



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

THE ELECTIONS ACT NO.24 OF 2011

ELECTION PETITION NO.8 OF 2013

**IN THE MATTER OF ARTICLES 22,23,25,28,80, 81, AND 88 OF THE REPUBLIC OF KENYA,
2010**

**IN THE MATTER OF SECTIONS 75, 76, 80 AND 86 OF THE ELECTIONS ACT NO. 24 OF
2011 LAWS OF KENYA AND THE RULE MADE THEREUNDER**

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
ACT**

ELECTION FOR THE GOVERNOR OF THE COUNTY OF MOMBASA HELD ON

4TH MARCH 2013

The Petition of SULEIMAN SAID SHAHBAL

BETWEEN

SULEIMAN SAID SHAHBAL.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

MWADIME MWASHIGADI2ND RESPONDENT

HASSAN ALI JOHO3RD RESPONDENT

HAZEL EZABEL NYAMOKI OGUNDE.....4TH 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, **SULEIMAN SAID SHAHBAL** and the 3rd Respondent, **HASSAN ALI JOHO**,

both participated in the said elections as candidates for the position of Governor of the County of Mombasa. The Independent Electoral and Boundaries Commission (IEBC) was responsible for conducting the elections. The 2nd Respondent, **MWADIME MWASHIGADI**, was the County Returning Officer of the IEBC, in the Mombasa county.

The 4th Respondent was the running mate of the 3rd Respondent in the elections.

After conducting the elections the IEBC, through its Returning Officer announced that **HASAN ALI JOHO** had been duly elected as the Governor. The particulars of the results that were announced by the IEBC were as follows:

- (a) ABDALLA HEMED MWARUWA17,335**
- (b) ANDERSON CHIBULE WATSUMA..... 2,258**
- (c) HASSAN ALI JOHO132,583**
- (d) IBRAHIM KHAMIS ATHMANI.....10, 124**
- (e) LAWRENCE KAMAU MACHARIA.....1,064**
- (f) MUTUKU ISAAC MALILA.....1,368**
- (g) SULEIMAN SAID SHAHBAL94,905**
- (h) TENDAI LEWA MTANA9,045**

- TOTAL VOTES CAST.....268,709**

The IEBC then published in the Kenya Gazette dated 13th March 2013, that **HASAN ALI JOHO** was the Governor of Mombasa County, whilst **HAZEL EZABEL NYAMOKI OGUNDE** was the Deputy Governor.

The Petitioner has brought this Petition to challenge the validity of the election of the 3rd Respondent.

His contention was that every last check, rule and balance that had been put in place to ensure the integrity of the electoral process was egregiously violated by the 1st, 2nd and 3rd Respondents.

Those 3 Respondents are said to have exploited the failure of the Biometric Voter Registration (BVR) and the Electronic Voter Identification (EVD) to “spike” the numbers in favour of the 3rd Respondent.

It is the Petitioner's case that because of widespread malpractices by the IEBC officers who had been placed in-charge of the election, the results that were announced did not reflect the democratic will of the voters.

In the Petition, the petitioner cited a total of eleven (11) broad grounds, as follows;

- (a) Intimidation of voters and agents.
- (b) Violence prior to and during the voting exercise;
- (c) Submission of votes without agent sign off (sic!);
- (d) Transport of Ballots;

- (e) Bribery and treating of voters;
- (f) Partiality and favoritism/IEBC inaction;
- (g) Ballot stuffing;
- (h) Creation of illegal streams
- (i) Inaccurate tallying and manipulation of figures;
- (j) Ballot serial numbers and counterfoils not corresponding;
- (j) Removal of agents from polling and tallying centres.

In respect to each of those broad grounds upon which the Petition was founded, the Petitioner provided further particulars, in the manner following:

Removal of Agents from polling and tallying centres.

(a) The widespread and systematic removal of the petitioner's agents from the tallying centres and counting halls was calculated to ensure that the agents could not ascertain what transpired during the voting process, and verifying the results announced by the IEBC.

(b) At MWIJARU polling station, the petitioner's agents and those of the Wiper Democratic party were forcefully ejected, on the instructions of agents of the IEBC and of the Returning officer.

(c) At KIEMBENI polling station the Petitioner's agent was denied access while the counting of votes was going on.

(d) At MAINVIEW PRIMARY SCHOOL, ELIM CHURCH, ASK GATE B, ST. KEVIN ACADEMY, the petitioner's agents were denied entry until after 4.00p.m.

When the petitioner testified in court, he said that the agents of the Wiper Democratic Party were thrown out of the counting halls.

His testimony was that at least 47 of their agents had sworn affidavits to say that they had been thrown out.

He is on record as saying;

“My agents were thrown out from polling stations. IEBC did not have proper accreditation. They allowed agents in the morning and they signed, and they

later shut them out at counting time. My agents were accredited. Some of them swore affidavits, in this Petition. And some showed proof of their accreditation. Some agents did not get accreditation documents. Some were allowed in even without the document. All our agents were allowed entry into the polling stations in the morning.”

From the petitioner's own evidence, cited above, it appears that none of the agents of the Wiper Democratic Party were denied entry into polling stations until 4.00p.m, as suggested in the Petition. The Petitioner said that all of them were allowed entry into the polling stations in the morning.

On his part, **PW3, JAPHETH MWAZUNGA**, testified that he was a coordinator of the Petitioner's agents. His main task was to take to those agents, tea, food and water, throughout the day. He would go

to the polling stations, ask for the agents, and the said agents came outside, where PW3 handed over the tea, water or food. He did so at Timbwani, Licodep Social Hall, Maji Safi and Daru-Ulum.

Considering that PW3 was handing over the tea, water and food to the petitioner's agents at those polling stations, that means that the petitioner's agents were present at the said polling stations, between 12.00noon and 2.00p.m, according to the time-span stated by PW3.

PW4, MIRAJ ABDULLAHI, was a candidate for County Representative for Tononoka Ward. She vied under the UNITED DEMOCRATIC FORUM (UDF) ticket.

She expressly stated that she had no role in the elections for the position of Governor for Mombasa County.

However, the UDF agents were allowed into the polling stations at about 10.00a.m.

PW4 also confirmed that when votes were being counted, she remained outside the polling station. Therefore, she did not know what transpired inside the counting hall.

PW5, JUMA ADAM ZAWADI, was an agent for Wiper at Majengo Village Polling Station, in Mvita Constituency.

He arrived at the polling station at 5.30a.m, where he went to the stream that he had been assigned to. He said that he was in Stream 3.

Later, when votes were being counted, **PW5** was informed that the Wiper agent in Stream 4 was feeling unwell. **PW5** said that the agent, who was unwell, is named MIRIAM.

After MIRIAM was taken ill, it was **PW5** who doubled-up as the Wiper agent in Stream 3 and Stream 4.

In other words, the Wiper agent in Stream 4 only left because she was unwell.

Meanwhile, according to **PW5**, the Wiper agent in Stream 5 was RAZIA YUSUF.

From the evidence so far tendered by the petitioner, there was no evidence at all to show that the Wiper Agents were either denied entry until 4.00p.m, or that they were ejected from the counting halls when the votes were being counted.

When **PW5** was shown the Polling Day Diary for Majengo Village Hall, Stream 4, he confirmed that Razia Yusuf was indicated as having been the Wiper agent in Stream 4. However, **PW5** insisted that notwithstanding the contents of that document, Razia Yusuf was in Stream 5.

Razia Yusuf is shown to have signed the declaration at 6.00a.m, when the station was opened. The same Razia Yusuf signed the certificate before counting started.

PW6, ROBERT MUSILI MWASIA, was a candidate for the Kongowea Ward, on a Wiper ticket.

In his affidavit, he said that his agents were removed from the polling station at Karama Grounds. He deponed that the reasons for their removal were unknown to him. However, he added that the reasons for the removal of the said agents were insufficient to warrant their removal.

I must say that I found it difficult to appreciate how PW6 was able to determine that the reasons for the removal of his agents was insufficient to warrant their removal, yet PW6 did not know the reasons why the agents were removed.

PW6 voted at the Mombasa Social Hall, Kongowea, at about 2.00p.m.

Earlier that day, PW6 had gone around the polling stations within Kongowea. But he made it clear that he never entered into any of those polling stations.

According to **PW6**, Wiper had agents at the Karama Grounds polling station. He added;

“Karama had 8 streams. All the agents for Wiper were removed from the Karama polling station. I know that for a fact.”

That testimony sounded very firm and clear.

However, when **PW6** was shown the Forms 35 which had been signed by DAVID SYANDI and COSMAS KYALO, who were agents for Wiper, his comments were;

“I do not know who trained the Wiper agents. I do not recall the other Wiper agents.”

Surely, if the witness was not even sure of the identities of some of the Wiper agents, how could he have known that all the said agents had been removed from the polling stations at Karama Grounds?

Cosmas Kyalo had also signed the Polling Day Diary when the seals were being affixed, before voting started.

And when voting closed, the same Cosmas Kyalo again signed the diary.

All that evidence, which was tendered by the petitioner, proves the very opposite of the assertion made by the petitioner.

PW7, MGANDI SAMUEL KALINDA, was the KNC candidate in Mtongwe Ward.

KNC did not have a candidate for Governor, for the Mombasa County. The party had candidates for Ward and Women Representatives only. And **PW7** said that the KNC agents looked after the interests of that political party.

At Vijiweni Stream 1, the KNC agent was MUSHALI SULEIMAN MAGONGO. During cross-examination, **PW7** said that that agent was at Vijiweni all through.

Of course, that means that the agent was not thrown out.

PW9, RAZIA YUSUF, testified that she was the agent for Wiper in Stream 4, at Majengo Village Polling Station.

She got to the polling station at about 6.30a.m., and found that the voting had not yet started.

PW9 recorded the results in her book. Although the book was not brought before the court **PW9** said that the Petitioner got 221 votes, whilst the 3rd Respondent got 220 votes.

The complaint of **PW9** was that she was not allowed to record the serial numbers of the seals used to seal the ballot boxes.

As far as **PW9** was concerned, it is the results in her book that were accurate. This is what she said;

“The correct results are the ones which were

in my book. However, if the official results

announced at the tallying centre were the

same as I recorded, then the results are O.K.

The results at the tallying centre showed

Shahbal-221, and Joho-220”

It therefore follows that results announced by the Returning Officer, for Stream 4, Majengo Village Polling Station were correct, according to **PW9**.

Even more significantly, is **PW9**'s testimony that;

“On 4/3/2013 I remained at the counting hall

all through the counting. I did not fall sick or leave the counting room.

I was present even when counting ended, and the ballot boxes sealed..

I know Juma Adam. He was the Wiper agent at Majengo.

If Adam said I was not the agent in Stream 4, that would be incorrect. If Adam said that the agent in Stream 4 fell ill, and that he replaced her, that is also

incorrect. I never left Stream 4 at Majengo Village.”

It is evident that **PW9** did not support the case put forward by the petitioner. She was at the polling station from 6.30a.m. She was present all through the voting process, and later throughout the process of counting the votes.

PW16, ZAINABU SAID MKAROYO, was the Assistant Chief Agent for Wiper in Bofu Ward.

She testified that the Wiper Agent at Stream 3, Jamvi la Wageni was RASHID ATHMAN MACKENZIE, who was also known by the name MWAKUNJI ATHUMAN.

PW16 confirmed that that agent signed the Form 35 for the polling station at which he was an agent.

It was the evidence of **PW16** that when the agent signed the Form 35, he was satisfied with the results.

PW16 also said that the agent was at the polling station at the start of the voting and also at the end.

The foregoing evidence does not support the Petitioner's case.

PW17, BENJAMIN MULANDI MUTILI, was a candidate in the Port Reitz Ward. He voted at the Mwijabu Primary School, at about 12.00noon.

He identified the following 4 persons as those who were the agents for Wiper at Mwijabu Primary School;

(i) Cornelius Kivilu;

(ii) Martin Mwangangi;

(iii) Onesmus Mwilu;

(iv) Onesmus Nzioka.

PW 17 confirmed that three of the Wiper agents signed the Form 35.

PW 18, FLORA SABINA MASAMO, was a candidate for County Ward Representative in Ziwa la Ngombe.

She testified that the election for the Senator in Mombasa County was free, fair and credible. Those elections were won by Hassan Omar Hassan, of the Wiper Party.

As those elections were held at the same time as those for Governor, **PW18** said that the elections for the Governor was also free, fair and credible.

She also confirmed that the following 4 Wiper agents signed the Forms 35 at Ziwa la Ngombe;

(a) Joel Musyoka;

(b) Khamis;

(c) Felix Kivelenge; and

(d) Paul Mutiso.

PW19, JUMA MOHAMED SALIM SADIQ, was the Wiper candidate for Ward Representative in Mjambere Ward.

He stayed at Snake Valley polling station between 8.00a.m. and 8.30a.m. And although some agents were not allowed into the polling station earlier, **PW19** noted;

“when the voting started, the agents had been allowed in.”

PW20, SIMON MUOKA MUTHOSI, was the Wiper candidate for the Ward Representative of Changamwe Ward.

He said that the Wiper Party performed very well in the elections for Senator, and also that 2 of their candidates were elected as Members of the National Assembly, in Mombasa County.

In his opinion, those elections were free and fair.

PW20 also said that because the elections for the President and those for the Governor were conducted at the same time as the other elections, the process was the same in all the elections.

But he also expressed the view that if a problem arose in respect to one position, that need not affect all the other positions. His reason for so saying was that the outcome would depend on the polling station concerned.

PW20 gave the example of a situation in which fire broke out at one polling station, which would not necessarily affect all the six political positions that were being contested for in the General elections.

On the issue of the agent for Wiper, **PW20** said;

“In Changamwe, Wiper had agents in all the

Polling stations. But at some point they were asked to leave the polling stations on the grounds that their letters did not have IEBC stamps. They were later allowed

back in, after IEBC stamped their letters. That was after 3 hours.”

During the time when the Wiper agents were out, the voting continued, and **PW20** testified that the agents of the other parties were present.

What **PW20** testified about concerning the removal of the Wiper agents was generalised. He did not specify the particular polling station where the alleged removal of agents took place.

And, as we have already seen from the other witnesses of the Petitioner, many of the Wiper agents remained at their respective polling stations.

So what am I to make of the evidence of **PW20**?

The answer will be informed by the foregoing statements of that witness;

“My affidavit does not disclose the polling station where I voted. Therefore the IEBC could not be expected to reasonably respond to paragraphs 3,4,5 and 6 of my affidavit.”

He went on to disclose that he did not go to any particular polling station, other than the one where he voted. Even later, when votes were being counted, **PW20** did not visit any of the polling stations.

To my mind, that means only one thing; that he did not have any first-hand information about his allegation that the Wiper agents were asked to leave their respective polling stations.

I therefore find no probative value in the evidence of **PW20** concerning the alleged removal of agents.

PW21, MIRIAM MOHAMED OMAR, was an agent for Wiper in Changamwe. In her affidavit, she said that;

“8.THAT at one point, some of our fellow agents were thrown out of the tallying centre.”

However, when she was being cross-examined, **PW21** said'

“Some of my fellow agents were thrown out of the Tallying Centre. I was inside the Tallying Centre, when the agents were thrown out. I communicated with them on phone. What I mean is that those agents were not allowed entry. They were not thrown out. I was with a number of Wiper agents within the Tallying Centre. Those agents outside were coming to bring me food.

Those outside told me that they were denied access. They phoned me. I did not see them being denied access.”

Thus **PW21** started off with a serious statement concerning the removal of Wiper agents, but she then concluded by taking back that whole statement.

In the event, the petitioner did not lead any evidence to prove that his agents or the agents of the Wiper Party were removed from the polling stations or from the Tallying Centres. If anything, the petitioner's own witnesses have proved that there was no truth in that allegation.

Intimidation of voters and agents

In the Petition it was alleged that those acts of intimidation took place on the Election Day. The agents of the 3rd Respondent are said to have intimidated the agents of the Petitioner and the electoral officials at Frere Town Hall.

In particular, Mr. Abu Joho, a brother of the 3rd respondent is said to have brandished a gun, and threatened grave consequences if the 3rd Respondent was not elected.

Secondly, some un-named agents of the 3rd Respondent are said to have wielded guns at Mrima Primary School, threatening to shoot the petitioner's supporters and other candidates.

To prove the case of intimidation of voters and agents, as pleaded in the Petition, it was incumbent upon the Petitioner to lead evidence in that respect. In other words, he should have led evidence about the happenings at Frere Town Hall and at Mrima Primary School.

I have given careful consideration to all the evidence on record, but failed to trace any evidence in that respect.

Violence prior to and during the voting exercise

(a) It was alleged that many incidents happened during the months leading up to the elections. Those included the vandalising of the Petitioner's Billboards. Those who were arrested, were later released for no good reason.

The petitioner did not, in his petition assign blame for those incidents, to any of the Respondents. I therefore find that, by his own choice, the petitioner did not blame the alleged vandalism of his Billboards to any of the Respondents. Therefore, the Respondents did not need to respond to matters which were not directed at them.

But, there was a specific allegation that the 3rd Respondent's agents, including his brothers, Abu and Fahmi, attacked the Petitioner's supporters.

When the Petitioner was prosecuting his case, he made a decision to withdraw all the affidavits which contained references to the brothers of the 3rd Respondent. That implies that not a shred of evidence was led against either Abu or Fahmi Joho.

The other allegation made by the Petitioner was that one of his chief agents was assaulted inside the Central Police Station, Mombasa, where he had gone to report about ***“attempted threats to his life, by the Third Respondent's agents.”***

The Petitioner said that the person who was attacked at the police station was AHMED BADAWEY, who had been one of his agents.

Ahmed Badawy testified as **PW11**. He said that he worked as the Petitioner's Finance Manager.

In relation to the incident at the Central Police Station, **PW11** said that he was in a car which was being driven by Dr. Swaleh Shahbal.

After the 2 of them had had lunch at Bin Agil Restaurant in Majengo, Dr. Shahbal drove into a Petrol Station to get fuel. As the car was being fueled, another car came into the petrol station.

Five (5) people came out of that other car. One of those people came to Dr. Shahbal's car, and slapped him.

That prompted Dr. Shahbal to draw his gun, which he then fired into the air. After Dr. Shahbal fired, the 5 people sped-off.

When **PW11** was asked if he identified those 5 people, he answered in the negative.

Dr. Shahbal then drove to the police station.

As Dr. Shahbal was driving to the police station, **PW11** noticed that some two(2) vehicles which had been parked outside the petrol station, followed them.

The said 2 vehicles were a Toyota Prado and a Toyota Camry. The windows of both vehicles were tinted.

When Dr. Shahbal was making his statement, **PW11** remained outside the building, but within the police station. He was making a phone-call.

At that stage, the 2 vehicles which had followed them from the petrol station, arrived. Eight (8) people emerged from those 2 vehicles.

One person demanded to know from **PW11**, why they had shot at the eight people.

That person punched **PW11**. The said person's name is TETE.

When **PW 11** was being cross-examined by Mr. Balala advocate, he said;

“Eight people came from the vehicles.

I have not given their names. One person

demanded to know why we shot at him.

They did not tell us not to campaign for

Shahbal or that we should not vote for him.

They did not tell us who to vote for. A fracas

ensued.”

Later, when **PW11** was being re-examined by Mr. Gikandi Advocate he said;

“I recognized the person who punched me. He did not ask me anything. He just punched me.”

As the witness concluded his evidence without indicating why he believed that that incident had any

connection with this Petition, the Court asked him a few questions. He answered as follows;

“I refer to the 8 people as the 3rd Respondent's people because 2 of them were his relatives. I did not know the other six”

He also made it clear that the 2 vehicles, which those eight people used, were not branded. Furthermore, the incident at the petrol station was not near any polling station.

In the event, it is clear that just because two out of eight people were relatives of the 3rd Respondent, the witness concluded that the group of 8 were “the 3rd Respondent's people.”

To my mind, that is not the only logical conclusion that one can derive from the facts stated by **PW11**.

It is possible that when Dr. Shahbal fired in the air, as **PW11** thought, the people in the 2 vehicles which were outside the petrol station may have thought that Dr. Shahbal

had fired at them. After all, that is the only issue they raised with **PW11**, when they caught up with him at the police station.

It is important to note that the incident in question here, took place on 16th February 2013. That was about 3 weeks before the election date.

The Petitioner had specifically stated (in the Petition) that one of his chief agents was assaulted at the Central Police station. In his oral evidence, he provided the name of that person, as Ahmed Badawy (**PW11**).

In the affidavit, the Petitioner said that **PW11** was attacked when he went to report to the police about the attempted threat to his life by the 3rd Respondent's agents.

PW11 was a passenger in the vehicle driven by Dr. Shahbal. By the time they were going to the police station, it is only Dr. Shahbal who had been slapped.

Indeed, when they reached the police station, **PW11** did not go to make any report. It is Dr. Shahbal who went into the building to record a statement. **PW11** remained outside, making a phone-call.

The people who had slapped Dr. Shahbal were not identified by **PW11**. Therefore, **PW11** could not have been going to report to the police that his life had been threatened by agents of the 3rd Respondent.

In effect, the evidence of **PW11** does not support the assertion of the Petitioner.

PW12, ALI ASGHAR MUHDHAR ABDUL, testified about another incident which occurred on 16th February 2013.

That incident happened when **PW12** was driving a Toyota Voxy, belonging to the Petitioner.

PW12 and his team had finished campaigning at the Old Town. He was on his way to meet **PW11**, who was to pay them.

According to **PW12**, a Toyota Premio vehicle blocked his Toyota Voxy.

That incident happened after **PW12** had driven in the middle of the road, when he was trying to avoid a pot-hole. The action of **PW12** forced the Toyota Premio off the road. It is thereafter that the Toyota Premio blocked **PW12**'s vehicle.

This is what **PW12** said;

“I was avoiding a pot-hole. I was on the middle of the road. They left the road. I entered the pot-hole, on my side. They said that they thought I was trying to force them off the road. It is after that that they followed my car, and then blocked my car. They caught up with me and were annoyed. They accused me of trying to force them off the road. That was the problem. It is in those circumstances that the incident took place. They shouted at me, and took my keys. They also insulted me, for trying to force them off the road.”

The person who recovered the keys of the Toyota Voxy was **PW11**. That fact is confirmed by both **PW11** and **PW12**.

PW11 said;

“I called the people who had taken the key. They said that the driver had tried to run them off the road. They gave me the key and I took it to the vehicle. It is not the Joho people who returned the key. They did not accompany me.”

Clearly, the people who had blocked **PW12**'s vehicle had only done so because they felt that **PW12** had tried to force them off the road.

That fact was confirmed by a passenger in the vehicle which **PW12** was driving. That passenger was **PW10**, **FATMA ALHAJ HYDER**. She said;

“Those in the vehicle which stopped us were angry with the driver. They exchanged words with the driver and with people in our car. Some of the people in our car were trying to calm those who were outside, not to be

angry at the driver of our car. I do not know why they were so angry at our driver. Our driver did not try to run down people off the road. I am not aware of any such thing as I was not paying attention. They were accusing the driver of trying to run them off the road. That is why they were angry at him. They roughed up only the driver; not anybody else in our vehicle.”

I find and hold that the incident had no bearing on the elections, as alleged by the petitioner. It was an issue of road rage, pure and simple.

Even **PW10** confirmed as follows;

“For the next 2 weeks, we continued with campaigns vigorously. On election day, we had our people go out and vote. I was not intimidated by that incident.”

In the result, the petitioner has failed to prove that the 3rd Respondent visited violence against either the agents or the supporters of the petitioner.

There was also no evidence to support the petitioner's contention of widespread violence which caused many of the petitioner's supporters to fail to turn out to vote.

Although the Petition did not specify other incidents of violence, the petitioner's witnesses testified about incidents at Daru-Ulum Polling Station, and at Mweza Estate Likoni.

PW8, AHMED SALAMA, said that Mr. Masoud Mwahima and the 3rd Respondent tried to enter into Daru Ulum polling station by force.

By the time **PW8** reached Daru-Ulum, the OCPD for Likoni was trying to restore peace.

The 3rd Respondent was said to have been in a convoy of about 18 vehicles, when the OCPD chased him away. The time was between 9.00p.m. and 10.00p.m.

After the OCPD chased them away, the 3rd Respondent went to Peleleza Primary School. **PW8** followed them.

At Peleleza Primary School, the 3rd Respondent did not try to enter the polling station. However, “his people” tried to gain entry by force.

According to **PW8**, all these things were happening after the voting process had been concluded.

The 3rd Respondent returned to Daru-Ulum, where he was escorted into the polling station, by the police officer who was on duty. When that happened, the residents protested.

A commotion ensued after an agent of the 3rd Respondent drew out a pistol to try and intimidate people. During the commotion, one of the cars of the 3rd Respondent was stoned, and was damaged.

The 3rd Respondent left the polling station, “after *having surveyed and have access to the polling station for about 10 minutes*”,

stated **PW8**, in his affidavit.

During cross-examination, **PW8** confirmed that whilst Mr. Joho was inside the polling station, he (**PW8**) remained outside. He said that he, therefore, did not know what happened inside the polling station.

PW8 testified thus;

“Mr. Joho was inside. His agent, outside, removed a gun. This was after voting.

The removal of a gun could not impact on the voting. Those who are inside could not have seen the agent removing the gun.

They could not have been intimidated.”

Finally, during re-examination by Mr. Gikandi, the witness said;

“At Daru-Ulum the commotion was because residents were unhappy because 3rd Respondent entered the polling station.

3rd Respondent's vehicle was damaged, by stoning.”

In effect, by the evidence of **PW8**, it appears that the 3rd Respondent was neither intimidating people, nor visiting violence on them. It looks like the 3rd Respondent was at the receiving end of the violence.

Meanwhile, **PW23, ROPHIL MWAKIO NDAU**, talked about an incident in which a mob of about 70 people attacked his house at about 5.30a.m.

The mob was outside, whilst **PW23** was inside the house. He was not able to identify them.

As he said that he did not actually see the mob when it attacked, the witness was asked how he was able to know their number. He said that the figure 70 was just an estimate. He explained that the mob could have comprised 40 or 50 or 60 people.

And when it was suggested to **PW23** that that mob could have been thieves, he said that that was a possibility.

Having so concluded, the witness did not advance the petitioner's contention that that was act of violence and intimidation, directed against either voters or against the petitioner's agents.

In fact, **PW23** was not even an agent of the Petitioner. He was a candidate on the Kadu-Asili Party.

Both Wiper (to which the petitioner belonged) and ODM (to which the 3rd Respondent belonged) had candidates who vied against **PW23**.

Submission of Votes without Agents Sign Off.

The agents for the Wiper Party did not sign the results in some instances, because they were removed from the tallying halls, asserted the petitioner.

The results that were announced were different from what the agents had recorded, he added.

And the petitioner's case was that the results which did not have the signatures of his agents were neither verifiable nor accountable

In the first instance, I have already analysed the evidence pertaining to the contention that Wiper agents were forced to leave the polling stations and the tallying centres.

My conclusion, from the evidence adduced, was that the petitioner failed to prove that the Wiper agents were forced to leave the polling stations or the tallying centres.

And when the petitioner testified, he was invited by the advocates for the Respondents, to indicate the results which his agents had recorded, and which were different from those on the Forms 35, he said;

“The results were being tallied in a computer”

But that computer, which the petitioner was monitoring at his “Governor's Tallying Centre” was never made available to the court. As a consequence, the petitioner said;

“I do not have my computer here in court.

I agree that the details of the results or complaints are not before this court.”

In those circumstances, the petitioner failed to bring forth the results which his agents allegedly collected, and which were said to have been different from the results announced by the IEBC.

Furthermore, the evidence from the Forms 35 which were produced by the IEBC, show that very many agents of the Wiper party signed them.

In any event, the failure of candidates or of agents to sign the Forms 35, cannot, in law, of itself, invalidate the results. **Regulation 79(7) of The Election (General) Regulations, 2012**, provides as follows;

“The absence of a candidate or an agent

at the signing of a declaration form or

the announcement of results under

sub-regulation (2) shall of itself

not invalidate the results announced.”

That settles the issue conclusively.

In any event, **PW9**, who had complained about having been denied the opportunity to accompany the ballot boxes from the Majengo Village Polling Station, to the tallying centre, found that the results which she had recorded in her documents, at the polling station, were exactly the same as those announced at the tallying centre.

Meanwhile, **PW20, SIMON MUOKA MUTHOSI**, was not allowed to enter the vehicle in which the Presiding Officer was ferrying the ballot boxes from Changamwe Polling Station, to the tallying centre at the Catholic Church.

Inside the vehicle ferrying the boxes, PW20 saw the driver and security officers.

PW20 had his own car. And he informed the court that nobody stopped him from following the vehicle which was ferrying the ballot boxes.

The Petitioner had told the court that he had provided vehicles to some of his agents, to accompany the ballot boxes to the tallying centres. He also said that those who were not provided with such vehicles, were given fare.

Those arrangements made by the petitioner imply that he was well aware that his agents would not be allowed into the vehicles ferrying the ballot boxes. Therefore, I do not comprehend why it later became an issue when the agents were not permitted to use the transport provided by the IEBC to ferry the ballot boxes to the tallying centres.

Regulations 73(4) and 79(8) of The Elections (General) Regulations, 2012, require the Presiding Officer to ferry the ballot boxes, as soon as practicable, to the Returning Officer. There is no legal requirement that the Presiding Officer should make provision for the agents to accompany the ballot boxes from the polling stations to the tallying centre.

Bribery and treating of voters

The Petitioner asserted that in several parts of Mombasa County, the 3rd Respondent bribed and treated voters.

It is the petitioner's case that the incidents of bribery and treating were reported to the IEBC and the Returning Officer. However, they took no action.

The specific incident cited by the petitioner was said to have happened at Mrima Primary School, where the agents of the 3rd Respondent bribed voters at the entrance to Mrima Primary School polling station. The said acts of bribery were said to have been done with the full knowledge of the Presiding Officer and other IEBC officials.

However, the petitioner did not lead any evidence to support that contention. In principle, therefore, I should simply conclude that the only allegation of bribery, which the petitioner pleaded, was not proved.

But I note that **PW2** talked about vehicles which was being used to bribe people. The witness did not identify the vehicles or the people who were using them.

PW3, JAPHETH MWANZUGA talked about a lady who was bribing voters at Licodep. He did not identify the lady, save that she was wearing an ODM T-shirt.

That piece of evidence is not in **PW3's** affidavit.

PW3 said that;

“At Licodep I came out of my car. There is a perimeter wall around the Social Hall. From outside one cannot see what is inside. I tried to enter, but I was not allowed. It is not because I had no authority. Inside the polling station, I did not witness anything.

I was outside. I was at Licodep for 15 minutes. I saw one lady who was dishing out money

to people who had lined-up to vote.

The line was outside the perimeter wall.”

When **PW3** was asked if he reported the incident to the IEBC, he answered in the negative.

Even assuming that the incident happened as illustrated by **PW3**, he did not prove that the Un-identified lady was an agent of the 3rd Respondent, or that the IEBC was made aware of the alleged bribery.

There were elections for six positions going on simultaneously. If someone wearing an ODM T-shirt was bribing people, the petitioner should have led further evidence to prove that that person was doing so on behalf of the 3rd Respondent. No such evidence was made available to the court.

On her part, **PW16, ZAINABU SAID MKAROYO**, testified that a Wiper agent named Mackenzie Athman, informed her that the Ward Representative and ODM agents were bribing people at Jamvi La Wageni.

PW16 was the Assistant Chief Agent for Wiper. That would explain why the Wiper Agent informed her about the bribery.

PW16 said that she also witnessed the Ward Representative and ODM agents bribing voters. However, although **PW16** knew the Ward Representative by name, she did not deem it necessary to report him to the police.

PW16 allegedly reported the incident to a lady, who was the Presiding officer at that polling station. **PW16** was sure that that lady was the Presiding Officer, although she did not know the lady's name.

When **PW16** was confronted with the Form 35 for Stream 3 at Jamvi la Wageni Primary School, she confirmed that the presiding Officer at that polling station was a man, **ATHMAN ABDALLA MWACHIPONDA**.

Clearly therefore, **PW16** was not a witness of truth.

It is noteworthy that the court had already formed an opinion that **PW16** did not strike it as being very honest; that was before the witness was confronted with the Forms 35.

By the time the witness was being confronted with that document, neither she nor anybody else in court, had any idea about the assessment which the court had recorded, about the demeanor of the said witness.

PW16 went on to say that the incident of bribery was outside the polling station, and that those being bribed were not in the lines of the people who were waiting to vote.

PW16 said that she did not know if the people who were bribed later rejoined the lines of those who were going to vote.

She also conceded that she did not know whether or not those who were bribed were registered voters.

In the result, the evidence of **PW16** did not prove that the 3rd Respondent bribed any voters. No nexus was demonstrated between the 3rd Respondent and those who were allegedly dishing out bribes.

And the people who received the money, if any, were not even known to have been registered voters!

PW20, SIMON MUOKE MUTHOSI, was the Wiper candidate for Ward Representative, in Changamwe Ward.

In his affidavit he deponed that an ODM agent named Chege, was seen bribing voters at Gome polling station.

But when he was being cross-examined by Mr. Balala advocate, **PW20** said;

“I did not witness bribery, intimidation and harassment. It is some agents of Wiper who told me about those..”

PW22, MARTIN MAKAU MAWEU, is the other witness who testified about bribery. He was at Chaani Primary School polling station, between 5p.m.and 6p.m.

PW22 narrated graphically, how the lady operated. She was carrying a big bag, which was covered with a lesa. She would talk to people on the line, and then the lady and such person moved towards the toilet.

When **PW22** talked to that lady, she told him that she was assisting people. The lady did not offer a bribe to **PW22**.

When **PW22** followed the lady to the toilet, the lady locked the door. This is how the witness explained the happenings;

“I did not see any bribery taking place.
The bribery was taking place, possibly on the queue. I did not see anybody receive money on the queue. But from the conduct of the lady, talking to the voters, moving to the toilet, and coming back, there was possibly, bribery.
But I admit that the lady could have been assisting voters to find the toilet or in other ways. I did not see any money being handed over to any voter.”

In a nutshell, neither **PW20** nor **PW22** witnessed any bribery.

I therefore find and hold that the petitioner failed to prove the allegations of bribery of voters.

Partiality and favoritism/IEBC inaction

The IEBC and its officials are said to have shown distinct favouritism and partiality towards the 3rd Respondent.

The particulars were that;

(a)At Ziwa la Ngombe – The Presiding Officer

personally supervised the illegal blending of pre-marked ballots with those votes which had been cast validly. The Presiding officer also pre-marked ballot papers in favour of the 3rd Respondent.

(b)At Mwijabu polling station – The IEBC and the Returning officer denied access to the

Petitioner's agent, whilst allowing in the agents of the 3rd Respondent.

(c)At Kiambeni polling station, the Petitioner's agent was denied entry, yet the 3rd Respondent's agents were given unlimited access.

(d)At Mainview Primary School, Elim Church,

ASK Gate B, St. Kevin Academy and on

several other polling stations in Mkomani

Ward, the petitioner's agents were denied entry until after 4p.m.

(e)At Mrima Primary School and Kwabomu Primary School the IEBC and the Returning Officer counted votes in favour of the 3rd Respondent without displaying to the agents for verification about the candidate who the votes had been cast for.

The issue of denial of access to the petitioner's agents has already been addressed.

And the issue of alleged pre-marking of the ballot papers, as well as the issue of alleged stuffing of ballot boxes were left, by mutual consent of all the parties, as issues which would be answered through the scrutiny.

The petitioner had said that stuffing of ballot boxes did not happen in all stations. He also said that he was unable to judge the extent of interference with the tallying process.

In those circumstances, the petitioner concluded thus;

“In the absence of scrutiny, I am unable to tell where the votes came from.”

The court asked Mr. Ndegwa, the learned advocate for the Petitioner if scrutiny would then

determine the petition, if it were to be carried out.

Mr. Ndegwa asked for time to enable him obtain further instructions from his client.

After he had obtained the said further instructions, Mr. Ndegwa informed the court that;

“Scrutiny would deal with 8 paragraphs in the Petition. But there are other issues such as bribery, intimidation or violence. In other words, three (3) other issues would still be left. Those issues may end up proving election offences e.g. violence or intimidation.”

Both Mr. Khagram and Mr. Balala, the learned advocates for the Respondents, insisted that if scrutiny was to be ordered, the results thereof would have to answer the entire petition.

But if scrutiny were ordered, the Respondents said that it should be limited to not more than the 200 polling stations, in respect to which the petitioner had filed an application for scrutiny.

After the Respondents had made their submissions on the question of scrutiny, the court adjourned the case to the following day. From the record, it is clear that the adjournment was given so that the petitioner could have adequate time to give due consideration to the issue.

When the case resumed, Mr. Ndegwa, the learned advocate for the Petitioner, informed the court as follows;

“The Petitioner agrees to the scrutiny of the votes. That would be in relation to the specified polling stations, which number about 200. The scrutiny will deal with eight of the Grounds of the Petition. That would leave the issues of;

- (a) Intimidation of votes and agents;***
- (b) Violence;***
- (c) Bribery and treating of voters; and***
- (d) Partiality and favouritism by IEBC.”***

Thereafter, the Respondents still urged the court to only allow scrutiny if it would determine the entire Petition.

After giving due consideration to the rival contentions, the court gave Directions on 7th June 2013. Through those Directions, it was ordered that scrutiny be undertaken in the 200 polling stations which had

been cited by the Petitioner.

Although the petitioner did not say so, at the time, one other issue was still left outstanding. That was the allegation that the IEBC had created illegal streams.

PW19, JUMA MOHAMED SALIM SADIQ, said that he voted at Kisauni Bavani, which was not a designated polling station.

The name of that polling station was not given in the affidavit. It was first given when **PW19** was being cross-examined.

In the circumstances, the IEBC could not have been expected to file an affidavit to respond to a specific polling station, as the petitioner and his witness had not named it in either the Petition or in the affidavit of the witness.

Nonetheless, **RW2, HENRY WANJALA MURENGA**, told the court that the polling station in issue had been duly gazetted.

I have no reason to accept the assertion of the petitioner, when he did not make available a list of the gazetted polling stations, to show that the one at which **PW19** voted was not gazetted.

THE SCRUTINY

The scrutiny exercise was conducted by Mr. S.K. Gacheru, the learned Deputy Registrar based at the High Court in Mombasa.

During the exercise, each of the parties was represented by two (2) agents at each of the two (2) venues where it was undertaken.

The agents signed the form embodying the results of the scrutiny. The said results were tabulated in line with the six (6) constituencies in Mombasa County, as follows;

1. MVITA

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	23,451	23,448	-3
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SHAHBAL	26,545	26,545	0
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2.LIKONI

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	20,265	20,244	-21
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SHAHBAL	12,722	12,718	-4
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3. NYALI

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	26,141	26,128	-13
SHAHBAL	16,499	16,518	+19

4. KISAUNI

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	26,242	26,231	-11
SHAHBAL	16,888	16,898	+10

5. JOMVU

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	17,461	17,430	-31
SHAHBAL	8,860	8,853	-7

6. CHANGAMWE

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	19,023	19,026	+3
SHAHBAL	13,391	13,386	-5

TOTAL

RESULTS ANNOUNCED RESULTS OF SCRUTINY DIFFERENCE

JOHO	132,583	132,507	-76
SHAHBAL	94,905	94,918	+13

From those results, it is clear that the overall number of votes for Joho were reduced by 76, whilst those of Shahbal were increased by 13.

Given those results, the “Expert” called as a witness, by the petitioner, commented that variation between the results which were announced, and the results of the scrutiny was very insignificant.

KINGSFORD MURIITHI RUCHA (PW24) was the expert. He told the court that he was

“a highly qualified man in statistics”

However, he did not go into the actual ballot boxes to verify actual results. In his own words:

“My analysis is theoretical, but supported by statistical and probability thinking; which is thus theoretical. The factual situation is more affirmative than theoretical.”

He made it clear that the analysis he conducted only confirmed the trend. Therefore, he said;

“If the actual results do not confirm the trends in my report, I could make a different report.”

Mr. Rucha agreed with the suggestion made by Mr. Khagram, the learned advocate for the the 1st and 2nd Respondent, that,

“.....I agree that the will of the people cannot be pegged on scientific analysis.”

For that reason, and also having been informed about results of the scrutiny which showed a variance of 0.125% from the results which IEBC had announced, the witness said;

“If I was to grade the performance of IEBC based on the insignificant variation, I would say it was Excellent. Now that we have all the benefit of actual results from the scrutiny, I do agree that the grading of the IEBC performance is Excellent.”

And when Mr. Balala, the learned advocate for the 3rd and 4th Respondents asked Mr. Rucha if the variance could have affected the results, the witness said;

“The margin of variation is 0.125%. That is insignificant. It cannot affect the results of an election.”

The petitioner's own expert has validated the results of the scrutiny. He says that the margin of variation was so insignificant that it cannot affect the result of the elections.

That bold pronouncement is an indictment on the petitioner's assertion that the results declared the IEBC and the Returning officer were inaccurate, not verifiable and not accountable. If nothing else,

the results of the scrutiny disprove the petitioner's contentions that the ballot boxes were stuffed, and that there was inaccurate tallying of results. No evidence of manipulation of figures was **manifested**.

Based on the grounds cited in the petition, and the consensus between all the parties, that the scrutiny would answer all the issues save for Intimidation of voters and agents; violence; bribery and treating of voters; and partiality and favoritism by IEBC; I could have concluded the Judgment at this stage.

But there are a few issues that arose during the trial, that need to be addressed.

I. **Methodist Church**

Form 35 for Methodist Church polling station, Stream 4, shows that there were 726 Registered voters. However, those who voted were 770.

RW26, LUCIANA JUMWA SANZUA, was the Returning Officer for Nyali Constituency. As far as she was concerned, the contention that more persons cast their votes compared to the registered voters was a non-issue. She explained it thus;

“It is a non-issue as IEBC had several registers. There was one principal register in different types namely:

(a)EVID, which is the electronic register.

(b)A printed copy of EVID.

(c)Special Register of persons without biometrics.

In Nyali Constituency I had 29 Registration

Centres. We created 113 polling stations from

those centres. Methodist was one such centre,

and it had 4 polling stations. The EVID

of Methodist Church contained all registered

voters for the whole centre, i.e. the 4 Streams.

Therefore, regardless of which stream you were at, the name would be traced on the EVID. EVID is electronic. It is possible to cross the voter's name in the electronic register. I was able to monitor, on line, that the voter's name was crossed out. The BVR machines did not fail in Nyali Constituency”.

When the Returning Officer was reminded that **Regulation 69(1) (e) of the Elections (General) Regulations 2012**, required the name of a voter to be crossed after being given ballot papers, she said that she was aware; and that the names were being crossed on the electronic register.

But why would a voter cast his vote in a stream where his name was not on the manual register?

The Returning Officer explained as follows;

“In Mombasa, polling stations opened late due to insecurity. The voters were in lines from very early. People declined to move to streams where they would have to go to the back of the lines.

They were allowed to vote in any of

the streams provided their names were in the Register. Under Section 4, the Register is defined. EVID is the poll register.”

That explanation sounds plausible; but is the Returning Officer correct, about the definition of the Register?

Section 4(1) of the Elections Act reads as follows;

“There shall be a register to be known as

the Principal Register of Voters which shall comprise of-

(a) a poll register in respect of every polling station;

(b) a ward register in respect of every ward;

(c) a constituency register in respect of every constituency;

(d) a county register in respect of every county;

(e) a register of voters residing outside

Kenya.”

In the case of **RAILA ODINGA Vs THE IEBC & OTHERS, (NRB) PETITION NO. 5 OF 2013**, the Supreme Court had occasion to delve into the definition of the Principal Register, at page 90. This is what the learned Judges said;

“What is the 'Principal Register of Voters?’”

In the light of the provisions of the

Constitution [Articles 38(3) and 83] and

of the Elections Act [sections 2,3,4],

and the evidence adduced in court, we

must conclude that such a register is

not a single document, but is an amalgam

of several parts, prepared to cater for diverse groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared is dictated by law, and the prevailing demographic circumstances of the country's population. The register can also take several forms, as contemplated by Section 2 of the Elections Act, which stipulates that such a register includes a register compiled electronically.”

As the principal register includes a register compiled electronically, that must mean that the requirement for the crossing of the name of a voter who has cast his vote, can be done electronically.

In this instance, **RW26** explained that each of the 4 streams in Methodist Church polling station had 726 registered voters. She continued to explain that;

“Therefore all the voters at that centre was

2904. Those 2904 voters were divided into

4 streams. But all voters names were available in the EVID. If a voter was in one stream, if he insisted, he was allowed

to vote in any other stream provided his

name was in EVID. To determine whether more persons voted than were registered,

we need to add the numbers from

the 4 streams.

Stream 1 – 442

Stream 2 – 367

Stream 3 – 512

Stream 4 – 770

Total -2,091

So out of the 2904 registered voters, only 2091

persons voted. That would be 72%

turn-out at Methodist. Therefore, there was no over-voting.”

That evidence is not only plausible, it provides a complete answer to the assertion that in Stream 4 there were more persons who voted than those registered.

(ii) **Extra Ballot Box**

It was suggested that the Presiding officer from Methodist Church polling station ferried to the tallying centre, one extra ballot box.

There is no doubt that there was a commotion at

the tallying centre when the Presiding Officer from Karama Grounds was seen with seven ballot boxes, instead of six. It was therefore believed that he had sneaked in one extra ballot box.

The process of tallying was interrupted, because it was definitely necessary to verify the origin of that extra ballot box, and the reasons why it was there.

RW26 was the Returning Officer. She explained as follows;

“I tried to ascertain why there were 7 boxes;

that meant putting aside the Methodist boxes, until the last day. On that date, there was another presiding officer who had 5 ballot boxes. The extra ballot box was with a white lid, which meant it was for Presidential

Elections. It had nothing to do with the

Governor's Election. That extra box did not

affect the elections for the Governor. At the

tallying centre, we did not introduce any new votes, which had not already been

announced at the polling station. No party

or candidate complained about the results

for the Governor, after I announced the

results.”

That means that the extra ballot box had no impact at all on the results for the position of Governor.

The ballot box was in relation to the presidential Elections.

Secondly, the results had already been announced at the polling station. There would have been nothing to gain by trying to introduce an extra ballot box at the tallying centre. And the fact that the Petitioner did not cite that incident in his Petition, confirms the Returning Officer's testimony, that no party or candidate had any issues after the Returning Officer resolved the issue pertaining to the alleged extra ballot box.

The petitioner submitted that the elections were neither simple nor transparent.

When voters queued for long hours, and then, sometimes found that they were in the wrong queues, they felt discouraged when asked to get into the correct lines. Does that make the electoral process anything but simple?

The IEBC has already indicated that when a voter declined to go back to the queue, he would be allowed to vote in any of the streams, provided he was a registered voter.

In effect, the IEBC provided practical solutions, when necessary.

But it is my hope that a more efficient system can be put in place for the future elections. By so saying, I am not implying that the system used in the elections in issue was not simple. Standing in a queue, and then going into a particular room, depending on the place, (in the alphabet), where the voter's name was, is a simple exercise.

There was no allegation that that system favoured any candidate or political party.

Secondly, every political party had authority to have agents at polling stations. Those agents, together with the observers who kept an eye on the process ensured that the system was transparent.

The use of transparent ballot boxes was yet another facet in ensuring literal transparency. It was most definitely a major improvement over previous elections, in which the ballot boxes were opaque.

The petitioner submitted that the purported votes that were cast would be nothing if the process of putting them in the ballot boxes was constitutionally flawed.

I was therefore invited to find that because there were incidences that fell foul of the Constitution the purported election was a nullity *ab initio*.

First, it must be emphasized that the Petition does not assert that the elections were a nullity.

In the case of **NUH NASSIR ABDI Vs ALI WARIO & 2 OTHERS, (MBS) ELECTION PETITION NO. 6 of 2013**, Odunga J, was grappling with the question as to whether or not documents which might be supplied to the court, through scrutiny, and which would thus not have been evidence produced by the petitioner, can be relied upon to determine the petition. He held as follows;

“To the contrary, it may assist the Court in

determining the question whether or not the

Principles under Article 81 of the Constitution were adhered to. However, the petitioner is put on notice that he should avoid the temptation to enlarge his case outside the scope of his pleadings, since it is trite that a party is bound by his pleadings,

despite the evidence.”- Emphasis is mine.

And in the case of **NGANGA & ANOTHER Vs OWITI & ANOTHER [2008] 1KLR749**, at **Page 752**, O’Kubasu, Mbito and Mwera JJ.made the following pronouncement;

“After hearing all the foregoing, it needs no emphasizing that evidence in any litigation should go to prove the claims laid in that case. If the case is proved, then reliefs are given according to the evidence.

Conversely, if no evidence proves the claims then reliefs as per the prayers do not issue. So evidence is never led to make out a case from the prayers sought but evidence is to prove

claims as pleaded, which in turn may lead to granting of reliefs prayed. Let us look at the claims in this petition vis-à-vis the evidence.”

Bearing in mind the legal requirement that each party will be bound by his pleadings, I note that one of the reliefs being claimed for in this petition is a declaration that the petitioner was the validly elected Governor of Mombasa County.

Surely, for the petitioner to seek to be declared the validly elected Governor, he must be deemed to have recognized the fact that elections were actually held in Mombasa County. If the electoral process was a nullity, as suggested in the petitioner’s submissions, he could not possibly be declared to have been validly elected, even assuming that the election of the 3rd Respondent was nullified.

I therefore find no basis, in law or in fact, to warrant the declaration that the elections in issue were a nullity.

The petitioner also invited me to hold that in instances where the Respondents had not rebutted his evidence, the same should be deemed to have been uncontroverted.

In my understanding of the law, the Independent Electoral and Boundaries Commission is not under an obligation, in an election petition, to prove that the election was conducted in a manner that was free, fair, verifiable and accountable. In election petitions the burden of proof vests upon the petitioner who assails the election in issue

As was held in the case of **WILLIAM MAINA KAMANDA Vs MARGARET WANJIRU KARIUKI & 2 OTHERS (NBI) ELECTION PETITION NO. 5 of 2008**, the burden of proof is on the petitioner, and it is sufficient for the Respondent to simply deny the allegations, and leave the rest to the Petitioner.

In **MADUNDO Vs MWESHEMI & AG MWANZA HCMC NO. 10 of 1970** the court held as follows:

“Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations, and that is why it is not enough merely to prove the allegation but also necessary to prove that the allegations affected the results of the election. No doubt a person who seeks to avoid an election results has the duty of leading evidence in support of his allegation, and without doing so, his petition would fail.....”

And what is the standard of proof?

That is now well settled. It is higher than the standard of proof applicable in civil cases, which is, proof on a balance of probabilities. However, the standard is lower than that required in criminal cases, which is, proof beyond any reasonable doubt.

It is on the basis of these legal principles that I went about evaluating the evidence tendered by the petitioner, within the context of his pleadings.

The petitioner has submitted that Polling Day diaries were “Strategic election materials”, which should have been placed inside tamper-proof envelopes, pursuant to Regulations 73 and 93.

On the other hand, the Returning Officer testified that those diaries were not “Strategic election materials.” His explanation was that the diaries cannot be construed as strategic because elections can actually be conducted without them.

The Elections Act and the Regulations made thereunder, do not define “strategic election materials.”

But Regulation 73(3) of the Elections (General)

Regulations requires the Presiding Officer to place the following materials in separate tamper-proof envelopes;

- “(a) the spoilt ballot papers, if any;**
- (b) the marked copy register, where
necessary;**
- (c) the counterfoils of the used ballot papers; and**
- (d) the statement specified in the
regulations.”**

In effect, the Polling Day Diary is not one of the items which a Presiding Officer is required to put in tamper-proof envelopes, as alleged by the Petitioner.

Bearing in mind the fact that the burden of proof rests on the petitioner, it cannot be presumed that because some polling day diaries were not produced by the IEBC, the contents thereof would have proved the Petitioner’s case. If one were to so find, it would constitute a shifting of the burden to the Respondents, to prove that the assertions made by the petitioner were untrue. No such onus vests upon the Respondents.

In fact, in his Reply to the Respondents’ submissions, the Petitioner conceded that the burden of proving his Petition, vested on him.

By suggesting that if the IEBC had made available the Polling Day Diaries, that would prove the petitioner’s case, the petitioner appears to be saying that those materials were necessary to help him prove his case.

If that were the case, there was nothing that could have stopped the petitioner from applying for orders that the said diaries to be produced in court.

In conclusion, I find that the petitioner has not satisfied the court that there were such malpractices or violations of either the Elections Act or of the Constitution, that would warrant the declaration that the elections for the office of the governor of Mombasa County were either unconstitutional or unlawful.

I also have no evidence of any election offences committed by the Respondents.

I find that the elections, although not perfect, were conducted in a free, fair, transparent, verifiable and accountable manner.

In effect, the 3rd Respondent, HASSAN ALI JOHO, was validly elected as the Governor for Mombasa County; and the 4th Respondent, HAZEL EZABEL NYAMOKI OGUNDE was validly declared the Deputy Governor for Mombasa County.

I find no merit in the Petition, and I therefore dismiss it.

The petitioner has asked me to grant him costs, even if I should dismiss the petition. In the alternative, he asks me to order that there be no orders as to costs.

The 1st and 2nd Respondents have asked for costs in the sum of KShs.15,000,000/-. That sum is said to be informed by the nature and length of the proceedings in this case. These 2 Respondents therefore also ask for Certificate for two counsel.

Meanwhile, the 3rd and 4th Respondents have asked that costs be awarded to them.

I have found no reason in law, or in fact, to deviate from the rule of thumb, which requires the court to order the successful party to be awarded costs. I therefore order the Petitioner to pay to the Respondents, the costs of the Petition.

The said costs will be taxed by the learned Deputy Registrar, unless the parties will have agreed on the quantum.

I find no reason to issue a certificate for two counsel for the 1st and 2nd Respondents, and therefore, I decline the invitation to issue such certificate.

During the taxation of the bills of Costs, it is directed as follows;

- a. **The costs payable to the 1st and 2nd Respondents, jointly, shall not exceed KShs.3,000,000/=.**
- b. **The costs payable to the 3rd and 4th Respondents, jointly, shall not exceed KShs.3,000,000/-**

After the final costs payable are either agreed or taxed, the money which the Petitioner had deposited in court shall be paid out to the 1st and 2nd Respondents on the one hand, and the 3rd and 4th Respondents on the other hand. The said deposit will be paid out equally, between those two sets of Respondents, as part of the costs due to them.

Pursuant to **Section 86(1) of the Elections Act**, a Certificate shall issue to the IEBC, notifying it that the issue as to the validity of the elections of the 3rd Respondent, as the Governor of the County of Mombasa, has been determined, by a declaration that he was validly elected, and that the 4th Respondent was validly declared the Deputy Governor.

Finally, I wish to most sincerely thank all the lawyers for their industry and co-operation. **Mr. Ndegwa** and **Mr. Gikandi** for the Petitioner; **Mr. Khagram** and **Mr. Nyamodi** for the 1st and 2nd Respondents; and **Mr. Buti** and **Mr. Balala** for the 3rd and 4th Respondents.

My appreciation also goes out to **Mr. Ibrahim**, my hand-working court clerk, who also doubled-up as an interpreter.

Mr. Willis Oluga has been a most supportive researcher; I thank him.

I also thank **Ms Milka** and **Ms Christine**, the two secretaries who managed the feat of completing the typing of the massive record of proceedings, timeously.

Mrs. Lucy Maruga, who typed this Judgment, quickly and correctly, is a true asset; thank you.

The parties who appeared before me are also commended for aiding me in fast-tracking the proceedings.

Thank you all.

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

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FRED A. OCHIENG

JUDGE