



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELECTION PETITION NUMBER 6 OF 2013**

NUH NASSIR ABDI.....PETITIONER

VERSUS

1. ALI WARIO.....1<sup>ST</sup> RESPONDENT

2. FRANCIS RUNYA(RETURNING  
OFFICER, BURA CONSTITUENCY.....2<sup>ND</sup> RESPONDENT

3. THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

**INTRODUCTION**

1. On the 4<sup>th</sup> March 2013, the people of the Republic of Kenya pursuant to the provisions of Article 1(2) and 38(2) of the Constitution went to the general elections which *inter alia* included the election of the members of the National Assembly. One of such elections took place in Bura Constituency which is the subject of this judgement.
2. The following candidates presented themselves for election as the Member of Parliament for the said Constituency:
  - a. **Ali Wario**
  - b. **Farah Dahir Eyow**
  - c. **Mahadhi Ali Loka**
  - d. **Nuh Nassir Abdi**
  - e. **Omar Aideed Abdi**
  - f. **Osman Adhan Gure**
3. Following the declaration of the results of the said elections, the petitioner herein, **Nuh Nassir Abdi**, who was the runner up according to the results declared by the **Independent Electoral Commission of Kenya**, (the Commission) and which elections were won by the 1<sup>st</sup> respondent herein, on 10<sup>th</sup> April 2013 filed this petition. According to the results declared by the Commission, the first respondent garnered a total of 8,586 votes while the petitioner garnered 8,575, an indication that the results as declared by the Commission showed the difference between the

Petitioner and the 1<sup>st</sup> Respondent as 11 votes.

## **THE PETITION**

4. In his petition, the petitioner seeks the following orders:
  - a. **AN ORDER** for production for scrutiny, inspection and verification of all the Biometric Voter Registers and Marked Voter Registers used for the Parliamentary Election at Bura Constituency.
  - b. **AN ORDER** for the production for scrutiny, inspection and verification of all written statements made by the presiding officers under the provisions of the Elections Act and the Elections (Parliamentary and County Elections) Petition Rules 2013.
  - c. **AN ORDER** for the production for scrutiny, inspection and verification of the Electronic Logs of the transmitted parliamentary election results for Bura Parliamentary Constituency.
  - d. **AN ORDER** for scrutiny, inspection and verification of all the ballot papers validly cast in the Parliamentary elections in Bura Constituency.
  - e. **AN ORDER** that there be a recount and tally of the entire ballot papers validly cast, rejected and spoilt votes in parliamentary elections for Bura Parliamentary Constituency.
  - f. **AN ORDER** for production of all Forms 35 for all polling stations relative to the Parliamentary Elections at Bura Constituency for scrutiny and tallying of all the results.
  - g. **A DECLARATION** that the 1<sup>st</sup> Respondent was not validly elected as Member of the National Assembly for Bura Constituency.
  - h. Upon scrutiny of all the votes validly cast, rejected and spoilt the Court do **DECLARE** the Petitioner to have validly been elected as the Member of the National Assembly Bura Constituency.
  - i. In the alternative, **AN ORDER** be issued to the 3<sup>rd</sup> Respondent to conduct fresh Elections under the law.
  - j. **AN ORDER** that the costs of the Petition be borne by the Respondents jointly and severally.
5. The grounds upon which the said petition was based were as follows:
  - a. that the Parliamentary Election for Bura Constituency was not free, fair and transparent.
  - b. that Parliamentary election for Bura Constituency was not conducted in an accurate, verifiable secure, accountable and transparent as required by Article 86 of the Constitution.
  - c. that the Election Voter System adopted in Bura Constituency by the 3<sup>rd</sup> Respondent was neither simple, accurate, verifiable, secure, accountable nor transparent as required by the law.
  - d. that counting and tallying of votes were neither open nor accurately collated; neither were appropriate structures or mechanisms to eliminate electoral malpractices set-up including the safe-keeping of electoral materials, contrary to Articles 86 of the Constitution.
  - e. that the Parliamentary Election was not conducted in accordance with the provisions of the law nor in accordance with the principles laid down therein or in any law relating to such elections in particular the Elections Act (Act Number 24 of 2011), the Elections (General) Regulations (Legal Notice Number 128 of 2012) nor in accordance with the principles of natural justice and that as such seriously affected the said election and the results thereof to the detriment of the Petitioner.

- f. that the whole election exercise and counting of the ballots was marred by irregularities which taken singularly or collectively rendered the said election process and the purported results unfair and undue and hence they ought to be subject to nullification in accordance with the law.
6. On the factual aspect, it was contended as follows:
  1. There were discrepancies between the Biometric Voter Registers and the Manual Voter Registers.
  2. There was a breakdown of the Biometric Voter Registers in almost all the polling stations resulting in voters being denied to vote because their names were missing in the manual registers though having registered in their respective centres, and holding valid Voter's cards.
  3. Voters were denied a chance to cast their votes and/or turned away by the Presiding Officers of the 3<sup>rd</sup> Respondent despite being in the queue before 5 pm on account that they were time barred, yet the presiding officers did not ensure that the voting was done Timely.
  4. The counting process of the said Elections was irregular and ballot books and papers for the said Constituency were mishandled, interfered with, wrongly marked or stamped or unstamped or improperly placed in the wrong ballot boxes raising serious doubts of impropriety, misconduct by the officers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  5. There was tampering and/or mishandling of the election materials that was to ensure that the ballot papers and other materials were safe and secure.
  6. The ballot boxes at the tallying centre were opened in the absence of agents or anyone to verify the reasons of the said actions.
  7. Broken seals of the 3<sup>rd</sup> Respondent were scattered and strewn all over the tallying centre the day after tallying the ballot papers, thereby casting doubt on the security of the ballot papers cast, unused ballot papers and other election materials.
  8. Voters were assisted by the Presiding Officer of the 3<sup>rd</sup> Respondent at Yaqrıt Centre Polling Station in the absence of the agents contrary to the provisions of Regulation 72 (2) of the Elections (General) Regulations, 2012.
  9. Similarly, at Walestokocha Polling Station, voters were assisted by the Presiding Officer of the 3<sup>rd</sup> Respondent in the absence of the Petitioner's agent contrary to the provisions of Regulation 72 (2) of the Elections (General) Regulations, 2012.
  10. No reasons were recorded by the Presiding Officers in the above Polling Stations as required by law.
  11. The said voters were not shown the candidates for whom they had cast their votes in order to confirm and authenticate their choices, contrary to the law.
  12. The Petitioner's agents were not given Form 35s by the Presiding Officers, as required under Regulation 79 of the Elections (General) Regulations, 2012 to show the results of the counting at every polling station as required, thereby denying the petitioner the right to verify and ensure that the results were accurate as required by law.
  13. At the Tallying Centre at Bura Tallying Centre, the ballot boxes were opened and resealed in the absence of the Petitioner's agents.
  14. The Petitioner witnessed the 2<sup>nd</sup> Respondent collecting the seals strewn all over the Tallying Centre, on the day after the announcement of the Election Results.
  15. At the Tallying Centre and during tallying, the total number of votes cast in favour of the candidates, as was being projected electronically, was different from the number of votes being read and tallied at the Returning Officer's desk and the petitioner was unable to verify the actual tally, and the request for a recount was unjustifiably rejected to the detriment of Your Petitioner.
  16. At Walestokocha Polling Station, there was a variance in the number of votes cast in favour of the Petitioner as relayed by his agents and as announced by the 2<sup>nd</sup> Respondent.
  17. That the number of ballots marked in the Petitioner's favour but which were treated as rejected because of lack of the 3<sup>rd</sup> Respondent's rubberstamp was an unusually high number and no reason was offered by the 3<sup>rd</sup> Respondent or his officers.

18. The 2<sup>nd</sup> Respondent was under a duty to resolve the above anomaly at the Tallying Centre and before making the formal announcement, which he failed to do as required by law, to the detriment of Your Petitioner.
19. In Eltutu Mobile Polling Station all the registered voters turned out to vote (100% turn-out) an irregular and un-usual occurrence in a station which is a mobile station, in a nomadic area.
20. the 3<sup>rd</sup> Respondent deliberately failed to respond to the Petitioner's numerous written requests for documents pertaining to the said elections to the detriment of the Petitioner.

## THE RESPONSES

7. To the said petition, the respondents filed their responses.
8. According to the 1<sup>st</sup> respondent, **Ali Wario**, all the agents representing different candidates were not given the forms 35 in various Polling Stations as there was inadequacy of the said forms. Regarding Yaqrit Polling Station which the Petitioner complains of several irregularities, including irregular voter assistance, the 1<sup>st</sup> Respondent deposed that he was informed by his agent that all the four agents duly signed the form 35 and that the presiding officer's comment on the polling day diary was that the election was free, fair and transparent. He averred that there was 92% voter turnout in the said Polling Station and the Petitioner garnered 78% of the vote. He further averred that he was informed by the 3<sup>rd</sup> Respondent that the Electronic Voter Identification Device (EVID) failed in most Polling Stations but the voters whose details appeared in the manual register and in the green book were allowed to vote. The 1<sup>st</sup> Respondent further stated that although the law allows assistance of voters in need, the same must be done in a way that safeguards the right to vote by secret ballot. Thus, according to him, the Petitioner's argument that agents should have been present when voters were marking ballot papers is not tenable. The 1<sup>st</sup> Respondent sought to rely on various electoral observers reports to confirm that the 4<sup>th</sup> March, 2013 General election was conducted in a free and fair manner.
9. On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it was pleaded that contrary to the Petitioner's allegations, the Bura Parliamentary Elections were free, fair and generally complied with the Constitutional requirements. As such, they sought to put the Petitioner to strict proof of each of his allegations. According to them, the technology hiccups experienced in the execution of the said election were similar throughout the whole country and not just Bura Constituency. Nevertheless, they stated that the 3<sup>rd</sup> Respondent had put in sufficient measures to ensure that the said challenges did not compromise the integrity of the contested election. Specifically, the Returning Officer averred that consequent to the failure of EVID, the IEBC officers in all the Polling Stations within Bura Constituency continued with the use of the photo list print out of the Biometric register together with the manual register and the Green Book. In this regard, he attached a copy of an extract of the Principal Register of Voters for Inspection to prove that all the persons listed by the Petitioner as having been denied to vote on account of names missing from the registers were indeed in the manual register. Conversely, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argued that even if some irregularities complained of by the Petitioner may have occurred, the same did not materially impact on the outcome of the contested election. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents state that all eligible voters who were at the Polling Stations by 5p.m were allowed to vote. They further argued that Regulation 80 of the *Elections (General) Regulations, 2012* empowers the Presiding Officers to conduct a recount of votes upon request by a candidate or his party agents at the close of counting, and not the Constituency Returning Officers, at the close of tallying. Thus, the Petitioner's request for recount at the tallying centre was not tenable. It is also the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' contention that there was no mishandling of election materials and that accredited agents were given copies of forms 35. However, in Polling Stations with inadequate forms 35, all agents were asked to make copies. It was their position that voter assistance in both Yaqrit and Wolestokocha Polling Stations was done in strict compliance with Regulations 72 of the *Elections (General) Regulations, 2012*.

## MODE OF TAKING THE EVIDENCE

10. Rule 10(3)(b) of the *Elections (Parliamentary and County Election Petitions) Rules, 2013* (hereinafter referred to as the Rules) provides that an election petition shall be supported by an affidavit by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner. Rule 12(1) thereof provides that a Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial while subrule (2) thereof provides that the affidavit under sub-rule (1) shall state the substance of the evidence; be served on all parties to the election petition with sufficient copies filed in court; and form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by Petitioner on any contested issue. Similar provisions apply to the case for the respondents. Any witness who has not sworn an affidavit is not, without leave of the Court, eligible to testify and such leave is only to be granted where sufficient reason is given.
11. Dealing with similar provisions the Court of Appeal of Uganda (per **Byamugisha, JA**) in **Badda & Another vs. Mutebi Civil Appeal No. 25 of 2006 [2008] 2 EA 42** held as follows:

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

12. Pursuant to the aforesaid provisions, I directed that the affidavits on record would be deemed as the evidence in chief and that the deponents thereof would be cross-examined thereon.

### **THE CASE FOR THE PETITIONER**

13. In his affidavit evidence, the petitioner herein who gave evidence as PW-1 deposed that he participated in the 2013 General Elections as a voter and Parliamentary Candidate sponsored by the Wiper Democratic Movement of Kenya (WDM-K). According to him, he cast his vote at Bangale Primary School polling station and visited all the three streams therein as well as the two streams of Miti Boma Centre Polling Station. Apart from these the petitioner, in an effort to assess the progress of the election exercise proceeded to Yaqrit Centre polling station; Kuriti Primary School polling station; Basahargesa Nursery polling station; Miti Boma Centre polling station; Bangale Primary School polling station; Bultobanta Village polling station; Tula polling station; Mororo Primary School polling station; Hatata Primary School polling station; Mororo Madrasa polling station; Wekoye polling station; Komor Dukub polling station; Dukanotu Primary School polling station; and Bilbil Primary School polling station. According to him, due to the failure by the Biometric Voter Registration Machines, resort was had to the manual register. Although his name together with that of his security personnel, **Shukri Ahmed Kuno**, were found in the Electronic Register, the same could not be found in the manual registers in all of the three streams of the **Bangale Primary School Polling Station**. However after raising the issue with the Presiding Officer as well as the Returning Officer, they were allowed to vote and the issue noted in the Polling Day Diary (hereinafter referred to as the Diary). This happened despite his having confirmed that his name was in the register. He further deposed that at **Miti Boma Centre Polling Station**, the polling room was very small and crowded inhibiting the agents from monitoring the voting process, and that when he raised his concerns with the Presiding Officer he was advised that it was the best room the 3<sup>rd</sup> Respondents could get. In his view, the election exercise and counting of the ballots was marred by irregularities which taken singularly or collectively rendered

the said election process and the purported results unfair and undue and hence they ought to be subject to nullification in accordance with the law. These irregularities were particularised as follows: that there were discrepancies between the Biometric Voter Registers and the Manual Voter Register; as a result of the inconsistency between the Biometric Voter Register and the Manual Voter Register, eligible voters were denied to vote, to the detriment of the Petitioner; there was unexplained breakdown of all Biometric Voter Register in all the polling stations resulting in voters being denied to vote because their names were missing in the manual register though having registered in their respective centres and holding valid Voter's Cards; as a result, the elections at Bura Constituency were not accurate, verifiable and transparent as required by law and the petitioner went a head to indicate the names of seven people who according to him had their names missing in the manual registers. Giving 3 examples from Bilbil Primary School Polling Station, the petition averred that there were voters who were denied a chance to cast their votes and/or turned away by the Presiding Officer of the 3<sup>rd</sup> Respondent despite being in the queue before 5 pm on the grounds that they were time barred, yet the Presiding Officer did not ensure that the voting exercise was conducted timeously. It is further contended that in some Polling Stations voters were assisted in the absence of the agents while in Bilbil Primary School Polling Station, votes validly cast for the Petitioner, were wrongly placed in the Governor's ballot box, and upon concerns being raised by petitioner's agent, **Yunis Hussein Gure**, were dismissed without any valid reasons. It is further averred by the petitioner that his agents were denied forms 35 as required under Regulation 79 of the ***Elections (General) Regulations, 2012*** to show the results of the counting at every polling station as required, thereby making it impossible to correctly and accurately tally the results at the Tallying Centre. The petitioner further contended that there was refusal for a recount by the Constituency Returning Officer, Bura after the tallying process was completed upon the request of the Petitioner contrary to Regulation 80 of the ***Elections (General) Regulations, 2012*** (hereinafter referred to as the General Regulations). Further irregularities, according to him were that at the Tallying Centre, his supporters witnessed ballot boxes being opened and resealed in the absence of the agents and that he witnessed broken seals strewn all over the Tallying Centre a day later and raised his concerns with the Returning Officer and witnessed the Returning Officer of the 3<sup>rd</sup> Respondent collecting the few seals remaining on the ground the day after the announcement of the results. It was his evidence that one clerk of the 3<sup>rd</sup> Respondent was caught with a Parliamentary ballot paper marked in favour of the 1<sup>st</sup> Respondent herein and after being questioned, the clerk was unable to give any valid reason and that this incident was recorded in the "day book". Further at the Tallying Centre and during tallying, the total number of votes cast in favour of the candidates, as was being projected electronically, was different from the number of votes being read and tallied at the Returning Officer's desk and he was thus unable to verify the actual tally, and that his request for a recount was denied at the end of the tallying without any valid reasons. According to him, the number of ballots marked in his favour, but which, were treated as rejected because of lack of the 3<sup>rd</sup> Respondent's rubberstamp was unusually high, to his detriment. After final tally and before the announcement of results he realised that the margin of votes between him and the 1<sup>st</sup> Respondent was below twenty (20) and requested for a recount of all the votes in the parliamentary boxes because his agents were denied the Forms 35 and hence he could not verify the accuracy of the votes as they were being tallied and transmitted but this request was denied to his detriment. His efforts to get the Chairman of the Commission to intervene were equally unfruitful. To him the 100% turnout of voters at Eltutu mobile polling station was unusual and irregular taking into account the fact that the station was a mobile station, in a nomadic area. Despite his concerted efforts to access the documents pertaining to the elections, it was his evidence that he was denied the same.

14. In cross-examination by **Mr. Balala** learned counsel for the 1<sup>st</sup> respondent, the petitioner stated that that he is a Veterinary Surgeon practicing in Nairobi and Bangale of Bura Constituency. He stated that he had no complaints against the 1<sup>st</sup> Respondent but his allegations were against the IEBC. He confirmed that prayers (a) to (f) of the Petition relate to scrutiny and recount and thus some were spent after scrutiny and recount exercise while others were partially spent. Specifically, paragraphs 22(d), (e) and (f) have been satisfied while paragraphs (a) (c), (g), (h) (I) and (f) remain. He asked the court to declare him the winner of the said Parliamentary Elections if the

- scrutiny and recount report was in his favour.
15. He informed the Court that that he voted at Bangale Primary School Polling Station Stream One (1) at about 7.00 a.m on 4<sup>th</sup> March, 2013 in the company of his security officer. He explained that at the time he went to vote, the EVID machines at the Polling Station were operational. However, their names (his and security officer) could not be found on the manual register but they were found in the EVID. However, after the intervention of the Returning Officer, they were allowed to vote. He stated that the Returning Officer instructed the Presiding Officer to note their case in the day book. He further confirmed that he is the speaker of Tana River County Assembly having been elected to that position on 23<sup>rd</sup> March, 2013 but clarified that this was before he filed the present Petition. He confirmed that the members of the said County Assembly were elected in the same election of 4<sup>th</sup> March 2013 but they were legitimate regardless of the irregularities which affected the election. When questioned about the conflict between his role as a speaker of Tana River County Assembly thus a state officer and his pursuit of the present Petition, a seemingly political activity, he stated that the speaker is a Political Officer and the **Elections Act** and the Constitution allowed him to participate in an election before he became a speaker and therefore there is no conflict between the two. He also stated that he did not wish to resign but he would make the decision at the right time if there would be a repeat of the Bura Constituency elections. He said that the poll results showed that he was defeated with 11 votes and it is for that reason he had requested for scrutiny and recount however he clarified that after recount and scrutiny the vote margin remained the same. The Petitioner went on to testify that on the voting day, after casting his ballot at Bangale Polling Station he travelled to other Polling Stations to assess the progress of the polling. He commenced his visits at about 8.00a.m and concluded around 11.00 p.m. after visiting 14 stations in which he spent an average of 5 to 10 minutes per station. He stated that he had agents who were trained on how to fill form 35. He testified that he was at the tallying centre at Bura County club when the poll results were announced. He refuted the results and protested to the Returning Officer because he had not been given all the forms 35. He requested for a recount but the Returning Officer refused his request. He tried to get assistance from the IEBC chairman but he too did not help him. Later on he wrote several letters to the Returning Officer and the IEBC which were ignored. However, the Petitioner confirmed that he received forms 35 from all Polling Stations from the IEBC after filing the Petition but complained that the said forms 35 were inconsistent.
16. Regarding how the breakdown of EVIDs and how it affected elections at Bura Constituency, the Petitioner confirmed that the breakdown of EVIDs affected every candidate and every voter irrespective of party affiliation. However, he insisted that he was aggrieved by the enormous number of people who were turned away. It was the Petitioner's testimony that at about 10a.m on the polling day, he went to Yaqrit Centre Polling Station and found that the Presiding Officer was assisting voters in absence of agents. All the agents were within the room but the Presiding Officer assisted the voters in the polling booth alone. His agents complained to him and he intervened. Thereafter, the agents were allowed to witness as the voters marked ballot papers. The Petitioner confirmed that he was satisfied with the scrutiny and recount process and the report. However, he said he had no evidence to corroborate his allegation that his agents were denied forms 35. The Petitioner also complained that in some Polling Stations such as Bilbil Primary Polling Station, voters were turned away even when they were in the queue before 5.00p.m. The said Polling Station was closed at about 10.00p.m. However, he acknowledged that his agent in the said Polling Station, **Yunis Hussein** did not make any complaint to the Presiding Officer and none was recorded in the day book.
17. Upon cross examination by **Mr. Nyamodi**, the Petitioner reiterated that the refusal for recount at the tallying centre by the Returning officer was contrary to Regulation 80 and dealt him unfairly. He also stated that it was unusual that in Eltutu there was 100% turnout of all the registered voters.
18. On re-examination by **Miss Kilonzo**, the Petitioner confirmed that the total number of votes that he got after IEBC tallying was 8575 votes while 1<sup>st</sup> Respondent got 8586. The numbers changed after scrutiny and recount to Petitioner 8557 and Respondent 8568. He confirmed that the vote margin between him and the 1<sup>st</sup> Respondent remained 11 votes after scrutiny. He also stated that the number of ballot papers marked in his favour which were rejected by IEBC were 22 while for 1<sup>st</sup> Respondent's were 12. The difference is 10. Thus, according to him that would have affected

the results of the election.

19. The petitioner called **Yunis Hussein Gure** who testified as PW2. In his affidavit which constituted his evidence in chief, PW2 deposed that he participated in the March 4<sup>th</sup> 2013 General Election as an Agent for the Wiper Democratic Movement, posted at Bilbil Primary School Polling station in Bura Constituency, Tana River County and that during the counting of the votes cast, he noticed that there were three Parliamentary ballot papers in the Governor's ballot box marked in favour of the Wiper Parliamentary Candidate, **Nuh Nasir Abdi** but that on requesting, the parliamentary ballot papers to be counted with the rest of the Parliamentary ballots, the Presiding Officer refused the request and instead returned the ballot papers into the Governor's ballot box and sealed it. He was therefore unaware whether this anomaly was corrected. He was not cross-examined by any of the parties.
20. The next witness who testified as PW3 was **Osman Abdi Dado**. According to his deposition, he was an agent for Wiper Democratic Movement at Yaqrit Nursery School Poling Station in the same Constituency. To him the voting process started at 9.00 am and that although he was seated with other agents on one side of the room they were not allowed to witness the voting of the assisted voters by the Presiding Officer. This led to a commotion and after the intervention by the petitioner the agents were allowed to do so by which time around 20 voters had been assisted by the said Presiding Officer alone to cast their votes. In cross-examination by **Mr Balala**, he said that in that Stream the 1<sup>st</sup> respondent won the elections and that the agents were many. The booth was however small in size and was constructed by used carton boxes. He, however, confirmed that he was unaware who the said 20 people had voted for. On being questioned by **Mr. Nyamodi**, he confirmed that they were given seats and after the commotion the process went on smoothly. The evidence of this witness was corroborated by the depositions of **Ismail Abdi Dado**. Similar averments were made in the deposition by **Hussein Bulo Rhova**, a registered voter at Bilbil Primary School Polling Station who deposed that as a result of the commotion, the Presiding Officer at the Polling Station was whisked away by police officers and voting resumed in his absence.
21. **Ahmed Haji Arte**, testified as PW4. According to his deposition, he was a registered voter at Bilbil Primary School Poling Station and that although he was duly registered to vote and went to the Polling Station and queued from 4.00pm to 9.00pm he amongst others was informed that they could not vote because they were time barred hence he never exercised his right to vote for a candidate of his choice. In cross-examination by **Mr. Balala** the witness said that his home is very far from the Polling Station. He corrected the impression created in his affidavit that he went to the Polling Station at 9.00pm. Similar depositions were made by **Abdi Jarso Mohamed & Bishar Guhad Sigat**, .
22. There were other deponents who had sworn affidavits in this matter but who were not required by the respondents for cross-examination. Pursuant to Rule 12 (2) (c) of the Elections Rules their evidence are part of the record and the Court is bound to consider them. However some deponents, **Maka Abdi Haji, Ibrahim Roble Mahamud, Maka Abdi, Fatuma Kuso Shido** and **Hassan Abdi** though were required for cross-examination by the respondents, were not availed for the said purpose. In **Theodore Otieno Kambogo vs. Norwegian People's Aid Nairobi (Milimani) HCCC NO. 774 of 2000, Warsame, J** (as he then was) was of the view that the fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. While conceding that this is not to say that the affidavit evidence is not good, the learned Judge was of the view that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying thereon. However the Court of Appeal in **David Kinyanjui & 2 Others vs. Meshack Omari Monyoro Civil Appeal No. 125 of 1993** was of the view that the Court should not act on an affidavit whose deponent cannot be examined. Accordingly I do not intend to attach much weight to the said two affidavits.
23. However there was the deposition of **Halima Dikati Abdi** to the effect that though she was a registered voter at Huruma Primary School, when he reached the place where he was to cast his vote, his name was missing from the manual register though he had earlier on confirmed that her name was in the register. She was however unable to confirm this from the Electronic Register which was not functioning. On cross examination she confirmed that her name was appearing in the principle register of voters for inspection. Similar depositions were made by **Fatuma Kuso**

- Shidho, Ibrahim Hussein Rage, Ali Farah Durow, Halima Abdikadir Sugho**, (who in cross-examination identified her name and photograph on the principle register of voters for inspection but insisted that her name was found missing from the manual register) and **Mauludi Shukri Salat**. That some voters' names could not be found in the manual register was similarly confirmed by **Idris Adhan Dubow**, an agent of the petitioner at Basan Hargesa Polling Station and **Hussein Bulo Rhova**, who on being referred to another stream was unable to cast his vote as that stream was closed for voting. This fate seems to have befallen **Hassan Jeli Warabu**, a registered voter at Bilbil Primary School Polling Station as well. According to **Hussein Guracho Budhul**, his name was similarly missing from the Electronic Register and was informed that he was registered in Kwale. He however confirmed that his name was in the principle register of voters for inspection but denied that he was guilty of double registration.
24. There was another set of deponents who deposed that they were illiterate and were assisted by the Presiding Officer to vote. The Presiding Officer however marked their ballot papers for a candidate who was not of their choice. These were **Hassan Abdi Mahamud** and **Maryan Abdi Mohamed**. The former in cross examination admitted that although his name was not in the computer the same was found in the manual register and although he identified the photograph of the person he wanted to vote for his ballot paper was marked for the person he was not intending to vote for and that this was done in the absence of the agents. With respect to the latter, she, on cross-examination testified that though she was unwell she was not accompanied by anyone who could assist her and that she was denied assistance. She however confirmed that she identified the person she wanted to vote for by the photograph and placed the mark thereon after which the ballot paper was picked and dropped in the box. With respect to the depositions of **Adhan Ismail Hassan, Maka Abdi Haji, Faduma Weheliyo Yussuf, Fatuma Bero Hassan, Halima Adhale Dade, Faduma Mahadi Santur, Abdiya Ibrahim Bute, Hawo Abdi Haji, Muslima Suldano Abdi, Abdulla Abdi Mamo, Hamdi Hassan Santur** and **Abdi Haji Mahamud**, save for testifying that they were illiterate and they were assisted by the Presiding Officer in the absence of the agents, they could not tell whether or not their ballot papers were marked as they had intended.
25. On his part, **Mohamed Somane Kuno**, who was an agent for Wiper Democratic Movement at Wadesa Primary School, during the counting process it was realised that there were ballot papers that did not have the stamp of the Independent Electoral and Boundaries Commission and which the Presiding Officer considered as rejected despite opposition from the agents but without marking the same as "rejected" or "rejection objected to". Similarly at the Tallying Centre, the Returning Officer did not consider the said rejected votes. **Ahmed Makale Uwes**, an agent for the same party at Walestokocha Polling Station, deposed that the agents were not allowed to freely observe the voting process as they were hurdled into a corner hence they did not observe the assistance of the illiterate voters by the Presiding Officer. It was his evidence that Orange Democratic Movement agents were chased away from the Poling Station and that whereas at the conclusion of the counting process, the petition had garnered twelve votes, at the Tallying Centre the Returning Officer announced that he had garnered seven votes and despite raising concerns thereon, the same were dismissed by the Returning Officer. **Hassan Abdi Jarso**, on the other hand deposed that he was a polling clerk posted at the same station and went ahead to confirm the deposition made by with respect to the votes garnered by the petitioner.

### **THE CASE FOR THE RESPONDENTS'**

26. The first witness for the defence who testified as DW1, was the 1<sup>st</sup> respondent, **Ali Wario**. According to him, he participated in the 2013 General Elections as a voter and Parliamentary Candidate nominated by the National Alliance Party (TNA). On the 4<sup>th</sup> of March 2013, he cast his vote at Huruma Primary School Polling Station and visited Walestokocha Mobile and Sabukia Primary Polling Stations. He confirmed that at Bilbil Primary School the number of voters were 12 which represented 100% voter turnout which to him was not an anomaly or an irregularity. At **Yaqrit Centre Polling Station**, he was informed by his agent one Mohamed Ali Dame that there were a total of four agents present at that polling station and all of them duly signed Form 35 and that the presiding officer's comments on the said form was that the election was free, fair and transparent. At this polling station there was a 92 % voter turn-out and the Petitioner in actual fact garnered 78% of the votes. According to legal advice from his advocates, under the Constitution

and the Law a voter may be assisted in voting by either bringing someone who will assist him to vote or by the presiding officer and that according to his agents all agents agreed to this mode of assistance. According to information from his agents, the counting and tallying exercise was correctly and accurately done at all Polling Stations and that all agents present during counting and tallying acknowledged this by signing against the Form 35 as required by law. However, in some Polling Stations the Forms 35 were inadequate and that all agents had to rely on the Forms 35 results submitted by the Presiding Officers alone and in such cases Presiding Officers told the agents who wanted the Form 35 to make copies of the same. However, since voting and counting of votes ended very late into the night and that furthermore Bura being a remote area, it was impossible to find photocopiers to make copies of the Form 35. He deposed that at the Tallying Centre and during tallying, there were no irregularities which occurred or which were witnessed, however at Komor Dukub Polling Station the Presiding Officer opened two ballot boxes in his presence and in the presence of all the other candidates and agents present, one for presidential and one for county ward representative. The Presiding Officer confirmed that there were no anomalies and asked all said candidates and agents present to sign confirming this which he did. At the said tallying centre no ballot boxes for the Bura Parliamentary elections were reopened after having been sealed at the polling station. He deposed that the 3<sup>rd</sup> Respondent in a bid to ensure that those who had validly presented their registration details in the Green Book were not disenfranchised due to the part of the malfunction of the Biometric Voter Registration kit resolved to allow those people in such special circumstances to vote upon verification of their details. He then proceeding to enumerate the minutes of the meeting which was held by the 3<sup>rd</sup> respondent and concluded that the Election Voter System adopted in Bura Constituency by the 3<sup>rd</sup> Respondent was simple, accurate, verifiable, secure, accountable and transparent, and that the 3<sup>rd</sup> Respondent discharged its mandate and conducted the elections as required by the various Election Laws and the Regulation.

27. In cross examination, the 1<sup>st</sup> respondent testified that he voted in Huruma Primary School Polling Station, stream 1 and thereafter visited 2 other Polling Stations; Walestokocha and Sabukia to see how the voting was progressing. He said that he voted in the afternoon and by the time he was voting the EVID had ceased working. He also stated that his agents, **Abdi Noor, Mohamed Ali, Mohamed Elma., Dawoud** and **Khalif Bute** informed him that there was a shortage of forms 35 in their Polling Stations and they had been told to make copies. He testified that the agents were not intentionally denied form 35s but there was a shortage and due to the unavailability of photocopiers in the affected areas, the agents were not able to obtain copies of the form 35. It was also his testimony that his agent at Huruma primary Polling Station informed him that due to the failure of the EVID, some voters could not find their names and were therefore barred from voting. He also confirmed **Dawood Ali's** affidavit with respect to Bahsargesa Polling Station that the EVID did not work and that names of some voters were missing in the manual register and therefore they could not vote. He stated that he had enclosed in his affidavit the report of the election observers to show that the elections in Kenya were free and fair. The 1<sup>st</sup> Respondent further testified that the vote ascribed to him by IEBC after tallying were 8586 and the Petitioner's 8575. After scrutiny by the court, he got 8568 votes while the Petitioner got 8557 votes. Thus, a difference of 11 votes was maintained after scrutiny. Further, he testified that there were votes left for the determination of the court. Two (2) in the Petitioner's favour and six (6) in his favour. As such, if the court awards the votes as claimed, the vote margin would be 15 votes. Hence, he would still be the winner.

28. **Dawood Birik Ali**, testified as DW2. According to his affidavit, he participated in the March 4<sup>th</sup> General Election as an agent of The National Alliance Party posted at BasanHargessa Polling Station in Bura Constituency, Tana-River County. Although the voting started at 8.00am after about one hour, the electronic voter register failed to work. As some of the names of the voters' names were similarly missing from the manual register, the voters whose names could not be found in the manual register did not vote. According to him, however, the Presiding Officer was assisting all illiterate voters in the presence of all the agents in the Polling Station and that no voter complained his/her candidate of choice for the various seats was not marked by the Presiding Officer until the voting came to a close at around 11.00 pm. After counting the ballot boxes were sealed and all the agents signed form 35 and were informed by the Presiding Officer that since the

forms were inadequate all agents who wanted copies were to accompany him to Bangele to make copies of the same and on reaching Bangele the photocopying machine was not working hence the said photocopies could not be done. In his view, election process in BasanHargessa was to the best of his knowledge free and fair and substantially in compliance with the Constitution Statute Law and the rules of natural justice.

29. In cross examination, DW2 stated that some people who came and whose names were missing from the computer did not vote although he was unaware whether they had slips. He, however, stated that the illiterate voters were being assisted by the agents on the table where people were and not in the booths. To him only one register in book form which had photographs was being used.

30. DW3 was **Francis Runya**, the 2<sup>nd</sup> respondent herein and was during the said elections the Returning Officer for Bura Constituency. He also doubled as the 3<sup>rd</sup> Respondents Constituency Elections Coordinator for the same Constituency. According to his affidavit which constituted the evidence in chief, by virtue of Regulations 83 and 87 of the Elections (General) Regulations, 2012, he is mandated to receive election results from presiding officers in polling stations, tally the said results of National Assembly Elections, announce the said results of the tally, and deliver returns of the tallies to the Commission. It was his evidence that the Register of Voters as contemplated under Section 4 of the **Elections Act, 2011**, is composed of an electronic version and a manual version of the register, and that the two were meant to complement each other, where a voter's name was missing in one version of the register and therefore all persons who had registered as voters by the 18<sup>th</sup> of December 2013, and whose names were appearing in either the electronic version or the manual version of the Register, and came to the polling station with the identification document that they had registered as a voter with, were allowed to vote. In reliance on the affidavit of **Dima Omar**, he stated that Miti Boma Centre Polling Station, which was a mobile polling station, was big enough for the conduct of the elections, and effectively accommodated the election officials and the accredited agents and indeed, the exercise of voting was conducted in an orderly and efficient manner, since only one voter was allowed into the voting hall at a time. It was his view that the Petitioner has failed to impugn the electoral process and the validity of the results announced by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, since he has failed to show that the alleged irregularities indeed occurred, and that they were so substantial as to affect the credibility of the electoral process in Bura Constituency and further that the Petitioner has also failed to adduce evidence to show that such irregularities were premeditated and introduced by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, for the purpose of causing prejudice to any particular candidate. It was deposed by him that consequent to the challenges experienced in the deployment of the Electronic Voter Identification Device (EVID), the Presiding Officers in all the polling stations within Bura Constituency continued with the use of the photo list print out of the biometric register together with the manual register which is also known as the green book, which had at all times been designated as the primary voters register. Nevertheless, he averred that the Petitioner has failed to show that the persons allegedly denied the right to vote, were substantial enough to change the outcome of the election results for the Bura Constituency National Assembly elections. While relying on the extracts of the register of voters from the said Constituency, he deposed that all the persons listed in the petition as not having voted since their names were missing, were indeed in the Register of Voters and that the voters who were in the voting queue by the time of close of polling at 5pm were allowed to vote. It was his view that the Presiding Officers in Bilbil Primary School and Yaqrit Centre polling station assisted voters according to the procedures under Regulation 72 of the Elections (General) Regulations, 2012, and that some agents were aggrieved since the Presiding Officers in the said station refused the agents from standing inside the polling booths, as the assisted voters exercised their right to vote in secrecy. Agents, according to him, are allowed to be present in polling stations and to observe the goings on in a polling station and that allowing agents to be present as voters marked their votes would compromise the fundamental constitutional principle of secrecy of the ballot. Similarly, the elections officials, including the Presiding Officers, and the clerks, were precluded by the electoral laws, from retrieving stray ballots, erroneously cast by the voters in the wrong ballot boxes. With respect to the allegation of exclusion of agents, the witness averred that the alleged agents outlined therein have not provided their accreditation credentials, and have therefore not proven that they were indeed accredited agents. To him, all accredited agents of political parties were allowed into the voting halls as

required by law and that all the agents present at the close of counting of the ballots were given an opportunity to sign the Form 35s in each polling station in Bura Constituency save for those agents who did not stay until the end of the counting of the ballots, especially after they got tired or saw that their candidates or political parties were not faring well in the counting of the ballots. In his view, Regulation 80 gives the respective Presiding Officers, at the close of counting, and not the Constituency Returning Officers, at the close of tallying, the power to conduct (or cause) a recount of the votes, upon request of a candidate or his party agents hence the County Returning Officer was not in a position to accede to the request of the Petitioners as alleged. On the allegation of the broken seals, the witness deposed that the Petitioner has made bare allegations without any particulars, and has even failed to provide details of the serials of the seals allegedly broken in the serialized ballot boxes hence he has failed to discharge his burden of proof. To him, out of the 21,466 votes that were cast in the election for the member of the National Assembly for Bura Constituency only 166 were rejected which represents only 0.8% of the votes cast in the said election which percentage is not unusually high. With respect to 100% turnout at Eltutu Polling Station, he stated that the total number of registered voters therein was 12 voters, and that a 100% voter turnout for such a small number of people belonging to the same community is not unusual. In conclusion, he averred that since the tallying process at the tallying centre in Bura Constituency was very transparent, that is how the Petitioner was able to tell that the margin between the valid votes that were cast for him and those cast for the 1st Respondent was below 20. He sought for dismissal of the petition.

31. On cross examination DW3 stated that he was working with 90 Presiding Officers while the total officers were 450 trained in Elections Rules. He confirmed that the margin between the 1<sup>st</sup> respondent and the petitioner was 11 votes and that the total votes cast was 21,466. He stated that the Register to be used in election in Section 4 of the Act is the Principal Register of Voters and that the 3<sup>rd</sup> Respondent released the Principal Register, the Photolist, the alternative register, the duplicate register and the day book. The photolist, according to him, is a print out of the EVID both of which went through the process of inspection and the copies were certified copies. He, however, conceded that the document attached to his affidavit was the principal Register for inspection and was not the document that was availed to the Presiding Officers at the polling stations. In his view, the success rate of Biometric Voter Registration (BVR) system very high and surpassed 95%. However with respect to the laptops, he revised the said percentage to 40% although he would not admit that it was a failure since he was unaware of any Polling Station in which none of the EVID worked at all. However when referred to the Polling Diary for Kaniki Mobile Centre, he stated that the Presiding Officer stated that the EVID machine failed to operate completely while in the diary for Bukanotu Polling Station the Presiding Officer commented that the EVID was disgusting and switches off automatically. With respect to Narontu Polling Station, the diary indicated that the EVID only accepted one voter's scan. When referred to the affidavit sworn by the Presiding Officer at Basahargessa Polling Station in which it was indicated that those whose names were missing were referred to the other streams, the witness conceded that this was not possible as that station only had one stream and that there was no indication of the number of people whose names could not be found. There was however no reference to the green book. Similar position prevailed in Huruma where however 8 people could not find their names in the EVID while 6 had their names missing from the manual register and there was no indication that they were referred to any of the other streams. The said names were however not the same. The Polling Day Diary (PDD) indicated that the EVID was defective. Similar position was replicated in stream 3 of Huruma Polling Station save that there were 12 voters missing in the register but had their names in the EVID. As for Bangale Polling Station Stream one where reference was made to both manual register and EVID there was no mention of the green book. After the failure of the BVR kits the voters were allowed to vote manually in that station. At Kanaronadha polling station the EVID did not work and the details of the voters were checked manually though three voters were turned away as their identification particulars did not match. At Asako primary school polling station EVID similarly failed and resort was had to the manual register. Similarly, the witness confirmed that at Chewele Primary School the EVID failed and a candidate could not find his name in the EVID. Similarly the petitioner was unable to find his name in the manual register. However the witness reiterated that the two registers were complementary and when used together the defect would be reduced to zero. In cases however

where one's name was found missing from both registers one would not be allowed to vote. The holding of an acknowledgement slip was prima facie evidence of registration. From the records filed the witness confirmed that there was no reference to the Green book or the Principal Register and though the Presiding Officers were obliged to keep record of the names of persons whose names were missing from the register no such record was kept. He however stated that that information is not required in so far as the announcement of the results is concerned and there is no provision for it in form 35 though it may be a useful provision in future. He admitted that they simply relied on the serial numbers and did not count the actual form 35s since it was the duty of the supplier to avail the said forms. Ultimately however, it was the responsibility of the 3<sup>rd</sup> respondent to ensure this was done since it was the one which outsourced the same. Whereas the regulations required that the said forms be supplied to the agents, the witness admitted that there may have been items which were missing and from the records agents were required to make photocopies though there were instances when the photocopiers were not working. In his evidence the regulations required stamping of both the counterfoils and the ballot papers and where ballot papers were not stamped a voter would be denied the right to vote. He was however unaware whether any foreign votes were found though according to the report of scrutiny 4 ballots were rejected because they were unstamped while there were 23 ballot papers which were unstamped. He further testified that the Presiding Officers were trained with respect to assistance of voters and that during assistance of voters the agents are to be present but should not witness hence it is only the presiding officer who can tell whether or not he has followed the instructions since he is the one who carries out instructions given by the voter and is in a position to know the person to whom the voter votes. He however said that the voter can see the faces. He was however unaware of either the extent of voter literacy or the extent of voter assistance in Bura Constituency. With respect to Basahargessa polling station, the witness admitted that the Presiding Officer did not indicate he made reference to the Green Book though from affidavit of **Halifa Radul**, there was no mention of any such references despite the claim that he had an acknowledgement.

32. In further cross-examination by **Mr. Balala**, the witness testified that he was hired in 2010 by IEBC as Returning Officer and was involved in registration. Upon the close of the registration, they compiled a Register of voters which register was available for inspection in Bura. However, between the inspection and the voting, the Register may change and this may be due missing names or double registration both of which may affect the final register. Similarly, a person who is registered in another constituency may become a victim and may not vote. In his view, the Primary Register is the same as the manual Register and he did not instruct the Presiding officers to send people away when the electronic register fails because the two complement each other and are of the same quality because one is a mirror of the other since ordinarily, a register is a print out of the EVID and they are in every station. Therefore, if someone took the time to look for the details in manual register they would be found even if not in fingerprint reader. While confirming that for Huruma, there were 8 people missing from in EVID while 4 people were not be in the manual register, he said it is possible the people who not in manual register may not have registered. Referred to the 4 people whose names were not in manual register, the witness said that since their voter registration numbers were not indicated it is possible they never registered since there was no indication that they did come with acknowledgement slip which in itself may not be proof of registration. He however stated that since the registers were used for the 6 elections, if there was a defect in any of the registers it would affect all the candidates. On the counting procedure the witness stated that the Ballot boxes are opened one at a time and the contents are poured on a table in presence of all agents, sorted in the presence of agents and counting is done by displaying the ballots and objection, if any, it is raised by agents. If recount is sought, the Presiding officer orders recount and if none, then the ballots are put back in the box and form 35 filed in. There are 2 sections of form 35 with general particulars and individual candidates respectively and which one is filled first depends on the Presiding officer while agents sometimes sign at the back. Form 35 according to him is a Statutory Form which is put in the box and sealed with serial numbers and if copies available they are supplied to each agent and if not available photocopies made. According to him he did not get any information that the counting was not done according to procedure and there were no complaints that a presiding officer refused to recount votes when required. He therefore relied on form 35s to input inform 36. Referred to the copies of the Polling Diaries, the witness said that what was referred to were just extracts of

the full PDDs and hence some paragraphs and Pages were missing since most of them had only 2 pages as opposed to containing the entire daily happenings hence he was not in a position to say what the other Paragraphs contained. However Paragraph 61(4) of the Polling Day Diary is not specifically mentioned though (g) provides other materials. To him, Polling Day diary is for later day not for purposes of elections and is supposed to assist the Presiding Officer in proper carrying out of his duties hence the failure to record therein does not render the election unfair. A Green Book to the witness is a book of original entries and is different from the Primary Register but is found in the Polling Station whereas the Manual Register is a manual Register as opposed to electronic register. With respect to the people who were denied to vote due to discrepancies in their identification, the witness stated that they were not allowing old identity cards and that without Identification cards people are not allowed to vote. While confirming that there were not enough form 35s, he denied that there were none since the forms were supplied initially and at the tallying he got all of them and he never received any complaint that there were none. He denied knowledge that any presiding officer gave anyone unstamped ballot papers and therefore the presumption was that everyone got stamped ballot papers because that was the requirement. To him an unstamped ballot paper becomes rejected since a rubber stamp under Regulation 82 is a security feature as it is meant to be unique for that election and without it the officers are by law obliged to reject the ballot paper. Referred to the Polling Day Diary for Buntobanta Polling Station, the witness stated that since the agents were interfering with secrecy he reminded them of the voters secrecy and that the Presiding Officer marked the vote witnessed by the voter who it is not suggested were blind or ignorant and that each ballot paper had the face of the candidate and the candidate could be identified from the facial features.

33. In re-examination the witness reiterated that in the general elections they had the Electronic Register (the BVR), The Photo register (Manual Register) and the Green Book used to register people during the Registration process which were to complement each other and were all available in the Polling station. He clarified that the register annexed to the affidavit and the soft copy are not the same registers since the one annexed was the one used for inspection and the one which was finally used could have changes resulting from double registration and missing of names. Largely, however, the register remained the same. In his view, the challenge with respect to EVID did not affect the result because of the said complementarity. To the witness, the voter assistance was done in accordance with the law.
34. According to **Bute Annah Abdallah**, who testified as DW4, she was she was the Presiding Officer at Yaqrit Centre Polling Station (Stream 1) during the general elections that were conducted on the 4<sup>th</sup> of March 2013. According to her, she and other Presiding officers at Yaqrit Centre polling station assisted voters according to the procedures under Regulation 72 of the Regulations, and that some agents were aggrieved since the Presiding Officers in the said station refused the agents from standing inside the polling booths, as the assisted voters exercised their right to vote. At the end of the counting and tallying of results at the polling station, they filled the Form 35s as required by the Regulations, and issued them to the accredited agents present for signature but not all the agents signed the said documents since some of them left early and did not wait for the finalization of the counting of votes. In her view, all duly accredited agents were admitted into the polling station and they were allowed to freely conduct their duties whilst in the polling station.
35. In cross-examination by **Ms. Kilonzo**, the witness stated that before ballot begun it was confirmed that the boxes were empty, sealed and seals recorded and after polling the seal numbers were similarly recorded. After counting, the ballots are returned and sealed and seal numbers recorded. According to her the Returning Officer issues the packets of ballot papers with serial numbers which are recorded. When preparing form 35 the serial numbers are recorded as well as the number issued, the number used, the number spoiled and the number rejected in Polling Day Diary hence the only way to verify that the seals on the boxes were in same place at the station is in the diary. This Diary was however handed over to the Returning Officer who acknowledged receipt by going through the diary. According to the witness about 95% of the voters were illiterate at Yaqrit centre Number 047 and that the votes cast were 180, 95% of which required assistance. In her testimony, they were offered the assistance when coming in and taken to the booth by the two the Presiding Officers in the presence of agents. She conceded that she assisted the majority and that when they enter, they present their problem and a determination is made whether it is a case

- for assistance. However, the witness stated that the marking of the ballot paper was done in the presence of the agent who could see how the marking was being done.
36. In further cross-examination by **Mr. Mohamed**, the witness stated that the function of the diary is to record all activities undertaken on the Polling Day from the commencement of the Polling till closing and is part of the administrative embodiment of the daily activities. He reiterated that with regard to assistance of voters it was done in the presence of all the agents present hence she had to devise a system of allowing them to witness. In Stream one of Yaqrit Centre in which the witness was the Presiding Officer, **Nuh Nassir Abdi** got 140 votes while **Ali Wario** got 40 hence the petitioner won in this Polling Station.
37. The next witness was **Iddris Mahat Ali** who testified as DW5. According to him, he was the Presiding Officer at Bilbil Primary Polling Station (Stream 2) during the general elections that were conducted on the 4<sup>th</sup> of March 2013. He stated that voters who were in the voting queue by the time of close of polling, which time was extended beyond 5pm to 10.30 pm in all streams in Bilbil Primary (since the opening of the polls were delayed), were allowed to vote. He confirmed that he and other Presiding officers at Bilbil Primary School polling station assisted voters according to the procedures under Regulation 72 of the Elections (General) Regulations, 2012, and that there were no complaints from any agent with regard to their procedures. He, however admitted that indeed there was commotion in Stream 2 of the polling station, and the Presiding Officer had to be replaced by himself, but the voting did not go on until he arrived. He contended that all duly accredited agents were admitted into the polling station and they were allowed to freely conduct their duties whilst in the polling station.
38. On cross-examination by **Ms. Kilonzo**, the witness stated that the Returning Officer issued him with the Polling Day Diary and that after the elections he put it in the ballot box. Whereas in Bilbil Stream 2 where he was voting extended beyond 5.00 he could not recall recording that in the Diary. He admitted that there was a problem at Bilbil Polling Station and that he went there to replace the Presiding Officer and that the first entry was done by the previous Presiding Officer and he could not remember putting the time when he finished though he said that the voting stopped at 10.30p.m. When answering questions put to him by Mr Mohamed, the witness stated that he was stationed at Bilbil Polling Station although he was not the one who opened that station since he came at about 10.30a.m. He however stated that Polling started ready between 8.30a.m. and 10.00a.m. and since there were so many people in the queue the voting had to be extended to allow them vote.
39. According to **James Maro Kofa**, who testified as DW6, he was the Presiding Officer at Bangale Primary School Polling Station (Stream 1) during the general elections that were conducted on the 4<sup>th</sup> of March 2013. According to him, consequent to the challenges experienced in the deployment of the Electronic Voter Identification Device (EVID), the Presiding Officers continued with the use of the manual register, which had at all times been designated as the primary voters register and that all persons who had registered as voters by the 18<sup>th</sup> of December 2013, and appeared in either the manual register or the Electronic Voter Identification Device (EVID) and came to the polling station with the identification document that they had registered as a voter with, were allowed to vote. However, persons whose names did not appear in either of the registers in Stream 1 were referred to either Stream 2 or 3. In his view, the Petitioner has failed to show that the persons allegedly denied the right to vote, were substantial enough to change the outcome of the election results for the Bura Constituency National Assembly elections and that all the persons listed therein as not having voted since their names were missing, actually voted, and that their names are indeed in the Register of Voters.
40. Cross-examined by **Ms. Kilonzo**, the witness admitted that he knew the Petitioner and saw him on the date of the election and that he voted in stream one in his presence. He conceded that when the petitioner came there were challenges on the BVR kit whereby it took long for BVR kit to behave so there was a delay. However fingers were sighted and he was allowed to vote. According to him, the BVR was working but slow. He, however said that although they checked his name in the manual register, he could not recall where they sighted his name whether in BVR or manual Register since there was a lapse 5 months. The witness explained these challenges to the Returning Officer as this problem did not affect the petitioner alone. as there were other voters who could not locate their names in either register but had Identity Cards and acknowledgement slips. In those circumstances they were told to hang around and in his case, there was no voter

- who failed to get their names in either register and every voter with acknowledgement slip was able to vote. Although he was issued with Polling Day Diary he could not recall how many stamps he was issued with. He could not recall stating we were only issued with one IEBC stamp. According to him, voting closed at 4.25 a.m. due to the delay and this information is in the Polling Day Diary. According to him, he recorded the time he started and the time he ended as well as the serial numbers in the Polling Day Diary. He similarly recorded the number of ballot papers issued by numbers in the Diaries. To him they normally serialise the first number and the last one in the Diary and there were unused ballots spoilt and counterfoils in the Diary which he took to the Returning Officer who acknowledged receipt of the documents.
41. Cross-examined by **Mr. Mohamed**, the witness reiterated that he knew the petitioner and that although his name was not in the manual register it was found in the BVR and despite the challenges he was allowed to vote. He clarified that it is only the people whose names appeared in the register who were allowed to vote and not those whose names did not. He explained that the total number of voters were 697 in Bangale and that the petitioner got 368 votes while the 1<sup>st</sup> Respondent got 242 hence **Nuh Nassir Abdi** won in his stream.
  42. Next to testify as DW7 was **Pauline Wanja** who was the presiding officer in Huruma Primary School Stream one. According to her evidence, consequent to the challenges experienced in the deployment of the Electronic Voter Identification Device (EVID), the Presiding Officers continued with the use of the manual register, which had at all times been designated as the primary voters register and that all persons who had registered as voters by the 18<sup>th</sup> of December 2013, and appeared in either the manual register or the EVID and came to the polling station with the identification document that they had registered as a voter with, were allowed to vote while those persons whose names did not appear in either of the registers in Stream 1 were referred to either Stream 2 or 3. According to her the Petitioner has failed to show that the persons allegedly denied the right to vote, were substantial enough to change the outcome of the election results for the Bura Constituency National Assembly elections and that all the persons listed in the supporting affidavit as not having voted since their names were missing, actually voted, and that their names are indeed in the Register of Voters.
  43. On cross-examination by **Ms. Kilonzo**, the witness testified that at Huruma Primary School there were three streams and that she was issued with Polling Day Diary to record the activities of the day including the time of reporting to the station, time of opening, names and identities and the Progressive number of voters as well as the time of closure of the station. They recorded other activities such as names of voters whose names were missing and that after polling the diary was returned to the Returning Officer. According to her the BVR did not work throughout although from the beginning they had problems and after 20 minutes it started working but completely broke down at 1.00p.m. at which point she was advised to use the Manual Register. She confirmed that there were voters who had their names in the manual Register but not in the EVID machine or some had names on both. Similarly, there were voters who were in the manual register but not in the EVID. Although they resorted to manual register, some voters had their names missing from the manual registers and were referred to other streams as she did not allow them to vote in Stream One. She did not, however record the names of those she referred to streams 2 and 3 and was unaware whether they found their names in other registers. According to her they produced the identity cards and not the acknowledgement slips. Although the Returning Officer advised her to use the Manual Register, he did not verify whether the said voters appeared in his EVID. She however confirmed that those whose names were missing from EVID were nevertheless allowed to vote as their names appeared in the Manual Register. However, there were 4 people whose names appeared in the EVID but were missing in the manual Register and had their names been missing in the EVID they would not have been allowed to vote. According to her the Returning Officer gave us instructions to rely on the information we had. While answering questions by Mr Mohamed, the witness testified that the Primary Register was initially both but when the EVID failed to work, they resorted to the Manual Register although some voters names were not found and were advised to check with Stream 2 or 3 since she was only in charge of stream one. However, those who found their names in the register were allowed to vote.
  44. Next was **Alfred Ngonyo**, the presiding officer of Bilbil Primary School Polling Station stream one who testified as DW8. According to him, voters who were in the voting queue by the time of close of polling, which time was extended beyond 5pm till 10.30 pm in all streams in Bilbil

- Primary (since the opening of the polls were delayed), were allowed to vote. He confirmed that he and other Presiding officers at Bilbil Primary School polling station assisted voters according to the procedures under Regulation 72 of the Regulations and that there were no complaints from any agent with regard to our procedures but whereas there was commotion in Stream 2 of the polling station and the Presiding Officer had to be replaced, the voting did not go on until his replacement arrived. To him, all duly accredited agents were admitted into the polling station and they were allowed to freely conduct their duties whilst in the polling station.
45. In cross examination by **Ms. Kilonzo**, the witness testified that he was given Polling Day diary although he could not remember recording opening and closing time in the Polling Day Diary which at the close was placed in one of the 7 ballot boxes containing the ballot papers and took it to the Returning Officer. On the voting day, he confirmed that the EVID initially took time before working but later responded although did not work the whole day and later failed to work. During the time it was not responding he got in touch with the Returning Officer who told him to use the Manual Register. In his evidence most people got their names in the register and those with identity cards and election cards also voted. However, there were people whose names were missing in the register but with acknowledgement slips whose names he could have recorded though he could not be certain. However, those whose names were not in the manual register but had Identity cards and acknowledgement slips did not vote although he did not verify from the Returning Officer whether these names were in the Returning Officer's EVID. According to him the illiterate voters in his stream could have been a third and he confirmed that in his stream, the voters were 551. The illiterate voters were assisted in presence of the agents, who confirmed when they were voting. According to him, Regulation 72 permitted him to go with the agents to where he was assisting the voters. On being cross-examined by Mr Mohamed, he stated that the main register was Manual Register and that if one's name was missing from the manual Register they could not be allowed to vote. He reiterated that he assisted the voters in the presence of all the agents. Referred to form 35 for Bilbil Primary School, he confirmed that the total number of registered voters were 605 while the votes cast were 521 out of which **Nuh Nassir Abdi** got 502 hence the election was properly conducted.
46. Next to be called was **Ayub Harun**, who was the Presiding Officer at Basahargesa Nursery School Polling Station Stream 1. According to him, consequent to the challenges experienced in the deployment of the EVID, the Presiding Officers continued with the use of the manual register, which had at all times been designated as the primary voters register and all persons who had registered as voters by the 18<sup>th</sup> of December 2013, and appeared in either the manual register or the EVID and came to the polling station with the identification document that they had registered as a voter with, were allowed to vote while those whose names did not appear in either of the registers in Stream 1 were referred to either Stream 2 or 3. In his view, Petitioner has failed to show that the persons allegedly denied the right to vote, were substantial enough to change the outcome of the election results for the Bura Constituency National Assembly elections. With respect to the supporting affidavit, it was his view that all the persons listed therein as not having voted since their names were missing, actually voted, and that their names are indeed in the Register of Voters.
47. On cross-examination by **Ms. Kilonzo**, he testified that Basahargessa Nursery School in which he was the Presiding Officer had only one stream. According to his affidavit persons whose names appeared in the Register were allowed to vote while those whose names were not there were referred to stream 2 or 3. He however confirmed that there was only one stream hence those whose names were missing were not told to go anywhere although they were not allowed to vote either. He confirmed that on the voting day the EVID did not work though there were few voters at the beginning who used it after which they used the manual Register. Although he was aware of the Registers of people without Biometrics the same was not used although he was unable to explain why this was so. Despite the fact that the EVID failed to work and some people had their names missing, he did not liaise with the Returning Officer. Although some people had acknowledgement slips, it was his evidence that they would not allow them to vote if their names were missing from the Register. He was however unaware of the Green Book. Referred to the person whose name was missing he said it was **Ali Farah Duro**. In answer to Mr Mohamed's questions, the witness stated that the Primary Register was Manual Register and when the EVID failed to work, any person whose name was missing from the Manual Register was not permitted

to vote.

48. There was one other witness whom the respondents requested for cross-examination, **Bishar Hassan Alio**, but whose presence was availed and **Mr. Nyamodi** requested that his evidence be treated in the same manner as those of the petitioner who failed to attend the Court for cross-examination and it was so ordered.

### **SUBMISSIONS IN SUPPORT OF THE PETITION**

49. **Ms. Kilonzo** submitted on behalf of the Petitioner. She stated that the results and report of the scrutiny are in support of the ground in the Petition. That is, Bura Constituency election was not conducted in accordance with the Constitution, the Elections Act and the Rules thereunder. She submitted that there were breaches of the law, mistakes and irregularities in the conduct of the said election which affected the results of the election.
50. Specifically, she stated that: the use of Registers of Voters disenfranchised eligible Voters as there were differences in names of eligible Voters between the Electronic register and the manual register and upon failure of the Electronic register eligible voters were denied the right to vote; the assistance of illiterate voters at Wolestokocha and Yaqrit Mobile Centre Polling Stations was in breach of the law and as a result illiterate voters were disenfranchised; the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' mishandled election materials in contravention of the Constitution and the law; the Petitioner's agents were not given Forms 35 by the Presiding Officers; the number of unstamped ballots marked in the Petitioner's favour but rejected because of lack of the IEBC rubber stamp was an unusually high.
51. Due to the above irregularities, the Petitioner submitted that the outcome of the said election was substantially affected. He therefore prayed that the court vitiate the said election under Section 83 of the Elections Act. Reliance was placed on **Morgan And Others vs. Simpson & Another [1974] 3 All ER 722** and the court of Appeal decisions in **Murgor vs. Ingonga And Another, [2008] 1 KLR (EP) 191** and **Wambuge vs. Limo and Another [2009] eKLR** to the effect that no election can be free of human error, however if that human error affects the results of the election, the election should be declared void. In the English case, one of the irregularities was that the Presiding Officer failed to stamp ballot papers resulting in unstamped ballot papers being rejected. The court in analysing whether the unstamped ballots affected the results, allocated the ballots marked in favour of the candidates and reached an opinion that if ballots were properly stamped the runners-up candidate would have won the election. The court therefore found that the failure to stamp ballot papers affected the outcome of the election results. Accordingly, the Petitioner asked this court to follow the practice and principle in the ***Simpson's case*** and award the unstamped ballot papers to the candidates for whom they were marked.
52. The Petitioner further submitted that Regulation 61(1)(g) of the Regulations makes it mandatory that ballot papers be stamped at the back before they are issued to voters while Regulation 77(1) (a) states unstamped ballot papers should be rejected. As such, failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to stamp some ballot papers disfranchised the affected voters.
53. It was submitted on behalf of the Petitioner that Forms 35 returned by the Returning Officer for Komanduku Mobile Polling Station indicated that there were 7 rejected votes however during scrutiny the 7 ballot papers were not found in the ballot box. The Petitioner therefore urged the court to consider this anomaly as it was not possible to ascertain why those 7 papers were rejected and whether they were properly rejected.
54. The Petitioner submitted that Articles 38 and 83 (3) of the Constitution guarantees registered voters right to vote at an election for which they have registered for. On the strength of the testimony of **Pauline Wanja's** testimony, the Petitioner submitted that the EVID, the manual register and the Green Book used to register people during the registration process were meant to complement each other but they were not identical. Furthermore, the Petitioner submitted that the polling day diaries and affidavits of his witnesses revealed massive failure of EVIDs and voters whose particulars were not found in the manual register were not allowed to vote. The Petitioner himself experienced the same problem but his registration was confirmed from the Returning Officer's EVID, a privilege which was not accorded other people with similar challenges. He argued that the Bura Constituency Principle Register for Inspection attached to the 2<sup>nd</sup> Respondent's affidavit shows that only 2 of the Petitioner's witnesses are not appear in that

- register. Thus, it is clear that the witnesses did verify their registration and yet the particulars were not found in the manual register used during elections.
55. With regard to assistance of illiterate voters, the Petitioner submitted that the Presiding Officer could only mark a ballot paper on behalf of a voter in the presence of agents. As such, the Petitioner argued that in Yaqrit, Walestokocha and Bibil Polling Stations, 16 illiterate voters were assisted by the Presiding officers in the absence of party agents and hence these voters were denied their right to vote for their preferred candidates.
56. The Petitioner submitted that in many Polling Stations the Petitioner's agents were not provided with the Forms 35 contrary to Regulation 79 of the *Elections (General) Regulations, 2012* and as a result he was unable to verify the results of the Election.
57. On the strength of the Court of Appeal decision of **James Omingo Magara vs. Madson Onyongo Nyamweya [2010] 4KLR (EP)**, the Petitioner submitted that the scrutiny and the recount of the votes disclosed numerous irregularities which the court should not shut its eyes to. Particularly, the failure by the Presiding Officers to record the occurrences in the Polling Stations in their respective polling day diaries during elections denied the Petitioner a chance to verify some facts important to his case. The Petitioner also sought to distinguish the Supreme Court judgment in *Raila Odinga's case* (supra) on account that in the present Petition the vote margin is only 11 votes.
58. In conclusion, the Petitioner prayed that the Court consider in totality the conduct of Bura Parliamentary Elections and find that the law was not complied with and the outcomes thereof were affected. Accordingly, declare the said elections void.

## **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

59. Relying on the 1<sup>st</sup> Respondent's written submissions filed herein, **Mr. Balala** submitted that the Petitioner had not discharged the burden of prove required in proving that there was non-compliance with electoral laws by either of the 3 Respondents and that the non-compliance affected the results of the contested elections. He stated that having failed to discharge the burden proof on his shoulders, the Petitioner shifted it to the Respondents while at the same time trying to fish out materials from the scrutiny and recount report to widen the grounds of his Petition. As such, the Petition must fail.
60. **Mr. Balala** further submitted that the Petitioner had no *locus standi* in contesting the validity of the elections for Bura Constituency as he continues to derive a benefit from the same election process being the elected speaker of Tana River County Assembly. Therefore according to him, the prosecution of this Petition by the Petitioner is a violation of Chapter 6 of the Constitution and an abuse of the courts process.
61. Regarding the standard of proof required in election matters, **Mr. Balala** submitted that the Supreme Court of Kenya in the *Raila Odinga's case* (supra) set the threshold of proof as "... above the balance of probability, though not as high as beyond reasonable doubt." In his opinion, by failing to prove the allegations contained in the Petition, the Petitioner had failed to discharge the burden of proof on his shoulders to the required standards.
62. With respect to disenfranchisement of registered voters, it was submitted on behalf of the 1<sup>st</sup> Respondent that the Petitioner's allegations that the use of manual register after failure of EVID disenfranchised voters is not sufficient enough to warrant the voidance of the contested election. The *Raila Odinga's case* was again relied on to this effect.
63. Furthermore, on the strength of *Raila Odinga's case* (supra), the 1<sup>st</sup> Respondent submitted that it was proper and legal for the IEBC official to resort to manual register. He submitted that the Principal register which is also referred to as manual register was a print out of the EVID and all the registers including the green book formed a complementary record of registration. He reiterated the 2<sup>nd</sup> Respondent's evidence that there was a probability that the voters who claimed to have registered but could not find their names in any register may have been victims of double registration and therefore were left out during the shifting of registers. Others could have been registered in other Polling Stations other than where they went to vote. As such, despite being in possession of an acknowledgement slip, where a person failed to appear in any of the registers, it would have been irregular for the IEBC officials to allow such a person to vote. Reliance was placed on the findings in **Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries**

**Commission (IEBC) & 10 OTHERS [2013] eKLR.**

64. The 1<sup>st</sup> Respondent further submitted that the law provides for a window of inspection and verification of registration and mechanisms of addressing any emerging issues before elections. Therefore, the court is not the proper forum to adjudicate on issues of registration which were preliminary to the election. The 1<sup>st</sup> Respondent implored the court to also consider that even if the EVID failed and a few people were disfranchised, the voter turnout was very high and it would be it wrong to disfranchise them by nullifying the said election. Finally on this issue, the 1<sup>st</sup> Respondent invited the court to consider of what use an order for fresh elections would be simply because some people were not registered properly. According to him, ordering fresh elections will result to the same problem with the same registers and back to another Petition.
65. **Mr. Balala** submitted that the crux of Petitioner's case is that the court should consider marked unstamped ballot papers that were rejected and consider them in favour of the candidates the marks appear for, as was done in **Morgan vs. Simpson (supra)**. Doing that, according to the 1<sup>st</sup> Respondent would be contrary to Regulation 77(1) (a) of the ***Elections (General) Regulations, 2012*** which in mandatory terms "shall" requires ballot papers without IEBC stamp to be rejected.
66. Furthermore, the 1<sup>st</sup> Respondent submitted that the law under Section 83 of the Elections Act is different in wording from the English law set out in the Morgan's case. Section 83 of the Elections Act requires that for an election to be declared void, one has to show that there was none compliance with principles of Constitution. The said principles are contained in articles 38(3), 81 and 86 of the Constitution. He cited the case of **Karauri vs. Mbogo & Another (2008) 1 KLR (EP)** in which the court cited ***Morgan -v- Simpson (supra)*** and went on to explain that Section 83 of the Elections Act had modified ***Morgan -v- Simpson*** to the effect that it is no longer enough to prove that malpractices took place in an election but one must establish to the satisfaction of the court that such malpractice were of such nature and magnitude that it affected the validity of the outcome. Reliance was place on **Raila Odinga vs. IEBC & Others (supra)**. According to the 1<sup>st</sup> Respondent, the authority in ***Raila Odinga's case*** overrides ***Morgan v Simpson*** and indeed any Court of Appeal decision not consistent to it is bad law.
67. Therefore, the 1<sup>st</sup> Respondent's submitted that the English law and the electoral regime on which ***Morgan v Simpson*** case was decided is very different from the Kenyan system and therefore the same principles cannot be said to apply *mutatis mutandis*. Moreover, the electoral laws in England has also changed since the Morgan's case. Still, the 1<sup>st</sup> Respondent submitted that **Lord Denning** in the ***Simpson*** case attributed the failure to stamp ballot papers to the Presiding Officers working in a hurry. The same has not been proved by the Petitioner in the present Petition he submitted.
68. The 1<sup>st</sup> Respondent went on to submit that considering the unstamped ballot papers in the manner suggested by the Petitioner will open a floodgates of mischief for candidates in future to rig results or spoil a victors margin by stuffing the ballot box with pre-printed but unstamped ballot papers after the fact. It would set a bad precedent and encourage resort to rejected votes as a means of determining election Petitions contrary to the considered wisdom of the framers of the regulation to exclude such votes from the final tally. As such, according to him there is a presumption that the unstamped ballot papers were not issued by the IEBC officials and therefore they can be considered under any circumstances. Thus according to the 1<sup>st</sup> Respondent, the true and credible account of the contested election for the court should rely on is the scrutiny report.
69. With respect to disenfranchisement of illiterate voters, the 1<sup>st</sup> Respondent submitted that Regulation 77 permits voter assistance by persons of the voter's choice and if that person is unavailable, by the Presiding Officer. The agents are allowed to witness the assistance but should not be present in the compartment of a Polling Station while a voter is in the compartment for the purposes of marking his or her ballot paper. As such, according to the evidence of the assisted voters the agents were lawfully barred from looking at the ballot itself or entering the booth. In this regard, the case of in **Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman (2010) eKLR** was cited to the effect the right to secret ballot is fundamental and in areas where clan loyalty is high like Bura Constituency, the clan members disguised as agents could be used to intimidate clan members to vote for their clansman.
70. The 1<sup>st</sup> Respondent submitted that although the Petitioner asked the court to reject ballot papers marked with signatures, Regulation 77(2) ***Elections (General) Regulations, 2012*** requires that:

**“(2) A ballot paper on which a vote is marked which bears marks or writing which may identify the voter, shall not by that reason only (emphasis by 1<sup>st</sup> Respondent) , be void if an intention that the vote shall be for one or other of the other candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby.”**

71. Thus, the 1<sup>st</sup> Respondent asked the court to award him all the ballots cast in his favour but were rejected by the IEBC because the signatures thereof were not identifiable. They are: 1 ballot with a signature **Darime** Polling Station; **Hirimani** Secondary School Polling Station-1 vote with a signature mark and **Yaqrit** Polling Station- 1 vote with a signature mark. Thus according to him, with the addition of these 3 votes the 1<sup>st</sup> Respondent remains the winner of the contested election by 8568 against the Petitioner’s 8557.
72. Further, the 1<sup>st</sup> Respondent submits that if the court was to consider the unstamped ballots as suggested by the Petitioner, then there would be a deduction of 3 votes from the Petitioner’s IEBC count for Wekoye Polling Station before adding the unstamped ballot papers in favour of both. However, the 1<sup>st</sup> Respondents argued that he would still be the winner by 6 votes.
73. On the strength of **Joho vs. Nyange (2008) 3 EKLK (Ep)** and **Ramadhan Seif Kajembe vs. R O Jomvu & 3 Others Mombasa Election Petition 10 of 2013**, the 1<sup>st</sup> Respondent urged the court to find that the irregularities alleged by the Petitioner had no effect on the outcome of the election.
74. The 1<sup>st</sup> Respondent also asked the court to find the Petitioner guilty of interfering with the voting process by insisting that his agents be allowed to witness the illiterate voters mark ballot papers at Yaqrit Polling Station, contrary to the law.
75. Accordingly, the 1<sup>st</sup> Respondent submitted that the Petitioner had not proved contravention of any of the salient Constitutional principles. Therefore, the court should dismiss the Petition with costs to the Respondents. He asked the court to bearing in mind that the 1<sup>st</sup> Respondent was represented by two advocates.

## **2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS’ SUBMISSIONS**

76. **Mr. Okonjo** submitted on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He began by emphasizing the role of the court to uphold and protect the democratic will of Bura people where that will is discernible. In executing this obligation, he submitted that the court must direct its mind to the overriding constitutional principles that underpin the electoral system and electoral processes as established under the Constitution, the Act and the Regulations. These principles are contained under Article 1(2) of the Constitution which bestows the people the power to exercise their sovereign power either directly or through their democratically elected representatives. Article 4(2) of the Constitution which declares Kenya a multi-party democratic state founded on the national values and principles of governance referred to in Article 10 of the Constitution. Also Articles 81 and 86 of the Constitution. Reliance was placed on the authority of **Raila Odinga & 5 Others vs. IEBC and 3 Others (supra)**.
77. On the authority of **Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others [2013] eKLR**, it was submitted on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the court’s primary concern should be whether the elections were conducted in a free, fair and transparent manner that reflects the will of the Bura people.
78. Accordingly, **Mr. Okonjo** submitted that the court has done its part in ordering for scrutiny and recount and it is clear the 1<sup>st</sup> Respondent garnered majority of the votes. As such, the democratic will of the Bura people is sacrosanct regardless of the win margin of votes. He urged the court to discourage Petitions brought purely on the ground of a narrow margin.
79. With respect to the burden of proof, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ again relied on the **Raila Odinga’s case (supra)** and Section 107 of the **Evidence Act** and Rules 10(1)(e), 10(3)(b), and 12(2)(a) of the **Elections (Parliamentary And County Elections) Petition Rules, 2013** to the effect that the Petitioner bears the burden of proving his case as contained in his Petition. On the standard of proof, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submits that what the Petitioner must discharge is

- beyond reasonable doubt since he has throughout his Petition, accused the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of deliberately colluding with the 1<sup>st</sup> Respondent to rig the elections in favour of the 1<sup>st</sup> Respondent. The said allegations impugn the Respondents with electoral malpractices that attract criminal sanctions hence he must prove his case beyond reasonable doubt.
80. Regarding the irregularities alleged by the Petitioner, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that elections are human endeavours and there are bound to be irregularities. Consequently, before the court can nullify an election, it must be satisfied that the evidence of the malpractices before it is substantial as to affect the credibility of the electoral process and that such irregularities were premeditated and introduced by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for the purpose of causing prejudice to the Petitioner. Again the Supreme Court findings in the **Raila Odinga's case** cited in support. In this regard further reliance was placed on the authorities of **Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others** (supra), **Steven Kariuki vs. George Mike Wanjohi & 2 Others [2013] eKLR**.
81. With respect to disenfranchisement of voters, the **Mr. Okonjo** submitted that the Petitioner failed to prove that there were any voters who were disenfranchised. However, according to him, even if indeed there were inaccuracies in the register, they were not pre-meditated by the Respondents or calculated to disenfranchise the voters to the detriment of the Petitioner. In addition, the failure of the electronic voter identification device was a difficulty experienced countrywide, and which difficulty was not an irregularity, as the entire electoral process is essentially a manual process, and technology is only meant to complement it. Reliance was also placed on the **Raila Odinga's case (supra)**.
82. With regard to the rejected ballot papers that the Petitioner alleges were in his favour, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that Regulation 77 of the Regulations states that unstamped ballot papers should be rejected. Therefore, the presence of the said rejected ballots cannot be a ground for the nullification of an entire election. Further, the issue of unstamped papers was an afterthought after the Petitioner failed to prove that the ballot boxes were tampered with. In his view, the Petitioner did not provide any proof that the said unstamped ballots were legitimate and issued by the IEBC. Accordingly, as per the Petitioner's evidence, the court must subtract the unstamped ballot from the Petitioner's tally.
83. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further submitted that the assistance of voters was done according to Regulation 77 and Article 38(3) of the Constitution. That is by allowing the agents to witness but not allowing them into the polling booth. As such, the Petitioner's claim that agents should have been allowed to stand inside the polling booth would have been a violation of the secret ballot as envisaged in article 38 (3) of the Constitution.
84. Accordingly, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents asked the court to find that the elections were conducted in accordance with the principles laid down in the Constitution and the electoral law and he 1<sup>st</sup> Respondents were validly elected as the Member of Parliament for Bura Constituency.

## **THE LAW**

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

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

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

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

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

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

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

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

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

87. It follows that the judiciary when carrying out its mandate under the Constitution and other legislative enactments does so under the power delegated to it by the people of the Republic of Kenya. In other words there is a social contract between the people and the judiciary under which the people have agreed to delegate their powers to *inter alia* the judiciary hence that power must be carried out in the interest of the people of Kenya. Public policy therefore becomes very crucial in the exercise of such delegated authority. However, public policy has been described as unruly horse, and when once you get astride of it you never know where it will carry you. Judges are to be trusted as interpreters of the law than as expounders of what is called 'public policy'. The matters that fall within the scope of the doctrine of public policy have been long since defined, and if the consequences of such a condition being held to be valid, will be so deplorable, it is for the legislature and not the Courts to intervene. See **Richardson vs. Mellish 130 ER 2, Bing 252; Re Mirams [1891] 1 QB 594.** It has therefore been stated that public policy is not a safe or trustworthy ground for legal decision, and no Court may invent a new head of public policy. See **Janson vs. Drienfontein Mines [1902] AC 484.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*(i) by secret ballot;*

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

*(iii) conducted by an independent body;*

*(iv) transparent; and*

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

91. Section 83 of the Act provides:

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

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

### **PRINCIPLES**

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

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

**“The right of a people to freely elect their representative in a credible electoral process is recognised as a human right. Article 21 of Universal Declaration of Human Rights which was adopted and proclaimed by the General Assembly of the United Nations in Resolution 217A(III) on 10<sup>th</sup> December 1948 provides that everyone has the right to take part in the**

governance of his country, directly or through freely chosen representative. Everyone has the right to equal access to public service in his country. The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures... Article 25 of the International Convention on Civil and Political Rights (1966) which Kenya ratified and expressed her accession to on 1<sup>st</sup> May 1972 states that every citizen shall have the right and the opportunity, without any distinctions mentioned in Article 2 and without unreasonable restrictions (1) to take part in the conduct of public affairs, directly or through freely chosen representative (2) to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors (3) to have access on general terms of equality, to public service in his country... In its Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers which was commemorated on 27<sup>th</sup> October 2005 at the United Nations in New York and which was endorsed by among others, the African Union, the Commonwealth Secretariat and the Inter-Parliamentary Union, (organisations to which Kenya is a member) the United Nations Electoral Assistance Division stated that genuine democratic elections are a requisite condition for democratic governance, because they are the vehicle through which people of a country freely express their will, on the basis established by law, as to who shall have legitimacy to govern in their name and in their interests. Achieving genuine democratic elections is a part of establishing broader processes and institutions of democratic governance. Therefore, while all election processes should reflect universal principles for genuine democratic elections, no election can be separated from the political, cultural and historical context in which it takes place...The makers for effective implementation of the indices of free and fair elections are as follows: Electoral law and system; Constituency delimitation; Election management; The right to vote; voter registration; civic education and voter information; Candidates, political parties and political organisation, including funding; Electoral campaign, including protection and respect for fundamental rights, political meetings, media access and coverage; balloting, monitoring and results and finally complaints and dispute resolution.”

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

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

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

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

98. It is worth repeating that the Court is aware of its duty to consider and determine the evidence adduced by the parties to the election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters to elect a representative of their choice. This position is informed by the fact that election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, they are nonetheless disputes of great public importance and this is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that election petitions

should not be taken lightly. Generalised allegations are therefore not the kind of evidence required to prove election petitions but they should be proved by cogent, credible and consistent evidence. The court, apart from doing justice between the parties, must also consider the aspect of public interest in the electoral process which is to give the voters a duly elected member representing them in Parliament. The jurisdiction to hear and determine an Election Petition is therefore a special jurisdiction donated to the court. See **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others Nairobi HCEP No. 13 of 2008**; **Joho vs. Nyange & Another (No. 4) [2008] 3 KLR (Election Petitions) 500**; **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 352; [2000] 1 EA 115**; **Wanguhu Ng'ang'a & Another vs. George Owiti & Another Election Petition No. 41 of 1993**; **Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others Nairobi HCEP No. 11 of 2008**; **Mahamud Muhumed Sirat vs. Ali Hassan Abdirahman & 2 Others Nairobi HCEP No. 15 of 2008**.

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

**“The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”**

100. In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred. That is not the case in election petitions. The standard is higher than proof on a balance of probabilities but lower than the standard beyond reasonable doubt required in establishing criminal cases unless the allegations are made of electoral malpractices, for instance bribery, which require higher proof. The allegations in a petition are grave and consequently the party laying them is expected to present evidence that is cogent, consistent and credible. See **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others** (supra); **Joho vs. Nyange & Another** (supra); **Wanguhu Ng'ang'a & Another vs. George Owiti & Another** (supra); **Muliro vs. Musonye & Another [2008] 2 KLR (EP) 52**; **Onalo vs. Ludeki & 2 Others (No. 3) [2008] 3 KLR (EP) 614**; **William Kabogo Gitau vs. George Thuo & 2 Others** (supra); **Mbowe vs. Eliufoo** (supra); **Joseph Wafula Khaoya vs. Eliakim Ludeki & Lawrence Sifuna Election Petition No. 12 of 1993**.

101. Under section 107 of the *Evidence Act*, the burden of proof lies upon the person who desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts. The section lays down that if a person wishes the court to believe in the existence of a particular fact, the onus of proving that fact is on him, unless the burden of proving it is cast by any law on a particular person. The burden of proving that the election is liable to be set aside for corrupt practices is heavily on the petitioner because it is he who seeks to have the election declared null and void; the standard of proof has to be to the satisfaction of the court since the court cannot be deemed to be satisfied if it is in doubt. See **Hassan Ali Joho & 2 Others vs. Hotham Nyange & Another Civil Appeal No. 198 of 2007**; **Amolak vs. Bhagwandas-A [1977] SC 8151**; **Mbowe vs. Eliufoo** (supra).

102. The burden is heavy on him who assails an election petition which has been concluded. He must prove the allegation to the satisfaction of the court and what is deemed to be to the satisfaction of the court is always difficult to decide and varies in practice according to the nature of the case. The standard of proof depends on the seriousness of the allegations made. The burden of proof rests throughout on the petitioner and the quality of evidence that is advanced is to be considered with thoroughness and gravity which is commensurate with the dire consequences that can follow. See **Manson Oyongo Nyamweya vs. James Omingo Magara & 3 Others Kisii HCEP No. 3 of 2008**; **Ayub Juma Mwakesi vs. Mwakwere Chirau Ali Mombasa HCEP No. 1 of 2008**; **Nelson vs. Attorney General & Another [1997] 2 EA (CAT)**.

103. In Madundo vs. Mweshemi & AG Mwanza HCMC No. 10 of 1970, the rationale for placing a heavier burden on the petitioner than in ordinary civil cases was given as follows:

**“An election petition is more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons. To require the petitioner to satisfy such standard of proof is not only fair but reasonable in the circumstances. Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations but also necessary to prove that the allegations affected the results of the election. No doubt a person who seeks to avoid an election results has the duty of leading evidence in support of this allegation and without doing so, his petition would fail, although the trial court is not bound to decide an election petition only on the petitioner’s evidence.”**

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

105. In Kalembe Ndile’s Case, it was held:

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

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

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

***“...because it (elections) is conducted by human beings, there bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affects***

***the outcome of the results that the court will have no option other than to nullify the said results.”***

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

### **DETERMINATIONS**

108. At the commencement of the hearing of the petition the Court in the exercise of the powers conferred upon it under Section 82 of the Act gave directions for the scrutiny and recount of the votes cast in the Constituency. At the end of that exercise the Deputy Registrar submitted a report which showed that the 1<sup>st</sup> respondent had won the election with a margin of 11 votes which was the same margin that was declared by the Returning Officer. However, there were some discrepancies noted. Since these discrepancies may affect the outcome of the petition, it is important that the same are dealt with *in limine*.

109. Whereas the number of valid votes declared to have been cast in favour of the 1<sup>st</sup> respondent were 8,586, the report of the recount actually found that the number of valid votes cast for that particular candidate were 8568. As for the petitioner whereas it was declared that he had garnered 8,575 votes the recount found that he had garnered 8,557 votes.

110. Regulation 77 of the Regulations provides as follows:

1. ***At the counting of votes at an election, any ballot paper***

- a. ***which does not bear the security features determined by the Commission;***
- b. ***on which votes are marked, or appears to be marked against the names of, more than one candidate;***
- c. ***on which anything is written or so marked as to be uncertain for whom the vote has been cast;***
- d. ***which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station;***  
***or***
- e. ***is unmarked,***

***shall subject to subregulation (2) be void and shall not be counted.***

2. ***A ballot paper on which a vote is marked –***

- a. ***elsewhere than in the proper place;***
- b. ***by more than one mark; or***
- c. ***which bears marks or writing which may identify the voter,***

***shall not by that reason only be void if an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and is not shown that the voter can be identified thereby.***

111. Some of the disputed votes were so disputed on the basis that the dotted and circular marks did not constitute a “mark” and others on the ground that they bore a signature mark against the candidate. It is trite that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches and this is because where possible, the courts seek to give effect to the will of the electorate. Once it is clear to the Court that the will of the electorate can be discerned from the ballot paper, the Court ought to give effect to that will as expressed by the voter and ought not to deny that voter the right to exercise his democratic rights by unnecessarily importing technicalities into the process. ***Black’s Law Dictionary***, 9<sup>th</sup> Edition by Bryan A. Garner at page 1055 defines “mark’ as “a symbol, impression, or feature on something, usually identify it or distinguish it from something else”. It is therefore

my view and I so hold that in dealing with the rights of the people to exercise their democratic rights with respect to their representation the Court ought to give a liberal meaning to the words used and ought not to unduly restrict the meanings of the words if the result would be to disenfranchise the electorates. In my view therefore the fact that a voter has used a “dot”, a circular mark or even a signature does not necessarily render that vote invalid if his intention can clearly be discerned therefrom. Similarly, where the mark extends outside the box meant for a particular candidate the same ought not to be rejected unless that mark crosses over to the box meant for another candidate in such a way that it is not possible to determine which candidate the voter intended to vote for. This was the position with respect to one of the ballot papers for Dukanotu Primary School claimed by the petitioner which in my view was properly rejected since it contained two marks in different places and with respect to different candidates. There were votes in which the stamp impression were not legible and were disputed by the petitioner that the stamp could possibly have been a “rejected/spoilt” stamp. In election petitions the presumption is always that the elections were properly conducted hence a person who seeks the Court to find otherwise ought to prove that the same were not so conducted. Therefore to expect the Court to find that a stamp which was deemed by the Presiding Officer to have been that of a valid vote to be otherwise based on conjectures and presuppositions would be to shift the onus of proof in election petitions which is on the petitioner. It is therefore my view that the decision of the Presiding Officer authenticating the aforesaid votes cannot be faulted without evidence to the contrary.

112. That brings me to the related matter of the status of unstamped ballot papers. Under Regulation 77(1)(a) aforesaid it is clear that the presiding officer is obliged to reject a ballot paper which does not bear the security features determined by the Commission. This particular rule is not subject to the exceptions in sub-regulation (2). The only question is whether the Commission’s rubberstamp constitutes a security feature pursuant to regulation 77(1)(a). Regulation 69(1)(g) of the said General Regulations require an election official before issuing a ballot paper to a voter to stamp the ballot paper at the back with the official mark of the Commission. The consequences of the omission of such a stamp was stated in **Alexander Arthur Ojera vs. Returning Officer and A A Banya Gulu HCCC No. 3 of 1961 [1961] EA 482** in which it was held as follows:

**“The provisions of section 46(1) of the Legislative Council (Elections) Ordinance, 1957, are mandatory and give the returning officer no power to accept a ballot paper which is in fact lacking the official stamp or be, or whether or not it bears writings whereby a voter can be identified. It follows that the “decision” referred to in subsection (3) cannot be a decision to accept a ballot paper which is unstamped or bears writing of the kind specified. It can only be a decision on the question whether or not a ballot paper bears of official mark, or whether or not it bears writings by which the voter can be identified. It is on those questions that the returning officer’s decision, under subsection (3), is final and cannot be questioned on an election petition. This is the only construction of the section by which subsections (1) and (3) can be reconciled...In the present case, it was not open to question that the ballot papers with which we are concerned had no official mark and did bear writings by which the voters could be identified. Consequently, the returning officer had no option but to reject them after showing them to the candidates. Even though the candidates wished them to be accepted, it was a contravention of section 46(1) for the returning officer to accede to their wishes.”**

113. In the same case it was held that the purpose for requiring the rejection of a ballot paper for want of an official mark must be to show that the paper has been duly issued to a voter by the proper authority and that it is not, for example, one which has been forged or has been unlawfully obtained or issued.

114. It follows that the unstamped ballot papers were properly rejected by the presiding officer(s).

115. The petitioner contended that since the number of the unstamped ballot papers were unusually high in his case, the petition ought to be allowed since had the same been stamped the results of the elections would have been affected. Assuming that the said ballot papers were issued by the Commission’s agents and were for some reason unstamped the question would be whether that would be a reason to nullify an election. Obviously if the failure to stamp the said ballot papers

was intended to ensure that most of the votes cast in favour of the petitioner were rejected, that would in my view be a ground for nullifying the elections if it is proved that the rejected votes as a result thereof would have affected the results as alleged by the petitioner herein. In **Writ No. J1/6/2013** between **Nana Addo Dankwa Akufo-Addo & Others vs. John Dramani Mahama & Others** the Supreme Court of Ghana expressed itself as follows:

**“Compliance failures do not automatically void an election; unless explicit statutory language specifies the election is voided because of the failure. There is no such explicit language in Article 49 or C.I. 75. In election jurisprudence, as in Canada, when election officials fail to comply with election codes, the statutes are evaluated as directory unless the officials’ committed fraud, the statute expressly declares noncompliance fatal, or the noncompliance changed or muddled the result. *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 626 (Mass. 1982) (“A voter who has cast his ballot in good faith should not be disenfranchised ‘because of the failure of a ministerial officer to perform some duty imposed upon him by law.’”) *Att’y Gen. ex rel. Miller v. Miller*, 253 N.W. 241, 243 (Mich. 1934); *Pyron v. Joiner*, 381 So.2d 627, 629(Miss. 1980) (en banc) (quoting authorities that stated that elections held at the proper time and place and under the supervision of competent persons will not be overturned for irregularities in the manner the election was conducted unless the contestant proves that legal votes were rejected, illegal votes were allowed, or a combination in a number sufficient to change the results or render them uncertain).”**

116. In this case I do not have evidence on the basis of which I can find that the unstamped ballot papers were issued by the officers of the Commission and in light of the mandatory provisions of Regulation 77(1)(a) as read with Regulation 69(1)(g) aforesaid were properly rejected

117. With respect to assistance of voters Regulation 72(2) of the General Regulations provides that where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such a voter, in the presence of the agents. The issue that arises is whether in conducting his/her duties pursuant to the aforesaid provisions, the presiding officer is obliged to ensure that the agents actually witness the person to whom the voter has cast his vote. To do so would in my view be contrary to the provisions of Article 38(3)(b) of the Constitution which provides for the right of a voter to vote by secret ballot. This is also covered under Regulation 72(7) which provides that:

***“no person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this subregulation commits an offence.”***

118. This position was affirmed in **Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman** (supra) in which it was held that

**“It was evident from the evidence adduced in regard to the manner in which persons who are illiterate voted that the principle of the secrecy of the ballot was thrown out of the window. A practice emerged, which practice was condoned by election officials, by which agents of the various candidates were allowed to mark ballot papers on behalf of the illiterate voters. In some polling centres the illiterate voters were required to either loudly state the candidate of their choice upon entry into the polling station or were asked by the agents to state who their preferred candidate was so that the agent for the stated candidate could mark the ballot paper on his or her behalf. Such voter was denied the opportunity to exercise his right to vote in secrecy. It appeared that the candidates encouraged this breach of the law with a view to roping in members of their respective clans to vote for them. The right to vote for a person of your choice in a secret ballot is a basic human right. It is a fundamental human right that is recognised by international conventions and by our Constitution and electoral law.”**

119. I therefore find that since the voters who were assisted by the presiding officers did not allege that they had with them persons of their choice who would have assisted them, the fact that they were assisted by the presiding officers was itself not contrary to the law. There was an allegation by some of the witnesses that since the agents were not present, they were unable to tell whether or not they actually voted for the candidates of their choice. As I have already said it was incumbent upon the voters to appear with their assistants in the absence of which the presiding officers were properly entitled to offer such assistance. That the number of agents present would not have offered conducive environment for the voters to exercise their rights in secrecy is not in doubt. It would however have been unlawful for the presiding officers to have required the voters to declare their candidates in advance in order for the presiding officer to decide which agent to accompany the voter to the booth. As was held in Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman (supra):

**“The petitioner has established serious breaches of the law by the electoral body which allowed agents of candidates to assist illiterate and incapacitated voters without swearing an oath of secrecy, and secondly, in allowing the said agents to assist more than one voter in a polling station. It was clear to the court that the presiding officers at the said polling centres abdicated their responsibilities to ensure that incapacitated and illiterate voters were given an opportunity to vote for a person of their choice without intimidation or being coerced to disclose their preferred choice upon gaining entry into the polling stations. Electoral laws are enacted to be applied equally to all the constituencies in the country except where the law has specifically given exceptions after taking into account the special circumstances of the particular voter or the particular voting area. The failure by the electoral officers to allow the illiterate voters to express their wish in a secret ballot meant that the said officers breached the law.”**

120. There however was evidence that in certain instances, the agents did witness the voters cast their votes. That was clearly a breach of the law and ought not to have been allowed. The Court therefore finds that in allowing agents to confirm the candidates for whom the voters cast their votes there was breach of the law. That breach however is not enough to entitle the Court to nullify the elections. A similar position arose in Ng’weshemi vs. Attorney General Mwanza HCMCC No. 5 of 1970 where the High Court of Tanzania expressed itself as follows:

**“The question whether non-compliance with the provisions of the Act relating to elections affected the result of the election would depend on the nature of the particular complaint or irregularity and the margin of victory... Where a specific irregularity has been proved and the number of votes affected established with some provision then allowance should be made for that and if after such adjustments have been made the successful candidate still retains some margin of victory then the irregularity has not really affected the result of the election... Where, however, the complaint goes to the root of free election such as a case of organised campaign or undue influence, and it appears that a substantial number of votes were obtained thereby, then the full extent of such wrong practice may never be known the Court may be inclined to hold that it affected the result of the election without proof of actual reversal of the result... The failure to provide screened compartments where electors could cast their votes secretly, screened from observation, contravened the principle of the secrecy of the ballot but considering that it affected 4 out of 106 polling stations and there was no question of any sinister motive, it cannot be said that it affected the result of the election. The conditions were the same for both candidates. Had it affected a majority of the polling stations then one may possibly say that this was not really an election as envisaged by the Act.”**

121. As was held in James Omingo Magara vs. Manson Onyongo Nyamweya & 2 Others Civil Appeal No. 8 of 2010 (supra), the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. It has not been alleged that the presence of the agents did affect the results of the election. Similarly with respect to the voters

who were unable to tell whether or not the presiding officer did place the mark where they intended, it cannot be said that the results were thereby affected. There were, however three witnesses who testified that the mark was placed in favour of a candidate who they did not intend to vote for. One of them however admitted that she identified the person she intended to vote for by his photograph and after the mark was placed thereat it was dropped in the box. Taking into account the number of those who claimed that their ballot papers were not cast in favour of their candidates of choice in comparison to the margin between the petitioner and the 1<sup>st</sup> respondent I am unable to hold that the said allegation even if true did affect the result of the election.

122. From the evidence on record it is clear that contrary to the contention by the respondents that the manual register and the electronic register were complementary, there were names which were missing in either of the said registers. In other words whereas some of the names were missing in the manual register but were in the electronic register similarly some names were found missing in the electronic register but were found in the manual register. In the circumstances of this case I am unable to find that the manual registers and the electronic registers which were in use in this Constituency were complimentary. It follows that there is a probability that the breakdown of the electronic register may have affected some of the potential voters. I am however cognisant of the holding by the Supreme Court in ***Raila Odinga's case*** in which the highest Court in the land seem to have taken into consideration the fact that “**no credible evidence was adduced to show that such irregularities were premeditated and introduced by the 1<sup>st</sup> Respondent, for the purpose of causing prejudice to any particular candidate**”. This view seems to have modified the position in ***Morgan and Others vs. Simpson & Another*** (supra) and ***Gunn and Others vs. Sharpe and Others*** (supra). In my view the above expression seems with due respect to have been too broadly worded. Where the electoral process has been so badly conducted that no meaningful election can be said to have taken place the intention of the body charged with the management of the electoral process may well be immaterial. In this petition however, I am unable to find that the elections were so badly conducted that no meaningful elections can be said to have taken place. Suffice it to say however that despite my misgivings about manner in which our Supreme Court couched the above sentence, I am Constitutionally bound by the said decision hence I find that there is no evidence on the basis of which I can find that the failure by the Commission to ensure that the two registers were complimentary was premeditated and was meant to cause prejudice to a particular candidate. The Supreme Court of Ghana in ***Nana Addo Dankwa Akufo-Addo & Others vs. John Dramani Mahama & Others*** (supra) expressed itself as follows:

**“In this petition as enumerated above by the 1<sup>st</sup> Respondent, no evidence was adduced to show that the noncompliance were premeditated and carried out by the presiding officers who were agents of the 2<sup>nd</sup> Respondent, with the intent of causing prejudice to any particular candidate or change the election's outcome or to render it uncertain. Courts usually apply the election code to protect—not defeat—the right to vote. Public policy favours salvaging the election and giving effect to the voter's intent, if possible. The right to vote is at the core of our democratic dispensation, a principle I have earlier affirmed in this opinion with reference to *Tehn-Addy and Ahumah-Ocansey* line of cases supra.”**

123. With respect to allegation that the Commission's agents failed to issue the party's agents with form 35s as stipulated under Regulation 79 of the Regulations, this was regrettably explained as due to lack of sufficient numbers of the said forms and that the said agents were permitted to photocopy the same.

124. However before I deal with the issue, it is important to understand the role of agents in an election petition. In ***Nana Addo Dankwa Akufo-Addo & Others vs. John Dramani Mahama & Others*** (supra) the Court expressed itself as follows:

**“It is clear from the constitutional and statutory regulations that the polling agent forms an integral part of the conduct of the polls on Election Day. He has before the polls sworn to the same oath that the presiding officer and polling assistance have sworn to abide by the laws and regulations governing the conduct of the election..... A counting agent is required to sign the Declaration of Results form. Poling agents should obtain copies of the signed copy of**

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

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

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

126.What then are the consequences of the failure to supply the agents with copies of the said forms? It must be remembered that the issuance of form 35 comes at the end of the counting of the votes. It is therefore a post-counting process. The breach of rule 79 was a post-election anomaly which, in my view, did not affect the vote. The anomaly was in any case cured by the re-counting and scrutiny of the vote which verified that the 1<sup>st</sup> respondent had won the election for it will be remembered that the object of scrutiny is to ascertain by striking out votes or adding votes which candidate had the majority of lawful votes while the object of re-counting is to eliminate any mistake made in the counting of the votes. Accordingly the omission to supply the agents with copies of form 35s did not affect the result of the elections and cannot be a basis for nullification of an election if the same was otherwise validly conducted.

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

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

**Election Court to summon the District Elections Co-ordinator and once summoned the witness has to swear an affidavit and deliver to court sufficient copies thereof as provided for under rule 18(4) of the Election Petition Rules.”**

128. To drive the point home the Court of Appeal held **Wildlife Lodges Ltd. vs. Jacaranda Hotel Ltd. Civil Appeal No. 249 of 1999**, that nothing is immaterial that helps justice to be done; nothing is extraneous which helps prevent injustice being done.
129. Therefore the Court is properly entitled to peruse the Polling Day Diaries in order to ensure that justice is done. However, in this case nothing turns on the polling day diaries since it is not alleged that the anomalies if any affected the results of the instant election.
130. I now wish to deal with the role of the Returning Officer under Regulation 83(1)(a) of the General Regulations. That provision provides that immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present tally the results from the polling stations in respect of each candidate without recounting the ballots that **were** not in dispute. (Emphasis mine). In my view, this provision seems to bar a Returning Officer from recounting the ballots which were not in dispute. The employment of the word “were” rather than “are” in my view implies that the dispute ought to have been raised at the polling station. Therefore where no dispute arose from the polling station the Returning Officer has no power to accede to a request for a recount. In this case, there is no indication that such a request was ever made at the polling station. Accordingly, the Returning Officer would have been within his power to reject such a request.
131. In this petition matters have not been made any better by the omission to have **Yakub**, the petitioner’s chief agent from whom he purportedly derived most of his information to swear an affidavit in this petition. The court is therefore properly entitled to make adverse inference that the said evidence, if had been availed, would probably have been adverse to the petitioner’s case as was held in **Ndungu vs. Coast Bus Co. Ltd [2002] 2 EA 462**. In any case the petitioner’s evidence based on information received from his Chief Agent amount to inadmissible hearsay.
132. Having considered the issues raised in this petition, I wish to reiterate what was said in **Fitch vs. Stephenson & Three Others [2008] EWITC 501 QB** that the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules or of the duties of the election official providing that the result of the election was unaffected by those breaches and that the availability of proportionate judicial remedy for rectifying the result and declaring the true result of the election following scrutiny and a recount prevents the necessity to choose between vitiating the entire election and allowing an erroneous result to stand. Thus it is inappropriate for the court to declare that an election should be avoided where breaches of the Rules at the counting stage have not, in fact affected the result.
133. The court is not convinced that the alleged omissions on the part of the Electoral Commission Officials were sufficient to invalidate the results which may have been announced. Those omissions were procedural anomalies which did not in any way invalidate the election results. Further, some of the alleged anomalies were indeed post-election anomalies which did not affect the vote. The court comes to the conclusion that the alleged breaches or irregularities that were said to have existed in the election were not so pervasive or so serious as to affect the overall results of the election. It follows, therefore, that in the circumstances, the courts must give effect to the will of the electorate of Bura Constituency.

## **ORDER**

134. In the result this petition fails and is dismissed with costs to the 1<sup>st</sup> respondent, upon whom the petitioner rightly laid no blame. There was a prayer for a certificate for two counsel. In **Taj Deen vs. Dobrosklonsky and Bhalla & Thakore Civil Appeal No. 32 of 1956 [1957] EA 379** the East African Court of Appeal dealing with the issue expressed itself as follows:

**“If the costs of civil litigation are allowed to rise to a point where the claim itself becomes relatively unimportant, the law is not being properly administered, and public confidence in the courts will be destroyed.....The instant case was not a difficult case but was monstrously**

prolonged mainly through the fault of the appellant's counsel which does not make it difficult. Under the wording of the rule a certificate for two counsel may be granted having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case. It is an incorrect exercise of the discretion to grant a certificate on one of these grounds alone when consideration of the others would suggest that it should be refused. Unless a case is a test case, and the amount involved is thus much larger than it appears to be, a certificate of two counsel should not be made where the claim is small. Consequently decree varied by excising the certificate of two counsel."

135. In East African Power & Lighting Company Ltd vs. Kilimanjaro Construction Ltd [1983] KLR 392 the Court of Appeal declined to certify for two counsel on the ground that the two advocates never appeared together in court for the plaintiff and there was no indication of a leading counsel.

136. In Choitram vs. Nazari Civil Appeal No. 8 of 1982 [1984] KLR 327; (1982-88) 1 KAR 437; [1976-1985] EA 53, it was held that an order for costs of two counsel depends upon the appreciation by the Court of the nature of the appeal and that each case depends on its own facts and one considers them all and remembers that it can be a luxury for which an opponent should not be made to pay or in some cases a pre-caution which it was proper to take so that the case of the party in question may be fully presented to the court, and that the court may have every assistance possible in a difficult case in arriving at a proper conclusion.

137. Whereas, it is true that election petitions are high stake litigations, that alone does not justify certificate for two counsel. I am not satisfied that this petition was such a complex petition to defend that certificate for two counsel is warranted. Accordingly the 1<sup>st</sup> respondent's costs are assessed in the sum of Kshs 1,000,000.00.

138. In terms of Section 86 of the *Elections Act, 2011 (No. 24 of 2011)*, I declare and certify that the First Respondent, **Ali Wario**, was validly elected as a Member of the National Assembly for Bura Constituency and it is hereby directed that a certificate of this determination do issue to the Commission and the Speaker of the National Assembly as provided under section 86(1) of the *Elections Act*.

139. In conclusion I wish to express my appreciation to counsel for the diligence and industry in conducting this petition. If I have not referred to all the authorities cited to me by counsel it is not out of lack of appreciation for their efforts.

Orders accordingly.

**Dated at Mombasa this 25<sup>th</sup> Day of September, 2013**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of**

Mr. Mutula Kilonzo Jnr.....for Petitioner

Dr. Njiru, Mr. Mohamed and Mr. Balala.....for the 1<sup>st</sup> Respondent

MR. Nyamodi.....for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents