



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELECTION PETITION NUMBER 4 OF 2013**  
**BETWEEN**  
**GIDEON MWANGANGI WAMBUA .....PETITIONER**  
**VERSUS**  
**1. INDEPENDENT ELECTORAL AND**  
**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**2. KHATIB ABDALLA MWASHETANI..... 2<sup>ND</sup> RESPONDENT**  
**3. JUMA MUSA (RETURNING OFFICER**  
**LUNGA LUNGA CONSTITUENCY) .....3<sup>RD</sup> RESPONDENT**  
**CONSOLIDATED WITH**  
**ELECTION PETITION CAUSE NO. 9 OF 2013.**

**BETWEEN**  
**HASSAN NYANJE CHARO.....PETITIONER**  
**VERSUS**  
**1. INDEPENDENT ELECTORAL AND BOUNDARIES**  
**COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**2. JUMA MUSA.....2<sup>ND</sup> RESPONDENT**  
**3. KHATIB ABDALLA MWASHETANI.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. On the 4<sup>th</sup> March 2013, the people of Lunga Lunga Constituency (hereinafter referred to as the

- Constituency) joined their fellow Kenyans in electing their representatives inter alia for the Member of Parliament in the National Assembly pursuant to the provisions of Article 1(2) and 38(2) of the Constitution.
2. In that election, the following presented themselves as candidates:
    - a. **Abdalla H. Juma Ngozi**
    - b. **Benson Mutisya Mwilu**
    - c. **Hassan Hamisi Renge**
    - d. **Joshua Kombora Korokoro**
    - e. **Khatib Abdalla Mwashetani**
    - f. **Mbwana Yusuf Hassan**
    - g. **Michael Tsimba**
    - h. **Murabu Chaka Tsuma**
    - i. **Omari Mwana Zonga**
    - j. **Philip Munga Degwa**
  3. On 5<sup>th</sup> March 2013, the 3<sup>rd</sup> respondent in his capacity as the Constituency Returning Officer declared that **Khatib Abdalla Mwashetani**, the 2<sup>nd</sup> respondent was the valid elected Member of Parliament for the seat of the National Assembly for the said Constituency.
  4. It is that declaration that triggered these two petitions which were filed by two voters who are the two petitioners herein, **Gideon Mwangangi Wambua** as petitioner in Petition No. 4 of 2013 and **Hassan Nyanje Charo** as the petitioner in Petition No. 9 of 2013. For the purposes of this judgement the two petitioners will be referred to as the 1<sup>st</sup> and 2<sup>nd</sup> petitioners respectively.
  5. Pursuant to the provisions of Rule 18 of *Elections (Parliamentary and County Elections) Petition Rules*, (hereinafter referred to as the Rules), the two petitions were consolidated and were heard in file No. 4 of 2013 hence this consolidated judgement. Accordingly, reference to the respondents will be in accordance with the order in which they appear in petition no. 4 of 2013.

### **THE 1<sup>ST</sup> PETITIONER'S PETITION**

6. In his petition, the 1<sup>st</sup> petitioner seeks the following orders:
  1. **The election conducted for the national assembly for Lunga Lunga Constituency was not simple, bribery-free, transparent, accurate, accountable or verifiable, and the ensuing results are invalid for illegality;**
  2. **The declaration that Khatib Abdalla Mwashetani was not validly elected as member of the national assembly for Lunga Lunga Constituency;**
  3. **A scrutiny and recount of votes is ordered;**
  4. **Mr Benson Mutisya Mwilu was validly elected as the member of the national assembly for Lunga Lunga Constituency; or**
  5. **In the alternative, an order for a fresh election in the national assembly for Lunga Lunga Constituency;**
  6. **The costs of this petition are provided for;**
  7. **Any other relief the election court may find fit to grant in the circumstances of this petition.**
7. The grounds upon which the said petition was based were as follows:
  - a. **that the said election was not valid, and was marred by rampant bribery, undue influence on voters and want of transparency whose particulars were pleaded in the petition which acts adversely affected the results of the election in Lunga Lunga Constituency.**
  - b. **that the election for member of the national assembly for Lunga Lunga Constituency was also marred by grave irregularities in that agents for TNA Party were wrongfully excluded from the polling stations particularised in the petition with the result that no independent TNA candidates' agents or TNA party agents could vouch for the voting processes in such polling stations.**

- c. that the transmission of results in the national assembly election from Polling Stations in Lunga Lunga Constituency to the gazetted Tallying Venue was not transparent, nor foolproof and that the transparency, security and accuracy in the said election adversely affected the results of the said election to the grave prejudice of the voters and other candidates

### THE 2<sup>ND</sup> PETITIONER'S PETITION

8. In his petition, the 2<sup>nd</sup> petitioner seeks the following orders:
  1. There be a scrutiny, recount and re-tallying of votes in all the polling stations and that the Court accordingly make appropriate orders arising from the scrutiny, recount and re-tallying exercise.
  2. A declaration that the 3<sup>rd</sup> respondent was not elected and or validly elected as a Member of Parliament for the Lunga Lunga Constituency seat during the 4<sup>th</sup> March 2013 elections.
  3. In the alternative and without prejudice to the prayers set out above, an order that a fresh election be held in respect of the National Assembly Parliamentary seat for Lunga Lunga Constituency
  4. The costs of this petition be paid to the Petitioner by the Respondents.
  5. Any other relief that this Court may deem just to grant
9. The grounds upon which the said petition was based were as follows:
  - a. That the 1<sup>st</sup> Respondent recorded and announced results from various polling stations in Lunga Lunga Constituency that were not the results on the ground at the polling stations. The votes cast and counted at the polling stations and tallied at the Tallying centre and announced by the 1<sup>st</sup> respondent were all different in relation to some polling stations.
  - b. There were also various allegations of undue influence, bribery, treating of voters, disruption of elections, violence and intimidation which were alleged.
  - c. It was alleged that despite discrepancies pointed out to the 1<sup>st</sup> respondent, he went out to announce the results without verifying the same hence the results announced were unverified, inaccurate, insecure, unaccountable and not transparent.
  - d. It was pleaded that the 3<sup>rd</sup> respondent connected his laptop to the Commission's frame contrary to the law.
  - e. It was contended that the 1<sup>st</sup> respondent failed to supply candidates' agents with duly filled in form 35s from the polling stations in breach of the law.
  - f. According to the 2<sup>nd</sup> petitioner there was no accurate or accountable transparent re-tallying by the 2<sup>nd</sup> respondent before the results were announced.
  - g. The 2<sup>nd</sup> petitioner contends that at Shimoni Primary School Polling Station all agents were told to take a break just before counting contrary to the law.
  - h. To the 2<sup>nd</sup> petitioner, the 1<sup>st</sup> respondent failed to comply with the rules and regulations governing the conduct of elections by not employing the use of the Electronic systems allowed and spelt out in the law
  - i. It is further alleged that the 3<sup>rd</sup> respondent working with some employees of the 1<sup>st</sup> respondent tampered with electronic results from the Constituency.

### THE RESPONSES

7. To the said petitions, the respondents filed their responses.
8. According to the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the *Independent Electoral and Boundaries Commission*, (hereinafter referred to as the Commission) and the 3<sup>rd</sup> respondent, **Juma Musa**, (hereinafter referred to as the Returning Officer), since the Government of Kenya through the Commission put in place a robust institutional and statutory framework to ensure that the elections held in 2013 were free, fair and credible, no lawful basis has been set out or any or any sufficient

evidence laid to warrant setting aside of the results. While admitting existence of challenges with respect to electronic voter identification and result transmission system, it is contended that voting nevertheless continued vide the use of manual registers which contained biometric details of voters hence the integrity of the electoral process was neither violated, vitiated, breached, compromised or rendered ineffective. To them the people of Lunga Lunga Constituency were not deprived of their legitimate expectations and the result declared reflected their will. It was pleaded further that the petitions were filed outside the time stipulated under the Constitution for doing so. According to the respondents, they did not abdicate their statutory obligations; the process was lawfully, properly, transparently and effectually carried out save for typographical errors which were manifested in the data input in form 36 but which did not materially affect the declared results which were accurate and verified; the 2<sup>nd</sup> respondent did not connect his laptop to the 1<sup>st</sup> respondent's mainframe computer; all statutory forms were supplied to the agents present and pasted as required; there was no breach of Election laws save in cases of minor deviations which did not vitiate or materially affect the outcome of the elections; access was given to all accredited agents who were not barred from the polling stations and there was no discrimination and that polling day diaries were maintained by all Presiding Officers.

9. On behalf of the 2<sup>nd</sup> respondent, it was contended that the petition was presented way out of the mandatory time constitutionally provided for the filing of the petitions concerning an election. According to him Mwashetani Foundation Limited is a separate legal entity which is not a party to these proceedings. He denied the various allegations of bribery and undue influence of voters made in the petitions. According to him, the election for the Member of Parliament of Lunga Lunga Constituency was free and fair and that there were no acts of rampant bribery or at all and hence the outcome of the election was valid and legal. While admitting the malfunction of the electronic system of transmitting results his position was that this affected all the parties but avers that parties which had agents in the alleged polling stations had access to the same. Similarly, all agents were restricted from accompanying the 1<sup>st</sup> respondent's officials to the Tallying Centre due to lack of accommodation within the vehicles transporting the officials and materials. To him the allegation of want of transparency, security and accuracy in the election is incorrect and the results were not affected thereby as the same were verified by all agents and the results as announced and declared at the tallying centre matched the result announced at the Polling Station. While denying the other allegations in the petitions and the affidavits, he contended that a scrutiny and recount of votes will be a waste of the court's resources and time since the election was conducted according to the law and the constitution and that the results therefrom were verified by other parties as valid and an accurate reflection of the will of the people. According to him, the 2<sup>nd</sup> petitioner is suing as a proxy of another candidate in the said elections hence the petition is an abuse of the court process. It is contended that nobody was allowed within the precincts of the Polling Station or at all and that the functions of the school had been halted in order for the elections process to be carried out hence there was no one to receive the alleged desks. The 2<sup>nd</sup> respondent expressly denied the particulars of the petitions and averred that the results as announced and declared from the Polling Stations were accurate, secure, accountable and transparent and that though form 35s were not enough agents were told to photocopy the same. He was however unaware of the need for re-tallying exercise.

### **MODE OF TAKING THE EVIDENCE**

10. It is important before venturing into the issues revolving around these petitions to understand the procedure of hearing election petitions as stipulated under the Rules. Rules 10(3)(b) of the said Rules provides that an election petition shall be supported by an affidavit by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner. Rule 12(1) thereof provides that a Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial while subrule (2) thereof provides that the affidavit under sub-rule (1) shall state the substance of the evidence; be served on all parties to the election petition with sufficient copies filed in court; and (c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by Petitioner on any contested issue. Similar provisions apply to the case for the respondents. Any witness who has not sworn an affidavit is not, without leave of the Court,

eligible to testify and such leave is only to be granted where sufficient reason is given. This procedure which is similar to the Uganda electoral procedure was explained in **Badda & Another vs. Mutebi Civil Appeal No. 25 of 2006 [2008] 2 EA 42**, in which **Byamugisha, JA** expressed herself as follows:

**“Rule 15 of the Parliamentary Elections (Election Petitions) Rules section 1 number 141-2 makes it mandatory that all evidence at the trial for or against the petition should be by way of affidavits, read in open court with the exception that with leave of the court a person swearing an affidavit which is before court may be cross-examined by the opposite party and be re-examined by the party on whose behalf he swore the affidavit. Furthermore the court on its own motion may examine a witness if the court is of the opinion that the witness is likely to assist the court reach a just decision.... It is correct that the court has discretion under rule 17 to conduct the trial in a way it sees fit but this is subject to rule 15 which is mandatory. Due to the urgency and importance of election matters, rule 15 is intended to facilitate expeditious disposal of petitions. Be that as it may, the learned trial Judge adopted an irregular procedure by allowing witnesses to give evidence in chief on their affidavits when they should have been merely cross-examined to test their veracity. This defeated the purpose of the rule by wasting a lot of time. It is further astonishing that all counsel for each party acquiesced in this irregularity.”**

11. What this provision means is that in election petitions, the affidavits filed both in support of and in response to the petition form part of the record and unless the Court decides otherwise constitute the record of the examination in chief. What then follows is a confirmation by the witness that the affidavit was sworn by himself and the contents are true after which the opposite party proceeds with cross-examination. This rule is in recognition of the fact that the timelines for the hearing and determination of election petitions are very strict and do not allow for extension. Therefore it behoves a party to ensure that the affidavits are self-contained as it were and the same are as detailed as possible. A party ought not to file a scanty affidavit containing only skeleton material in the hope that he will be afforded an opportunity to build on it since that opportunity may not be forthcoming. Parties to an election petition ought to know what the exact case for the other side is in order to adequately prepare their areas of cross-examination if any in order to avoid unnecessary waste of judicial time.

### **THE PETITIONERS' CASE**

12. The 1<sup>st</sup> petitioner, **Gideon Mwangangi Wambua**, who introduced himself as a coordinator for the TNA candidate in the constituency, in his affidavit as PW1 deposed while reiterating and confirming the allegations contained in the petition that those averments are a testimony to the fact that there was rampant bribery by the 2<sup>nd</sup> respondent who gave needy Lunga Lunga Secondary School children attending schools within and outside Kwale County, school fees and other handouts, by himself or through Mwashetani Foundation Account No. 1988640901 maintained at First Community Bank, Mombasa Branch, only a week or so before the election with the sole intention of inducing the parents of such recipients to vote for him. In support of this fact the deponent exhibited copies of 4 cheques numbers 000138, 000169, 000170 and 000179. According to him there were many other cheques amounting to probably thousands of shillings which were issued to parents in the said Constituency in order for the 2<sup>nd</sup> respondent to endear himself to the electorates in the final days of the campaign an act which to him was illegal. Apart from that the 2<sup>nd</sup> respondent according to him during most of the campaign meetings held in Lunga Lunga before election assisted women groups in villages with cooking ‘*sufurias*’; helped sink several toilets and supplied secondary and primary schools with desks, lockers and water tanks while in other instances, he was seen dishing out wads of money during the election day. According to him, there were many irregularities such as the failure to electronically transmit provisional results from the Polling Stations before the ballot boxes were ferried to the tallying stations, exclusion of TNA agents from the polling stations so that the results declared and gazetted by the Commission cannot be valid and correct. In support of his contention the witness exhibited photographs of the

desks allegedly supplied by the 2<sup>nd</sup> respondent. It was his evidence that in Kikoneni it was only after his intervention that TNA agents were admitted therein at which point many people had voted. To him the said acts of bribery and irregularities influenced the manner in which the voting took place and tainted the results which were not a true reflection of the will of the people of the Constituency. The same denied the process of semblance of validity with the result that the loser of the election was declared the winner while the winner, the runners up. As the presiding officers did not keep Polling Day Diaries (PDD) the effect of the malfunction of the electronic results transmission system made verification of the results difficult.

13. In answer to questions put to him in cross-examination by **Mr. Khagram**, learned counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the 1<sup>st</sup> petitioner stated that on 4<sup>th</sup> March, 2013 he was a voter and coordinator for **Benson Mutisya Mwilu** individually and not party agent although his party was in TNA Party. According to him, he witnessed one incident of bribery and the people who were bribed was **Robert** and **Damaris**. **Damaris**, according to him, was given a cheque on 14<sup>th</sup> February, 2013 which was 3 weeks before election. Although he saw the incident, he did not do anything about it despite being aware that it was an offence. He, however denied that his candidate gave any handouts. He however stated that he did not see IEBC officials and did not report because it was in the evening. With respect to denial of entry of TNA agents at Kikoneni, he testified that he was informed by Chief Agent of TNA **Mr. Mwaina Chikobe**. Though he was not an agent of TNA and had no authorisation from IEBC to access Polling Stations. Therefore, he was outside the Polling Stations though in further cross-examination he admitted that as a co-ordinator, he entered the Polling Stations and that this authorisation was by his candidates and not by IEBC and that he was not told that it was an offence to access the Polling Station without authorisations. To the contrary, he said that as a Co-ordinator, he knew he could access the Polling Station. According to him, TNA agents were refused entry in Kikoneni Polling Station. However referred to the Polling Day Diary for Kikoneni Polling Station at the back of page 200 of the documents filed by the Commission pursuant to Rule 21 of the Rules he confirmed that agent number 7 was **Mr. Wambua Musanifu Kombo** who was a TNA agent for Kiloneni and that there was a signature. He however said that he was allowed in latter at about 10.00 a.m. According to him, they did not witness anything before then. Referred to page 202, which was a record of serial number of ballot boxes and candidate/agent, seals used at the station of Polling he again confirmed that **Wambua Msanifu Kombo's** name and signature appeared as well as the back of page 209 at the back. He was however doubtful whether he witnessed the ballot boxes before commencement of voting. With respect to his deposition that Polling Day Diaries were not kept he said that when TNA agent entered, they were kept correctly. He said that after the TNA agents were allowed in Kikoneni Primary School after talking to **Musa Juma** and the Deputy Presiding officer he left and continued with his visits after going home. He however confirmed that his reports were received from the Chief agent and that he did not visit Polling Stations. When he went to the Tallying Centre in the evening, he was permitted to enter the centre by the Chief Agent though other people were given authorisation letters by IEBC. Referred to his statement that other Polling Stations did not admit TNA agents, he clarified that he was not sure. He was then referred to various pages of the said document filed by the Commission and he confirmed the presence and signatures of TNA agents. With respect to the tallying at Shimoni, he said that the ballot boxes were opened in the Tallying Centre and that he saw the Returning Officer reading results from the paper but they were not transmitted electronically. He confirmed that he never raised any complaint though there was one mistake which was rectified while the others were not. He further confirmed that he did not have any complaint or objection with respect to tallying based on form 35s. Referred to his statement that his candidate garnered zero votes in some stations, he said that the stations under reference were not mentioned in the affidavit while his paragraph 8 was based on information he received and verified. To him, his candidate did not undertake any development projects in Lunga Lunga. He admitted that he did not report to Police and the Commission about these allegations though he received information that some people cast their votes whose names were not in the register. Asked about what comprised the register, he said he did not know while the number of registered votes in Lunga Lunga Constituency was 34,404 according to the Commission. With respect to paragraph 12 of his affidavit the witness stated that it was based on the fear that something might have been going on.

14. In answer to questions posed by **Mr. Abed**, learned counsel for the 2<sup>nd</sup> respondent, PW1

reiterated that he was appointed Co-ordinator by the candidate for TNA and for TNA and that he was only representing the candidate as a co-ordinator. Though he had no letter of appointment his role was to supervise the campaigns, elections and tallying and to oversee the candidate's matters on the ground, following the campaigns and the election. According to him, he was appointed because he understands the election process. He conceded that mostly, his activities were outside the Polling Stations and that he did not know what was happening inside this Polling Station. While denying that he had filed another petition apart from this, he admitted that he had participated in election petition before and that in 2007 he was co-ordinating **Mutisya's** campaign in an election in which they lost though they did not file any petition. He confirmed that there were 4 cheques which were drawn by **Mwashetani** Foundation in the names of Schools and signed by two people. He however confirmed that there was no name for **Khatib Mwashetani**. Referred to the photographs of the desks he said they were taken by himself though they did not bear **Mwashetani's** name. With respect to the Women Groups which were assisted he named them as Mwanja, Kitumbire, Lunga Lunga Centre, Malewa though the names were not in his affidavit. With respect to donation of *sufurias*, he admitted that he did not see **Mwashetani** donating the same. In his evidence **Mutisya** was dissatisfied with the results though he was not told to petition as a voter and he did not petition on his behalf but on behalf of Lunga Lunga voters. He however confirmed that there were many candidates for Lunga Lunga but was unaware if any of them filed any petition. He was however aware of a petition filed by another voter. On further questioning he admitted that he has filed the petition on behalf of **Ben Mutisya** though **Ben Mutisya** is not his witness.

15. In re-examination by **Mr. Kimani**, PW1 stated that the petition was his though in the event of its success **Benson Mutisya** would get the certificate because he was the winner. In his view the person who was number 2 ought to have been the winner and the runner up ought to have been **Khatib Mwashetani**. He said that Candidates are not allowed to bribe or induce voters and in this case the bribery was in form of cheques to schools as particularised in his affidavit which were given on the last days of campaigns. He reiterated that he saw **Damaris Nzula** was given a cheque though he could not remember the cheque. He said that the cheques were given to him by his people and in only one instance was able to establish as having been given by **Khatib Mwashetani**. He however said that he was not familiar with signature of **Khatib Abdalla Mwashetani** and that his evidence was based on evidence gathered from beneficiaries or parents of beneficiaries. To him, it is an offence to give donations or bribery during campaigns and he was surprised that one of the candidates was doing so and his intention was to bring to attention of court what was happening. He however denied having been a beneficiary of the said cheques since he did not have a small child. He saw the cheques which were donated to Majimoto Secondary School and whose photographs he took during the last week of campaigns around 25<sup>th</sup> February, 2013 from the information obtained from the parents but which he saw on 28<sup>th</sup> February, 2013 he saw them. According to his information received from a witness who saw the *sufurias* being donated in Mwanja, Lungalunga and Malewa, the *sufurias* which were donated were the big ones. According to him, the registered voters were 26,000 and the ones announced were 25,119 so there is 1000 which was unaccounted for. Though he sought for results there was no response to the letter. To him therefore he does not know who got the floating votes which appear in the Commission's accounts and the tallying by Returning Officer was incorrect. He however confirmed having not requested for the result from the Returning Officer. With respect to the boreholes in Vanga he confirmed having seen the same and that these projects were initiated by **Khatib Mwashetani**. On being taken through the records filed pursuant to Rule 21 of the Rules, the witness concluded that no proper records were kept and that TNA agents were not permitted in the Polling Station from the beginning, hence the process was not fair. He was therefore of the view that he could not tell what happened and that may have affected the results. On being asked about the 2<sup>nd</sup> respondent's computer he said that he did not know what the computer which belonged to **Mwashetani** was being used for. He however did not see any electronic transmission and did not know how the data was being verified. Since his candidate lost by 719 votes while 1197 votes were not accounted for, it was his view that if any of the other candidates got these votes, the results would have changed.

16. The next witness to give evidence as PW2 was the second petitioner, **Hassan Nyanje Charo**. According to his affidavit, he was registered as a voter in Lunga Lunga Constituency. While

reiterating the grounds of his petition, he deposed that at Shimoni Secondary School tallying centre the results do not tally with the total valid cast in the Constituency. According to him, the total votes cast for all the candidates add to 25,119 as opposed to the total valid votes cast of 26,294 hence there is a difference of 1,175 unaccounted for by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. He further deposed that at Vitsangalaweni Primary School Polling Station, the 2<sup>nd</sup> respondent herein had one tanker of water delivered to the school on 1<sup>st</sup> and 3<sup>rd</sup> March 2013 to be used by the residents while a similar water tank delivered water at Kinyungu Primary School Polling Station in the company of **Hemed Majuto** the 2<sup>nd</sup> respondent's agent. Near Kanana Primary School Polling Station, the 2<sup>nd</sup> respondent's agent was seen brandishing a pistol openly and violently hence impeding the voting process. Apart from that it was alleged that outside Mwena Primary School Polling Station the 2<sup>nd</sup> respondent's employees, agents and/or servants were seen handing out cash bribes, maize flour and lessos to voters while at Kanana Primary School and Mwazaro Nursery School polling stations the 1<sup>st</sup> respondent allowed people without identity cards to vote. He further contended that the 3<sup>rd</sup> respondent herein announced and declared the result of the Member of National Assembly poll for the Constituency without first having properly tallied the results from the polling stations and that after voting the agents were not given form 35s by the presiding officer as required by the law.

17. In cross-examination by **Mr Simiyu** learned counsel for the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> petitioner said that he is a businessman who has been operating a kiosk for more than 8 years. According to him, on 4<sup>th</sup> March, 2013, he was a voter holding Identity Card Number is **0395937** while his voter Registration Number was **00853512112716006**. On the said date he voted at Mwanguda Primary Polling Station at about 7.00a.m. where he arrived after 6.00a.m. He however was not aware when the station was opened as he found people in the queue and when his time came, he voted after which he went home but later went to the Tallying Centre where he arrived at about 8.00p.m. He did not however visit any other Polling Stations hence he did not know what happened in other stations. Although he said he was a campaigner for Wiper Part for Parliamentary seat, he said he was not an agent and his candidate was **Omar Bwana Zonga**. Since he joined the party late he did not know whether there was a Chief campaigner. Whereas there were 10 candidates for the Constituency seat, **Zonga** got 4377 votes and was satisfied with the results though the 2<sup>nd</sup> petitioner was not. When referred to the Polling Day Diary at page 158, the witness conceded that there were agents of other parties though he was unable to tell which parties they belonged to. Neither was he aware of the procedure for appointment of agents though he was aware that Wiper Party had agents including at Shimoni and were there till closure of the Polling Station. Whereas he was aware that the agents were supposed to be issued with forms he said that the same were not issued. According to the information he received from agents there were offences at Shimoni though he was not a Tallying agent and did not go inside but was about 1-2 metres from the Tallying Centre till the end. He only entered the Tallying Centre later when people were entering and was not aware that it was an offence to enter without authority. By that time, the Tallying was over so he did not know what happened. He however saw a laptop computer therein but did not know what happens in the Tallying Centre. As far as he was concerned the Tallying Centre is a place of recounting votes and after the Tallying, the votes cast were 26,228. He did know the number of the registered voters and although there were 10 candidates he did not attend their campaign rallies and did not know the other agents. He however confirmed that during campaign, people sell their ideas but did not know promises which candidates made though he knew of projects which were done during campaigns. He was aware of other projects such as sinking of boreholes sunk by CDF which were ongoing as well as classrooms and agreed that classrooms deserve desks some of which were supplied and some were yet to be supplied. Similarly he admitted that schools require toilets some of which were incomplete. Since he was not at Kanani Polling Station, he did not witness the pistol incident. He similarly was not there when cash was being given and as he did not go to any Polling Station, he did not witness any of the irregularities in the said Polling Stations. Even at Mwangunda Polling Station where he voted, there was no incident and according to him, no one swore an affidavit that there were irregularities in the said Polling Station. He however was of the view that the elections were not fairly conducted though **Mr. Zonga** did not swear any affidavit in support of his petition. To him, apart from **Mr. Mwashetani**, none of the candidates have petitioned save for his fellow voter. He only knew

- Mwashetani** for three months though he contested for Councillor in 2007 on NARC-RAINBOW and lost but never complained. At that time **Mr. Mwashetani** did not contest. He insisted that he was not satisfied with the current results.
18. In answer to questions from **Mr Abed**, PW2 reaffirmed that he was a kiosk operator selling food and that he was not engaged in any other business apart from peasant farming. According to him his business is carried out in Mwangunda in Jumbo Ward and the building is semi-permanent and that he earns about Kshs.15,000/=. He however denied that he was in Court on behalf of **Omar Zonga** but he was supporting the Party in which he was contesting. Apart from the party he denied that there was any relationship between them, save for the Party. While admitting knowing **Zonga** who was an MP for the area he denied that he consulted him before coming to court though he said that **Zonga** informed him he was satisfied. He insisted that he paid security for costs and after voting, he went home till the Tallying time. Therefore the only things he knew were from his agents. While admitting that **Omar Zonga** got 4,387, he said he did not know why **Zonga** was indicated as petitioner.
  19. In re-examination by **Mr Asige**, he said that he did not know how the phrase 'Your Petitioner' appears in the affidavit since in his petition, the petitioner is himself and **Zonga's** name is not in the petition. To him the reason why he has said that the elections were not fair is due to a difference of 1,175 between the votes cast in Lunga Lunga of 25,119 and the total votes cast of 26,294 hence the 1,175 votes were not accounted for in for IEBC records. Although he said that he was not present during the tallying, he said that he saw a laptop computer which was connected to IEBC. The computer according to him was for an agent of **Mwashetani** and that it was working. There was however another computer in the IEBC room.
  20. The next witness who testified as PW3 was **Chikophe Mwaruwa**. According to his affidavit, he was the Chief Agent for TNA Party and Chief campaigner for Presidential and Parliamentary positions. According to him, he received all TNA agents' appointment letters in good time and forwarded the same to the Commission's offices at Lunga Lunga to facilitate the issuance by the Commission of accreditation documents. He was however not issued with any authority as he was assured by **Mr Juma Musa** that a special authority was unnecessary and he was told that TNA agents could just report to their respective Polling Stations and in case of any problem he should be contacted. As a result of the foregoing the TNA agents were excluded from the polling stations and it took intervention for some of them to be allowed therein. However most stations in the constituency remained without agents. On the election day he called the returning officer to complain about the incident after receiving two early calls the officer declined to receive any more calls hence he was unable to intervene in more than 30 such stations from where he learnt that the exclusion of TNA agents that the results were adversely affected as the party's candidates score very poorly. According to him, the Returning Officer was fully aware of the problem but decided to ignore it to the prejudice of the party's candidates in the entire constituency. It is therefore his view that the election process was flawed as the party's said agents were only allowed in after the close of the poll and tricked into signing returns. According to him although he went to the Tallying Centre at 6.00 pm the ballot boxes started streaming in at about 8 o'clock. When at the centre he realised that the Returning Officer was in constant consultation with the 2<sup>nd</sup> respondent discussing matters relating to the elections away from the other candidates and their officials and the Commission's officials a development which according to him was very unusual.
  21. In answer to questions from **Mr. Simiyu**, PW3 stated that on 4<sup>th</sup> March, 2013 he voted at Perani Polling station which station opened at 6.00a.m. and closed at 5.00p.m. According to him he voted at around 8.45 a.m. His party's candidate was **Ben Mutisya** whom he knew within the period of campaign. He could not however tell whether **Ben Mutisya** was satisfied with results. After voting, he returned to Central Position at Lunga Lunga Town to Co-ordinate the agents since he was the party's sole Chief agents had other agents in various Polling Stations. According to him, he was appointed by his party while it is him who appointed TNA agents during the campaigns who were trained by the Party. He confirmed that he had a list of all the agents prepared by himself and knew that the agents were to produce oaths of secrecy and Appointments letter from the Party with identification card to be allowed in a Polling Station and that those who did not have them were to be barred. He reiterated that although his agents had documents they were not authorised. Despite availing the oaths of secrecy from the Party to Returning Officer he was informed by the latter that the documents were unnecessary. He however said that his agents

- did not swear affidavits in this petition and that it is him who swore on their behalf. Asked whether he knew the rules he answered in the affirmative and said that he was supposed to provide IEBC with list of agents which he did not produce but only produced oaths of secrecy for stamping which were however not stamped. He was aware that the agents allowed had accreditation letters but no TNA was allowed in station because the forms were not legalised. Referred to one **Bakari Juma Bakari** he confirmed that he was an agent for the party although he said he did not know all the names of the party's agents. He however could not say at what time the said **Bakari** signed page 96. Similarly referred to page 125, he said he could not tell the party's agents at Kikoneni. With reference to one **Shallet Kanze Fikirini**, he said he did not know her. He admitted that the party's agents were present but were barred. He however admitted that **Denis Chikophe** was his son who signed the document at the end of the function. He admitted that he did not see any agent being forced to sign. At the Tallying Centre, according to him were Mr. Mrabu Chaka, Omar Zonga and the 2<sup>nd</sup> respondent. According to him on 5<sup>th</sup> he stayed in the room throughout with the 2<sup>nd</sup> respondent and there were no breaks. According to him, Tallying was being done by **Juma** and his team of Presiding Officers and was being observed by **Mrabu** and the 2<sup>nd</sup> respondent who were not allowed to handle the proceedings. He however confirmed that when he went to vote he did not observe any irregularities.
22. In answer to the questions posed by **Mr Abed**, the witness reiterated that some of their agents were barred from accessing Polling Station and that he received about 10 calls to that effect and when he enquired from the Returning Officer he was told that they had no legal documents to go into the Polling Stations. He however resolved the problem by calling **Mr. Juma** and going to the Polling Stations where the problem occurred and the agents were allowed late without any legal papers. He confirmed that he knew the 1<sup>st</sup> petitioner although they are not friends though he was a TNA supporter and was inside the Tallying Centre.
23. In re-examination, PW3 stated that the duty of the agent is to look into the conduct of elections to ensure that documents are proper and that the elections are fair and lawful and he is supposed to be given a copy of the form and for one to be agent, you require a letter of approval from the party authorising you and it is that letter called accreditation and the oath of secrecy that allows one to witness the elections. According to him, he was tricked because he expected the Returning Officer to ensure that the elections were fair and he was assured there would be no problem. He confirmed that there were security arrangements in Polling Stations and no agent could access the Polling Stations without authorisation from **Mr. Juma** hence the step he took was to call **Mr. Juma** and explained to him the problem. Despite promising to act, he later stopped picking his calls. Referred to Page 96, he confirmed that the name of the TNA agent is the last one though the time is not indicated while at the reverse of page 98 there are no names, no identification numbers and no signatures which according to him is an indication that the seals were not verified by signatures of witnesses. According to him he was saddened by what he saw at the Tallying Centre. In his view although the Presiding Officers are expected to capture all the events the issue of late admittance of agents is not recorded in any of the diaries and similarly there is no recording of the waiver of the requirements. When he raised the issue the agents were however admitted despite the fact that they had no documents. In his view if his agents had been allowed in earlier his candidates would have secured more votes. He clarified that at the Tallying Centre, he would leave his seat when there was a break and although the candidates were 10 the Returning Officers was consulting with **Mwashetani** contrary to the procedures. Referred to pages 53, 58 and 125, with respect to the signature of **Shallet Kanze Fikirini**, he said the same ought to have been signed at the close of the station but her name was missing at the start of the counting and at the opening of the station.
24. Next to take the witness stand was **Rashid Bogodzo Sengeza**, who testified as PW4. According to him, he was a registered voter at Perani Polling Station and an aspirant for Vanga Ward. However, when he arrived at the polling station in the morning he found his name missing and complained to the presiding officer who gave him a number to call after which he was allowed to vote after waiting for 3 hours. During the time he was waiting he noticed other 20 people who were similarly stranded at the station with the same problem. After he was allowed to vote at least 16 other people who were stranded and most of whom were known to him were allowed to vote despite the fact that their names were missing from the register. During the time he was waiting he noticed that campaigners for the 2<sup>nd</sup> respondent were persuading the voters to vote for the 2<sup>nd</sup> respondent

- and despite his protests to the returning officer no action was taken. Between 10.30 and 11.00 am the 2<sup>nd</sup> respondent visited the station, removed some money which he gave to one **Juma Omar Sengeza** to distribute to voters at which point the voters left the queue to go for the money and when the police went to check the 2<sup>nd</sup> respondent drove away. The witness reported this incident to one **Corporal Andawa** but was told the police were stretched thin and could not respond to the complaint. His attempt to report the incident to the presiding officer similarly went unheeded. According to him the fact that people whose names were not on the register could vote was a manifestation that the election process was neither transparent nor foolproof.
25. In cross-examination by **Mr Simiyu**, the witness said that his voters' registration number was **21126-1224-0**, and that he registered at Perani Polling Station. According to him after voting he went home a distance of about 800 metres to Polling station. He said that he was candidate for County Representative for KADU ASILI but did not win. He said when he went to vote he had his Identification card and voters' card and that his name was not found hence the delay in voting. When he arrived, his name was missing from the manual register which he had inspected. His name was neither in Stream 1 nor Stream 2 and he was informed that his name would be checked in the Green file and after 3 hours he was called from home to go to the station and was allowed to vote. He said that he did not know it was an offence to vote when not registered. According to him, the number of people who voted despite the fact that their names were missing from the register were about 20 whom he knew by appearance. According to him the 2<sup>nd</sup> respondent came between 10.30 and 11.00 a.m. and since he was inside the vehicle he did not see who he was with removed a bundle of notes in 50/- currency and gave to **Omar Sengeza** but he did not come out of the vehicle. He said he was near the vehicle. After he called **Corporal Andawa**, did not report back. He saw irregularities at the Polling Station. According to him, there were voters whom he saw in the morning and when he came back, they were in the queue talking to voters. He stated that there were two streams and he did not know how long they were taking before voting though some of the people he saw had voted and he told the Presiding Officer so when he came back.
26. In response to the questions posed by **Mr Abed**, he said that he was a candidate for County Representative for Kwale Vanga Ward where voted and had KADU ASILI agents. When he was called from home to go and vote he just went and voted and had his identification card and voter's card although according to him, it was possible to vote in the last elections without identification card and voter's card. After voting, he went home and he was told by the other 16 voters that they also voted and showed him their fingers although he had checked the manual register with them. The first time he saw the 2<sup>nd</sup> respondent was when he was giving money and was told he was the one. He denied that he collected the money as he found it unusual and was surprised and felt bad. Although he called **Corporal Andawa** through the number given to him by **Karanja**, he did not report the incident after the said officer declined to take the report. Although he knew the said people who voted, he did not know them by their names. According to him although he lost the County Representative seat, he did not lose fairly but he was unable to petition.
27. In re-examination he reiterated that anybody could have voted even without being in the register. He said that he saw the person who gave the money and knew who he was though he was in a vehicle and that he saw people leaving the queue to go and scramble for the money after which the vehicle left.
28. PW5 was **Damaris Nzula Mutunga**. According to her affidavit, she participated in the elections for 4<sup>th</sup> March 2013 and was registered at Jua Kali Nursery and Primary School Polling Station. In her evidence, she is a parent in Lunga Lunga Secondary School where her daughter **Caroline Nzembi Kiguzo** is in form 2 while her son **Ruwa Kiguzo** is in class 2 at Jua Kali Primary School. About 2 weeks before elections she attended a public meeting at Jua Kali Nursery/Primary School at which the 2<sup>nd</sup> respondent requested them to vote for him in the parliamentary election with a promise that he would assist in paying school fees for those children in secondary school and assist in the development of local schools and in the supply of school equipments, books and desks. At that meeting she received a cheque for Kshs 3,000/- made out in the name of Lunga Lunga Secondary to the credit of her daughter's school fees which she presented and was issued with a receipt. Apart from that the 2<sup>nd</sup> respondent supplied her son's school with desks which were delivered by a white canter a few days before election date on which day she was present in school attending parents meeting. As a result of the foregoing, she felt indebted to vote for the 2<sup>nd</sup>

respondent.

29. In cross-examination by **Mr Simiyu**, the witness said that she voted on 4<sup>th</sup> March, 2013 at Juakali Nursery School and the elections were proper. She said that she was given the cheque on 14<sup>th</sup> by the 2<sup>nd</sup> respondent's clerk and the same was signed by the 2<sup>nd</sup> respondent himself though the same was written by **Mwashetani Foundation** and was drawn in name of her daughter, **Caroline Nzembi Kiguzo** although she had not exhibited her birth certificate. Though she did not have the cheque she had the receipt from school. She was however, unaware that it was an offence to take money during elections. According to her she was given the cheque on 14<sup>th</sup>. She however did not report the matter to the police although she informed the co-ordinator of the Commission. By that time she had known the 2<sup>nd</sup> respondent for two months. She confirmed that she had her own candidate although she attended the campaign of other candidates, four in all and whereas there were other pledges the other candidates only said what they would do if elected. She said that the recipients of the cheques were four and she knew their names. According to her, Lunga Lunga is not a new school but slightly old and when she was born it was there. According to her, the school has rubber stamp though the stamp is that of Mswambweni District Education Officer. The stamp was however neither signed nor dated. According to her, the desks were brought on 26<sup>th</sup> February 2013 and she did not record the Registration number of the vehicle though she was there. According to her, they were 10 desks and not either 20 or 9 and she neither talked to the people who brought them nor did she ask who brought them although they had told the 2<sup>nd</sup> respondent would bring the desks since the 2<sup>nd</sup> respondent himself promised them that he would bring them the desks and hence she knew he is the one who brought the desks.
30. In response to the questions by Mr Abed, the witness said that according to the receipt, 1800/= was for lunch, 400/= was for computer, 200/= for Parents Teachers Association (PTA) while 600/= for examination. There was however no tuition fees and the receipt indicated it was received from **Caroline Kiguzo**. She admitted that the name of **Khatib Mwashetani** was not there. Similarly, there was no **Mwashetani Foundation** although there was a cheque which was drawn by the 2<sup>nd</sup> respondent's secretary whom she knew for well over two months by appearance and signed by the 2<sup>nd</sup> respondent himself. She confirmed that the cheque was written in the name of **Mwashetani Foundation** and was given to her by the 2<sup>nd</sup> respondent and was signed by one person. She confirmed that the desks were taken to Juakali Nursery school and not to her house.
31. In re-examination, she said that she was given the cheque by the 2<sup>nd</sup> respondent. However, her daughter did not ask for assistance but the assistance was to help her children. The cheque number contained in the receipt was -000105 which was the cheque she was given by the 2<sup>nd</sup> respondent and she took it to the school the next day on 15<sup>th</sup>. She was however not aware who stamped the receipt and was not aware whether the date and telephone were necessary. According to her Lunga Lunga Secondary school is within Msambweni District and that she was influenced by the donation which she was not given alone. According to her the 2<sup>nd</sup> respondent requested them to vote for him and that he would do more. Although she did not understand the motive she just took it as a donation. She confirmed that she the 2<sup>nd</sup> respondent sign the cheque. She however said she was not aware of the regulations regarding the signing of cheques by Mwashetani Foundation but confirmed that the other four people were also given cheques for fees and they had children in the Secondary. As a result, she was happy though she was no longer happy about what happened.
32. **Robert Charo Karisa** was then called and he testified as PW6. According to him he is the father to **Alfred Fondo Matho** a student at Kwale High School. In form 1. The said student was initially selected to join Ribe Boys High School but he could not raise the fees. However, during the campaign period in Lunga Lunga in the later February, 2013 he was offered a cheque no. 000138 for Kshs 5,000/- by the 2<sup>nd</sup> respondent drawn in the name of Ribe Boys High School. Since he could not raise the Kshs 40,000/- required at Ribe Boys he first took the son to Perani Secondary School where he paid part of the fees and on presenting the said cheque the Head Teacher requested **Mwashetani Foundation** to re-issue a cheque in the name of Perani Secondary School. However he was unable to use the cheque as he eventually took his son to Kwale High School which is partly a day school. According to him, he did not request for the cheque but was issued when the 2<sup>nd</sup> respondent was campaigning in the village and upon being informed about his son's

- plight. The cheque according to him was forwarded to him by the village chairman, **Pius Mukiti** who showed the 2<sup>nd</sup> respondent the letter. While not being bitter about the turn of events he said only wanted justice to be served. He however confirmed that he did not vote since he was holding a waiting letter.
33. In cross-examination by Mr Mohamed, the witness said that he did not vote and that the cheque was in the name Ribe Boys High School. He however reiterated that it was issued by the 2<sup>nd</sup> respondent although the name was that of **Mwashetani Foundation**.
34. In re-examination the witness said that the cheque he was given by the 2<sup>nd</sup> respondent and that he was told that he was coming and was only called when the cheque was written and he was given at the campaign. According to him he was shown the 2<sup>nd</sup> respondent by village chairman. Although he was given the cheque with the others, he was not concerned about the others who were behind so he could not talk about them. He however did not use the cheque because he could not afford to take his son to Ribe and the cheque was not altered.
35. PW7 was **Alfred Wekesa Wanyonyi**. According to him, he was a student at Kenyatta University and voted at Kiruku School Polling Station. On 27<sup>th</sup> February, 2013 he was attending a meeting at **Mr Mwanjia's** home graced by the 2<sup>nd</sup> respondent and **Khalfan Jida**, a former Councillor in the area. At that meeting he was the 2<sup>nd</sup> respondent issue 3 cheques for school fees for 3 students, **Idd Ali Bushiuti, Zainabu Hamad Karoyo** and **Sofia Jita** each in the sum of Kshs 3000/-. According to him all the 3 were students at Kikoneni Secondary School. According to him the 2<sup>nd</sup> respondent gave the said cheques to assist parents who were not well to do but requested those present to vote for him in the election which was due in one week. He also heard the 2<sup>nd</sup> respondent promise the Muslim congregation present that he would assist them with building blocks to build a mosque in Kiruku area on **Mwanjia's** land in place of the temporary structure. After about 3 days the blocks were delivered and he took photographs thereof which he exhibited. According to him the 2<sup>nd</sup> respondent was bribing the voters while he had not even finished building his house in Msambweni Constituency.
36. In cross-examination by **Mr Simiyu**, he said that he played no role in the elections but was just a citizen. Neither did he campaign for any candidate. Whereas he knew there were 10 aspirants for parliamentary seat he neither knew the number of voters in Lunga Lunga nor who won in the constituency. He however said that he was a residence of the constituency since birth and was doing accounts in the university in Finance in second year. According to him, his fees are paid by his parents and he has never sought for a bursary or CDF assistance. In his evidence when he went to vote everything was in order and he did not visit any other polling station. He confirmed that he saw the 2<sup>nd</sup> respondent issue two cheques to three schools but did not ask him why. According to him he saw one of the cheques and the recipient was **Idi Ali** although it was in the name of the students **Idd Ali Bushuti** and it was drawn by the 2<sup>nd</sup> respondent and was for First Community Bank in the sum of Kshs.3,000/= and was given to the parent who has however not sworn an affidavit in this case. According to him, the parent came to him and told him he would vote for the 2<sup>nd</sup> respondent. He neither reported to the police nor informed the Commission but after being called by Chief Co-ordinator, he volunteered to come to court. In his view, he did not vote for a person of his own choice though he was not given anything by the 2<sup>nd</sup> respondent. Apart from the 2<sup>nd</sup> respondent's meetings he attended other meetings by **Mrabu Chaka** and **Bela Ngozi's** meetings where they promised to fulfil their pledges after the elections. According to him the photographs exhibited to his affidavit were taken by himself though he was not a photographer on 2<sup>nd</sup> March, 2013, 3 days after the promise. He knew the 2<sup>nd</sup> respondent two weeks to election although he did not know exactly where he was staying. He however knew one of his homes in Msambweni which was under construction.
37. In answer to **Mr Mohamed's** questions this witness stated that though he voted at Kiruku Primary School he neither annexed his voter's card nor the cheques to his affidavit. He was similarly unaware if the parents he mentioned here swore affidavits. While contending that the blocks were brought to **Mr. Mwanjia's** land by the 2<sup>nd</sup> respondent, he admitted that the 2<sup>nd</sup> respondent was not in the picture and that he did not report incident to police station.
38. In re-examination, he clarified that February has 28 days and that he took the photograph on 2<sup>nd</sup>

- March, 2013, which was after 3 days. He confirmed that the cheques were issued in the names of **Mwashetani Foundation** and that the recipients were the parents while the cheques were in the names of Kikoneni Secondary for benefit of students. He said that he saw the particulars in the cheque and that the 2<sup>nd</sup> respondent promised to bring three loads of construction materials in that meeting which was a campaign meeting which promise was honoured on 1<sup>st</sup> March, 2013 when he saw the stones and took a photograph to confirm. He however only had a glimpse of one of the cheques which cheque though was not given to him changed his mind and he was not free to vote for his preferred candidate.
39. Called as PW8 was **Ngome Movoo Ngome**. According to him, he was a voter at Jua Kali Nursery Polling Station and was a parent at Kingwede Secondary School where his daughter, **Chizi Ngome**, is in form 3. One week before the election day, a public meeting was held by the 2<sup>nd</sup> respondent at Jua Kali Nursery/Primary School which he attended at which the 2<sup>nd</sup> respondent gave a cheque for Kshs 3,000/- drawn in the name of his daughter's secondary school towards her school fees and he was asked among other people present to vote for the 2<sup>nd</sup> respondent and that on being elected he would assist even further. The 2<sup>nd</sup> respondent further promised to supply the school with 20 desks if he was voted in at the election as a Member of Parliament for Lunga Lunga Constituency. A few days while he was walking from his house he saw a vehicle off-loading some desks at the school and on a subsequent parents meeting he saw the new desks and confirmed that the 2<sup>nd</sup> respondent had kept his promise even before election took place. Thereafter he was no longer able to exercise his free will in the election.
40. In answer to questions posed by **Mr. Simiyu**, the witness said that he was a resident of Juakali Village and has stayed there for about 10 years though he was not born there. He could remember other candidates whose meetings he attended. He however said that he voted for the person he wanted and thereafter went home, and did not go to any other polling station. At the polling station, there was peace save that the electronic devices which he was told were defective. Apart from that, the elections were peaceful. According to him the meeting he mentioned at Juakali Nursery and Primary was on 14<sup>th</sup>. At the meeting, there were three parliamentary candidates, **Mr. Mwashetani**, **Ngozi** and **Mwambiweje** or **Mr. Zonga**. All of them spoke about their agendas. The cheque was given by the 2<sup>nd</sup> respondent's secretary who signed and gave it to him. He however accepted having known the 2<sup>nd</sup> respondent for a short period and appreciated his help though the 2<sup>nd</sup> respondent does not know his family and before that date did not know his daughter was in form 3. The cheque was however not exhibited and he only read it briefly and was drawn in the name of school - Kingwede Primary School. The cheque was however **Mwashetani Foundation** which he knew is separate from **Khatib Mwashetani**. The desks were however brought by the 2<sup>nd</sup> respondent's people whom he only saw on that day. He however knew they were from the 2<sup>nd</sup> respondent since he had promised to bring them the desks and even the vehicle, a white canter, had his posters. Although he promised 20 desks they got 10 desks and said he would bring the rest after elections. He confirmed that he knew **Damaris Nzule** as a villager who was at the meeting although he did not see her on the date of delivery of the desks since there were many people. He said he did not report because that was an assistance. However the other candidates did not give them anything.
41. In answer to questions by **Mr Mohamed**, the witness stated that his documents got lost after elections though he did not report the loss. He however confirmed that he voted for the person he wanted who is the person who assisted. The cheque, he confirmed, was in the name of the school not his name and took it himself to the school and was given a receipt which he lost.
42. In re-examination the witness said that he did not know the procedures for cheque payment and that the cheque was given to him in the public within the school compound after the meeting and when the 2<sup>nd</sup> respondent asked for four parents. On being asked his daughter's documents by the secretary he submitted the same and the secretary wrote Kingwede though she did not know where her daughter was learning but obtained it from the documents he presented. He however made no request for the same but the 2<sup>nd</sup> respondent just asked those who had fees problems. Since the time he took the cheque to school and was issued with a receipt he has not received any complaint that the cheque was dishonoured. He confirmed that he saw the cheque being signed by the 2<sup>nd</sup> respondent who signed, tore it, and gave it to him after being written by secretary in presence of

- the four others who included **Damaris Nzule**. That gift however influenced his decision in voting though he was happy on his behalf and his daughter. He confirmed that the school is within their village and he saw the vehicle which brought the 10 desks and he was happy because of desks and fees. According to him this happened two weeks before election on 14<sup>th</sup> February, 2013.
43. **Joseph Kiio Musau** gave evidence as PW9. According to him, he was a voter at Kitungure Primary School Polling Station and participated in the campaigns. According to him the 2<sup>nd</sup> respondent was well known to him as he used to visit his village and conducted a *harambee* for Maji Moto Primary School at the invitation of his village in January 2013 at which time he met him personally. Close to the election date the 2<sup>nd</sup> respondent visited his village frequently and met the people staying near the Polling Station who gave him their requests and needs including the need for cooking *sufurias* and he supplied two large size *sufurias* to a women group in Kitungure on or about 21<sup>st</sup> or 22<sup>nd</sup> February, 2013 after which the 2<sup>nd</sup> respondent promised to supply desks for a secondary school to be started at Maji Moto later this year but went ahead to supply 9 desks in anticipation that the school would be started on selection of form one students in March 2013. The 2<sup>nd</sup> respondent also advised the Community to look for a timber and a *fundi* to make desks on site to save on the costs. According to him two large size *sufurias* were supplied at his shopping centre by the 2<sup>nd</sup> respondent and were received by women representatives for use during weddings, village welfare meetings and celebrations where food is served in plenty. According to him this generosity probably endeared the 2<sup>nd</sup> respondent to the electorates as he became very popular close to the election date.
44. In cross-examination by **Mr. Simiyu** the witness disclosed that his Identification card was number 05341381 while his voters' Registration number was 0565812112601159-6 and that he had been a resident of Kilungure for 25 years and was a retired hotelier having worked with Nyali Beach Nairobi, Mombasa and Baringo. He was however not a party agent but only read about candidates in the media and their posters. He came to know the 2<sup>nd</sup> respondent in January 2013 when he was conducting fundraising although he started going to their place in 2012 when he started knowing him. He stated that on the voting day he voted without problems and that he voted for the people he wanted which was his secret. According to him, there were small problem that is why he left but when he came back, there was no problem. According to him there are three Primary schools, Majimoto, Kilungure and Buluku Primary Schools and that Majimoto has not even finished one year and is still under construction by the community through the CBO. The school which started a Nursery is still standard 3 and is still under construction and still requires infrastructure. There was a fund-raising at the school in January 2013 and it is them who invited the guests and that many people came such as the 2<sup>nd</sup> respondent, Cortec Mining and former councillors. The 2<sup>nd</sup> respondent donated two (2) very big *sufurias* about 20 kilograms and that there was promise to supply desks 9 of which were brought on 25<sup>th</sup> March, 2013 by the 2<sup>nd</sup> respondent's people in a vehicle by four (4) men and were meant for Secondary School which was to commence this year. Although he did not talk to them and they had no marks, the witness believed that they were brought by the 2<sup>nd</sup> respondent because he is the one who promised and the said people said that the desks were from the Honourable. Although he did not see the 2<sup>nd</sup> respondent supply the *sufurias* he similarly believed they were brought by him. The photographs were however not taken by him but by a person to whom he gave the camera. According to him, he knew it was wrong to give donations during elections although he did not see the need to report.
45. While responding to questions by **Mr. Mohamed**, the witness said that it was them who invited the 2<sup>nd</sup> respondent and that though he was present when the *sufurias* were being given the 2<sup>nd</sup> respondent was not present. He however admitted that the vehicles did not have any names
46. In re-examination, the witness said that he heard promises being made for *sufurias* by the 2<sup>nd</sup> respondent and that there was no other person who made pledges which pledges were during the campaigns by the 2<sup>nd</sup> respondent. According to him he saw the pledges being fulfilled. Kitungure, according to him, sought help for *sufurias* while Majimoto wanted fundraising. According to him, although the school had started it neither had no students nor desks as it was to start in 2013 hence Majimoto wanted fundraising and desks. According to him he has no problem with the Member of Parliament and likes him a lot and his generosity and development and was not impressed by

- the other candidates. Although twenty (20) desks were pledged nine (9) were supplied. He said that he was a member of the school. Since the rest of the desks have not been brought they have been taken to primary school. Both the *sufuria* and desks were supplied before the election and are helping in the village.
47. The next witness was **Kiilu Maundu** who testified as PW10. According to him, he participated as a voter at Jua Kali Nursery School Polling Station. In his evidence he is a member and vice-chair of the school committee. He deposed that a fortnight or so, before the elections, the school committee and members of the public convened a meeting to meet the 2<sup>nd</sup> respondent at the prompting of his Chief Campaigner in the area, **Mr. Nyanje Mdoe** and at the first meeting the school committee highlighted the school's needs after which the 2<sup>nd</sup> respondent promised to deliver 20 desks with a promise to settle the outstanding land purchase price and build additional classrooms as soon as he was voted in as a Member of Parliament. Towards that end the 2<sup>nd</sup> respondent supplied 10 new desks to the school a week or so before the election day and they were received by the school chairman, members of the committee and the public during a parents' meeting at the school. Due to his magnanimity in supplying new desks and making monetary contribution towards payment of school fees for those parents with children in secondary school, the 2<sup>nd</sup> respondent endeared himself to the villagers. He pointed to one occasion when he witnessed the 2<sup>nd</sup> respondent writing cheques for needy children and that he held no less than two meetings which he personally attended and made monetary contributions to needy students as well.
48. In cross-examination by **Mr Mohamed** the witness said that after voting, he went back to his work and that there was no problem that he saw. He affirmed that he was the vice chair of the school committee though no documents are issued after election by parents. The school, according to him was constructed by **Omar Zonga** using CDF. According to him the school was been constructed by a private individual but the school has two (2) teachers who teach in shifts and are paid by parents. Although the school was build two years ago it started operating this year since they had not finalised all preparations, had 18 desks. He disclosed that the photographs were taken by **Gideon Mwangale** in his presence. At the time they received the 10 desks they had 18 others, some of which were broken. He reiterated that the 2<sup>nd</sup> respondent did not request the meeting which took place a fortnight on 14<sup>th</sup> February, 2013. It is not indicated in the affidavit. The plot, according to him, sold by **Mdole Nyanje Mwangofe** at Kshs. 80,000/= and he was paid Kshs.20,000/- by **Omar Zonga** though CDF though balance has not been paid and is being demanded.
49. In answer to **Mr Mohamed's** questions the witness said that the 2<sup>nd</sup> respondent pledged twenty (20) desks but brought ten (10) through his people who told them that they were the pledges given by the 2<sup>nd</sup> respondent and the people identified themselves and confirmed they were from the 2<sup>nd</sup> respondent and the rest would be brought later. He said that although he saw the 2<sup>nd</sup> respondent giving cheques he did not photocopy them though they were from **Mwashetani Foundation** in favour of Lunga Lunga Secondary School.
50. In re-examination, the witness re-affirmed that the cheque was being given at the school by the 2<sup>nd</sup> respondent and that they were not demanding the cheque from him but that it was a political function and not that of the Foundation. As the school Vice chairman, he said nobody told me to ask for money from the Member of Parliament or **Mwashetani Foundation**. He however confirmed that he was there when the school made the request and they were brought ten (10) desks. According to him the person who pledged was the 2<sup>nd</sup> respondent when the elections were one week away and he was influenced by the desks donation.
51. PW11 was **Musyoki Musembi Musyoka**. According to him, he was a teacher at Lunga Lunga Primary School and he participated in the elections. According to him, he was a parent in Jua Kali Primary School. Lunga Lunga where his grandchild, **Brighton Matano Musyoka**, attends nursery section of the school. When he heard that the 2<sup>nd</sup> respondent was going for a campaign rally a fortnight or so before election, he attended the meeting at which he witnessed the 2<sup>nd</sup> respondent make a promise to supply 20 new desks to the school and to assist those with children in secondary school by way of fees. He further promised to construct additional classrooms for the school and to pay off the debt owed to the person who sold his land to the school provided he was

voted in as Member of Parliament. He further witnessed the 2<sup>nd</sup> respondent issue cheques to 4 parents and residents of his village each of 3,000/- to **Ngome Movuo Ngome, Damaris Nzula Mutunga, Nyanje Mdoe** and **Muthini Ngoma** towards the settlement of their children's school fees. According to him the recipients were jubilant and displayed the cheques for all to see. A few days to the election while he was attending parents meeting at the school a white vehicle brought 10 new desks to the school. At the meeting which was attended by the 2<sup>nd</sup> respondent he said that he heard the 2<sup>nd</sup> respondent openly implore the voters and members of the public to vote for him as he was capable of delivering developments in the area and appeared to endear himself to some people especially the recipients of the school fees cheques. According to a list exhibited by himself which he claimed to have received from a parliamentary candidate, the 2<sup>nd</sup> respondent gave many more cheques to parents of secondary school students. In his view the acts of offering monetary contribution to the needy students through poor parents, while generous on its face value, clearly amount to undue influence and bribery of voters as it was done so near to the election date that the said parents could not help but elect the 2<sup>nd</sup> respondent. Those acts as well as in Vanga and other neighbouring Wards where the 2<sup>nd</sup> respondent delivered new desks, iron sheets and school fees cheques influenced elections in favour of the 2<sup>nd</sup> respondent according to him.

52. In cross-examination by **Mr Simiyu**, the witness said that he had stayed in the area for almost thirty (30) years and that he participated in campaigns in the last elections on a TNA party but not for a candidate though in that capacity he was involved in campaigns for the candidates including parliamentary candidate who was **Benson Mulu Mutisya**. He was however only involved for two (2) weeks but had never campaigned for the 2<sup>nd</sup> respondent and was not associated with ODM party before then. According to him he was an untrained teacher for almost 3 years since 2010 in Lunga Lunga Primary School in standard eight (8) where he was teaching Mathematics and Social Studies in standard five (5). At the time of giving evidence he was however in Happy Life Academy Primary School. On the day of the voting he went home after casting his vote and at the time of voting it was serene and he did not see any anomaly. To him, at that time, the elections were fair. Although the 2<sup>nd</sup> respondent made pledges such as supply of twenty (20) desks and construction of additional classrooms, the constructions have not been done. Juakali Primary School which was started last year by **Hon. Zonga** is under government although he could not tell the source of funds. According to him **Mdoe Nyanga** who is owed the money for the purchase of the land has not been paid. He confirmed that the 4 cheques which were issued were mentioned to the persons he mentioned in his affidavit and they were for Kshs 3,000/-each. The desks were however brought on 26<sup>th</sup> February, 2013 by a white vehicle. According to him there were people present since they were aware that there was going to be a meeting and one of the persons called **Mwakubo** spoke to them though he did not see the 2<sup>nd</sup> respondent. One of the people however confirmed that they were pledged by the 2<sup>nd</sup> respondent. He was however unaware of **Mwashetani Foundation** though he confirmed that the cheques came from **Mwashetani Foundation** not **Khatib Mwashetani**. Referred to the list annexed to his affidavit he said that he did not know where these documents came from.
53. In answer to questions from **Mr Mohamed** the witness said that though the desks were brought by white vehicle he did not know the owner of the vehicle and that he did not know where the list came from.
54. In re-examination the witness stated that the list in question was for the beneficiaries of **Mwashetani Foundation**, 2013 and that he was shown the same by another candidate and he did not know where he got the list from. He confirmed that he saw the issuance of the cheques after the political meeting. He said that it was after he was asked to assist that people went for the cheques which were given by the 2<sup>nd</sup> respondent. Whereas some people were happy, others were not. He confirmed that the people who received the cheques were voters.
55. **Peter Alexander Ndeti** gave evidence as PW12. According to him, he was a registered voter at Tsuini Primary School Polling Station and he participated in the last elections as a voter and attended many campaign meetings organised by the candidates. In one such meeting the voters sought to be assisted by the 2<sup>nd</sup> respondent with a water tank for their Primary School a week before the elections. The 2<sup>nd</sup> respondent obliged and brought a water tank at Magangani Primary

- School which tank is still at the school. According to him the villagers wanted the water tank for use at the school. He also heard the 2<sup>nd</sup> respondent promise to donate *sufurias* to women groups at Magangani Centre. He however was not aware whether the same were delivered. In three other meetings he heard the 2<sup>nd</sup> respondent offer to educate the children of the area in secondary schools by paying their school fees. From the information received from the headmaster of Mahuruni Primary School he was made to understand that the 2<sup>nd</sup> respondent gave the school 20 bags of cement to floor a toilet in the school a fact which the headmaster, **Mr. Nyae**, disclosed to him when he went to inquire.
56. In cross-examination by **Mr Simiyu**, the witness stated that after voting, he left and went home immediately and that the election was peaceful and he did not hear any complaint. He confirmed that his cellphone a NOKIA C1 has a camera and that the photos he took are still in the camera though the dates are not shown. In his view, the photos are evidence that what happened is contrary to electoral procedures since it was a means of confusing voters to vote for the 2<sup>nd</sup> respondent. According to him, the tanks were brought by a vehicle and since he was only interested in the benefit to them, he was not interested in the vehicle. He however confirmed that the 2<sup>nd</sup> respondent was not there and whereas he did not report the incident either to the police or the Commission he informed Co-coordinator.
57. In response to the questions by **Mr. Mohamed**, the witness said that it was the villagers who asked the 2<sup>nd</sup> respondent to assist with a water tank and not him who offered. Though the 2<sup>nd</sup> respondent promised *sufurias*, the witness confirmed that he had not stated that the pledge had been fulfilled. In re-examination the witness stated that he heard the pledges at Tsuri to the women who had asked for assistance of *sufuria* and it was a political meeting. He was however unaware whether the *sufurias* were supplied. According to him, he would not miss the 2<sup>nd</sup> respondent's meetings and that he was influenced during the voting and that the pledges were during the last week of election.
58. Questioned by the Court this witness confirmed that he used to go to the meetings to get money and that he did in fact obtain money. Accordingly the Court directed the **Director of Public Prosecution** to investigate his conduct.
59. The next witness was **Kimanzi Mutanya** who testified as PW13. According to him, he exercised his right to vote in the last elections. According to his evidence he attended campaign meeting and one of such meetings was that of the 2<sup>nd</sup> respondent in his area and saw the 2<sup>nd</sup> respondent issue and give out cheques for needy students hardly a week before the elections. The 2<sup>nd</sup> respondent also promised that he would deliver before the elections iron sheets to Mabambarani Primary School to demonstrate that he would keep his promise to deliver development if elected as a Member of Parliament for the Constituency. After 3 or 4 days the said iron sheets were delivered at the school and that he helped in offloading the same which were 40m in number at the invitation of the chairman of the village.
60. In cross-examination by **Mr Simiyu**, the witness said that he was a resident of Mabambarani and was a voter. According to him the voting was peaceful and there was no problem. According to him, he attended only one meeting at Mabambarani on 20<sup>th</sup> February, 2013. According to him the residents required iron sheets and were supplied and they are the ones who offloaded them at about 5.00pm for the vehicle whose registration number he could not remember. Although he saw the people who bought them, he did not see the 2<sup>nd</sup> respondent. He however did not talk to the people who brought the iron sheets. In his evidence the iron sheets were brought towards end of February, 2013 but he did not report as he did not know it was an offence as to him it was an assistance and he did not see anything wrong.
61. On being cross-examined by **Mr. Mohamed** the witness said that the 2<sup>nd</sup> respondent pledged iron sheets and he brought them although he did not see him and only saw his followers.
62. The next witness was **Charo Danda Mwero** who had sworn two affidavits in petition no. 4 of 2013. According to his depositions, he was a registered voter but attended several campaign meetings convened by the 2<sup>nd</sup> respondent who was reputed to be very generous. At Mutune and Mkwanjune Village meetings the 2<sup>nd</sup> respondent promised to bring development in the area by supplying women groups with cooking *sufurias* and by sinking water wells for the villages. According to him the 2<sup>nd</sup> respondent gave out work to sink water well at Mtune, near **Mzee**

- Mwathi's** and **Mzee Musembi's** residences which water well is almost complete and is being finalised. According to him one of the people who were enlisted to dig the well was one **Mwatumbi** whose elder sister is married to the witnesses' elder brother. According to him, he also got Kshs 50/- from the 2<sup>nd</sup> respondent at Mwanjuni meeting through his campaigner in the area with a request that he should vote to the 2<sup>nd</sup> respondent from a person who was not aware that he had no voters' card.
63. In answer to questions by **Mr Simiyu** the witness said that he was born and raised in Mtune. According to him he was only attending the 2<sup>nd</sup> respondent's rallies since in the other rallies there were no handouts. He confirmed that the residents of the Constituency have water problem and rely on water from River Uмба. He was unaware of any boreholes sunk before 4<sup>th</sup> March, 2013 although there are some which are far but these are private ones. He however did not know the dates when the photographs annexed to his affidavit were taken and admitted that they could have been taken before elections. According to him **Mzee Mwathi** and **Mzee Musembi** do not have the capability to sink boreholes although he had no such proof. While admitting receipt of the 50/- in Mkwanjuni meeting he said he knew that receiving bribe is an offence but he accepted because he was broke and had no money.
64. In answer to questions by **Mr Abed**, the witness stated that he attended the 2<sup>nd</sup> respondent's rallies in Mtune and Mkwanjuni and though he could understand the Swahili language which was being used at the rally he could not speak the same. The photographs according to him were taken by his friend and could not remember exactly when he was given 50/=. According to him the 2<sup>nd</sup> respondent gave the money but it was given out by the elders in Mkwanjuni.
65. In re-examination, the witness said that the 50/= he was given came from the 2<sup>nd</sup> respondent and that many people got it and that it was at a meeting in which the 2<sup>nd</sup> respondent was seeking for votes in order to be voted for. According to him his aim was just to receive the money although he would have voted for him had he been registered. According to him the said Wazees were not capable of sinking the wells because they were there when the water problem was there and they did not sink them until the 2<sup>nd</sup> respondent came. In his evidence the 2<sup>nd</sup> respondent said he would sink the boreholes before election and he sunk them but they were incomplete since they were abandoned after elections.
66. On application by **Mr Eredi** on behalf of the Attorney General the Director of the Public Prosecution was directed to investigate the conduct of the said witness with a view to making a determination whether an electoral offence could have been committed.
67. PW15 was **Marinda Jawa Kombo**. According to him, he was registered as a voter in Mwena Polling Station. On the voting day he went to the Polling Station and found a group of people outside the station distributing money, maize flour and lessos to people who were proceeding to cast their votes therein. Among those doing so were **Rama Karisa, Mohamed Mugai, Mohamed Bazi** and **Hamisi Bakaya** who according to him were campaign agents for the 2<sup>nd</sup> respondent. When he reported the incident he was referred to the 1<sup>st</sup> and 3<sup>rd</sup> respondents' officials at the polling stations and upon so reporting he was told to report the incident which according to him went on the whole day at Lunga Lunga police station which he did but no action was taken.
68. In answer to questions put to him by **Mr Simiyu**, he said that on 4<sup>th</sup> March, 2013, he voted at Mwenia Polling Station and although he did not annex his voter's registration card he had it on 4<sup>th</sup> March, 2013. When he arrived at 11.00a.m, voting was underway and hence he could not tell when the station was opened. He however peacefully casted his vote and that inside the polling station there was no problem. After voting, he went outside the polling station gate where there were police officers and it was at the gate that there was a problem.
69. In cross-examination by **Mr Abed** the witness testified that when he went outside, he did not go away but stood outside and saw the people giving out money and other things. He however saw the said people when he was going in but he did not know what they were doing since he was not concerned with them and it is only when he came out that he saw them giving out the money and telling people to vote for the 2<sup>nd</sup> respondent. However he himself was not followed by anybody and was not given anything. In his evidence the people giving the said handouts were known to him as agents of the 2<sup>nd</sup> respondent and he talked to them after voting. According to him he knew they were agents of the 2<sup>nd</sup> respondent because they were telling people to vote for the 2<sup>nd</sup>

- respondent and he knew them as agents of the 2<sup>nd</sup> respondent. When he reported, he was told by OCS that the officers were in the field.
70. In re-examination by **Mr Asige**, the 2<sup>nd</sup> petitioner's advocate, the witness stated that the reason he talked to them was because he saw them giving money, flour and *lessos* and selling their candidate – the 2<sup>nd</sup> respondent. To him, the people who were being talked to and given the said handouts were going to vote. He further said that the police officers were inside and that he reported the matter to the officials of the Commission who referred him to the police who were outside the gate. According to him he knew the people who were giving the handouts very well including their heights, clothes and physical features. He reiterated that they were doing so on behalf of the 2<sup>nd</sup> respondent.
71. The next witness to be on the witness stand was **Mwalewa Jefa** who testified as PW16. According to him, he was a registered voter in Lunga Lunga Constituency and a businessman residing and working for gain in Vanga. He further deposed that on various dates in February 2013, in an area known as Mtune, the 2<sup>nd</sup> respondent while on a campaign trail after hearing the grievances of the people immediately started building a well for the people in the area and said he would build a nursery school once he was elected as Member of Parliament for the Constituency and had 10 desks delivered for the nursery school on 27<sup>th</sup> February 2013. While on campaign trail in Ziwa la Wandaka the 2<sup>nd</sup> respondent after hearing the grievances of the people promised to build a well and a new nursery once elected as local Member of Parliament. Accordingly the 2<sup>nd</sup> respondent instructed two wells to be built at Mtune and Ziwa la Wandaka and while the well at Mtune is nearly complete the one at Ziwa la Wandaka has been abandoned.
72. In cross examination by **Mr Simiyu**, the witness said that on 4<sup>th</sup> March, 2013 he voted at Kiveu Primary school where he arrived before 8.00a.m. because he was agent for Wiper and had the required document though he did not annex the same. According to him, he was among the first ones to vote and that the Commission followed the procedures and there were no problems. According to him, Mtune has no school but there is a nursery school. He reiterated that on 18<sup>th</sup> the 2<sup>nd</sup> respondent while campaigning, the residents requested him to build for them a school and he promised desks which were brought by the 2<sup>nd</sup> respondent on 27<sup>th</sup> March at 2.00p.m. by a pick up although he did not know the registration number. The 2<sup>nd</sup> respondent was not in the Pickup but was in his vehicle. Although he spoke to the people who brought the desks they did not tell him they were brought by the 2<sup>nd</sup> respondent.
73. In cross-examination by **Mr Abed**, the witness said that paragraphs 3 and 4 of his affidavit referred to the same day but two meetings which he attended to hear the agenda and while seated he heard the elders request for the wells, construction of school and desks and the 2<sup>nd</sup> respondent pledged and did. According to him the request was made by the elders.
74. In re-examination the witness clarified that with respect to paragraphs 3, he meant 18<sup>th</sup> February, 2013. According to him the desks were donated by the 2<sup>nd</sup> respondent who confirmed when he with the pick up in his entourage that he had donated the desks for the time being. At that time the desks were in the vehicle being offloaded and he wanted to be voted for. The witness saw and heard him asking for votes.
75. PW17 was **Harrison Ngoro Joto**. According to his affidavit, he was a registered voter in Lunga Lunga Constituency and on 3<sup>rd</sup> March 2013, a tanker with 1,000 litres of water was driven into Kinyungu Primary School at around 10 am accompanied by one **Hemed Majuto** who was vying for the County Ward Representative Seat for Dzombo ward in Lunga Lunga Constituency. According to the witness the said **Hemed Majuto** said that the water had been given and provided by the 2<sup>nd</sup> respondent for the people of Kinyungu and its environs. In his view the said water was given to influence and sway the voters in the area to vote for the two men.
76. On being cross-examined by **Mr. Simiyu**, the witness said that he was a registered voter and voted at Kinyungu Primary School where he arrived at about 8.00a.m. when voting had started. After voting he went home and did not visit any Polling Station. According to him, he voted for his favourite candidate. He said that he stays about 200 metres from Kinyungu Primary School and could see the school. The lorry, according to him, came at about 10.00a.m on 3<sup>rd</sup> brought water then left. He reiterated that the water was 10,000 litres and was poured in the school tank

- which had a capacity of 10,000 litres. He could not however remember the registration of the lorry. The 2<sup>nd</sup> respondent was however not present but **Hemedi Majuto** a contestant of Dzombo ward was there and he said he was sent by the 2<sup>nd</sup> respondent. The witness however said that he did not know their parties although **Majuto** also wanted to win despite the fact that he never told them his projects but just told them that he was sent by the 2<sup>nd</sup> respondent. The water, he said, was brought on 3<sup>rd</sup> and election was 4<sup>th</sup>. He however did not get a chance to speak to the 2<sup>nd</sup> respondent. According to him, the school has gone to standard 6 with many pupils and uses the rain water from the tank since it does not have a water supply. He denied that the tank is filled by a vehicle and asserted that that was the first time it was being done. He reiterated that **Mr. Hemedi** did not say he is the one who brought the water but told people he was sent and apart from what **Hemedi** told them, he did not have any other evidence that the water was brought by the 2<sup>nd</sup> respondent.
77. In cross-examination by **Mr Abed**, the witness said that although he saw the lorry, there was no writing on it apart from Water Tank and had no posters or names of the 2<sup>nd</sup> respondent. According to him, **Hemedi** said that the water was for the residents in order for the people to vote for him and the 2<sup>nd</sup> respondent. He said that the water was distributed there and then until it got finished but could not say whether it was brought by the 2<sup>nd</sup> respondent.
78. In re-examination, the witness confirmed that the water was brought by a tanker Registration Number KWQ 171 in the presence of **Hemed Mafuto** who said that he was sent by the 2<sup>nd</sup> respondent to bring to the residents the water to enable them vote for him and the 2<sup>nd</sup> respondent who was a contestant for parliamentary seat. **Hemedi Majuto** was however a contestant for a ward representative but said they were in the same party. He reiterated that the water that was brought was distributed the same day to enable people vote since there was serious scarcity of water.
79. PW18, **Yusuf Rashid Mrafi**, in his affidavit deposed that he was a registered voter in the Constituency and on 4<sup>th</sup> March 2013 at around 6.00 am he proceeded to Mwazaro Nursery School Polling Station to cast his vote. However the voting did not start until around 8.00 am and at around 8.30 am a man of Indian or Arab descent came out of a vehicle and started to queue and five minutes later a young child of similar descent came out, went to two the police officers and gave them a bottle of mineral water and another container each whose contents the witness did not know. According to him the said man spoke to the police officers they went into the vehicle and when he came out requested the voters on the queue to help him remove some wood planks to sit on but the voters refused. When it started raining however, the voters on the queue were moved to stand in a perpendicular line and while there the witness saw several people brought by the above mentioned man into the polling stream but who were voting using identity card with the assistance of police officers. According to him he had never seen the said people in that area and believed they were brought to cause disturbance. Having voted he proceeded to Kanan Primary School to assist his mother cast her vote. While there he saw the 2<sup>nd</sup> respondent park his vehicle outside the school and hand out money to voters on their way to the Poling Station. According to him many people at this poling station were voting without identity cards. He further noticed that the illiterate voters who requested that they wanted to vote for **Mwamiweje**, the nickname for **Omari Mbwana Zonga**, were told by the presidn officers to choose another candidate as there was no such candidate.
80. In cross-examination by **Mr Simiyu**, the witness said that he has been residing in the area for 10 years though he was not born in Shimoni as his home Chwaka. According to him he voted for his favourite candidate and that he saw some irregularities. To him there were two queues for black people and brown people facing each other. Although there were two streams, there was only one entrance and there was only one queue clerk. However immediately after voting, he left and visited Kanana Nursery Polling station. According to him the vehicle he mentioned NOAH gray in colour though he did not know the registration number and there were about ten people who came out one by one. After voting, the witness talked to the police who told him to go away and he did not inform IEBC officials.
81. In answer to the questions by **Mr Abed** the witness said that the person he was mentioning was not the 2<sup>nd</sup> respondent and he did not know who the people of Indian and or Arab descent were.

82. In re-examination the witness said that when he arrived at the polling station at 6.00a.m. there were people waiting to vote and that the queue was one before the vehicle came – NOAH – Gray in colour and it was only after talking with the police that they started their own queue hence there were two queues for blacks and light skinned. According to him **Omar Bwana Zonga** was the Member of Parliament and he is known as **Mwambiweji** though the Commission's officers denied that his name was there.
83. The next witness was **Fatuma Kassim Gambere** who testified as PW19. According to her, she was an agent hired by Wiper Party to observe and assist in the last general election and was stationed at Shimoni Primary School Polling Station which had two streams. On the said day after the voting exercise was complete at around 5pm the 3<sup>rd</sup> Respondent drove into the compound in his vehicle, a VX Land Cruiser registration number KBR 202M and proceeded to the polling station room peeped into the stream when the counting was about to start whereafter the Presiding Officer left the station and went into the 2<sup>nd</sup> respondent's vehicle and sat there for 20 minutes. When the Presiding Officer came back he asked the agents to leave and go for a break and only the Commission's officials were left therein. Once outside the witness realised that only the agents in their stream were told to go on break though the Presiding Officer from their stream kept on going to the 2<sup>nd</sup> respondent and going into the other stream. At around 7pm another vehicle black Toyota IST registration number KBS 284Q pulled outside the gate of the polling station and attempts by the witness to go outside were thwarted by police officers though he noticed that the vehicle was carrying some agents working for the 2<sup>nd</sup> respondent. According to her the petitioner on being informed of the happenings also sent his servants in another vehicle and there ensued a fracas but they left after they were told to do so by police officers.
84. On being cross-examined by **Mr. Simiyu**, the witness said that she knew **Athumani Ali Gambere** who was related to her. Her candidate in the Wiper Party was **Omar Zonga** and she confirmed that Stream one was won by **Omar Zonga** with 460 votes. Referred to form 35 for Shimoni Stream one she confirmed that her name was not there. She clarified that **Omar** got 190 votes in stream one but got total of 460 votes in Shimoni but was the winner in Stream one. She confirmed that she was not an agent in Stream two. According to her the elections process was not proper since a candidate is not allowed to talk to voters. She however did not report to the police although they wrote their complaint and took to the tallying officer.
85. In re-examination, the witness said that she signed form 35 after elections. In this form my name is not there. I have appointment letter by Wiper Party. According to her he registered voters according to the information she got from the Commission were 1056 yet form 36 showed 1055 voters and not 1059. According to her she signed form 35 although she did not see her name in the form which she was shown. According to her the 2<sup>nd</sup> respondent was talking to the Presiding Officer. In her evidence there was commotion at the gate before the counting and that the police prevented them from stopping the fracas.
86. The petitioners then called **John Mwavu Bemaundu** who testified as PW20. According to him, he was KENDA Party agent and while at the Tallying Centre he discovered some discrepancies during the announcement of results for the different aspirants vying for various seats in the Constituency. According to him, the results for **Mrabu Chaka** were different from those at. At least 2 polling stations since he was said to have received 1 vote at the Kasemeni Primary School centre while his agents informed him that **Chaka** had received 61 votes at that polling station. When a complaint was raised at the Tallying Centre and the ballot box opened, it was revealed that **Chaka** indeed had 61 votes and not 1 vote as had previously been announced. At Mugombezi Polling station of the other hand the same candidate was said to have received 5 votes which on complaint was found at the Tallying Centre to have been 55 votes. A similar complaint was raised with respect to Manda Primary School Polling Station where it was indicated that the same candidate had received 1 vote instead of 61 votes but this time round the officials at the Tallying Centre declined to open the ballot box. The refusal by the said officials according to the witness in light of the earlier confirmed discrepancies amounted to unprofessional behaviour on the part of the officials and a violation of Article 86 of the Constitution. According to the witness the votes cast were different while the polling station votes cast were different from those that were counted at the constituency Tallying Centre and different from those announced by the 3<sup>rd</sup> respondent.
87. In cross examination by **Mr. Simiyu**, the witness said that he voted at Vitsangalaweni Polling

- Station at 9.00a.m. He clarified that he was not an agent but a party co-ordinator. He said that he was travelling in many places as co-ordinator and had documents authorising him to enter anywhere where their agents were within Lungalunga constituency since he was the Chief agent as there was no distinction between Chief Agent and Co-ordinator. According to him he was the Party Tallying Agent although the letter from his party did not mention Tallying Agent or Chief Agent. However he said that as a Co-ordinator, when the Tallying Agent, **Nzani Kazungu**, could not attend due to ill health, he stepped in. According to him although there were agents present no agent disputed the form 35s. However not all problems were solved as only problems from two polling stations were solved as the person responsible declined to sort out the other problems.
88. In re-examination the witness reiterated that he was a co-ordinator and that in tallying, the Returning Officer was collating results from the stations and announcing of the results. According to him when the Returning Officer announced that the winner got 5,189 votes they realised there was a problem since the votes cast were different from the ones announced. According to him while the votes cast was 26,079 and the registered voters are 34,404, the total votes cast were 25,311. The total rejected were 192 while the total valid votes were 25,119. His candidate, **Mohamed**, after announcement, got 3,781. However some 804 votes were not given to candidate Number 8 from Mamba Polling Station which has 804 votes. With respect to Polling station Number 8 column 8 for **Mrabu Chaka Zuma** their votes totalling 804 are unaccounted. According to him, whereas the total Votes cast were 25,919, the 10 candidates all got 26,478 votes thus there was a difference of 1,175 votes which was unaccounted for. Since the winner got 5,189 as announced and the second person, **Benson Mutiysa Mwilu**, got 4,469 votes if these unaccounted votes had been given to the losers, they would have won. Referred to form 36 at page 110, he confirmed that it was signed by Returning Officer **Juma Musa** on 6<sup>th</sup> March 2013 and the total votes cast is 26,478 which is a difference of more than 1,000 votes. In the next column total number of votes voted cast is/were 26,000 and which is different with 1,175 votes. Apart from this there are several alterations which were not announced. To him, there are votes which were unaccounted which would have affected the results.
89. The next witness who testified as PW21 was **Benard Okello**. According to him, he was a registered voter at Kanana Nursery School Polling station where he cast his vote on 4<sup>th</sup> March 2013 at about 9.00am. After casting his vote, he saw people fighting outside but within the vicinity of the station. According to him a group of people alighted from a vehicle used during campaigns by agents of the 2<sup>nd</sup> respondent and were armed with one of them brandishing a pistol at the crowd. As a result the people who were queuing to vote as well as the ones who were on their way panicked and ran away.
90. In cross-examination by **Mr. Simiyu**, the witness said that after voting he left immediately and did not visit any other Polling station that day. According to him there was one policeman inside the school. On the way he saw 2 vehicles but did not look at their Registration Numbers and the only one he saw was a black one which was the 2<sup>nd</sup> respondent's and the one which was being used during campaigns although he thought it was a Prado. He knew the vehicle because it was the vehicle being used during the campaigns. According to him he attended one rally by the 2<sup>nd</sup> respondent and only saw one black vehicle. According to him, the people who alighted were not fighting anyone but when one of the persons came out, he showed the gun and the witness ran away with others after which he did not know what happened. He however did not know how the incident started but only saw the gun. To him the person who was showed the gun, **Athman**, reported the incident to police while he, himself did not.
91. In answer to the questions by Mr. Mohamed, the witness said that whereas he saw people fighting he did not know why they were fighting. He said he did not know the people he saw coming from the vehicle save that he knew the vehicle. He confirmed that he saw people who had queued to vote running and they told him that they did not go back.
92. PW22 then took the witness stand. She was **Riva Bakari Sifee** and according to her, the Wiper Party Chief Agent at Shimoni Secondary School Tallying Centre. According to her the votes announced by the 1<sup>st</sup> respondent had many anomalies and when the votes recorded for all the 10 candidates were added up the number did not tally with the number of the total votes cast as the number of valid votes cast for all the candidates was 25,119 while the number of valid votes cast was 26,294 hence showing a difference of 1,175 votes between the two figures which was

- unaccounted for. According to her the results recorded by the 1<sup>st</sup> respondent for the petitioner at the Tallying Centre was different from the reports that she was receiving from the agents at the polling stations. In her view the results of the aspirants for the constituency were tampered with and the result slip released by the 1<sup>st</sup> respondent showed several of the aspirants with fewer votes than those actually cast and counted at the polling stations all over the constituency. While at the Tallying centre she noticed that several vehicles bringing the ballot boxes from the various polling stations did not have any party agents in them.
93. In cross-examination by **Mr. Simiyu**, the witness said that after voting, she went home at 12.30 p.m. In her view there is a requirement that agents must accompany the ballot boxes to the Tallying Centre and if this is not done it is unlawful. She however agreed the candidates were supposed to provide transportation. Although according to her there were many anomalies, there were two anomalies which were sorted out.
94. In re-examination the witness reiterated that though there were many anomalies only two were sorted out as the Returning Officer declined to settle the others and said they should be sorted out elsewhere.
95. The last witness for the petitioners was **Athumani Ali Gambere** who testified as PW23. According to him, he was a former Police Officer working as a body guard for Omari Zonga. In his evidence, on 4<sup>th</sup> March 2013 at around 10.00 am he received a call from his employer to go to Kanana Polling Station where his employer had heard someone was bribing voters and check the occurrences. He left Shimoni in motor vehicle registration KBE 888B with a driver. On the way he saw a young man standing on a hill trying to make a phone call. On the way back he saw the young man stop three people walking towards the polling station and packed his vehicle and went to ask him why he was stopping people going to vote at which point the young man became defensive and ran away into the bushes. Along the way he said they came to a point along the road where the road is narrow and only one vehicle could pass at a time. At that point they were blocked by vehicle registration number KBR 202M, VX Land Cruiser which declined to give way and the driver of the said vehicle with others approached them and one of them tried to open the doors of the vehicle but failed. On realising the driver removed a pistol and cocked it. Immediately the witness reached for the gun that was underneath the car at which point the driver reversed the vehicle and the public on seeing this gathered at which point the driver started brandishing the gun at the crowd. According to the witness the young man earlier seen by him appeared and entered the other vehicle and as the vehicle passed them he saw the 2<sup>nd</sup> respondent therein. According to him the said respondent and his agents were driving and intimidating voters and may have influenced some voters who witnessed the confrontation.
96. In cross-examination by **Mr. Simiyu**, the witness said that the vehicle in which he was tinted. He said that he resigned from Police force in 2000. He further said that he had left **Omar Zonga** the previous evening. According to him, he was not given the name of the person who was giving money but he knew him by appearance since he talked to him. He came to know **Benard Okelo** due to this case as he did not know him at the time of voting although he did not see him on that day and was not with him. He said the incident was less than one Kilometre from the Polling Station and reiterated that it was a narrow road and the vehicles cannot pass each other hence one vehicle must pass before the other. According to him the other vehicle obstructed because it reached there and stopped although he was not sure that the engine was switched off. In his evidence the said vehicle was also tinted on the windows and there were two people in front but he did know who were behind. When the person came out, he saw the person behind as the 2<sup>nd</sup> respondent. The person turned the door, removed the gun, got hold of the witness and asked why the witness was disturbing people. It is not in the affidavit. Although he was a former police officer, he said he did not have certificate to possess firearm and does not handle weapons and that the weapon in the vehicle was that of **Omar Zonga** who is licensed and that he had never used it since it is an offence to handle firearms without licence. He said he reported at the police on 4<sup>th</sup> March.
97. In answer to questions by **Mr. Mohamed** the witness said that he got information that some people were being bribed from **Omar Zonga** who wanted him to confirm. He said he did not know the name of the person he saw standing on raised ground but saw the person stop someone and they held hands and gave him something which the witness did not know. He disclosed that

- the driver he was with was called Rashid although the driver did not swear an affidavit in this case. He admitted that he did not personally see the 2<sup>nd</sup> respondent bribing people but saw his people because the person who ran away came out and after the gun incident he entered the 2<sup>nd</sup> respondent's vehicle and if the people came from the 2<sup>nd</sup> respondent's vehicle, they must have been his people though he did not see him personally threatening people or bribing.
98. In re-examination, the witness said that the other vehicle was tinted on the side but not windscreen and it was KBR, green in colour and that the 2<sup>nd</sup> respondent was in the front seat of the vehicle.
99. At the conclusion of the evidence by PW23, the petitioners' case was closed and the respondents opened their case.

### THE RESPONDENTS' CASE

100. The first witness to take the witness stand for the respondents was **Juma Musa Juma** who testified as DW1. According to him he was the Constituency Returning Officer for the Constituency in the just concluded 2013 General Elections having been duly appointed as such pursuant to the Provisions of the **Elections Act 2011** (No.24 of 2011) and **The Elections (General) Regulations 2012**. According to him he swore the affidavit on his own behalf as well as that of the Commission having been so authorised by it to make the Affidavit on its behalf. In his view many of the Affidavits sworn and filed in support of the Petition are devoid of specific particulars but rather contain general speculative allegations based on conjecture and, as such, apart from making general denials of such allegations of wrongdoing, he was unable to depose to or address the specific issues with particularity in order to rebut the allegations made. In this respect, he was advised by his advocate, **Mr. Sanjeev Khagram** that the Petitioner has failed and/or is far below the standard of proof required to discharge the burden placed upon him. To him, the Commission, in the exercise of its mandate under Articles 86 and 88 (4) of The Constitution Section 44 of the **Elections Act** (No. 24 of 2011) and Section 4 (M) of The Independent Electoral and Boundaries Commission Act, deployed the use of appropriate technology and approaches in the performance of its functions. According to him, since this petition is, in certain respects, replicated from the Petition filed in the Supreme Court of Kenya in Petition No. 5 of 2013 (**Raila Odinga –vs- Independent Electoral And Boundaries Commission & 3 Others**) particularly as concerns the use and failure of the **BVR** Machines and **EVID** technology, he annexed a true Photostat copy of the Affidavit of **Dismas Ong'ondi** sworn on the 19<sup>th</sup> day of March 2013 in the aforesaid Petition and filed therein on the same day and adopted all the averments made therein as if they were set out herein seriatim and deposed to by him. The said **Dismas Ong'ondi**, he stated, was the Commission's Director of Information, Communication and Technology. According to DW1, the 2013 General Election was not an electronic election but rather a manual election in which technology was used to supplement and not supplant the manual voting, counting transmission and tallying of the votes. He therefore denied that every check, rule and balance put in place to ensure the integrity of the electoral process was egregiously violated by the First Respondent or himself and that the election for the position of Member of Parliament for the Constituency were not free, fair or credible. He reiterated that the electoral process contemplated in law in Kenya as the system of voting, counting, transmission, tallying announcement of results is primarily a manual system of voting which is configured with various safeguards to preserve the integrity of the process. The use of various electronic devices and IT was an additional process intended to make the electoral process more efficient and in order to enhance transparency and integrity but was not intended to substitute the legally stipulated and envisaged manual electoral process. To him, despite the challenges faced by the Commission in the deployment of the technologies on election day – **EVID** and **RTS** – the Commission continued to use the primary manual electoral process effectively (whose efficacy and accuracy has not been challenged or disproved) and that the elections for the Member of Parliament for Lunga-Lunga Constituency were free, fair and credible and reflected the will of the people of the County and any discrepancies (which he denied) alleged were of such minor nature that they did not affect the outcome of the declared results. To him, the challenge to the results was based on matters of conjecture or of a speculative nature which can, under no circumstances, be the basis of granting the relief sought. He specifically denied that there was widespread exclusion of TNA agents from Polling Stations or that there were widespread

irregularities so as to invalidate or make incorrect the results declared by the Commission and stated only persons recognised as 'agents' in law were permitted to access or remain in the Polling Stations and counting halls or the tallying centres while all other persons without proper accreditation from the Commission were excluded from the Polling Stations for good reason. According to him, he was informed by several Presiding Officers that there were several cases of persons alleging to be 'agents' who wished to access the Polling Stations and he instructed them that unless they had valid accreditation documentation from the Commission, they were to be excluded from the Polling Stations. However, from the Affidavits sworn by the various Presiding Officers from Polling Stations he noted that TNA agents did sign the Polling Day Diaries as well as the Statutory Forms in most if not all instances. He did not however accept that there were any irregularities whatsoever in the elections for the National Assembly conducted in the Constituency hence the blanket allegation that Presiding Officers did not keep the Polling Day Diaries was also untrue since in many instances where specific allegations have been made, the Presiding Officers who swore Affidavits produced copies of the Polling Day Diaries and that all the diaries for the 89 Polling Station which were kept by the Presiding Officers were available for production to the Court if so required. However, it was not practical to produce each one of them by way of a bundle of documents as an Exhibit when no specific allegation had been made concerning this. He therefore denied that any individuals cast votes when their names did not appear in the register and averred that all voters who voted at the election of 4<sup>th</sup> March 2013 were registered and whilst they had challenges with the Electronic Voter Identification Services (**EVID's**), they were in possession of the Green Book which was the Manual Register and so long as an individual's name appeared in this register, they were allowed to vote. To him, there were a number of registers present – the Electronic Biometric Register, a printed version of this, a special register and the Green Book – and which constituted 'the Register of Voters. He contended that no one was allowed to vote twice as is alleged in the Petitioners' Affidavit and no evidence of this was been produced. With respect to allegations of bribery, his view was that no formal complaint with sufficient particulars was ever lodged with the Commission or indeed himself and had such complaint been lodged, appropriate action would have been taken. The witness further denied that he was responsible for issuance of 'agents' accreditation which was the responsibility of the Commission's Regional Co-ordination Office and he specifically denied ever having had any conversation with the **Mr. Chikophe Mwaruwa** on the question of TNA agents accessing Polling Stations and from the Form 35's and contrary to the allegations made, most if not all TNA Agents signed the Statutory Forms as well as the Polling Day Diaries. To him if there was any issue with persons being excluded from Polling Stations, it was on account of their accreditation documents being wanting and not because there was a conspiracy as against TNA. To the witness unless not properly accredited, all 'agents' lawfully recognised and properly accredited by the IEBC were permitted to remain at the Polling Stations, counting halls and tallying centres without exception including those at Shimoni Primary School Polling Station. Further all agents were availed copies of the Forms 35 and 36 and no formal complaints with sufficient particulars were lodged with the First Respondent regarding alleged election offences and neither the First Respondent nor himself were aware of the alleged acts complained. Therefore the witness contended that the results declared for the National Assembly Elections for the Constituency were a true reflection of the exercise of the will of the people and not a result that was manipulated or one that resulted from a manipulated exercise and he therefore denied that the Commission officials connived in any way whatsoever to give the 'TNA Candidates' raw deal and since all agents signed of their own free will he denied that any agent, whether TNA or otherwise, was forced or tricked into signing any of the statutory Forms. With respect to the Polling Day Diaries he averred that these are not statutory documents required to be retained by the Commission for public record purposes but rather are a tool introduced to enhance transparency, integrity and improving efficiency of the election process. He however could recall that on 4<sup>th</sup> March 2013, he received a call from the Presiding Officer at Perani Primary School Polling Station informing him that there was an aspirant for Vanga Ward whose name did not appear in the Biometric (**EVID**) register. The said Officer informed him that **Mr. Sengeza** was livid as his name appeared on the ballot and he would never, have been allowed to vie for a seat unless he was a registered voter. The witness requested the said Presiding Officer, to check whether his name appeared in the Green Book which was the Manual Register compiled by the Commission from the forms completed by individuals at the time of the

voter registration exercise and about an hour and a half later, he received a call from the said Presiding Officer who confirmed that **Mr. Sengeza's** name did appear in the Green Book and that they would shortly call him in to vote. It was therefore untrue for him to allege that he was permitted to vote when his name was not on the register since if this was the case, even his nomination for an elective post would have been rejected. He further stated that other cases of voters were allowed to vote when their names were not on the register. He however denied that any breaches were reported from Perani Primary School Polling Station and that if the same had been reported action would have certainly been taken if it was found any breaches had occurred. In his view, there appears to be an orchestrated attempt by the Petitioner to paint the Commission and himself in bad light in a bid to achieve a victory for his party's candidate and he found it extremely strange and regrettable that if the instances of breaches prior to the elections indeed existed, why no formal complaint with specific particulars was lodged. To him, in so far as the results of the election for the National Assembly for the Constituency are concerned, whilst there may have been some typographical error due to exhaustion and the pressure to announce the results, these certainly did not affect the outcome of the Election in which the people's will was expressed and the declaration made in so far as the winning candidate is concerned still stands. To him therefore it is patently clear that the Petitioner has no basis in law or evidence to persuade this Honourable Court to grant the reliefs sought on account of alleged breaches and wrongdoing which it is apparent, to the contrary, did not occur and that even any minor variances that may be present are not of such nature as to affect the outcome of the election or result declared or vitiate the entire election for the National Assembly for the Constituency. Based on the advice from his advocate he believed that the evidence produced herein by the Petitioner falls far short of the requisite standard and ought to be discounted and/or ignored. Further he stated that from the affidavits filed in support of the Petition that many of the deponents thereto admitted, on oath, to having committed election offences and in order to preserve the sanctity of the law as well as the electoral process, the Honourable Court ought to make appropriate orders in this respect. According to him, during the elections including (but not limited to) the voting exercise, vote counting exercise, tallying exercise and declarations made, no specific complaint was ever raised with his office as regards any wrongdoing or the commission of alleged election offences or malpractices and had specific complaints with sufficient particulars been raised, appropriate action would have been taken against the perpetrators thereof. According to the witness there were certain typographical errors in the Form 36 that were subsequently ratified and he exhibited the amended for 36. It was his evidence that all votes cast were accounted for and tallied. With regards to the affidavit of **Marinda Jawa Kombo**, the witness deposed that no complaint of the matters complained of was made or sufficient particulars supplied otherwise appropriate action would have been taken and he was further unaware of the other general allegations of bribery and/or treating and no complaints were lodged as regards these. With reference to the affidavit of **Yusuf Rashid Mrafi**, he was not aware of any breaches or wrongdoing at the various Polling Stations referred to therein and certainly no complaints regarding these were raised or made. According to him only registered voters were permitted to vote on the 4<sup>th</sup> March 2013 general Elections provided they had the proper documentation required and no other persons were permitted to vote and certainly not unregistered persons as appears to be suggested therein. With regards to the affidavit of **Bernard Okello**, he denied that any incident occurred at Kanana Nursery School Polling Station as alleged as he would have certainly received a report or complaint on this had such incident occurred. In his view, there was adequate security at the said Polling Station and had anyone been found branding weapons close to a Polling Station, they certainly would have been apprehended and charged with the relevant offence. As regards the Affidavit of **John Mwaivu Bemaundu**, he denied that the provisions of Article 86 of The Constitution of Kenya were violated or that there were several anomalies whether as alleged or at all and to him, the errors did not materially affect the outcome. To him most of the allegations were not reported to him but he denied the allegation that the 2<sup>nd</sup> respondent's laptop was connected to the frame of the Commission's system. He therefore sought that the petitions be dismissed with costs

101. In cross-examination by **Mr Kimani**, the witness said that apart from being the Returning Officer for the Constituency, he was also the constituency elections Co-ordinator for the constituency. According to him there is a difference between **Mr. Juma** the Returning Officer

and the Commission though he is representing the Commission and himself in his affidavit though he did not receive written authority from the Commission to swear affidavit on its behalf. He said that the main mode of communication from Presiding Officers to his office was through mobile phone and that they had a call centre to facilitate the communication housed at the Tallying Centre. According to him he only visited Lungalunga, Mwazaru, Kidimu while the rest of the stations depended on mode of communication provided by Commission. He confirmed that they had laptops at the Tallying centre and there were communications from the stations to calling centres by way of short text messages from all the polling stations from which messages were sent at intervals of every two hours. According to him they got form 35 which they used to prepare form 36. With respect to **Mrabu Chaka** he admitted that there were minor discrepancies and that 804 votes were not captured in the final tally. However he said that the omission was discovered immediately at the Tallying Centre though the result he read for **Mrabu Chaka** was minus 804 votes. According to him since there were 6 elections by the time they moved to the next person they had realised and amended form 36 though by that time they had already read the results minus the 804. He however conceded that the amended results was not announced and that **Mrabu Chaka** was not there when they announced the results and that if the said votes are included, he would become number two, the runner up. Referred to Vanga C061, he said that Candidate number 2 **Mutisya** was given 22 instead of 2 but this he explained as a typing error. He further confirmed that he gave 2 votes to Number 3 instead of 13 while candidate no. 6 was given 9 votes instead of 913. As for candidate number 5 his votes were underestimated by 10 votes. According to him, because of the omission, they only accounted for 665 votes. He however admitted that 313 votes are significant. In Vanga he said that there were 5 typographical errors involving adjustments and that they were not in tandem with form 35s. With respect to Kiniki Primary, he said that there were 295 valid votes cast and only 250 votes are allocated to the candidates since the others were typed out and this was discovered after announcement of results. With respect to station C022, 28 votes were typed out and nobody was given credit for them in form 36. As for station C030, there were 10 votes typed out while in station C060 10 votes were typed out. He however clarified that they are not hanging but allocated to candidate. For station 014 Kikonde, 10 votes typed out while in Bengo station C034 3 valid votes were omitted. At Shimoni Primary School station 0001 there were 2 excess valid votes since 827 valid votes were indicated instead of 825 valid votes. With respect to station C008 shows 665 votes were cast while valid votes according to form 35 is 655 thus showing a difference of 10 votes. A similar problem was witnessed in C020, C063 4073 Mlahiwu, Mwalewas, Mwasefu. He however testified that on noticing the errors, they amended form 36 so that pages 99-105 is the first form and with 166-110 being the amended. However the amendment did not, in his view affect the outcome. He said that where you have excess votes cast than registered voters you do not include the station but in their scenario they did not have excess votes and had the errors been discovered earlier they would have done things differently. Although as a perfectionist he regretted the errors he said that since the results were not affected he did not regret the errors despite the fact that he did not attain his aspiration with respect to transfer of data. To him these errors were very simple and the exercise was very simple and fair to the candidates since the figures are in form 35s. Although the difference between the winner and the runner up was 719 as declared, upon amendment, the number changed to 565. According to him, in the initial tallying 1167 votes were not tallied. He however conceded that there was a candidate who requested for the testing the same with form 35 and I acceded to the process which involved a recount of votes in two stations, Mgombezi and another station wherein the candidate said that there are errors in postings in form 35s. According to him they were obliged to communicate results in Page 99 to the Commission which they did although the form does not provide for comments. They however did a report and explained the amendments though he admitted that the alterations at page 105 are not countersigned. According to him some candidates including the 2<sup>nd</sup> respondent attended the Tallying exercise. He however denied that he was known to the 2<sup>nd</sup> respondent before the nominations hence to him the allegation that there was unholy association between them was mischievous distortion of facts. He denied having any interaction with him even once at the Tallying Centre. Although he had the responsibility of ensuring all stakeholders had access to my office, he could not remember receiving any call from the witnesses such as **Chikophe Mwaruwa** though he could not tell whether his Personal Assistant, **Newton Kioki** received the calls. With regard to Perani he

admitted that the candidate's name was missing and he knew he had registered since it is him who cleared him and he was allowed to vote after they found his name in the register after he gave directions. With respect to the other alleged people whose names were missing he said he was not made aware since the action was to be taken by the Presiding officer if names were missing. He however denied that TNA agents were locked out. We have the call centre but I did not go to all the Polling Centres. He however said that although **Bogodzo** was allowed to vote the other 16 were not since whereas **Bogodzo's** name was missing in the EVID it was in the original Register. According to him, the Presiding Officer did not report the issue of the other 16 and only involved him in **Bogodzo's** case because he was a candidate so he would not know whether the 16 were allowed to vote or not. Referred to the Polling Day Diary for Lungalunga Primary, he said that whereas particulars of agents are signed when they report and when the Presiding officer wants to seal the boxes, they can sign after the process provided there is a consensus but must be taken on the earliest opportunity. According to the training given to the Presiding Officers, he said that the Presiding officer cannot allow an agent to enter the Polling Station without particulars of accreditation. He however said that the particulars are taken before the sealing exercise is concluded. In his view all incidents are in the notebook since the Polling Diary is administration tool hence the reason why the notebook is placed in the ballot box in order to avoid its manipulation as opposed to the Diary which is not foolproof. Whereas he admitted that he exhibited an affidavit of **Dismas Ongondi**, he said that he could not vouch for the matters had deposed to in his affidavit. He however said that he did not receive any complaint with respect to any wrong doing as the same were not reported to him.

102. In answer to the questions by **Mr Asige**, the witness said that the constituency is a new constituency and that it is a very poor constituency without water, roads, schools etc. The majority of the people have not gone to school and the illiteracy is very high. He said that he prepared form 36 at the Tallying Centre when he was collating results and announcing the results. He admitted that they were tired and that to a certain degree, concentration declines and mistakes or errors may be made which may not be deliberate but if they are not serious you do not regret. According to him they announce results and then tally. In the constituency they had 79 Polling Streams and 89 streams and they received 89 form 35s from the various Presiding Officers. He said that he relied on the form 35s and that the instruments filed pursuant to Rule 21 are not made by himself. Although his duty was to collate, announce and tally results accurately and promptly, he admitted that in election every vote counts. He admitted that the law does not allow him to make errors on the forms. According to him the results were announced on 5<sup>th</sup> evening overlapping to 6<sup>th</sup>. According to him, he announced the results on 5<sup>th</sup>/6<sup>th</sup>, prepared form 36 which he signed and the crowd dispersed and that he declared the results in paragraph 4 of the petition no. 9 of 2013 which was identical to Page 99 of the filed documents. He however admitted that there was amendment in form 36 which contained so many handwritten amendments in that form which he signed and dated it 6<sup>th</sup> March, 2013. According to him, these amended results were the accurate results for the constituency according to him though the same have never been declared or announced to the people of the constituency. He admitted that the results he announced on 5<sup>th</sup>/6<sup>th</sup> March, 2013 to the people were inaccurate. He conceded that there were complaints in about two polling stations about incorrect numbers and he attended to them. The nature of the complaint was that what was announced was different from what was contained in form 35. He confirmed that the complaint was correct and that the complainants were right. He conceded that they were pressed for time and everybody was tired but denied that there were other complaints. He said they recorded the two disputes in the ballot boxes and in the note book which is very crucial and is in the ballot boxes and therefore for one to get to what actually happened, one had to get to that notebook. While admitting that the 2<sup>nd</sup> respondent's came to the station with a laptop, he said that there was no way he could have sat on their side since he was not an IEBC official. While admitting that the Tallying centre had electricity, he said that they did not have installed computers but only laptops and that they were operational. To him, there was nothing wrong with anybody having a laptop and he did not know whether it was the only laptop in the room. Since they had no system at Lunga Lunga there was no system to connect to. Although the phones at the calling centre were working the RTS did not work. He clarified that he only used form 35 to amend form 36. According to him, he people registered in Lunga Lunga

were 34,404 and the 2<sup>nd</sup> respondent according to announcement got 5,188 and was declared the winner. However slightly 26,286 voted according to his records, which is 76% not 73% which is not correct hence the 2<sup>nd</sup> respondent who garnered 5,196 got slightly over 20% of the people who voted but the percentage would be lower with respect to the total registered voters. He admitted that he did not know how many registers were there at Lunga Lunga constituency. According to him his denial of the incident alluded to by **Benard Okelo** was because he did not receive a report from that polling station. He however denied that they were constrained with staff and said that they had adequate staff over 70 in Lunga Lunga Constituency to be accurate and efficient in discharge of duties. According to him, most Presiding officers preferred to record incidents in the notebook rather than in the diary and that what happened would be contained in either the two instruments. He however said that he did not know whether the ballot boxes were accompanied by agents.

103. In re-examination by **Mr Khagram**, the witness stated that he was a Gazetted Returning Officer by IEBC in charge of the Constituency and that it is the Returning Officer who is the proper person to swear the affidavit because he was acting with the authority of the Commission representing the Commission and hence was the eye and ears of the Commission. He confirmed that he is a permanent and pensionable employee of the Commission. According to him, since he lives in Lunga Lunga he had no other motives for registering in Lunga Lunga. He said that they announced results as per form 35 and tallied them in form 36 after which they declared the results. To him the first form 36 was the tallying while the amended was the re-tallying. According to him, the tallying and re-tallying were open, transparent and credible. He said that the bundles of form 35s were prepared by the Presiding officers and not by him. He said that save for one or two form 35s all of them were signed by the Presiding Officers and that those are the ones used in tallying and re-tallying. To him as of 10<sup>th</sup> April, 2013 when the petition was filed, they were aware of the re-tallying. He said that in each of the 89 station, they gave form 35s and they announced result for each of the streams and the agents and their candidates were present and it was only one agent/candidate who complained in respect of two issues while the other issues were not raised and they accepted the results. That is in connection with back of form 35. However the two complaints were sorted out to the agents' satisfaction. With respect to **Mrabu Chaka's** votes, the witness said that he was initially Number 4 and after re-tallying, became Number 2, while Number 2 moved to 3 and Number 3 moved to Number 4. I see Petition Number 4 Paragraph 11. According to him, the petition number 9 does not concern **Mrabu Chaka** while with respect to **Benson Mwilu**, he moved down after re-tallying and could not have won. In his view, election is about competition and for the winner to become an elected leader hence there is no price for Numbers 2, 3, 4 and 5. In his view, the minor discrepancies did not change the results of the elections. If the re-tallying could have changed the winner, it would have been catastrophic since the person declared winner would not have been the winner. The re-tallying did not change the results and reflected the will of the voters and the 2<sup>nd</sup> respondent was declared MP on 6<sup>th</sup> March, 2013 when he announced the results. If there was anything that was not done correctly, he would not have sent them to the Commission. According to him, in the Petition, no single station has been mentioned. Referred to C021 – Kituki – Page 46, he said 9 agents signed while at page 105 with respect to station C21, the error was what **Mrabu Chaka** got, as the form 35 indicated 50 and we amended to 50 while at station C008 Majoreni total voters initially show was 655 while form 35 showed 665 votes and these are the numbers they entered in form 36. Therefore it was his view that none of the candidates lost even a single vote and that the errors were not biased and there was no malice since errors affected all the candidates and the errors were amended and the forms sent to Nairobi. According to him, it was not correct that 1197 votes were not allocated and form 36 was amended, the very day before they closed the centre. To him, normally, votes are counted at the Polling stations and the Presiding officers announce the results and the agents are allowed to demand for recount and if satisfied, they sign the form 35s. Majority of form 35s were signed posted and given to the agents who gave them to their secretariats who tallied them and the agents were given copies of form 35 and none of them raised the issue that they were not given copies of form 35. He confirmed that when they were reading the result, the votes for **Mrabu Chaka** were disputed and they recounted the disputed votes for **Mrabu Chaka** and he was satisfied. After recount, they got what he had as per form 35 and he signed the amended form 36 to confirm the amendments. Referred to the documents filed under rule 21 the witness was able

to point out at the various instances when the TNA agents were present. With respect to the phones the witness clarified that the normal phones were working but the ones meant for Result Transmission System which were configured to transmit the results were not working. Not all the EVID's worked and where they did not work they resorted to manual registers. According to him, the final result is contained in forms 35 and 36 not the ones transmitted electronically and that the results in form 35 in court accord with declarations made. He admitted that everybody was tired and there was possibility of making an error but he did not regret the error because they corrected the errors and even with the errors the outcome did not change. He said that nobody was barred from bringing a laptop to the Tallying Centre since it was not an offence to have a laptop since the Commission's laptops were not even connected to the sockets but were standing alone. Therefore the 2<sup>nd</sup> respondent's laptop could not have been connected to the system because it had collapsed. According to the witness they were not responsible for transporting agents to the Tallying Centres and the parties could have provided their agents with transport to follow their vehicle.

104. The next witness for the respondents was **Raymond Mpemba Ruwa** who testified as DW2. According to him, he was the Presiding Officer at Perani Primary School Polling Station (Stream 2) at Lunga Lunga Constituency in the Kwale County during the General Elections held on 4<sup>th</sup> March 2013. With regard to the Affidavit of **Rashid Bogodzo Sengeza**, he conceded that his name did not appear on the Register, but after consultation with the constituency returning officer, it was confirmed that his name appeared in the Green Book as a registered voter and thus was allowed to vote. He however denied that any voters were allowed to vote whose name did not appear on the register. He further stated that there was no instance of campaigners for the 2<sup>nd</sup> respondent at Perani Primary School Polling Station or in its vicinity and certainly no complaints as regards this were raised with them and that had there been complaints, they would have taken action appropriately. He further deposed that no one complained to him on any happenings at the entrance of the polling station, and that they had security officers to make sure that any wrong doings should be reported immediately. It was therefore his view that the elections conducted at Perani Primary School Polling Station were free, fair and credible.

105. Cross-examined by **Mr Kimani**, the witness admitted that he encountered a problem at Perani in that he could not find some names in the manual register for about 15 to 20 people and he sought directions from the Returning Officer's office who after some difficulty in getting him, explained his problem. According to him **Bogodzo's** complaint was that he was unable to vote because his name was not in the manual register but his name appeared in the Green Book. According to him, it is the Returning Officer who made the decision that he should vote and it was communicated to the witness via a phone. For the 16 others, he was told to check the Greenbook and if their names did not appear in Greenbook they should not vote. He however did not hear any complaint or skirmishes and that the main complaints were on lack of names and how the names were divided among the streams. They had identified the problems beforehand so they re-arranged the names in alphabetical order though he did not get approval of the Returning Officer. But this was used to direct the voters where to go since the names were not alphabetically arranged. He confirmed that they had police because it was a big area. From the polling centre to the gate was about 200 metres. So they put one at the gate and one on the queue since they had two police officers. However the police officer did not report any incident at the gate and he did not see anything untoward and hence he could not take action on something that he had not seen and had not been reported to him.

106. In answer to **Mr Asige's** questions the witness reiterated that the biggest challenge was the lack of names in the registers since there were people whose names did not appear in the register and did not vote. He admitted that there were serious shortage of form 35s but could not remember whether none of the agents were given the form. In his view none of the agents were given the form and they only stuck it on the wall. Although he was in charge of stream 2, referred to page 94 he confirmed that it was signed by himself on 4<sup>th</sup> March, 2013 at around 2.00 or 3.00. He clarified that the form was signed on 5<sup>th</sup> and not on 4<sup>th</sup>. Shown his form 35 he admitted that none of the agents signed the form because by that time most of the agents had gone as there were no party agents by the time he finished counting though the reason was not indicated as it skipped his mind. He could not similarly recall whether he indicated in the Diary which he submitted to the tallying centre. He accepted that without the diary, he could not state that he entered the challenges. According to him he was accompanied by party agents to the Tallying Centre.

107. In re-examination by **Mr Mosota**, the witness said that he looked for the missing names in the Greenbook. According to him, the reconstructed list was the same as the register and it was meant to avoid the confusion since the register was not alphabetically arranged. According to him, the confusion on dates could have been due to lapse in dates. In his evidence they were not told it was mandatory to make comments in form 35s and there was no incident which was reported that required to be signed. He confirmed that no reasons were given for failure to sign the form 35 by the agents.
108. **Khatib Abdalla Mwashetani**, herein referred to as the 2<sup>nd</sup> respondent testified as DW3. According to him, he participated in the 2013 General Elections as a voter and Parliamentary Candidate nominated by the FORD KENYA Party and was duly elected and certified by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as having won the election for the Member of Parliament of Lunga-Lunga Constituency. According to him, he, in person nor in conjunction with any other aspirant of any political office in Kwale County, have never given needy Lunga-Lunga secondary school children attending schools within and outside Kwale County, school fees and other handouts a week or so before the election, with the sole intention of inducing the parents of such recipients to vote for him and that the allegations of bribery contained in Paragraph 3 of the Petitioner's Affidavit are all false and have been conjured by the Petitioner. Furthermore, the Petitioner in his affidavit and Petition failed to state the specific dates in the election period that he paid the bribes which he denied having paid. According to him, he was one of three (3) Directors of **Mwashetani Foundation** which is a separate legal entity which has not been made a party in these proceedings therefore any allegations against it are invalid in law. He proceeded to deny that he gave cash handouts even on the election day for the supply of building materials, desks and lockers to secondary and primary schools in the area, the installation of tanks and the sinking of toilets in public places at his own cost. To him the will of the people was exercised in that everybody voted for their candidate of choice and it is impossible to say that the allegations contained in Paragraph 10 of the affidavit which he denied in their entirety, had an effect in any way on the outcome of the election of the member of National Assembly of Lunga-Lunga Constituency. According to him, he denied the averments contained in Paragraph 6 of the affidavit in that the Petitioner was making generalized allegations of irregularities without being specific and furthermore, the results were not transmitted electronically because the system failed to work not only in Lunga-Lunga but in many parts of Kwale County and the Country at large and that everybody had to rely on manual tallying of the results and that no agent of TNA and or any other Party was excluded from the Polling Stations as mentioned by the Petitioner at Paragraph 6 of the affidavit. To support this contention he exhibited a bundle of the Forms 35 of the Polling Stations that the Petitioner alleged in his Petition that his agents were excluded, which forms were consequently signed by all agents of all parties present at the Polling Stations. According to him, the absence of any agent in the Polling Station did not invalidate the election in any way. He denied visiting the schools mentioned in paragraph 7 to deliver any equipment including new desks. He further denied that he supplied goods and equipment to schools, churches and community groups and to him the Petitioner failed to mention these party informers neither did they sign affidavits to that effect, and whatever the Petitioner alleged in the said paragraph of the affidavit therefore amounted to hearsay evidence and could not be used in this Honourable Court. In response to paragraph 9 of the affidavit it was his position that the Petitioner gain made allegations which were baseless in that the agents who supplied the Petitioner with that information which was completely false, did not swear affidavits to that effect. Based on information from his advocate there was no criteria to lock out some agents and specifically TNA agents out of Polling Stations if they had with them the necessary documents indicating that they were agents for the party for purposes of the election and that all other Parties have not made any complaints about their agents being locked out hence this allegation therefore seemed wild. To him, the election process was in accordance with the constitution and the **Elections Act** and that there were no irregularities whatsoever and that the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents duly declared the right candidate as the winner of the elections. He conceded that there was no transmission of the results electronically as the electronic systems failed to work and that everybody had to rely on the manual tallying after the ballot boxes had been ferried to the Tallying Centre. In his view and in response to paragraph 13 of the affidavit, the votes that the Petitioner sought to explain had been cast, had no effect or at all in the total outcome of the election of the member of National Assembly of Lunga-Lunga Constituency and

that the Petitioner also failed to mention these other Polling Stations by name if there are any hence the contents in Paragraph 13 of the affidavit were therefore baseless. According to him, he never made any promises in his own person in the final weeks preceding the elections to procure any desks and or school equipment for any school, offer money to any individual or community groups and or village groups, declare or attend any public *harambees* or Political rallies and offered cash handouts at the said functions in the last few days and or weeks and or month to the elections, neither did he attend any public gathering or fundraising organized by any school whether primary, nursery or secondary and made any kind of promises whatsoever to the parents, teachers and students anything or at all if they voted for me on the day of the election. He further denied the averment by those who alleged to have witnessed him committing the said allegations. In his view the 2<sup>nd</sup> petitioner is a proxy to a candidate who vied for the seat of the Member of Parliament for the Constituency. In his view the provisions of the law were adhered to and he did not violate any provisions of the law. In his view the results announced and declared at the Tallying Centre tally with the results of the votes cast in the Constituency. He further denied the allegations that he delivered tanker of water and denied that there was any connection between him and **Hemed Majuto**. To him the allegations directed at his driver were committed by an agent of **Omar Zonga** and in any case the event did not affect the outcome of the election. According to him, the form 35 were not enough for every agent and any agent who wished to make copies thereof could do so as the same were attached to the door and entrance to the polling station.

109. In cross-examination by **Mr Kimani**, the 2<sup>nd</sup> respondent said that he made a decision to vie for the seat from five years ago when I was 33 years, due to the problems that were there and my capacity in order to try and change their lives and living standards of the people. He said that he did not have a residence in Lunga-Lunga but had a residence is Msambweni. Although he started his campaigns in 2008/2009, his main campaign started after announcement by the Commission in 2013. According to him, during the campaigns he had a convoy of 3 cars because of security though his supporters were not moving with him. The people who habitually accompanied him were his security, driver and a personal assistant. His driver was **Khamis Shamvi** and the role of his Personal Assistant was to keep record of what was going on and the schedules. To him, the most significant problems were education, clean drinking water, sanitation. Poverty however was due to low standard of education, sanitation and water. He however did not address these issues during the campaign but proposed how to fix them. According to him, some of the proposals were on invitation while some were on encounter and he made so many proposals on health, including maternity which proposals he prepared verbally and were with his Personal Assistant and it is the work plan I am using now as an MP. With respect to education, he did a work plan to be executed after elections. According to him, he held two to three rallies at Jua Kali but could not remember the exact dates. He however denied the allegation that he signed a Cheque at Jua Kali. While admitting that there is a mosque at Kiruku village he denied that it was built under his sponsorship. Although before January he was engaged in some construction he could not remember it was in Kiruku. He however admitted that he had sponsored some projects such as construction of mosques, churches and schools and had also helped in so many things such as education, furnishing classrooms. He also tried to solicit funds to raise the educational standards and also provided bursaries. According to him, it was consolidation of ideas. He also sponsored some students, women groups including cooking providing big *sufurias* as well as sponsoring the sinking of boreholes not less than 18 for the past four years before the election period. The bursaries were however on application basis as he had agents who would establish the children with capacity to perform well but were unable to afford education. He targeted students with 350 points and above but at times had to lower it down. Shown the cheques dated 15<sup>th</sup> February, 2013 referred to in the receipt from Lunga-Lunga Secondary school, he said that he did not have schedule of personal cheques issued to schools. He however confirmed that he was the one who was giving the cheques so the Personal Assistant would not have them since he engaged him 6 months before elections. He admitted that he knew Mtune area having assisted there when the wells in Mtune when being constructed. He said that he had agents who were paying and that they were on-going activities. When shown cheque no. 000138 dated 20<sup>th</sup> February 2013 in the sum of Kshs 5,000/- to Ribe High School, he said that he could not remember dealing with the case and that the cheque was not his personal cheque. He however confirmed that he could see his signature on the cheque though he could not remember when he signed the cheque. He confirmed that other

signature was for members of the Trust. Although the trust operates by looking at the application he conceded that there are others given without. According to him the cheque dated 20<sup>th</sup> February 2013. was the 138<sup>th</sup> cheque issued from the date he got the cheque book. He could not remember exactly how many cheques he issued in 2013. He however denied having attended any meeting to approve bursaries for **Mwashetani Foundation** though he could not remember when approval to issue the cheque in question was given. He was however aware that a company acts through directors and he was still one of the original subscribers of **Mwashetani Foundation** though he could not remember the last time he was served with a notice convening meeting for the Foundation. Referred to the affidavit of **Musembi Musyoki Musembi**, he confirmed that the cheque is for Mwashetani Foundation dated 27.2.13 signed by him in favour of Perani Secondary School no. 000170 for Kshs.2,000/= for Perani Secondary School. The last one was 000179 dated 27.2.2013 for Kshs.2,000/= in favour of Gonzi Girls. He confirmed that all the cheques save for Ribe are in Lunga-lunga and they bear his signature though he complained that he was not an expert. Referred to cheque Number 000169 in the list, he confirmed the list as reflecting some of the transactions by the Foundation and that the cheques annexed were not fabricated but were issued by the Foundation and were issued in February. He could not however remember attending any bursary meeting for Foundation. He confirmed that the campaign period was December 2012 to March 4<sup>th</sup> 2013. To him he issued personal cheques before December 2012 to assist individuals though he could not remember the number. He however denied that the cheques were his since they are for two different entities between Mwashetani the person and the Foundation. He however confirmed that he never resigned or retired from the board of the Foundation but reiterated that he could not remember the last time he received invitation to attend its meeting. On the voting day he admitted that he visited other polling stations and passed Perani Primary School and therefore if it was said his vehicle was seen near Perani that would be right. He said that he was driven by his driver to Perani and admitted that he could have slowed down but I did not talk to anybody. According to him, he slowed down at the gate and proceeded and it is untrue that he stopped. He denied the allegations made against him since to him that would have jeopardised his chances of being elected. To him he was slowing down to observe. He denied that Rashid was known to me on 4<sup>th</sup> March, or at all and similarly, he could not remember whether **Damaris Nzula** was known to me. According to him, they would lie because they are affiliated to his opponents. Although it would not be possible for him to personally pluck a cheque, his view was that the election would not stop the functions of the Foundation from going on. To him, he was fighting for people to recognise him as a strong candidate and it would not be possible for people to mistake him for another candidate and that those who voted for him knew whom they wanted to vote for. Although he visited Perani, Kanana and Nzombo, he could not vouch for what happened in the station since he did not go inside. Referred to the petition he admitted that the results are the ones read out at the Tallying Centre and after they were read, he did not leave immediately since they were waiting for others such as Ward Representatives though he did not wait till the end of the Tallying process and could only remember his results as 5,188. He however learnt that the declaration was revisited and knew where the irregularities were since he in-putted the data from form 35s. He was however unaware whether the Returning Officer made another declaration for Lunga-Lunga. Referred to page 99 of the filed documents he confirmed that they were the results which were announced while the ones appearing at page 105 were not announced and he could not vouch for the other statistics. At the Tallying Session he heard one of the protestations from **Mrabu Chaka** who was seated next to him and who was disputing the votes as declared that he had more votes than the ones announced. The matter was however resolved and it was confirmed that he was complaining on good grounds. The entire box was opened and votes for **Mrabu Chaka** counted and it was discovered that what was announced was lower than what he had garnered by 450 votes. On his part he did not make any complaint as his votes were understood as well as **Mrabu Chaka's**. He however knew that eventually when the errors were corrected the results of Lunga-Lunga changed. At the centre it was only himself and **Mrabu Chaka** who were the contestants present. While conceding that there were a few discrepancies due to human error his view was that the whole process was accurate.

110. In answer to question by **Mr Asige**, the witness stated that **Mwashetani Foundation** is non profitable organisation but admitted that it was his brainchild although he later clarified that it was his baby but conceptually it incorporated 3 of them though the idea was his having been the one

who brought it up despite the contributors being many. He said that the Foundation is registered and that they paid for registration with **Abubakar Juma Manzenye** and **Haji Shariff Haji** and it was registered on 27<sup>th</sup> January, 2010 with the Registrar of Companies. According to him, he is the first subscriber and it is a Foundation, a company with objectives such as alleviation of poverty and eradication of HIV. Although he is the Chairman of the Foundation, every person has a part to play. According to him, they had had about two Board Meetings since its registration in 2010 though he could not remember when they took place although he was present at both occasions. The minutes of the meeting were kept by the secretary, **Abubakar Juma** and the first board meeting was about education as well as the second one involving both persons and institutions but not specifically for Lunga-Lunga Constituency. He said that the Board dealt with issues in Msambweni, and Diani where they contributed to destitute students. With respect to institutions there are no other areas as all areas are in Kwale. According to him, he has been in politics since late 2010 and he developed active political ambition when I got involved in elective politics aiming at National Assembly for Lunga-Lunga constituency and though he was not a resident of Lunga-Lunga he had properties in Lunga-Lunga. He however denied that the Constituency is one of the poorest place on earth and stated that it is rich with resources which have never been exploited. He however conceded that the majority have no education and that the majority of the people are very poor with minimal infrastructure and health facilities. It has no tarmacked road and no piped water and is a far flung constituency. Although he admitted that he was born and went to school in Mombasa, he said that he had lived in Lunga-lunga, in Vanga ever since he was born since his parents live in Vanga. According to him, he swore affidavit in answer to the petition before **Balala and Abed** in presence of **Mr. Abed**. According to him, when he got into politics in 2010 there was no constituency known as Lunga Lunga. He admitted that he supplied desks to students generally to various Schools although it was not aimed at making him a member of parliament specifically but generally it was part of his strategy to enhance the quality of life. He could not however remember he delivered the desks but denied that this was during January, February and March, 2013 but was far before then. He admitted that he supplied water and sunk bore holes and wells but not between January and March but before December. He accepted that he had sunk some boreholes one in Mwena since they required another well and there was one going on. He denied however that he had started a new one and further denied that he had ever given bursaries to Lunga-Lunga student as a person or through agents though the foundation had paid fees for various students in Lunga-Lunga before election. With respect to the allegation of commotion when going to Kanana, he said he was in my taking a nap vehicle but denied that his agent drew a gun. He admitted that his vehicle is a green Land cruiser KBR 202N though he had 8 vehicles 3 of which are Land cruisers. However the vehicle he had was the one he was using for the rallies. According to him, no guns were brandished to his view since he was the only one who possessed a legal firearm. He was however informed that the owner of the vehicle in which **Omar Zonga** sat reached for a gun though he could not vouch for it. He admitted that he was a political threat to all the aspirants because of his political activities such as the developments he did such as sinking boreholes, supply of desks and paying fees though he was unable to remember the number he paid fees for. He however confirmed the results in paragraph 4 of the petition no. 9 of 2013 were the ones announced for himself and that there were no other results announced. Referred to the reverse of page 105 of the documents filed by the Commission he confirmed that the cancelled figure of 5,188 was the figure which was announced by the Returning Officer though the handwritten figure is 5,198 which he was however unaware of. After announcement, of the figures in form 36 at page 99, he was given a certificate of result declaring a winner on 5<sup>th</sup> March, 2013 by the Returning Officer. He admitted that by the time of announcement, he was personally tired and other people were sleeping although he could not confirm that there were inadequate form 35s since each one of his agents had form 35 hence he had known his results from the forms even before the announcement had been made. He said that the complaint by **Mrabu Chaka** was in respect of the votes announcement and it was about the number of votes garnered at the particular station and that one ballot box was opened and recount was done and a scrutiny done which revealed errors showing that form 35 was incorrect. He was however not present when the other ballot box was opened. However the correction was announced by the Returning Officer although he could not remember the Returning Officer making any note thereof and neither could he remember any demands made by other candidates and the Returning Officer saying that there

- would be no further recounts. According to him, eventually declaration was done only once. He admitted that **Kassim Abdalla** is his brother and his Chief agent. Asked whether any new forms 35s were issued he said he could not confirm the same though he heard complaints from agents that they had not been given form 35s. According to him he was sure he won the election and did not find any irregularities.
111. In answer to questions by **Ms. Kanabar**, DW3 reiterated that the elections were free and fair and denied that he was connected to the Commission but that the laptop was meant for his input and it was his personal computer.
112. The next witness who testified as DW4 was **Elina Kwekwe Mangale** who deposed that she was the Presiding Officer at Lunga Lunga Primary School Polling Station (Stream 1) during the General Elections held on 4<sup>th</sup> March 2013. According to her all the agents allowed into the polling station had, in their possession, the signed oath of secrecy Forms which she personally verified before allowing them into the Polling station and that no agents who were properly accredited were excluded from the polling station irrespective of what time they arrived or what party they represented. The only persons excluded, according to her were those 'agents' who did not comply with the law or were not properly accredited. In her view, the elections conducted at Lunga Lunga Primary School Polling Station were free, fair and credible and all agents signed the Form 35 and her polling day diary, save for some who had left the polling station. According to her there was consensus between herself and all agents present on all matters and no dispute or complaints were raised.
113. On being cross-examined by **Mr Kimani**, the witness denied that she allowed people to vote yet their names were not in the register and asserted that she only allowed people who had all the requirements and excluded people who did not have all the requirements though she did not have their names. She however did not meet any agent who had not met the requirements. According to her form 35 at the reverse of page 40 was supposed to be signed on 4<sup>th</sup>. To her she finished the counting on 4<sup>th</sup> at night past midnight and the people who signed at the back signed after she finished counting. While acknowledging that she was under an obligation to keep a Polling Day Diary, she confirmed that page 44 item 1.3. reverse which was to be signed on 4<sup>th</sup> was empty. According to her she did not encounter any problem at the Polling station and that is why she did not record any. She confirmed that she was the one who made the counting at Page 55, 53 and 56, items 3.21 and 3.6 and that they were to be done after the exercise and to be signed by the people who were there after the exercise and that the same was done on 5<sup>th</sup> at Shimoni. In her evidence the handover of the ballot boxes was done at Shimoni and the forms were signed and handed over to her. She however did not go with the people.
114. In answer to **Mr Asige's** questions the witness said that since there were 3 streams at Lunga-Lunga there would be 3 form 35s for each stream and that her stream was stream 1. Stream 2 was **Beatrice Tembe** while stream 3 was **Juma Boy** and that they filed form 35s. Referred to form 88, the witness said the form was in respect of the results from the 3 streams signed by herself since they were expected to give the final report for the whole station and she was the one who combined the 3 streams. She however admitted that there was a mistake in the final figure although it was the form she sent to Shimoni Tallying Centre.
115. In re-examination by **Ms Kanabar**, the witness said that the agents required a letter from the party, identification card with the oath of secrecy and that if they did not have them, they would be excluded. Referred to page 44 of the Diary, the witness admitted that it was blank while pages 47, 52, 53 and 56 being were signed by the agents.
116. DW5 was **Beatrice Kulaphira Tembe** who deposed that she was the Presiding Officer at Lunga Lunga Primary School Polling Station (Stream 2) at Lunga Lunga Constituency in the Kwale County during the General Elections held on 4<sup>th</sup> March 2013. According to her all the agents allowed into the polling station had, in their possession, the signed oath of secrecy Forms which she personally verified before allowing them into the Polling station and that no agents who were properly accredited were excluded from the polling station irrespective of what time they arrived or what party they represented. To her the only persons excluded were those 'agents' who did not comply with the law or were not properly accredited. In her view, the elections conducted at Lunga Lunga Primary School Polling Station were free, fair and credible and that all agents signed the Form 35 and her polling day diary, save for some who had left the polling station. She further

- deposed that there was consensus between myself and all agents present on all matters and no dispute or complaints were raised.
117. In answer to the questions posed by **Mr Kimani**, she said that she did not encounter any problem in her stream no. 2. According to her she filled in the Diary and gave it to the Returning Officer at the Tallying Centre at Shimoni and that she was accompanied by the security officer and the Presiding Officer but not the agents because they had left the station hence the reason for the blank page. She denied that anyone was excluded from the streams though she could not remember the agents who were present.
118. In cross-examination by **Mr Asige**, the witness reiterated that she did not give any form 35 to any of the candidates' agent because they had left but could not talk about the other streams which had their own Presiding Officers.
119. In re-examination, the witness said that the agents had to show the oath, letter and identification card and that all the agents had them otherwise they would not have been allowed. According to her page 133 was not signed because they had left and that she allowed them to do as they pleased. According to her pages 139 and 144 were signed by the agents who were there and witnessed the process and here were no issues hence the elections were free and fair.
120. **Mwanamisi Bakari Mohamed** gave evidence as DW6. According to her affidavit, she was the Presiding Officer at Jego Polling Station at Lunga Lunga Constituency in the Kwale County during the General Elections held on 4<sup>th</sup> March 2013. To her all the agents allowed into the polling station had, in their possession, the signed oath of secrecy Forms which she personally verified before allowing them into the Polling station. It was her position that no agents who were properly accredited were excluded from the polling station irrespective of what time they arrived or what party they represented and that the only persons excluded were those 'agents' who did not comply with the law or were not properly accredited. It was therefore her view that the elections conducted at Jego Polling Station were free, fair and credible and all agents signed the Form 35 and her polling day diary, save for some who had left the polling station. Further there was consensus between herself and all agents present on all matters and no dispute or complaints were raised.
121. On being cross-examined by **Mr Kimani**, the witness said she opened the station at 6.00a.m. by which time there were many agents as well as observers who had arrived and she noted their particulars in the Poling Day Diary. Referred to item 1.4 at the reverse of page 96 with respect to the particulars of observers, she said that she forgot to enter and may be she recorded the same in the field notebook. According to her when she closed the station, she sent the data using a phone vide a short message and invited people to sign form 35 at 5.00 o'clock. To her the exercise was well conducted and though by 5.00 she had not counted the votes, they wanted to go home. By the time she finished counting at about 11.00pm she could not recall the number of agents though most of them were from the neighbourhood and she delivered the boxes the same night with Deputy Presiding Officer and Security officers and was received after midnight and the handing over exercise was witnessed by some agents whose names she could not remember. She travelled at night because Shimoni is far from Jengo and is about one and a half hours travelling. Although she could not estimate the distance she said it was about 100 km.
122. In answer to the questions by **Mr Asige**, the witness stated that Jego Primary is a single stream polling station and she was the one in charge. She said that there was electricity at Jego Primary and she had so many copies of form 35s and that all the agents who were there were provided with form 35s and she posted about five forms at the Polling station since they were many. She likewise took many forms to Shimoni but could not remember the number.
123. In re-examination by **Ms Kanabar**, the witness stated that the form 35 was filled in by both herself and the agents after counting and that it took her one and a half hours to go to the Tallying Centre. She stated that the agents were not in the car and were found there. In her evidence the Diary at page 92 was filled and signed by the agents and that there were no restrictions on them. To her the elections were free, fair and credible.
124. Next on the witness stand was **Mwatela Guni Nguttah** who testified as DW7. In his affidavit he deposed that he was the Presiding Officer at Mwazaro Primary School Polling Station. According to him, all the agents allowed into the polling station had, in their possession, the signed oath of secrecy Forms which she personally verified before allowing them into the Polling station and that no agents who were properly accredited were excluded from the polling station irrespective of

- what time they arrived or what party they represented and that the only persons excluded were those 'agents' who did not comply with the law or were not properly accredited. It was therefore his view that the elections conducted at Mwazaro Polling Station were free, fair and credible and all agents signed the Form 35 and his polling day diary, save for some who had left the polling station. Further there was consensus between himself and all agents present on all matters and no dispute or complaints were raised.
125. In cross-examination by **Mr Kimani** the witness stated that whereas in his affidavit he had indicated that there were people who were excluded, he did not exclude any agent since all agents who came had documents. He said that Mwazaro had one stream and he completed the counting exercise at 5.00 and summarised at 10.30. and transmitted the material the same night in company of security personnel and the Deputy Presiding Officer. He handed over the material to the Returning officer at 5.00 a.m. the next day in the company of the security personnel, the Deputy Presiding Officer and the agents who were many. The agents, however, did not fill in the form and that they made comments in the notebooks. Although the station was opened at 6.00 in the morning, they signed after 5.00 o'clock after voting and that he signed form 35 after 10.00p.m. To him, immediately he signed he invited them to sign. The station, the witness stated is 2 Kilometres from the Tallying Centre and he handed over the ballot boxes after midnight. He was however unaware of the reason why the agents did not sign handing over. He confirmed that he supplied them with form 35s. As they had a small van they did not have enough space for agents.
126. In answer to **Mr Asige's** questions the witness said that he swore two (2) affidavits but was supplied with one copy and that there are no annexures to the second affidavit. Referred to the Diary at page 241, he said he had 162 form 33s but had no form 34s and form 35s. He closed the station at 5.00p.m. and did not supply agents with form 35s. He went to the Tallying Centre at Shimoni at 10.30 a.m. but was not accompanied by any agent and handed over the material to the Returning officer in the presence of **Neema**, the Deputy Returning Officer was there and went home and by the time of the announcement he had already gone home.
127. In re-examination the witness stated that she filed in the first part of form 35 and that the same was signed by agents after polling. He said that they were given form 35s at the centre and that it was signed by agents. To him the signatures of the agents in the Diary confirmed that they witnessed what took place. He said that although they only had a small van, the agents were allowed to follow them though he could not say whether they came or not. According to him there were no problems in his polling station and the elections were free fair and credible.
128. Called as DW8 was **John Kioko Mwilu** who deposed that was the Presiding Officer at Kikoneni Primary Polling Station stream 1 at Lunga Lunga Constituency in the Kwale County during the General Elections held on 4<sup>th</sup> March 2013. To him, all the agents allowed into the polling station had, in their possession, the signed oath of secrecy Forms which he personally verified before allowing them into the Polling station and no agents who were properly accredited were excluded from the polling station irrespective of what time they arrived or what party they represented hence the only persons excluded were those 'agents' who did not comply with the law or were not properly accredited. The elections conducted at the Polling Station, according to him, were free, fair and credible and all agents signed the Form 35 and his polling day diary, save for some who had left the polling station. There was however consensus between himself and all agents present on all matters and no dispute or complaints were raised.
129. In cross-examination by **Mr Kimani**, the witness testified that the Polling station there were two streams and he was in charge of stream one. According to him, he maintained a diary which was signed by the agents in their respective parts though he could not remember which parts. He had more than 6 agents and they signed on opening, at closing of station and at the conclusion of counting. He opened the stream at 6.20 a.m. at which time, there were more than six agents but only three qualified to sign. Referred to page 203 he said that at the opening of the station the agents were five (5) and that **Saumu** and **Salim Hassan** were the only ones who did not sign. Three of them wrote their names but after perusing their documents he sent them out to fulfil the requirements. Referred to page 202 he said it was a record of serials of ballot boxes and candidate used at start of polls and was being filled in after opening the station. He admitted that the three agents who signed had signed one side but not the other. However page 196 was not signed by the same people mentioned earlier save for **Said Juma**. According to his evidence he did not receive any complaint save for the agent who had no requisite documents. However when the document

was brought he allowed him to participate and sign. With respect to **Hamadi Juma**, he said he had the documents but asked for permission to go outside and when he came back he signed the other documents. He confirmed that **Benson Mutisya** and **Mwashetani** voted in his station. He confirmed that a person calling himself Chief Agent visited him and complained about the delay in allowing his agent in the station. At the close of the station at 5.00, he had four agents while the Deputy and the other agents had left. He transmitted the ballot boxes in the morning at about 5.00 on 5<sup>th</sup> to Shimoni although they had no agents who went in their own transport and he met them at the Tallying Centres where he handed over to Returning Officer **Mr. Juma Musa** in the presence of the agents.

130. With respect to the questions from **Mr Asige**, the witness said that he was Presiding Officer at Kikoneni stream 1 where **Khatib Mwashetani** and **Benson Mutisya** who were contestants voted and parliamentary election counting ended at about 11.00. When he finished counting all agents were there and all those present got form 35s. According to him, Kikoneni had two (2) streams and he filled in 10 form 35s. Referred to page the Diary at page 199, he said that according to that page, there were no form 34 as well a form 35s. He said that the in charge of the other stream was Samuel Luseno who filled in his form 35 at page 19 as each Presiding Officer is supposed to fill in one form. However one joint form was filled in by himself in Luseno's presence and witnessed by the Deputy Presiding officer. He however admitted that there was a mistake in the total tally of 679 instead of 678 votes and that it meant that even the ones submitted had mistakes yet it was the 678 that was relied upon in declaration of results at Shimoni.
131. In re-examination, the witness said that the requirements were Identification card, letter of appointment and oath of secrecy and if the agents did not have them they would not be allowed in. However according to the Diary **Wambua Msanifu Kombo** signed the same. To him, there was no mistake and that miscalculation by one or two votes does not affect the results of the candidates. According to him the only problem was lack of all the documents but later the agents were allowed in and the elections were conducted free, fair and credible.
132. Dw9 was **Abubakar Juma Mayenze**. According to him, he was one of the Directors of **Mwashetani Foundation** (hereinafter referred to as the Foundation) which was incorporated as a company on the 27<sup>th</sup> of January 2010 to cater for needy students who have problems with school fees obligations, setting up projects to help poor communities and schools in Lunga-Lunga Constituency among other things with the main goal of alleviating poverty and spurring economic and social development. The Foundation operates an account at First Community Bank, Mombasa and that the other Directors of the Foundation are **Mr Khatib Mwashetani**, the 2<sup>nd</sup> respondent and **Mr Haji Sharif Ali Haji** who are the signatories of that Account as per the terms in the Articles and Memorandum of Association of the Foundation, with either of them having the right to withdraw funds from the account. To him, the account at First Community Bank is used solely for the purposes of paying school fees for poor and needy students whose parents for several reasons cannot raise the same. He deposed that they were issued a cheque book on or about January 2011 when they started issuing cheques for students in need and that the maximum they awarded students was Kshs 5,000 and since it was established, the Foundation has been involved in many projects in Lunga-Lunga Constituency which benefited the local community as well as schools, churches and mosques, Community Centres and Village Groups some of which include financing of the construction of the Wasini bridge project in Wasini Island in which the Foundation donated Kshs 100,000 to the sponsors of the project in 2010; buying and delivery a Solar Panel at Wasini to help the local community at Kshs 40,000 in 2011; donation of funds for the construction of seven (7) classrooms at Kikoneni Primary School in 2013 which project is yet to be finished to date; donation of *Sufurias* to Community Centres in many villages across Lunga-Lunga, iron sheets to Primary and Secondary Schools, desks and lockers, construction of pit latrines and toilets in Primary and Secondary Schools alike. As a Director, he was involved in most of the projects that the Foundation had committed itself to since one of the other directors **Mr Haji Sharif Ali Haji** had travelled out of the country and the other director **Mr Khatib Abdalla Mwashetani** was involved in politics as he was vying for a seat in the National Assembly for Lunga-Lunga Constituency. He clarified that the Foundation was not incorporated as a political tool for purposes of the election but had been in existence before that and its aims, objects and projects for the community could not be halted neither abandoned because of the General Election simply because the Foundation and the aspirant for the seat of the National

Assembly **Mr Khatib Mwashetani** are two (2) distinct persons in law, and there are some other individuals who as Directors of the company do not have any political ambitions neither did they vie for any political seat. To him, to allege the Foundation was a political tool which sought to influence voters by bribing them in order to vote for **Mr Mwashetani** was false. According to him, the Foundation is still in existence long after the General Election, 2013 was concluded and is still committed to alleviate poverty and bring about economic and social development and change to the people of Lunga-Lunga as per the Foundation's founding objectives as stated in the Memorandum of Association.

133. In cross-examination by **Mr. Kimani**, the witness said that there is no Chairman of the Foundation and that he was a Foundation Director of the Foundation but did not know the quorum of the foundation. Referred to page 21 of the Articles he confirmed that the quorum is to be fixed by director and if not fixed shall be 3 and admitted that they have never fixed a quorum for the Foundation. Although the foundation has 3 directors, he said the directors have not met recently and that they met when they incorporated the company in 2010 and the meeting was attended by the 3 directors to deliberate on the programs of the Foundation and though he was the secretary, he could not remember all the resolutions. He however confirmed that they had met since then but some times before. Though he could not remember the year. He however confirmed that they had met twice. At the second meeting which was on education they resolved on the fees for the children because it was the important matter in the foundation despite the fact that they had no request for fees before them. He confirmed that the Foundation has one Bank account with First Community Bank though he could not remember the account number. The source of funds is from contributions from directors, donations from different businesses both in Kenya and outside Kenya and the signatories are himself, and the other directors, **Haji Shariff** and **Khatib Abdalla** and any two can sign. He however said that no resolutions had been passed for withdrawal. Referred to the copies of the cheques exhibited to the affidavit of **Gideon Wambua**, he said he did not know what the cheques were for. Likewise he was unable to tell where cheque Number 000125 emanated from since he could not remember signing the same. He however denied knowledge of the signatures of his co-directors. With respect one of the cheques he confirmed that it was a First Community bank Cheque drawn on the Foundation Account Number 1988640901. He however denied that any of the two signatures was his though it was dated 20<sup>th</sup> February, 2013. Again referred to Cheque Number 169 drawn on **Mwashetani Foundation** Account Number 1988640901 he similarly denied that any of the signatures thereon was his though it was dated 20<sup>th</sup> February, 2013. With respect to cheques nos. 169 drawn on **Mwashetani Foundation** dated 27<sup>th</sup> February, 2013, cheque Numbers 00170 and 00179, he said he did not know where these cheques came from since he was not privy to the same cheques and said that he was not given any other cheques in that month though he is the one who sits in the office of the Foundation. Although **Haji** had been outside the country, he said he was recently back though he could not remember the month. Although some cheques were issued by the Foundation he could not remember the one he issued and when he issued them. He however admitted signing and issuing cheques on account number 1988640901 on the same Bank and same serial number. He could not however remember whether they passed the resolution to issue the cheques but confirmed that the foundation had not lost any chequebooks to his knowledge. He admitted having issued the cheque to Ribe Boys High School although he could not tell whether his co directors issued the other cheques. To him, they could not issue the cheques without his knowledge. He however could not remember the months when **Haji** was out of the country though he was away for a while and could not tell whether he was out of the country before elections. According to him they have been receiving applications for bursaries in 2013 though he could not remember the number of cheques he issued in the said year and could only remember two cheques in 2011. Although at times he could accompany the 2<sup>nd</sup> respondent to the campaigns, he could not remember how many times he did. He admitted that they have been engaged in community projects such as pit latrines, building schools, delivery of desks and assisting Groups although he denied that the sink wells. He admitted that in 2013 they were building classrooms in 2013. He however denied that the 2<sup>nd</sup> respondent was giving Foundation cheques during campaigns and denied that in 2013 he visited any school to deliver cheques.

134. In response to **Mr Asige's** questions, the witness denied that there is kinship between him and

- the 2<sup>nd</sup> respondent. He could neither remember how much money they have spent since the formation of the foundation and neither could he remember how much the Foundation had received without checking the records despite him having the same. According to him, the company has no members although they have two meetings of directors. While denying knowledge of the cheques shown to him, he admitted that from the copies they were genuine and admitted that there was no record of any missing cheque.
135. In re-examination he said that he issued cheques in 2011. We had agreed as directors though they are still issuing cheques up to now but in the names of schools and not individuals. According to him, the Community Projects started in 2010 and they are still continuing with them.
136. Next to be called to take the witness stand was **Kassim Abdalla Delle** as DW10. According to his affidavit, he participated in the March 4<sup>th</sup> General Election as the Chief Agent of the FORD Kenya Party posted at Shimoni Secondary School Tallying Centre in Lunga-Lunga Constituency, Kwale County. According to him, the Electronic Tallying System was not functioning at all and that the IEBC and the 3<sup>rd</sup> Respondent instead opted for manual tallying of the votes. He however had with him his Personal Computer (lap-top Computer) which he used to conveniently tally and record the results of Lunga-Lunga Constituency as they were being announced Polling Station after another and that his computer was not connected to any device and or machine of the Commission. He deposed that there was no restriction as to the mode of tallying and recording of results and all agents present during tallying depended on the results from the 3<sup>rd</sup> Respondent and were satisfied that the serial numbers on the ballot boxes were correct and that all the ballot boxes' seals were all intact. According to him, he saw the chief agents of Wiper Democratic Movement, The National Alliance Party (TNA), Safina Party and CORD at the Tallying Centre and no agent present raised a complaint about the consistency or otherwise of the votes as tallied in the Tallying Centre with those which were announced at the Polling Station save that the agent of Wiper Democratic Movement complained about the concurrence of the number of votes in Mwananyamala Polling Station with those at the Polling Station. Accordingly, the ballot box of the said Mwananyamala Polling Station was subsequently reopened and the votes recounted and that the results concurred with those at the Tallying Centre. To him, the results tallied concurred with the results that had been announced at all Polling Stations and after the recount, the agents of all parties within the Tallying Centre signed against a fresh form 35 issued by the returning Officer and the 3<sup>rd</sup> Respondent announced and declared the results as set out in the Declaration of Election Results Form and the 2<sup>nd</sup> respondent was subsequently declared the winner of the said Parliamentary Election for Lunga-Lunga Constituency, was congratulated by the Commission officials and that they shook hands after that after which the 2<sup>nd</sup> respondent immediately left and did not speak to the officials of the Commission and specifically the Returning Officer after that. To him, the tallying process was accurate and fair and the total number of votes cast in favour of all candidates was as received from the different Polling Centres and the election process in Constituency was free and fair and substantially in compliance with the Constitution and law in the handling of records and tallying exercise.
137. When cross-examined by **Mr Asige**, the witness stated that he was the Chief for agent for Ford Kenya Party and the 2<sup>nd</sup> respondent and not a campaigner. He however attended one campaign rally for the 2<sup>nd</sup> respondent at Kinango about two weeks before elections. According to him they only had two candidates from the party and he was only an agent for the 2<sup>nd</sup> respondent. According to him he swore the affidavit in **Balala's** office witnessed by Mr. Mohamed though the stamp was that of **Daniel M. Ngozue**. He denied having sworn any other affidavit. Referred to the annexure to his affidavit, the witness stated that those were the results announced at the Tallying Centre and confirmed that there was a recount which was required by one of the aspirants. However, the result concurred with those at the Tallying Centre. He clarified that only the box which had issues was opened. He admitted that there was a form which was discarded by the Returning Officer but never heard of complaints of shortage of form 35s. After declaration of the results by the Returning Officer, he left the Tallying Centre. I left immediately but I cannot remember the time but it was in the night. He conceded that the 2<sup>nd</sup> respondent was his elder brother. He however denied knowing **Abubakar** and denied that he was his relative.
138. The next witness who testified as DW11 was **Mwanaisha Kasayo Swaleh**. According to her,

she participated in the March 4<sup>th</sup> General Election as an Agent of the FORD Kenya Party posted at Vitsangalaweni Polling Station in Lunga-Lunga Constituency, Kwale County and she arrived at the Polling Station at around 5.30a.m in the morning and the Polling Station was officially opened to the public around 6.00a.m and voting commenced immediately thereafter. According to her voting at the Polling Station went on smoothly without any interruption from outside. She was in the company of some other agents from the following parties; Wiper Democratic Party, The National Alliance Party (TNA), Orange Democratic Movement and the Safina Party who were present inside the Polling Station and witnessed the voting process without raising any complaints or at all. After the close of voting at around 5.00p.m in the evening, all the agents then remained behind to witness the counting of the votes and concurred as to the veracity and accuracy of the counting process by signing against the Form 35 that the Presiding Officer issued to be signed after the counting process was done which form the Presiding Officer then attached on the door and the other entrances to the Polling Station for everybody to see the results. Due to inadequacy of the forms, however, the agents present were not given copies thereof though those who wished to make copies of the form were allowed to do so. According to her, during the counting process, no agent was turned away neither locked out of the Polling Station and all agents who were present during voting were also present during counting of the votes which process was accurate and fair and the total number of votes cast in favour of all candidates was correct. Thereafter the Commission's officials invited any of the agents who wished to accompany them to the Tallying Centre at Shimoni Secondary School to do so but had to use their own means since the vehicles used by the Commission could not accommodate all agents. She therefore did not see any agent of any party getting in the vehicles used by the Commission officials and those agents who accompanied the Commission officials used their own means of transport.

139. In cross-examination by **Mr. Simiyu**, she admitted that the ID No. in the appointment letter was not hers. She said that she saw the Presiding officer with form 35 and she was only given to sign but nobody was given the form. According to her there was electric power and other agents were present though they did not accompany the ballot boxes. She was however not concerned with the people who were being permitted to enter the station.

140. DW12 was **Mohamed Abdalla Masemo** and according to his affidavit, he participated in the March 4<sup>th</sup> General Election as an Agent of the FORD Kenya Party posted at Kikoneni Polling Station in Lunga-Lunga Constituency, Kwale County where he arrived at around 5.30a.m in the morning and at around 6.00a.m in the morning the Polling Station was officially opened to the public and voting commenced immediately thereafter. According to him, voting at the Polling Station went on smoothly without any interruption from outside and all voters who voted left immediately and there was no voter lingering around at the Polling Station after they had cast their votes. In his evidence all voters whose names were not in the Manual Register were told by the Presiding Officer to check in other streams to check if their names were in the registries there. He deposed that the 2<sup>nd</sup> respondent voted and immediately left the Polling Station. According to his deposition, he was in the company of some other agents from Wiper Democratic Party, The National Alliance Party (TNA), Orange Democratic Movement and the Safina Party and that all the agents of the aforementioned parties were present inside the Polling Station and witnessed the voting process without raising any complaints or at all and after the close of voting at around 5.30p.m in the evening, all the agents then remained behind to witness the counting of the votes. To him, all the agents concurred as to the veracity and accuracy of the counting process by signing against the Form 35 that the Presiding Officer issued to be signed after the counting process was done which was then attached on the door and the other entrances to the Polling Station for everybody to see the results and though the agents present were not given copies of the Form 35 as they were inadequate, any agent who wished to make copies thereof was allowed to do so. However during the counting process, no agent was turned away neither locked out of the Polling Station and all agents who were present during voting were also present during counting of the votes which process was accurate and fair and the total number of votes cast in favour of all candidates was correct. The Commission's officials then informed them that any of the agents who wished to accompany them to the Tallying Centre at Shimoni Secondary School had the liberty to do so but had to use their own means since the vehicles used by the Commission could not accommodate all agents and the Commission's officials left at about 5.00a.m in the morning the next day to the Tallying Centre at Shimoni Secondary School and he did not see any agent of any

party getting in the vehicles used by the Commission officials and all agents who accompanied the Commission officials used their own means of transport.

141. Cross-examined by **Mr Kimani**, the witness conceded that the ID No. in the affidavit was not his and that the affidavit was sworn before **Balala Abed** before **Balala, Abed** and **Mohamed**. He reiterated that the process of election at Kikoneni was conducted very well and there were no problems. He however reiterated that forms 35s were also few. He admitted however that he was not involved in permitting agents to enter the station so could not talk about the issue. He reiterated that they did not accompany the ballot boxes and could not talk about what happened thereafter as he left the ballot boxes with the Presiding Officer and his people.
142. DW13 was **Mdzomba Chala Gombe** and according to his affidavit, he participated in the March 4<sup>th</sup> General Election as an Agent of the FORD Kenya Party posted at Perani Polling Station in Lunga-Lunga Constituency, Kwale County where he arrived at around 5.30a.m in the morning and at around 6.00a.m in the morning the Polling Station was officially opened to the public and voting commenced immediately thereafter. To him, voting at the Polling Station went on smoothly without any interruption from outside and all voters who voted left immediately and there was no voter lingering around at the Polling Station after they had cast their votes. According to him, all voters whose names were not in the Manual Register were told by the Presiding Officer to check in other streams to check if their names were in the registries there. He did not however see the 2<sup>nd</sup> respondent visit the Polling Station at any time during the voting and subsequently the counting exercise. He was in the company of some other agents from Wiper Democratic Party, The National Alliance Party (TNA), Orange Democratic Movement and the Safina Party all of whom were present inside the Polling Station and witnessed the voting process without raising any complaints or at all. After the close of voting at around 5.30p.m in the evening, all the agents then remained behind to witness the counting of the votes and concurred as to the veracity and accuracy of the counting process by signing against the Form 35 that the Presiding Officer issued to be signed after the counting process was done and the same was attached on the door and the other entrances to the Polling Station for everybody to see the results. Although the agents present were not given copies of the Form 35 as they were inadequate, any agent who wished to make copies of the form 35 was allowed to do so. In his evidence, during the counting process, no agent was turned away neither locked out of the Polling Station and all agents who were present during voting were also present during counting of the votes. It was his view that the counting process was accurate and fair and the total number of votes cast in favour of all candidates was correct. He deposed that the Commission's officials stated that any of the agents who wished to accompany them to the Tallying Centre at Shimoni Secondary School had the liberty to do so but had to use their own means since the vehicles used by the Commission could not accommodate all agents and he did not see any agent of any party getting in the vehicles used by the Commission officials and all agents who accompanied the Commission officials used their own means of transport.
143. In response to **Mr Kimani's** questions the witness stated that since he was inside the Polling station, he could only talk about what happened inside the Poling Station. He was not involved in the process of allowing people to enter the station. Although he was in stream 1 he confirmed that his name was not there. Neither could he see his name in stream 2. According to him, they were given the form to sign when they entered and they signed form 35. He was however not concerned about those who were being allowed to enter and could not control those who were being allowed in. They were told the forms were few and anybody who wanted could photocopy.
144. DW14 was **Hamisi Mohamed Shambi** and he deposed that he was the 2<sup>nd</sup> respondent's driver. According to him, was in the company of the 2<sup>nd</sup> respondent in his vehicle Land Cruiser VX with plates number KBR 202M and that the 2<sup>nd</sup> respondent was seated at the back of the vehicle while the witness was driving the vehicle. According to him the 2<sup>nd</sup> respondent told him that they should go to Kanana Polling Station to pick a friend who had cast his vote there and also observe the voting exercise at the Polling Station. They arrived at the Polling Station and picked up **Amos Mwitah Marwa** after he had cast his vote. According to him, the voting exercise at Kanana Polling Station was going on smoothly when we arrived to pick **Amos Mwitah Marwa** and they left the Polling Station and headed to another Polling Station to check out the voting process. As they reached a section of the Mombasa-Diani road which is narrow in that only one vehicle at a time could pass, they saw another vehicle registration number KBE 888B blocking the main

Mombasa-Diani road and there was a scuffle which had ensued between a young man and another middle aged man as the middle aged seemed to be harassing the young man who was much shorter and smaller than the middle aged man. The witness got out of the car and went to ask the middle aged man why he was harassing the young man and the former told him he was a policeman and that he should back away. When asked identify himself the person got into the vehicle and attempted to shut the door behind him to which the witness opened and insisted to be shown some form of identification indicating he was indeed a police officer and after the said person saw him opening the door and resisting, he pulled out a pistol from the vehicle's compartment which is beside the driver's seat and brandished it at him. Fearing for his life, he immediately backed away from the vehicle with plates number KBE 888B and sought to return back to their vehicle. According to him, the said middle aged man was **Athumani Alii Gambere**, a body guard of Honourable Omar Zonga, a former police officer not licensed to own a pistol. In his view, the middle aged man's conduct amounted to masquerading as a Police Officer which conduct is against the law. To him, the 2<sup>nd</sup> respondent did not see the scuffle that took place as he was in the back seat of the vehicle though he informed him of the incident once he got back in the vehicle but the 2<sup>nd</sup> respondent did not get out of the vehicle the entire time the incident took place.

145. In cross-examination by **Mr Asige**, the witness said that they were with the 2<sup>nd</sup> respondent during campaigns during which there were many people. According to him the 2<sup>nd</sup> respondent was a resident of Msambweni which is not in Lunga-Lunga and had no residence in Lunga-Lunga and he was surprised that not being a resident in Lunga-Lunga people welcomed him. He however denied that he was dishing out money though he donated desks to many schools and was also sinking wells in several places in Lunga-Lunga constituency. He however did not donate water and *sufurias* which were donated by councillors. He admitted that he saw him giving cheques to parents to pay fees and that he had many vehicles which he was using different vehicles. He admitted that Lunga-Lunga is a poor area without water and good roads and during our campaign, they came across people and there was a fight at Kanana between him and another person on the election day though they had not reached the Polling Station but near it. He admitted that they took a boy who had voted from Kanana called Amos. He agreed that on their way back, the road way is narrow so one had to give way and repeated what he stated in his affidavit. Though according to him it was the other person who removed the gun, he could not tell whether the 2<sup>nd</sup> respondent witnessed the incident. He admitted that the 2<sup>nd</sup> respondent has a gun but did not know whether he had a gun on that day. Although he had adjusted his seat the witness could not say whether the 2<sup>nd</sup> respondent was awake or asleep.

146. DW15 was **Rehema Swaleh Bori**. According to her she participated in the March 4<sup>th</sup> General Election as an Agent of the Ford Kenya Party posted at Kanana Polling Station in Lunga-Lunga Constituency, Kwale County and she arrived at the station at around 5.30a.m in the morning while at around 6.00a.m the Polling Station was officially opened to the public and voting commenced immediately thereafter. In her view, voting at the Polling Station went on smoothly without any interruption from outside and she was in the company of some other agents from Wiper Democratic Party, The National Alliance Party (TNA), Orange Democratic Movement and the Safina Party all of whom were present inside the Polling Station and witnessed the voting process without raising any complaints or at all. After the close of voting at around 5.00p.m in the evening, all the agents then remained behind to witness the counting of the votes and concurred as to the veracity and accuracy of the counting process by signing against the Form 35 that the Presiding Officer issued to be signed after the counting process was done which were then attached on the door of the Polling Station for everybody to see the results. However, the agents present were not given copies of the Form 35 as they were inadequate. To her the counting process was accurate and fair and the total number of votes cast in favour of all candidates was correct.

147. On being questioned by **Mr Asige**, the witness stated that he knew the 2<sup>nd</sup> respondent as a generous person and although she attended his meetings he did not know whether he did many things during the campaign. She however did not see him dish money but there were many people. She admitted that there were scarcity of form 35s at Kanana and that the agents were not given form 35s by the Presiding Officers. Since she did not go to the Tallying Centre she did not know how the materials were transferred to Shimoni Tallying Centre. Although the votes the 2<sup>nd</sup> respondent garnered at the station was announced the witness said she forgot.

148. In re examination she clarified that the 2<sup>nd</sup> respondent's generosity started long before the campaigns.
149. Next to testify as DW16 was **Ali Mwatseko Ali**. According to him he participated in the March 4<sup>th</sup> General Election as an Agent of the Ford Kenya Party posted at Mwena Polling Station in Lunga-Lunga Constituency, Kwale County. His testimony mirrored that of DW15 and in cross examination by **Mr. Asige** he said that he did not know the 2<sup>nd</sup> respondent though he had heard about the name and got the work just like any other work. He however said that whereas the 2<sup>nd</sup> respondent does not reside within Lunga Lunga his parents do reside there. He admitted that at Mwena Polling Station there was scarcity of form 35 and the agents were not given form 35s. Since he did not go to Shimoni Tallying Centre he did not know how results were taken to the Tallying Centre though the person who won was the 2<sup>nd</sup> respondent with 346 votes. He however could neither see his name nor his signature and form he signed though he insisted he signed one. In re-examination he said that the agents were allowed to photocopy the form although he did not himself make a copy and that by that time most agents had left.
150. The next witness was **Mwanatumu Juma Zamarawi**. According to her affidavit, she was an Agent of the FORD Kenya Party posted at Shimoni Primary School Polling Station in Lunga-Lunga Constituency. Her evidence was similar to the previous witnesses' evidence and in cross-examination by **Mr Asige**, she said that she could not remember who appointed her as an agent. She said she knew the 2<sup>nd</sup> respondent for the first time in his meeting at Shimoni before campaign started when he came to visit the people. I did not know him before. She however denied that at that meeting, the 2<sup>nd</sup> respondent was generous and could not remember what he said. According to her she signed her affidavit in the presence of **Mr. Mohamed**. She confirmed that not all agents including herself got form 35 because they were few. She however said that forms 35s were placed in the ballot box and that the ballot boxes were taken to Shimoni Tallying Centre. However as she did not go to the Tallying Centre she did not know what transpired there. In re examination she clarified that though form 35 were few one was pasted and those who wanted to could photocopy the same.
151. **Hemedi Abdalla Majuto** gave evidence as DW18 and according to him participated in the March 4<sup>th</sup> General Election as an Aspirant contesting the County Representative Seat for Dzombo Ward, Kwale County through the FORD Kenya Party ticket. In or about September 2012, he received complaints from Vitsangalaweni residents about a severe shortage of water in that area which area was in Dzombo ward and as an aspirant for that ward, and as a duty imposed on him by the community he wished to serve come the General Election, he sought to find a solution to this problem. Accordingly, he sought funds from some of my close friends in Nairobi where he was working and together with the money he had opted to buy tanks to serve the areas which were most affected namely, Vitsangalaweni village and Kinyungu village since the Ministry of Water was unresponsive to the complaints of the residents. It, however, took some time for him to acquire the necessary funds to get the water tanks needed by the residents of the aforementioned villages. On or about February 2013 he acquired the funds and bought three (3) 5,000 litres water tanks and he and his agents decided to put two of the water tanks in Vitsangalaweni village and the other in Kinyungu village one of which was placed near a mosque in Kinyungu. By the end of February or thereabouts, they acquired lorries which had tankers to fill the water tanks with water so that the villagers could fetch and it took a few days before the villagers had filled their drums with water. To him, the water tanks were for the sole beneficiary of the residents of Vitsangalaweni and Kinyungu and were not bought as a bribe to induce voters to vote for him. He clarified that they were neither friends nor had a personal relationship of any kind or at all with the 2<sup>nd</sup> respondent and had no knowledge of a company by the name of **Mwashetani Foundation** and is not an agent and or employee of the 2<sup>nd</sup> respondent.
152. In answer to questions by **Mr Asige**, the witness said that during campaigns, he was conducting his own campaigns and they did not relate and knew the 2<sup>nd</sup> respondent just like other contestants and did not talk to him personally. He admitted that there is high level of poverty Lunga Lunga and water scarcity is one of the biggest problems and if you supply water it is like gold. He admitted that if you promise the people road and schools, the people will follow you. Similarly, if you promise to eradicate poverty and show evidence, the people would follow you. He admitted that he gave water in February 2013. According to him, he was not inducing people to vote for

him but was just helping them. However he conceded that he had not given water since then had done other things as a leader. Although he knew the 2<sup>nd</sup> respondent before the elections, he was unaware whether he sunk wells, assisted schools, donated *sufurias* or donated desks in Lunga-Lunga since they were conducting different campaigns. According to him it is him who assisted the women.

153. Called as DW19, **Amos Mwita** deposed that he was a friend of the 2<sup>nd</sup> respondent and he cast my vote at Kanana Polling Station in Lunga-Lunga Constituency at around 10.00a.m. after which **he** waited somewhere outside the Polling Station for the 2<sup>nd</sup> respondent's vehicle as he had informed him that he and his driver were headed towards Kanana and that they would pick him up. Soon thereafter, the 2<sup>nd</sup> respondent arrived in the company of **Khamis Mohamed Shambi** who was driving the vehicle while the 2<sup>nd</sup> respondent was seated at the back seat. The witness informed the 2<sup>nd</sup> respondent that the voting exercise was going on smoothly and that he had nothing to worry about. He then got in the vehicle which was a Land Cruiser VX plates number KBR 202M and sat in the front seat beside the driver and they left for another Polling Station to check on the progress of the voting exercise. While they were on the Mombasa-Diani road at a section of the road that is very narrow and slim, in that only one vehicle at a time can pass through, they saw a vehicle with number plates KBE 888B blocking the road and a middle aged man harassing a young man who was much smaller in size than him. According to him, **Khamis Mohamed Shambi** got out of the car and he heard him ask the middle aged man why he was harassing the young man and the middle aged man told **Khamis** that he was a police officer and kept repeating this. The witness also got out of the vehicle to know what was happening. The middle aged man got into the vehicle and attempted to shut the door behind him to which **Khamis** opened and insisted to be shown some form of identification indicating he was indeed a police officer. After **Khamis** opened the door of the vehicle that was blocking the road and from which the middle aged man had come from, he saw **Khamis** lean as if to ask the man something but he did not hear what **Khamis** asked him nor what the man said after that. He suddenly saw the middle aged man pulling a gun from the vehicle and his tone was very harsh even though he could not clearly hear what he was saying. He immediately got back into the car after he saw **Khamis** retreating in their direction and heard **Khamis** describe the middle aged man as **Athumani Alii Gambere**, a body guard of Honourable **Omar Zonga**. According to the witness, the 2<sup>nd</sup> respondent did not get out of the car while the entire incident was taking place and that he saw little of what was going on as he was seated at the back seat of the vehicle they were travelling in.
154. In cross-examination by **Mr Asige**, the witness said whereas he had stayed in Kidima for 6 months, he was not born there. He reiterated that the 2<sup>nd</sup> respondent did not get out of the car and when the witness got into the car the 2<sup>nd</sup> respondent was leaning backwards and saw little because after they came back he asked what the problem was. He however said that the 2<sup>nd</sup> respondent was awake. According to him they did not enter the Polling station. The time according to him was around noon. After that they did not go to any other station. In re-examination he reiterated that there was only one pistol involved in the incident and it was brandished by the middle man.
155. Called as DW20 was **Vincent Zahoro Kengo**. According to him, he was the Presiding Officer at Mzizima Dispensary and in that station all the agents allowed into the polling station had in their possession the signed oath of secrecy forms which he personally verified before allowing them into the station and that no agents who were properly accredited were excluded from the polling station irrespective of what time they arrived or what party they represented. The only persons excluded, according to her were those 'agents' who did not comply with the law or were not properly accredited. In his view, the elections conducted at Mzizima Dispensary Polling Station were free, fair and credible and all agents signed the Form 35 and her polling day diary, save for some who had left the polling station. According to her there was consensus between herself and all agents present on all matters and no dispute or complaints were raised.
156. In cross-examination by **Mr. Kimani**, the witness said that he swore this affidavit before **Daniel**. He could not remember any agents who were excluded. Referred to page 114 he said admitted that the letters are overwritten. According to him, they had no forms 34 and 35. To him there were no complaints and to him, no-one was excluded. He however confirmed that at page 123. there was no TNA agent. According to him, he told the agents to indicate their parties but they did not indicate. He said that they signed after voting. In re-examination, he said that according to form

- 35, the TNA agent was **Shallet Kanze** and her name appeared at the opening. The agents, according to him, had to show letters of appointment, oath of secrecy, and the Identification card and if they did not have them, he would not allow them. To him there were no other issues and the elections were carried to in a fair, free and credible manner.
157. DW22 was **Mwanasiti Suleman Mwijuma** and according to her, she was the Presiding Officer at Mwamtsefu Primary School Polling Station and his evidence mirrored that of the previous witness. In cross-examination by **Mr Kimani** he said that he allowed those agents who had documents to enter though he could not remember the number. The problem at the station was that the EVID Machines did not work and they had no power so they used the manual register. He confirmed that they had form 35s though he could not remember the number he filled in. The station had one stream and the voting closed at 5.00p.m. though his certificate indicated that voting closed at 11.30 p.m. Although he could not remember when he finished counting, he said it was same date and that the agents were there though they did not accompany the ballot boxes.
158. In answer to **Mr Asige's** questions, he said that though he had form 35s, they were inadequate. Although the number of the people who cast their votes were 155, he wrote 159 in words, which he admitted that was an error. However, that form went to Shimoni. He admitted that he was called by the Returning Officer when it was realised that the number had gone up and he wanted the witness to reduce it. Accordingly the number was corrected it to 155 though he forgot to correct it in words and gave it to the Returning Officer before announcement. In re-examination the witness said that according to form 35, the total number of votes cast is 159 and if the same is reduce by 4 votes it comes to 155 and that was what he was asked to correct. He confirmed that the form was signed by the agents. Whereas there was no electricity, there was pressure lamp.
159. DW22 was **Victor James Mzinga**. He was the Presiding Officer at Shimoni Primary School Polling Station and his deposition was similar the previous two witnesses. In cross-examination by **Mr Kimani**, the witness said that although he filled in form 35 on 4<sup>th</sup> March, he forgot to date it though he signed it. According to his Pre-polling entry, he never received form 34 and 35. He disclosed that at the time of the handing over of the ballot boxes agents were not and there was no evidence of anyone who witnessed it. In cross-examination by **Mr Asige**, the witness said that he indicated total valid votes cast to as 428 while the same were 430 which was an error. According to him the ballot box was not opened to the best of his knowledge. He however admitted that the Returning Officer relied on the erroneous form. In re-examination, however, he said that the number of votes cast was 430 while 2 votes were rejected so that the number of valid votes cast was 428 hence there was no mistake. Questioned by the Court he however admitted that the number of the individual candidates' votes was 630.
160. The next witness on the witness box was **Juma Hamisi Bora** who deposed that he was the Presiding Officer at Lunga Lunga Primary School Polling Station stream 3. The contents of his affidavit was not any different from that of the immediate previous witnesses. In cross-examination by **Mr Kimani**, the witness admitted that his Pre-polling Diary did not indicate receipt of form 35. While admitting that he had problems with badges and mixed up of names, he denied that he excluded some agents. He disclosed that at the time of the handing over of the ballot boxes on 6<sup>th</sup> March, 2013 the agents were not there. He admitted that he had problems and excluded some though he could not remember their names. In re-examination he said that he received National identification card, letter from the party and Oath of Secrecy. Although he had a problem of badges, he clarified that it was not necessary to wear badges hence it was not a problem. Although sometimes the voters were not sure whether they were in stream one or others, it was his position that at the end of the day they voted hence there were no other problems and the elections were free, fair and credible.
161. Testifying as DW24, **Abdalla Omar Sopa** testified that he was the Presiding Officer at Mwena Primary School Polling Station. His evidence in chief as contained in his deposition was similar to the evidence given by the previous witnesses. In cross-examination by **Mr. Kimani**, the witness said that he filled in Pre-polling activities at page 72-73. He said that due to shortage supplements were brought later after completion of the elections and these included badges and forms 33, 34 and 35 due. According to him, he did not fill in item 1.6.2 at page 76 because the agents had no seals and that is what the form required. However the lack of the Presiding Officer's name was due to human error. He however admitted that whereas the closure of the station was witnessed by the people who were present, there was no TNA agent on the page. He however said that there

was no problem with TNA agents at the opening. He denied that he excluded any agent though the agents had to have identification card, oath of secrecy, letter from party and badges and he informed those who did not have them not to enter. According to him, those who did not have the documents feared and excluded themselves. In cross-examination by **Mr Asige** the witness said that he received the form on 4<sup>th</sup> March, before counting in the evening and he signed it on 5<sup>th</sup> after the other agents had signed on 4<sup>th</sup>. In re-examination by **Mr Simiyu**, he said that the forms were required after close of the station and he had form 35. He said that when we sealed the boxes in the morning, agents were there they signed. However page 76 was not filled because it was dealing with candidate/agent seals which they did not have. Page 76 reverse shows, agents present with serial numbers. To him the Commission's conditions were that an agent who had not fulfilled the conditions would not be allowed and the conditions applied across the board. Whereas he stayed with agents till 4.00am, at the handing over at Shimoni, they were not there as the distance is about 55 kilometres.

162. According to **Mathenge Nduthu Mathai** who was DW25, he was the Presiding Officer at Shimoni Primary School Polling Station (Stream 2) and his affidavit was couched on similar terms to the previous witnesses. In cross-examination by **Mr. Kimani**, he said that he did not receive some materials such as Polling Station arrows. Whereas he received 93 form 33, he received no form 34 and 35. According to him, all agents who came had the requisite documents and he gave the agents an opportunity to sign when they reported. However at the closure of the station, only two people signed in addition to himself and 4 people neither signed nor expressed any sentiments despite being present. He however admitted that he did not capture any incidents a fact which according to him may have skipped his mind. According to him, he had no control over the observers, agents and media and they were free to move in. When he handed over on the 5<sup>th</sup>, the agents were not there and it was not witnessed by any of them hence the reason why page 183 is blank. In response to **Mr Asige's** question, he said that Lunga Lunga Constituency is a new constituency and the level of illiteracy is high. I was in charge of stream one. I signed form 35. I took it to the Tallying Centre. As per his the diary, he had no Ballot papers and queue clerks and security officers at the opening of the station at 6.00a.m. He confirmed that the serial number for the ballot box for the Member of National Assembly at item 1.6.1 Page 55 was 131378 while at the closure at item 2.4 the member of National Assembly was Number 178600 hence he admitted there was a contradiction though according to him, this would not have affected the result. At page 59, he admitted that he did not indicate Number 1-5 which was a grave omission. Referred to item 3.2 record of member of National Assembly he said the serial Number was indicated as 178600 which was not the one at the commencement of the exercise. When he took the ballot boxes to the Tallying Centre, he said none of the agents accompanied him. Referred to page 5, he said he did not know whose green Land cruiser it was that was referred therein but it was within the compound. In re-examination, he said that there were badges and that he received them prior to the Polling day. He also had queue clerks. With respect to the serial numbers he admitted that there must have been an error. In answer to the questions from the Court the witness admitted that the 178600 was an error.

163. **Samuel Avugwi Luseno** gave evidence as DW26 and according to him, he was the Presiding Officer at Kikoneni Primary School Polling Station stream 2. As was the trend his affidavit was not materially different from those of the preceding affidavits. In cross-examination by **Mr Kimani**, the witness said that here were no problems as alleged by the **Mwaruwa**. Whereas he stated in his affidavit that the people he excluded were those who did not have the papers, he said that he did not exclude anybody. He confirmed that by that time of opening he had not received forms 33, 34, and 35. He admitted that he knew Caroline Kigoso as a student at the school though he did not know her parents and recognised the receipt annexed to the affidavit of PW4 as resembling one from their school. He admitted that according to the list filed by the Commission the valid votes cast were 339 though he made a return for 338 and admitted that he posted the votes by more than one vote though it was incorrect that one contestant was given one vote since it was just an oversight error. He however admitted in cross-examination by **Mr Asige** that the Returning Officer used the figure of 338 rather than 339. In re-examination, he said that he had forms 33, 34 and 35 on election date and he received them after the voting process. He admitted that though the results announced was 338 instead of 339, none of the candidates were prejudiced as no prejudice was caused to the contestants.

164. The next witness to testify was **Riziki Juma Ndegwa** and her evidence similarly mirrored the evidence of the previous witnesses. According to her she was the Presiding Officer at Kanana Nursery School Polling Station. In cross-examination by **Mr. Kimani**, the witness said that he did not have any problems in the station hence the reason why his Diary was blank. He said that he did not exclude anyone. The statement states that the only people excluded were those without documents. He admitted that he did not have certain things and that he received form 35 on 4<sup>th</sup> March at about 2.00p.m. with the names already filled in. According to him, he had TNA agents present at the station and he captured all the names of agents present. Referred to the reverse of page 228, he conceded the names of the TNA agent was not there which meant they were not there when the said part was being filled in and he could not remember if they came later. He was however emphatic that he did not exclude anyone from TNA. He said that he was not accompanied by any agent to the Tallying Centre. In answer to **Mr Asige's** questions the witness said that since he was within the station he could not know what was going on.
165. In re-examination the witness reiterated that he did not exclude TNA agents at Kanana Polling Station and referred to the Diary he identified instances where TNA agents were present. He further confirmed that he had form 35 and would not have declared the results without the forms.
166. The last witness to testify was **Kibaruwa Marangi Mongoh** who was the Presiding Officer of Mzizima Primary School Polling Station and his evidence was along the lines of the previous witnesses. In cross-examination by **Mr. Asige**, he said when referred to page 65 that there were alterations which were made by himself the same day of the counting. He said that since the vehicle they had could not accommodate the boxes, the officials and agents, the agents did not accompany the boxes. He confirmed that at the Tallying Centre there was a complaint by one of the contestants, **Mrabu**, and the box was opened in the presence of the Returning Officer and the votes were counted. However, he said there was no mistake although he did not record this. He further denied that the alterations were made after the recount. In re-examination, he said that there were 7 party agents including KENDA agents whose party **Mrabu** contested in. He said that he did not need form 35 until after counting and he gave the agents the form. Although there was a complaint he said the recount confirmed that what was indicated was what the candidate got and there was no other form 35 that was completed. However, at the polling station there was no complaint.

## **PETITIONERS SUBMISSIONS**

167. At the close of the hearing **Mr Asige** learned counsel for the 2<sup>nd</sup> petitioner filed his submissions which were highlighted orally before this Court. The Petitioner extensively relied on the averments in the Petition and submitted that Lunga Lunga Constituency election was not conducted in accordance with the Constitution, the **Elections Act** and the Rules thereunder. **Mr. Asige** submitted that there were breaches of the law, mistakes, irregularities and corrupt malpractices in the conduct of the said election, which affected the outcome of the election. Specifically, he submitted that the elections did not comply with the principle of free and fair election. That is, they were not free from violence, intimidation, improper influence and corruption. Further, he submitted that the election was not conducted transparently and in an open and democratic manner as required by Article 81(e) of the Constitution. **Mr. Asige** further submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents failed to ensure that the voting method in the said election was simple, accurate, verifiable, secure, accountable and transparent. He stated that the votes cast were not counted, tabulated, and the results announced promptly by the Presiding Officers in line with Article 86 of the Constitution. The crux of the Petitioner's submission therefore is that the election results the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' announced and declared on 6<sup>th</sup> March 2013 and contained in the original form 36 were inaccurate, unverifiable and unaccountable. It is on the basis of this original result that the Petition is anchored. According to the Petitioner, the results contained in the amended form 36 have not been announced or declared by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to date and therefore cannot be said to be valid results for the Lunga Lunga Constituency Parliamentary Elections within the meaning and contemplation of the

Election Act and the Regulations thereunder. The Petitioner submitted that the amendment of the results in the form 36 after announcement of the result was done in the absence of agents and candidates contrary to Article 86(c) of the Constitution, Section 83 of the ***Elections Act*** and Regulation 83(i), 83(b) as well as Regulation 87(2) (a) (b) of the ***Elections (General) Regulations, 2012***. The amended undeclared results are not contemplated in the provisions of the ***Elections Act*** and are therefore invalid *ab initio*. Therefore, the Petitioner submitted that, on the face of the said infringement of the law, the protection of Section 83 of the ***Elections Act*** cannot be invoked to salvage, redeem or sustain the Lunga Lunga National Assembly election results. **Mr. Asige** submitted that Section 83 of the ***Elections Act*** is only applicable when there are results within the meaning of Article 86(b) and (c) of the Constitution to the effect that the votes casts and the results from polling stations are openly and accurately collated and promptly announced by the returning officer. Furthermore, the Petitioner opined that the court has no jurisdiction under the Constitution and the Election statute and Regulations to validate the amended result unilaterally. As such, the Petitioner submitted that his Petition solely relies on the election results as per the original form 36. The Petitioner further submitted that the 3<sup>rd</sup> Respondent irregularly issued Form 38 declaring the 2<sup>nd</sup> Respondent as the winner of the contested elections on 5<sup>th</sup> March 2013 before the result of the said elections was announced on 6<sup>th</sup> March 2013. Regarding the burden and standard of proof, the Petitioner argued that he had satisfied his burden in accordance with the requirements set in **Raila Odinga & Others vs. IEBC & Others EP. 5 OF 2013 Supreme Court of Kenya** and section 107 of the ***Evidence Act***. Regarding claims of bribery, undue influence and violence against the 2<sup>nd</sup> Respondent, the Petitioner submitted that on the strength of the evidence of **PW15, PW16, PW17 and DW14**, the Petitioner had proved to the required standard that the 2<sup>nd</sup> Respondent engaged in acts of bribery, undue influence and treatment of voters during the campaign period and just prior to the 4<sup>th</sup> March 2013 election in breach of Section 76 (2) (3) of the ***Elections Act***. The Petitioner argued that the 2<sup>nd</sup> Respondent cannot raise the defence that he did not personally engage in any bribery, violence, corrupt and illegal practice as the same were committed by his authorized agents. It was also the Petitioner's submissions that the allegations of violence against the 2<sup>nd</sup> Respondent were proved through the evidence of **PW21 and PW23**. In conclusion, the Petitioner prayed that the Court consider in totality the conduct of Lunga Lunga Parliamentary Elections and find that the law was not complied with and the outcomes thereof were affected. Accordingly, declare the said elections void with costs to the Petitioner.

168. On behalf of the 1<sup>st</sup> petitioner, it was submitted by **Mr Kimani** that the evidence adduced by the petitioner with respect to bribery and undue influence a petitioner must lead clear and cogent evidence and the standard of proof hovers between a balance of probabilities and beyond a shadow of doubt. An election is a sacred public act. Where corrupt practices are alleged the court is enjoined to examine them with scrupulous care and merciless severity because the court is enjoined to maintain the purity of elections to the extent that they find their way in court by way of petitions and the court ought not to worry about the plea of perfection because the evidence shows that IEBC was not perfect or pure in discharging of its obligations. In his view, the allegations of corruption were many and the petitioner led evidence in support of all of them. The law on bribery in Kenya particularly in election process is inspired by the need to maintain purity of elections. In cases of simple bribery or giving of handout the offence is complete when money is given directly or given to someone to give to voters. Therefore, we have a situation where a candidate need not commit bribery directly but can do it by others such as Limited Companies, Associations or other individuals. On the issue of cheque issued in respect of schools, it was his view that there is abundance of evidence that there were cheques drawn on account of **Mwashetani Foundation** given to voters at campaign rallies and the driver of the 2<sup>nd</sup> respondent provides independent confirmation not just of the 2<sup>nd</sup> Respondent's generosity but acts of blatant and brazen bribery. The said driver, it was submitted, confirmed that 2<sup>nd</sup> Respondent gave cheques at rallies and what the court should look for is a clear evidence of bribery and sufficient corroboration. The absence of one of the directors was to him a corroborating factor that he was outside the country throughout December to April and that Mwashetani Foundation acts through directors. The question is who issued the cheques and with what intentions. In cross-examination the answers were just hollow. Bribery in election is not different and Section 119 of the ***Evidence Act*** applies with respect to adverse possession with respect to cheques other than the two cheques.

He invited the court to view this with microscopic eyes and find that bribery can be committed through agents. Further corroboration was to be found in the testimony of PW4 and PW5 which placed the 2<sup>nd</sup> respondent at the gate of Perani gate and it was conceded by 2<sup>nd</sup> respondent that he drove by and slowed down. In his view, there was no shortage of undue influence by 2<sup>nd</sup> Respondent to spoil voters with gifts such as iron sheets, wells and *sufurias*; gifts which are intended to induce people during election time also amount to bribery. The driver of 2<sup>nd</sup> Respondent confirmed delivery and assistance to Churches and mosque. Where a fact is alleged and evidence is alleged the burden and standard of proof shifts and it behoves the respondent to offer an explanation lest the court invokes sections 112 and 119 of **Evidence Act**. Finally, he submitted that the results challenged are not the correct results of the election of Lunga Lunga constituency and that was confirmed by documents filed and the evidence in cross-examination. The effects of having 2 sets of form 36 was that the petitioners were made to come to court on a fake statement because the result announced were not the true results while the true results according to the Returning Officer are in the amended form 36 which are not the results for an election. The results of the election are to be communicated to the public which are admitted null results. To him, the results were not results at all since they were not announced. The law requires the court to know the truth so that if the people did not know results the court would know the truth. The court can therefore peremptorily allow the petition and if the court is not persuaded then the court ought to find that acts of bribery and undue influence were proved which affected the results. He submitted that all the malpractices demonstrate that the results of Lunga Lunga elections could have been different since the results could have changed if all the floating votes were given to the runner up. Statutory threshold to him had been satisfied and the court should not worry about expenditure of IEBC hence the option is to order a re-run. As regards costs, he submitted if the court is not persuaded by their case, there were sufficient grounds to warrant the bringing of the cases and the court should consider the role of the petitioners' position to see purity and make appropriate directions.

### **RESPONDENTS' SUBMISSIONS**

169. On behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents, it was submitted by **Mr. Khagram** that both Petitioners had not discharged the burden of prove required in proving that there was non-compliance with electoral laws by any of the Respondents and that the non-compliance affected the results of the contested elections. As such, he submitted that the Petitions must fail. To this effect, he relied on **Raila Odinga vs. IEBC & Others - Supreme Court Election Petition No. 5 of 2013; Kiarie Waweru vs. Beth Wambui Mugo and 2 Others Nairobi HCEP No. 13 Of 2008; Joho vs. Nyange & Anor (2008) 3 KLR (EP) 500 at Page 507.** On the authority of **Gideon Mwangangi Wambua vs. IEBC & Others Election Petition No. 4 of 2013,** and Section 83 of the ***Elections Act***, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submitted that the Petitioners must not only establish that irregularities or electoral malpractices did occur but must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents further submitted that the entire electoral process as conducted by the 1<sup>st</sup> Respondent enjoyed a presumption of having been constitutionally and legally been carried out and the errors in the transposition of the results of individual Forms 35 from the Polling Stations to the Form 36 by the Returning Officer, and which errors the 3<sup>rd</sup> Respondent corrected immediately after noticing, did not materially affect the results. That is, whilst the position placing of the other candidates changed, the returned candidate, **Khatib Abdalla Mwashetani** still remained the winner of the election conducted on the 4<sup>th</sup> March 2013 in respect of the Lunga Lunga Constituency Parliamentary election. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents went on to submit that the errors in the transposition of results in some Polling Stations from forms 35 to form 36 occurred as a result of an honest human error aggravated by difficult circumstances in which the elections were conducted and there was no intention of subverting the democratic will of the electorate. On the part of the 3<sup>rd</sup> Respondent. In this regard, the findings of **Kimaru, J** in **Rishad Hamid Ahmed Amana vs. IEBC and 2 Others, Malindi Election Petition Number 6 of 2013,** were relied on as follows:

**“What is not in doubt is that even if the figure of 600 votes was added to the then total votes of 10,639 that the Petitioner is said to have obtained, that would add up 11,239 which will still be less than 11,560 votes that the 3<sup>rd</sup> Respondent obtained. It may well be argued, as was submitted by the Petitioner, that this was an irregularity that vitiated the entire results. This court is not persuaded that an arithmetical error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take into consideration as being a material factor, in the absence of other evidence of the irregularity, which would lead to the nullification of an election result.”**

170. Concerning the Petitioners allegation that party agents and particularly TNA agents were locked out of the polling stations, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents contended that no evidence was adduced to prove that the agents who were locked out were properly accredited. Further, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent stated that the Polling Day Diaries and Forms 35's from the polling stations complained of clearly shows that TNA agents were present and actually signed the statutory documents. Nevertheless, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents argued that even if the agents were indeed barred from accessing the polling stations, Regulation 62(3) of the ***Elections (General) Regulations, 2012*** is clear that absence of agents cannot invalidate proceedings at a polling station. Reliance was placed on this court's ruling in **Seif Ramadhani Seif Kajembe vs. The Returning Officer & Others Election Petition No. 10 of 2013**. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent submitted that no evidence was adduced by the Petitioners to prove that any agent was barred from signing Form 35 at any Polling Station by the Presiding Officers. Further, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents went on to submit that while Regulation 78 of the ***Elections (General) Regulations, 2012*** provides for the signing of the Forms 35, Regulation 79(7) states that the absence of a candidate or an agent at the signing of a declaration form or the announcement of results cannot by itself invalidate the results announced. Reliance was placed on **Wilson Mbiti Munguti Kabuti & 5 Others vs. Patrick Makau Kingola & Anor HCEP No. 9 of 2013 (Machakos)**. Regarding the allegations of bribery against the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submitted that the Petitioners did not adduce credible evidence to prove bribery, an electoral offence, beyond reasonable doubt. For example, they contended that **PW5's** testimony that she was given a cheque by **Mwashetani Foundation** which she used to pay school fees for Lunga Lunga Secondary School, was discredited in cross examination when she failed to explain why the rubber stamp on the receipt showed Msambweni District Education Officer – Lunga Lunga and not the said school. Furthermore, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents contended that **DW26, Samuel Avugwi Luseno**, a teacher from the said Lunga Lunga Secondary School disputed the receipt. It was also the 1<sup>st</sup> and 3<sup>rd</sup> Respondents contention that the Petitioners and their witnesses failed to adduce evidence to show that the allegations of bribery had been reported to the police. Therefore, they could not substantiate the same. Reliance was placed on **Mohamed Ali Mursal vs. Saadia Mohamed & 2 Others Eklr Petition No. 1 of 2013**, to the effect that it was necessary for the Petitioners to prove to court that the allegations of bribery had been reported to the authority. It was submitted on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents that the existence of two Forms 36 for Lunga Lunga Constituency did not vitiate the said election as the Returning Officer, explained that the second form 36 was done after realization that there was an error during tallying. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents therefore argued that despite the errors and the correction thereof as reflected in the amended form 36, the results of the disputed elections were not substantially affected. It was also submitted on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents that the Petitioners' allegation that 1175 votes were unaccounted for is not tenable as the error was corrected at the tallying centre and the true position of the results declared by the returning officer in the presence of all parties. The 2<sup>nd</sup> Respondent was not a direct beneficiary of the alleged 1175 votes. Further, the error was a typographical error which never benefited any particular candidate moreso the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents contended that even after the correction of the errors and all votes allocated, the 2<sup>nd</sup> Respondent still maintained the lead and none of the Petitioners has disputed the correctness of the amended Form 36. Accordingly, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents asked the court to find that the election of the Member of National Assembly Lunga Lunga Constituency was free, fair and credible and therefore dismiss both Petitions with a maximum costs of Kshs. 10,

000,000.00 to the Respondents; bearing in mind they are two petitions consolidated, the length of the proceedings and the number of witnesses involved. **Mr Khagram** relied on the decision of **Mwongo, J** in **Ferdinand Ndungu Waititu vs. The Independent Electoral & Boundaries Commission & 8 Others Nairobi Election Petition No. 1 of 2013** and finally submitted that since there was the irregularities relied upon did not affect the result costs ought to be awarded to his client. However in the event that the petitions are allowed based on the allegations of bribery by the 2<sup>nd</sup> respondent, he similarly prayed that his clients be awarded the costs.

171. On behalf of the 2<sup>nd</sup> respondent it was submitted by Mr Mohamed that the role of the court to uphold and protect the democratic will of Lunga Lunga people where that will is discernible. In executing this obligation, he submitted that the court must direct its mind to the overriding constitutional principles that underpin the electoral system and electoral processes as established under the Constitution, the *Elections Act, 2011*, and the *Elections (General) Regulations, 2012*. These principles are contained under *Articles 1(2), 4(2) and 10(2)(a)* in which the people exercise their power either directly or through their democratically elected representatives. Reliance was placed on the authority of **Raila Odinga & 5 Others vs. IEBC and 3 Others** (supra). On the strength of section 83 of the *Elections Act*, he submitted that an election *per se* is deemed proper and valid unless and until vitiated by the Court. As such, he contended that the Petitioners bear the legal burden to prove the twin requirement that: the contested election failed to comply with the law and that the non compliance substantially affected the outcomes of the elections. Reliance was placed on the authority of **Raila Odinga & 5 Others vs. IEBC and 3 Others** (supra), **Karauri vs. Mbogo & Another (2008) 1KLR (EP)** and **Morgan & Another vs. Simpson & Another [1974] 3 ALL ER 722** and Section 107(1) of the *Evidence Act*. The 2<sup>nd</sup> Respondent also relied on this court's ruling in **Seif Ramadhani Seif Kajembe vs. The Returning Officer & Others** (supra) to the effect that the burden of proof in an election petition lies heavily on the Petitioner and he cannot shift his liability to the Commission. It was submitted on behalf of the 2<sup>nd</sup> Respondent that Section 64 of the *Elections Act* requires the Petitioners to establish that the person alleged to have taken a bribe is a voter and that as a result of the bribe he/she voted or refrained from voting for a particular candidate. The burden is on he who alleges bribery to show the intent, ill will or ill motive of the giver. Regarding this, the 2<sup>nd</sup> Respondent relied on the *Halsbury's Laws of England, 3rd Edition Vol 14* at page 220 that:-

**“Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the elections.....for this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of a person alleged to have been bribed is not conclusive.”**

172. The 2<sup>nd</sup> Respondent further submitted that it is also vital for the Petitioners to prove on a higher degree that the effect of bribery had a substantial impact on the outcomes of the contested election. Reliance was placed on **Muliro v Musonya & Another (2008) 2 KLR, Wilson Mbithi Munguti Kabuti & 5 Others vs. Patrick Makau Kingola & Another [2013] eKLR**. Further, on the authority of **Joho v Nyange & Another (2008) 3 KLR (EP)**, the Respondent argues that the Petitioners must provide examples of instances of the bribery. Furthermore, the 2<sup>nd</sup> Respondent relied on **Thomas Malinda Musau & Others vs IEBC & Others EP 2 of 2013** to the effect that failure to report alleged bribery, intimidation and violence of voters/agents to the relevant authorities cannot be remedied by court. The 2<sup>nd</sup> Respondent submitted that the Petitioners failed to prove that the witnesses who alleged to have received the said bribes were registered voters as required by law. It is also the 2<sup>nd</sup> Respondent's submission that the Petitioners' witnesses confirmed that the cheques they received were not drawn by the 2<sup>nd</sup> Respondent, but by **Mwashetani Foundation** and the payees were various schools which did not vote. The 2<sup>nd</sup> Respondent further contended that the allegations of supply of school desks, water tanks, iron sheets, cash, *sufurias*, sinking of wells and building of toilets were not proved and if at all these acts occurred, it was not proved that voters were induced to vote for the 2<sup>nd</sup> Respondent. Further, the Petitioners and their witnesses failed to connect these acts with neither the 2<sup>nd</sup> Respondent nor his agents. For instance, **Marinda Jawa Kombo** testified that he saw a group of persons

distributing maize and connected them with the 2nd Respondent. Upon cross examination he said that he just knew that they were agents. No evidence was produced to prove the agency. **Mwalewa Jeffa** testified that the 2nd Respondent sunk a well in Mtune while **Harrison Ngoro** testified that one **Hemed Majuto** brought a water tanker but failed to establish a nexus between the 2<sup>nd</sup> Respondent and the people who committed the said acts. **Benard Okello** testified that there was fighting outside the polling station but did not establish whether it affected the voting process. Accordingly, the 2<sup>nd</sup> Respondent submitted that the generalized allegations of bribery against the 3<sup>rd</sup> Respondent by both Petitioners do not meet the required threshold of standard of proof. The 2<sup>nd</sup> Respondent submitted that **Mwashetani Foundation** is a separate legal entity registered as a company incorporated in the year 2010. Paragraph 3 of its memorandum clearly shows its objects to include establishing rural based community boreholes, to provide care and improve quality of life. As confirmed by the evidence of one of its directors, **Abubakar Juma Manyenze**, the Foundation is still in existence long after the General Elections and is still committed to alleviate poverty. Therefore, according to him, the Petitioners failed to prove the nexus between him and the acts of bribery complained of. Regarding the complain on failure by agents to sign forms 35, the 2<sup>nd</sup> Respondent on the strength of **Wilson Mbithi Munguti Kabuti & 5 Others vs. Patrick Makau King'ola & Anor HCEP 9/2013 (Machakos) eKLR** and Regulation 79(7) of the ***Elections (General) Regulations, 2012*** submitted that failure by a candidate or agent to sign form 35 cannot invalidate the results unless the Petitioners proved that the said failure had an effect to the outcome of the results. Further, the 2<sup>nd</sup> Respondent stated that the evidence of the Presiding Officers confirmed that the said forms were few and the agents were asked to make copies. With respect to the Petitioners' complain that some agents were blocked from the assessing the Polling Stations, the 2<sup>nd</sup> Respondent submitted that the evidence of the Presiding Officers showed that only the agents without the necessary authorization were disallowed from entering the Polling Stations. He contended that no agent testified that she was blocked out of the Polling Station and only the TNA chief agent one, **Chikophe Mwaruwa** testified and made wide allegations that TNA agents were blocked out without giving out the names of the agents said to have been blocked out. Further, the 2<sup>nd</sup> Respondent submitted that a close examination of the Polling Day diaries shows that TNA agents at one time or another appended their signatures in the said diaries. Furthermore, he submitted that Regulation 62(3) of the ***Elections (General) Regulations, 2012*** provides that the absence of agents cannot invalidate proceedings at a polling station. He relied on the authority of this court's ruling in **Seif Ramadhani Seif Kajembe vs. The Returning Officer & Others** (supra) paragraph 36, that:

**“It was incumbent upon the petitioner to adduce evidence to show that in those polling stations it was his agents who were locked out therefrom with documentary evidence showing that they were accredited agents for the petitioner. This was evidence which was peculiarly within the knowledge and possession of the petitioner and by not adducing the same the petitioner has deprived the Court of the crucial evidence on the basis of which the Court can make a finding in favour of the petitioner with respect to the scrutiny sought. Whereas the petitioner has submitted that he has identified 27 polling stations in which his agents were absent, that submission is not supported by the evidence on record so far and as I have held elsewhere in this ruling it was incumbent upon the petitioner to peruse the record to see whether based on the documents filed pursuant to Rule 21 of the Rules there was a need to seek the Court's leave to adduce further affidavit evidence.”**

173. It was submitted on behalf of the 2<sup>nd</sup> Respondent that the Petitioners complain that failure by the election system technology resulted to manual system which was untrustworthy and easily manipulated, is unfounded. Reliance was placed on the Supreme Court's findings in **Raila Odinga & 5 Others vs. IEBC and 3 Others** (supra) to the effect that, the Petitioners' case insofar as it attributes nullity to the contested election on grounds of failed technology devices, is not sustainable. The 2<sup>nd</sup> Respondent also submitted that the Petitioner in Petition No. 9 failed to show how the setting up of a laptop of the 2<sup>nd</sup> Respondent at the tallying centre affected the final tallying and results. The 2<sup>nd</sup> Respondent also urged the court to find that although the Petitioners

are voters who denied being associated with any of the candidates, cross examination revealed that they were backing and were supported to lodge the Petitions herein by **Ben Musau** and **Omar Zonga** respectively, two who were unsuccessful aspirants in the said Parliamentary seat. Accordingly, the 2<sup>nd</sup> Respondent asked the court to find that the 2<sup>nd</sup> Respondent was validly elected as the Member of National Assembly by the electorate of Lunga Lunga Constituency and dismiss the Petitions with costs to the 2<sup>nd</sup> Respondent.

174. The following issues were agreed by the parties and modified by the Court as forming the issues for determination by this Court:

1. **Was the election for the position of the Member of National Assembly for the seat of Lunga Lunga constituency held and carried out on the 4<sup>th</sup> March 2013 carried out in a free, fair, transparent, impartial, credible and administered in an accurate and accountable manner?**
2. **Was the election carried out in compliance or substantial compliance of the principles laid down in the Constitution or other governing written law?**
3. **If not did the alleged irregularities and non-compliance as petitioned materially affect the results of the election?**
4. **Were there any election offences committed by any person in connection with the election which the subject of this petition and if so, by whom?**
5. **Was the 2<sup>nd</sup> respondent validly elected as the Member of the National Assembly for the Constituency?**
6. **What order is appropriate for the Court to make in this petition?**

### **THE LAW**

175. Article 1 of the Constitution of Kenya provides as follows:

***(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***

***(2) .....***

***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***

***(a) Parliament and the legislative assemblies in the county governments;***

***(b) the national executive and the executive structures in the county governments; and***

***(c) the Judiciary and independent tribunals.***

176. It is in recognition of the foregoing provision that Article 159(1) of the Constitution provides as follows:

***Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

177. It follows that the judiciary when carrying out its mandate under the Constitution and other legislative enactments does so under the power delegated to it by the people of the Republic of Kenya. In other words there is a social contract between the people and the judiciary under which the people have agreed to delegate their powers to *inter alia* the judiciary hence that power must be carried out in the interest of the people of Kenya. Public policy therefore becomes very crucial in the exercise of such delegated authority. However, public policy has been described as unruly horse, and when once you get astride of it you never know where it will carry you. Judges are to be trusted as interpreters of the law than as expounders of what is called 'public policy'. The matters that fall within the scope of the doctrine of public policy have been long since defined, and if the consequences of such a condition being held to be valid, will be so deplorable, it is for the

legislature and not the Courts to intervene. See **Richardson vs. Mellish 130 ER 2, Bing 252; Re Mirams [1891] 1 QB 594.** It has therefore been stated that public policy is not a safe or trustworthy ground for legal decision, and no Court may invent a new head of public policy. See **Janson vs. Drienvontein Mines [1902] AC 484.**

178. It therefore follows that in determining what the public policy is, the Court ought to address itself to the provisions of the Constitution and various enactments by the legislative arm of the government since Parliament is deemed to enact legislation which reflect the public policy. This is especially important in electoral disputes and therefore the High Court has jurisdiction to determine the question whether a person has been validly elected as a Member of the National Assembly and in determining the validity of an election, the court will take into consideration the provisions of the Constitution, the ***Elections Act, 2011*** (hereinafter referred to as the Act), ***Elections (Parliamentary and County Election Petitions) Rules, 2013*** (hereinafter referred to as the Rules) and Regulations made thereunder and the general principles recognised as constituting the proper conduct of a valid election.

179. Article 38(2) and (3) of the Constitution provides as follows:

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

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

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

***(3) Every adult citizen has the right, without unreasonable restrictions—***

***(a) to be registered as a voter;***

***(b) to vote by secret ballot in any election or referendum; and***

***(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.***

180. Article 81 of the Constitution on the other hand provides as hereunder:

***The electoral system shall comply with the following principles—***

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

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

***(c) fair representation of persons with disabilities;***

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

***(e) free and fair elections, which are—***

***(i) by secret ballot;***

***(ii) free from violence, intimidation, improper influence or corruption;***

***(iii) conducted by an independent body;***

***(iv) transparent; and***

***(v) administered in an impartial, neutral, efficient, accurate and accountable manner.***

181. Section 83 of the Act provides:

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

182. In my view the principles contemplated under the foregoing provision are the ones in Article 81 of the Constitution set out hereinabove.

### **PRINCIPLES**

183. However the Courts have in the past laid down certain legal principles which guide the Court in determining disputes arising from electoral disputes.

184. First and foremost, it is recognised that the electoral process is a democratic process undertaken by the citizens in the exercise of their rights to be represented by a person of their choice. In determining election petitions, the High Court is required to be mindful of the fact that election petitions are not ordinary suits where a party is enforcing a right that accrues to him as a person. The court has to take cognisance of the fact that an election is a signification of the exercise of the democratic rights of the people to have a person of their choice represent them in the National Assembly. The court has to take into account the fact that under Article 4(2) of the Constitution Kenya is a democratic multiparty state which espouses democratic ideals that recognise that it is only the people who have the right to determine their political leadership and thus Parliamentary election is and ought to be pivotal to its people and its governance and a free and fair election is accepted as the basis of a valid election. That determination is exercised in free and fair elections which can be so judged in accordance with the provisions of the Constitution, Legislation and International Conventions and Treaties which Kenya as a sovereign State is party to under Article 2(5) and (6) of the Constitution. The test as to what constitutes a free and fair elections will of necessity be the internationally accepted standard of what constitutes such free and fair elections. As was held by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others Nairobi (Milimani) HCEP No. 10 of 2008:**

**“The right of a people to freely elect their representative in a credible electoral process is recognised as a human right. Article 21 of Universal Declaration of Human Rights which was adopted and proclaimed by the General Assembly of the United Nations in Resolution 217A(III) on 10<sup>th</sup> December 1948 provides that everyone has the right to take part in the governance of his country, directly or through freely chosen representative. Everyone has the right to equal access to public service in his country. The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures... Article 25 of the International Convention on Civil and Political Rights (1966) which Kenya ratified and expressed her accession to on 1<sup>st</sup> May 1972 states that every citizen shall have the right and the opportunity, without any distinctions mentioned in Article 2 and without unreasonable restrictions (1) to take part in the conduct of public affairs, directly or through freely chosen representative (2) to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors (3) to have access on general terms of equality, to public service in his country... In its Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers which was commemorated on 27<sup>th</sup> October 2005 at the United Nations in New York and which was endorsed by among others, the African Union, the Commonwealth Secretariat and the Inter-Parliamentary Union, (organisations to which Kenya is a member) the United Nations Electoral Assistance Division stated that genuine democratic elections are a requisite condition for democratic governance, because they are the vehicle through which people of a country freely express their will, on the basis established by law, as to who shall have legitimacy to govern in their name and in their interests. Achieving genuine**

democratic elections is a part of establishing broader processes and institutions of democratic governance. Therefore, while all election processes should reflect universal principles for genuine democratic elections, no election can be separated from the political, cultural and historical context in which it takes place...The makers for effective implementation of the indices of free and fair elections are as follows: Electoral law and system; Constituency delimitation; Election management; The right to vote; voter registration; civic education and voter information; Candidates, political parties and political organisation, including funding; Electoral campaign, including protection and respect for fundamental rights, political meetings, media access and coverage; balloting, monitoring and results and finally complaints and dispute resolution.”

185. The Constitution has given the Court jurisdiction to hear the election petition and the court is expected by all the laws, to determine that the process of election has been free, fair and transparent and that the court must give effect to the tenets of the Constitution, Rule of Law, Electoral Laws and Regulations made thereunder and if the court finds that the electoral process was badly flawed and that the process so undertaken could affect the results of the election as declared, the court should not hesitate to declare the election as null and void. Therefore whereas elections are about numbers, where despite a finding that the respondent won the election the Court is of the view that an election was conducted so badly that it was not sufficiently in accordance with the laws relevant to an election it would still be declared void as the court cannot shut its eyes to such illegal acts which although cannot affect the result of the election, nonetheless clearly revealed that the election was not conducted in accordance with the law. An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity of the flaw, it is bound to affect the election results. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated. See **James Omingo Magara vs. Manson Onyongo Nyamweya & 2 Others Civil Appeal No. 8 of 2010**; **Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others (supra)**; **Wabuge vs. Limo & Another [2008] KLR (EP)**; **Kabogo Gitau vs. George Thuo & 2 Others (supra)**; **Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007**; **Morgan vs. Simpson [1975] 2 QB 151**.

186. Therefore as provided under Section 83 of the Act, the court will not interfere with the democratic choice of the voters unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections. In the phrase “affected the result”, the word “result” has been held to mean not only the result in the sense that a certain candidate won and another candidate lost and that the result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. However when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules. Therefore no parliamentary election will be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary election rules if it appears to the tribunal having cognisance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect its results. See **Mbowe vs. Eliufoo [1967] EA 240**; **Re Kensington North Parliamentary Election Petition [1960] 2 All ER 150**.

187. The burden of establishing the allegations in an election petition regarding the conduct of the

said election and the results announced thereafter is on the petitioner. This position has now been affirmed beyond doubt by the Supreme Court in **Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others Nairobi Petition No. 5 of 2013 [2013] EKL.R.** In this case, the court in paragraphs 196, 197 and 203 observed as follows:

**“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law. IEBC is a constitutional entity entrusted with specific obligations, to organise, manage and conduct elections, designed to give fulfilment to the people’s political rights [Article 38 of the Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.....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 fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden.”**

188. It is worth repeating that the Court is aware of its duty to consider and determine the evidence adduced by the parties to the election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters to elect a representative of their choice. This position is informed by the fact that election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, they are nonetheless disputes of great public importance and this is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that election petitions should not be taken lightly. Generalised allegations are therefore not the kind of evidence required to prove election petitions but they should be proved by cogent, credible and consistent evidence. The court, apart from doing justice between the parties, must also consider the aspect of public interest in the electoral process which is to give the voters a duly elected member representing them in Parliament. The jurisdiction to hear and determine an Election Petition is therefore a special jurisdiction donated to the court. See **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others Nairobi HCEP No. 13 of 2008**; **Joho vs. Nyange & Another (No. 4) [2008] 3 KLR (Election Petitions) 500**; **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 352**; **[2000] 1 EA 115**; **Wanguhu Ng’ang’a & Another vs. George Owiti & Another Election Petition No. 41 of 1993**; **Reuben Nyang’inja Ndolo vs. Dickson Wathika Mwangi & 2 Others Nairobi HCEP No. 11 of 2008**; **Mahamud Muhumed Sirat vs. Ali Hassan Abdirahman & 2 Others Nairobi HCEP No. 15 of 2008**.

189. With respect to the standard of proof required in election petitions, it is now established that generally the standard of proof in election petition cases is higher than that applicable in ordinary civil cases i.e. that of proof on a balance of probabilities. Dealing with this issue the Supreme Court in **Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others** (supra) expressed itself as hereunder:

**“The threshold of proof should, in principle, be above the balance of probability, though not**

**as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”**

190. In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred. That is not the case in election petitions. The standard is higher than proof on a balance of probabilities but lower than the standard beyond reasonable doubt required in establishing criminal cases unless the allegations are made of electoral malpractices, for instance bribery, which require higher proof. The allegations in a petition are grave and consequently the party laying them is expected to present evidence that is cogent, consistent and credible. See **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others** (supra); **Joho vs. Nyange & Another** (supra); **Wanguhu Ng'ang'a & Another vs. George Owiti & Another** (supra); **Muliro vs. Musonye & Another [2008] 2 KLR (EP) 52**; **Onalo vs. Ludeki & 2 Others (No. 3) [2008] 3 KLR (EP) 614**; **William Kabogo Gitau vs. George Thuo & 2 Others** (supra); **Mbowe vs. Eliufoo** (supra);; **Joseph Wafula Khaoya vs. Eliakim Ludeki & Lawrence Sifuna Election Petition No. 12 of 1993**.
191. Under section 107 of the *Evidence Act*, the burden of proof lies upon the person who desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts. The section lays down that if a person wishes the court to believe in the existence of a particular fact, the onus of proving that fact is on him, unless the burden of proving it is cast by any law on a particular person. The burden of proving that the election is liable to be set aside for corrupt practices is heavily on the petitioner because it is he who seeks to have the election declared null and void; the standard of proof has to be to the satisfaction of the court since the court cannot be deemed to be satisfied if it is in doubt. See **Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007**; **Amolak vs. Bhagwandas-A [1977] SC 8151**; **Mbowe vs. Eliufoo** (supra).
192. The burden is heavy on him who assails an election petition which has been concluded. He must prove the allegation to the satisfaction of the court and what is deemed to be to the satisfaction of the court is always difficult to decide and varies in practice according to the nature of the case. The standard of proof depends on the seriousness of the allegations made. The burden of proof rests throughout on the petitioner and the quality of evidence that is advanced is to be considered with thoroughness and gravity which is commensurate with the dire consequences that can follow. See **Manson Oyongo Nyamweya vs. James Omingo Magara & 3 Others Kisii HCEP No. 3 of 2008**; **Ayub Juma Mwakesi vs. Mwakwere Chirau Ali Mombasa HCEP No. 1 of 2008**; **Nelson vs. Attorney General & Another [1997] 2 EA (CAT)**.
193. In **Madundo vs. Mweshemi & AG Mwanza HCMC No. 10 of 1970**, the rationale for placing a heavier burden on the petitioner than in ordinary civil cases was given as follows:

**“An election petition is more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons. To require the petitioner to satisfy such standard of proof is not only fair but reasonable in the circumstances. Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations 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 this allegation and without doing so, his petition would fail, although the trial court is not bound to decide an election petition only on the petitioner’s evidence.”**

194. Similarly in **Kirahim Khursid vs. Khurshid Ahmed & Others, 1975 Air 290, 1975 Scr (1) 643**, court observed as follows:

**“However, we have to remember another factor; an election once held is not to be treated in**

**a light hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing serious elements of uncertainty on the verdict already tendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the longest practice alleged against the returned candidate is adduced.”**

195. Therefore irregularities in the conduct of an election will not vitiate the result unless the irregularities either were so serious that the election was not in accordance with principles laid down in the law or the irregularities affected the result. Again, the overriding objective of the Act, it has been held, is to promote the right to vote and this requires that the Act should be interpreted in such a manner as to provide citizens with every opportunity to vote and that the primary duty of the court is to give effect to the will of the electorate. Therefore reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the modern jurisprudence when considering procedural matters. Much of the law points out that the obligations imposed by election statutes on election officials such as a returning officer, are directory as opposed to mandatory. The difference is that, if mandatory provisions are not complied with then the thing done is invalid or void, while it is sufficient, if a directory enactment is obeyed or fulfilled substantially. Courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules or of the duties of the election official providing that the result of the election was unaffected by those breaches. The availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous result to stand. Thus it is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result. See Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007; Fitch vs. Stephenson & Three Others [2008] EWITC 501 QB; Keefe vs. Pukanich [2007] NWTSC 90.

196. In Kalembe Ndile's Case, it was held:

**“One of the principles governing the electoral process under Article 82 of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavour and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”**

See also Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others [EP NO. 12 of 2013].

197. This position was recognized by Maraga, J (as he then was) in Joho vs. Nyange & Another (2008) 3 KLR (EP) 500 when he stated as follows:

**“...because it (elections) is conducted by human beings, there bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.”**

198. Therefore whereas human errors can be understood, the errors should not be consistent and serious. See Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others (supra).

## DETERMINATIONS

199. One of the irregularities that runs across the Polling Stations according to the petitioners is that the TNA agents were not allowed into a number of the polling stations at the opening of the station. It was alleged that this was deliberate since the Returning Officer had assured the party's chief agent, PW3 that there was no need for the said witness to avail the documents and that the said party's agents would be admitted into the polling stations. As a result of this stratagem, the party's agents were locked from the said polling stations. On behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents it was however contended that there was no such stratagem and that those who had no documents were rightly denied entry as that was the condition given by the Commission. In re-examination PW3 admitted that for one to be an agent one required accreditation documents from the party. However there were instances when TNA Party agents did sign the Diaries although this was explained by the same witness that this was after they were allowed in the course of the day. One disturbing factor however is that the said TNA Party agents were never called to testify in this petition. No reason was given why they were not called to at least testify as to the fact of their being locked out of the station. The respondents' case was that they were not bound to control the agents and that the agents were free to come in and leave the station as they wished. Without the agents being called to give evidence it is my view that the mere fact that certain pages of the Diaries were not signed by the agents in light of the denials of the allegations of trickery by the Returning Officer does not elevate the evidence above the standard of balance of probability. Accordingly I am not satisfied that TNA agents were locked from the various polling stations mentioned though the manner in which the various Presiding Officers kept their records left a lot to be desired.
200. There was an allegation that the agents were not issued with copies of form 35s. In a number of instances this was admitted by the 1<sup>st</sup> and 3<sup>rd</sup> respondents though it was explained as having been due to lack of adequate number of the said forms. The respondents however contended that the agents were permitted to make photocopies of the same. It is true that under Regulation 79(2)(c) the Presiding Officer is obliged to provide each political party, candidate, or other agent with a copy of the declaration of the results and that now calls for an examination of the role of party agents in an election petition. **Writ No. J1/6/2013** between **Nana Addo Dankwa Akufo-Addo & Others vs. John Dramani Mahama & Others** the Supreme Court of Ghana expressed itself as follows:

**“It is clear from the constitutional and statutory regulations that the polling agent forms an integral part of the conduct of the polls on Election Day. He has before the polls sworn to the same oath that the presiding officer and polling assistance have sworn to abide by the laws and regulations governing the conduct of the election..... A counting agent is required to sign the Declaration of Results form. Polling agents should obtain copies of the signed copy of the results for their candidates. If a polling agent refuses to sign the results he must give reasons to the Presiding Officer or a superior election official. To conclude the discussion on the role of presiding officers and polling/counting agents I wish to observe that these presiding officers and polling/counting agents have to undergo intensive and proper training to be able to carry out this very sensitive tasks assigned them under the Constitution and C.I. 75. These persons have to show professionalism, understanding of the electoral laws which may seem simple but complex to carry out. Even though the EC offers training for the agents of candidates, I think it is the responsibility of Political parties to ensure that the agents they appoint have been thoroughly trained and acquainted with what they have to look for. Most of the irregularities complained of in this petition are not trivial as it is the inaction of both the polling agents and presiding officers that has brought us here. Had the polling/counting agents been more attentive to what the presiding officers were required to fill on the forms and the sources from which the information is to be extracted e.g. the voters register, ballot booklets and the biometric verification equipment the errors on the pink sheet might have been minimal. Political parties must invest in the training of their polling agents and not leave it all to the Electoral Commission which appears to organize crash training programs due to limited time.”**

201. This position was reiterated in *Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others* (supra) where the Court stated that:

**“The participation of the candidates or their agents is not incidental or cosmetic to the process but is an important component of the electoral process and that is the reason why the election regulations provide that at each stage of the electoral process the candidates or their agents participate in the process. The presiding officers are required to ensure that at each stage of the electoral process the candidates and their agents participate and in the event that a candidate or his agent refuses to participate in the electoral process, a mechanism has been put into place for the presiding officer to give reasons for failure or refusal by the candidate to participate in the electoral process.”**

202. What then are the consequences of the failure to supply the agents with copies of the said forms?

It must be remembered that the issuance of form 35 comes at the end of the counting of the votes. It is therefore a post-counting process. The breach of rule 79 was a post-election anomaly which, in my view, taken alone did not affect the result of the elections if that was the only complaint.

203. With respect to the Polling Day Diaries, I agree with the holding by the Court of Appeal in **Omingo Magara's case** (supra) that when interpreting legislation relating to election the primary purpose is to ensure that there is a free, open and properly conducted democratic election and that if there have been irregularities they should be exposed to the view of the general public. I also associate myself with the holding of **Musinga, J** (as he then was) in **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others Kisii Election Petition No. 2 of 2008** wherein the learned Judge expressed himself as follows:

**“While every effort must be made to follow rules of procedure as stipulated under the Act and the Election Petition Rules, the same should not be interpreted in a narrow and restrictive manner that may give undue advantage to some of the parties in an election petition. An election court should endeavour to do substantial justice without allowing unnecessary clogs and fetters to be placed along the path of justice.....In its quest for truth and just determination of an election dispute, an election court is not limited to examining only the documents referred to in Rule 19 of the Election Petition Rules but can examine any public document that is shown to be relevant...Section 23(b) of the Act also empowers the Election Court to summon the District Elections Co-ordinator and once summoned the witness has to swear an affidavit and deliver to court sufficient copies thereof as provided for under rule 18(4) of the Election Petition Rules.”**

204. To drive the point home the Court of Appeal held **Wildlife Lodges Ltd. vs. Jacaranda Hotel Ltd. Civil Appeal No. 249 of 1999**, that nothing is immaterial that helps justice to be done; nothing is extraneous which helps prevent injustice being done.

205. Therefore the Court is properly entitled to peruse the Polling Day Diaries in order to ensure that justice is done. I have already said that the record keeping by the Commission's officials at the polling stations was anything but efficient.

206. It was further alleged that while transporting the ballot papers from the various polling stations to the Tallying Centres, the agents were not permitted to accompany the said ballot boxes. This was explained by the 1<sup>st</sup> and 3<sup>rd</sup> respondents as having been due to lack of adequate space in the vehicles which were meant to carry the election officials, the ballot boxes and the security agents. However, the parties were at liberty to make their own arrangements for the transportation of their agents. In my view political parties ought to not only train their agents but also ensure that they provide them with adequate accommodation and transportation in order to ensure that the interests of the political parties are adequately protected and ought not to leave everything in the hands of the Commission. Whereas I agree that for the sake of transparency and accountability of the electoral process effort ought to be made to ensure that party agents participate at every stage of the electoral process including the transportation of the ballot boxes from the polling stations to the Tallying Centres I am not prepared to hold that the mere fact that the ballot boxes are not accompanied by the party agents without more would be a ground for nullifying an election unless it is proved that some irregularities were committed along the way which affected the results of

the election.

207. With respect to the electronic transmission of results, the issue was canvassed in the *Raila Odinga Case* by the Supreme Court which the Court expressed itself as follows:

**“But as regards the integrity of the election itself, what lawful course could IEBC have taken after transmission of technology failed? There was no option, in our opinion, but to revert to the manual electoral system as was done... Since such technology has not achieved a level of reliability, it cannot be considered a permanent or irreversible foundation for the conduct of electoral process. This negates the Petitioner’s contention that, in the instant case, injustice, or illegality in the conduct of election would result if IEBC did not employ electronic technology. It follows that the Petitioner’s case, insofar as it attributes nullity to the Presidential election on grounds of failed technology devices, is not sustainable”.**

208. The same Court was of the view that:

**“An objective reading of the Regulations cited, does not reveal a contemplation of elections conducted solely by electronic means. The elections of 4<sup>th</sup> March 2013, were not envisaged to be conducted on a purely electronic basis. Regulation 60 of the Elections (General) Regulations, 2012, illustrates that if the elections are to be facilitated by electronic means only, relevant guidelines shall be availed to the public. Regulation 59 provides that voting is done by marking the ballot paper, or electronically. Thus the voting system envisioned in Kenya appears to be manual. Regulation 82, and section 39 of the Elections Act, which deal with electronic transmission, operate on the basis that electronically transmitted results are only provisional. Of this fact, the Court will take judicial notice, in deciding whether Presidential elections can be invalidated due to non-compliance with regulations requiring electronic transmission.”**

209. It follows that the mere fact that the results were not transmitted electronically cannot be a basis for invalidating an election if the results of the same express the will of the electorate.

210. It was alleged that the 2<sup>nd</sup> respondent attached his laptop to the frame of the Computer System which was in use by the Commission. In my view no credible evidence was adduced to support this fact save for the fact which was admitted that there was a laptop belonging to the 2<sup>nd</sup> respondent at the Tallying Centre. Taking into account the admission that there was a failure of the Result Transmission System, I do not see what would have been achieved by the attachment of the laptop to the Commission’s failed system.

211. That there was some form of gun drama at Perani was admitted by the witnesses on both sides of the divide. However, both parties made allegations that the gun drama was orchestrated by the opposite side. Assuming without deciding that one of the parties orchestrated the same the next question would be the effect of such an incident. In *Kabogo Gitau vs. George Thuo & 2 Others* (supra) **Kimaru, J** was of the view that although there was evidence of violence, the same was in respect of an isolated case and was indeed one off incident which did not amount to generalised violence that could in the circumstances vitiate an election. Similarly, it has not been alleged that there was widespread violence which would justify the Court in vitiating the elections. Whereas it was alleged that some of the potential voters ran away as a result of the violence no such potential voters testified in this case. Again in *Benson Maneno vs. Jacob Machekele and Others Malindi EP No. 14 of 2013*, it was held by **Kimaru, J** that for the Petitioner to sustain the claim that violence disrupted the election, he was required to establish that the Respondents were either responsible for the violence or condoned or connived in the perpetration of violence. In this case although it was conceded that the 2<sup>nd</sup> respondent was in his vehicle there was no satisfactory evidence that he was responsible for the same or that he condoned or connived in the perpetration thereof.

212. It was alleged that the election was marred by rampant bribery of voters in form of money for school fees, supply of school desks, supply of water tanks, supply of iron sheets, cash to churches, supply of *sufurias*, sinking of wells and building of toilets.

213. Section 64 of the *Elections Act* provides:

**(1) A candidate who—**

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

**(i) to vote or refrain from voting for a particular candidate;**

**(ii) to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for an political party or candidate;**

**(iii) corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or**

**(b) directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter—**

**(i) to vote for or refrain from voting for a particular candidate; or**

**(ii) corruptly does any such act on account of such voter having voted for or refrained from voting;**

**(c) in any manner unlawfully influences the result of an election;**

**(d) directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement to or for any person in order to induce that person to—**

**(i) procure or endeavour to procure the election of any person; or**

**(ii) procure the vote of any voter at any election;**

**(e) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any voter at an election;**

**(f) advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in bribery at any election;**

**(g) being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;**

**(h) after any election, directly or indirectly in person or by any other person on**

*his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;*

*(i) directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or an account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; or*

*(j) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of bribery.*

*(2) Any person who in consequence of that person's acceptance of any consideration votes or refrains from voting commits an offence.*

214. In Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman (supra), it was held:

**“Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however, insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice. The court strips the proceeding in each case of every colour, every dress, and every shape to discover its real and true nature. The court has always refused to give any exhaustive definitions on the subject, and has always looked to the exact facts of each case to discover the character of the transaction.... In this case the petitioner was required to prove to the required standard of proof that indeed the petitioner or his agents bribed the voters and it is not enough for the petitioner to state that he saw certain persons acting at the alleged behest of the 1<sup>st</sup> respondent bribe voters. The actual act of bribery must be described in sufficient detail for the court to reach determination that indeed such bribery took place. There must be sufficient evidence to establish nexus between the person giving the bribe and either the 1<sup>st</sup> respondent or his known agent. Knowledge of the 1<sup>st</sup> respondent or his agents in the act of bribery must be established and this is because bribery is an electoral offence under section 10 of the Election Offences Act, and once established, may result in the nullification of an election. The petitioner and his witnesses did not adduce any evidence to connect the persons who were allegedly bribing voters with the 1<sup>st</sup> respondent. The credibility of the petitioner's case on the allegation of bribery would have been boosted if the petitioner procured a voter or voters to testify in support of his case in regard to the allegation of bribery. Consequently this allegation was not**

proved.”

215. In **Badda & Another vs. Mutebi** (supra), it was held:

“For purposes of the offence of bribery to be complete it cannot be disputed that some of the members of the football club and their fans, who received the cow were registered voters and this is evident on a balance of probabilities. There were no inconsistencies nor contradictions in the affidavits in support of this ground. Therefore the learned Judge’s finding that the gift of the cow was clearly intended to influence the voters to vote for the first appellant is accepted...Commission of an illegal practice once proved to the satisfaction of court is sufficient ground for annulling the election under section 61(c). The burden of proof is on the party alleging that the bribe was given out by the appellant in order to influence the voter to vote for the giver. It is essential that the person to whom the bribe is given is registered as a voter at the time of the election and is not disqualified from voting. The offence of bribery is complete when money is given by the person to someone to give to voters.... One act of bribery once proved to the satisfaction of the court is sufficient for setting aside an election”

216. In this case, there is no direct evidence that the 2<sup>nd</sup> respondent bribed any voter. The evidence is that he used **Mwashetani Foundation** in which he was a director to carry out the alleged acts of bribery. If it is true that **Mwashetani Foundation** was the 2<sup>nd</sup> respondent’s vehicle through which he carried out the alleged actions, this Court would not hesitate to find that the acts of the Foundation were indeed the acts of the 2<sup>nd</sup> respondent and proceed to nullify the results of the elections. From the evidence on record and having listened to the testimony of witnesses I have no doubt in my mind that the 2<sup>nd</sup> respondent did issue the cheques which were issued to the students in various schools within the constituency. The evidence of DW9, **Abubakar Juma Manyenze** that he was unaware of how the said cheques which were admitted to be genuine by the 2<sup>nd</sup> respondent were issued, taking into account the fact that the only other director who could have issued the said cheques was out of the country and the said witness was unable to pin point the exact period when he was away only left the 2<sup>nd</sup> respondent as the person who could have issued the said cheques. The only issue is whether the said cheques were issued with the intention of influencing the outcome of the elections. In my view the mere fact that a candidate in an election carries on with the developments which he had started prior to the electioneering period does not necessarily amount to bribery unless the said actions are so intertwined with the elections that it is not possible to separate the two events. In this case the evidence is that the Foundation was registered in the year 2010 and it was carrying out activities long before the electioneering period. There was evidence that in certain cases it was the residents of Lunga Lunga Constituency who sought help from the 2<sup>nd</sup> respondent in particular with respect to the assistance to the women groups, building of schools, sinking of wells and supply of desks. In those circumstances, I am not prepared to find that the actions of the 2<sup>nd</sup> respondent amounted to bribery. However with respect to the issuance of cheques there was evidence that the 2<sup>nd</sup> respondent took the initiative of identifying the needy students to whom the cheques were to be issued. Whereas the issuance of the cheques by the 2<sup>nd</sup> respondent himself at the campaign rallies was highly suspicious and perilously close to bribery, taking into account his position as a director of **Mwashetani Foundation** which foundation had been involved in development projects before the elections would clearly show that the 2<sup>nd</sup> respondents’ actions could have been both in personal capacity and in his capacity as a director of the said Foundation since the cheques were the Foundation’s cheques. That kind of scenario suspicious as it is and while tottering on the brink of bribery and corruption does not convince me that the offence of bribery has been proved to the standard of beyond reasonable doubt taking into account the fact that bribery is a criminal offence.

217. With respect to the actions of DW18, **Hemedi Abdalla Majuto**, the evidence was that he was a candidate in his own right. Whereas the witnesses for the petitioners alleged that this witness claimed that he was an agent for the 2<sup>nd</sup> respondent, that claim was denied and as was held in **William Kabogo Gitau vs. George Thuo & 2 Others** (supra):

**“Although the court holds that the petitioner indeed established that there was bribery of voters who were queuing the polling centre, the person who did the bribery was a civic candidate in the said elections and therefore the court cannot reach a conclusion with certainty that the bribery was done on behalf of the first respondent. In the premises therefore, the court holds that the petitioner failed to establish to the required standard of proof that the 1<sup>st</sup> respondents bribed the voters to such extent that the court is persuaded to nullify his election on that ground. The petitioner therefore failed to prove any electoral malpractice or election offence as against the 1<sup>st</sup> respondent.”**

218. I would apply the holding to the other instances where bribery was alleged to have been carried out by the agents of the 2<sup>nd</sup> respondent.

219. It was further alleged that the actions of the 2<sup>nd</sup> respondent amounted to undue influence and treating of voters. Section 62(1)(a) of the Act provides:

***(1) A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election—***

***(a) before or during an election—***

***(i) undertakes or promises to reward a voter to refrain from voting;***

***(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or***

***(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.***

220. In my view the evidence presented before this court does not prove that there was any offence of treatment as defined hereinabove.

221. With respect to undue influence section 63 of the Act provides:

***(1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—***

***(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;***

***(b) impeding or preventing the free exercise of the franchise of a voter;***

***(c) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or***

***(d) impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits the offence of undue influence.***

**(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.**

**(3) A person who directly or indirectly by duress or intimidation— (a) impedes, prevents or threatens to impede or prevent a voter from voting; or**

**(b) in any manner influences the result of an election, commits an offence.**

**(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—**

**(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or**

**(b) to display the ballot paper on which the voter has marked his vote, commits an offence.**

222. Having considered the evidence on record I am not satisfied that the offence of undue influence was committed by the 2<sup>nd</sup> respondent as alleged.

223. Undue influence, however, must be distinguished from improper influence under Article 81(e) (ii) of the Constitution. Whereas undue influence is an election offence, improper influence may not necessarily amount to an offence though where established may be a ground for nullification of an election. Influence alone does not justify interference with the results of the election. Elections are about influencing the voters to vote for a particular party or candidate. Candidates ought to do this by selling their policies. Politicians preoccupy themselves with outdoing one another with respect to what they intend to achieve for the electorates and it is on the basis of such policies that people are expected to determine whether or not elect the candidates. Elections are meant to be exciting events and it would be a very boring exercise if candidates were not freely allowed to sell their policies. However, in the course of selling their policies the candidates are not permitted to resort to improper methods in seeking such elected posts. In my view political rally platforms are shelves on which parties and candidates display their policies and not their financial prowess. From the evidence on record, the 2<sup>nd</sup> respondent in his rallies promised to deliver the electorates of Lunga Lunga from their afflictions and on gaining foot at the National Assembly abandoned some of the projects midstream. Although the 2<sup>nd</sup> respondent did not expressly admit having abandoned the said projects, in cross-examination he admitted that since the elections he had not supplied any desks to schools. That is a clear manifestation that improper influence was employed to secure the votes of the people of Lunga Lunga Constituency.

224. Our Constitution frowns upon candidates and political parties which secure the people's nod to represent them by way of employment of improper influence in the course of seeking elective positions. This position was recognised by **Mwongo, J** in **Ferdinand Ndungu Waititu vs. The Independent Electoral & Boundaries Commission & 8 Others Nairobi Election Petition No. 1 of 2013** in which he expressed himself *inter alia* as follows:

**“I think that to constitute a void election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such nature as to disclose through clear and weighty evidence, any one or more of the following....an attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election.”**

225. Whereas actions of candidates may not necessarily satisfy the criteria for the offence of undue influence, where a candidate takes advantage of the electorates vulnerability to secure their votes in a manner that makes the electorates beholden to him, that in my view may justify the nullification of the elections results since the results will not be a reflection of the exercise of the free will of the electorates. As was held in **Bura vs. Sarwatt [1967] EA 234:**

**“In cases of allegations of unlawful campaigning and undue influence, once instances are proved to show that there was unlawful campaigning and a substantial number of votes obtained by undue influence, the court may well not need proof of the actual possibility of a reversal of the result if it can be shown that the instances proved reduce the majority to very narrow one.”**

226. In my view, in determining whether or not the result of an election is a reflection of the will of the electorates, the Court must consider the cumulative effect of all the circumstances. As was held by the High Court of Tanzania in Ng’weshemi vs. Attorney General Mwanza HCMCC No. 5 of 1970:

**“The question whether non-compliance with the provisions of the Act relating to elections affected the result of the election would depend on the nature of the particular complaint or irregularity and the margin of victory.....Where, however, the complaint goes to the root of free election such as a case of organised campaign or undue influence, and it appears that a substantial number of votes were obtained thereby, then the full extent of such wrong practice may never be known the Court may be inclined to hold that it affected the result of the election without proof of actual reversal of the result.”**

227. In this case the Constituency in question is a remote Constituency with high levels of illiteracy, high poverty levels with inadequate infrastructure not to mention lack of adequate water. A candidate who not only promises to alleviate the said problems but goes ahead during the campaign period to show tangible signs that if elected such problems will be things of the past clearly and unfairly gains mileage over the other candidates. In this petition I was particularly impressed by the evidence of PW8, **Ngome Movoo Ngome**, who struck me as an honest witness. According to him, he was among the people who received a cheque from the 2<sup>nd</sup> respondent towards his daughter’s school fees. To him the cheque was just an assistance and he saw nothing wrong with it. He was however grateful for having been one of the beneficiaries and heard the 2<sup>nd</sup> respondent asking to be voted for and pledging further assistance. However, this act of ‘generosity’ on the part of the 2<sup>nd</sup> respondent which took place only 2 weeks to the election date interfered with his ability to exercise his free will. In his evidence the cheque was signed by the 2<sup>nd</sup> respondent. In cross-examination the 2<sup>nd</sup> respondent admitted that since he engaged his Personal Assistant six months before the elections he was the one personally issuing the cheques. He admitted that there were wells in Mtune area whose constructions were being paid for by his agents and that the same projects were on-going. Referred to the cheque no. 000138 dated 20<sup>th</sup> February 2013, issued in favour of Ribe Boys High School he admitted that his signature appeared thereon though he could not remember the date when he issued the same. Similarly he was unable to remember the exact number of cheques he issued in the year 2013. He similarly conceded that the cheque nos. 000170 and 000179 both dated 27<sup>th</sup> February 2013 issued in favour of Perani Secondary School and Gonzi Girls were signed by him.

228. There was overwhelming evidence that the 2<sup>nd</sup> respondent in this case made certain promises to the electorates during his campaign rallies and initiated certain projects. He issued cheques to needy students in the Constituency and this fact was confirmed by his own driver, DW14. Whereas the said actions might have been undertaken in his capacity as a director of **Mwashetani Foundation**, the distinction was clearly lost to the electorates. To the electorates the fact that the 2<sup>nd</sup> respondent physically issued the cheques must have endeared them to his camp as was confirmed by the testimony of the witnesses in these petitions. The 2<sup>nd</sup> respondent took a calculated risk in choosing his campaign rallies as the avenues to articulate the objectives of the Foundation. He ought to have clearly demarcated the boundaries between the actions of the Foundation and his individual actions as a candidate for the National Assembly seat for Lunga Lunga Constituency. By not so doing the 2<sup>nd</sup> respondent blurred the vision of the electorates into having an impression that the acts of “generosity” engendered by the Foundation were actually acts of the 2<sup>nd</sup> respondent. In those circumstances it cannot be said that the people of Lunga Lunga

Constituency did exercise their free will in voting for the 2<sup>nd</sup> respondent as their representative in the National Assembly. I therefore find that the results of the elections of Lunga Lunga Constituency did not meet the criteria under Article 81(e)(ii) of the Constitution that election system must comply with the principle of free and fair election which are free from improper influence. It is therefore only fair that the candidates return to the people so that they can articulate their policies without improperly influencing the manner and the outcome of the election.

229. I now wish to deal with the role of the Returning Officer under Regulation 83(1)(a) of the General Regulations. That provision provides that immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present tally the results from the polling stations in respect of each candidate without recounting the ballots that **were** not in dispute. (Emphasis mine). In my view, this provision seems to bar a Returning Officer from recounting the ballots which were not in dispute. The employment of the word “were” rather than “are” in my view implies that the dispute ought to have been raised at the polling station. Therefore where no dispute arose from the polling station the Returning Officer has no power to accede to a request for a recount. In this case, whereas there was no indication that disputes were raised at the Polling Station, the Returning Officer in two cases proceeded to open ballot boxes and proceeded with the process of the recount. That process revealed that there were mistakes in form 35s. The act of the Returning Officer was clearly beyond his mandate. If there was a dispute raised for the first time at that point he ought to have let the issue of the recount to be dealt with by the Court. By making an order for recount when there was indication that there were disputes before the Presiding Officers, the Returning Officer clearly usurped the powers of the election petition court. That was clearly a grave irregularity on the part of the Returning Officer. Apart from that it is evident that the results of the election which were announced and declared by the Returning Officer were found after the said declaration to contain errors. Consequently the Returning Officer proceeded to issue an amended form 36 in the absence of the candidates and their agents. In my view the Returning Officer has no powers to unilaterally amend form 36 in the comfort of his office in the absence of the candidates or their agents. To do so would be contrary to the principles under Article 81(e)(iv) and (v) of the Constitution that the electoral system shall comply with the principle of free and fair election which are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. An election system in which the final results are not declared to the electorates, candidates or their agents but are clandestinely amended cannot be said to meet the above criteria.

230. Apart from this anomaly, there were various instances in which the Presiding Officers admitted that the figures entered in for 35s were incorrect. However it was these incorrect figures that were transmitted to the Tallying Centre. Whereas such mistakes taken individually might not have affected the results the fact that there were several consistent mistakes cannot be overlooked. As was held by **Rawal, J** (as she then was) in *Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others* (supra):

**“No one can deny that Forms 16A and Forms 17A are the most important documents in the electoral process and they should be shown to have been duly filed in and completed. This has not been shown to have been undertaken in this petition. Nay they are shown to have been badly flouted. Whereas human errors can be understood, but the errors should not be consistent and serious. A Returning Officer, even if has taken assistance from his/her deputies, cannot abdicate her duty and legal obligation to scrutinise the validity of Form 17A which is a document to be used to declare the winning candidate. Form 16A's should also conform to Regulation 35A at each polling station as they are to be scrutinised and relied upon by the Returning Officer to fill in Form 17A. Regulation 35 of the Election Regulations provides for the procedure to be followed by the Presiding Officer at the polling station culminating to the sealing of ballot boxes. These are very serious and onerous obligations stipulated by the electoral laws and cannot be lightly shrugged off under the guise of human errors. If allowed to be overlooked, that will result in slow death of democracy which our country is trying to preserve and the courts should come forth to be the guardian of such preservation. The ballot boxes had many flaws and it is thus apparent that apart from the 2<sup>nd</sup> respondent issuing the certificate of result on 28<sup>th</sup> December, 2007 before the completion**

**of the tallying process, the respondent simply abdicated, ignored and failed in the important obligation of completion of Form 17A..... In the court's considered view, it is very clear that the process of the election starting from the ferrying of ballot boxes to the whole process of receiving and tallying the ballot boxes in the tallying centre and declaration of the 1<sup>st</sup> respondent as a successful candidate do not demonstrate that there was affair and free election. Therefore the court finds that there were serious anomalies in the process of election results, which are fundamental and are in the nature which would affect the results of the election. Serious and admitted or undisputed anomalies and non-compliance of important mandatory provisions of the electoral law from the electoral officials are placed before the court and the court in all fairness has no option but to come to the conclusion that the parliamentary election of Makadara Constituency was not fair, free and transparent and that the 1<sup>st</sup> respondent was not validly elected as the member of parliament of the said constituency. The court, however, does not find 1<sup>st</sup> respondent or other respondents guilty of any election offence under the Election Offences Act (Cap 22). Accordingly, a certificate to that effect be issued forthwith to the Speaker of the National Assembly in terms of section 30(1) of the National Assembly and Presidential Elections Act (Cap 7). The third respondent thus shall proceed to conduct the bye-election as required under the law."**

231. Similarly in this case there were numerous omissions on the part of the Commission's officials such as the fact that the total number of votes cast in many cases did not agree with the votes obtained by individual candidates; the figures contained in at least two form 35s were found to be incorrect on the recount of the votes at the Tallying Centre a fact which affected the positions of rest of the candidates apart from the declared winner. I have already mentioned that the record keeping by the Commission's officials left a lot to be desired. Some of the pages of the Diary were left blank without any explanation at all. Taken separately and individually they may not have affected the results of the elections but taken as a whole one cannot say that the results of the elections reflected the will of the people of Lunga Lunga Constituency. These errors coupled with the decision by the Returning Officer to single-handedly in the absence of the Candidates or their agents and in the comfort of the former's office to amend the contents of form 36 after the declaration of the results leave me with no choice but to find that the elections of Lunga Lunga Constituency were not conducted in accordance with the principles stipulated under our Constitution. The legal principle is that if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. In other words I am unable to find that the will of the people found expression in the results which were impugned. As was held by **Kennedy, J** in **Islington West Division Case, Medhurst vs. Lough and Gasquet [1901] 5 O & H 120, 17 TLR 210, 230:**

**"An election ought not to be held void by reason of transgressions of the law without any corrupt motive by the returning officer or his subordinates in the conduct of the election where the court is satisfied that the election was, notwithstanding these transgressions, an election was really and in substance conducted under the existing election law, and that the result of the election, that is the success of the candidate over the other was not and could not have been affected by those transgressions. If on the other hand the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void."**

232. That in my view is the position of these petitions. In my view the manner in which elections were conducted in Lunga Lunga Constituency may only be a study on how not to conduct

elections for Parliamentary Seat in this Country. Granted that the last elections were complex and fatigue did set in. However Kenya must conduct its elections within the minimum internationally accepted standards of conducting elections as expected by the Constitution and where the laws of the Country do not offer conducive environment for the proper conduct of the elections appropriate legislative measures ought to be undertaken so that the Constitutional aspirations are attained instead of engaging in a farce in the name of carrying out elections. Where the Court finds that the elections that were carried out were no elections at all the Court will not hesitate to nullify the results thereof.

233. The totality of what I have stated herein above is that the conduct of the 2<sup>nd</sup> respondent during the period leading to the elections which conduct from the evidence improperly influenced the electors of Lunga Lunga Constituency to vote for him coupled with the shoddy manner in which the officials of the Commission carried the election process it is my view and I so hold that there were transgressions of the law by the respondents severally which transgressions taken cumulatively leads me to the inescapable conclusion that there is reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned was really been elected by the majority of persons voting in exercising their free will and in accordance with the laws in force relating to elections, hence this court is bound to declare the election void and I so declare. The lesson I send to the Commission is this: conduct elections whose process and results attain the minimal standards expected in a democratic state and in compliance with the principles laid down in the Constitution and the laws relating to elections. To the 2<sup>nd</sup> respondent I say this: clearly create a demarcation between your activities as a Director of the Foundation and those relating to your candidate as a contestant for the Parliamentary seat especially during the campaign period to avoid the impression that you and the Foundation are one and the same entity.

### **ORDER**

234. That leads me to the issue of costs. The general rule is that costs follow the event and therefore a successful party ought to be awarded the costs. In these petitions however, the petitioners were voters and not candidates. That however is not necessarily a reason to deprive them of the costs of the petitions. As was held by this Court in Mombasa High Court Election Petition No. 6 of 2013 between **Nuh Nassir Abdi vs. Ali Wario & 2 Others:**

**“To bar the petitioner from exercising the rights which accrued to him before he took up his position as State Officer would in my view amount to denial of his fundamental rights enshrined in the Constitution. Not only was he a candidate but he was a voter in the Constituency the subject of this matter and Article 38 of the Constitution enshrines his right to vote and present himself to an election which is free fair and regular. Where a voter feels that the elections were not conducted as per the Constitution I do not see why he should be barred from contesting the same, even if he is a State Officer. The mere fact that one is a State Officer does not in my respectful view take away fundamental rights and freedoms under the Bill of Rights unless such enjoyment is limited under the Constitution. I do not see any barrier to the right of a State Officer being represented by a person of his choice and that includes candidates in an election. Whereas it may be considered immoral by some people to challenge the results of an election whose benefit the petitioner does not stand to gain or whose results he derives a benefit from, we are not concerned with the morality of the petitioner or his intentions for challenging the elections since if the elections were not conducted in accordance with the law no person ought to gain from the flawed process. An electoral process is a public process and not merely a personal duel between the contestants.”**

235. In petitioner Number 4 of 2013, the petitioner who was coordinating the campaigns for one of the candidates, **Benson Mutisya** conceded in cross-examination that he filed the petition on behalf of the said **Benson Mutisya** although this was denied by him in part of his evidence. The fact that

the said **Benson Mutisya** informed him, according to his evidence, that he was dissatisfied with the results yet did not find it necessary to petition lends credence to the 1<sup>st</sup> petitioner's answer in cross-examination that he had filed the petition on behalf of the said candidate. With respect to the 2<sup>nd</sup> petitioner, he was similarly a campaigner for one of the candidates, **Omar Zonga**. What is however surprising is that his candidate was satisfied with the outcome of the election and it was not lost to the Court that in paragraph 4 of the Petition **Omar Zonga** was referred to as "Your Petitioner". This pleading was confirmed in paragraph 2 of the supporting affidavit. As indicated elsewhere in this judgement affidavits filed in support of a petition constitute evidence in chief and hence is incapable of being amended. Therefore whereas I have found that the petitions merited and ought to succeed, the conduct of the petitioners in this petition is not deserving of an order for award of costs in their favour. It is clear that the petitioners herein were acting at the behest of their respective Candidates who for reasons unknown to the Court decided not to be in the forefront. Whereas that does not sanitise an otherwise badly conducted election, the award of costs being in the discretion of the Court, that conduct must be deprecated hence there is no justification for awarding them the costs of the petitions.

236. Taking into consideration all the glaring anomalies, the irregularities and the electoral malpractices cited, including clear and blatant non-compliance with mandatory requirements of the law by the presiding officers and the conduct of the 2<sup>nd</sup> respondent which made the elections which were conducted in respect of Lunga Lunga National Assembly constituency seat not to be transparent, free, fair and accountable and free from improper influence, the court pronounces and declares the said elections and the results thereto to be null and void. The 2<sup>nd</sup> respondent was not validly elected as Member of the National Assembly of Lunga Lunga constituency. Accordingly there will be no order as to costs. In other words each party will bear own costs of the petitions.

237. It is hereby directed that a certificate of this determination do issue to the Commission and the Speaker of the National Assembly as provided under section 86(1) of the **Elections Act** and the 1<sup>st</sup> respondent should proceed to conduct a bye-election as required under the law.

238. In conclusion I wish to express my deepest gratitude to all counsel who appeared before me in these two consolidated petitions for the diligence and industry in conducting the said petitions. If I have not referred to all the authorities cited to me by counsel it is not out of lack of appreciation for their efforts.

Orders accordingly.

**Dated at Mombasa this 26<sup>th</sup> Day of September 2013**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of**

**Mr. Asige for Mr. S.M. Kimani** Advocate for the Petitioner in Petition No. 4 of 2013.

**Mr. Asige** instructed by Asige Keverenge & Anyanzwa Advocates for the Petitioner in Petition No. 9 of 2013.

**Mr Khagram** instructed by A B Patel & Patel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

**Mr. Abed** and **Mr Mohamed** instructed by Balala & Abed Advocates for the 2<sup>nd</sup> Respondent.

