



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ELECTION PETITION NO.3 OF 2013**

**JOHN OKELLO NAGAFWA .....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT**

**SAMSON OJIEM ORIEDO .....2<sup>ND</sup> RESPONDENT**

**PAUL OTUOMA NYONGESA .....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**The Pleadings**

1. As elsewhere in the country, the voters in Funyula Constituency turned out in their thousands on 4th March 2013 to cast their votes in favour of their preferred candidates. One such voter was John Okelo Nagafwa (**the Petitioner**). He was displeased with the Return announced by the Returning Officer (**the 2nd Respondent**) declaring Paul Otuoma Nyongesa (**the 3rd Respondent**) as the winner in the election of the Member of The National Assembly for Funyula Constituency. Upon that announcement the 1<sup>st</sup> Respondent (hereinafter also referred to as the "**Commission**") duly declared the 3<sup>rd</sup> Respondent as the person elected for that position in a special gazette notice published on 13<sup>th</sup> March 2013. This Petition challenges the validity of that outcome
2. In the Petition dated 8th April 2013 and filed on 10th April 2013, the Petitioner asserts that the Election was not carried out in accordance with the provisions of the Elections Act 2011 (**the Act**) and the Elections (General) Regulations 2012 (**the Regulations**) or in accordance with the principles of Common Law. It was alleged that the 3<sup>rd</sup> Respondent bribed and treated voters. It was said that this happened both prior and on the polling day. It was asserted that the 3<sup>rd</sup> Respondent printed, published, distributed, posted or caused to be printed, advertisements,

handbills, placards or posters in a manner that contravened the provisions of Section 67(1) (b) of the Act.

3. The 3rd Respondent was accused of unleashing violence against the supporters and agents of other candidates at the polling stations. It was also alleged that the 3rd Respondent with the connivance and or collusion of the 2nd Respondent caused persons who are not registered as voters in Funyula to unlawfully cast their votes. That these same people voted more than once, ignored the queues at the polling stations and campaigned within the polling stations.
4. As for the 1st and 2nd Respondents they faced a charge of entering or marking results which they knew or had reason to believe to be false. It being alleged that the 1st and 2nd Respondents committed the following breaches-

**“(a) Omitting to prepare accurate and complete election returns and statutory documents;**

**(b) Filing the result declaration forms by the Presiding Officers at the polling stations and the tallying centre in the absence or without the agents for the candidates or political parties.**

**(c) Misplacing or getting rid of the result declaration forms from the polling stations;**

**(d) Announcing and declaring results that were unlawful, fraudulent, fictitious and false;**

**(e) Using, accepting and manufacturing fake, forged, unlawful and fraudulent election returns, documents and results; and**

**(f) At several polling stations and the tallying centre the counting and tallying was done or undertaken using fake, incomplete, unsigned and unverified documents including Forms 35.”**

5. In the end, it was the Petitioner's case that by reason of the non-compliance with the written law the Election was not conducted substantially according to the law and principles laid down therein and the breaches, contraventions and non-compliance affected the outcome of the said Elections.
6. The 1st and 2nd Respondent filed a joint response in which they denied the allegations and averments made in the Petition. The Respondents maintained that the Election organized by the Commission was free and fair and administered in a transparent, accountable, impartial, neutral and efficient manner.
7. The 3rd Respondent in a short response filed on 7th May 2013 joined the 1st and 2nd Respondents in denying the allegations on the Petition and stated that he was duly elected as the Member for National Assembly for Funyula Constituency.

#### **Issues for Determination and Principles applicable**

8. The Court invited the parties to agree on issues for determination but only the Petitioner gave a proposal. Having looked at the proposal, the Court was of the view that it captured the issues in contest and adopted them. They are-
  - i. Whether the 3rd Respondent was validly elected and declared as Member of Parliament for Funyula Constituency during the Election held on 4th March 2013.
  - ii. Whether the Parliamentary Election held on 4th March 2013 in Funyula Constituency was conducted in a free, fair and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.
  - iii. Whether there was breach of the Elections process that compromised the integrity and outcome of the results, and whether such breach, if any, was adequate to nullify the Elections of Funyula Constituency.

- iv. Whether the Respondents both jointly and severally were involved in any electoral malpractices / offences.
- v. Whether the 3rd Respondent committed Election offences.
- vi. Whether a fresh Election for member of the National Assembly for Funyula Constituency ought to be held.
- vii. Whether there are consequential declarations, orders and reliefs including costs that this Honourable Court should grant upon the determination of the Petition.

9) Article 81 of The Constitution provides for the General principles for the Electoral system and provides-

***81. The electoral system shall comply with the***

***following principles—***

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

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

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

***(d) universal suffrage based on the aspiration for***

***fair representation and equality of vote; and***

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

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

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

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

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

***(v) administered in an impartial, neutral, efficient,***

***accurate and accountable manner.***

Through the provisions of The Act and subsidiary legislation made thereunder, Parliament has made rules and regulations for the conduct and supervision of Elections. The duty of an Election Court is to inquire and examine whether a disputed Election complied with these Constitutional expectations and the Laws and Regulations governing the conduct, management and supervision of Elections. Upon carrying out that inquiry and examination, the Court must reach a decision on the basis of the provisions of Section 83 of the Act;

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

10) It does not seem contested that in construing the provisions of Section 83 the Courts should take the approach proposed by Lord Denning in Morgan Vs Simpson [1974] 3ALL ER 722 where he said at page 728-

***“Collating all these cases together, I suggest that the law can be stated in these propositions (1) If the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or not ... (2) If the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Elections, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated.”***

This Court will adopt that approach.

11) It has to be remembered that the Petitioner carries the burden of proving that an Election result is invalid and needs to be dislodged. That would be in keeping with the provisions of Section 107 and 108 of the Evidence Act which requires that a person asserting the existence of facts must prove that those facts exist. In terms of the standard of proof the Supreme Court has recently in **Petition No. 5 of 2013 Raila Odinga and The Independent Electoral and Boundaries Commission & 2 Others** cast it as follows-

***“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.”***

Clearly, a person who assails an Election bears a heavy responsibility.

12) A feature of this Petition is that a substantial amount of evidence was adduced by persons who were party agents in the Election. In fact, out of the 29 number of witnesses who gave oral testimony on behalf of the Petitioner 9 were party Agents. Two days ago this Court in **Busia Election Petition No.2 of 2013 Henry Okello Nadimo –vs- 3 others**

after setting out the roles, duties and rights of an Agent observed as follows;

***“And as correctly stated by PW 8, who was a contestant herein, the Agent is the eye and ear of the candidate in the Election. It is through Agents that candidates participate in and observe the Election process. It is through these Agents that candidates and indeed the public can require that the Commission administers the Election in an impartial, neutral, efficient, accurate and accountable manner. And when Agents carry out their roles diligently, then pressure is put to bear on the Commission to carry out its mandate as expected by the Constitution and the Electoral Laws. As observed in NANA ADDO DANKWA AKUFO-ADDO & 2 OTHERS and JOHN DRAMANI MAHAMA & 2 OTHERS Agents are not merely exalted observers.***

37) For those reasons, how the Agent carries out his duty, conducts himself, treats or is treated by the Polling officials is important. An Agent who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart where at the hearings an Agent raises complaints about the conduct of the Election the Agent must be asked questions about the action taken by him or her to seek intervention when the issues arose. Where the Agent is guilty of inaction, then the Agent will be hardput to explain the inaction. On the converse the Court may take a benign view of the evidence of an Agent who raises a legitimate complaint or query in a formal and timeously fashion. These are but a few instances on how the evidence of an Agent can assist the Court to assess the credibility of the Election process. The point to be made is that the evidence of Agents can turn out to be crucial in aiding the Court to get a true impression of how an Election was managed and conducted.”

## **The Evidence**

13) These are the principles that will guide my survey and evaluation of the evidence herein and the eventual determination of these proceedings. The hearing of witnesses was lengthy and fairly involved. The Petitioner summoned some 29 witnesses, the Respondents 11 witnesses while there were 3 joint witnesses. The Court finds it orderly to consider the evidence under the themes of allegations made.

### **Bribery and Treating**

14) Section 64 of The Elections Act defines bribery in a most detailed manner and makes it an offence. In dealing with the allegation of bribery our Courts have embraced the following passage from Halsbury's Laws of England (4th Edition) at paragraph 780-

**“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 or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not**

**sufficient, and the confession of the person alleged to have been bribed is not conclusive** In endorsing this approach, **J.V.O Juma J. In Eustace Mbuba Ntwiga v Julius Musyoka & 3 others** [1999] eKLR remarked;

**“The burden of proof throughout rests on the Petitioner and the quality of the evidence that is preferred by him is to be considered with a thoroughness and gravity which is commensurate with the dire consequences to the Second Respondent that can follow by virtue of the provisions of Section 6 of the National Assembly and Presidential Elections Act (Cap 7) and Section 35 of the Constitution.”** (my emphasis)

Juma J. was discussing the consequences in the past statutory framework. They are still dire consequences under Section 87 of the current Election Act. An Election Court is required at the conclusion of the hearing of a Petition to send to amongst others The Director of Public Prosecutions a written report indicating whether an Election offence has been committed and the names and descriptions of the persons who have been proved at the hearing to have been guilty of that Election offence. With this in mind the Court now turns to examine the allegations of bribery starting with those said to have been committed before the Polling Day.

15) James Oduor Rahedi (PW 11), Henry Barasa Okumu (PW 12), Douglas Wandera (PW 13) are all teachers. It was their evidence that on 20<sup>th</sup> October 2012 the teaching fraternity of Funyula Constituency attended a Consultative meeting with the 3<sup>rd</sup> Respondent then the area Member of Parliament. The meeting which was held at Nangina Girls Secondary School was graced by the presence of Hon James Orengo. It is said that the meeting turned out to be a purely political matter in which teachers were given ksh.700/= each as a bribe to entice them to support the candidature of the 3<sup>rd</sup> Respondent.

16) In cross-examination Counsel for the 3<sup>rd</sup> Respondent emphasized the date of the meeting. It was on 20<sup>th</sup> October 2012. The significance of the date, as I understood it, was that it fell outside the Election period. The Election period is defined by Section 2 of The Act to mean,

**“The period between the publication of a Notice by the Commission for Presidential, Parliamentary or County Election under Sections 14,16,17 and 19 and the**

## **Gazettement of Election Results.”**

It is public knowledge that the Commission published the Notice of Election on 27<sup>th</sup> December 2012. That was about two months after the date of the Teachers Consultative meeting.

17) The posture of Counsel for the 3<sup>rd</sup> Respondent suggested that the Court should not detain itself in inquiring into allegations of a corrupt Act said to have been committed outside the campaign period. So should I dismiss those allegations offhand?

18) It is true that Bribery under Section 64 of The Act makes reference to the conduct of a “**candidate**”. Under Section 2 of The Act a candidate means a person contesting for an Elective post. Technically, there can be no contestant for an Elective post under the Act before the commencement of The Election period. For that reason any corrupt act akin to Voter Bribery committed before the Election period would not amount to bribery under The Elections Act. But that is not the end of the matter.

19) What this Court must consider is whether as an Election Court it should censure a Respondent for Electoral malpractice in the nature of bribery, treating, violence or undue influence which is committed prior to the Election period. Counsel did not address me on this important question. I venture an opinion. Under Article 81 of the Constitution an Integral element of a free and fair Election is that it is free from violence, intimidation, improper influence or corruption. Any Act or conduct that subverts free and fair Election affronts not only the Constitution but Electoral Laws. The timing of the Act and conduct may be immaterial as long as it has the effect of perverting the course of an Election. Even if committed prior to the Election period that act or conduct will amount to an Electoral malpractice as long as it remains operative and capable of subverting a free and fair Election. The question is whether if committed outside the Election period the effects of the malpractice pervades into the Election period. They are lessons to be learnt from the following short passages in Halburys Laws of England (4<sup>th</sup> Edition) **“Paragraph 276. Time of bribe. In order to Constitute the offence of bribery it does not matter how long before an Election a bribe is given provided the bribe is operative at the time of the Election.”** (my emphasis)

Elsewhere at paragraph 782;

**“A candidate at the General Election may be guilty of treating even though the treating took place before the dissolution of Parliament and consequently before he came within the statutory definition of “candidate”. A corrupt act is not the less corrupt because it is done a long time before the election, but in determining whether it is reasonable to conclude that an act is done with a view to influence votes, the element of time becomes a very material one.”**

What is of significance is whether the act is done with a view of influencing votes or the outcome of an Election.

20) And there is a real importance about this. Barring the circumstances contemplated is Article 146, the dates of Elections are known given the provisions of Article 136 2(1) of The Constitution. The Article provides;

**“(2) An election of the President shall be held**

**(a) On the same day as a General Election of Members of Parliament being the second Tuesday in August.”** Unscrupulous politicians should not be afforded the luxury of engaging in malpractices that are intended and capable of unlawfully influencing an impending Election in the comfort that acts done are outside Election period and therefore outside the ambit of the Election Act. There is therefore a basis for me to inquire as to whether there was bribery at Nangina.

21) The 3<sup>rd</sup> Respondent accepts that there was a teachers meeting held at Nangina. It was his position that it brought together 700 teachers and was held in the full glare of the media. He denied that Elections was an agenda and that he bribed the teachers.

22) In his affidavit evidence Rahedi (PW11) does not state who gave him the ksh.700/=. In his oral evidence he says,

**“I have not said that the money came from Hon Otuoma.”**

If it was to be believed that he was bribed then he would deserve just as much censure as the giver. But the confession of an alleged receiver is not enough proof that he was indeed bribed. Even without a further probe into the other aspects of the evidence of this witness, it does not pointedly implicate the 3<sup>rd</sup> Respondent. He did not see Hon Otuoma give the bribe and he does not name the giver or say that it was done with the authority, consent and approval of Hon Otuoma.

23) In his oral evidence Okumu (PW 12) says that he attended the meeting. But he does not say that he or other teachers were bribed by the 3<sup>rd</sup> Respondent. That may explain why he never mentioned this meeting at all in his written affidavit. His evidence is not adverse to the 3<sup>rd</sup> Respondent.

24) The account of Wandera (PW 13) was as follows:-

**“In the first meeting it was headteachers and teacher leaders distributing the money. Hon Otuoma did not personally give us the money but he supervised it. After I was given 700/=, Hon Otuoma told us to remember him and the ODM Team then I realized it was a bribe.”** (my emphasis)

That contradicts paragraph 5 of his affidavit when he says,

**“The agenda of the meeting turned purely political and after seeking our support we were given ksh.700/= each as a bribe to entice us support his candidature.”**

So, was the money given before or after the 3<sup>rd</sup> Respondent had sought for their support? That contradiction weakens the probative value of that evidence. That inconsistency would have been inconsequential if there was other evidence to corroborate this account. None was forthcoming. The Petitioner has failed to prove that there was bribery at Nangina.

25) This Court turns to give attention to the meeting said to have taken place on 23<sup>rd</sup> February 2013 at the Bunandi home of the 3<sup>rd</sup> Respondent. The affidavit evidence of three of the four witnesses is word for word a mirror of the other in its substantive content. PW11, P13 and P14 all state that Hon. Otuoma was due to host a meeting for teachers at his Bunandi residence on 8<sup>th</sup> February 2013 but it was rescheduled to 23<sup>rd</sup> February 2013. On that day, it was alleged, the 3<sup>rd</sup> Respondent personally gave Kshs. 1,000/- to each teacher in attendance.

26) The different affidavit testimony of PW12 was more detailed. He says that the meeting was attended by about 300 teachers from both primary and secondary and were addressed by Kenya National Union of Teachers (KNUT) officials and some Politicians including the 3<sup>rd</sup> Respondent. That the meeting then ended at 5.30pm and the 3<sup>rd</sup> Respondent stood at the main gate to his home and gave out Kshs. 1,000/- to each teacher as they left. He was among those who received money.

27) The witness had said that it had been explained to them that the occasion was to celebrate the good performance of Samia District in the past Kenya Certificate Primary Examinations (KCPE). But the meeting turned out to be something else because, **“other than a few congratulatory messages for teachers, the speeches were heavy with campaign messages and pleas for the teachers votes in the 4<sup>th</sup> March 2013 General Election.”**

28) On his part the 3rd Respondent conceded that he had previously invited teachers to his home to celebrate their good performance. He further conceded that in some of those past occasions, teachers were given monetary rewards contributed by parents. He however denied that any such meeting took place in February 2013.

29) Save for PW12, the other three teachers did not explicitly say why the money was given to them. Was it as a reward for the good performance or was it to influence them to vote for the 3rd Respondent. As for PW12, he stated-

***“The 2nd meeting was on 23rd February 2013. I confess I was given Kshs. 1,000/-. When Hon. Otuoma was giving the money he asked us to remember him.”***

An inference to be made is that the purpose of the money was to influence PW12 to vote for the 1st Respondent. So is bribery at Bunandi sufficiently proved?

30) As observed earlier, the substance of the affidavit evidence of PW11, PW13 and PW14 was deposed in words that are a carbon copy of the other. Is this an unusual mark of consistency or an attempt to fabricate a story? This Court finds it bizarre that three (3) witnesses would narrate an incident using the exact words and in the same sequence. That raises suspicion as to the credibility of the narration.

31) And it would not be lost that of the four witnesses only one explicitly says that the money given was a bribe. It was also not explained how bribery on such a scale, involving 300 teachers, would go unreported either to commission or the police. These put together does not sufficiently assure me that the alleged meeting took place and that there was bribery.

32) Musa Suleiman Musa (PW2) is the Imam for Jamia Mosque at Sio-Port. He swore an affidavit herein on 24th May 2013. He testified how he arranged a meeting on 24th February 2013 on behalf of the 1st Respondent. He ushered his visitor to his office which is within the Mosque. There the 1st Respondents met the Mosque’s Committee and the Council of Elders. Those comprised a total of 29 persons.

33) That after imploring on them to vote for him in the upcoming Elections, the 1st Respondent offered them a token of Kshs. 29,000/- to be shared equally amongst them. If that was true then the Candidate would not only be guilty of the offence of bribery but would also have contravened the Electoral Code Of Conduct by campaigning in a place of worship (paragraph 6 (d) of the Code)

34) Then there was a second incident. That after the meeting, the 1st Respondent proceeded to the front door of the Mosque where he addressed a crowd. He asked them to vote for him. He then openly proceeded to give money in denominations of Kshs. 100/- to the people present at the front door of the Mosque.

35) Answering questions fielded in cross-examination, the Imam stated-

***“As a religious Elder I was not happy about this but I took the money. Buying votes is Unconstitutional. I spent the money that I was given. I never reported this incident to the Police.”***

36) What did the 3rd Respondent have to say in answer? He denied visiting the Mosque on that day. He denied meeting his constituents in the Mosque on that day. He however admitted visiting the Mosque on several occasions in the past, but that he did not know the Imam well.

37) This is the word of one person against the other without more. I am asked to believe the Imam because in the words of Counsel for the Petitioner **“It is doubtful that PW2 an Imam would without good reasons confess to having received a bribe notwithstanding the dire consequences that might ensue?”** I think I require more than just the assurance that a man of cloth is unlikely to tell an

untruth. At any rate a confession of an alleged receiver is not conclusive evidence. An allegation of bribery is a serious allegation imputing criminal conduct on a person. Before such an adverse finding is made, the evidence implicating the wrongdoing must be crystal clear for all to see. Can this be said of this evidence? I am afraid not, the Imam had put together not only a Council of Elders but also the Mosque Committee. These are the people who are said to have received Kshs. 1,000/- each. These are people who are known to him. There has been no reason put forward why none of these 29 people was mentioned by name and secondly why there would be only one single person willing to come forward in evidence. Without more, the allegations of the Imam remain his word against that of the 1st Respondent. There is no reason for this Court either to believe or disbelieve one side. When this happens, then the threshold of prove is not reached.

38) What about bribery on the Polling Day itself? In the affidavit in support of the Petition, the Petitioner states that he saw one Philip Masiga bribe voters at Lugala Primary School Polling Station at 7.00am on the Polling day. It was his testimony that Masiga was a campaigner of the 3rd Respondent and was bribing voters with 'lessos', calendars and money. That he was determined to arrest Masiga but he (Masiga) fled on a “**boda boda**” motorcycle. He said that he also saw Masiga bribe voters at Nambuku Primary School.

39) Responding to questions in cross-examination, he stated that could not tell where, when and how the lessos which had the words “**ODM Tuko Tayari**” imprinted was manufactured. He failed to give the name of any voter who had been bribed.

40) In answering these charges, the 3rd Respondent told Court as follows-

***“I know Philip Masiga. I heard allegations against him in the Court. Mr. Masiga is Chairman of ODM Party. I stood in ODM ... Mr. Masiga was campaigning for Party candidates. He was not my particular agent. No one in authority has asked me about Masigas conduct.”***

41) Masiga admitted visiting Lugala Primary School Polling Station and Nambuku Primary School Polling Station on the voting day. He however denied bribing voters. He stated that he did not have any campaign materials with him. He denied that anything on the calendar (P Exhibit 3) connected it to him.

42) The evidence is a claim by one side and a denial by the other. It is the word of one against the other. It is true that the lessos that was produced in Court had the words “**ODM tuko tayari**” printed on it, while the calendar had the portrait of the 3rd Respondent. That said there was no evidence, cogent or otherwise, to connect these materials to the 3rd Respondent. There was no proof that these were made or manufactured by him or with his consent or approval. Further, even if it was accepted that Masiga misconducted himself, no evidence was led to demonstrate that he did so on behalf or with the approval of the 3rd Respondent. This Court is of the view that the evidence was too tenuous to successfully prove a charge as serious as bribery. Not a single receiver of the bribe was named nor was there an attempt to prove that the persons bribed were in fact voters.

43) Dishon Barasa Adala (PW4) and Josephine Nabwire Were (PW25) voted at Kabwodo Primary School Polling Station. They claimed that there were incidents of bribery there. PW4 alleges that on the morning of 4th March 2013, at around 9.00am, he found Petronila Odinga, Pius Wanyama and Basil Wandera at the entrance to the Polling Station. They attempted to bribe his wife but she declined. PW4 later reported the matter to a Police Officer who was present at the Polling Station. That Officer interrogated Petronilla but that she was later released after he had bribed the Officer with Kshs. 500/-.

44) It was the evidence of PW4 that the persons had argued voters to vote for the 3rd Respondent. But on cross-examination he stated-

***“I have seen Hon. Otuoma for the first time here in Court. I have not seen these three (3) people with Hon. Otuoma.”***

45) I am afraid that the evidence on record cannot prove the allegations. For one, the Court was not told why the primary target of the bribe, that is, the wife of PW4 did not testify to corroborate the account of her husband. Secondly, although it is said that the three were asking voters to vote for the 3rd Respondent, there is no evidence to connect the three persons to the 3rd Respondent. Even if it had been proved that they had bribed voters, the Court would not have a basis to hold that they had done so with the knowledge and consent or approval of the candidate.

46) And I think that the evidence of PW25 is even weaker. Her evidence was-

***“I found Millicent and Petronilla at the Station. I saw them call only these 2 voters. They were told to vote ODM 6 piece.”***

She later says-

***“I never saw the voters cards of the two bribed women.”***

This evidence fails to link the alleged bribery with the 3rd Respondent and just as critical fails to establish that the persons allegedly bribed were voters or were given money to influence or alter the course of the Election.

47) This Court disagrees with the following submissions by the Petitioners Advocate-

***“... That apart for (sic) the general denies (sic) by the third Respondent in his affidavits, the evidence of PW4 and PW25 have not been rebutted. No affidavit was sworn by either Petronila Odinga, Basil Wandera or Millicent Odika.”***

Once the 3rd Respondent denied the claim, albeit generally, then it was an issue that required the Petitioner to prove on the standard required by the law. On evaluation, the Petitioner failed to do so even in the absence of specific rebuttal by the three.

48) Alice Nafula Oduori (PW5) told Court that as she went to vote on 4th March 2013 she saw a group of people campaigning for Hon. Otuoma and dishing out money. One of those who was bribed, she says, was her nephew Kennedy. That he received a bribe of Kshs. 200/-. It was her further testimony that a “tea kiosk” had been set up outside the Polling Station where voters were treated to free tea and “mandazi” and urged to vote ODM candidates.

49) The witness does not say that the givers are unknown to her, yet she gave no names. The seriousness of the charge of bribery calls for some firmness in the evidence. The name of the giver is as important as the receiver and when the witness does not know the names then that too must be stated and other cogent evidence tendered. I am afraid that the evidence of PW5 lacks this firmness and falls short of the standards required by the Law. In addition, no nexus is established between the alleged misconduct and the 3<sup>rd</sup> Respondent.

50) Kizito Oucha Otuoma (RW14) is the uncle of the 3rd Respondent. He visited both Wakhungu Primary School Polling Station (030) and Wakhungu Secondary School Polling Station (031) on the Polling Day. He was using motor vehicle KBJ 032A. It is the evidence of James Ogallo Oketch (PW7) that he saw Kizito at Wakhungu Secondary and that he (Kizito) was bribing voters.

51) It was also the testimony of the witness that Festus Okumu and David Oramisi were bribing voters on behalf of Hon. Otuoma. Okumu presented himself to Court and denied these allegations. He testified that Hon. Otuoma (3rd Respondent) does not know him. His evidence in cross-examination was not shaken at all. All there is to the evidence is the word of PW7 which is uncorroborated. Nothing much can turn on this unsupported evidence. On record are two conflicting accounts of equal strength or is it equal weakness? The evidence is too faint.

52) The same can be said about the evidence against Kizito (RW14). He too, while admitting to

being present outside Wakhungu Secondary Polling Station denied engaging in bribery. There is his word against that of PW 7 and nothing more. As always it was incumbent upon the Petitioner to prove the allegations he made. It does not help his case when the Police Officer who was said to have witnessed the bribery was not named nor called to testify. That police officer may have provided invaluable corroborative evidence. Even if the offence took place, save for family and business relationship, there was no evidence connecting the 3rd Respondent to the alleged malpractice.

53) Francis Majoni Oguta (PW15) voted at Wakhungu Primary School Polling Station. It was his affidavit evidence, and repeated orally, that Timothy Achoka (RW10) ***“was giving out money just outside the fence and prevailing upon votes to vote for Dr. Paul Otuoma.”*** Not unexpectedly Achoka (RW10) denied having bribed any voter. Both the accuser and the accused were steady under cross-examination and stood their ground.

54) It bears repetition that for a charge of bribery to be sustained against a candidate it needs to be proved to the

required standard that he personally bribed or that a bribe was given with his knowledge and consent or approval or by his agents. This critical element lacks in the evidence before Court. Achoka denied bribing voters at all. He further denied knowing the 1st Respondent as at 4th March 2013 when the incident was said to have taken place. As for the candidate, he said-

***“I do not know Timothy Achoka. I am not aware about the allegations made against him. I just heard the allegations here in Court.”***

On his part the accuser said-

***“I have never seen Timothy with Hon. Otuoma.”***

And he makes no further attempt to link Achoka with the 3rd Respondent. The witness having failed to make this nexus has failed to establish the charge against the 1st Respondent.

55) Were Ouma Eliud (PW16) says that he was an agent of UDF Party at Bujwanga Secondary School Polling Station. He deposed that-

***“ODM Agents bribed old men.***

***I saw an ODM agent named Karen bribing voters and prevailing them to vote Hon. Otuoma.”***

It was said that the briber was going on in the voting room in the full view of other party agents. That surely would be courageous!

56) In the face of these accusation, the 3rd Respondent testified-

***“I am not aware of bribery at Bujwanga Secondary School. I know Karen but I am not aware of the allegations made against her. She could have been a party agent. My party had candidates for each slots. The 6 positions.”***

57) I find it incredible that only one witness could be available to tell this fantastic story of bribing going on inside a voting room in the full view of agents from different political parties. It is surprising that no other agent complained about this blatant act. It is also incredible that PW16 who was a party agent never put this complaint in writing to the commission or the police and that would only raise it with his party two months after the Election. An Agent is not an elevated observer. He is a participant in the Election. I am not persuaded that such a participant would allow the defilement of an Election process in such an overt manner without raising an immediate and formal complaint. This Court does not accept the uncorroborated account of PW16.

58) It is said that Cornel Ogoa is an ODM Delegate and bribed voters at Odiado Primary School Polling Station as they queued to vote. James Ouma Mediani (PW21) says that he turned down Cornel's overture to bribe him. Nowhere in the written or oral evidence does PW21 say that the bribery or attempt at bribery was prompted or at the instance of or blessed by the 1st Respondent. Even though this Court is urged to believe that evidence as it is unchallenged it fails to implicate the 1st Respondent. At any rate, the Petitioner is under duty to prove all elements of his case that are not expressly admitted. These incidents of bribery were not admitted by the 1st Respondent.

59) It was alleged by Nelson Odwuor (PW22) that Irine Iduwa, an official of ODM party, was bribing voters with 'lessos' at this Polling Station. That the lessos had the portrait of the 1st Respondent. That the giving of lessos was in the Polling Station. Alarmed by this, says PW22, he requested the security officer to remove her from the Polling Station. He also reported this misconduct to his campaign manager, a Mr. Ouma.

60) Irine Iduwa (RW6) is the Treasurer of ODM in Busia County. She says that she voted at Busibi at 7.30am and left. She denied giving money or a lesso to anyone. In the course of her oral testimony she was taken to task on two issues. One was in respect to paragraph 9 of her affidavit of 7th May 2013 in which she said-

***“That I never went to Busibi Primary School Polling Station on the 4th March 2013 and I could not therefore have talked to the Polling Officials.”***

This would directly contradict what she said in paragraph 3 of her affidavit and also her oral testimony that she voted at Busibi Primary School. She explained this as a mistake, that paragraph 9 should have read to Buribi not Busibi. Is this explanation plausible?

61) There is a context in which paragraph 9 was made. That paragraph and the two preceding paragraphs was a response to allegations contained in the affidavit of Benson Wandaa Okuku to the effect that the witness (RW6) was present irregularly in the polling room at Buribi Primary School. It seems plausible that in attempting to answer this allegation she mistakenly said that she did not visit Busibi when she meant Buribi. And such mistakes do happen. Notice for instance that the Petitioner's own witness (PW9) admitted an error in his affidavit when in cross-examination he said that there is no such station as Buribi. What is good for the Petitioner must be good for the Respondents. This mistake is not enough to impeach the credibility of Irine.

62) The other issue taken against her was that in her affidavit she denied knowing PW9. This is how she explained herself-

***“I do not know Benson Wandera Okumu. I have known him since he came to give evidence in Court. I saw him in Court. I got to know that he is the Benson Wandera Okuku who comes from our home (paragraph 8 of the affidavit). As at the time of making this affidavit, he had stated that he hails from Buribi (refers Court to paragraph 2 of affidavit of Benson Wandera Okuku (PW9). I now realize I know him.”***

This Court accepts this explanation because PW9 himself in his oral testimony made reference to Busibi and not Buribi.

63) The Court will now evaluate the rival evidence given by PW22 and RW6. And this evaluation must necessarily include the evidence of PW9 who was a party agent for Ford Kenya at Busibi. It was his evidence that RW6 sat throughout the day in the Polling room of the Polling Station. This is in contrast with what was said by PW22 where the bribery took place. PW22 in re-examination stated-

***“I visited Busibi only once at about 12.00noon. Irine was inside the Polling Station but outside the classroom.”***

The classroom was the polling room. So did the bribery happen inside or outside the

polling room? The Petitioners own witnesses give conflicting accounts.

64) Then there is this statement by PW9 which would not be consistent with the evidence about bribery-

***“Voting went on well and I voted.”***

The significance of this statement is that it was made by a person who was not an ordinary voter, he was a party agent

in that polling station. He was in the locus where bribery is said to have taken place. On its assessment of the evidence, this Court is unable to find that there was bribery at Busibi.

65) The evidence of bribery at Sigulu came from Vincent Ochieng Ongondo (PW28). It was his testimony that-

***“I saw one Mwalimu George who is known to me bribing voters mostly in Kshs. Notes currency. When I confronted him he took off on a motor cycle.”***

66) Mwalimu George would turn out to be George William Oduor Odhiambo (RW5). He denied visiting Sigulu and refuted the claim of bribery.

67) The evidence here is almost typical of the other evidence that this Court heard on bribery. It is the word of one witness against the other. And the evidence of the Petitioners case lacks the firmness required to prove this serious allegation. The witness does not say the quantum of the bribe and does not name the receivers. But what deals

the Petitioners case a body blow on this incident is the following response given by the witness in cross-examination-

***“I have not stated who George was supporting or representing.”***

That evidence does not implicate the 3rd Respondent at all.

68) Rumbiye Primary School Polling Station must go down as the most talked about Polling Station in these proceedings. Indeed the Petitioner sees what is said to have happened there as a central plank to his case. The Petitioner submits-

***“The happenings or the events at Rumbiye Primary School Polling Station epitomizes the corruption and bribery which had bedeviled the Election in question. Here, bribery trigged (sic) violence ...”***

For now the Court concentrates on the allegations on bribery.

69) Emmanuel Wandera Egesa (PW3) is said to be a resident of Nasiroyo Village in Rumbiya Sub-Location. He set out at 12.00 noon on 4th March 2013 to vote at Rumbiye Primary School Polling Station. That on reaching the gate of the Polling Station he met David Erulu, who is known to him, giving out money to voters in denomination of Kshs. 100, 200 and 500/-.

70) That Erulu attempted to bribe him but he declined. Displeased with what he saw, PW3 told Court that he reported the matter to the Security Officer who was present. He was advised by the Officer to effect a Citizens' arrest. That PW3 put together 5 people who arrested Erulu. Erulu it is said was rescued later in violent circumstances. That will be discussed in some detail later in this decision.

71) David Lidbury Awille (RW15) is also known as David Erulu. He denied visiting Rumbiye

Polling Station or being arrested on 4th March 2013. He also denied bribing voters. It was his testimony that on that day he visited Rumbiye Catholic Church which is about 11/2 – 2km from the polling station. There he found young men in animated debate about their favourite candidates. That he then called Wilberforce Oundo (PW23) to ask him why his (Oundo's) young men were excited in spite of the poll regulations.

72) It was submitted by the Petitioner's Counsel that this Court finds corroboration of the evidence of PW3 in the evidence of PW1, PW6, PW23 and Milka Anyango Andiega. Let me look at that evidence.

73) PW1's evidence is not direct in that he stated in paragraph

14 of his affidavit in support of the Petition that he was informed that Erulu was bribing voters in Rumbiye. He does not say who gave him this information. But he says that on the following day, he lodged a complaint with the Police about the incident at Rumbiye but never lodged one with the Commission.

74) PW6 gave lengthy testimony in Court. It was substantially, almost entirely, on the violent aspect of Rumbiye complaint. Not once either in his oral or written testimony does he say that he saw Erulu bribe voters. This is how he makes reference to the issue of the bribery-

**"10) ... there was a commotion between the group of youth and the said David Erulu. The youth alleged that he was bribing voters at the Polling Station."**

75) On the part of PW23, he states-

**"I know Emmanuel Junior (PW3) he was one of my supporters and within Rumbiye wailing to vote ... He called me earlier that he was under pressure to receive a bribe from Erulu."**

He later went on to say-

**"I did not personally witness acts of bribery. I spoke to Emmanuel Junior after the incident had happened."**

Emmanuel Junior is PW3.

76) Milka Anyango Analiega swore an affidavit on 8th April 2013 in support of the Petition. She was however not called to testify. She deposed that she was a duly appointed agent for New Ford Kenya Party assigned to Rumbiye Primary School Polling Station. She then states this in paragraph 11 of her affidavit-

**"I went outside and found one David Erulu known to me dishing out money to voters persuading them to vote for Dr. Paul Otuoma. It was then that he was beaten thoroughly. His clothes were torn off."**

77) My survey of this evidence is that only two witnesses allege to have directly seen Erulu bribe voters. Milka's evidence was untested by cross-examination as she did not testify. The other was PW3.

78) In cross-examination PW3 deviated on an aspect of the incident. That deviation must turn out to be important. The substance of his evidence in chief is that he saw Erulu bribe voters and that Erulu in fact attempted to bribe him. But in cross-examination he says-

**"I never saw David bribe or attempt to bribe any other person."**(my emphasis)

This would be a substantial deviation because there was an earlier attempt by the witness to exaggerate.

79) Is it safe to rely on the evidence of a witness who was willing to exaggerate? Perhaps not in view of this other part of his evidence

**“I informed the Police Officer. The Officer had not seen David bribe voters, it was a distance. The IEBC officials had not seen David bribe voters.”**

The picture painted is that it was only he and Milka who witnessed the corrupt practice.

80) It needs to be underscored that evidence of bribery needs to be sharp, cogent and firm. In this instance Milka does not state that she does not know the names of the receivers yet she does not name them. Milka does not state the amount of bribe that was given. For Erulu his evidence was been exaggerated. It is also noteworthy that Christine Juma who was an agent working under the Petitioner signed Form 35 for Rumbiye Primary School Polling station without any protest or reservation on the process or outcome.

## **Violence**

81)

Section 65 of The Election Act criminalizes the use of force or violence during the Election. It is the Petitioners case that the 2nd Respondent is guilty of this offence. In paragraph 21 of the Petition it is averred that-

***“In several Polling Stations the Third Respondent by himself and/or through his agents and supporters created violence, .....that undermined the integrity of the whole process. “***

The only evidence in respect to Election violence was that involving an incident at Rumbiye.

82) I have no difficulty accepting that Egesa (PW3), the star witness in this incident, visited Sio Port Police Station on 5th March 2013 and lodged a complaint of assault. Details of that report will be revisited shortly. That report was received by P.C John Ngetich (RW8) who entered it as OB No. 4 of 5<sup>th</sup> March 2013.

83) Thereafter P.C Levy Namai (RW9) issued him a P3 form and the same was duly completed by James Wandera (RW3), a Clinical Officer at Sio Port District Hospital who also treated him. Although there was much furore made about an unstamped copy of the P3 this Court thinks that it was needless. I say this because the P3 form produced as an Exhibit (PExhibit 9B) had the mark of the O.C.S Sio Port affixed on it and was recognized as authentic by RW9. That witness also confirmed that it was the one he had issued to Egesa. Any controversy around it would rest when RW3, the Clinical Officer, confirmed that the Exhibit was the P3 form brought to him by Pw3 and which he duly completed in its Part II.

84) The Clinical Officer examined PW3 on 8th March 2013 and found that he had a four day old injury to his lower limbs. The nature of injuries being tenderness to his buttock but with no obvious injury. The question to be answered is whether this injury was caused by the 3rd Respondent or his agents or supporters on 4th March 2013 at Rumbiye.

85) The evidence of PW3 is that after the arrest of Erulu, the 3rd Respondent arrived at the scene in two vehicles and accompanied by his youth. That the youth attacked the 5 people who had assisted in the arrest of Erulu. In the process they beat PW3 and snatched his telephone.

86) Knowles Tabu Khadali (PW6) says that he was outside Rumbiye Polling Station when the violence erupted and that he witnessed the commotion. He stated as follows in his affidavit-

***“That I moved closer and I saw Dr. Otuoma’s youth descend in one Emmanuel Egesa who is known to me. They beat him up and took his cellphone because he had been take (sic) photos of the event including the chaos that had erupted.”***

87) PW6 took photographs of the scene using his mobile phone handset. Eleven (11) photographs were exhibited.

88) The 3rd Respondent admits that he visited Rumbiye Primary School Polling Station. He had intended to visit as many polling stations as possible. He explained that he commenced his visits with Rumbiye because it was at the extreme end of the Constituency. Although it was his view that the pictures taken by PW6 were blurred and unclear, he thought that he appeared in some of them. Listen to this-

***“[Shown pictures PExhibit 5.1-5.11] some faces are familiar. I can see my brother Peter (PExhibit 5.1) he is on the foreground. There is no violence on his part. I see him again and myself here [PExhibit 5.7]. I can see advocate Oundo [PExhibit 5.10]. I can see myself, my security detail (Bwire), he is behind me. I cannot remember seeing Oundo Advocate on that day. But I now see him in the photograph. The photos are not very clear. I see a vehicle that looks like mine [PExhibit 5.2]. In the background is a car which I do not know.”***

89) As for Erulu (RW15), he categorically denies that he visited Rumbiye Polling Station. That after casting his vote at Buburi Polling Station he visited Rumbiye Catholic Church. That the Church and the Polling Station are on separate locations. He further denied that he was in the photographs [PExhibit 5.1-5.11]. He thought that the photographs were unclear. This Court noted that the witness was hesitant on this aspect of his evidence.

90) There is clear evidence that places the 3rd Respondent at Rumbiye Primary School Polling Station some time on 4th March 2013. He admits this. And although he denies being involved in any violence he said this-

***“To the best of my knowledge, I did not get any commotion at Rumbiye. I spoke to the Police Officer because he was the first person I met, he told me that there was some small commotion outside the Polling Station. Once I was told that all was fine I left for my home.”***

91) So whose version is to be believed bearing in mind that it is the Petitioners responsibility to prove the allegations he makes. The evidence of PW6 was that it was the youth of

the 3rd Respondent who beat Egesa. As for the victim himself, he was not quite consistent. In his affidavit evidence he says that it was the youth who beat him. And in his oral evidence he named one of them as Dennis Mugwanga. That story changes in cross-examination when he says-

***“Hon. Otuoma poked my upper back with the fimbo ... I was hit by blows and kicks. Otuoma’s bodyguard beat me.”***

For the first time he introduced Hon. Otuoma and his bodyguard.

92) Still on the identity of his assailants, the witness told Court that he gave the following names to the Police, Robert, Dennis, Otuoma’s bodyguard John and Thadeus. Notice that the 1st Respondents name does not feature. Anyhow, the point to be made here is that the Police Officer (RW8) who received the report was adamant that the victim did not name his assailants. It would be for this reason that in both the OB 4 of 5th March 2013 and the P3, it is only indicated that the victim was assaulted by persons well known to him but without names. To demonstrate that he faithfully captured the names of suspects as given by complainants, RW8 gave the example of OB entry 2 of the same day were a complainant gave the names of his assailants as Leonard Odongo, Jacob Malingu, Beston Juma, Ochieng Mabuta and Moses Luande. I found RW8 to be truthful and I believe him.

93) The evidence of RW8 is fortified because even the Clinical Officer (RW3) who treated Egesa stated that the patient did not disclose to him the names of the five persons who assaulted him.

94) Attention turns to the other aspects of the attack. PW3 reported to the Police that he suffered

from blows and kicks. He never mentioned the stab of a “*fimbo*”. The medical documents show that he sustained injuries to his lower limbs. No injuries were detected on his upper back where he said the 3rd Respondent had poked him with the fimbo.

95) A short observation on the photographs produced. The Court was quick to notice that there are not the clearest of photographs. But one can make out that there are images of people in those photographs. What this Court was unable to make out was the image of a person being beaten using blows and kicks, or being beaten at all.

96) This Court has pointed out the inconsistencies on the assault incident surrounding Egesa. That does not help the Petitioners argument that there was violence at Rumbiye. The allegation of violence has not been proved adequately.

### **Of campaign posters**

97) Section 67 1(b) of The Elections Act creates an electoral offence in the following manner;

**“A person who-**

**(a) ...**

**(b) Prints, publishes, distributes or posts up**

**or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to any Election and which does not upon its face the names and addresses of the printer and publisher; ....**

**Commits an offence ...”**

Under Section 67(a) that offence is a cognizable offence. A cognizable offence being one for which a police officer may arrest without a warrant (see Section 2 of The Criminal Procedure Code).

98) In paragraph 13 of the Petition the Petitioner avers that the 3rd Respondent committed an offence under Section 67(1) (b) of The Elections Act. In support of that averment the Petitioner produced in Court a poster [PEXhibit 2] with the portrait of the 3rd Respondent and the ODM slogan. There are no names and address of the printer on the face of the poster. Prima facie, the poster breaches provisions of statute.

99) The 3rd Respondent denied that PEXhibit 2 was his poster. He further states that the posters he used in the campaigns were glossy and of better material. He found support in the evidence of RW12 who is the Chairman of ODM party in Funyula Constituency and the organizing Secretary of ODM party in Busia County. In cross examination RW12 was invited to comment on PEXhibit 3 and he said-

**“It is a campaign poster. This is portrait but it is not clear. But this was not the material. The slogan for ODM was “Tuko Tayari”. I see the words “Eifumbuhe Siity Olume” I do not know the meaning. This does not look like ODM material. We had posters for Dr. Otuoma from ODM Headquarters. I saw several of his posters. I have not availed a sample of our posters. Exhibit 2 is not the kind of material we used.”**

100) I am urged by the Petitioner to find in his favour because neither the 3<sup>rd</sup> Respondent nor his witnesses supplied to Court their Election materials for examination. But to do so would be to shift the burden of proof to the 3<sup>rd</sup> Respondent. This would be to violate the law in respect of the burden of proof which places the Petitioner with the onus of proving all allegations he has made in the Petition

(see Raila Odinga case above, Joho -Vs- Nyange & Another (2008)3 KLR EP and Machakos Election Petition No. 1 of 2013 Richard Kalembe Ndile & Another -Vs- Dr. Patrick Musimba Mwei & 2 Others.

101) Even though the Petitioner can be credited for exhibiting the poster, he does not tell Court where he found or recovered it from and save for the portrait on it, why this Court must believe that it is the work of the 3<sup>rd</sup> Respondent or his agents. To that extent the evidence is thin and insufficient to prove an allegation which is criminalized by The Election Act.

102) And it has to be said that the commission of an offence under Section 67(1) (b) is an Election malpractice but that alone would not be sufficient reason for an Election Court to nullify the Election. I share the same view as Kimaru J. in Election Petition 10 of 2008 William Kabogo Gitau v George Thuo & 2 others [2010] eKLR. Discussing the provisions of Section 11 (1) of the Repealed Election Offences Act which had similar wording as the current Section 67 (1) (b) the Judge held;

**“This court has carefully considered the evidence adduced by the petitioner and the 1<sup>st</sup> respondent in regard to this alleged election offence. Having perused the election posters of the petitioner and the 1<sup>st</sup> respondent, it was clear to this court that both the petitioner’s and the 1<sup>st</sup> respondents posters did not bear on its face the names and addresses of its printers and publishers. Section 11(1) of the Election Offences Act provides that in the event it is established that any person had committed the election offence specified in the Section, such a person shall be liable to imprisonment for a term not exceeding four (4) years. It is therefore evident that where any person is aggrieved by any election poster that does not bear on its face the name and address of its printer or publisher, such a person is required to lodge a criminal complaint with the police. The fact that a party to an election petition did not specify on the face of his election poster the name and the address of the printer or publisher cannot result in the nullification of an election.”**

### Use of Public Resources

103) Although a matter arose in the course of the hearing as to whether the 3<sup>rd</sup> Respondent committed an offence under Section 68 of the Election Act the same was not pleaded. That provision of the Law bars and criminalizes the use of public resources for the purpose of campaign during an Election or referendum.

104) It is often said that parties to any litigation are bound by their pleadings, and there is no reason why an Election proceeding should be an exception. Admittedly, the duty of an Election Court is to inquire whether an Election under dispute complied with the principles laid down in the Constitution and Electoral laws. But that inquiry is not open ended and must be carried out within the context of the pleadings. Kimaru J. had this to say in Mahamud Abdirahman and 2 others Nairobi Petition No.15 of 2008,

**“From the outset, this Court wishes to state that the Petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a Court of law shall only be on the basis of the pleadings that have been filed by the party moving the Court for appropriate relief. In the present petition, this Court declined the invitation offered by the Petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This Court will therefore not render any opinion in respect of aspects of the Petitioner’s case which he adduced evidence but which were not based on the pleadings that he had filed in Court, and in particular, the Petition.”**

A danger of unbounded and run-away proceedings is demonstrated in the matter before me. The issue as to whether or not the 3<sup>rd</sup> Respondent was guilty of use of public resources first arose during the

hearing of the Respondent's case and when the 3<sup>rd</sup> Respondent was testifying. It cannot be said that the 3<sup>rd</sup> Respondent had a fair opportunity to answer to this charge and prepare his defence. It would be unjust for this Court to consider or make a finding in respect to an issue that was introduced so late in the day.

### **Misdirection of assisted voters**

105) There are voters who by reason of disability or being unable to read or write need the assistance or support of another person to cast their votes. Regulation 72 is the legal framework for this assistance and support and Regulation 72(1) reads-

***“On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the Presiding Officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.”***

To mismark a vote of an assisted voter is an assault to the voters right to vote and a direct defilement of the voters will. No doubt a serious issue. It also is, agreed that where a charge is in the nature of a criminal allegation then it must be proved with cogent evidence. So is it a criminal offence for a person authorized to assist a voter to deliberately mismark the vote?

107.A person assisting a voter may either be a Presiding Officer or any other person qualified to assist. In the latter circumstances, the person is required, before assisting or supporting, to make a declaration of secrecy before the Presiding Officer. Regulation 72 (5) (a) and (b) provides-

***“5) The following shall apply in respect to***

***a person who assists a voter under this***

***Regulation-***

- a. ***The person shall, before assisting or supporting the voter, make a declaration of secrecy before the Presiding Officer in Form 32 set out in the schedule.***
- b. ***A person who breached his or her Regulations commits an offence under the Act.”***

Form 32 requires an assistor to declare that he or she shall assist the voter in strict obedience of those the requirements, one being, that;

***“1. ....***

***2. That I shall mark the role of the voter I***

***am assisting for the candidate of the***

***voters choice and for no other person.”***

To Act against this declaration is to commit a crime.

108.In respect to the Presiding Officer any misdirection would amount to an offence under Section 59 of The Act which is an offence by members and staff of the Commission. He could be liable under Section 59(1) (a) or 59(1)(l)-

***“59(1) A member of the Commission, staff or other person having any duty to perform***

***pursuant to any written law relating to any Election who .....***”

***(a) makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true;...***

***(l) willfully contravenes the Law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful consideration***

109. Geoffrey Barasa Okochi (PW8) told Court that owing to paralysis to his right hand, he needed assistance to vote. That assistance would initially come from the Presiding Officer of Sidonge Primary School Polling Station but that, against his instructions, he marked the ballot paper in favour of a candidate Davis Bob Catt Omanyo. Upon protesting, another ballot paper was issued and with the help of a Ford Kenya Agent, the ballot was marked as he wished. It was nevertheless his complaint that the first ballot paper was not destroyed and that it was retained by the Presiding Officer who put it in his coat pocket.

110. The Commission never made a direct response to this allegation save that the second Respondent did not receive any complaint in respect to assisted voters. It may be true that PW8 had to use a second ballot paper because he was dissatisfied with the manner in which the first ballot was marked but there is no evidence that first ballot found its way into the box. And at any rate the 3rd Respondent would certainly not have been a beneficiary because the testimony of the voter is that ballot had been marked in favour of David Bob Catt Omanyo. This Court is unable to make much of this incident save to see whether it corroborates the allegations that the malpractice on assisted voters was rampant and systemic.

111. PW10, Clement Makokha Guyuni assisted his illiterate mother to vote at Busembe Polling Station. He was content, it would seem, with the manner in which he was allowed, and eventually, assisted his mother vote. He said-

***“I voted without a problem, I also assisted my mother vote without a problem, I took an oath first then I assisted her vote. I marked on her behalf. She chose me. The agents observed.”***

There was compliance with the law.

112. His gripe is that he witnessed the Presiding Officer deliberately mislead other illiterate voters and that caused an uproar amongst agents. They complained and voting was stopped. Two of the agents who complained were Gilbert Ongwako and Telewa. He was however unable to name any of the aggrieved voters. And none of the agents who are said to have witnessed the irregularity came forward to support this account. And there was no evidence of any complaint by the agents. It is little wonder that the witness finally remarked-

***“I am surprised that the agents signed that voting went on smoothly.”***

113. Fred Okumu Magero (PW17) voted at Namasango Nursery School Polling Station. It was his evidence that he sought assistance from the Presiding Officer because he was semi- illiterate and that it was his first time to vote and so in his own words-

***“I did not want to have my vote spoilt so I asked for assistance.”***

It was then his testimony that, against his wish, the Presiding Officer marked the ballots in favour of ODM candidates. That when he queried this, the Presiding Officer issued him with new ballot papers.

114. Having learnt his lesson, it would seem, he now marked the ballot papers by himself. His

complaint was that the Presiding Officer remained with the two protested ballots and that he saw him cast them into the boxes. This Court is reluctant to believe this witness in the absence of evidence that supports his story. My assessment is that the witness was not eligible to vote as an assisted voter. Persons who are eligible are those who are unable to vote by reason of a disability or being unable to read or write (Regulation 72(1)). The witness admitted having attended Namalo Primary School, although he says that he dropped off at Class 7. That they were taught English and Kiswahili languages and then very tellingly said-

***“I do not understand English well but I can read it.”***

A voter does not speak to a ballot paper, he reads it. On the ballot paper are names of candidates, their pictures and their party symbols. The instruction on how to mark the ballot papers were both in English and Kiswahili languages.

115. The witness may have trapped himself when he stated that he was able to tell that the Presiding Officer was marking in favour of candidates other than that of his choice. If he is to be believed then he committed an offence under Section 58(o) of The Act by pretending to be unable to read or write so as to be assisted in voting. Not much reliance can be placed on such a witness.

116. One of the agents for Ford Kenya at Namboboto Boys Primary School Polling Station was Vitalis Fred Sama Wanyama (PW18). He said this of assisted voters-

***“Despite raising objection, illiterate people were assisted by the Presiding Officer only and without supervision or assistance of the party agents and they were misguided and or misled. It is only later on after 10.00am when the majority of the electorate had cast their votes that the Presiding Officer allowed the party agents to supervise with the illiterate who were a majority at the polling station.”***

In cross examination he admits that he does not name any of the illiterate voters whose ballots were wrongly marked or marked against their wishes.

117. There was another lamentation at Namboboto Boys Primary School. That the Presiding Officer would assist voters in need of assistance or support in the absence of party agents. That when Newton Wandera Ndako (PW24) complained, the Presiding Officer allowed only ODM Party agents to witness the marking of the ballots. If true, then it would be a serious breach on the conduct of the Presiding Officer. PW24 was a knowledgeable agent and refused to sign Form 35 because he was unhappy about the conduct of the poll. But he did not tell the Court why he never raised this serious irregularity in writing to the Commission or why he never had a record of the number of assisted voters who were involved to inform a subjective assessment of the gravity of the issue. It is also curious that the agents of the other parties did not come forward to support the evidence of PW24.

118. There were issues raised about the manner in which the ballots of assisted voters were being marked at Bwangangi Primary School Polling Station. Benedict Wandera Magero (PW19) says that he noticed that many voters had come to vote in the company of assistors. That the assistors marked the ballots without seeking to know the choice of the assisted voters. He says that he complained to the Presiding officer and it was agreed in consultation with agents representing different parties that only the Presiding Officer assists such voters. This was followed but that the Presiding Officer did not allow the agents to observe when this was done.

119. That said, the witness stated that he never saw or heard any

assisted voter complain that marking of his/her ballot was done against his/her wish. Further there was no evidence on how many assisted voters were aggrieved. That evidence would have been critical in helping the Court assess the gravity or otherwise of the alleged malpractice at Bwangangi.

120. Dennis Ojamba Oduori (PW20) was a Ford Kenya agent at

Sijowa Primary School Polling Station. He noticed that some people were assisting or supporting more than one assisted voter. That would contravene Regulation 72 5(c) of The Regulations. On complaining to the poll officials, it was agreed that assistance or support be left to the Presiding Officer. Although he says that the irregularity was rampant, he does not give the number of assistants who were involved. He also told Court that none of the assisted or supported voters complained about the marking of their ballots. This witness was a party Agent at the Polling Station. He did not explain to Court why he did not raise this issue at the time of Polling or counting of the Ballots. And what is this Court to make of the fact that at the close of polls this witness was one of the three Agents who signed Form 35? This Court is unable to make much of this complaint.

121. The evidence in respect to Luchulu Primary School Polling

Station is even weaker. The complaint was that the Presiding Officer did not allow party agents to witness how he marked the ballots of assisted voters. But in cross-examination Jane Nora Bwibo Okisa (PW26) who had raised the issue did not think it to be serious. She stated that her only gripe was that the Presiding Officer did not allow her to sign Form 35. On her own evidence, there is no proof at all that the assistance or support given to voters who required it was fouled.

### **Signing of Forms 35 by candidates or their agents.**

122. At the Polling Station, results of an election in respect to the National Assembly are declared in Form 35 (Regulation 79 of The Regulations). It is expected that the candidates or agents sign that declaration. The law, however, contemplates that candidates or their agents could refuse or fail to sign the declarations or be absent at the time of signing and makes the following provision in Regulations 79(3), 79(4), 79(5), 79(6) and 79(7) of The Regulations.

***“79(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.***

- 4. Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.***
- 5. Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.***
- 6. The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).***
- 7. The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation.”***

123. It is asserted for the Petitioner that various Forms 35 were not signed by the candidates or their agents. The Petitioner assails the declaration forms because, in his view, the Presiding Officers made a fatal omission by failing to record the fact of refusal or failure to sign or to give reasons for non-signing of the declaration.

124. The Petitioner lined up witnesses who were party agents at various polling stations. Some namely, PW9, PW20, PW28 and Milka Anyango Amega signed the forms. Then PW18 denied the signature said to be his on the Form. But he did not call any evidence to prove it was a forgery. The evidence of these five (5) witnesses does not advance the hypothesis of the Petitioner.

125. In that category of agents would be PW26 who explained that he did not sign Form 35 for the

National Assembly as the Presiding Officer asked a few agents to sign the forms for the 6 different levels of the Election. She signed for another level and in answer to a question put to her by Court, she stated that she would have signed the one for the National Assembly results if she had been given the opportunity. An implicit endorsement of the Form 35 for the National Assembly.

126. Then there are those who deliberately refused to sign the Forms 35 because of one reason or other. PW24 who was a party agent at Namboboto Boys Primary School polling station says that he refused to sign the Form because he was unhappy about the manner in which support was given to assisted voters. While PW19 refused to sign because he was dissatisfied with the manner in which the votes were cast. Both did not record their reasons for refusal as required by the Regulations.

127. Peris Narobo Nekesa and Jackson Wafula Odero did not explain their failure to sign the Forms and in fact did not raise any complaint in respect to the signing of Forms in their affidavit evidence. While PW16 stood out because he stated that although he asked for Form 35 to register his protest over the conduct of the poll, the Presiding Officer refused to avail it to him.

128. I give these details to demonstrate that the non-signing of Forms 35 can be attributed to various reasons. And the manner of dealing with them also differs. Where the agents (like PW26, PW24 and PW19) confirm that the Form truly and accurately captures the results of the count, then it is not available for them to seek invalidation of Forms 35 merely because they did not sign them. The Petitioner will not be allowed to dispute a result which is endorsed by his own witnesses.

129. As for Nekesa and Odero, they never gave any reason for failing to sign the Forms. The Court will never know whether they were present or absent at the count or the time the other agents signed the votes. Importantly they never raised any complaint in respect to the count.

130. That leaves the Court with the evidence of PW16 who says that the Presiding Officer at Bujwanga Secondary School Polling Station, refused to avail to him the Form 35 so that he would record his protest. That allegation required some explanation from the Officer concerned but none was forthcoming. If he is to be believed then this would be a breach by the Presiding Officer. Yet taken in the context that this was the only evidence of such breach out of 76 polling stations that seems to be an isolated case. That would not be a true picture of how the rest of the polling, counting and announcement of results was managed and conducted. Even more importantly, it was not alleged, nay proved, that the Form did not faithfully reflect the count of ballots at that station.

131. This Court is not persuaded that, case has been made for the invalidation of the results announced on the ground of the non-signing of Forms 35 by all agents. It is in circumstances such as those revealed in this case that the provisions of Regulations 79(6) and 79(7)(2) are of apt application. The refusal or failure of a candidate or an agent to sign the declaration or to record reasons for their refusal to sign or their absence at the signing cannot by itself invalidate the results announced.

### **Alterations to Forms 35 & 36**

132. The Returning Officer conceded that some Forms 35 had alterations. Some alterations were countersigned and others were not. In their closing arguments counsel for the Petitioner cited the following stations where the Forms suffered alterations without counter signature. These are-

- I. Mundaya Primary School Polling Station (001)
- II. Sibinga Primary School Polling Station (003)
- III. Busulere Primary School Polling Station (005)
- IV. Sagania Primary School Polling Station (006)

- V. Sibale Primary School Polling Station (009)
- VI. Moody Awory Primary School Polling Station (012)
- VII. Nyakwaka Primary School Polling Station (024)
- VIII. Sijowa Primary School Polling Station (040)
- IX. Sigalame Primary School Polling Station (045)
- X. Namasali Primary School Polling Station (048)
- XI. Angeng'a Family Life Centre Polling Station (053)
- XII. Nabutuki Primary School Polling Station (054)
- XIII. Hakati Primary School Polling Station (070)
- XIV. Ganga Youth Polytechnic Polling Station (071) Stream
- XV. Ganga Youth Polytechnic Polling Station (071) stream

Counsel then pressed the argument that-

***“It is difficult to tell the effect of alteration as the initial figure is not clearly visible. Being a closely contested election, any vote lost or gained would definitely affect the final result.”***

133. The Petitioner did not deem it necessary to call a document examiner or statistician to advise on the possible effect of the alteration. That may have assisted the Court to appreciate whether or not the alterations had any effect on the outcome of the Election. In the absence of that vital assistance, the Court has taken time to look at each of the affected Forms.

134. Form 35 can be divided into five (5) parts-

(I) Part 1 – The Heading and Particulars of the Polling Station, stream and constituency.

(II) Part 2 – captures the Numbers of registered voters, spoilt ballot papers, votes cast, reject votes, disputed votes, rejected objected votes and valid votes cast.

(III) Part 3 – the number of valid votes cast in favour of each candidate.

(IV) Part 4 – The Declaration.

(V) Part 5 – The Presiding Officers Statutory

comments.

135. Common to thirteen (13) of The fifteen (15) impugned Forms is that the alterations appear in Part 2 only and not part 3 of the Form. This is of great significance.

136. There has been no evidence that votes cast exceeded the number of registered voters or that spoilt, rejected or disputed votes were counted in favour of the 3rd Respondent. If that were so, then the alterations in Part 2 of the Form would be critical. Part 3 of the Form captures the number of valid votes cast in favour of each candidate. Whether or not the final result will be affected substantially lies in whether these figures can be faulted or are so unclear and marred as to be incapable of showing the number of valid votes cast in favour of each candidate. In the absence of proof that Part 3 was distorted, I cannot strike down the results in the 13 forms as the results in respect of each of the candidates has not been impeached. In the main, the integrity of the Forms is intact. I am not persuaded that I should go the way in **William Kabogo Gitau – Vs- George Thuo & 2 Others** where the Judge was dealing with a different situation “**where specific results of specific candidates were either cancelled or altered without the Presiding Officer countersigning the alteration.**” In the case before me I have found that in only one Form was the result of the candidates altered or cancelled.

137. This Court was also asked to invalidate the results in Form 35 in respect to Sibinga Primary School (003) the reason being that stamped over the signature of the Presiding Officer was an IEBC mark with the words ‘**Rejected**’. There was no explanation made by the Commission on what this meant. Looking at Form 36, the figures entered there are those transferred from this Form. So was this result truly rejected? It would not seem so and in any event the law requires the Form 35 to be signed by the Returning Officer (Regulation 79(1) of The Regulations. There is no requirement for stamping the Form with any mark.

138) The Petitioner pointed out six (6) inaccurate entries on Form 36. The entries were not an accurate transfer of some Form 35 figures to Form 36. I have looked at those entries and sought to examine whether they could affect the result of the Election. The inaccurate entries are captured in the table below;

**Namboboto Girls Primary School Polling Station (018)**

Entry	Form 35	Form 36	Effect on Votes
Rejected Vote	1	0	-1
Votes Cast	51	50	-1

**Sichekhe Primary School Polling Station (026)**

Entry	Form 35	Form 36	Effect on Votes
Votes Cast	182	144	- 38

**Rumbiye Primary School Polling Station (062)**

Entry	Form 35	Form 36	Effect on Votes
Votes Cast	376	378	+2
Valid Votes	373	375	+2

**Ganga Youth Polytechnic Polling Station (071) Stream 2**

Entry	Form 35	Form 36	Effect on Votes
Votes Cast	385	387	+2

From this table, it is clear that there were no errors whatsoever in the transposition of the votes garnered by each individual candidate Forms 35 to Form 36. The disparity is in respect to either the numbers of total votes cast or rejected votes. There has been no proof that there was over-voting in any of this impugned Polling Station. Neither has it been proved or indeed alleged that any rejected votes were cast in favour of the 3<sup>rd</sup> Respondent. In respect to Sibinga Primary School Polling Station, on summation, I found that the correct total number of valid votes was transposed from Form 35 to Form 36. There was no error. The errors I have found are incapable of affecting the final result. In addition, mistakes in only six entries out of over nine hundred entries made in the Form 36 cannot move this Court to rebuke the declaration.

**Of other irregularities raised against IEBC**

139) The Commission, as in other parts of the country, conducted, managed and supervised a fairly intricate and involved Election in Funyula. There are myriad of other allegations raised by the Petitioner against the Commission. Of concern to an Election Court is whether if proved, those allegations amount

to a substantial departure of the law or whether the departures affected the outcome.

140) Of some allegations, this Court was unable to find wrong doing whatsoever on the part of the Commission. The Commission was able to stop a voter from voting for a second time at Wakhungu Primary Polling Station. On this occasion the Commission deserves commendation not condemnation. Then there is the accusation that the Presiding Officer left the polling station at Sijowa Polling Station And left his Deputy to manage it. Surely, given the long hours that polling took it cannot be humanly possible for the officials not to seek temporary relieve or refreshment. There is nothing irregular about this as long as the station is at all times either attended by the Presiding Officer or his Deputy.

141) There is then a category, of complaints where the Commission may have got it wrong in the first instance. It was alleged that the Presiding Officer at Namboboto Boys Primary School Polling Station had initially refused to allow agents to inspect the condition of the Election materials at the commencement of polling. He however obliged after some insistence from agents. And on inspection the materials and ballot boxes were found to be in good order. Similarly Pauline Nabwire Ouma whose name was wrongly marked as having been issued with a ballot paper was allowed to vote. These are isolated and insignificant transgressions which were in any event corrected.

142) PW23 who was an aspirant and the eventual runners up in the declared outcome felt disadvantaged because of the manner in which his name appeared in the ballot paper. He claims to be popularly known as Dr. Oundo Mudenyio and it was his wish that this popular name appeared as his name in the ballot paper. Instead the names used were Wilberforce Ojiambo Oundo. The witness sought to demonstrate that the Election was skewed in favour of the 3rd Respondent. The witness however was to concede that his official name is Wilberforce Ojiambo Oundo. That is the name that appears on both his National Identity Card and Passport. Critically, it is the name that appears in the Register of voters

143) PW23 was a UDF Party Candidate. Regulation 38(a) of the Regulations requires that a Nomination paper submitted by a Political party should bear the name of the candidate as it appears in the Register of voters. The words of that Regulation are in mandatory terms. A validly nominated candidate is issued with a Certificate of Nomination (Regulation 51(2)). An essential of a ballot paper is that it shall contain the name and Party symbol of the person validly nominated (Regulation 68). The only logical inference is that the name of the candidate in the ballot paper shall be as it appears in the Nomination Certificate and the name in the Certificate shall be as it appears in the Nomination paper submitted by the Political Party. In obedience to Regulation 38(a) the Nomination paper must bear the name of the candidate as it appears in the Register of voters. The name of PW23 appearing in the Register of voters is Wilberforce Ojiambo Oundo. And in compliance with the law the name that appeared in the ballot paper was that name. PW23 cannot be heard to accuse the Commission of bias when the Commission had complied with the law. There is no merit in this complaint.

### **The Court renders itself**

144) In my humble view, this Petition was a tale of many allegations with little proof. It does not require an alchemy to turn allegations into fact. What is required is the quality of evidence set by the Law. The Petitioner, I am afraid has failed to discharge the onus placed on him by the Law. This Court must at all times keep in view the provisions of Section 83 of the Act which are significant enough to deserve recalling.

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

There was evidence of some minor transgressions committed by the Commission. Those did not constitute substantial non-compliance with Electoral Laws. And they did not affect the result. This Court finds that the Election for the National Assembly for Funyula Constituency was free and fair and complied with the principles laid down in the Constitution

and the written Law relating to Elections. The win by the 3<sup>rd</sup> Respondent was not a close call. The people of Funyula spoke clearly and loudly. The primary duty of an Election Court is to give effect to the will of the people. This Court finds that Hon Paul Otuoma Nyongesa was validly declared as the elected member for the National Assembly for Funyula Constituency in Election held on the 4<sup>th</sup> of March 2013. Let “*Eifumbuhe Siitya Olume*” prevail for now. This Petition is dismissed with costs.

### **A proxy Petition?**

145) Throughout the proceedings the Court sensed that the Respondents blamed this Petition on one Eugene Victor Wandera and Dr Wilberforce Ojambo Oundo (PW 23). That became more the clearer when I was urged by Counsel for 3<sup>rd</sup> Respondent, in his closing arguments, that I should order that the costs of this Petition be borne by the two. The 3<sup>rd</sup> Respondent is saying that this is a Proxy Petition brought by the Petitioner on behalf of the two losers.

146) I have, elsewhere, in **Busia Election Petition No. 2 of 2013, Henry Okello Nadimo –Vs IEBC & 2 Others** reflected on how to deal with such an assertion and I stated-

*“The 3rd Respondent has repeatedly asserted that this Petition is brought by the Petitioner as a proxy of some named principals. The 3rd Respondent will have to prove those allegations. Needless to say no adverse finding can be made against the so called principals without affording them an opportunity of answering the allegations. But in the event that the proxy arrangement were to be proved and*

*the Petition fails, then a fair question would be whether the Respondent should have a remedy of costs against the “principles”. It is the suggest of this Court, without pretending to provide a final answer, that Rule 36(1) of 36(1) of The Election (Parliamentary & County Elections) Petition Rules 2013 is wide enough to enable a Court direct an order of costs against such persons. The Rule provides-*

*‘36(1) The Court shall, at the conclusion of an Election Petition, make an order specifying-*

*(a) The total amount of costs payable;*

*and*

*(b) The persons by and to whom the costs*

*shall be paid (my emphasis)*

*The use of the word “persons” and not “party” is, in my view, deliberate. In appropriate circumstances, persons other than the Petitioner/s or the Respondents*

*may be subjected to costs. There is no reason why the actual owner of a failed petition should be left unpunished.”*

147) An allegation that a Petitioner is an “Agent Petitioner” is indeed serious. That label discredits both the Petitioner and his supposed principles. The Petitioner and Dr Oundo took to the witness stand. But I saw no serious effort by the Respondents to demonstrate that the Petitioner was a shadow of Dr Oundo or Wandera. I decline to return a verdict condemning them.

### **Costs**

148) I was urged by Counsel for both sides to grant a certificate of costs for two Advocates as the

case was complex and involving. Paragraph 59 of the Advocates Remuneration Order gives discretion to a Judge to certify for costs for more than one Advocate in certain matters. Confronted with a similar question Leonala J. in Election Petition 2 of 2008 **Francis Mwanzia Nyenze –vs- Charles Mutisya Nyamai & 2 others** stated;

**“Granted, election petitions are a matter of public interest but I take the firm view that the fact of being political in contents should not increase their importance in the eyes of the court. Neither do I take the view that there is anything spectacularly technical about them save for political emotions which are in no way a measure of technicality.”**

Given the number of witnesses and the lengthy hearings the task of Counsels was without doubt involving. That said this matter cannot be said to be complex. True the case involved a discussion of the provisions of a new Election Statute and Regulations. It also involved a discussion of Electoral principles against the backdrop of the 2010 Constitution. That said the discussions were within fairly well settled legal principles that have governed Electoral disputes in the past.

149) The answer to the laborious nature this Petition is not in granting a certificate for two Advocates but in remunerating the effort made by Counsel in attending to this matter both in and outside Court. The Respondents will have to persuade the taxing officer as to what is a fair and just remuneration. On my part, I shall give the taxing officer that latitude but being mindful the costs should not be used to punish and hurt a losing party. I use the powers granted to me by Rules 36 of the Rules to cap the total amount that shall be payable. The total amount payable shall be the sum of kshs.4,000,000/= to be shared equally between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the one hand and the 3<sup>rd</sup> Respondent on the other. Whatever sum shall be arrived at by the taxing officer shall be shared on that basis.

150) Finally, I owe a gratitude to the people of Funyula for the patience shown during the hearing and disposal of this matter. To Counsel, their outstanding contribution through arguments and research made the task of preparing the decision the lighter. Thank you. I also thank the entire staff of Busia Law Court for the invaluable support I received in the course of this long hearing. My special gratitude, as always, to the Deputy Registrar of this Court Madam Mildred Munyekenye.

**F. TUIYOTT**

**J U D G**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 26<sup>TH</sup>**

**DAY OF SEPTEMBER 2013**

**IN THE PRESENCE OF:**

**KADENYI.....COURT CLERK**

**OUNDO.....FOR PETITIONER**

**MUTAHI.....FOR 1<sup>ST</sup> RESPONDENT**

**MUTAHI.....FOR 2<sup>ND</sup> RESPONDENT**

**HON ORENGO & WANGALWA..... FOR 3<sup>RD</sup> RESPONDENT**