



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NUMBER 10 OF 2013

RAMADHAN SEIF KAJEMBE.....PETITIONER

VERSUS

1. THE RETURNING OFFICER,

JOMVU CONSTITUENCY.....1ST RESPONDENT

**2. THE SECRETARY, THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....2ND RESPONDENT**

**3. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD
RESPONDENT**

4. BADY TWALIB BADY.....4TH RESPONDENT

JUDGEMENT

INTRODUCTION

1. **Seif Ramadhan Seif Kajembe** (*the Petitioner*) was among the ten (10) candidates who contested the Jomvu Constituency Parliamentary seat. The 4th Respondent, **Bady Twalib Bady**, was declared to be the winner of the election by **Neema Douglas Karisa**, the 1st respondent who was the Constituency Returning Officer. According to the results that were published by the Independent Electoral And Boundaries Commission (**IEBC**) (the 3rd Respondent), the 10 candidates garnered the following votes:

- 1 **Seif Ramadhan Kajembe – 7,152.**
- 2 **Abeid Kombo Juma – 372.**
- 3 **Bady Twalib Bady – 11,435.**
- 4 **John Musa Kilonzo – 1,705.**
- 5 **Leonard Nzioki Mwetha – 168.**

- 6 **Mohamed Faki Mwinyihaji – 3,203.**
- 7 **Ombulimari Nyanje – 1,971.**
- 8 **Paul Muhulo Msabaa – 1,058.**
- 9 **Saidi Mwakama – 2,443.**
- 10 **Samwel Kagechu Githendu – 1,675.**

2. The 4th Respondent was duly gazetted by IEBC as the duly elected Member of Parliament of Jomvu Constituency on 13th March 2013.

THE PETITION

3. The Petitioner was aggrieved by the declaration of the 4th Respondent as the validly elected member of the National Assembly for Jomvu Constituency by the 1st and 3rd Respondents and pursuant to the provisions of Article 87 of the Constitution, Section 75 of the *Elections Act* (hereinafter referred to as the Act) and Rule 3 of the *Elections (Parliamentary and County Elections) Petition Rules* (hereinafter referred to as the Rules), the Petitioner lodged the present Petition on 10th April, 2013 challenging the validity of the election of the 4th Respondent.
4. The Petition was based on the following grounds:
 1. **That the Jomvu Constituency Returning Officer omitted, neglected and/or refused to demand, from each polling centre in the respective Ward within Jomvu Constituency, duly completed copies of Form 35 duly signed and approved by party agents affiliated to all candidates as required by law;**
 2. **That the Jomvu Constituency Returning Officer omitted, neglected and/or refused to issue, at each polling centre in their respective Ward(s), duly completed copies of Form 35 to all candidates' agents for their possession and records as required by law;**
 3. **That during counting of ballots at Kwa Shee Polling Station in Jomvu Constituency Returning officer omitted, neglected and/or refused to verify with party agents the origin of diverse un-registered Ballot Boxes brought for counting and tallying, instead proceeding to determine and declare the results of the election of Jomvu Constituency Member of Parliament while including the ballot papers originating from the aforesaid several un-declared ballot Boxes brought in from parts un-known.**
 4. **That during the receipt of ballot boxes and tallying of ballots there was general disorder at the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres which hampered transparent tallying as most if not all of the counting and tallying was done in the absence of party agents.**
 5. **That the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to tally, in respect of each of the polling centres in their respective Ward the respective results for the elections of each of the elections for the Member of Parliament, Member of Parliament and Woman Representative seats at the respective Polling Station(s) where the votes were counted and/or at Tallying Centre as required by law;**
 6. **That the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to announce, in respect of each of the Polling Stations in their respective Wards the total results for each of the elections for**

the Member of Parliament, Member of Parliament and Woman Representative seats at the respective Polling Station(s) where the votes were counted and/or at the respective Constituency Tallying Centre(s) as required by law;

7. That the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to display Or affix on the wall of each of the Polling Stations and/or Tallying Centers in their respective Ward(s), the total results for each of the elections for Member of Parliament, Member of Parliament and Woman Representative at the respective Polling Station(s) where the votes were counted and/or at the Constituency Tallying Centre(s) as required by law;

8. That the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to promptly transmit electronically or otherwise, in respect of each Polling Station in their respective Ward(s), the total results for each of the elections for Member of Parliament, Member of Parliament and Woman Representative at the respective Polling Station(s) where the votes were counted and/or at the Constituency Tallying Centre(s) as required by law;

9. That Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to hold, upon conclusion of counting and tallying of ballots at each of their respective Ward Tallying Centres, a consensus meeting with all party agents then present before proceeding to the Jomvu Constituency Tallying Centre;

10. That Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers, having consistently blocked party agents from accompanying ballot boxes being transported from their respective polling centres to the respective Constituency Tallying Centre(s), Did proceed to travel with and/or transport election results and election materials to Jomvu Constituency Tallying Centre in private motor vehicle(s) owned by some of the candidates and/or their known associates;

11. That the Jomvu Constituency Returning Officer omitted, neglected and/or refused to hold, upon conclusion of tallying of ballots and/or receipt of returns from the respective Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Tallying Centre(s), a consensus meeting with the party agents then present at the Jomvu Constituency Tallying Centre for candidates for the Member of Parliament seat before proceeding to announce publicly the results of the election of Jomvu Constituency Member of Parliament;

12. That the Jomvu Constituency Returning Officer abdicated his legal mandate to secure from the Mikindani, Miritini and Jomvu-Kuu Ward Returning Officers a full and proper account of the total number of:

- i. Ballot Boxes allocated to each of the three (3) Wards within Jomvu Constituency for election of Constituency Member of Parliament by the 2nd and 3rd Respondents;**
- ii. Ballot Papers allocated to all three (3) Wards within Jomvu Constituency for election of Constituency Member of Parliament by the 2nd and 3rd Respondents;**
- iii. Ballot Papers issued to voters to enable them cast votes for election of Jomvu Constituency Member of Parliament;**
- iv. votes cast in the Jomvu Constituency for election of Member of Parliament, including those spoilt;**

Before proceeding to declare the result for the election of the of Constituency Member of Parliament for Jomvu Constituency;

13. That the Jomvu Constituency Returning Officer omitted, neglected and/or refused to take into account and give due consideration to the complaints forwarded to him by the Petitioner viz-a-viz the validity and/or propriety or otherwise of inclusion of the aforementioned un-verified results from the Polling Stations and Constituency Tallying Centres in the final result Or hearing the Petitioner on the question of the validity and/or propriety or otherwise including the said results in the final result And without giving any or any proper reasons for why the announcement and/or declaration of election of Jomvu Constituency Member of Parliament should proceed in the face of these irregularities

5. The petitioner therefore sought the orders for a declaration that the 4th respondent was not duly elected as the Member of Parliament for Jomvu Constituency and that to the contrary it was the petitioner who was duly elected as such. In the alternative the petitioner sought an order for scrutiny of the votes cast in the Constituency as well as an order for costs. The application for scrutiny was in due course heard, found unmerited and dismissed.

1ST, 2ND AND 3RD RESPONDENTS' RESPONSE

6. In response to the said petition the 1st, 2nd and 3rd respondents filed a joint response in which they averred that the 1st Respondent received form 35 in respect of the election for the Member of the National Assembly for Jomvu Constituency from all Presiding Officers in the said Constituency all of which completed and signed as by law required. It was further pleaded that form 35's were made available to all candidates and agents at the various polling stations in the Constituency. According to the 1st respondent, no ballot boxes other than those that had been duly issued and used at KwaShee Polling Station were used during the election for the Member of the National Assembly for the Constituency and that the Constituency Tallying Centre for Jomvu Constituency was at Mikindani Primary School and not as alleged in paragraph 4 of the Petition. To the 1st respondent there was no disorder at the said Constituency Tallying Centre.
7. It was these respondents' case that The results of the election for the Member of the National Assembly in Jomvu Constituency were announced at each polling station; that at the conclusion of the counting of vote a copy of form 35 was affixed at the entrance of all polling stations in Jomvu Constituency as by law required; that technology was deployed to assist in the conduct of the abovementioned elections and though challenges were experienced in usage of the said technology, the said challenges did not affect the integrity of the election as adequate arrangements had been put in place which election was by law a manual election; that it was not in every polling station where a meeting to build consensus needed to be held but where it was necessary the such a meeting was convened by the relevant Presiding Officer; that it is not a legal requirement for agents to accompany ballot boxes when they are being transported from the polling station to the Constituency Tallying Centre and that sufficient safeguards are built into the law to ensure the integrity of election results once they leave the Polling Station.

4TH RESPONDENTS' RESPONSE

8. On behalf of the 4th respondent, it was pleaded that the petition was void for having filed out of time. Further it was pleaded that there was no accusation levelled against the 4th respondent and that the election was conducted in absolute, resolute and substantial compliance with the letter and the principles set out and/or implied in the Constitution and the written laws relating thereto and further that the facts alleged by the Petitioner do not and cannot vitiate the validity, integrity, credibility and/or result of the election. To the 4th respondent, all ballot boxes used were registered and were verified by all the party agents. Tallying, according to him, was done openly and transparently in the presence of party agents who verified the correctness and transparency of the

process. To him the allegations were unsubstantiated, full of falsehoods and only meant to mislead the Court as the votes were duly and correctly counted and results tallied and announced. It is the 4th respondent's case that copies of forms 35 were annexed at the entrance of the polling stations for agents to make copies while the failure of the electronic transmission of results was experienced countrywide and did not affect the outcome of the election and its validity. With respect to the consensus meeting the same was denied and it was contended that the failure to hold the same did not in any case affect the outcome of the results. The 4th respondent further denied that the petitioner's agents were excluded from accompanying the ballot boxes and that the same cannot invalidate the results of the election.

9. To the 4th respondent all the votes were verified by all the agents present and there was no inclusion of un-verified results in the final results. In his view there were no errors, malpractices, illegalities and offences as alleged and that he won fairly by a majority vote and through the will of the people. To him, the people exercised their democratic right freely without any form of interference and hence the petitioner ought to respect the will of the people.

MODE OF TAKING THE EVIDENCE

7. 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.
8. 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.”

9. 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

10. In his affidavit evidence, the petitioner herein who gave evidence as PW-1 reiterated the contents of the petition and apart from indicating that he was relying on the affidavits sworn by his witnesses stated that following the irregularities and discrepancies witnessed at the County Tallying Centre, he did write to the Chairman of the I.E.B.C., and the County Returning Officer but neither received no response thereto nor were the announced results amended.

11. In cross-examination by **Mr. Okonjo**, learned counsel for the 1st, 2nd and 3rd respondents, the petition stated that according to him, the 4th Respondent was not duly elected and he was asking the court to declare him as the elected candidate for Jomvu Constituency since he believed that he won the election though he could not tell by how many votes since he was not the one counting the votes. He was similarly unable to tell the number of votes he lost as a result of the alleged irregularities although in his view, his witnesses proved that the number of votes that were due to him were unfairly denied by the Independent Electoral and Boundaries Commission, the 3rd respondent herein (hereinafter referred to as the IEBC). To the petitioner, it was upon IEBC to prove how many votes he was denied unfairly since the Presiding Officer just imagined figures. He, however, denied that some of his witnesses had left the Polling Station by the time the results were released but asserted that they were thrown out and it was the duty of the officers to call agents back if they threw them out. He however confirmed that the constituency Returning Officer is not the one charged with issuance of form 35. While admitting that he had not disclosed in the Petition the particulars of the ballot boxes mentioned in the petition, he said that if the court required the serial numbers of the boxes they would be furnished. He however acceded that the failure of the election devices did not apply to me only. While responding to the questions posed to him by **Mr. Mohamed**, learned counsel for the 4th respondent, the petitioner stated that he was registered at Kwashe Primary and voted at around 3.00.p.m. His problem however was that he was unable to find his name initially though it was later found and voted. He confirmed that the letter he wrote to the Returning Officer was dated 6th March 2013 was after the results. It was his view that the Returning Officers have powers to order recount at the Tallying Centre. On being re-examined by **Mr. Kithi** his advocate, the petitioner stated that he had documents proving the IEBC made mistakes and affirmed that 40% of his agents were not in the Polling Stations and were chased away hence the difference. The said agents had no copies of form 35 hence his prayer for scrutiny and recount.
12. PW2 was **Lucy Palte Balu**. According to her affidavit, she was registered as a voter at Miritini Station Polling Centre where she participated in the 2013 elections as a voter *inter alia*, for Jomvu Member of Parliament, and as Agent for the petitioner. According to her affidavit, on the 4th March, 2013, she arrived at Miritini Station to cast her vote and that thereafter proceeded to her duties to observe the voting process at the Station, but was denied access to the Polling Centre although she had all the prerequisite documents. When she complained to the Presiding Officer, the latter ignored her and she was chased away by his assistants and therefore had to stand outside the Station, 50 meters away hence could not monitor the voting process. According to her, other Agents were allowed into the Polling Centre although they did not have their credentials. Her attempts to witness the counting in the evening were similarly unsuccessful hence her Principal was left unrepresented in the process. After she left the said Polling Station neither her nor any of her fellow party agents were called back there for counting and/or tallying of votes and the next thing she knew is that election results were announced which included results allegedly originating from the said polling station. In cross examination by **Mr. Okonjo**, PW2 stated that although she was a voter in the Constituency, she neither indicated her registration number nor exhibited her acknowledgement slip. Although she was the petitioner's agent she confirmed that her accreditation letter was similarly not exhibited. When questioned by **Mr. Mohamed**, PW2 reiterated that she had not exhibited any document showing she was an agent though she had the same but was told to stay 10 metres from the Polling Station. In re-examination, PW2 stated that she never entered the Polling Station from the beginning and could not remember the name of her co-agent though they were with him and stayed outside throughout. In her view on the same day she had her documents and the badge and the fact they were not exhibited does not mean they were not there.
13. Next to testify as PW3 was **Lucy Njoki**. According to her affidavit, she was a duly registered as a voter at Miritini Station Polling Centre in the Constituency where she participated in the 2013 elections as a voter *inter alia*, for Jomvu Member of Parliament. According to her on the 4th March, 2013, she arrived early at Miritini Station to cast her vote but voting started at a round 11 am – 12 noon and proceeded well, but at around 2 – 3:00p.m. there appeared a lady wearing Bui Bui who sat under a tree holding some papers but making no attempts to vote. Being concerned, being concerned, she approached her and saw that she was holding some ballot papers for different seats and when the witness tried to greet her she hid the said papers and the witness

walked away and informed her friend. Her attention was next drawn to a fat lady, whose presence they also found suspicious. That lady, according to the witness entered a white Probox and left the car carrying huge amount of cash which she placed in her purse, and walked back to the polling station and went to the Presiding Officer, talked to him for 5 – 6 minutes and thereafter then walked out of the polling station having, in the witness's own words, presumably given the money to the Presiding Officer. When the witness followed her outside, she found her talking to some people and directing them to a lady named **Zahara**, who had been canvassing for votes all day among the voting queues convincing them to vote for 4th respondent. Her attempts to report the matter to the police were however unfruitful. On being cross-examined by **Mr. Okonjo**, PW3 admitted that she had not exhibited her acknowledgement slip but confirmed that she suspected that the lady gave the Presiding Officer money. In answer to **Mr Mohamed's** questions, the witness stated that although she voted at around 11.00a.m she did not go home but stayed although she admitted that it was an offence to stay there after voting. According to her the lady had *buibui* and was in front of her about 7 metres. She however could not tell for which position they were and to whom they belonged and she informed her friend, **Fatuma Amani**, with whom she was and reported the matter to one of the officials of the IEBC who according to her was an agent but whose party she did not know. Although she reiterated that she saw a lady entering a Probox Car, she could not remember its registration number. Similarly she could not tell the Occurrence Book number of the report she made. Since the police to whom she reported ignored her. In re-examination, she stated that she and her said friend **Fatuma** reported to the police who were present who denied the allegations and they reported nowhere else apart from the voting agent who was next to the entrance.

14. **Leila Mahfoudh Karangu**, testified as PW4. According to her affidavit, she was duly registered as a voter at Miritini Station Polling Centre where she participated in the 2013 election(s) as a voter *inter alia*, for Jomvu Member of Parliament and as an Agent for the Petitioner. On the 4th March, 2013, she arrived at the said Polling Station to cast her and thereafter proceeded to her duties to observe the voting process thereat. In her evidence, she encountered a lady named **Zahara** who was campaigning on the voting queue and she was personally given Kshs.100/= together with a group of voters not personally known to her, with the rider that they should vote the 4th respondent and give her their names so she could get them more money. According to PW4, by 6.00 p.m. the process stopped, and counting started at 8.00 p.m. when there were some arguments as to where the counting would be done. Eventually, the ballot boxes were removed from the station and two (2) *Matatus* came and took some ballot boxes away from the polling stations for counting at an un-known location and in the absence of party agents and observers. However, while the counting process was going on, there was a blast, the lights went off at which the Police threw their fire arms down and everybody ran out in the darkness. The lights came back after 10 – 15 minutes, but in the interim there were no alternative sources of light. According to her, when she tried to access the counting hall she was refused entrance and was asked whose Agent she was, and when she said she was the 4th respondent's agent she was allowed in while those who mentioned the petitioner's name were denied access. In cross-examination by **Mr. Okonjo**, the witness conceded that she did not indicate her registration number in her affidavit and that she had no exhibited any document showing that she was an agent for the petitioner. She denied that she took the Kshs.100/= she was purportedly offered by **Zahara** and reiterated that the counting of certain boxes was done in a different location since all the ballot boxes for the MP were taken away. However, when the blast occurred everyone including police officer ran away. She further stated that although she was an agent and gave her documents to IEBC she was denied entry to witness the counting. She however admitted that she did not have accreditation documents though in her evidence the blast occurred when the petitioner was winning. Although in her view the petitioner won the elections she was unable to state by what margin. On cross-examination by **Mr Mohamed** the witness stated that she started her work as agent at 9.00a.m. and that **Zahara** followed her at about 1.00p.m. when she had gone outside for a call of nature. According to her **Zahara** wore no agent badge. When voting ended at 6.00pm counting started at 8.00p.m. and the boxes were removed before the end of the counting although the said process ended at about 3.00a.m. or 4.00a.m. In her view the cause of the blast was a grenade which in her view was meant to stop the counting and it was caused by the 4th respondent's agents. At this time it was her evidence that she was inside the room. In re-examination the witness confirmed that she neither

exhibit her identity card nor her accreditation card since she did not find it necessary to do so. She admitted that she took the Kshs 100/- which she was offered. In her evidence she was in ODM Party while the 4th respondent was in ODM Party.

15. PW5 was **Ali Nyamai**, and the Court noted that this witness was present in Court when the previous witness was testifying. According to his affidavit, he was registered as a voter at Mikindani Polling Centre in the Constituency and participated in the 2013 election(s) as a voter *inter alia*, for Jomvu Member of Parliament and as an agent for the petitioner. On the 4th March, 2013, he arrived at Mikindani Polling Centre to cast his vote but voting started very late at around 9am by which time people were unhappy with the behaviour of IEBC and on making inquiry was informed that the officials were waiting for instructions from the Returning Officer. According to him, there was no security officer at their stream, but only a lot of movement in and out of the room by IEBC Officials and the officer in charge did not do anything. Despite reporting this to the presiding officer no action was taken and voting went on until 8:00pm when the station closed and thereafter counting started between 10:00 to 11:00pm. He was however unable to understand why the security officers were not present and why it took too long before the counting commencement. Further he was suspicious of the fact that the agents did not accompany the ballot papers to the Tallying Centre. In cross-examination by **Mr Okonjo**, the witness testified that he was both voter and agent though he had not exhibited any document. He however conceded that the delay in the commencement of the voting process was due to lack of security agents. According to him there were movements by the IEBC officials in one room yet they ought to have involved the agents in every step they were engaging in. He however conceded that the irregularities were based on his suspicion since he did not notice any. According to him, the agents were supposed to accompany the ballot boxes though this was never done. In answer to **Mr. Mohamed's** questions, the witness conceded that since the voting started at 9.00a.m. and ended at 8.00p.m. the time lost had to be compensated. He however suspected that there were irregularities between the time when the station opened and voting started. However, there was no irregularity on the boxes. He however stated that his party agents were denied entry at the Tallying Centre. In re-examination he clarified that only the 4th respondent was inside the Tallying Centre.
16. Next to testify as PW6 was **Juma Swaleh**. It was similarly noted that this witness was present in court when one of the witnesses was testifying. According to his affidavit, he was registered as a voter at Miritini Primary Polling Station in the Constituency and participated in the 2013 elections as a voter *inter alia*, for Jomvu Member of Parliament, and as agent for the Republican Congress Party. According to her, on the 4th March, 2013, he arrived at Miritini Primary Polling Station at 4:30am, but the IEBC Officials only arrived at 9:30am and when voting commenced at 10:15am, the Deputy Presiding Officer prevented the agents from assisting illiterate voters and only relented when he got furious. In his evidence, he was stationed in stream 2 but though it closed early at 4.30 p.m., counting of votes delayed until 9.45 p.m. when the Clerks of IEBC wanted to move counting of the votes to the Constituency Tallying Centre in Mikindani, but he refused, and with the support of other party agents, votes were counted at the polling station. However, as the counting of the votes for the Member of Parliament was going on, lights went off and on thereby confusing the count. However the officials of the IEBC declined to recount the votes despite being requested to do so. In his evidence at around 3:00 am something was thrown on top of the *mabati* roof, causing all agents, police and Deputy Returning Officers to run away from the polling station leaving the ballot papers and boxes in the polling room. When the lights went off again he saw an old white man with Islamic hat in the room standing near the boxes whom he was informed was the 4th respondent's uncle by the Wiper agent. In cross examination by **Mr. Okonjo**, he said that he was an agent for Republican Congress Party though he did not his voter's Registration Number and their candidate was **Omar Mbuni**. His reason for not exhibiting any documents was due to the fact that the same were returned to the party. He stated that they were not permitted to assist illiterate voters though they were trained that the agents were to witness voting by illiterate voters which they were denied. He reiterated that after the lights went out the Presiding Officer declined the request for the recount. He however did not know the name of the alleged uncle to the 4th respondent. With respect to the questions by Mr Mohamed the witness stated that whereas the petitioner was in ODM Party and the 4th respondent was in Wiper Party, he was in the said RCP. He however did not know what caused the lights to go out. In re-examination however he stated that the blackout occurred twice at 2.00a.m, at 3.00a.m. which led to confusion and the same was

- caused by the officers.
17. Next to testify as PW7 was **Zubeda Swaleh**. Similarly the witness was in Court when one of the previous witnesses was testifying. According to her affidavit, she was duly registered as a voter at Mikindani Polling Centre where she participated in the 2013 elections as a voter *inter alia*, for Jomvu Member of Parliament and was an agent for the Petitioner. On the 4th March, 2013, she arrived at Mikindani Polling Centre to cast her vote and thereafter proceeded to her duties to observe the voting process at the same Centre, but left briefly leaving her colleague **Maryan** to observe until she returned at 12.00pm and continued observing till evening. However when the voting process was completed at 7.00 pm she was forcefully compelled to leave the counting hall at gun-point and therefore could not observe the counting of the votes or the tallying and could not vouch for the accuracy or integrity of the election results as announced vis-à-vis her principal, the petitioner since all of his agents were locked out of the counting process. According to her, other Agents were allowed into the Polling Centre although they did not have their credentials as she sat outside, therefore no Agent was present on behalf of petitioner. To her the whole counting process was highly partisan in its conduct since the 4th respondent and **Mwidani** were allowed into the counting hall as counting was going on and they spoke to the Presiding Officer for around fifteen (15) minutes. After she left the said Polling Station neither herself nor any of her fellow party agents were called back there for counting and/or tallying of votes and the next thing she knew is that election results were announced which included results allegedly originating from their Polling Station, but which they had neither counted nor tallied. In cross-examination by **Mr. Okonjo**, the witness conceded that she had neither disclosed her details nor exhibited accreditation documents. According to her the Presiding Officer declined to allow her despite her request hence she could not vouch for integrity or accuracy of the process. At the time of her removal the 4th Respondent's agents were inside. She however conceded that she had not specific allegation of irregularity although both of them were removed despite having the papers. She conceded however that she has not alleged that the results as announced were not the correct ones. In answer to **Mr Mohamed's** questions, she stated that she was forcefully removed at gunpoint by Presiding Officer although she did not report anywhere else. It is the Presiding Officer who had the gun. In re-examination, she stated that since she was not present she could not vouch for the integrity and accuracy of the process.
18. After the evidence of PW7, **Mr. Kithi** informed the Court that the rest of the witnesses declined to testify for the petitioner and hence sought to close the petitioner's case.
19. 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 affidavits sworn by the deponents who decided for reasons best known to themselves not to appear for cross-examination.

THE CASE FOR THE 1ST, 2ND AND 3RD RESPONDENTS

20. In the defence of their positions the 1st, 2nd and 3rd respondents called the 1st respondent, **Neema Douglas Karisa**, as DW1. According to her affidavit, apart from having been the Returning Officer for Jomvu Constituency, she is the 3rd Respondent's Constituency Elections Coordinator for Jomvu Constituency. According to her, during an election that was conducted on the 4th of March 2013, the 4th Respondent was duly elected as the member of the Nation Assembly for Jomvu Constituency and not Senator as is alleged in paragraph 1 of the said affidavit of the Petitioner. In her view since the affidavits of **Hellen Atieno Hajula, Fatuma Amani, Martine Omondi Olonde, Fred Nyamunga, Shillingi Salim** and **Amiri Kombo Kurwaty** were not

annexed to the petition the same cannot be responded to. It is further deposed that the **Election (General) Regulations** stipulate the circumstances in which a recount can take place and in any event recounts are only possible at polling stations and cannot take place at constituency tallying centres as requested by the Petitioner. He however confirmed that that the said polling stations in Jomvu Constituency opened late because she instructed all Presiding Officers not to open any polling station until adequate security personnel had been deployed which instruction flowed from the unfortunate and cowardly acts of terrorism that had happened in Changamwe Constituency early on the morning of 4th March 2013. In her view, no prejudice was occasioned to voters as the polling remained opened after 5pm so as to compensate for the time lost by its late opening. To her Edward Athumba was not a Deputy Presiding Officer at Mikindani Primary School as he alleges but was in act a Deputy Presiding Officer at Mikindani Social Hall Polling Station (Stream 6) and further that he not speak to **Edward Athumba** as he alleges but issued instructions only to Presiding Officers. According to her in respect of Mikindani Social Hall Polling Station (Stream 6) the Presiding Officer was **Linda Akoth Geno**. In cross-examination by **Mr Kithi**, the witness said that she is a permanent employee of IEBC being constituency Co-ordinator but was gazetted as the Returning Officer of the election. She stated that she had a separate contract when she was gazetted and hence signed a contract to allow her to be the Returning Officer. However no mention was made about payment and whereas the period was for the general election, the contract stated she was to be Returning Officer for the March elections. She could not however remember whether the contract talked of her relationship with IEBC after the March 4th election which had been concluded and hence she is no longer the returning officer but a Constituency Elections Co-ordinator. In further cross-examination she conceded that did not instruct Nyamodi to represent her but that he was instructed by IEBC hence she has not paid legal fees to **Nyamodi**. She however admitted that the Polling Day Diaries were not exhibited to her affidavit which Diaries similarly did not indicate the time they were filled in. She however admitted that the Diary proved that **Athumba** was the Presiding Officer, the Deputy Presiding Officer and the agent. She however, neither knew when polling at Stream 6 concluded nor who was present at the conclusion of the counting at Mikindani Polling Station as that information was not there as it should have been on the last Page towards the end of the diary. According to her, the main reason for exhibiting only 2 pages was to support the evidence of the Deputy Presiding Officer and that as far as her affidavit goes, it was sufficient although they do not verify the accuracy of the election. In her view, form 35 is to verify the information and whereas IEBC allowed one agent per party at the Polling Station, the witness did not know the legal basis for this requirement. To her with respect to coalitions, each Party in the coalition would have own agent and that the party agent would be looking into the interest of all the candidates from his party. Referred to the Diary for Mikindani Primary School Stream 3 the witness confirmed that there were 3 agents are for Republican Congress and two agents for the ODM Party. She clarified that whereas her duty was to train the Presiding Officers, the, management was at the discretion of the Presiding Officers who may not have followed her instructions. She was however of the view that this was a proper and fair election because in her view it would be better if the parties' agents were more than if they were not represented. However, the requirement for only one agent was for comfort to avoid overcrowding. She clarified that they doing one counting at once which although was taking long, that was the way it was done and that her directions did not compromise the elections. She denied that she deliberately hid information in form 35. In answer to **Mr. Mohamed's** questions, the witness said that she saw the letter asking for recount in the petition but she could not order for recount since recount should have been done at the Polling Station hence the letter ought to have been written to the Presiding Officer. In her view, the letter was written after declaration of results. She clarified that since most of the stations opened late, the voting time was extended in order to compensate for the time lost so that no voter was turned away. She denied that any malpractices were communicated to her by the Presiding Officers and the agents and as each party was represented by their agents who were trained by IEBC, it was not responsibility of IEBC to look for agents hence the election of Member of Parliament for Jomvu Constituency was free and fair. In re-examination, the witness testified that as the 3rd Respondent's Constituency Co-ordinator she is an agent of 3rd Respondent and swore the affidavit as agent of the Respondent. In her view, the instructions of 3rd Respondent for an advocate also covers her and that apart from the list of Presiding Officers, she attached the extract of Polling Day Diaries to show distribution

of agents which was representative and also to show the various Presiding Officers. On the allegations that the agents were locked out the witness said that the numbers were limited due to space and to ensure that all the parties were represented and that no prejudice was caused by additional agents. With regard to agents of RPC, the candidates for RPC did not win and the fact that it had 3 agents did not give advantage to RPC candidate. According to her there were no shifts for election officials who stayed for the entire period and she did not receive any complaint of length of period the election was taking and fatigue by agents. The witness stated that the Polling station was opened between 7.30 and 10.30 a.m. on her instructions not to open due to security but there was extension of time in stations that opened late and she never received complaint of voters being turned away as all the voters were allowed to vote. To her the elections were free, fair and were in accordance with the Constitution and Regulations and the few hitches did not affect the results of the elections.

21. The next witness who testified as DW2 was **Dama David Sintio**. According to his affidavit, he was the Presiding Officer at Miritini Primary School Polling Station (Stream 3) during the general elections that were conducted on the 4th of March 2013. While conceding that the Polling Centre where he was the Presiding Officer opened at 10 am, he explained that this was due to the fact that two Senior Police Officers had been killed earlier on by members of the Mombasa Republican Council (MRC) who wanted to disrupt the general elections at the Coast as a result of which the police withdrew all security at the said Polling Station and voting could not commence until there was sufficient security at the Polling Station. He was therefore instructed by the Returning Officer not to open the Polling Station until there was adequate security. However, the said Polling Station opened until after 5p.m so as to compensate for its late opening. According to him, **Juma Swaleh** was not a duly accrued agent as he has not exhibited to his said affidavit his credentials as an agent and he could not recall the deponent being an agent in his stream. According to the witness, where voters were assisted to vote, this was done in strict compliance with Regulation 72 of the Elections **(General) Regulations** since agents do not assist voters to vote but the said Regulation requires that agents merely observe a voter being assisted to vote by the Presiding Officer. Contrary to the allegations made his position was that the polling station did not close early and all counting of votes was done at the polling station which had gas lamps, which were on through the night and the one time when there was a blackout the said lamps were on and counting went on normally. In cross examination by **Mr. Kithi**, the witness stated that he could not remember the names of Party agents and did not have relevant copies of their names. He clarified that Miritini Primary School is different from Miritini Railway Station. The procedure, according to him, is after counting you fill in form 35 duly signed by the agents. You then put one inside the ballot box, display one and provide copies. Further one is expected to fill in the original form 35 and stick another form 35 on the ballot box. He said that he produced several copies though he could not remember the number of form 35s which he gave agents but admitted that they were limited. He confirmed that all the forms were written in his own hand and were not carbon copies though he did not retain a copy for himself. After counting he sent an SMS to the Tallying Centre using his own phone to one of the various numbers provided for the Tallying Centre. He personally transported the ballot boxes to the Tallying Centre and retained one form 35 which he presented to the Returning Officer. He however acceded that that form was not annexed and did not know the reason why this was so. In response to the questions by **Mr Mohamed**, the witness reiterated that he opened the station at 10.00 a.m. because there was security hitch though they were required to open at 6.00a.m. hence the late closure to compensate for the time lost. According to him, since the agents were required to have clearance from IEBC and badges, without the same no agents would be allowed in. To him, the Presiding Officer was the only one mandated to assist the voters and the agents were to witness which instructions he followed instructions. He confirmed that they had gas lamps and that all agents were present and never complained but were given form 35 which they signed. In re examination the witness said that his affidavit was in response to various issues and affidavit of **Juma Swaleh** and since it was not in response to the issue of arithmetic of counting of votes in form 35, there was no need to exhibit form 35. He affirmed that he gas lamps we there and were on throughout and there would be no cause of alarm in event of blackout. He confirmed that he was in contact with the Returning Officer at the time of counting and during the exercise.
22. Testifying as DW3, **Ali Abdallah Ali**, deposed that he was the Presiding Officer at Mikindani Primary School (Stream 1) Polling Centre during the general elections that were conducted on the

4th of March 2013. While conceding that the Polling Centre opened at 9 am, he explained the cause of this as being that two Senior Police Officers had been killed earlier on by members of the Mombasa Republican Council (MRC) who wanted to disrupt the general elections at the Coast as a result of which the police withdrew all security at the said Polling Station and hence voting could not commence until there was sufficient security at the Polling Station. Based on the instructions given to him by the Returning Officer, he could not open the station as was expected but the time which was lost was compensated as the voting went on till 8.00 pm. Contrary to the allegations made by **Zubedi Swaleh** he denied that any agent was removed or that there was any discrimination in the treatment of agents. In cross examination by **Mr. Kithi**, DW3 stated that he handed over his documents to IEBC including form 35 which contained the names of the candidates and their respective votes in his stream, the agents and their signatures. According to him, he made many copies to be placed outside the box, outside the station and each to the agent and one to be inserted inside the box. The one he remained with he gave Returning Officer who acknowledged on the said form. Accordingly, he did not remain with any evidence that he gave him the form hence the reason for not exhibiting the same. He reiterated that no agent was removed from the Polling Station and they signed form 35 which he was unable to retrieve from the Returning Officer. According to him he recorded his affidavit before an advocate for the IEBC named **Odongo**. Though he is no longer a Presiding Officer he were told that in case of complaints he would be called hence though the evidence is his, it is adduced on behalf of IEBC. He however confirmed having not paid **Mr. Nyamodi**. In his evidence the Regulations were that they were to report every 3 hours through SMS of the number of voters who had voted. However, the IEBC phone was not working and he informed the Returning Officer when she was going round with her Information Technology (IT) person. By the time of the breakdown in the communication devices he had reported 3 times after which he resorted to the use of his own mobile phone as advised. Responding to the questions by **Mr Mohamed**, the witness said that though they opened the station late at 9.00a.m, they closed at 8.00p.m. after the last person voted. During election, they had security officers and that during counting all party agents were present and he did not receive any complaint from any agent and they all signed and he gave them their copies. He was however unable to tell whether **Zubeda Swaleh** was an agent since they were relying on authorisation from the Returning Officer without which they would not allow the agents in. According to him, he neither has a gun nor is he licensed to carry any. In re examination, the witness said that since he was not responding to tallying of results, there was no need to exhibit form 35. While he could not tell the names of all agents who were present, he reiterated that they had to present their documents and if **Zubeda** was not an agent she would not have signed form 35 which form would have not been of any assistance. Therefore, if her name was in the form, it would have proved that she was not denied entry. Since he used his phone when the ones of IEBS stopped working, it was his view that the failure did not affect the operations of IEBC as the message was transmitted. He reiterated that in his stream he did not receive any complaint that any agent was denied and that all agents were present till the end of the counting though he was unable to tell from which parties they were. In her view, despite the delay, all the voters voted in his stream.

23.As counsel for the petitioner did not wish to cross-examine the rest of the deponents, the case for the 1st, 2nd and 3rd respondents was thus closed.

THE 4TH RESPONDENT'S CASE

24.On behalf of the 4th respondent, the 4th respondent, **Bady Twalib Bady**, testified as DW4. According to his affidavit, he was one of the candidates for seat of the National Assembly for Jomvu Constituency under the Wiper Democratic Party of Kenya under the CORD Coalition in which elections he was declared the winner on the 5th of March, 2013 as being the candidate who garnered and received majority of votes and was thus issued with a certificate and was subsequently gazetted in the Kenya Gazette on the 13th of March, 2013 as the duly elected Member of National Assembly for Jomvu Constituency. According to him, as a candidate in the election, he was naturally observant and vigilant on the conduct of other candidates and their agents and supporters—as well as election officials—prior to during and after the Election and in

his view the allegations made in the petition including the decision to write the letter to the Returning Officer were/are either afterthoughts or outright falsehoods, designed to enable the Petitioner (ab)use the court process to overturn the popular democratic choice of the electorate to elect him as the Member of National Assembly for Jomvu Constituency. He clarified that he was the duly elected member of National Assembly for Jomvu Constituency and not the duly elected Senator as stated by the Petitioner in his supporting affidavit. In his view, after the counting and tallying of all votes in the various polling stations, Forms 35 were used to record valid votes garnered by each contender and which was signed by the party agents present one of which was left and affixed at each polling station providing particulars of the number of the voting in that particular station as required by the law. In response to the affidavit of **Juma Swaleh**, the 4th respondent stated that he was unable to confirm if he is a voter or an agent since he failed to provide any evidentiary proof to support his statement. To his knowledge, assisting of voters is done by the Presiding Officer, Deputy Presiding Officer or a relative/friend/guardian of the assisted voters and not by agents as alleged by **Juma Swaleh**. According to him, the statements of the said **Leila Mahfudh Karama** are totally full of confusing facts unsupported by any evidentiary proof while he felt prejudiced by the statement of **Ali Nyamai** and **Zubeda Swaleh** by the lack of details as to the exact polling station as there was no polling station in Jomvu Constituency known as Mikindani Polling Centre. To him statements of **Lucy Njoki** are majorly based on presumptions, assumptions and suspicions. With respect to the affidavit of **Juma Hatibu Mwinyihaji** he retorted that at no point in his statement has it been stated that **Ramla** was paying voters money to vote for him and the said **Ramla** was not an agent for Wiper Democratic Movement. According to him, the said **Ramla** is a sister to the Petitioner and if at all the said **Ramla** was bribing voters then she was bribing voters to vote for his biological brother who is the Petitioner herein. He stated that **Juma Hatibu Mwinyihaji** is biological brother to the Petitioner's mother and thus the real maternal uncle to the Petitioner. According to him, the facts alleged by the Petitioner do not and cannot vitiate the validity, integrity, credibility and/or result of the election which he won fairly by a majority vote through the will of the people and in an election that was free, fair and transparent hence the petitioner seeks to substitute the will of the People who elected him as their Member of National Assembly for Jomvu Constituency in an election that was free, fair, transparent and credible and by the standards established by law.

25. In cross examination by **Mr Kithi**, the 4th respondent stated that his agents signed the form and were given their copies and they left with their copies according to his Chief Agent, **Ahmed Kombo**. According to him the task of exhibiting the form was that of his Chief Agent although he was not sure whether he had exhibited the same. According to him Wiper Democratic Party on whose ticket he contested on 18th January, 2013. Before then, he was in ODM where he was the Chairman ODM, Chagamwe Constituency from which party he resigned as Chairman on 18th January, 2013 by way of letter to the Registrar of Political parties copied to ODM. According to him what was submitted was the party list because the party agents were the ones representing the Party Candidates according to the Regulations and agreement and the instructions of IEBC given informally to the agents. According to him the certificate was dated 5th March, 2013 and was given to him the same day though it was signed after 30 minutes by the Returning Officer was **Neema Karisa** which was the next day in the presence of County Representatives, including the petitioner. After taking his certificate he left as he was not concerned about the other candidates. He confirmed seeing the Returning Officer signing and rubberstamping the certificate though he could not remember seeing the petitioner sign anywhere. According to him the letter was an afterthought because he got his certificate at 12.05 a.m. and the letter ought to have been written before the announcement but was instead written on 6th while the announcement was on 5th. Further though the letter was seeking recount the same ought to have been at Polling Station and not Tallying Station. Since he was just a candidate he could not say whether or not the petitioner was chased. In answer to the questions by cross-examination by **Mr. Okonjo**, the witness stated that the certificate only shows the winner and according to him, the person who ought to be given the certificate is the winner. According to him, the elections were done according to the law and since there is no dispute on the counting, there was no need to exhibit the forms and it was not his duty as respondent to bring the same. In re-examination, he stated that though before joining Wiper, he was in ODM at the time of the General Elections on 4th March, 2013 he was in Wiper

- since you cannot contest in an election without being a Member of the party.
26. DW5 was **Faiza Ramadhan Kajembe**. According to her affidavit, she was appointed as an agent by Wiper Democratic Movement Party of Mikindani Primary Polling Station and admitted that on 4th March 2013 during the general elections, Mikindani Primary Polling Station was opened at 8:30 am and that was the only challenge that she witnessed at Mikindani Primary School Polling Station. Despite that the elections were free, fair and transparent. In cross-examination by **Mr. Kithi**, the witness stated that she was appointed agent of Wiper on 28th February, 2013, before signing the oath of secrecy. Before then she was not a member of a party but her name was taken to Nairobi and she was informed by SMS to go and get her oath of secrecy from Co-ordinator of Wiper Democratic Movement called Mohamed. According to her she was recommended as a party agent by the 4th Respondent after she informed him that she wished to be his agent. Although she could not remember the name of the Presiding Officer at Mikindani she knew that she was a woman and when referred to the list of Presiding Officer she confirmed that the Presiding Officer at Mikindani Social Hall was **Edward Athumba** while she was in Mikindani Primary. She however confirmed that the petitioner is her stepbrother. In answer to questions by **Mr Okonjo**, the witness reiterated that she was an agent in Mikindani Primary and could not recall seeing **Edward Athumba** at the station since he stated that he was Deputy Presiding Officer at Mikindani Primary and that Mikindani Primary and Mikindani Social Hall are two different stations. In her view the late opening did not prejudice anyone because they agreed that the time would be compensated and all voters who turned out voted.
27. DW6 was **Musembi Dendla Japhet** according to whose affidavit, was appointed as an Agent by Wiper Party under the CORD Coalition of Miritini Primary Polling Station Stream 2. According to him, it is not the obligation of the agents to assist illiterate voters and that the agents are only obligated to witness the assisting of voters and which was done by all agents present. In his view, the allegation that there was confusion during counting is totally false and incorrect and that the averment in paragraph 5 in the affidavit of **Juma Swaleh** is absurd and false and that no such alleged incident occurred at Miritini Primary Polling Station save that something fell at the roof of the said polling station after which there was calmness and there was no movement as alleged and the counting of votes was smooth and transparent as it was done openly in the presence of the Presiding Officer, Deputy Presiding Officer and all the agents present. In cross examination by **Mr Kithi** the witness stated that although he could not remember the date when he was appointed, he had never been a member of any other party before then. As a voter he voted at Miritini Bamako, though he could not remember ODM's agent in the station. He could not remember the number of agents at the station. He, however confirmed that **Juma Swaleh** was his fellow agent and he knew him before since they stay in the same area. According to him when **Juma Swaleh** went he was there since he was there from 6.00a.m. According to him, the counting ended at night at about 2.00a.m. although he was not be certain. According to him, all agents present signed form 35. In re examination he said that every Party had agents including the Petitioner's agents all of whom signed without complaint and that the votes were properly counted and there were no complaints.
28. **Lucy Atieno Juma**, testified as DW7. According to her affidavit, she was an Agent appointed by the Wiper Democratic Movement Party under the CORD Coalition of Miritini Station Polling Centre. She was however unaware of the contents of paragraph 1 of the Statement by **Lucy Palte Balu** to the effect that she was a voter and an agent as she did not annex any evidence to support the same. According to her all the agents who had the requisite credentials were allowed into the polling station. She was further unaware of the contents of paragraph 1 of the Statement by **Leilah Mahfudh Karama** to the effect that she was a voter and an Agent in Miritini Station Polling Station as she did not annexed any evidence to support the same. According to her there was no blast that occurred as alleged and there was no incident of bribery that she witnessed nor was there any that was reported and in her view, the voting, counting and tallying of votes at Miritini Station Polling Centre was free, fair, transparent and in accordance with the law. In cross-examination by **Mr Kithi**, she said that she was agent in Miritini Railway Station which had 6 streams and that she voted at Miritini Railway Station Stream 3. Although she confirmed from the affidavit of **Neema Karisa** that under Railway Station there were 12 streams, the affidavit of **Lucy Palte** did not disclose the stream in which she was. According to the witness they were not together in the same stream and it was not possible for her to recognise **Lucy** if she saw her since it was long

- ago. Similarly she could not tell whether she was with **Leila Mahfudh** in the same stream. When questioned by **Mr Okonjo**, the witness said that only those with badges and accreditation letters were being allowed in the Polling Stations. In re-examination she reiterated that there was no blast and that the counting of votes was incident free.
29. Next to give evidence was **Juma Makau Kiliku** who testified as DW8. According to her affidavit, he was an Agent appointed by the Wiper Democratic Movement Party under the CORD Coalition of KwaSheePrimari School Polling Station in which station the voting was smooth with no incidents of any electoral malpractices whatsoever and in particular there were no incidents of voter bribery at the Station as alleged by **Juma Hatibu Mwinyihaji**. To him, the allegations of undue influence and of voter bribery by the said **Juma Hatibu Mwinyihaji** are unjustified, incorrect, unsupported by any evidentiary proof and totally full of falsehood since every voter exercised his democratic right to vote freely without and kind of interference from any person whatsoever and the tallying and counting of votes was done openly and transparently in the presence of the Presiding Officer, Deputy Presiding Officer and the respective Party and/or Candidates agents. Further all the ballot boxes used during the entire voting period were verified by all the agents present and each valid vote cast was rightly accorded to its rightful party. In answer to questions posed by **Mr Kithi**, DW8 stated that the agents were appointed by the party and that though the counting started at about 9.30 p.m. it went on till about 2.00a.m. He confirmed that he signed form 35 and denied that **Juma Hatibu** was denied entry into the Polling Station. On being cross-examined by **Mr Okonjo** he confirmed that from the affidavit of **Juma Hatibu**, the latter did not state that he was an agent but a voter and that the names of voters are not indicated in form 35.
30. DW9 was **Ahmed Kombo Ahmed**. According to his affidavit, he was appointed as the Chief Agent by Wiper Democratic movement for March 4, 2013 General Elections for Jomvu Constituency and was mandated to supervise all agents appointed by Wiper Democratic Movement Party in Jomvu Constituency with the role of coordinating, liaising and watching brief for all the Candidates vying for all positions viz; Presidential, Gubernatorial, Senatorial, County Women Representative, Member of Parliament and County Ward Representatives for Jomvu Constituency. According to him, there is no polling station in Jomvu Constituency that was known as Mikindani Polling Centre - as stated in the affidavits of **Ali Nyamai** and **Zubeda Swaleh** and therefore the allegations of electoral malpractices at Mikindani Polling Centre are a fabrication only meant to secure the Petitioner an unfair advantage and mislead this Honourable Court. He deposed that while on a tour of the various polling stations in Jomvu Constituency, he observed that all the political parties were represented by their respective agents who had unlimited access into the polling station and he did not come across a single incident where any accredited party agent were denied access. According to him, despite the challenges experienced the elections were generally conducted in a transparent manner. According to the information he received from his agents all agents were allowed to participate in all important electoral process such as breaking of the ballot seals, verification of the voting process, sealing of the ballot boxes, collating the results and the tallying process in all polling stations hence apart from challenges such as failure of BVR electronic voting machines, failure of electronic systems and long queues and delays in opening of some polling station, there were no irregularities/electoral malpractices in Jomvu Constituency and hence the results of the elections, including that of Member of National Assembly for the Constituency which is being contested herein, are a true reflection of the will of the People of Jomvu Constituency who freely and transparently exercised their democratic right in voting for the 4th Respondent herein and their will should be respected. In cross-examination by **Mr Kithi**, the witness said that he was appointed Chief Agent on 28th February 2013 and was at Mikindani Social Hall. He said the list of agents was prepared and given to him by Co-ordinator of Wiper, one Mr. Mohamed. According to him he was the Chief Agent for Jomvu Constituency. According him, although it was his duty to avail form 35 he did not avail the same because they were not required. He, however denied that the Petitioner's agents were locked out and that they were not allowed to sign the form 35. To him every agent was given form 35. In answer to **Mr Okonjo's** questions, he said the reason why he did not avail form 35 was because he did not see any complaint on the counting hence he did not see the need to avail them.
31. DW10 was **Mwidani Ramadhan Kajembe** who according to his affidavit was of any polling station known as Mikindani Polling Centre as he was not at Mikindani Polling Centre as alleged.

In cross examination by **Mr Kithi** he said that he did not play any role in the elections. Although he said that allegations were made against him in the affidavit of **Zubeda Swaleh**, he at the same time admitted that there are many **Mwidanis** in Mombasa and could not explain why he was the one who was called. He however disclosed that the 4th Respondent is his brother in law having married his sister. He also disclosed that **Faiza Kajembe** is his younger sister same father and same mother and that there is another sister married to 4th Respondent. In re-examination he told the Court that the petitioner is his brother.

32. After the evidence of this witness the 4th respondent closed his case.

PLAINTIFF'S SUBMISSIONS

33. On behalf of the plaintiff it was submitted by **Mr. Kithi** that the response on record filed by 1st, 2nd and 3rd Respondents is not properly on record because the pleadings are signed by the advocates and yet the nature of a petition or response is such that it must be signed by the party and not the advocate just as the petition and reference was made to Rules 75(a) and 14(2) and (3) all of which do not contemplate execution of a response by counsel on the record. In addition, it was submitted that 2nd and 3rd Respondents are body corporate and for the response to be valid the same should have been under corporate seal. In **Mr Kithi's** view, the affidavit filed by 4th Respondent does not in any of its 42 paragraphs aver to the accuracy of the facts in the 4th Respondent's response to the petition. Similarly, there is no affidavit from the 3rd Respondent and therefore, the facts in the response are not supported by any affidavit asserting the veracity of the contents of the response. He further submitted that whereas the affidavit sworn by the 1st Respondent in Paragraph 2 alleges that he is authorised to swear it there is no authority annexed to the affidavit and it would therefore, be irregular for the court to deem that it is filed on behalf of 2nd and 3rd Respondents. Learned counsel further submitted that the responses to the petition are irregularly on record not only as to who have executed them but they are filed pursuant to an improper appearance and reference was made to Rule 7(1) (k) which applies to appointment of advocates to act in case there would be a petition against a winning candidate. The notice under Rule 7(1), according to him is one filed after election but before petition is not notified. Consequently, the responses filed by the respondent having not been preceded by notice under Rule 7(1)(a) the notices are irregularly on record since an advocate cannot instruct himself hence the notice of appointment is contemplated to be executed by the Respondent. In support of this submission reference was made to the case of **Orengo vs Moi vs 12 Others (No. 2) [2008] 1 KLR (EP)** where it was held that an election court need not fall back on the Civil Procedure Rules. To **Mr Kithi**, the notice under Rule 7(1) cannot therefore be identical to notice under Civil Procedure Rules. To him, whoever signs on behalf of the respondent should be a person duly authorised by a power of Attorney. In the result, learned counsel submitted that the form of the two notices of appointment filed are irregular and do not put counsel properly on record. It was further submitted that the 1st Respondent conceded to the absence of any contractual relationship between herself and the firm of **Nyamodi** and that she has never instructed or remunerated that firm. While relying on **Cheshire, Fifoot and Furmston's Law of Contract 12th Edn. P. 26** – counsel submitted that representation of parties by advocates is on contractual basis and if the same is disavowed then all consequential proceedings undertaken are null and void. It was argued in the alternative that the appearance of **V.A. Nyamodi** for 1st, 2nd, and 3rd Respondent is irregular owing to conflict of interest apparent on record due to divergence in their interests. To learned counsel while 2nd and 3rd Respondents are under constitutional mandate to provide free and fair election, the 1st Respondent's contract has expired hence the joint representation renders a clear conflict of interest as between the advocate and the parties themselves and in support of this submission reliance was placed on **E.A. Foundly works (K) Ltd vs Kenya Commercial Bank Ltd [2002] 1 KLR 443** where it was held that an advocate cannot depose to contentious matter in an affidavit. Leaned counsel also drew the Court's attention to response to the petition filed on 4th May, 2013 and 7th March, 2013 and in which it was stated that **Seif Kajembe** was duly elected. According to **Mr Kithi** since this statement was not amended despite the lapse of a long period of

time the statement constitutes an admission that the petitioner was duly elected. It was further submitted that annexed to the affidavit to the petition is a letter constituting the lodging of a formal dispute and under section 74(1) and (2) of ***Elections Act***, IEBC is given jurisdiction to settle electoral disputes as long as they do not arise subsequent to announcement of results. Since the 1st Respondent admitted receipt of the letter the letter did qualify as a dispute in as much as it challenged the outcome and made before announcement of the results hence the 1st Respondent did not have jurisdiction to refuse to adjudicate the dispute. In learned counsel's view, the court must make adverse inference from that unwarranted haste in light of the fact that equity and the Constitution provide that no wrong is without remedy. Citing **Welamondi vs The Chairman ECK [2002] 1 KLR 486**, it was submitted that whereas the Commission exercised discretion, the high Court is entitled to interfere. Since fair administration is now part of legal right and Articles 10 and 141 are clear about the national principle of governance, the decision to announce the winner flouted the constitution and should not be allowed to stand. To counsel, there is a difference between the validity of the declaration of results and that of the winner and having failed to exercise its powers under the Act, it affected the validity of the election. Counsel urged the Court to reconsider the decision in the application for scrutiny and directed the court's attention to **Kibaki vs Moi (2008) 2 KLR** in which the Court of Appeal visited *stare decisis* that subsidiary legislation cannot overrule Primary legislation. Since the ***Election Act*** is subsidiary to the Constitution and in particular the requirement in Article 86 that whatever system adopted must be verifiable and accountable, it was submitted that the decisions relied upon by the court which were made before the present constitution cannot stand.

1ST, 2ND AND 3RD RESPONDENTS' SUBMISSIONS

34. On behalf of the 1st, 2nd and 3rd respondents, it was submitted that the provisions of Chapter Seven of the Constitution, especially Articles 81 and 86 of the Constitution, and the ***Elections Act*** (hereinafter referred to as the Act) as well as the ***Elections (General) Regulations*** (hereinafter referred to as the General Regulations), are meant to realise the provisions of Articles 1(2), 4(2) and 10(2)(a) which is that a democratic state in which the people exercise their power either directly or through their democratically elected representatives hence the Court must have in mind the overriding constitutional objective of the electoral process, in its adjudication of the instant dispute. Citing **Raila Odinga & 5 Others vs. IEBC and 3 Others [2013] eKLR**, it was submitted that the fundamental way in which the Court is to exercise an insightful approach is by way of fidelity to the terms of the Constitution, and of such other law as objectively reflects the intent and purpose of the Constitution. Accordingly it was submitted that the Court must be guided by the principle of democracy, which requires that the will of the people, where it can be discerned from the electoral process, or from the scrutiny by the courts of the electoral returns must prevail. Citing **Richard N. Kalembe Ndile & Another vs. Patrick Musimba Mweu & 2 Others [2013] eKLR**, it was submitted that at the end of the day what is of prime concern to the Court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly whether the respondent was validly elected. Relying on the same case it was submitted that the Court must give primacy to safeguarding the will of the people over other electoral values such as accuracy. Similar sentiments were expressed in **Steven Kariuki vs. George Mike Wanjohi & 2 Others [2013] eKLR**. It was further submitted based on section 107 of the ***Evidence Act*** and Rules 10(1), 10(3)(b) and 12(2)(a) of the ***Elections (Parliamentary and County Election Petitions) Rules, 2013*** (hereinafter referred to as the Rules) have invested in the petitioner the burden of proving his case as contained in his petition and that these provisions require the petitioner to discharge his burden of proof by particularising his claims, and providing evidence in support, in his pleadings. It was submitted that only after the petitioner has discharged the burden of proof does it shift to the respondents and that 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 and reliance is once again placed on **Raila Odinga's Case**. To these respondents the petitioner has contravened Rule 10(3)(b) with respect to requirement for provision of grounds and further that in cross-examination the petitioner failed to provide credible evidence in support of the allegations in the petition especially since the petitioner ought to have proved his allegations of the commission of electoral malpractices which

attract criminal sanctions beyond reasonable doubt. It is submitted that the witnesses relied upon have not produced evidence of either their registration as voters in the Constituency or letters of election agent accreditation from the petitioner's political [party proving that they were so accredited. It is submitted that in any case their allegations were based on suspicions without basis. Citing **Raila Odinga's Case**, **Kalembe Ndile's Case** and **Steven Kariuki's Case**, it was submitted that an election should not be set aside merely because there are irregularities, or non-compliance with constitutional or statutory principles since it has to be appreciated that elections are human endeavours and are not carried out by programmed machines. Whereas there were challenges, it is submitted that there was no evidence that these affected the results of the elections in the Constituency. The respondents having deposited with the Court complete sets of forms 35s it was submitted that the allegation that the 1st respondent did not demand for the same must be false. With respect to provision of the form 35s to the agents it was submitted that such a duty is on the Presiding Officers and not the Returning Officer. With respect to allegations of introduction of unregistered ballot boxes it was submitted that no such evidence was preferred and this applied to allegation that counting and tallying was hampered by confusion. Similarly, it is submitted that the allegation that there was no tallying was contradicted by the evidence on record. With respect to the allegation that the said forms were not affixed to the walls of the polling stations it was submitted that there was evidence to the contrary and in any case it has not been shown how this affected the results. On the failure of the electronic transmission system reliance was placed on **Raila Odinga's Case**. With respect to failure to hold consensus meetings it is submitted that there is no requirement for the same and it has not been shown how the failure to hold the same affected the results. Similarly there is no requirement that agents do accompany ballot boxes to the Tallying Centre. On the request for the recount it was submitted that he same was belatedly made and was made to the wrong officer.

35. On the submissions made by **Mr. Kithi** in his final address, it was submitted that the same were not related to the issues for determination. It was submitted by **Mr Okonjo** that the agreed issues at the pre-trial conference filed were five which have not been canvassed in the petitioner's submissions. To him, proceedings are meant to assist the court and direct the minds of the parties on the issues to be canvassed on which evidence is to be laid and therefore, where a party chooses at point of submission issues which do not form part of agreed issues and did not form the substance of the conduct of the petition they must be disregarded. He submitted that the petitioner's submissions with respect to record of pleadings of the respondent are preliminary objection and application for the court to remove from its records the pleadings and these should have been made before commencement of the hearing under Rule 17 of Elections Rules and are therefore incompetent hence the Petitioner is estopped from making the application, having gone thorough the entire spectrum of the hearing without objections and the petitioner has served ad received pleadings and has therefore acquiesced to the document being on record and reliance for this line of submission was placed on **Peter Nganga Muiruri vs Credit Bank Ltd. [2006] eKLR 85-89**. He further submitted that by his conduct, the petitioner has acquiesced on his right to object and cannot do so by submission and hence ought to be ignored. Nevertheless, he submit first that Rule 14 of the rules does not provide that response be signed by the Respondent since Rule 16(3) (b) which deals with filing of the petition is express that the Petitioner must sign the petition and yet there is no such requirement for the response. To him, the Rule delineates a response from an affidavit which contains the facts since a response is unusually deposed to by advocate or respondent to a petition. In addition, he submitted that there is no legal ground that a corporate body cannot make joint response with individuals and urged the court to take judicial notice of statutory situation of the 2nd respondent which is created under Section 10 of IEBC Act which establishes office of Secretary as well as the Act which provided for the office of Returning Officer under section 3 for each constituency. To him, a Returning Officer is an agent of the Commission who is custodian of electoral process hence, there cannot be any complaint against 2nd Respondent as individual or secretary of the Commission and hence the Court should find that a joint response is proper and lawful. With respect to lack of response, he reiterated that 3rd Respondent is a body corporate which cannot depose to the facts hence the 1st Respondent can depose on behalf of 3rd Respondent as there is a legal and statutory agency between them. With respect to Memo of Appearance, he submitted that in all instances, the petitioner has served the

advocate with pleadings and accepted service from the advocates and there is no prejudice occasioned to the petitioner. To learned counsel the final line of the response was a typing error but does not relieve the petitioner of burden and standard of proof hence the petitioner's submission that the error is at admission does not lie.

4TH RESPONDENT'S SUBMISSIONS

36. On behalf of the 4th respondent it was submitted that the issues of representation were not part of the agreed issues and in any case Civil Procedure Rules do not apply to election petitions. Relying on section 83 of the Act and **Raila Odinga's Case**, it was submitted that the petitioner must set out by raising firm and credible evidence of public authority's departure from prescription of the law and that in determining the standard of proof the threshold of proof should be above the balance of probability and not as high as beyond reasonable doubt. Reliance was also placed on **Karauri vs. Mbogo [2008] 1 KLR** and **Morgan vs. Simpson & Another [1974] 3 All ER 722**. It was submitted that a request for recount ought to be made at the Polling Station and not anyone else hence the letter relied upon as constituting a dispute cannot be termed an electoral dispute. It is submitted that under Regulation 79 the absence of a candidate or agent at the signing of a declaration shall not of itself invalidate the results announced and reliance was placed on **Wilson Mbithi Munguti Kabuti & 5 Others vs. Patrick Makau King'ola & Another HCEP 9/13 (Machakos) KLR**. It was therefore submitted that while form 35s are essential for purpose of verifying the votes even where parties don't sign them the results still stand and if a party is unavailable to collect the form that would not be a ground to vitiate the election if the same did not affect the outcome of the results. On the failure to electronically transmit the result reliance was placed on **Raila Odinga's Case**. On the allegation that the Petitioner's Party Agents were thrown out, it was submitted that based on Regulation 62(3) that the absence of agents shall not invalidate proceedings at a polling station. In the result it was submitted based on **John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others Nairobi HCEP No. 13 of 2008** that the Petitioner has failed to discharge his duty of burden proof hence the petition ought to be dismissed with costs.

THE LAW

37. 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.

38. 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.

39. 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.**

40. 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.

41. 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.

42. 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.

43. 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.

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

PRINCIPLES

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

46. 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 10th 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 1st 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 27th 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.”

47. 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.
48. 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.**

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

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

50. 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.**

51. 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.”

52. 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.**

53. 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).

54. 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).**

55. 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.”

56. 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.

57. 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].

58. 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.”

59. 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

60. Before embarking on the merits of the case, I will deal with the consequences of the presence of a witness in Court at the time of another witness on the same side is giving evidence before the former gives evidence. The practice is that a witness ought not to be in Court while a co-witness is giving evidence before the former gives evidence. This rule is meant to avoid the possibility that a witness may derive advantage from the manner in which the earlier witness gave evidence and hence tailor his evidence accordingly. The rule, however, does not apply to the parties to the suit. Where this rule is breached the Court may take it into account in deciding what weight to attach to such a witness. However, the mere fact that a witness was present in court while another was giving evidence does not *ipso facto* render his evidence inadmissible. In Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others (supra), it was held that:

“Admissible evidence is that which is (1) relevant and (2) not excluded by any rule of Law or Practice. The court has, however, a general discretionary power to control and this include power to exclude evidence even if it is admissible. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined... The evidence cannot be relevant or admissible unless such evidence is based on the issues as per the petition and particulars supplied. The purpose of particulars is to prevent surprise and limit inquiry at the trial to matters set out in particulars and a party is bound by his pleadings and issues raised from the pleadings and particulars which become the pleadings in the petitions. What a party is prevented to do is to lead evidence from his witnesses on the matters which are not pleaded in his case and this is so because the other party has to be aware and prepared for the evidence to be led... In general the prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevance. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant, some things which are relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence and such matters are inadmissible. Admissible evidence is thus that which is (1) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others and if so, it will be admitted. Evidence may also be admissible for one purpose and not for another. The court has, however a general discretionary power to control evidence and this includes the power to exclude evidence even if it is admissible.”

61. Under Rules 10(3)(b) and 12(1) of the Rules affidavits filed in support of the petition and in response to the petition do constitute the evidence in Chief and accordingly, the fear of one witness adopting the evidence of another by the fact of being in Court when the other witness is giving evidence is rather remote. I am therefore of the view that in the circumstances of this case, the mere fact that some witnesses were in Court when another witness was testifying is inconsequential.

62. On merits, the following issues were filed by the Petitioner and were generally agreed by the parties to constitute the issues for determination in this petition:

1 Was the election for position of Governor in Jomvu Constituency on the 4th March

2013 carried out in a free, fair and credible manner?

2 Was the election carried out in compliance or substantial compliance of the principles laid down in the Constitution or other governing written law?

3 If not, did the non compliance materially affect the results of the election?

4 Were any election offences committed by any person in connection with the election which is the subject of this Petition and if so, by whom?

5 Were the Fourth Respondent validly elected as the Member of Governor for Jomvu Constituency?

63. Apart from the obvious errors with respect to the position in dispute and grammatical errors the foregoing broadly are the issues in this petition. However before determining the same there are certain facts which must be reconciled and determinations made thereon before a determination can be made on these broad issues.
64. Before delving on the various allegations made in the petition it is worth repeating that since the presumption is that elections are conducted in accordance with the law, it is upon the petitioner to adduce cogent, credible and consistent evidence which show that the elections were not conducted in accordance with the law and that the non-compliance affected the results thereof. Where therefore the witnesses allege that they were present at the polling stations and participated as either voters or agents facts which would be peculiarly within their knowledge, it behoves them to bring forth sufficient material that would show that indeed they were present at the Polling Stations on the material day. One therefore expects voters to exhibit copies of their acknowledgement slips while agents are expected to exhibit copies of their accreditation documents. In the absence of these documents the Court may well be entitled to find if their allegations are disputed that indeed they were not present at the places they alleged they were on the material day. In this case it is unfortunate that none of the deponents of the affidavits in support of the petitioner's case exhibited any documentary evidence to prove these facts. Indeed in such circumstances the Court may well be justified in drawing adverse inference that had the said documents been exhibited they would have disapproved the allegations made by the said deponents.
65. In my view the first issue for determination is whether Jomvu Constituency Returning Officer omitted, neglected and/or refused to demand, from each polling centre in the respective Ward within Jomvu Constituency, duly completed copies of Form 35 duly signed and approved by party agents affiliated to all candidates as required by law. As rightly submitted by the respondents there was no evidence to support this allegation. In compliance with the provisions of Rule 21 of the Rules, the 3rd respondent filed copies of form 35s from the various polling stations and it has not been alleged that the same were not genuine forms. No evidence was led to prove that at the Tallying Centre there were no such forms. This ground of the petition must accordingly fail.
66. The second ground of the petition was that the Jomvu Constituency Returning Officer omitted, neglected and/or refused to issue, at each polling centre in their respective Ward(s), duly completed copies of Form 35 to all candidates' agents for their possession and records as required by law. Whereas it is true that it is not the obligation of the Returning Officer to issue to the agents form 35s, I take this to have been an inadvertence on the part of the petitioner since the issuance of the said forms is placed on the Presiding Officer under Regulation 79(1)(c) of the General Regulations. What are the consequences of the failure by the Presiding Officer to issue the said forms? The issuance form 35s is a process that is usually undertaken at the close of the counting. 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. It has not been contended that the failure to issue the said forms, even if though would have been in contravention of the aforesaid rule 79, materially affected the results of the election.
67. The next issue in the petition was that during counting of ballots at Kwa Shee Polling Station in Jomvu Constituency Returning officer omitted, neglected and/or refused to verify with party agents the origin of diverse un-registered Ballot Boxes brought for counting and tallying, instead

proceeding to determine and declare the results of the election of Jomvu Constituency Member of Parliament while including the ballot papers originating from the aforesaid several un-declared ballot Boxes brought in from parts un-known. None of the witnesses who testified before this Court and whose evidence was tested in cross-examination made any references to any unregistered ballot papers. In any case if there were any such ballot papers the issue ought to have been raised at the Polling Stations rather than at the Tallying Centre. Accordingly nothing turns on this allegation.

68. The next allegation was that during the receipt of ballot boxes and tallying of ballots there was general disorder at the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres which hampered transparent tallying as most if not all of the counting and tallying was done in the absence of party agents. Assuming without deciding that counting and tallying was done in the absence of party agents, Regulation 79(1)(7) of the General Regulations provides that the absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced. Therefore it is not enough for a party to allege and even prove that there were no agents present at the time of counting or tallying. The party must show that the absence of the agents was not through any fault of theirs and that the results were affected thereby. What then are the consequences of the failure by the agents to participate in the electoral process? It must always be remembered that the role of the party agents is to ensure that the interests of their principals are protected. An electoral process however traverses party lines and therefore the mere fact that agents of a particular party did not participate in the electoral process for whatever reason may not necessarily lead to the nullification of an otherwise properly conducted election. Therefore a party who alleges that its agents were locked out from participating in the electoral process ought in my view to go further and show that as a result of the non-participation in the process, the results of the election were affected. In *Reuben Nyang'inja Ndolo vs. Dickson Wathika Mwangi & 2 Others* (supra) the Court held that the failure by a candidate or his agent to sign the Form 16As cannot invalidate the results contained in the said Form 16A and therefore the fact that the said Form 16As were not signed by the agents does not render any of the results from the various polling centres invalid.
69. The role of agents in an election petition was the subject of the determination in **Writ No. J1/6/2013** between **Nana Addo Dankwa Akufo-Addo & Others vs. John Dramani Mahama & Others** in which the Supreme Court of Ghana expressed itself as follows:

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

70. If therefore the absence of the agents is due to their own neglect of duty, that cannot be blamed on the respondents. It is incumbent upon the political parties and candidates to ensure that their agents are properly trained and facilitated in order for them to ensure that the interests of their principals are protected at all times. In this case, no evidence has been led to show that the absence of the agents, even if true, did affect the results of the elections in Jomvu Constituency.
71. With respect to allegation of general disorder at the Mikindani, Miritini and Jomvu-Kuu, PW5's conclusions that there might have been irregularities at Mikindani Primary School Polling Station were merely based on suspicions. He admitted that he did not in fact witness any irregularity thereat. PW7, on the other hand who alleged that she was removed from the Polling Station admitted that she did not report such a serious incident anywhere. In any case the incident was denied and therefore it became an issue of one's word against the other and that did not elevate the standard of proof anywhere near the balance of probability leave alone above it. With respect to the evidence of PW4, **Leila Mahfoudh Karangu**, her evidence was clearly unreliable. On the one hand she stated that she was denied entry into the polling station while at the same time she alleged that she was inside. Her evidence was clearly exaggerated and was laced with certain allegations whose basis was never laid such as the allegation that the blast was a grenade. I am therefore not convinced that the results of the elections were affected by the said blast. Similarly with respect to the claims of blackouts there was evidence that the relevant Polling Station had gas lamps and I have no reason to find that the allegation that there were blackouts interfered with the results of the elections in light of the evidence that there were gas lamps. In other words the allegation of blackout has not been proven to the required standard which is above balance of probability. With respect to the allusion of violence in **Kabogo Gitau vs. George Thuo & 2 Others** (supra) **Kimaru, J** was of the view that although there was evidence of violence, the same was in respect of an isolated case and was indeed one off incident which did not amount to generalised violence that could in the circumstances vitiate an election. Similarly, it has not been alleged that there was widespread violence which would justify the Court in vitiating the elections. Again in **Benson Maneno vs. Jacob Machekele and Others Malindi EP No. 14 of 2013**, it was held by **Kimaru, J** that for the Petitioner to sustain the claim that violence disrupted the election, he was required to establish that the Respondents were either responsible for the violence or condoned or connived in the perpetration of violence. In this case am not satisfied that this requirement has been proved.
72. It was next alleged that in Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to tally, in respect of each of the polling centres in their respective Ward the respective results for the elections of each of the elections for the Member of Parliament, Member of Parliament and Woman Representative seats at the respective Polling Station(s) where the votes were counted and/or at Tallying Centre as required by law. It is further alleged that the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to announce, in respect of each of the Polling Stations in their respective Wards the total results for each of the elections for the Member of Parliament, Member of Parliament and Woman Representative seats at the respective Polling Station(s) where the votes were counted and/or at the respective Constituency Tallying Centre(s) as required by law. These allegations as correctly submitted on behalf of the respondent were clearly contradicted by the petitioner's own evidence that he presented his complaint after the tallying.
73. It was next alleged that the Mikindani, Miritini and Jomvu-Kuu Ward Tallying Centres Returning Officers omitted, neglected and/or refused to display or affix on the wall of each of the Polling Stations and/or Tallying Centres in their respective Ward(s), the total results for each of the elections for Member of Parliament, Member of Parliament and Woman Representative at the respective Polling Station(s) where the votes were counted and/or at the Constituency Tallying Centre(s) as required by law. Again this was a post-election requirement and the failure to comply therewith even if it was true did not affect the results of the elections. However there was evidence from the respondents which contradicted this allegation hence the same was never proved to the required standards.
74. With respect to the allegation of failure to transmit the results electronically, it was admitted that the 3rd respondent experienced serious challenges with respect to compliance with this requirement. However the issue was conclusively dealt with the **Raila Odinga's Case** in which the Supreme Court expressed itself as follows:

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

75. It follows that the mere fact that the results were not transmitted electronically cannot be a basis for invalidating an election if the results of the same express the will of the electorate.
76. On the failure to hold consensus meeting, no legal provision has been cited which require the same to be held. Whereas it may be a good practice to do so, the failure to do so does not amount to non-compliance with any written law which is a pre-requisite to voidance of an election under section 83 of the Act. Even if there was such a requirement it has not been shown that the failure to comply therewith affected the results of the elections.
77. On the allegation that the agents did not accompany the ballot boxes to the tallying centre, once again whereas it may be a good practice to do so if only to show that all the electoral processes and stages are transparent and avoid any unnecessary suspicion, there is no express provision which requires agents to accompany the ballot boxes to the Tallying Centre. In my view this is an area where the aforesaid consensus meeting between the electoral officials may become handy so that the Candidates or the parties may make necessary transport arrangements to ensure that their agents do accompany the ballot boxes. In the absence of any such legal requirement, these provide adequate security machinery to ensure that the ballot boxes are not tampered with along the way from the Polling Centres to the Tallying Centre. Again even if there was such a necessity to accompany the ballot boxes it has not been alleged let alone being proved that the failure by the agents to accompany the ballot boxes affected the results of the elections.
78. It is also alleged that Jomvu Constituency Returning Officer omitted, neglected and/or refused to take into account and give due consideration to the complaints forwarded to him by the Petitioner viz-a-viz the validity and/or propriety or otherwise of inclusion of the aforementioned un-verified results from the Polling Stations and Constituency Tallying Centres in the final result or hearing the Petitioner on the question of the validity and/or propriety or otherwise including the said results in the final result and without giving any or any proper reasons for why the announcement and/or declaration of election of Jomvu Constituency Member of Parliament should proceed in the face of these irregularities. In this case the letter of complaint was dated 6th March 2013 and it was addressed to the Constituency Returning Officer. Regulation 83(1)(a) of the General Regulations 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 even if it had been made. However it is clear that the said request is dated a day after the results were announced hence the said request was inconsequential.
79. There was an attempt to show that there was a lady who was giving out money with a view to influencing the voting outcome. This was however not expressly pleaded. In **Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman** (supra), it was held:

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

80. From the casual manner in which this serious allegation was introduced, it is clear that the same was half-heartedly canvassed and it is my view that the standard of proof necessary for sustaining the said allegation has not been attained.
81. In his oral address to the Court, **Mr Kithi** raised several points of law. Suffice it to say that most if not all these issues were never pleaded and hence did not form part of the issues for determination by this Court. I have already dealt with the failure to plead matters in controversy. I however wish to reiterate the sentiments of holding of **Musinga, J** (as he then was) in **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others** (supra) that:

“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.”

82. As was held by **Ringera, J** (as he then was) in **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460:**

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair

orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”

83. In this case, the issues raised have been raised at the tail end of the proceedings when evidence has been taken. It has not been alleged that any party has been prejudiced by the alleged non-compliance with the rules of procedure. Article 159(2)(d) of the Constitution provides that in exercising judicial authority, the courts and the Tribunals shall be guided by the principle *inter alia* that justice shall be administered without undue regard to procedural technicality. Accordingly even if I were to accede to the petitioner’s submissions that there were procedural lapses made by the respondents, I would be very reluctant to strike out the pleadings filed in response to this petition at this stage of the proceedings.
84. Having said that it is my view that the issues raised are in any event unmerited. First and foremost in matters of procedural deficiencies, unless they go to the jurisdiction of the Court or cause prejudice to the other parties cannot be the basis for disenfranchising the electorates in an otherwise properly conducted electoral process. As was recently held by **Majanja, J** in **Caroline Mwelu Mwandiku vs. Patrick Mweu Musimba & 2 Others [2013] eKLR:**

“The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties....The guiding principle in consideration of this matter is the overriding objective of *the Rules* which is stipulated under rule 4(1) of *the Rules* as “to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.” This objective is best realised by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, “(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.”.....Rules 4 and 5 are therefore a testament of the provisions of Article 159(2)(d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities. The fact that elections are special disputes governed by special reforms does not exonerate the court from this prime obligation to do substantive justice. In the recent Supreme Court decision in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* Nairobi Petition No. 5 of 2013 [2013]eKLR the court stated in part as follows regarding this provision; “The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties...”.....I am satisfied that in these circumstances no injustice has been or will be occasioned by the failure of the petitioner to set out the result of the election. The fact that election disputes are *sui generis* governed by special regime of rules does not exonerate the court of its prime obligation and indeed reason for its existence; that of delivering substantive justice.”

85. Apart from the forgoing it is clear that the submissions made on behalf of the petitioner do not form part of the issues in dispute in this petition. As was the position in **Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman** (supra) in the present petition the issues raised in the submissions never formed the issues in dispute hence ought not to be the basis of the determination in this petition. This was recognised by **Mwongo, J** in **Ferdinand Ndungu Waititu**

vs. The Independent Electoral & Boundaries Commission & 8 Others Nairobi Election Petition No. 1 of 2013 in which he held:

“as in litigation, a petitioner is bound by his pleadings. It is common that a petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts the opponents into a difficult position in knowing what the real case they must answer is, and what it is the court must determine.”

86. On the issue of the execution of the response Rule 10(3)(a) of the Rules states that an election petition shall be signed by the Petitioner or by a person duly authorized by the Petitioner. The word “authorize” is defined by ***Black’s Law Dictionary***, 9th Edition by Bryan A. Garner at page 153 as meaning “To give legal authority; to empower; to formally approve; to sanction” while authority is defined at page 152 thereof as “The right or permission to act legally on another’s behalf; esp. the power of one person to affect another’s legal relations by acts done in accordance with the other’s manifestations of assent; the power delegated by a principal to an agent”. To therefore interpret that rule to mean that the petition can only be signed by the petitioner or a donee of his power of attorney would in my view be to unduly restrict the meaning of the word “authority”. In any case, it is clear that whereas rule 10(3)(a) of the Rules provides that an election petition shall be signed by the Petitioner or by a person duly authorised by the Petitioner, Rule 14 which deals with Response to petition does not have a similar provision. Form EP 4 in the schedule to the Rules does not expressly provide that the response be signed by the respondent in person. Even if it provided so Section 72 of the ***Interpretations and General Provisions Act***, Cap 2 Laws of Kenya, provides:

Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.

87. I therefore find that there is no requirement that the response be signed by the respondent in person or a donee of his power of attorney.

88. It is not alleged that the response was in fact not signed. Even if the same had not been signed, in **Transgem Trust vs. Tanzania Zoisite Corp. Ltd Arusha HCCC No. 33 of 1968**, the Court was of the view that signing of a plaint is a matter of procedure and this defect does not affect the merits of the case or the jurisdiction of the court. I however, wish to say no more on that issue. Suffice it to say that the response was duly signed by the advocate on record. The fact that the petitioner accepted service of the response and the replying affidavit unconditionally and fully participated in the hearing without objection clearly show that he was never misled. Accordingly I cannot uphold the said objection.

89. It has further been alleged that it was improper for the respondents to file a joint response. The position of the secretary to the third respondent is provided for under Article 252(12) of the Constitution while section 2 of the Act provides for the position of a Returning Officer who is defined to mean “a person appointed by the Commission for the purpose of conducting an election or a referendum under this Act”. These two officers are therefore agents of the 3rd respondent. In this Petition, the 1st and 2nd respondents are not sued in their personal capacities but are sued by virtue of the office they hold. In **Ayub Juma Mwakesi vs. Mwakwere Chirau Ali Mombasa HCEP No. 1 of 2008 Ibrahim, J** (as he then was) held while dealing with the role of the Returning Officer *vis-à-vis* the defunct Electoral Commission that while the Returning Officer was mandated to carry out the election, he did that under the general direction and supervision of the Electoral Commission of Kenya. The court was of the view that the office of a Returning Officer was an organ within the Commission and while the Returning Officer discharged his duties independently he did so in consultation, co-ordination and under the direction of the Commission. Accordingly, the acts of the Returning Officer in my view cannot be treated as being conducted in isolation to that of the IEBC. In my view I do not see what is inherently wrong in an agent and a principal filing a joint response to a petition. Even if one was a statutory body while the other is a natural person I would not uphold such an objection. Being agents of the 3rd respondents, the 1st

and 2nd respondent or either of them can properly depose to matters touching on the 3rd respondent hence the objection that there was no response by the 3rd respondent must similarly fail.

90. On the issue that the 1st respondent did not instruct the firm of **Nyamodi & Company Advocates**, the law is clear that an agent properly instructed by a principal binds the agent in that matter and hence there is no necessity that where both the agent and the principal are sued each one of them must instruct separate legal counsel. Whereas they may choose to do so, where the principal has instructed a legal counsel in which an agent is sued there is no objection to the legal counsel also acting for the agent since the liability of the agent in such matters is invariably vicarious.
91. The other objection taken is that there was no authority given by the 3rd respondent to the 1st respondent under seal to depose to matters on the former's behalf. First and foremost where a resolution is required before a legal person undertakes legal proceedings is a resolution under seal. The law does not necessarily require that the authority under seal be itself exhibited. It is upon the person alleging that there was no such authority to prove the same. In **A Baumann & Co. (Uganda) Ltd vs. Nadiope Kampala HCCS No. 610 of 1966 [1968] EA 306**, it was held as follows:

“The Deputy Chief Registrar certainly has power under Order 5 to sign a summons to enter appearance if a judge has authorised him to do so; and he has signed as an acting Deputy Chief Registrar. In these circumstances a rebuttable presumption is created that the officer concerned was duly authorised, by the application of the maxim, *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* – (everything is presumed to be rightly and duly performed until the contrary is shown). This is, of course only a presumption and it can be rebutted by the minimum of evidence. For the purpose of this suit, there is no evidence whatever before the court that the officer concerned had no authority to sign the summons. Since there is no requirement in Order 5 rule 1(3) that the authority of the judge must be given by a notice that has to be made public, there is nothing to prevent a judge handing a file over to an officer of the court with a request to sign the summons on his behalf. In the absence, therefore, of evidence to the contrary the court finds that the suit which was duly instituted under Order 4 is not defeated by any infringement under Order 5.”

92. Our **Evidence Act** in section 109 provides that “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.” Therefore the burden is upon the petitioner who alleges that there was no authority under seal to prove that fact if he expects the court to base its decision thereon. Without any such evidence there is no basis upon which I can find that the authority under seal even if it was necessary was not given.
93. It has been submitted that since there was no valid appearance entered to the petition all the processes subsequent thereto ought to be ignored and nullified. In **Raphael Jacob Samuel vs. The Public Trustee & 7 Others Civil Appeal No. 16 of 1980 (CAK)**, the Court of Appeal held while relying on **Nanjibhai Prabhudas and Co. Ltd. vs. Standard Bank Ltd. [1968] EA 670** that:

“The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is a nullity, unless the incorrect act is of a fundamental nature. Matters of procedure are not normally of a fundamental nature... Using an incorrect form of procedure which has, in fact brought the parties before the Court and has, enabled the parties to represent their respective cases to the Court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never existed.”

94. The question is therefore whether the failure to enter appearance ought to be treated as such a fundamental omission that all that follows it including the filing of a response and the subsequent hearing ought to be nullified. In this case, it has been submitted that there was a Notice of Appointment that was filed. Under the normal civil proceedings where a party files a defence without entry of appearance, the defence is normally treated as constituting an appearance as well.

Whereas the provisions of the Civil Procedure Rules do not necessarily apply to elections petitions, it is my view that in order to ensure that the spirit of Article 159(2)(d) of the Constitution which enjoins the Courts to exercise its judicial authority while being guided by the principle that justice shall be administered without undue regard to procedural technicalities cures this anomaly. Where therefore a party who is aggrieved by a procedural mishap does not take the earliest opportunity to contest the same and waits until after the trial is finalised to raise the issue unless the mishap goes to the jurisdiction of the Court, the Court would be very reluctant to uphold objection and may well be entitled to hold as I hereby hold that the procedural. As was held in **Eastern And Southern African Trade And Development Bank (PTA) and Another vs. Ogang (2) [2002] 1 EA 54 (Comesa):**

“The right to challenge proceedings conducted in breach of the rules against bias may be lost by waiver either express or implied. There is no waiver or acquiescence unless the party entitled to object to an adjudicator’s participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. However once those conditions are met a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity. The same principles apply where an adjudicator is subject to a statutory disqualification. In the case of statutory disqualification there appears to be a presumption that regularity cannot be conferred by waiver or acquiescence, but a party failing to take objection may be refused relief if he seeks a discretionary remedy when subsequently impugning the proceedings.”

95. The decision whether or not to expunge proceedings is an exercise of judicial discretion and it has not been alleged that the petitioner herein was not aware of the procedural disability complained of. The pleadings complained of were timeously filed and at all material times the petitioner ought to have been aware of their deficiencies if any. As the proceedings have been allowed to run their course, the interest of justice in my view dictates that this objection ought not to be sustained.
96. It was also submitted that there was an admission in the response that the petitioner was the duly elected member of the National Assembly for Jomvu Constituency. The respondents admitted that there was a typographical error in the response. In my view the Court ought to give a holistic approach to the pleadings filed and ought not to rely on one sentence to arrive at a determination if it is clear from the rest of the pleading and the case as a whole that such determination will be contrary to the case as presented. The Court of Appeal in **Choitram vs. Nazari Civil Appeal No. 8 of 1982 [1984] KLR 327; (1982-88) 1 KAR 437; [1976-1985] EA 53**, expressed itself with respect to admissions as follows:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgement being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admissions must leave room for no doubt that the parties passed out the stage of negotiations to a definite contract. It matters not if the situation is arguable, even if there is a substantial argument; it is an ingredient of jurisprudence provided that a plain and obvious case is established upon admissions by analysis. Indeed there is no other way, and analysis is unavoidable to determine whether the admission of the fact has been made either on the pleadings or otherwise to give such judgement as upon such admissions any party may be entitled without waiting for the determination of any other question between the parties. In considering the matter, the Judge must neither become disinclined nor lose himself in the jungle of words. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in courts and if a judge does not do so, or refuses to do so, he fails to give effect to the provisions of the established law by which a legal right is enforced.”

97. Whereas it would have been prudent for the respondents to have applied to amend their response, in the circumstances of this case I am not prepared to find that the failure to do so did prejudice

the petitioner. That the Court has power to amend pleadings at any stage of the proceedings is trite including at the appellate stage where the amendment was occasioned by inadvertence and no prejudice has been occasioned to the other party. In this case the petitioner clearly knew the case that he was to confront and he cannot and has not alleged that the case that he was to confront was that it was admitted that he was the validly elected Member of Parliament for Jomvu Constituency in the National Assembly. I am prepared to believe and I do hold that the said pleading was a mere inadvertence.

98. In the result this is the view I form of the issues herein:

- 1 The election of the Member of the National Assembly for Jomvu Constituency on the 4th March 2013 was carried out in a free, fair and credible manner.**
- 2 The said election was carried out in compliance or substantial compliance with the principles laid down in the Constitution or other governing written law.**
- 3 The non-compliance with the principles, if any, did not affect the results of the election.**
- 4 There were no election offences committed by any person in connection with the election which is the subject of this Petition.**
- 5 The Fourth Respondent was validly elected as the Member of the National Assembly for Jomvu Constituency.**

ORDER

99. In the result this petition fails and is dismissed with costs to the 3rd and 4th respondents assessed in the sum of Kshs 1,000,000.00 each.

100. In terms of Section 86 of the *Elections Act, 2011 (No. 24 of 2011)*, I declare and certify that the Fourth Respondent, **Bady Twalib Bady**, was validly elected as a Member of the National Assembly for Jomvu 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*.

101. In conclusion I wish to express my appreciation to counsel for their efforts in ensuring that this petition was heard and determined within the timelines stipulated under the Act.

Orders accordingly.

Dated at Mombasa this 25th Day of September, 2013

G.V. ODUNGA

JUDGE

Delivered in the presence of

Mr. Kithi.....for Petitioner

Mr. Nyamodi.....1st, 2nd and 3rd Respondents

Mr. Abed and Mr. Mohamed4th Respondent