



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
ELECTION PETITION No.6 OF 2013
ELECTION FOR THE MEMBER OF THE NATIONAL ASSEMBLY OF WEBUYE WEST
CONSTITUENCY (NO.222)
BUNGOMA COUNTY
BETWEEN
JOASH WAMANG'OLI PETITIONER/APPLICANT
AND
THE INDEPENDENT AND BOUNDARIES
ELECTORAL COMMISSION 1ST RESPONDENT
BENARD ODUOL, RETURNING OFFICER OF
WEBUYE WEST CONSTITUENCY..... 2ND RESPONDENT
DANIEL WANYAMA SITATI 3RD RESPONDENT
ZACHARY KARIUKI KIAGA 4TH RESPONDENT

JUDGMENT

1. Following the 4th March 2013 General Elections, the petitioner (**JOASH WAMANGOLI**) who was a candidate for Webuye West Constituency Parliamentary seat, lost the election to **DANIEL WANYAMA SITATI** (3rd respondent), by a mere 210 votes. He then filed this petition against the Independent Electoral and Boundaries Commission (IEBC) (the 1st respondent), Bernard Odul, (the Returning Officer, Webuye West Constituency - (the 2nd respondent), the winner of the electoral contest (Daniel Sitati Wanyama – as the (3rd respondent), and Zachary Kariuki Kiaga (the District Criminal Investigations Officer – DCIO), of Bungoma East Division, - (the 4th respondent).

2. The 1st respondent declared Daniel Wanyama Sitati as the elected member of the National Assembly for Webuye West Constituency No.222, Bungoma County (code 39) and published the results in the

Kenya Gazette Notice No.3159, on 13th March 2013. The declared results were as follows:-

DANIEL WANYAMA SITATI – 11,141

JOASH WAMANGOLI – 10,715

LEONARD WAFULA WAKOLI – 5,551

PETER JUMA SITATI – 1,667

GEORGE MAYEKU MATALA – 1,653

JOHN WAFULA WANJALA – 427

3. The petitioner contested these results on grounds that there were massive irregularities and malpractices resulting in a lack of transparency and accountability of the electoral process. The prayers sought are:-

- a. An order for scrutiny and recount of the votes cast and an examination of the tally contained in Forms 34, 35 and 36 of all the polling stations in the Constituency to determine the actual votes cast.
- b. An order for scrutiny of all electoral registers in the Constituency so as to establish the discrepancies of the total number of votes cast against registered voters, to determine the validity of total votes cast and correct outcome of the results of the electoral process in the Constituency.
- c. A declaration that the elections were not conducted in accordance with the Constitution and the Elections Act and the laws of the land.
- d. A declaration that the 3rd Respondent was not validly elected.
- e. A declaration that the petitioner won the elections or an order for fresh elections.
- f. An order to the effect that the 4th Respondent committed election offences, under the Elections Act, 2011.
- g. Costs of this petition.

4. The petition is opposed by the 1st, 2nd and 3rd respondents who filed responses. The 4th respondent although served, did not file a response.

5. **The petitioner's case**

The petitioner contends that the elections were not accurate, verifiable, secure, nor fair. He states that the election was carried out in contravention of electoral laws and various electoral offences were committed by the 1st – 3rd respondents.

6. The 4th respondent is accused of undue interference with the tallying process so as to make it impossible to complete the process satisfactorily. The petitioner complains that at the Tallying Centre;

- a. Transmission of results through the electronic media projected on the screen for public information, indicated that the provisional results were as follows:-

JOASH WAMANGOLI – 10,928

DANIEL WANYAMA SITATI – 10,921

- b. A tally of the votes cast done by the petitioner based on Forms 34 and 35 which were provided to him indicated results as:-

JOASH WAMANGOLI – 11,128

DANIEL WANYAMA SITATI – 11,028

- c. The tallying of total votes as indicated in Form 36, produced by the 2nd respondent indicated that:-

Total votes cast – 31559

Valid votes cast – 31247

Rejected votes - 312

7. When the petitioner did his calculations in the Form 36, he found that:-

Total votes cast – 31154

Valid votes cast – 30842

Rejected votes – 312

8. The petitioner also complains that apart from these arithmetical variances and discrepancies, the total votes for each candidate as declared in Form 36, showed different total sums. He laments that at the Tallying Centre, he was denied votes cast in his favour, and the Returning Officer only announced results of the 3rd respondent. He also complains that the 2nd respondent did not sign Form 36 of the Declaration of Results at the Tallying Station on 5th March 2013, nor did he issue the same to candidates and agents as required. The Form 36 was signed a day after the tallying i.e. 6th March 2013, and the figures entered were incorrect.

9. Further that, the 4th respondent exceeded his duties and committed election offences by:-

- a. Commandeering the entire tallying process and giving orders to the 1st respondent's officials particularly the Returning Officer thereby disrupting the tallying process.
- b. Prematurely escorting the Returning Officer out of the Tallying Centre under guard of police officers, before the announcement of other results.

10. The 4th respondent is accused of exercising duress and intimidation, calculated at instilling fear, thereby adversely influencing the results.

11. It is also the petitioner's case that there was inflation of votes in various polling stations by 1st and 2nd respondents, so as to indicate more votes than those legally cast, failure of biometric voter registration, illegal means of allowing ineligible persons to vote, or unlawfully introducing votes at polling stations.

12. Among the malpractices and offences claimed by the petitioner are bribery of voters, and allowing voting to continue far beyond the stipulated time.

13. Response by the 1st, 2nd and 3rd respondents:-

The respondents contend that the petition is fatally defective for non-compliance with mandatory provisions of the law. They maintain that the election was conducted in accordance with the laws that

govern elections and were conducted in a credible manner, and the results announced were a true reflection of the will of the people of Webuye West Constituency.

14. Although the respondents have denied most of the allegations made against them, or their agents, they have admitted, albeit with qualifications, a number of the allegation contained in the petition. For instance they have admitted:-

1. That there were accidental slips, human errors, minor non-conformities with the law and procedure which, in their view did not affect the credibility or the result of the election;
2. That there were discrepancies in the tallies in Form 36s but the said discrepancies were sorted out by the report of reconciled parliamentary votes given by the 1st and the 2nd Respondent which found the petitioner's tally to have been deflated by 313 votes and accordingly adjusted.
3. That there was interference with the tallying process at Bokoli tallying centre but blame it on the petitioner and his supporters.

15. **Evidence:-**

Although eleven witnesses swore affidavits in support of the petitioner's case, only eight were availed in court and cross-examined on the contents of their affidavits. The 4 witnesses who swore affidavits in support of the respondents', inclusive of the 2nd and 3rd respondent testified in support of the respondents' case.

Affidavits sworn by persons who did not testify do not carry much weight as they have not been tested by way of cross-examination.

The petitioner led evidence on:-

(a) Incidences of votes cast exceeding the number of registered voters.

According to form 35's and the register supplied to him by the 1st respondent more people than indicated in the register voted at Chebosi, Sawa and Matulo polling stations. However, he led no evidence to prove those claims.

(b) Agents denied access to polling stations or thrown out of the polling stations.

He complained that this happened at Chebosi, Matisi and at Lutaso RC. However, he could not remember the Presiding Officers who ejected them out or the names of the agents who were sent out.

(c) He also claimed that 1st respondent rejected the agents that the petitioner submitted and relied on fake agents. This happened at Mahanga and Bokoli and has been alluded to by Mulati Kuyefwe PW3. The petitioner conceded that this may have arisen as a result of his political party providing the 1st respondent with a different list of party agents.

(d) He stated that respondent denied him access to the principal voter register;

(e) He also contended that entries in form 36 issued to him by the 1st respondent did not tally with the contents of form 35's. The polling stations affected were Sawa Primary School, St. Anthony's deaf school and Matulo market.

(f) Incidences of bribery: Petitioner's agents saw one Lydia Namisi, the headteacher Webuye S.A Primary School bribe voters both at Webuye S.A Primary School and at Webuye DEB Primary school. Although he did not personally witness anyone being bribed he contends that he saw Lydia being ejected out of Webuye S.A Primary School polling station and wondered what other reason could have caused her ejection from the polling station if not the alleged bribery of voters.

(g)Understating and/or omission of his votes in the final tally:

16. This is said to have happened at:-

- I. **Kuywa FYM Primary School** where one stream was not accounted for in the final tally. Here he garnered 213 votes;
- II. **Matulo Market** where his votes were understated by 100 votes;

17. h) Undue influence and voting extending beyond the permitted time at Lutaso Primary School:

The petitioner took issue with the fact that the 3rd respondent spent a lot of time at this polling station during voting and tallying exercise. This coupled with alleged occurrence of a black out and allegations of party agents being ejected from the tallying hall caused the petitioner to believe there was manipulation to favour 3rd respondent.

18. It is worth noting that the 3rd respondent garnered a lot of votes here (556 compared to the petitioner's 59). It is noted that only the 3rd respondents' agents signed form 35 at this polling station. Although the petitioner maintained that voting went on beyond the stipulated time in this polling station, he admitted that he was not present when the station was opened for polling or closed at the end of the polling exercise.

i)Change in the manner results were being projected on the screen shortly before the final tally at the tallying centre:-

19. The evidence tendered is that the petitioner's results were swapped with those of the 3rd respondent shortly before the final results were announced. He contends that after results from all polling stations had been tallied the projected results (provisional) showed him having won the election by 10,928 to the 3rd respondent's 10,921. He also alleged that shortly before the final results were shown, the projector was switched off, and after consultations, final results projected showed that the 3rd respondent had won the election with 11, 141 to 10, 715 (his final score). He objected and asked for re-tally.

20. The petitioner and his witnesses maintained that re-tally commenced but the 4th respondent stopped it when he realized that the petitioner was leading and ordered the 2nd respondent to announce the results as earlier on projected.

21. As regards the final tally he wondered how his results dropped from 10,928 to 10,715 then rose to 11,028 as indicated in the reconciliation document prepared by the 2nd respondent.

22. k) Allegations that final results were never officially announced:

The petitioner contends that the 2nd respondent only announced the results of the winner and left without announcing the results of other candidates or the other contested positions. He also complained that no form 36 was generated for signing by the agents and the election officials as required in law.

l) There were allegations that the contents of statutory forms (i.e. 35's and 36) supplied to the petitioner differed from those annexed to the 1st and 2nd respondent's response. He wondered why the documents having come from the same source materially differed.

23. The petitioner complained that:-

- a. The Returning officer slept in the tallying hall during tallying;
- b. The projector was switched off shortly before the final results were announced;
- c. There were incidences of ballot stuffing or incidences of people not qualified to vote being allowed to vote. He admitted he had no evidence to prove this allegation save that he suspected this must have happened because of reported incidences of over-voting.

d. **Failure of technology.** He alleged that failure of the Biometric Voter Registration, (BVR) created room for ineligible persons to vote. He admitted he did not know any such persons who voted. It was acknowledged that failure of BVR machines was a nation-wide problem.

24. Regarding the reconciliation done by the 2nd respondent after the results were announced he maintained that the exercise was an attempt to justify the 3rd respondent's win as the 2nd respondent had no duty whatsoever to create reconciled results.

25. He blamed the commotion at the tallying on the 4th respondent for stopping the re-tallying exercise.

26. PW2, Martin Juma Simiyu, testified that Presiding Officers were not co-operative. However, he stated that he was personally allowed access to all the polling stations where all Presiding Officers were very friendly. He further stated that no party chief agent was denied access into the tallying centre.

27. He stated that the reception of ballot boxes at the Tallying Center was orderly and no ballot box was opened there. He also gave a detailed account of the procedure of receiving results at the tallying centre. He explained that results from the polling stations would be received by 1st respondents officials in the reception desk, checked for concurrence with the contents in form 35 attached to the ballot box and the one to be handed to Returning officer before the results could be tallied. If discrepancies were noted, such results would not be tallied until the discrepancies were explained and sorted out. He gave the example of Mahanga polling station where form 35 had serious alterations, party chief agents sought explanation from the election officials concerned before the results were accepted by consensus. He confirmed that there were complaints about the votes garnered by the 3rd respondent at Witi Chengoli polling station. He also confirmed that results from Misikhu, Webuye S.A and Mahanga polling stations were delayed.

28. He insisted that the petitioner was leading until ballot boxes from Kakimanyi, Bunjosi and Mahanga were brought in, when the lead was reversed. Apparently the re-tally which begun with these three stations did not reveal any irregularity.

29. Unlike the petitioner who stated that he had garnered 10928 from all polling stations, this witness maintained that this figure was exclusive of the results from the last three polling stations (Kakimanyi, Bunjosi and Mahanga). He explained that their basis for asserting that the petitioner was leading with 10,928 votes shortly before the results were announced was the provisional results that had been projected shortly before the projector was switched off and also on the basis of their own (agents') worked out figures.

30. He confirmed that towards the end of the tallying exercise there was controversy over projected results that showed the 3rd respondent leading.

31. He insisted that the petitioner's and 3rd respondent's names were interchanged when the final results were projected. According to him, the fact that the interchange only affected the petitioner and the 3rd respondent was suspicious.

32. This witness stated that 4th respondent ordered the 2nd respondent to announce the winner yet the parties involved in the tallying exercise had agreed to re-tally the votes. He also asserted that the intervention by the 4th respondent and the subsequent announcement of the results by the returning officer led to commotion as the petitioner and his team started protesting the outcome.

33. Owing to the confusion that ensued no party agent signed form 36.

34. Regarding malpractices at Lutaso primary School, Webuye DEB primary school and Webuye S.A primary school he stated that his party agents did not report any incidences in these polling stations.

35. **PW3, Mulati Wanga Kuyefwe**, who was the Chief Party agent for UDF party stated that at Mahanga and Bokoli polling centres presiding officers allowed fake agents to participate in the polls as opposed to the party's genuine agents. He however, admitted that the fake agents had letters from UDF party

headquarters even though the letters were not signed by the Chief UDF agent. He also complained that results from Mahanga and Bokoli RC polling stations were delayed.

36. He also complained that the 3rd respondent's votes were overstated at Chengoli polling station and those of the petitioner understated at Matulo market.

37. Unlike the other witnesses, he claimed to have seen the 2nd respondent switch off the projector. He also stated that the 4th respondent was closely supervising the 1st respondent's staff and shortly before the projection of the 2nd set of results the 2nd respondent went to consult with the tallying clerks

38. He admitted that the 1st respondent's officials showed them all form 35's and gave them opportunity to check the results contained therein save for the last three polling stations, that is Bunyosi, Kakimanyi and Mahanga.

39. **Amos Maketah, P.W.4**, Ford Kenya agent at Webuye S.A primary school, saw Lydia Namisi talking to some voters at the polling station. He saw her giving those people something but did not know what it was. Thereafter a certain lady walked into the polling hall carrying a piece of paper in her hand bearing the name of the 3rd respondent. When he asked who had given her the slip, she said it was Mwalimu Lydia. He did not know what Lydia and the women were talking about. However, he neither bothered to find out the name of the lady nor did he produce the slip in court. He could not state how many voters were given papers bearing the respondent's name.

40. Apart from the aforementioned incidences he stated that the rest of the process went on well.

41. It is significant that despite police officers presence at the polling station, this witness neither complained to them nor informed the officer in charge of the polling station (presiding officer). He however, maintained that he informed his fellow agents and one of the polling clerks. He gave no reason as to why he did not report the incident to the police or to the presiding officer.

42. **PW5, David Walubengo Mrutu**, UDF agent at Webuye DEB primary school S.A. similarly stated that he saw Lydia Namisi with some other women, eight in number, at the polling station. He heard Lydia telling the women, in Bukusu language, to go and vote for the 3rd respondent. However, he admitted that none of the women who accompanied Lydia voted at the station. He further stated that after Lydia was ordered by the Presiding Officer to go out of the polling station, she went to the gate where she continued bribing voters. Without specifying who was bribed or the amount of money used to bribe them, he maintained that he saw Lydia dipping her hand in the pocket then greeting people as they passed.

43. Upon cross-examination this witness stated that he did not know what Lydia was giving out, a position that contradicts the contents of paragraph 4 of his affidavit where he categorically stated that he saw her (Lydia) giving money to women to vote).

44. **Gilbert Juma Makokha (PW6)** an agent of Ford Kenya party at Matisi S.A primary school complained that the presiding officer failed to compensate for the time lost during opening of the polling station and that about 100 voters who were in the queue were not allowed to vote. He also complained that agents signed form 35 before the results were released.

45. **P.W.7, Winright Waitutu Nyongesa**, the Ford Kenya party agent at Lutaso polling station stated that the Presiding Officer, working in cahoots with the 3rd respondent, chased away other party agents from the counting hall but left New Ford Kenya party agents. He also stated that lights were switched off during counting.

46. **Fred Ofubo Wasike (P.W.8)** UDF agent at Matisi polling station complained that the Presiding Officer requested agents to sign form 35 before end of voting. He admitted that agents were trained on their role as agents and that they were required to sign statutory forms after the votes had been counted and results entered therein. He also confirmed that they signed form 35 without expressing any reservations.

47. **Analysis of the respondent's evidence:-**

The 3rd respondent (R.W.1) led evidence to the effect that tallying exercise at the tallying centre was peaceful. He, however, admitted that towards the end of tallying there was animosity as the petitioner contested the results.

48. He stated that after results from all polling stations had been tallied he won with 11, 141 to the petitioner's 10715.

49. He denied interference by the 4th respondent or even having seen him at the tallying centre.

50. He was at Lutaso RC the polling station sometime during voting and shortly after the end of voting. He stayed at the polling station from the time tallying began until results from the station were announced. He confirmed that Lydia Namisi was his supporter but she was not assigned any specific roles either as his campaigner or at all.

51. Despite the discrepancies arising such as omission of the petitioners votes (313 votes in the final tally), he maintained that the elections were credible, free and fair.

52. He was not surprised that he defeated the petitioner because he had also beaten him during party nominations. He denied the claims that his results were swapped with those of the petitioner immediately before the final results were announced and stated that the names of candidates were listed alphabetically, his being the first in the list followed by George Mayeku's. He blamed the petitioner's supporters for the commotion that occurred at the tallying centre.

53. **R.W.2, Jestymore S. Mukhwana**, denied the allegations that other party agents were chased from Lutaso RC polling station. He maintained that party agents were present during the tallying exercise. However, he had difficulties explaining why only the New Ford Kenya agents signed form 35. He denied the allegations of bribery and undue influence made against the 3rd respondent and his agents or supporters. He also denied the allegations that lights were switched off to enable 3rd respondent fiddle with ballot papers.

54. He could not recall any instance when the petitioner led by 10,928 or requested for a recount or re-tally of results.

55. **Joshua Wekesa Chenge, (R.W.3)** who was also an agent of New Ford Kenya at Lutaso corroborated the evidence of R.W.2 regarding the conduct of elections at Lutaso. He maintained that other political party agents were present during polling and counting, but for reasons unknown to him they did not sign form 35.

51. The Returning Officer, **Odul Bernard Argwings (RW4)** stated that the 1st respondent and its officials worked very well with the political party agents. He gave a detailed account of what happened at the tallying centre, from reception of results through verification, feeding of the results in form 36 (in electronic) form, to the announcement thereof.

52. He explained that if any discrepancies were noticed in the statutory forms, the Presiding Officers would be turned away, and such results were accepted only after the discrepancies were properly accounted for.

53. He admitted that some form 35's did not conform to the requirements governing the filling of the forms.

54. He signed form 36 a day after he had declared the results and that the form was not signed by any party agent. He also admitted that results for an entire stream at Kuywa polling station were omitted in the final tally.

55. He denied the allegations that he fell sick and slept in the tallying hall but admitted that at times he would walk out of the tallying hall and take a rest in the car parked outside the tallying hall.

56. He maintained that the 4th respondent did not help him to control the tallying process but he came in when chaos erupted in the hall towards the end of the tallying process.

57. Although nobody was arrested in connection with the chaos, the situation was so serious that he had to be whisked out of the tallying hall. He explained that owing to the chaos he was unable to print and sign form 36 at the tallying centre. He signed the same at the County tallying centre a day after he had declared the results.

58. **Reconciliation document**

The Returning Officer told this court that he prepared a reconciliation statement to demonstrate honesty in the manner he worked. This was because, upon re-looking at the work, he noted some errors, thus acknowledging that petitioner was right in claiming 313 votes, which were made up of 213 votes at Kuywa FYM and 100 votes at Matulo Market. The votes at Kuywa FYM had been omitted, while Matulo an entry was made of 026 instead of 126 votes. These errors were understated in Form 36 and were described as data entry error. However these errors were not contained in Form 35.

59. On the basis of the reconciliation document which he prepared, after being served with the petition, the 2nd respondent admitted that the results he announced at the tallying centre had various arithmetical errors and omissions. He, however, maintained that as demonstrated by the reconciliation documents those errors did not affect the results and were not targeted at the petitioner by design. When the reconciled results were introduced from Kuywa, they affected all the six candidates but the net result was the 3rd respondent was still leading by 11,238 to 11,028 garnered by the petitioner. His evidence also confirmed that the Petitioner demanded re-tallying of results, saying his results were swapped with those of 3rd Respondent. He denied the allegation that he colluded with the 3rd Respondent and the 1st respondent's personnel to defeat the petitioner.

60. **The Petitioner's submissions:-**

It is submitted:-

- a. That the evidence led by the petitioner, and his witnesses, prove that the 3rd respondent through his supporters bribed voters and gained undue advantage over other candidates;
- b. That the evidence of P.W.6 and P.W.8 prove that the officers of the 1st respondent compelled polling agents to sign blank form 35's;
- c. That the officers of 1st respondent accorded the 3rd respondent undue advantage over other candidates by allowing him to enter the polling room when polling was still ongoing and staying to the conclusion of the counting exercise;
- d. That officers of the 1st respondent allowed fake agents into the polling station thereby denying genuine agents into the polling stations;
- e. That form 35's filled by presiding officers do not conform with the requirements of the law and as such affected the accuracy and credibility of the results declared by the 2nd respondent;
- f. That tallying process and the subsequent declaration of the winner was not in strict conformity with the law;
- g. That no form 36 existed at the time the results were declared and that none exists before court;
- h. That there exists multiple **“form 36's”** before court which were prepared and signed

unprocedurally and/or contrary to the law.

61. 1st and 2nd respondents' submissions

It is submitted:-

1. That the totality of the petitioner's case is only as set out in the petition and the prayers therein; and the case may not be implied from matters or affidavits which are extraneous to the petition.
2. The only prayers sought in the petition are incapable of nullifying or quashing the 3rd respondent's victory.
3. The evidence of 1st and 2nd respondent as contained in the witness affidavit and the testimony of the 2nd respondent was credible and unshaken or discredited.
4. Notwithstanding the few admitted and apparent arithmetical errors and non-conformities disclosed by the 2nd respondent, the elections were held in accordance with the laws of the land and were credible, free, fair and transparent. Further the admitted errors and non-conformities, were minor, unintentional human errors which did not affect the result or credibility of the election;
5. That any proven irregularities and/or malpractices does not amount to a breach of the Constitutional Principles or the law governing elections.
6. That the allegations in paragraph 7(a) to (d), 9,10, 11, 14, 25, 26, 27, 28 and 29 of the petition are bad pleading for lack of particulars or specificity. Reliance is made on the decisions in **Wekesa v. Ongera & another** (2008) 2 KLR 66, **Issak v. Hussein & Another** (2008) 1 KLR (EP) 786 and **Joho Nyange v. Nyange & another**.

62. It is submitted that such generalized allegations or complaints are prejudicial to fair, resolution of election disputes.

63. Further that under **Section 107** and **108** of the **Evidence Act**, the petitioner bears the burden of proof of all allegations contained in his petition. In support of this proposition the following authorities are cited:-

Josiah & 4 others v. Ogutu (2008) 1 KLR (EP) 73;

Joho v. Nyange & Another (No. 4) (2008) 3 KLR 500;

Mbowe v. Eliufoo (1967) E.A 240;

Buhari v. Obasanjo (2005) CLR 7K;

Kizza Besigie v. Museveni Yoweri Kaguta & the Electoral Commission, EP No.1 of 2001.

64. Reference is made to the decision in **Raila Amollo Odinga & Others v. Ahmed Issack Hassan & others Election Petition No. 5 of 2013** where the Supreme Court of Kenya held:-

“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-thereafter, the evidential burden shifts or keeps shifting.”

65. It is worth noting that the position adopted by the Supreme Court in **Raila Amollo Odinga & Others V Ahmed Issack Hassan & Others** is by virtue of Article 163(7) of the Constitution of Kenya, 2010 (binding on this court).

66. It is submitted that the petitioner has a duty to adduce credible or cogent evidence to prove his allegations to the required standard of proof which is, proof beyond reasonable doubt where allegations of commission of offences are alleged and above proof on a balance of probabilities but below proof beyond reasonable doubts for other allegations. In this regard counsel cited, among other cases, **Raila Amollo Odinga & Others v. Ahmed Issack Hassan & others** Election Petition No. 5 of 2013, Supreme Court of Kenya, where it was held:-

“the threshold of proof should, in principle be above the balance of probability, though not as high as beyond reasonable doubt, save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data specific electoral requirements the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

67. Cited also is **Mazoka & others v. Mwanawasa & others** (4), Supreme Court of Zambia where it was held:-

“...for the petitioner to succeed...it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes issues to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters.”

68 The petitioner is accused of introducing additional grounds or complaints through witness affidavits. Citing **Nganga & another v. Owiti** where it was held that arguments by way of evidence should be relevant and connected to the pleadings. The court is urged to disregard any evidence which is extraneous to the pleadings. It is submitted that allegations relating to inflation of votes are generalized and no evidence was given of the stations where the malpractice occurred, the person(s) involved and the impact of the alleged malpractices on the election.

69. Further, there is no evidence to prove that the petitioner's agents were ejected at Lutaso Primary school. The identity of the agents chased out and the circumstances under which they were chased out are not established, and none of those agents was called to testify.

70. Regarding the 3rd respondent's presence at Lutaso during tallying, it is submitted that under **Regulations 62(1) and 74(4) of the Elections (General) Regulations 2012** candidates are given preference in respect of admission to polling stations during voting and counting of votes, and no evidence was led to prove that the 3rd respondent interfered with or influenced voters.

71. With regard to agents being denied access to polling stations, it is submitted that where that happened the agents either had no letters of appointment or had not signed oaths of secrecy as required in law; and further that under Regulation 62(3) of the Elections (General) Regulations 2013, the absence of agents does not invalidate the proceedings at a polling station.

72. It is further submitted that despite the petitioner having complained about use of fake agents at Mahanga and Bokoli polling stations, no evidence was led to prove who the fake agents were or proof that the letters they presented to Presiding Officers were not signed by the UDF Chief agent, as alleged and, the Presiding Officers not being document examiners could not reasonably be expected to determine which letters of appointment were valid or fake.

73. It is submitted that there is no evidence that agents requested for recount and that the request was rejected; and that it was the duty of party agents where incidences of non-compliance with the law and procedure was observed or noted, to record their name in form 35, refuse to sign the form and instead record their reason for refusing to sign; which duty none of the complaining agents complied with.

74. While allegations of failure of technology are admitted, this was not unique to Webuye West parliamentary elections but was a common problem countrywide. Citing the Supreme Court's decision in **Raila Amollo Odinga & Others v. Ahmed Issack Hassan & others** (*Supra*) the contention being that, by reverting to manual voting the 1st respondent did not violate any law; so the petitioner's case cannot hinge on the alleged failure of technology.

75. Further that not all alterations in form 35's, whether counter signed or not, invalidates the form. Where it is determined that the intention of the alterations was to falsify, forge or fraudulently change the contents therein the court must reject the results but where the intention was innocent, then the court should indulge the correction of an arithmetic or spelling error and no prejudice was occasioned on the results.

76. The court is urged to take judicial notice of the fact that under conditions of pressure and stress human beings are bound to make errors and may fail to counter-sign for their alterations.

77. It is argued that a document is no less a document because an alteration is not counter- signed. Although failure to counter sign may show negligence or carelessness of the official concerned, a court may not disregard the form, especially where the document is sealed with the seal (rubber stamp) of the institution.

78. Although under **Regulation 79(4) of The Elections (General) Regulations, 2012**, the Presiding Officer is obligated to record the fact of refusal or failure of agents to sign the declaration forms 35. It is argued that the Presiding Officer does not have to record that fact in the form. Even where a candidate or his agent has refused or failed to sign the said form, it is argued that refusal or failure to sign the form does not invalidate the result. Reference is made to **Regulations 79(6) and 79(7)**, which provide:-

“79(6) the refusal or failure of a candidate or an agent to sign a declaration form under sub rule (4) or to record the reasons for their refusal to sign shall not in itself invalidate the results announced under sub regulation (2) (a)

79(7) the absence of a candidate or an agent at the signing of a declaration form or the announcement of results shall not by itself invalidate the results announced”

79. In any event, unless it is proved that acts of fraud, conspiracy and corruption prevented the agents from signing the declaration forms, where the statutory forms are dated and signed by the election officials and/or the Deputy Presiding Officer, the results contained are valid, absence of signatures of candidates or their agents notwithstanding.

80. Concerning allegations of agents being forced to sign form 35 before end of tallying, it is submitted that evidence of the alleged acts of duress is scanty and unreliable. Since agents were trained on their role, it is argued that if indeed they were coerced to pre-sign the forms, they would have refused to sign and recorded the reason for their refusal to sign. Further, the fact that some agents, like P.W.5 said they did not sign the declaration forms negates the assertion that agents were forced to sign blank statutory forms.

81. In respect of complaints relating to register of voters, apart from the contention that there is no evidence, it is submitted that this court lacks jurisdiction to entertain such disputes as the court of first instance.

82. Further that there is no evidence linking the person who allegedly was involved in bribery, (Lydia Namisi) to the 3rd respondent or his political party; and that to expect the 3rd respondent to answer the allegations made against the said Lydia who the petitioner failed to make a party to the petition amounts to shifting the burden of proof to the respondent.

83. The reference to Form 34 is faulted as being bad in law as this court lacks jurisdiction to entertain any complaints relating thereto (form 34 relates to presidential elections. By dint of Article 163(3)(a) it is only the Supreme Court that has jurisdiction to hear and determine disputes relating to Presidential

elections).

84. The foregoing are some of the issues addressed in the submissions of the 1st and 2nd respondent. I shall address the rest of the issues raised in the submissions in the course of this judgment.

85. Most of the issues raised in the 3rd respondent's submissions are similar to those raised in the 1st and 2nd respondent's submissions, thus reproducing the 3rd respondent's submissions on such issues would serve no useful purpose in this judgment.

86. However, this observation does not mean this court disregards the submissions as the same are going to be considered alongside those of the 1st and 2nd respondents in the course of this judgment.

87. Other issues raised in the 3rd respondent's submissions relate to:-

- I. **i. Abandonment or substitution of the prayers sought in the petition:** The petitioner has, without any explanation, abandoned or substituted some of the prayers sought in his petition, by way of submissions.
- II. **ii. Failure of the petitioner to call his own party agent's as witnesses in the petition:** Failure by the petitioner to call his own party agent raises a presumption that if they were called they might not have given evidence favourable to the petitioner's case. Some of the witnesses deemed important in the petitioner's case and whom the petitioner failed to call are Rehema Kasiaya and Wycliffe Marangu who were the UDF polling agents at Webuye DEB and Webuye S.A polling stations respectively.

88. This proposition is premised on the decision of the Court of Appeal for East Africa in **Bukenya v. R** (1972) E.A 549 where it was held:-

“Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

III. **The Petitioner's failure to join Lydia Namisi and Peter Namutare in the petition.** Under **Rule 2(d)** of the **Elections (Parliamentary and County Elections) Petition Rules** these are persons whose conduct was complained of in relation to the elections and they ought to have been made parties to the petition.

IV. It is pointed out that the petitioner has vied for the Webuye Parliamentary seat 8 times and won only once, i.e. 1988; ever since then he has lost the seat successively. His previous performance is an indicator that he is not the peoples' choice.

89. With regard to the admitted and proved discrepancies, errors, omissions, irregularities and non-conformities with the election laws and regulations; it is submitted that the same were minor and did not affect the credibility of the elections or affect the results declared by the 2nd respondent. The court is urged to, dismiss the petition and find that the 3rd respondent was validly elected.

90. In a rejoinder to the issues raised by the respondents, petitioner maintains:-

1. That issues which cropped up during hearing of the petition and which had the potential to affect adversely the results of the election, whether pleaded or not, are matters which must come under spotlight, scrutiny and interrogation by the court. Reliance is made on the decision in **Justus Mungumbu Omiti v. Walter Enock Nyambati Osebe & 2 others** (Election Petition No.1 of 2008) where it was held:-

“All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a Constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon. In this case all illegalities and

irregularities which impugn the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not the subject of any pleading At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly whether the Respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded.”

2. That altering a document without counter-signing is tantamount to fraudulent misrepresentation of facts and evidence which must be not be accepted or condoned and that only alterations or correction which are counter-signed and witnessed or approved by all the parties concerned should be accepted. The argument here is that universal best practices demands that alterations effected in documents be counter-signed.
3. That **the mandate of the 1st and the 2nd respondent under 88(4) does not extend to election petitions and disputes subsequent to the declaration of results** (emphasis mine). This submission is made in respect of the reconciliation document prepared by the 2nd respondent, after filing of this petition, and in response to the issues raised in the petition.
4. That any law, including section 83 of the Elections Act, 2011, which purports to validate the results of any election by tolerating non-compliance with the principles espoused in the Constitution is inconsistent and/or in contravention of the Constitution and is, by dint of Article 2(4) of the Constitution null and void.
5. That the scrutiny and recount ordered by this court was for purpose of ascertaining the quality and credibility of the electoral process and the results and not to validate the quantity of the results or to confirm the winner.

91. **ISSUES FOR DETERMINATION:-**

The issues for determination are as framed and adopted by the parties in this petition during pretrial, including any other issues that might have arisen during the course of the proceedings.

92. The issues that were framed and agreed upon during pre-trial are:-

- a. Whether the Webuye West Parliamentary election conducted on 4.3.2013 was conducted in a **substantially free, fair and transparent manner?**
- b. Whether the 3rd respondent was validly elected and declared the winner of the Webuye West Parliamentary elections conducted on 4.3.2013?
- c. Whether the report of reconciled parliamentary votes given by the 1st and the 2nd Respondent regarding the alleged discrepancies in forms 34, 35, and 36 is capable of resolving the controversy surrounding the votes cast in favour of each parliamentary candidate; and if not
- d. Whether there is need to order for scrutiny and recount of the votes cast; and if so
- e. Whether the scrutiny and recount should be ordered for all polling stations or only in the contested polling stations?
- f. Whether there is need to order scrutiny of electoral registers in the Constituency; and if so
- g. Whether the scrutiny should be ordered for all polling stations or only in contested area.

- h. Whether any of the parties to this petition or their accomplices committed election offences, under the election Act or any other laws of the land?
- i. Whether the petition is fatally defective for violating mandatory provisions of the law?
- j. What reliefs should the court order?

93. Additional issues that cropped up during the course of the proceedings included *inter alia*, the jurisdiction of this court to address some of the matters raised in the petition, for instance, results contained in form 34 and disputes concerning registration of voters.

94. The principles which the electoral system must fulfill so as to qualify as being free and fair are set out in Article 81(e) of the Constitution of Kenya include *inter alia*:-

- a. Secret ballot
- b. Free from violence, intimidation, influence or corruption.
- c. Transparent
- d. Administered in an impartial, neutral, efficient, accurate and accountable manner.

95. By dint of Article 86, the IEBC is required to ensure that at every election:-

- a. The method used is simple, accurate, verifiable, secure, accountable and transparent.
- b. Votes are counted, tabulated and the results announced promptly by the Presiding Officer at each polling station.
- c. The results from the polling stations are openly and accurately announced by the Returning Officer.
- d. Appropriate systems are put in place to eliminate electoral malpractice.

96. The petitioner has a duty to demonstrate the elections held did not meet these standards. This brings into place the burden of proof and standard of proof in election petitions.

97. It is the duty of the petitioner to place evidence to prove that the elections were not substantially conducted in accordance with the electoral laws and that the irregularities complained of had a significant effect on the results as to compel the court to declare the election void. Indeed Section 108 of the Evidence Act states that:-

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

98. This position was confirmed by the Supreme Court of Kenya in the case of **Raila Odinga V IEBC and Others Petition No.5 of 2013** when referring to a passage in the Nigerian case of **BUHARI V OBASANJO (2005) CLR 7K** that:-

“The burden is on petitioners to prove that non-compliance has not only taken place, but also has substantially affected the result. . . . There must be clear evidence. . . . that the non-compliance has substantially affected the elections.”

99. At the end of hearing of this petition, the petitioner applied for scrutiny and recount, had the opportunity to address some of the issues that were framed for determination in this case. The issues addressed in that application were issues number (d), (e), (f) and (g).

100. Although issues number (c) and (i) were also addressed in the application for scrutiny and recount, no conclusive finding was arrived at. That being the case, and the parties having revisited them in their

submissions, I address them as follows:-

(i) Whether the petition is fatally defective for violating mandatory provisions of the law?

101. It is contended that allegations contained in paragraphs 7(a) to (d) of the petition are generalized. Similar sentiments are raised over paragraphs 9-14 and 25-29 of the petition. It is argued that the contents of these paragraphs lack in particulars and specificity, thereby making it difficult for the respondents to answer the same with the required degree of attention. Relying on **Wekesa v. Ongera & another** (2008) 2 KLR 66, **Issak v. Hussein & Another** (2008) 1 KLR (EP) 786 and **Joho v. Nyange & another** (No.4) (2008) 3 KLR 500 where, among other holdings it was held:-

1. Generalized allegations are not the kind of evidence required to prove election petitions-(**Joho v. Nyange**) (supra)

102. Generalized Allegations in Pleadings

I confirm the petition does not have some of the paragraphs contained in its submissions. There is no doubt that some of the allegations contained in the petition are generalized and lack particulars or specificity. This notwithstanding, I am unable to agree with the respondents' contention that want of particulars has the effect of rendering the entire petition fatally defective.

103. None of the authorities cited by the respondents supports the contention that lack of particulars renders a petition fatally defective. What the authorities emphasize is that such generalized pleading are incapable of proving the allegations contained therein. I can see no reason for deviating from that position. However, this position does not mean this court will condone all manner of evidence raised in support of the generalized allegations. Only evidence that arose and which the respondent had the opportunity to cross-examine the petitioner or his witnesses, will in the spirit of Article 159(2)(d) of the Constitution be considered.

104. (h) Whether any of the parties to this petition or their accomplices committed election offences, under the election Act or any other laws of the land?

These claims relate to acts of bribery, interference with tallying.

105. This contention is contested by the respondents' who have maintained that the burden of proof of all the allegations in the petition lay with the petitioner and that that burden never at any moment shifted to the respondents. That the petitioner had a duty to prove the allegations contained in his petition, where commission of electoral offences is alleged, beyond reasonable doubt; and this burden remained with the petitioner whether or not the respondents filed responses to the petition. Counsel referred to **Mazoka & others v. Mwanawasa & others** (4), Supreme Court of Zambia where it was held:-

“...for the petitioner to succeed...it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes issues to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters.”

106. Further that the evidence is incapable of proving that the respondents or their alleged accomplices committed any electoral offence. For instance, the allegations against Lydia's conduct are faulted as being inconsistent, contradictory and incredible. It is also described lacking in particulars as it does not contain the names of the persons who were allegedly bribed.

107. As concerns Peter Namutare, I find that other than being mentioned in connection with the alleged offence, no evidence was led to prove or substantiate his commission of the offence.

108. It is the activities of Lydia Namisi, which the petitioner and his witnesses capitalized on, in a bid to prove that the 3rd respondent, through his supporters, bribed voters and as a result gained undue advantage over his competitors.

109. Undoubtedly Lydia Namisi was an ardent supporter of the 3rd respondent. It is however, contended that she was not assigned any role in the campaign or election of the 3rd respondent. Further, that a supporter of a candidate is not an agent of a candidate; so, the 3rd respondent cannot reasonably be called upon to explain or account for her actions.

110. Whereas in the affidavits sworn in support of the petition the witnesses were categorical that they saw Lydia bribing voters; they seemed to be unsure of what Lydia was doing, if at all she did something. I also hasten to point out that the evidence of the petitioner and his two witnesses contradicted P.W.2 (his own witness) who led evidence to effect that his party agents did not report any incidences at Webuye DEB, Webuye S.A and at Lutaso.

111. The witnesses did not mention, by name, any voter who was bribed by the 3rd respondent or his alleged accomplices; that the witnesses did not deem it necessary to report the actions complained of to the police or the election officials in the stations concerned; and no voter recorded a statement about being either bribed by the 3rd respondent or his alleged accomplices. Moreover, the witnesses were not sure of what Lydia said to the people she allegedly talked with or even sure what she was giving them, if indeed she gave them something.

112. Due to these glaring lapses and inconsistencies in the evidence adduced by the petitioner and his witnesses I doubt that Lydia engaged in bribery. I also find nothing capable of proving that she did the acts complained of on the instruction or with the approval or connivance of the 3rd respondent. The evidence is based on pure suspicion and does not prove the claims made.

113. As to whether the 4th respondent committed electoral offences by interfering with tallying:

Whereas it was maintained that the 4th respondent interfered with the tallying process, the respondents, exonerated him from blame and said that he only played his role of providing security, according to the demands of the situation.

114. Given these contradictory views on the actions of the 4th respondent, I am incapable of agreeing with the petitioner that the evidence on record proves commission of election offences by the 4th respondent or even shifts the burden of proof to him

(c) Whether the report of reconciled parliamentary votes given by the 1st and the 2nd Respondent regarding the alleged discrepancies in forms 34, 35, and 36 is capable of resolving the controversy surrounding the votes cast in favour of each parliamentary candidate?

115. Before I consider this issue, I wish to address an issue that arose during hearing of the petition and in the submissions - reference to form 34 in the petition and the proceedings.

116. This submission is informed by the fact that under Article 163(3)(a) of the Constitution the Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President under Article 140 of the Constitution.

117. Under regulation 79(2) (a), form 34 is used in declaration of Presidential results at the polling stations and is not one of the documents contained in the ballot box(s) containing Parliamentary elections. The form is cited in error and the portion of the petitioner's prayers referring to it is bad in law. However, as reference to the form has not occasioned any prejudice to the respondent, the best I can do is to disregard it in consideration of the evidence adduced in the petition.

118. Concerning the report of reconciliation of the contents of form 35's and 36 that was prepared by the 2nd respondent after this petition was filed; it is submitted on behalf of the respondents that the reconciliation exercise restored to the petitioner the 313 votes that he was claiming. Further, that since the

report did not show that the petitioner won the election, the he should not have proceeded with this petition.

119. This contention is contested by the petitioner terming the reconciliation exercise unconstitutional, irregular, illegal and null and void.

120. From the totality of the submissions filed in support of the petitioner's case, the petitioner's contention is premised on Article 88(4)(e) of the Constitution which denies the 1st and 2nd respondent the jurisdiction to settle electoral disputes in form of petitions and/or disputes subsequent to the declaration of election results.

121. The Article provides:-

“88(4) The Commission (IEBC) is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of parliament and, in particular, for-

- a. **the continuous registration of citizens as voters;**
- b. **the regular revision of the voters role;**
- c. **the delimitation of constituencies and wards;**
- d. **the regulation of the process by which parties nominate candidates for elections;**
- e. **the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;.....”(Emphasis mine).**

122. Article 87(1) provides:-

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”

123. Pursuant to this constitutional edit, Parliament enacted the Elections Act, 2011. **Section 75(1)** of this Act vests the jurisdiction of determining the validity of a county election on the High court.

124. The question that presents itself is whether in preparing the reconciliation document the 2nd respondent acted within his powers and if so whether his report is capable of resolving the dispute herein.

125. It is conceded that the reconciliation document was prepared after declaration of the results of the elections which are the subject of this petition. The 2nd respondent in preparing the reconciliation report was reacting to the issues raised in this petition.

126. Even though the 2nd respondent had a right, as a party to this petition and as a witness for the 1st respondent, to prepare the reconciliation document, I am unable to agree with the respondent that the object of the document was to render the dispute lodged in respect of the elections herein resolved. I hold this view, because:-

- a. Under the provisions of the law aforementioned neither the 1st respondent nor the 2nd respondent has the mandate to deal with disputes relating to election petitions or disputes which arose after declaration of the results of the elections hereto.
- b. Secondly, the report of reconciliation was prepared by the 2nd respondent following the filing and service of this petition on him, and without involvement of any of the parties to the dispute

127. In this regard I concur with the petitioner that the report of reconciliation was unable to clear the doubt raised over the result declared by the 2nd respondent. However, there was nothing wrong with the 2nd respondent preparing the document for purposes of explaining the admitted omissions and discrepancies. The effect of the omissions and discrepancies on the results can only be determined by this court. In making that determination this court must consider the evidence adduced alongside any other evidence adduced in court regarding the results.

128. (a) Whether the Webuye West Parliamentary election conducted on 4.3.2013 was conducted in a substantially free, fair and transparent manner?

It is not disputed that there are discrepancies, irregularities, omissions and non-conformities with the election law or the Regulations. What is contested is whether the admitted errors and omissions substantially affected the results so as to justify the invalidation of the results. This is so because under Section 83 not every non-compliance with election law suffices to nullify the results of the election. The Section provides:-

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

129. The petitioner contends that there were massive and widespread irregularities and malpractices in the parliamentary elections for West Webuye Constituency and that in conducting the election the 1st and 2nd respondents breached the Constitutional principles of **Accuracy, Verifiability, Accountability, Transparency and Impartiality** as laid down in **Articles 38(2), 81(a)(d) (e) and 88(4)** of the Constitution.

130. It is submitted that this fact is illustrated by *inter alia* emergence of multiple statutory forms 35 and 36 with altered and illegally reconciled results.

131. As regards Section 83 of the Act and the authorities cited thereto, petitioner argues that any law, including section 83 of the Election Act, 2011 which purports to validate the results of any election by tolerating non-compliance with the law is inconsistent and in contravention of the Constitution.

132. The petitioner's contention is that proof of non-compliance with the law of elections *per se* suffices to invalidate the election. If this position is true, then owing to the admitted and manifest non-compliances with the law, for instance, failure of election officials to account for alterations or omissions in forms 35 and 36, this court is bound to declare that the elections were not conducted in a free, fair and transparent manner.

133. While acknowledging that the 1st respondent was under an obligation to conduct elections in accordance with the aforementioned Constitutional principles, it is submitted that these principles are not new and unique to Kenya. An election court on hearing a petition is called upon to assess the election qualitatively for compliance with the rules and quantitatively to determine the votes garnered by the candidates as a basis for declaration of a winner. That where errors and non-conformities with the law are noted, a determination must be made based on the effect of the non-conformities on the entire electoral process and the results. Where the non-conformities are minor and did not affect the elections and the results, the will of the people must be upheld.

134. Reference is made on the decisions in:-

1. **Mbogori v. Kang'ethe & another** (2008) 1 KLR (EP)168;
2. **Morgan & others v. Simpson** (1974) 3 ALL E.R. 722,
3. **Mkalla v. Gonzi & another** (2008) 2KLR (E.P) 771,
4. **Dr. Kizza Besigye v. Electoral Commission & another** (2006) 2 E.A 20,

5. **Murgor v. Ingonga & another** (2008) 1KLR 191 and
6. **Munyao v. Munuve & 4 others** (2008) 2 KLR (E.P) 20 for the proposition that not every non-compliance with the election law leads to nullification of elections.

135. In **Mbogori v. Kang'ethe**, for instance, it was held:-

“The evidence did not show how the admittedly substantial error in the total number of votes declared in favour of the 2nd respondent occurred. However, the error did not show ipso facto that the election was so badly conducted that it could not really be said to be an election. The error was not fatal to the election.”

136. In **Murgor v. Ingonga & another** (2008) 1KLR 191 it was held:-

“Where an election is conducted so badly that it is not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not....Where, as in this case, the election is so conducted that it is substantially in accordance with the law as to elections, it is not so vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the results of the elections.”

137. The philosophy in Section 83 and the foregoing authorities was upheld by the Supreme Court in **Raila Odinga V. IEBC & Others Election Petition No. 5 of 2013** where it was observed:-

“By no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people.....Did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the presidential election.....we have considered the evidence which came by way of depositions, and which was vigorously canvassed by the parties. In summary the evidence in our opinion, does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of the participation in the electoral process by any of the candidates who offered himself or herself before the voting public...We will therefore disallow the petition, and uphold the presidential-election results as declared by IEBC on 9th March, 2013.” (Emphasis mine).

138. The petitioner's submitted that Section 83 of the Elections Act, in as far as it tolerates non compliance with the law is inconsistent and in contravention of the Constitution, I must emphasize that under Article 87 of the Constitution, Parliament is clothed with the power to legislate on settlement of electoral disputes.

139. In exercise of its jurisdiction under Article 87 aforementioned, Parliament perhaps, in recognition that no election can be 100% perfect, through Section 83, sought to protect elections that are conducted substantially in accordance with the law regarding elections.

140. It is important to point out that the election law does not condone each and every breach of law. If there are breaches shown to have offended the aforementioned Constitutional principles, then the election would be vitiated. I am unable to agree with the petitioner that by merely recognizing that errors are bound to occur during an electoral process, Parliament breached any of the aforementioned Constitutional principles.

141. In this petition, the evidence on record shows that the process was largely peaceful. In fact, despite the respondent having made allegations relating to voter bribery at Lutaso, Webuye DEB and Webuye S.A; use of fake agents at Mahanga and Bokoli; exclusion of agents from Lutaso; inflation of votes in various polling stations, agents being forced to sign blank forms 35 and on failure of technology he led no evidence at all or any credible evidence to prove any of these allegations.

142. The evidence on record also shows that tallying of results at Bokoli tallying centre was largely conducted well and in a peaceful atmosphere. However, towards the end of the tallying exercise chaos arose owing to suspicion that the petitioner's results had been interchanged with those of the 3rd respondent.

143. This suspicion was premised on an allegation by the petitioner and his witnesses that shortly before results from the last three polling stations were tallied, projected results from 53 polling stations which had been tallied showed the petitioner leading with 10,938 votes to 10,921 of the 3rd respondent.

144. It is alleged that shortly before results from the last 3 polling stations (Bunjosi, Kakimanyi, and Mahanga) were tallied, the projector was switched off and after consultations among the respondents, the projector was switched on this time with the positions of the petitioner and the 3rd respondent interchanged. This change of positions and reduction of the petitioner's results from 10,928 to 10,715 sparked protests from the petitioner and his supporters.

145. It is also alleged that upon the petitioner's request for re-tally of the results and after the re-tallying exercise begun the petitioner was leading by 87 votes, when the 4th respondent ordered the 2nd respondent to announce the results as earlier on projected. This fanned more protests and unrest.

146. The evidence on record also shows that due to the chaos, the 2nd respondent hurriedly declared the 3rd respondent the winner and handed him with a certificate before he was whisked away by the security officers.

147. It is conceded that when the 2nd respondent declared the 3rd respondent winner, form 36 had not been printed, signed and availed to the candidates and/or their agents as required under Regulation 83 (1) (d) of the Election (General) Regulations 2012

148. It is also acknowledged that the 2nd respondent signed form 36 a day after he declared the results away from the tallying centre (at the County Tallying Centre). The reason given for this was that after calmness was restored at the tallying centre, the 2nd respondent learnt that the printer had developed technical problems and could not print the results. I will return to this evidence shortly.

149. Other complaints by the petitioner relate to form 35's which are the source documents for the information filled in form 36. It is contended that because some of the forms were not signed by party agents and/or the election officials and owing to the fact that several of them had alterations and omissions which were not accounted for or even counter-signed by the concerned elections officials or agents; the results contained therein are suspect and unverifiable.

150. This complaint was also the basis of the petitioner's application for scrutiny and recount. This court had the opportunity to consider this complaint and the evidence adduced in respect thereof. As there is no change in circumstances or evidence adduced in respect thereof, I reiterate this court's finding on these allegations, which is as follows:-

“... In some form 35's, although there were alterations the petitioner was unable to demonstrate how these affected the results....The following polling stations had alterations or discrepancies in form 35 and merit scrutiny and recount:-

- 1.Kuywa FYM stream 2 (020);**
- 2.Webuye S.A stream 4 (034);**
- 3.Sitikho Elgon RSF Primary school (019);**
- 4.Chebosi S.A primary School (041);**
- 5.Yalusi FYM (022);**

6. Witi Chengoli.

The application for scrutiny shall be limited to the named polling stations.”

151. The purpose for scrutiny was to establish the validity of the votes cast where there were allegations of irregularities and breaches of law. Scrutiny was also meant to help the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.

152. At the end of the scrutiny and recount exercise the Deputy Registrar of this court filed a report in respect of the exercise. The report read in part follows:-

“The parties confirmed the particulars of the inventory of the seals and the condition of ballot boxes as taken by the Deputy Registrar in presence of IEBC officer one Metrine Kituyi. The seals and condition of the boxes were in the same state as taken in the inventory.

The boxes were then moved to court and opened as per the directions and entries made on Forms A, B and C. The entries made on Forms A, B and C captured the whole exercise during the scrutiny and recount save for the following observations made against each ballot box upon opening:-

1. Witi Cheng’oli; Ballot Box S/N 144909

- a. Form 33 found for each candidate

2. Kuywa FYM Primary School, Ballot Box S/N 114156

- a. Form 33 found in respect of each candidates
- b. Five used booklets and one partially used booklet found inside the box.

3. Yalusi FYM Primary School, Box S/N 114160

- a. Form 33 for each candidates.
- b. One vote cast for Daniel Wanyama Sitati did not have an IEBC

stamp on the reverse. The serial number confirmed from the counterfoil and the vote confirmed as a valid vote.

4. Webuye S.A. Primary School, Box S/N 113648

- a. Form 33 found on each candidate
- b. Upon scrutiny one vote where the mark was between the line and not clear whether cast for John Wafula or Leonard Wafula Wakoli was rejected.
- c. Four stray votes that were not for National Assembly found in the ballot box.
- d. Random check done for each candidate on ballot paper cast against the counterfoil and the serial numbers on the counterfoil and ballot papers do agree.
- e. The used counterfoils counted and found to be 518 which did not agree with the total ballot papers which were found to be 517 in the box.
- f. The stamp on the reverse of one ballot paper was not clear. Upon confirmation from the counterfoil, the vote confirmed to be valid.

5. Chebosi S.A. Primary School, Box S/N 113592

- a. 7 used booklets, one partially used and one unused booklet found in the box.
- b. Three form 33s for Dan Wanyama Sitati in the box. For the rest of the candidates, one form 33 for each candidate found inside the box.
- c. Ballot paper S/N 0031576, 00031497, 00031450, 00031616, 0031437, 00031870 and 00031437 all had no rubber stamp at the reverse. The serial numbers were confirmed as existing on the counterfoil and all confirmed to be valid votes.
- d. One vote cast for George Matala found in the packet for Daniel Wanyama. The vote was awarded to George Matala upon scrutiny.

6. Chebini Primary School, Box S/N 113598

- a. Form 33 found for each candidate in the box.
- b. Two booklet fully used, one partially and one not used found

in the box.

7. Sitikho Elgon RSF Primary School, Box S/N 144157

- a. Form 35 affixed to box, a copy made.
- b. No form 35 found inside box.

- c. 4 used booklets, one partially used and 4 not used booklets found inside box.

The form 35s found inside boxes and affixed to the boxes, copies were made in presence of agents and are attached to this report. Also attached are forms **A**, **B** and **C** together with the inventories.”

153. On the basis of the report filed by the Deputy Registrar in court in respect of the scrutiny and recount, and given the fact that the petitioner failed to prove that the non-conformities rendered the results unverifiable or even affected the results; I am unable to agree with the petitioner that the malfeasances apparent in form 35's made the results, unverifiable.

154. In fact, the evidence on record shows that at the tallying centre, results from polling stations were only accepted and fed into form 36 after verification and concurrence on their authenticity between party chief agents and the 1st respondent's officers at the tallying centre.

155. Having addressed form 35's and the results contained therein, I now turn to the activities at the tallying centre that seem to have tainted a process that was otherwise peaceful and orderly.

156. It is not disputed that tallying at the tallying centre did not end well. It is acknowledged that the 2nd respondent did not generate form 36 and hard copies in respect thereof to the candidates, as required under Regulation 83 (1) (d) of the Elections (General) Regulations 2012.

157. From the reconciliation document, erroneously termed as the 2nd form 36 by the petitioner, it is clear that an entire stream was omitted in the final tally. It is also clear that results for other candidates were affected by what are described as minor anomalies of arithmetic nature.

158. The reconciliation document discloses that the errors and omissions in the results used to declare the winner affected all the candidates. I am not persuaded that the errors were tailor-made to favour any particular candidate.

159. Regarding failure to print, sign and issue Form 36 to party agents at the polling stations, I am persuaded that the 2nd respondent was prevented from so doing by the chaos that arose at the tallying centre. From the evidence on record, form 36 was in existence, albeit in soft copy. The candidates and

their agents knew their scores. In fact, it was on the basis of the said form 36 (in soft copy) that the petitioner requested for recount.

160. The petitioner faulted the Tallying process at Bokoli High School Tally Centre as being inaccurate. There were errors in transmitting results from Form 35 to 36, and in some instances, votes garnered by the petitioner were omitted. There were arithmetical errors which IEBC has admitted. The evidence does not in any way demonstrate fraud or deliberate manipulation to favour the 3rd respondent –the error in Form 36 affected all candidates. I wouldn't say that the votes were not verifiable by the paper trail left behind, indeed the recount and scrutiny confirmed that despite these errors, the 3rd respondent was still the Webuye West people's choice.

161. The situation here is similar to what was observed in Kisii Petition No.3 of 2013 Prof. Edward Akongo Oyugi V IEBC & 2 others concerning declaration of results from a computer rather than a hard copy. I can do no better than resound what Maina J states to the effect that the law does not prohibit reading of results from the computer, and it has not been shown how this adversely affected the results.

162. Similarly in the case of John Kiarie Waweru V Beth Wambui Mugo & 2 others (Election Petition No.13 of 2008) where Kimaru J. posed the question to whether the petitioner was justified to complain that since no announcement of results for all candidates took place at the Tallying Centre, then the court should nullify the election. The court noted the failure by the Returning Officer, but held the view that polling at the centres were conducted under the principle of free and fair elections.

163. A more recent decision by Kimondo J is that of Steven Kariuki V George Mike Wanjohi and 2 Others (Election Petition No.2 of 2013, where the Judge stated:-

“The spotlight must be trained firmly on the conduct of the Returning Officer and IEBC at the tallying hall... and to all the intervening events before gazettment of the Respondent as the winner. . . .”

164. The Judge extensively set out the provisions of Regulation 83(1) and 84 of the Election (General) Regulations 2012 regarding tallying and the role of the Returning Officer. Indeed as pointed out in that decision:-

“The Returning Officer in the tallying centre announces results from the various polling centres in the Constituency. Those results are contained in Forms 35. Form 35 is a snapshot of the contents of the ballot box as documented by Presiding Officers and verified by agents. Form 35 in my view is the most important primary record of the election. All the other forms are built atop it. . . . The results in form 35 are then tallied. They are fed into a computer to generate a spread sheet which evolves into a form 36. The winner is then issued with a form 38.”

165. In transposing the results to form 36, clerical errors and arithmetical are bound to result due to the speed and flow of information. The 1st and 2nd respondents are not infallible and these are expected human errors in such activity.

166. I have no doubt that the final Form 36 was not signed by any of the candidates or their agents, and was in fact generated the next day. However that does not invalidate the form whose contents largely correspond with the forms 35, and where there were variances, the reconciliation and scrutiny helped to verify the results. The explanation given by the Returning Officer is reasonable and does not suggest deliberate or dishonest intent to tilt the outcome of the election in the 3rd respondent's favour.

167. The duty of this court is to give effect and respect the will of the people of Webuye West in electing a representative of their choice. This court will not interfere with that choice unless it is established to its satisfaction that the irregularities complained of were of such magnitude that they substantially and materially affected the outcome of its electoral process.

168. In my view, failure to generate and give to the candidates or their agents Form 36 did not prejudice any of the parties. As such, it cannot form the basis of invalidation of the results declared by the 2nd respondent.

169. The upshot is that the elections herein were conducted in a substantially free, fair and transparent manner.

170. On whether the 3rd respondent was validly elected and declared the winner of the Webuye West Parliamentary elections conducted on 4th March, 2012; my answer is in the affirmative. The evidence on record shows he garnered the most votes being 11,238. The evidence on record also demonstrates that he did not participate in any election malpractices or commit any electoral offences. For these reasons, I am persuaded that he was validly elected and declared the winner of the National Assembly seat for Webuye West seat and I so declare.

171. **On costs**

It is submitted in the 1st and 2nd respondents' submissions that costs follow the event and that as the issues raised in the petition were quite engaging, this court should order costs in favour of the 1st and 2nd respondents on higher scale. Similar submissions are made by counsel for 3rd respondent.

172. Indeed, as a general rule, costs follow the event. However, petitions being a special category of ligations, circumstances may be proven negating the application of the general rule.

173. In my view, the fact that a petitioner has lost an election petition does not mean that in lodging the petition, he was overzealous or he acted unreasonably. The winning margin was narrow. Circumstances occurred in the course of the election necessitating lodging of this petition for the court to determine whether or not the circumstances affected the results of the elections.

174. There were errors and omissions noted. This was not a landslide victory, but a neck to neck result. The petitioner had every right to lodge the petition herein for the court to determine whether or not the manifest errors and omissions affected the results. If IEBC had been diligent, and even taken time to immediately reconcile the results, and give the information, the petitioner would probably not have filed this petition. In consideration of the observations I award costs to the Petitioner and the 3rd Respondent, to be borne by 1st and 2nd respondents. The same shall not exceed Kshs.2.5 million.

175. 4th respondent did not file a response or defend the case against him so he is not entitled to any costs. The costs shall be taxed by the Registrar of this court upon filing of a bill of costs as provided by Rule 35.

176. The security for costs deposited by the Petitioner shall be released to him. A certificate to issue forthwith as provided by section 86 of The Elections Act to the 3rd Respondent.

177. Finally, I must commend counsel for their industry and professionalism in this matter. I express my gratitude to both the petitioner and the respondent, and the people of Webuye West who have conducted themselves with maturity and outstanding dignity – especially the petitioner who remained calm and withstood some very unflattering moments during intense cross-examination.

Delivered and dated this 26th day of September 2013 at Bungoma.

H.A. OMONDI

JUDGE