



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

PETITION NO.5 OF 2013

PHILIP MUKUI WASIKE PETITIONER

AND

JAMES LUSWETI MUKWE 1ST RESPONDENT

IEBC 2ND RESPONDENT

SILAS ROTICH 3RD RESPONDENT

JUDGMENT

1. **PHILIP MUKUI WASIKE** (the petitioner) contested the Kabuchai Parliamentary seat in the General Elections held on 4th March 2013 and lost to **JAMES LUSWETI MUKWE**. There were nine candidates and the results as declared by IEBC (2nd respondent) were as follows:-

1. **ERIC KIMINGICHI WAPANGANA – 6526**
2. **ERIC KUCHO MAKOKHA – 4606**
3. **EUSEBIUS JUMA MUKWANA – 3529**
4. **FREDRICK WEKESA SICHANGI – 1543**
5. **JAMES LUSWETI MUKWE – 8966**
6. **JOSEPH WEKESA SIMIYU – 424**
7. **MARGARET NABWALA TOILI – 374**
8. **MARK WANJALA BARASA – 612**
9. **PHILLIP MUKUI WASIKE – 7805**

2. The petitioner was dissatisfied with these results and filed this petition against **JAMES LUSWETI MUKWE** (1st respondent, **IEBC** (2nd respondent) and the Returning Officer for Kabuchai Constituency, **Silas Rotich** (3rd respondent).

The prayers sought in the petition are:-

- a. An order for elaborate scrutiny of the principal voter register for Kabuchai Constituency and all related documents, including the polling day diaries and field notebooks, a scrutiny of used and unused ballot papers and a recount of all ballot papers cast;
- b. An order for verification of all statutory forms 34, 35 and 36.

- c. A declaration that the 1st Respondent was involved in electoral malpractices/offences and therefore was not validly elected;
- d. A declaration that the petitioner was the validly elected candidate for Kabuchai Constituency;
- e. A Declaration that the entire electoral process in Kabuchai Constituency was not only unconstitutional but also illegal and irregular;
- f. An order for fresh elections.
- g. Any other order the court may deem necessary to grant.

3. The petition is opposed by the 1st, 2nd and 3rd respondents who filed responses to the petition.

Petitioner's case

4. The case for the petitioner can be summarized as follows:-

(a) **Alleged incidences of double registration and voting:** The petitioner testified that the 1st respondent and Moses Masika Wetangula, before the elections conducted on 4th March, 2013, had hatched a scheme for multiple registration of voters and that pursuant to the scheme George Sitati Wekesa recruited 214 persons who were double registered and who he believed voted more than once in the elections held on March 4th, 2013.

George Sitati Wekesa, who allegedly was involved in the scheme, admitted that he recruited 214 persons believing that they were to be given civic education but, whom he later learnt were intended for multiple registration and multiple voting. He mentioned Christine Wekesa Weswa and Joan Mabuka as some of the persons whom were double registered at Matulo Friends Primary School and Chebukaka Boys Primary School. He did not know whether the said Christine Nekesa Weswa and Joan Mabuka or any of the other persons he suspected to have been registered more than once, voted in the March 4th General elections.

(b) **Complaints relating to errors, omissions and irregularities in statutory forms (forms 35 and 36):**

These complaints relate to:-

(i) **agents being forced to sign blank statutory forms before end of counting:** In this regard Carolyne Amoding who was the New Ford Kenya Party agent at Kisiwa Primary School led evidence to the effect that polling agents were forced to sign blank form 35's. Similar complaints were made by Dunstan Wafula Namusonge who stated that when he arrived at Kisiwa, the agents complained that the presiding officer had requested them to pre-sign form 35.

ii) **Agents being denied copies of signed form 35:** Joseph Mulongo Maelo stated that at Sanandiki polling station agents were denied form 35. Similar complaints were made by Carolyne Amoding in respect of Kisiwa polling station.

iii) **Failure by the Presiding Officers or their Deputies to authenticate the results by signing form 35:** The petitioner stated the statutory form for Busakala primary school was not signed by the Presiding Officer. The statutory form for Kibichori Primary School (stream 2) was not signed by the Deputy Presiding Officer.

iv) **Agents failure to sign statutory forms:** He cited statutory forms for Chebukaka and Lukhome polling stations as examples of statutory forms which were not signed by any party agent.

v) **Use of a wrong statutory form 35 to declare results at Lukhome primary school:** Here a form meant for Chemwa primary school was used to declare results.

vi) **Alleged differences between statutory forms produced in court and those signed by agents in the polling stations.** Whereas the form for Chwele polytechnic produced in court was not signed by any agent, the petitioner maintained that his agents had signed the form during polling. The petitioner also took issue with the signature contained in form 36 and contended that it differed with the signature in other documents given to him by the 3rd respondent.

Vii) **Presence of alterations which were not countersigned or accounted for in the statutory forms:** The petitioner testified that the contents of form 35's for Lukhome market, Nalondo, Khachonge, Kibochi, Chebukaka, Mukuyuni cattle dip, Kabuchai S.A and DEB primary school polling stations had alterations or cancellations which were not counter-signed or accounted for.

Viii) **Use of white out at Namaondo primary school.**

c). **Alleged understating of the petitioner's votes at Kisiwa and Chwele polling stations:** The petitioner relied on the evidence of his agent at Kisiwa, Carolyn Amoding who stated that he garnered 64 votes but form 35 reflected 44 votes. Similar complaints were made in respect of Chwele Youth Polytechnic and Chemwa bridge where it is alleged that the petitioner garnered 160 and 94 votes respectively yet form 35 showed he garnered 82 and 37 votes respectively.

d) **Overcrowding at polling stations:** Gilbert Kasembe Masinde (P.W.10) informed this court that he witnessed overcrowding at the polling booth at Busakhala and Kibichori polling stations. It is contended that these incidents threatened the secrecy of the vote.

e) **Vote counting and tallying being conducted in a dark room at Sanandiki:** Joseph Mulongo Maelo (P.W.5) and Albert Saeni Munoko, (P.W.6), who served as the agents for New Ford Kenya, at this polling station, testified that tallying and counting of votes was done in a room that was not sufficiently lit yet there was a room nearby which had electric power. They also complained that agents were put 4 metres away from the counting table hence being denied the opportunity to verify counting and tallying exercise.

f) **Bribery:** John Khauka Wanyama (P.W.4) testified that the 1st respondent personally and through Ford Kenya Party Agents and through Eliud Justus Wanyonyi alias Eliud Nalobire, the Chief Mukuyuni Location, was involved in electoral malpractices and offences namely, voter bribery and interference with campaign rallies called by other candidates. He confessed that he received Kshs. 50/= as a bribe. However, he admitted that the bribe did not influence how he voted.

5. Although the petitioner did not witness anybody being bribed by the 1st respondent he maintained that he had information from his party agents and supporters that the 1st respondent bribed voters through his supporters. Incidences of voter bribery allegedly took place at Lukhome, Kasosi and Sichei and were being coordinated by Ford Kenya Chief party agent, David Khaoya.

6. Some of the persons whom the 1st respondent allegedly bribed are Jacob Muchungi, Abiud Nasiala, Wilberforce Katu and George Sitati. The petitioner relied on the evidence of P.W.4 (John Khauka) and P.W.7 (George Sitati) who both claimed that the 1st respondent and/or his political party induced voters to vote for him or its candidates by dishing free goods or giving out money.

Alleged incidences of violence:

7. The petitioner singled out two incidences, one at Sikata where there was commotion when rowdy youths tried to rescue one Chenge, who was arrested while influencing voters in favour of undisclosed candidate and another which happened on 15th February, 2013, involving Joseph Mulongo Maelo (P.W.5). Even though there was no evidence linking the incidences to the 1st respondent or his political party, the petitioner believes that the 1st respondent or his party supporters must have had a hand in the violence.

8. Joseph Mulongo Maelo (P.W.5), on his part, testified that on 15th February, 2013 he was attacked by

five people, who included the 1st respondent's body guards. The attackers allegedly asked him why he was not supporting the 1st respondent, so he believed they were the 1st respondent's supporters (however in his statement to the police he did not give the reason for his attack or state that the attackers were the 1st respondent's supporters).

9. Sergeant Felix Fedix Aluoch's evidence is that investigation into the attack are ongoing and that nobody has been charged regarding that incident.

10. Further evidence regarding incidences of violence was given by Gilbert Kasembe Masinde who informed the court that sometime before polling day there were several incidences of violence around Chwele area. However, he did not give any details about the incidences or the persons responsible for them.

11) **Undue influence by use of witchcraft:** Mark Konya Mukisa's (P.W.9) evidence is that on the night of 23rd February, 2013, at about 11.30 pm, two people went to the petitioner's home and sat on a bench outside the house. When asked what they wanted, they claimed to have an appointment with the petitioner and gave a strange telephone number purportedly obtained from the petitioner. On being contacted the petitioner denied having had any appointment with the visitors or any person. Confronted with this information they panicked and attempted to flee. This forced the petitioner's guards to stop them from fleeing.

12. In the struggle that ensued, the suspects left their jackets which the guards searched and recovered witchcraft paraphernalia and a Ford Kenya party membership card bearing the name of Ronald Buyeka.

13. Although this witness did not know the suspects before, he later on learnt that one of them was "**Omukhuka**" (a Bukusu term for witchdoctor).

14. While admitting that a witchdoctor can practice his craft for good or bad, due to their puzzling conduct, he concluded that they had bad intentions.

15. The witchcraft paraphernalia recovered from the two persons was allegedly taken to police for further investigations.

16. Significantly, despite this court having granted leave to the petitioner to get an officer from the police station where the alleged evidence is held, to swear an affidavit introducing this evidence, nothing transpired. Consequently, the alleged witchcraft paraphernalia and Ford Kenya party tickets were not produced in court.

17. Without stating in what way voters were influenced by the acts of witchcraft complained of, the petitioner maintained the electoral process was unduly influenced through such acts which he believed were perpetrated by Ford Kenya Party supporters.

- i. **Alleged incidences of ballot stuffing:** Despite the fact that none of the petitioner's witnesses and/or agents reported use of pre-marked ballot papers and ballot stuffing in the polling stations, the petitioner maintained that the many unaccounted alterations in form 35's must have been informed by presence of pre-marked ballot papers and ballot stuffing in favour of the 1st respondent.

1st respondent's case

18. The 1st Respondent maintained that the elections were conducted in accordance with the laws of the land. He called a total of five witnesses and also gave his own view of the exercise and its outcome.

i). **That 1st respondent did not engage in bribery of voters or commit any electoral malpractices and/or offences:** Eliud Justus Wanyonyi, the Chief for Mukuyuni area, who was allegedly involved in influencing voters to vote for 1st respondent and Ford Kenya denied all the allegations against him. He

explained that John Khauka was out to settle scores with him because of the way he had resolved a dispute between him (Khauka) and a woman called Catherine Robai over land.

19. He confirmed one incident of violence at Chepsitat primary School where one person was arrested for allegedly influencing people to vote in a particular manner on the queue. However, he maintained that after he intervened, by appealing to the 2nd respondent's officials to release the person, calm was restored and all ended well.

20. Allan Wochwa Wanyonyi, who allegedly had sworn an affidavit in favour of the petitioner's case regarding the allegations of electoral malpractices and offences disowned that affidavit and denied all the allegations of bribery made against the 1st respondent and Ford Kenya party supporters. Regarding the affidavit he disowned, he explained that he signed a blank form believing that he was signing a petition for nomination of youth to the County Assembly.

21. He also testified that polling at Lukhome polling station, where he was an agent, was peaceful and orderly.

ii) **That tallying exercise at the Constituency tallying centre was proper and peaceful:** David Khaoya Simiyu, the chief party agent for Ford Kenya, told this court that tallying at the tallying centre (Musese) proceeded peacefully and that the Returning Officer (the 3rd respondent) was fair to all. He conceded that he did not sign form 36 but maintained that he witnessed the New Ford Kenya chief agent (Francis Namusasi) sign the form without any complaint or reservations. He gave the reason for his failure to sign form 36 as the excitement caused by his candidate's victory.

iii. **That there was no scheme for multiple registration and/or voting:**

22. The 1st respondent denied having had any knowledge of any voter who registered or voted twice; and/or having been involved in any scheme for double registration of voters.

23. Bramwel Ngala Wafula, the Organizing secretary of Ford Kenya, at the material time, also denied having any knowledge of such scheme either by the respondent or by the party or its officials.

iv. **Irregularities and errors:** The 1st respondent admitted that there were some irregularities observed during the electoral process but they were so minor that they could not and did not affect the outcome of the elections.

v. **Favouritism:** The 1st Respondent denied the allegation that he received undue advantage from the 2nd respondent and/or its agents, saying it is impossible for the winning margin of 1161 votes to have been added to him.

iv) **Form 36:** The 1st respondent admitted that neither he nor his party agent signed form 36. He explained that under Regulation 83(d) of the Election Petition (Regulations) 2012 it is the Returning Officer who is obligated to sign the form and that under Regulation 79(7) of the same regulations the absence of a candidate or agent cannot invalidate results.

The 2nd and 3rd Respondent's Case

24. The 3rd respondent who testified on behalf of the 2nd respondent and himself admitted that there were a few irregularities relating to statutory forms. The admitted irregularities relate to:-

a. **Signing form 35:** He admitted that at Busakala primary school (stream 1) the Presiding Officer did not sign form 35- the DPO signed. He also admitted that at Kiboochi the Deputy Presiding Officer did not sign form 35 but the Presiding officer signed.

b. **Alterations in the statutory forms:** He admitted that at Busakala, Chwele Youth Polytechnic (Stream 2), Sanandiki, Nakitumba, Muyayi market, Kabuchai, Nangwe, Khachonge, Makhonge, and Lukhome market there were alterations which were not counter-signed.

c. **Absence of agents or their failure to sign statutory forms.** This happened at Chwele Youth

Polytechnic- Stream 2 where no agent signed form 35 and no statutory comments were entered. At Lukhome Primary School agents did not sign the statutory form (there is a column for agents to record reasons for refusal to sign) .

- d. Third respondent conceded that white out was not one of the materials supplied by the 2nd respondent for use during polling.
- e. **Understating of the petitioner's votes at Chwele Youth Polytechnic.**

25. Regarding failure by the election officials to sign statutory forms the 3rd respondent explained that Presiding Officers and Deputy Presiding Officers played complementary roles and that a statutory form signed by either of them was valid for the purposes of Regulation 79 which obligates the Presiding Officer to sign the form. He also explained that under regulation 79(3) it is the agent(s) refusing to sign who should indicate the reasons for refusal to sign.

26. With regard to materials to be used at polling station, he explained that this is a policy matter which is dealt with at the headquarters and they provided gas lamps or pressure lamps for use in the polling stations. He also pointed out that the Presiding officer for Lukhome Market, where form 35 for Chemwa was used, had explained in writing that the forms had run out.

Issues

27. The issues that were framed and agreed on by parties during pre-trial are:-

1. Whether the electoral process for Kabuchai Parliamentary elections held on 4th March, 2013 was credible, free and fair?
2. Whether the results declared by the 2nd respondent truly reflected the democratic will of the people of Kabuchai Constituency?
3. Whether the 1st respondent was validly elected and declared the winner of the Kabuchai Parliamentary elections conducted on 4th March, 2013?
4. Whether the Court should order a scrutiny and recount of votes or election materials?
5. Whether the allegations in the petition are vague, generalized and lacking in particulars or specificity, thus rendering the petition fatally defective?
6. Whether the matters complained of substantially affected the results?
7. Whether the respondents, their agents or employees committed electoral offences. If so, what offences?

Submissions

28. In the submissions filed, two more issues are raised. These are:-

8. Whether the petition herein meets the Constitutional requirements for filing petitions?
9. Whether the petition and/or the proceedings in respect thereof are incompetent for having been drawn or conducted by an unqualified advocate?

29. As the last two issues are capable of preliminarily determining the petition, I will consider them first.

Whether the petition meets the Constitutional requirements for filing petitions?

30. The 1st respondent submitted that under Article 87(2) of the Constitution of Kenya as read with Section 77(1) of the Elections Act, 2011 a petition concerning an Election, other than a presidential

election, shall be filed within Twenty-Eighty (28) days after declaration of the Election results by the Commission. The 1st respondent was announced and declared as the elected member of parliament for Kabuchai Constituency on 6th March, 2013. This was later published and Gazetted in the Kenya Gazette on 13th March, 2013.

31. The 1st respondent contends that this petition having been filed in court on 8th April, 2013 (34) days after the election results were declared by the 3rd respondent) is unconstitutional. Reference is made to **Samuel Kamau Macharia and Another v. Kenya Commercial Bank Ltd and 2 Others** (unreported) where the Supreme Court observed:-

“A court's Jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law.

Where the Constitution exhaustively provides for Jurisdiction of a court of law, the court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor, can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal, the legislature would be within its authority to prescribe the Jurisdiction of such court ... by statute law.”

32. In interpreting the provisions of Article 87(2) of the Constitution as read with Section 77(1) of the Election Act, this court is urged to uphold and give effect to the letter and spirit of the Constitution.

33. It is submitted that there is no ambiguity in these provisions and that they clearly require that petitions concerning an election, other than a presidential Election, be filed within twenty-eight days after the Declaration of the results and NOT within 28 days of publication in the Kenya Gazette.

34. In a rejoinder the petitioner submits that under **Section 76 of Elections Act**, a petition to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette; that according to **Black's law dictionary**, a declaration is a formal statement, proclamation or announcement especially one embodied in an instrument. In this regard the declaration contemplated under Article 87(2) as read with Section 77(1) is publication of the results in the Kenya Gazette.

35. The 1st respondent's counsel submitted that the decision of the Court of Appeal in **Hassan Ali Joho & Another v. Suleiman Said Sharbal & 2 others** C.A No.12 of 2013 where it was held that **Section 76(1) (a)** of the Elections Act is not in conflict with **Article 87(2)** of the Constitution is erroneous.

36. Counsel urges this court, in interpreting **Article 87(2)** of the Constitution and **Sections 76(1)(a) and 77(1) of the Elections Act**, to find there is conflict between **Section 76(1)(a)** and **Article 87(2)**.

37. The question that arises is whether, in view of the Court of Appeal finding that the said Section is not unconstitutional, this court can disregard that finding in considering the issue.

38. Although under **Article 165(3) (d)** this court has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-

- i. the question whether any law is inconsistent with or in contravention of the Constitution, under Article 164(3) of the Constitution, the Court of Appeal has jurisdiction to hear appeals from this court. The Article provides:-

“The Court of Appeal has jurisdiction to hear appeals from-

- a. **the High Court; and**
- b. **any other court or tribunal as prescribed by an Act of Parliament.”**

39. It is noteworthy that in arriving at the decision that **Section 76(1)(a)** is not in conflict with the provisions of **Article 87(2)** of the Constitution and that the same is not unconstitutional, the Court of Appeal was exercising its appellate jurisdiction as conferred by **Article 164(3)**.

40. This court cannot assume jurisdiction for review of a Court of Appeal decision. The best that it can do is only to distinguish the decision with the case it is seized of.

41. In this petition there is nothing to distinguish as the question for determination is similar to what the Court of Appeal was asked to make a determination on.

42. I therefore decline to declare the petition unconstitutional.

Fate of proceedings conducted by an unqualified advocate:

43. The proceedings in this petition were almost exclusively undertaken by Mr. Godfrey Pwoka Wanyonyi, an advocate who does not have a valid practising certificate for the current year (2013). The advocate was suspended from legal practice for a period of Six (6) months effective from 20th May, 2013.

44. It is submitted that the said Advocate was not competent to either represent the petitioner or the firm of Gachiri Kariuki & Company Advocates, through which the petition was filed. Further that all proceedings taken by the said advocate, on behalf of the petitioner or on behalf of the said firm are a nullity. Reference to **Lukas Njuguna S. Karobia v. Consolidated bank** eKLR where Fred Ochieng J., observed:-

“The plaint and the application dated 20th June 2005 were both incompetent, on the grounds that they were drawn and signed by unqualified person. Even though Mr. Karuga Wandai was an admitted advocate, and one who was on the Roll at the time, that was not sufficient. He should have had a current practising certificate as at 20th June 2005, to be deemed as a qualified advocate.”

45. This court is urged to find that proceedings undertaken by Mr. Wanyonyi are incompetent and liable to be struck out.

46. In a rejoinder it is submitted that the petition was filed by the firm of Gachiri Kariuki & Company Advocates, and it was signed by the petitioner, so they are valid. It is further submitted that petitions being a special category of cases the procedure adopted by the court during trial is different- witnesses are simply introduced and subjected to cross-examination by the defence counsel. It is argued that their evidence is validly on record. It is also argued that counsel withdrew from the conduct of the petition immediately he got to know of his suspension; and that the circumstances leading to his disqualification are excusable.

47. Further that lack of a practising certificate merely renders an otherwise qualified advocate liable for the offences in **Section 31** of the Advocates Act as opposed to invalidating pleadings or proceedings conducted by the unqualified advocate; and that declaring the pleadings or proceedings herein a nullity would be tantamount to sanctioning a massacre of justice.

48. Reliance is made on **Njagi v. Kihara** (2000) LLR 1698 (HCK) where Mulwa J. observed:-

“To my mind, I don't think that documents duly drawn, signed and filed in court, and which the court has acted upon, by an unqualified person and more specifically an advocate because his name is in the Roll of Advocates under Section 2, should be expunged from the record and done away with.....Further, the statutory safeguards

on costs incurred by such a person that cannot be so recovered, and the relevant disciplinary procedures to which such a person is amenable in breach of such legislation are more than indicative that the documents so drawn, signed and filed by such a person, particularly if he is an advocate of the High Court of Kenya, whose name is duly entered in the Roll of Advocates, should not be declared null and void ab initio, with dire attendant risks both to the courts and to clients with respect to time and money, who are so innocent of the defects in full qualifications.”

49. Counsel contends that the proceedings were not exclusively conducted by Mr. Wanyonyi and that Mr. Ocharo was also on record, and, did conduct the proceedings in equal measure.

50. In reference to the case of **Lukas Njuguna S. Karobia v. Consolidated bank**, it is submitted that the procedure used to challenge the suit and application was different as the court was moved by way of an application as opposed to submissions, as in this case. The issue of the advocate's competence in this matter being raised at the tail end of the case in submissions is faulted.

51. The court is urged to favour substantive justice over technicalities and in so doing be persuaded by the decision in **Wilson Mbithi Munguti Kabuti & 5 others v. Patrick Makau & another** (2013) eKLR where L.N Mutende J. observed:-

“(18)It was upon the respondents to demonstrate what prejudice they would suffer as a result. The petitioners caused their witnesses to depose affidavits detailing the evidence to be adduced. The respondents did file their response to the petition based on the said evidence. There is nothing prejudicial in the circumstances. (19) This being an Election Petition where voters exercised their Constitutional rights, the question the court should pose is whether it will uphold procedural technicalities and let the meritorious matter be decided by being thrown out instead of letting the threshold and cause of justice win. (20) Substantial justice must be preferred against technical considerations.”

52. It not disputed that Mr. Godfrey Pwoka Wanyonyi, did not have a practising certificate when this petition was filed and throughout the trial, which was substantially conducted by him.

53. From the onset, the law does not allow an unqualified person to act as an advocate.

54. Section 2 of the Advocates Act defines the term **“unqualified person”** as, **“a person not qualified under Section 9 to act as an advocate.”** Section 9 is clear on qualifications that one must possess in order to practice as an advocate. The Section provides:-

“9. Subject to this Act, no person shall be qualified to act as an advocate unless;

- a. he has been admitted as an advocate; and**
- b. his name is for the time being on the Roll; and**
- c. he has in force a practicing certificate and and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).”**

55. Under Section 31 of the Act, it is an offence for an unqualified person to act as an Advocate. Section 34, on the other hand, makes it an offence for unqualified persons to draft certain documents.

The Sections provide:-

“31. (1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal

jurisdiction.

(2) Any person who contravenes subsection (1) shall–

- a. **be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and**
- b. **be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and**
- c. **in addition be guilty of an offence.**

34. (1) No unqualified person shall, either directly or indirectly take instructions or draw or prepare any document or instrument–

f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument.”

56. From the foregoing there is no doubt that the law requires that for an advocate to qualify, he or she must have in force a practising certificate.

57. Mr. Wanyonyi's authority to act for the petitioner and the firm of Gachiri Kariuki & Company Advocates is premised on the assumption that he was qualified to act as an advocate. For him to have been so qualified he needed to meet all the conditions set under Section 9 of the Advocates Act. Unfortunately, he did not have a current practising certificate when the petition was filed and during the entire period of trial. Want of a current practising certificate rendered him an unqualified person, for the purposes of the Advocates Act.

58. This being the case, by conducting this petition he committed an offence under Section 31 as read with Section 85 of the Advocates Act. His Actions are also subject to the consequences contemplated under Section 31 and 34.

59. Opinion on how the court ought to treat documents and proceedings drawn by an unqualified person is divided. Some judges have, in what is termed “interest of justice,” treated documents drawn and filed by unqualified persons as valid. A similar approach has also been taken with respect to proceedings conducted by an unqualified person, if that person was, at the material time an advocate of this Court. For this approach see **Njagi v. Kihara** (*supra*). Other judges have treated such documents and proceedings as bad in law and as such incapable of availing any reliefs to a litigant. For this approach see **Lukas Njuguna S. Karobia v. Consolidated bank** (*supra*).

60. The Court of Appeal, in exercise of its appellate jurisdiction, has also had the occasion to consider this issue. For instance in **Obura v Koome** [2001] 1 EA 175 where a memorandum of appeal was filed by an advocate without a practising certificate the court held:-

“In the circumstances, ... incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in this Court or in any other court.”

61. In **National Bank of Kenya v Wilson Ndolo Ayah**, Civil Appeal No. 119 of 2002 (Unreported), the Court of Appeal rendered itself thus:

“Section 9 makes provision for qualifications for practicing as an advocate, and the qualifications include having in force a current practicing certificate... It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates, we come to the conclusion that, will discourage excuses being given for justifying the illegality. A failure to invalidate the act by an unqualified

advocate is likely to provide an incentive to repeat the illegal Act.”

(See also Delphis Bank Ltd v Behal & Others [2003] 2 EA 412).

This court is urged to follow the approach adopted by the Court in Njagi v. Kihara and Wilson Mbithi Munguti Kabuti & 5 others v. Patrick Makau & another and to favour substantive justice over technicalities.

62. The issue is whether competence of documents drawn and/or proceedings conducted by an unqualified person, is a technicality that is curable under Article 159(2)(d) of the Constitution which provides:-

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(d) justice shall be administered without undue regard to procedural technicalities.”

63. In addressing this issue I will adopt the position taken by Musinga J., in Willis Evans Otieno v. Law Society of Kenya & 2 others, Petition No. 37 of [2011] eKLR where the judge held:-

“ I do not agree with the petitioner that the issue of competence of pleadings, and particularly where such incompetence arises from circumstances as in this case, can be termed as procedural technicality. This is a substantive question of law which goes to the root of the matter. The provisions of Article 159(2)(d) of the Constitution cannot be relied upon as a panacea for incompetent pleadings filed by an unqualified person. The Petition and Chamber Summons dated 8th March, 2011 must therefore be struck out with costs to the respondents, which I hereby do.”

64. Similar sentiments were expressed by Muchelule J., in the case of John Langat v Kipkemoi Terer & 2 Others, Kisumu HC. Civil Appeal No. 21 of 2013 (Unreported). In that case, the advocate who had filed the appeal did not have a practicing certificate. The learned judge concluded as follows:-

“Mr Anyoka sought to persuade the court that his client was innocent. He further sought to rely on Article 159(2)(d) of the Constitution of Kenya 2010 to argue that now that the court was dealing with a petition, a serious matter, the acts that may be deemed illegal or unprocedural should be excused. The Article enjoins the court to do justice to all parties without undue regard to procedural technicalities. There is a simple answer to Mr. Anyoka. It is criminal under Section 34 of the Advocates Act for an Advocate to practice without a practicing certificate. The Section is not a procedural technicality. It is a substantive statutory provision. The court is enjoined not only to protect the Constitution but all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of Section 34 of the Advocates Act is to perpetuate an illegality. Article 159(2) (d) does not condone such an act.”

I agree with these sentiments...”

See Abraham Mwangi Njihia v. I.E.B.C & 2 Others Election Appeal No.3 of 2013 where this case is quoted with approval.

65. Having determined that the issue of competence of the lead Counsel in this petition to represent the petitioner and the firm of Gachiri Kariuki & Company Advocates is not a technicality capable of being cured by invoking Article 159(2) (d) of the Constitution, I consider the contention that the petitioner was also represented by Mr. Ocharo whose standing is not in question.

66. It is not in dispute that the petition was filed by the firm of Gachiri Kariuki & Company Advocates and substantially prosecuted by the impeached advocate.

67. There is no evidence that the pleadings in this petition were not drawn and signed by the impeached advocate. Without such evidence, and there being no other advocate who represented the petitioner from the firm of Gachiri Kariuki & Company Advocates, it is reasonable to conclude that the pleadings were drawn by the impeached advocate. The pleadings were drawn in contravention of Section 34 of the Advocates Act. This fact makes the pleadings bad in law and incapable of forming the basis of prosecution of the petition either by the petitioner personally or through any other representative, including Mr. Ocharo, who was the assisting counsel to the impeached advocate.

68. The upshot of the foregoing is that the petition and the proceedings conducted in respect thereof are bad in law for having been drawn and prosecuted by Mr. Wanyonyi. This is rather unfortunate as counsel had been very diligent in representing the petitioner.

69. Although the above determination suffices to put to rest this matter, given the fact that the parties were able to fully represent their respective cases, I consider it necessary for this court to inform the People of Kabuchai what the outcome of the Petition would have been, had the petition been conducted by a competent advocate, and in the manner it was conducted by the impeached advocate and his able assistant Mr. Ocharo (whose role was very minimal).

70. As regards the issues that were framed and agreed upon during pre-trial, this court dealt with issue number (d), through the petitioner's application for scrutiny dated 22nd May, 2013.

71. The result of that application was an order for partial scrutiny and re-count in the following polling stations:-

1. **Makhonge Primary School** (067)
2. **Busakala Primary School Stream 1**
3. **Busakala Primary School Stream 2** (001)
4. **Chwele Youth Polytechnic** (002)
5. **Kisiwa Primary School** (024)
6. **Khachonge Primary School** (049)-stream 1,
7. **Khachonge Primary School** (049)-stream 2,
8. **Namaondo Primary School** (065),
9. **Lukhome Market** (072),
10. **Lukhome Primary School** (073).

72. The scrutiny and re-count was in respect of:-

1. Copy of the Principal register used during the elections.
2. Copies of result of each polling station in which the results are disputed.
3. The packets of spoilt votes.
4. The packets of counterfoils of used ballot papers
5. The packets of counted ballot papers.
6. The packets of rejected ballot papers; and
7. The statement showing the number of rejected ballot papers.

73. I will review the results of this exercise in the course of this judgment.

74. Issue number (e) relates to competency or otherwise of the petition on account of what are described as vague and generalized allegations.

75. It is submitted that the allegations in paragraphs 7(a)-(d), 9- 14, 25-29 of the petition are all generalized and lacking in particularization or specificity, and incapable of proving the petition. The cases cited are, **Issak v. Hussein & Another** (2008) 1KLR (EP) 786 where it was held:-

“The paragraph containing the general averment amounted to bad pleading and were normally not relied upon in almost all petitions. Consequently, the court did not rely on the allegations contained in that paragraph or the particulars in support of it in determination of the petition.”

Further that the allegations, like non-conformity to the principles of the electoral system by the respondents, or conspiracy between the 2nd respondent, its officers and officials or for multiple registration of voters are all generalized.

76. The petitioner's response is that as a general rule, a pleading should introduce acts complained of in general terms and the petition must be considered alongside witness affidavits and oral evidence. The issue was addressed when petitioner applied for scrutiny.

77. This court upon considering the allegations contained in the petition rendered itself as follows:-

“From the foregoing survey of the petitioner's petition there is no doubt that it fairly captures the issues raised in the application, albeit without any specifics or particulars. However, as regards the allegation that the petitioner's agents signed form 35's yet their names were not reflected in form 35's supplied by the 2nd respondent, I find no averment in the petition which supports that claim, whether by implication or implicitly. I also find no strain of evidence in the affidavits sworn in support of the petition to support such allegation. To allow such unsubstantiated evidence to form part of the record would, in my view greatly prejudice the respondents. This is so because they never got an opportunity to respond to those allegations and/or to cross-examine the deponents on their contents.

Whereas it is true that the petition is lacking in specificity and particularity, I note that the respondent got an opportunity to respond to the issues raised therein and even to cross-examine witnesses in respect of the same and would suffer no prejudice owing to the alleged lack of specificity and particularity.”(emphasis mine).

78. There being no change of circumstances in this petition, and given the fact that the foregoing finding was arrived at the close of trial, I have no reason to deviate from it.

BRIBERY AND TREATING

79. It is alleged that the 1st respondent personally and through his agents engaged in acts of outright bribery of voters prior to the election day and on the polling day with a view of securing their vote. Some of the people who the 1st respondent allegedly bribed were George Sitati (P.W.7) who in his testimony stated that on 25th February, 2013 the 1st respondent sent him Kshs.2000/= by Mpesa to induce him to vote for him.

80. It is also alleged that at Kasosi Primary School voters were bribed by 1st respondent's agents who were being co-ordinated by David Khaoya.

81. In his testimony, John Khauka (P.W.4) claimed that he received Kshs. 50/= in one of the campaign rallies called on behalf of the 1st respondent. The money was given to him by Chief Eliud Wanyonyi. He also mentioned Jacob Muchungi, Abiud Nasiala and Wilberforce Katu as some of other persons who received money (bribes) in order to vote for the 1st respondent in a meeting convened by the Chief at Samuel Miruni's home. The Chief's wife was also alleged to have given out sugar to people at her shop in Lukhome though P.W.4 didn't get the free sugar.

82. It is submitted that the 1st respondent breached Section 62 and 64 of the Elections Act, 2011 which outlaws acts of bribery and treating. This court is urged to find that indeed voters were treated and bribed by the 1st respondent or with his knowledge and consent and upon so determining to adopt the English position about proof of such acts as stated in Halbury's Laws of England 4th Edition Volume 15 at page

“As a general rule, due proof of a single act of bribery by or with the knowledge and consent or approval of the candidate or by the candidates agents, however insignificant the act may be is sufficient to invalidate the election. A court is not at liberty to weigh its importance nor can it allow any excuse whatever the circumstances may be.”

83. It is argued that the evidence on record suffices to prove that the 1st respondent by himself or through his agents is guilty of bribery and treating of voters.

84. It is submitted that the burden of proof in election petitions entirely lies with the petitioner to prove all the allegations in the petition; the standard of proof required is higher than the standard of proof required in normal civil cases, and a petitioner must prove his case beyond the **“balance of probabilities”** test required in civil matters. Reference is made to among other cases, Joho v. Nyange and Another (2008) 3 KLR (EP) 500 where Maranga J., (as he then was) observed:-

“As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is a consensus by electoral courts that generally the standard of proof in election petition cases is higher than that applicable in civil cases i.e that of proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases.”

85. Regarding the alleged acts of bribery and treating, it is submitted that the standard of proof required to prove these criminal acts is proof beyond reasonable doubt; and that the alleged incident of treating at Lukhome market was sufficiently controverted by the 1st respondent's witness-Eliud Justus Wanyonyi. It is further argued that the alleged bribery by George Sitati is an after thought as it is not pleaded in the petition; that the allegation was not sufficiently proved by way of evidence and that receipt of money by Mpesa is incapable of proving bribery or treating.

86. Even though the petition does not mention the names of persons allegedly bribed, I note that under paragraph 15 of the petition as read with the affidavits of Sitati and Khauka, the issue is raised. The issue also formed part of what the witnesses were cross-examined on. I don't agree with the 1st respondent that the same is an afterthought.

87. Both Sitati and Khauka testified that the 1st respondent and/or his agents influenced voters through acts of bribery and treating of voters. They even confessed that they personally received the bribes. For instance Sitati stated:-

“I received money from people as an inducement. Its after receiving the money that the sender sent me a message to say it was to influence me to vote for him....It did not influence my decision”

88. Khauka maintained that he witnessed acts of bribery and voter treating that were being carried by Chief Justus Eliud Wanyonyi who was a supporter of the 1st respondent. He confessed that he personally received Kshs. 50/= as an inducement to vote for the 1st respondent. However, he admitted that he had differences with the Chief and his wife who are his relatives.

89. In his testimony Justus Eliud Wanyonyi denied all allegations against him and the 1st respondent. He stated that the allegations made by John Khauka against him and his wife were actuated by malice and a desire to revenge as he had ruled against him in a land case.

90. Allan Wochwa Wanyonyi who apparently had sworn an affidavit in support of the alleged acts of bribery against the 1st respondents and his supporters disowned the affidavit and instead swore an affidavit disowning that affidavit's contents. He explained the circumstances leading to signing a blank form believing it was a petition for appointment of youth to the County Assembly.

91. The issue is whether bribery or treating has been proved to the required standard of proof or the evidence suffices to shift the burden of proof to the 1st respondent as was held by the Supreme Court in **Raila Odinga v. I.E.B.C & others** Election Petition No. 5 of 2013 at paragraph 203-

“A petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt-save this would not affect the normal standards where criminal charges linked to the election are in question. In the case of data specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

92. The evidence of John Khauka is sufficiently controverted by that of Justus Eliud Wanyonyi. I am also persuaded that claims by PW4 may have been actuated by malice as he admitted that he had personal differences with the chief. His evidence does not sufficiently link the 1st respondent with the alleged acts of treating of voters by the chief or his wife.

93. As regards the evidence of George Sitati I find as a fact that he was a staunch supporter of the 1st respondent and the Ford Kenya Party shortly before he decamped to the petitioner's party. Although he maintained that he switched loyalties before the 1st respondent sent him Kshs.2000/= to woo him, no evidence was led to prove when he stopped dealing with the 1st respondent or even to prove that the money was received as a bribe. The message which he says was sent to him linking the money with voting, was not produced in court. In my view, receipt of money from a candidate during campaign period is not *per se* proof of treating or bribery. The person alleging that the money was meant to bribe him must lead evidence capable of proving that there was a meeting of minds between the receiver and the giver, and that the money was being given or received to induce him to vote in a certain manner.

94. Owing to the admitted earlier dealings between the 1st respondent and the petitioner's witness (George Sitati) I entertain doubt whether the money received was a bribe. Besides, the witness seems to have been actuated by some ill motive in making the claim-he stated in court that he withdrew the money immediately and kept it to be used in evidence.

95. In determining this question I adopt the observation of Maraga J., (as he then was) in **Joho v. Nyange & another** (2008) 3KLR (EP) 500 thus:-

“Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made, instances of the bribery should be given.”

96. I hasten to point out that both George Sitati and Allan Wanyonyi appeared to me as “guns for hire” and persons who can do everything to suit their interest without regard to the consequences of their actions. Consequently very little weight, if any, should be given to their testimonies. Both of them are turn-coats who shamelessly have allowed themselves to be used to suit the demands of any given situation.

97. The upshot of the foregoing is that the evidence on record is insufficient to prove treating or bribery to the required standard or even shift the burden of proof to the respondents.

UNDUE INFLUENCE WITCHCRAFT AND VIOLENCE

98. Other complaints relate to undue influence through acts of violence and witchcraft allegedly perpetrated by the 1st respondent or his supporters- reference is made to the evidence of Mark Konya Mukisa (P.W.9) and Joseph Mulongo Maelo (P.W.5).

99. Mark Konya Mukisa's evidence stems from the two suspects arrested at the petitioner's compound and recovery of leaves, roots, hair, feathers and ash-like substance wrapped in polythene, which he concluded was witchcraft paraphernalia. Without stating how the alleged acts of witchcraft unduly influenced voters to vote for the 1st respondent or even laying reasonable basis for believing that the persons arrested at his home were supporters of the 1st respondent, the petitioner maintains that voters were unduly influenced by the said acts, and that the persons were supporters of the 1st respondent.

100. In the instant case despite the petitioner having made allegations that the voters were unduly influenced by acts of witchcraft or violence, he neither stated where or how the voters were influenced by the alleged incidences nor did he lead any evidence to prove commission of the alleged acts by the 1st respondent or his supporters. It is not the paraphernalia that should be subject of investigation by the court, but rather their effect – the evidence on this is weak, speculative and at worst, sensational – see **Bernard Shinali Masaka V Boni Khalwale and 2 others Election Petition No.2 of 2008** by Lenaola, J. Similarly, the evidence in support of the alleged incidences of violence is incapable of proving that any voter was prevented from exercising his right to vote for his/her preferred candidate, or proving involvement of the 1st respondent or his agents or supporters in the alleged incidences.

VIOLENCE

101. Whereas in his statement to the police Joseph Mulongo stated that he did not know the reason for his attack, he changed that evidence in court and maintained that his attackers were either body guards of the 1st respondent, or his supporters. If indeed this witness knew who his attackers were, he would have told the police. His evidence in court was an after thought and tailor-made to suit this case. It cannot be relied on to prove the alleged incidence of violence was orchestrated by the 1st respondent.

DOUBLE REGISTRATION

102. With regard to existence of a scheme to recruit persons who would be used for multiple registration so as to skew voting patterns, it is submitted that the evidence on record suffices to prove that the 1st respondent pre-conceived the scheme to influence the parliamentary elections for Kabuchai, and by colluding with 2nd respondent he unlawfully got persons believed to be his supporters to double register. The petitioner relies on the evidence of Sitati, who had deposed in his affidavit as follows:-

“(6). That in September, 2012, a scheme was hatched by Moses Masika Wetang'ula and James Lusweti Mukwe.

(7). That I and other strong supporters of James

Lusweti Mukwe and Moses Masika Wetangula

engaged in the said scheme to identify people

who could register and vote in more than one

polling station in Kabuchai Constituency and

Bungoma County.

(8). That I managed on my part to identify 214

potential voters for the said scheme in Chwele

and Mukuyuni Division in Kabuchai

Constituency.....

(13) That for Personal reasons I shifted my loyalty from Ford Kenya to New Ford Kenya under the Leadership of Eugene Wamalwa, as its part leader.”

103. It is submitted that the evidence led by the petitioner fell short of proving the allegations against him and that the evidence is contradictory as the position adopted by George Sitati before court contradicts his averments in his supporting affidavit.

Further, that the allegation of collusion between the 1st respondent and its staff was not pleaded, that there is no evidence of who the conspirators were or even of the persons who were alleged to indulge in multiple registration. That claims about the persons being supporters of the 1st respondent is a matter that requires specific proof, and the evidence of George Sitati should be taken with caution as he is a person who committed an election offence under Section 59(1) (m) of the Elections Act for failing to present or report to the 2nd respondent or to the Police the alleged double registration of voters.

104. It is also submitted that Elections (Registration of Voters) Regulations, 2012 provide a procedure for complaints relating to Registration of voters which may not be entertained in an election petition. In support of this counsel cited **Francis Gitau Parsimej v. National Alliance Party & Others** H.C Petition No. 359 of 2012-Nairobi where it was held:-

“Where the Constitution or statute establishes a dispute resolution procedure, then that procedure must be used.”

105. Although in his supporting affidavit George Sitati was categorical that the scheme hatched by the 1st respondent and Moses Wetang'ula was for recruiting persons who would be registered more than once with a view of multiple voting, he abandoned that position, and explained that he had recruited the persons believing that they would be given civic education, but later on learnt that they were meant for multiple registration. Among the persons he recruited and whom he believed to have multiple registration were Christine Nekesa and Joan Mabuka. He also mentioned Mutero Florine Nelima, Eliud Wabukha, Anne Nekesa Wanjala, Dennis Simiyu and Violet Atieno. Their double registration was mainly at Chebukaka and Teremi.

106. Despite the petitioner having promised to point out in principal register that the said persons were indeed double registered, at close of trial, no such evidence was produced in court, even after scrutiny of the Principal Register.

107. Whereas the evidence of petitioner and George Sitati is based on alleged confession by the persons who indulged in multiple registration the petitioner never bothered to call any of the said persons as a witness or even file any witness statement in support of the said allegations.

108. Without any independent evidence of confession in court the alleged confessions are no more than hearsay evidence which by dint of Section 63 as read with Section 25A of the Evidence Act, Chapter 80 laws of Kenya, is inadmissible. Section 25A in particular provides:-

“25A. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or a police officer...”

109. Although this section would be applicable if the persons who allegedly gave the confession were charged, I find the same relevant in determination of the issue herein as the court is by virtue of Section 87(1) obliged:-

“at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at hearing to have been guilty of an election offence.”

110. Since the alleged confession cannot form the basis of making a determination that they or any of them was registered more than once as a voter contrary to Section 57(1), equally, it cannot suffice to prove the alleged scheme.

111. Having found the alleged confession inadmissible the question to ask is whether the evidence produced in court is sufficient to prove commission of the alleged malpractice or offence by the respondents.

112. Before determining this question it is important to point out that existence of the alleged scheme was denied by the respondents, and that George Sitati opted to testify about the alleged illegal dealings, to which he is an accomplice after parting ways with the 1st respondent and/or his political party. Further, that notwithstanding the legal and political implications of the alleged dealings, Sitati did not deem it necessary to either report the incidents to the police, or 2nd respondent for investigations to establish the truth.

113. He abandoned the multiple registration scheme and said he had recruited the 214 persons for purposes of civic education!! My observation is that double registration is not *per se* proof of multiple voting. It only raises suspicion. Sitati himself confirmed that Christine and Joan whom he was certain double registered, were not randomly picked but were elected through strategic interaction with himself.

114. For the reasons stated above I hold that the evidence on record is insufficient to prove commission of any election offence by the respondents. However, I hasten to point out that a number of their witnesses claimed to have participated in unlawful activities like taking of bribes or aiding in commission of election offences.

115. To establish the truth in their allegations I recommend that investigations be carried out on their dealings, prior to and after the March 4th General Elections, with a view of establishing whether they committed election offences under the Elections Act. The people who should be investigated are George Sitati Wekesa for his alleged role in recruitment of persons who would be registered more than once and John Khauka for allegedly taking a bribe.

CREDIBILITY OF THE ELECTORAL PROCESS

116. The other issues which were framed for determination relate to the credibility of the entire electoral process and whether the results declared by the 2nd respondent truly reflected the democratic will of the people of Kabuchai Constituency. Alongside these two issues is the question whether the 1st respondent was validly elected and declared the winner of the Kabuchai Parliamentary elections conducted on 4th March, 2013. As these issues are related, I propose to tackle them together.

117. It is the petitioner's submission that an election is a process with a series of stages from the initial registration of voters, nomination, voting to the final stage of declaring the duly elected candidate. It is submitted if any of these stages is flawed through a failure to comply with the applicable law, it affects the quality of the electoral process and subject to the gravity of the flaw, it is bound to affect the results.

118. It is further submitted that from the totality of the evidence adduced in respect of electoral malpractices, irregularities and/or omissions committed before and during the Kabuchai Parliamentary elections conducted on March 4th 2013, some of which have been admitted by the respondents, the entire electoral process did not conform with the law.

119. This contention is contested by the respondents who maintain that despite the few irregularities regarding statutory forms and tallying of the results, the electoral process was substantially conducted in accordance with the applicable law and procedures. Reliance is made on Section 83 of the Elections Act which provides:-

“No Election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance

with the principles laid down in the Constitution and in that written law or that the non compliance did not affect the results of the election.”

and on, among other authorities, **Morgan and Others v. Simpson** (1974) 3 ALL E.R 722 where it was held:-

“(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 was affected or not” or

- 0. 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 it did not affect the results of the elections.”**

STATUTORY FORMS

120. Through the petitioner's application for scrutiny and recount, this court had an opportunity to make a determination on complaints relating to the malpractices and irregularities in statutory forms. There being no change of circumstances, I reiterate this court's finding in the petitioner's application to the effect that:-

“In a majority of the polling stations there were no alterations whatsoever and the Form 35's were signed both by IEBC officials and the party agents.

- a. In some polling stations there were irregularities and omissions but which do not affect the substance of the results as they do not relate to distribution of the votes between the candidates. In most of these stations IEBC officials countersigned the alterations, statutory comments are provided, agents signed the forms and the results add up (are verifiable).**
- b. In a few of the polling stations no statutory comments, countersigning or explanations were provided for the alterations effected thereon or the absence of agents. In these polling stations, it is difficult for the court or any other person looking at the statutory forms provided to verify the results.**

121. This court ordered a partial scrutiny and recount in respect of ten polling stations to determine the propriety or otherwise of the electoral process in those stations and the results therefrom-especially because of the anomalies noted in form 35. I will comment on the results of that exercise shortly.

122. The petitioner's counsel submitted that although Silas Rotich (3rd respondent) confirmed that Presiding Officers were trained on handling of Form 35, none testified and the failure to call Presiding Officers as witnesses raises doubts about accountability in the electoral process. The petitioner urged this court to interrogate the IEBC training manual to confirm non compliance. Of course this matter was never part of the evidence and its introduction is contested by respondent. The petitioner's contention is that the IEBC officials did not properly fill Form 35, which in any event either had anomalies or irregularities. These anomalies are listed as:-

EXCLUSION OF AGENTS FROM POLLING STATIONS AND SIGNING OF FORM 35

123. The complaint that petitioner's agents were excluded from polling stations and tallying centre was made by Carolyn Amoding.

124. Regulation 62(1) (c) of the Elections (General) Regulations 2012 (Referred to as Regulations), gives the Presiding Officer authority to regulate the number of people to admit to the polling station as agents. **Regulation 62(3) “The absence of agents shall not invalidate proceedings at a polling station.”** Although under Regulation 85(1) an agent is entitled to be present at the Tallying Centre, the Returning Officer is not obliged to admit more than one agent per candidate at the Tallying Centre.

125. Carolyn was denied entry to Tallying Centre – on her own admission she did not have the proper identification documents.

126. It is a fact that not all form 35s were signed by every agent, and in some instances, the Presiding Officer did not record the fact of the agents failure or refusal. The agents are required under Regulation 79(3) to fill their names and details in Form 35 after counting and declaration of the results.

127. My understanding is that where an agent is dissatisfied, he does not sign Form 35, but indicates reason for refusal in the appropriate column. The duty of the Presiding Officer under Regulation 79(4) is to record the fact of the refusal or failure. However as pointed out by the 2nd respondent's counsel, the difficulty arises where the candidate and their agents leave the polling station in a huff or in excitement upon declaration of results – he cannot force them to state their reasons. Regulation 79(6) (7) offers refuge to the effect that the absence, refusal or failure to sign Forms 35 or record reasons, shall not by itself invalidate the results.

128. It is upon the petitioner to demonstrate that an illegality was committed in the electoral process as to render the election invalid. Whereas it is true that the Presiding Officer did not sign the Form 35 relating to Kibochi Primary School Polling Station, there is indeed no ground in the petition relating to that station.

129. As regards Busakala Primary School, the form was signed by the Deputy Presiding Officer and bears an IEBC stamp. Any other doubt was cleared by the scrutiny carried out and the Deputy Registrar's report which showed that there was no deviation in the results contained in that form.

130. The original Form 35 relating to Lukhome Primary School went missing at the end of counting and departure of agents. Although the Presiding Officer inserted comments to that effect, this certainly created suspicion as to the bona fides of the exercise. However, the scrutiny exercise disclosed no difference between the results in the ballot box and those contained in Form 35.

131. There are claims by P.W.2 that she was pressurized by the Presiding Officer to sign blank form 35 due to time constraints. This evidence is contradicted by Dunstan Namusonge (P.W.8) who says, P.W.2 was intimidated to sign the forms as she was the only female agent in a sea of males and in his view, this amounted to duress. Apart from P.W.2 no other agent testified over such claims.

ENTRIES IN FORM 36

132. The petitioner contends that the 2nd respondent made false and inaccurate entries in the statutory forms so as to give the 1st respondent undue advantage. He maintains that entries in Form 36 were very different from those announced at Chwele Youth Polytechnic, Kisiwa, Chebunyi Primary, Wabukhonyi Primary, Matibo Friends, Chemwa, Pongola Primary, Sirane Youth Polytechnic, Sichei RC and Mpakani Market polling stations. The evidence led was not sufficient to prove any malpractice in these stations and I agree with respondents' counsel that a mere mention of a polling station does not itself establish the requisite legal standard of proof.

133. Undoubtedly, data entries in Form 36 had some erasures, but the question is whether they affected the credibility of the election. These errors were accounted for and no sinister motive was demonstrated to warrant invalidating the results.

134. I note that no, election can attain complete perfection and indeed Maraga J, (as he then was) in the case of **Joho V Nyange & Another** (EP No.4 of 2008) 3KLR 500 at pg 50 noted that:-

“Some errors in elections are nothing more than what is likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But where deliberate irregularities or forgeries are committed, different considerations should be given.”

135. The errors which have been shown to this court, are easily accounted for or explained.

As to the allegation that the Returning Officer's signature on Form 36 differed from the one he had appended on Form 35, the petitioner ought to have called a document examiner to verify this and the same remains a mere claim.

136. The 1st respondent confirmed that Form 36 was not handed over to him nor did he sign it after declaration of the results. He was however issued with a certificate by IEBC. I have addressed the issue of Form 36 in Election Petition No.6 of 2008 in detail where I observed that focus is firmly on the conduct of the Returning Officer and IEBC at the tallying hall; because this helps the court to determine whether the election was free, fair, transparent and accountable.

137. Form 36 is built from data contained in Form 35. There were entries in Form 36 which did not correspond with those in Form 35. However the exercise of scrutiny clearly disclosed that these entries were human errors, probably arising from the fast pace at which the information was expected to be transferred. The errors do not cumulatively affect the outcome for the petitioner or the respondent – admittedly there are irregularities such as the candidates not signing Form 36, but that alone would not invalidate the election.

138. In this regard, I draw from the remarks by the Supreme Court in Petition No.5 of 2013 (**Raila Odinga V Uhuru Kenyatta & Others**) pg 71 that:-

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

Overcrowding at Polling Booths:

139. Petitioner's case is that there was overcrowding at Kibichori polling station and this negated the concept of secret ballot. It is not clear who was overcrowding the booth, but of greater significance is that there is no evidence to demonstrate that such conduct affected the results.

140. Alongside this is the allegation by Albert Saeni Munoko, that at Sanandiki polling station he was not allowed to witness how the assisted voters were making their choice. However there is no indication of who these assisted voters were. Normally assisted voters are accompanied by persons of their choice, but where none is available, then Regulation 72 of the Election (General) Regulations 2012 empowers the Presiding Officer to assist the voter in the presence of the agents. Being present does not mean hovering over the voter, it means observing the activities and indeed evidence confirmed that agents (since they were many) sat at a distance where they could see what was going on as the voters got assistance.

LIGHTING MISHAPS

141. The respondents are accused of creating artificial power black outs, and using poorly lit rooms during counting at the polling stations. The 1st respondent admitted that there wasn't enough light in some rooms, e.g. Sanandiki polling station and the petitioner confirmed that he had to run to his residence and get a gas lamp to be used. What the petitioner is required to prove, in a manner that persuades this court is that this was:-

- a. A conspiracy between the respondents, so as to give the 1st respondent undue advantage.
- b. That the dim lighting affected the counting or entry of results.

142. Where there was a power outage, it affected all candidates, and the practicality of suddenly moving from the assigned counting room to a room of the petitioner's preference posed a security risk as explained by the Returning Officer. That certainly cannot be a reason to conclude that there was lack of transparency. It definitely created suspicion, but the burden of proving any mischief hasn't been

adequately dislodged by petitioner. I have evaluated the results at Sandandiki and contents of form 35 and entries transposted in form 36-the entries are properly entered.

FALSE AND INACCURATE ENTRIES

143. There were irregularities and some alterations made relating to Form 35 which is a statutory form. The petitioner's counsel submitted that the cancellations and alterations raised the question of veracity and credibility, thus rendering the results inaccurate, unauthenticated, and invalid. He drew from the decision by Kimaru J in **William Kabogo Gitau V George Thuo and others, Election Petition No.10 of 2008** – (see 2010 eKLR) where the court observed that cancellations and alterations on the statutory forms raised questions regarding veracity and authenticity of results.

144. The 3rd respondent admitted existence of arithmetical errors in three polling stations, and on the strength of this, counsel urges the court to find that the elections were not conducted fairly. He refers to Lenaola J, in **Benard Shinali Masaka V Boni Khalwale & 2 others (2011) eKLR** quoting the observations by Rawal J in **Reuben Ndolo V Dick Wathika and 2 others** Election Petition No.11 of 2008 (Nrb) as follows:-

“Where in th same circumstances as in this case, the Form 17A had arithmetical errors, the Form 16A’s were not signed by the Presiding Officers, their candidates, and/or agents, the court must nullify the election. . . .”

145. There were erasures/alterations for Nalondo, Kabuchai SA Primary School Nangare Primary School, Khachonge Primary School, Namaondo Primary School, Lukhome Market and Mukuyuni Cattle Dip. Some of the alterations were countersigned, others were not.

146. The alterations did not affect the substance of the results, especially relating to the distribution of the votes between the candidates. Any further doubts were cleared by the scrutiny and recount exercise which demonstrated that the entries were human errors and not fraudulent mischief. The same goes for total number of valid votes cast which were either entered in words and not figures or vice versa – in this regard I have keenly perused entries for Sanandiki, Wabukhunyi, Namilama, Walukaya, Nalondo, Sango, Muyayi, Sikata, Sawa, Chebukwa, Sitila, Khatiri, Lurende, Khakinye, Chekulo, Kimalawa and Mukuyuni Dip. Notably most of these polling stations were not mentioned in the petition, but I find that the errors were simple arithmetical error or minor human errors which did not substantially affect the final outcome. I think if the errors/erasures could not be reconciled by scrutiny, and the forms were not signed, then the election would be nullified. However, that is not the case here.

147. **Morgan V Simpson (1974) 3 ALL ER 722** provides a useful insight where the court held:-

“If the election was so conducted that it was substantially in accordance with the law as to elections, it is not violated by a breach of the rules or a mistake at the polls, provided it did not affect the result of the elections.”

SCRUTINY AND RECOUNT EXERCISE

148. Scrutiny and recount was conducted by the Deputy Registrar, Mr. Atyang in respect of the following stations:- Makhonge Primary School, Busakala Primary School, (two streams), Chwele Youth Polytechnic, Kisiwa Primary School, Khachonye Primary School (2 streams), Namaondo Primary School, Lukhome Market, and Lukhome Primary School.

149. The petitioner's counsel submits that during the exercise, it was discovered that there was erroneous judgment in sorting ballot paper types and votes cast. He argues the wrongful classification of ballot paper types, points out a lack of accuracy, transparency and accountability. Further that:-

- a. There were no statements by the Presiding Officer on the rejected ballot papers.

- b. Some of the ballot papers were not sealed and packed separately.
- c. During scrutiny some security seals were broken, missing or loose.
- d. Ballot storage conditions offered opportunity for tampering.
- e. Form 33 were missing from 8 polling stations and
- f. Forms 35 were not affixed to ballot boxes for 3 polling stations – they were however found inside the ballot boxes.

150. The major concern is at Chwele Youth Polytechnic which had two streams, and results were the petitioner got 323 votes. The scrutiny showed 79 additional votes for the petitioner, which had been omitted. The total number of votes cast was indicated as 468 instead of 546.

151. Kisiwa Primary School also had erroneous allocation of votes, with Erick Kimangonde Wapanganga's votes being inflated by 30 more, and Erick Kucho's votes deflated by 60, while Eusebus Juma Mukhwana's votes were inflated by 30.

152. There was also concern regarding missing counterfoils for used ballot papers.

153. The contention by counsel is that if scrutiny and recount of just ten stations revealed 82 votes in favour of the petitioner, then a similar trend for the entire Constituency would have recounted 800 votes. This is where the petitioner urges this court to invoke not just the principle of quantity but quality.

154. The respondents on the other hand were satisfied with scrutiny, saying the few errors detected did not shift the balance.

155. According to the report filed in court by the Deputy Registrar Mr Atyang, the results contained in the impugned form 35's were substantially correct. Only a few errors were discovered in respect of Chwele Youth Polytechnic Stream 2. Here the petitioner's votes went up by 79 votes. Those of the 1st respondent went up by 1 vote. At Kisiwa Primary School Stream 2, the results of Eric Kimingichi Wapang'ana's, Eusebius Juma Mukhwana and Fredrick Wekesa Sichangi went down by 30, 40 and 1 vote(s) respectively. Those of Eric Kucho Makokha went up by 60 votes.

156. At Namaondo Primary the 1st respondent's votes went down by 1 vote i.e reduced from 196 to 195. At Lukhome Market the 1st respondent's votes went up by 1 vote while those of the petitioner went up by 2 votes. The overall effect was that the results declared by the 2nd respondent were erroneous in respect of the total scores garnered by the respective affected candidates. However, the exercise did not reveal that a candidate other than the one declared won the elections. The 1st respondent still led the contest with 8,967 votes to the petitioner's 7,886.

157. Having cross-checked all entries contained in form 35s with the contents of form 36 used to declare the winner, I can confirm that they tally. In this regard the only proven variance between the results announced by the 3rd respondent and subsequently declared by the 2nd respondent is as indicated above.

158. Although the Deputy Registrar's report indicates that the ballot boxes were received in good condition and were in good condition when the scrutiny and recount exercise commenced, it is submitted on behalf of the petitioner that the ballot boxes were not properly stored and handled. Further that owing to poor handling and storage of the ballot boxes, some security seals were broken, missing or loose.

159. Without any evidence to show that the ballot boxes were tampered with, it is submitted that the ballot storage conditions offered a possibility for tampering. It is further submitted that the unproven tampering with the ballot boxes can explain why some electoral documents were missing in the opened ballot boxes. Some of the documents that allegedly could have gone missing owing to the alleged tampering are counterfoils, form 33s, copies of form 35s, and the presiding officers statement on rejected ballot papers.

160. The report of the Deputy Registrar, which forms part of the record of this court, was endorsed by agents of all the parties and their respective advocates indicates that despite one or two of the security seals having been loose or broken, each and every ballot box that was availed for the exercise was in good condition. In this regard the submission that the ballot boxes were poorly stored or handled has no leg to stand on.

161. Without proof that the ballot boxes were opened the speculation that the results contained therein were tampered with fails.

162. The duty of the court is to give effect to the will of the people and forms 35 upon scrutiny confirmed that the results reflected the will of the people of Kabuchai Constituency. Consequently the court declares that the James Lusweti Mukwe was validly declared the winner for Kabuchai National Assembly seat. The electoral process was credible. The petition is dismissed with costs.

163. The costs shall be borne by the petitioner and regard is given to the length of the trial, the input by counsel representing the respondents, some who had to travel from destinations outside Bungoma. In my view the costs should not exceed Kshs. 3 million.

164. The Registrar of this court shall tax the respondents bills of costs, part of the costs shall be drawn from the money deposited by the petitioner as security in this court. A certificate shall issue as provided under section 86 of the Elections Act.

165. My sincere gratitude to all counsel who have been industrious and gave very useful insight on election laws and sources of information. Counsel were willing to endure long sitting hours to ensure the court met the Constitutional time frame.

166. I thank the parties, especially the petitioner and respondent who have shown maturity and dignity during court appearances and their supporters who displayed great restraint and respect in court.

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

H.A. OMONDI

JUDGE