, the secretary who typed this Judgment.

Dated, Signed and Delivered at MOMBASA, this 27th day of September 2013.

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FRED A. OCHIENG

JUDGE