



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELECTION PETITION NO. 1 OF 2013

IN THE MATTER OF: ARTICLES 1, 3, 38, 81, 86 AND 87 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 75 AND 76 OF THE ELECTIONS ACT, 2011 (ACT NO. 24 OF 2011)

AND

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, (LEGAL NOTICE NO. 128 OF 2ND NOVEMBER, 2012

AND

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013 (LEGAL NOTICE NO. 44 OF 22ND FEBRUARY, 2013)

AND

IN THE MATTER OF: THE ELECTION FOR THE GOVERNOR OF MERU COUNTY IN THE GENERAL ELECTIONS HELD ON 4TH MARCH, 2013

BETWEEN

DICKSON MWENDA KITHINJI ----- PETITIONER

-VERSUS-

GATIRAU PETER MUNYA----- 1ST RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION----- 2ND RESPONDENT

FREDRICK NJERU KAMUNDE/

COUNTY RETURNING OFFICER, MERU COUNTY----- 3RD RESPONDENT

J U D G M E N T

The petition herein was filed by DICKSON MWENDA KITHINJI, a registered voter who was duly qualified and eligible to vote at Gakurine Polling Station within North Imenti Constituency of Meru County, on 26th March 2013 apparently on being sponsored by one of the candidates Dr. Kilemi Mwiria through the firm of M/S Mithega & Kariuki Advocates against GATIRAU PETER MUNYA, the 1st respondent, IEBC the 2nd respondent and FREDRICK NJERU KAMUNDE County Returning Officer Meru County, the 3rd respondent.

The candidates for the gubernatorial seat for Meru County held on 4th March, 2013 were HEZEKIAH GICHUNGE, who was sponsored by Kenya National Congress (KNC) and who garnered 34340 votes, JASTO MATI MAORE sponsored by ORANGE DEMOCRATIC MOVEMENT (ODM) and who garnered 9500 votes, KILEMI MWIRIA, sponsored by the National Alliance (TNA), and who garnered 180,837 votes, Peter Gatirau Munya, sponsored by the Alliance Party of Kenya (APK) and who garnered 184,273 votes and Reuben Mbaine Marambii sponsored by United Democratic Front (UDF) and who garnered 12134 votes. The total cast votes were 428,273 and total valid votes were 423,247. That after conclusion of the election the 3rd respondent Fredrick Kamunde County Returning Officer, Meru County, declared the 1st respondent to have been duly elected as the Governor of Meru County. The 3rd respondent declared the 1st respondent to have won the seat by garnering 184,273 votes. The runners up were Kilemi Mwiria who garnered 180,837 votes. The gap between the winner and the runners up was 3436 votes.

That after declaration of the votes the petitioner challenged the declaration of the 1st respondent as the duly elected to the gubernatorial seat of Meru County. In the petition dated 26th March, 2013, the petitioner sought the following reliefs:-

- a. ***The immediate scrutiny and recount of the votes cast in Imenti South, Tigania East, Igembe South and Buuri Constituencies;***
 - b. ***A declaration to the effect that the 1st Respondent was not validly elected as the Governor of Meru County of the Republic of Kenya during the general election held on 4th March 2013;***
 - c. ***A declaration to the effect that the election for the Governor of Meru County was a sham and, to that extent, is void and/or invalid;***
 - d. ***The costs of and incidental to this Petition; and***
- (e) Such other, alternative, further and/or incidental orders as the Honourable Court may deem just and expedient.***

The sole purpose of the reliefs sought were to void election of the 1st respondent. The petition was grounded on petitioner's supporting affidavit and statements of ten (10) witnesses. The petitioner in his petition has advanced a wide range of grounds of complaints. The grounds range from voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence and discrepancy in the results announced by the 2nd and 3rd respondents. The petitioner further complained of how 2nd and 3rd respondents conducted the elections. According to the Petitioner, there was contravention of the regulations governing the elections in respect of the following matters:

- a. ***Denial of agents the right to participate in the election;***
- b. ***Presenting fraudulent tally/returns where votes cast allegedly exceeded registered voters;***
- c. ***Votes garnered by candidates in Form 35s materially differed from Form 36;***
- d. ***Manipulation of results by altering figures in Form 35 and 36 without countersigning and duplication of results;***
- e. ***Complicity in harassment of TNA agents by officers of the provincial administration;***
- f. ***Failing to tally votes for Mwachune Polling Station (083) in Imenti South Polling Station;***
- g. ***Conducting the election in a partisan and biased manner by misleading illiterate and incapacitated voters to vote in favour of the 1st Respondent;***
- h. ***Denying voters the right to vote at Limoro and Antuanuu polling stations;***
- i. ***Accepting Form 35s and 36 not signed by agents in declaring results;***

- j. *Failing to project results and transmit results electronically to the tallying Centre;*
- k. *Failing to safeguard the safety of ballot boxes;*
- l. *Transporting ballot boxes in the absence of agents;*
- m. *Destroying valid votes in favour of Kilemi Mwiria at Mikinduri area;*
- n. *Irregularly requiring agents to sign blank Form 35s and 36;*
- o. *Failing to address agents concerns and objections;*
- p. *Allowing unauthorized persons to impersonate genuine agents and sign Form 34s and 36 at Muthara Youth Polytechnic;*
- q. *Refusal to display results on the doors of the polling stations;*
- r. *Forcing agents to take long breaks;*
- s. *Refusing to count and tally valid votes at Gambela, Mukuani and Kirimanchuma polling stations;*
- t. *Succumbing to pressure and undue influence from the 1st Respondent and Alliance Party Senatorial candidate;*
- u. *Refusing to conduct vote counting at Mitunguu primary school;*
- v. *Instigating arrest, harassment and threatening of an agent at Kaguru Tallying Centre;*
- w. *Accepting and including in the final tally ballots and ballot boxes of questionable origin brought to Kaguru Tallying Centre.*

For reasons stated in the petitioner's complaints the petitioner sought the reliefs in the petition which have already been stated hereinabove.

The respondents upon being served with the petition, pursuant to Rule 14(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013, filed their responses to the petition. The respondents opposed the petition. The 1st respondent in his response, on 18th April, 2013 filed his response together with a supporting affidavit and twenty five (25) witnesses' affidavits.

In summary, the 1st Respondent's case was that the elections for governor Meru County conducted on 4th March 2013 were free and fair and held in accordance to the spirit and intentions of the constitution and all the laws regulating elections.

The 1st respondent urged this court to dismiss the petition and it be determined that the 1st respondent was duly elected as the Meru County Governor.

On the other hand the 2nd and 3rd respondents in response to the petition filed an answer to the petition dated 22nd April, 2013 and a Replying Affidavit of Fredrick Njeru Kamunde together with the four (4) witnesses' statements. The 2nd and 3rd Respondents' case was that the elections for Governor Meru County on 4th March 2013 were conducted in compliance with the principles of the Constitution and written law and that if at all there was any non-compliance, the same was insignificant, in respect of isolated incidents, and thus did not materially affect the outcome of the elections as to undermine the will of the people of Meru.

The respondents urged the court to dismiss the petition with costs. During the pre-trial conference, parties in this petition raised several issues for determination by the court and which issues in the court's view may be crystallized into the following three(3) issues. These are as follows:

- a. *Did the 1st Respondent commit electoral offences and malpractices in the March 4th 2013 gubernatorial elections?*
- b. *Did the 2nd and 3rd Respondents conduct the March 4th Gubernatorial elections in contravention of the Constitution and Electoral Laws?*
- c. *If the said elections were not carried out in accordance to the principles of the Constitution and written law, whether the said non-compliance materially affected the outcome of the results*

Before evaluating the evidence adduced before this court, the court considers it appropriate to first address the question of burden and standard of proof. It is now accepted and settled that in an Election

Petition the burden of proving the allegations in a petition lies throughout with the petitioner. The petitioner is under obligation to discharge the evidentiary and legal onus of proof required of him in a petition. In this petition during the pre-trial conferencing on 15th May, 2013, the parties by consent agreed that the burden and standard of proof to be applied was as elucidated by the Supreme court of Kenya in the case of **of Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others, Petition No. 5 of 2013 (as consolidated with Petition No. 3 and 4 of 2013)** In that case, the Supreme Court held that “...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. **The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.**”

...Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been con-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear 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. All acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departure from the prescriptions of the law.” (Emphasis mine)

In election petition the petitioner who makes allegations of criminal nature against the respondent or that there has been breach of law by the respondent in his petition he must lay evidence proving the commission of the offences beyond reasonable doubt. It is futile for the petitioner to only point out the irregularities or alleged breaches which took place during the election but fail to establish that such irregularities were of such a nature that they affected the exercise by the voters to exercise their will to choose a candidate of their own choice.

In the Indian presidential election case of **Shri Kirpal Singh v. Shri V.V. Giri (1970) INSC 191: AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 567** as cited by the Kenyan Supreme Court, the Supreme Court of India just like its counterpart in Kenya stated that: “**There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence, not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence, on the strength of evidence which leaves no scope for doubt as to whether they have done so. Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice.**” (Emphasis mine)

In **Ntwiga v. Musyoka & 3 others (No. 2) (2008) 2 KLR (EP)**, the Court cited the decision of **Mohamed Jahazi v. Shariff Nassir A. Taib; Election Petition No. 9 of 1983**, where the Court held that: -

“The burden of proof throughout rests on the Petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of Section 6 of the National Assembly and Presidential Elections Act and Section 35 of the Constitution.”

Simply it is clear that in election petitions, the legal burden rests with the Petitioner to succinctly demonstrate that there was non-conformity with the law on the part of the Respondents in engaging in or permitting the commission of electoral malpractices, and in the declaration of results and that the alleged non-compliance affected the validity of the elections. The Petitioner must therefore adduce, before the Honourable Court, firm and credible evidence of departure on the part of the Respondents from the prescribed law.

As regards the standard of proof, this court is not only guided but is bound by the Supreme Court,

decision in **RAILA ODINGA & OTHERS V IEBC & OTHERS**(SUPRA) which laid to rest the debate as to the applicable standard of proof in election matters when it held at paragraph 203 of the judgment that: -

“The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standards 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. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt”.

In the case of **JOHN KIARIE WAWERU V BETH WAMBUI MUGO & 2 OTHERS(2008)** EKL R 4, Court set out the standard of proof on page 5 in the following words:

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

The threshold of proof, should in principle be above a balance of probability that is applicable in civil cases though not as high as beyond reasonable doubt that is applicable in criminal cases.

The court having set out the burden and standard of proof required in election petitions and having set out the issues in this petition the court shall now address the issues that emerged for determination during the hearing of the petition.

The first issue for determination is whether the 1st respondent committed the electoral offences and malpractices in the March 4th, 2013 gubernatorial elections. The petitioner in his petition dated 20th March, 2013 accused the 1st respondent of having committed several electoral offences and malpractices in the gubernatorial elections to the effect that the outcome of the election was not a representative of the free will of the people of Meru County. On examination of the petition it comes out clearly, that a total of three imputations of electoral offences and malpractices were cast against the 1st respondent which are as follows:

- a. ***That he engaged in widespread bribery and unduly influenced voters and election officials at inter alia the pig n whistle hotel in Meru town and Nguthiru primary school polling station.***
- b. ***That he engaged in widespread buying of voter’s cards at inter alia the Antuanuu, Kinang’aru, Charuru and Nduluma Polling stations in Tigania East Constituency.***
- c. ***That he engaged in widespread violence, intimidation and harassment of voters and election officials at inter alia Antuanuu, Kinang’aru, Nchuui, Charuru and Nduluma Polling stations in Tigania East Constituency.***

The Black’s Law Dictionary defines “undue influence” as the improper use of power or trust in a way that deprives a person of free will and substitutes another’s objective.

Section 63 of the Election Act (No.24 of 2011) defines the term “undue influence” to mean inter alia

“the use or threat to use force or violence (including sexual violence), either directly or indirectly, in person or through another person to: Compel someone to vote or not to vote for a particular candidate or political party; Prevent someone from voting; Compel someone to refrain from being a candidate or to withdraw as a candidate in an election; Prevent someone from being nominated as a candidate or from being a voter; Make someone not qualified to vote in that election, to vote.”

Section 64 of the **Elections Act** goes further to define Bribery in detail to occur *inter alia* when

“a candidate directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter: to vote or refrain from voting for a particular candidate; to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate; or the doing of any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate.”

The petitioner alleges under paragraph 6 of his petition that there was widespread bribery at Pig and Whistle Hotel and Nguthiru Primary School Polling Station. The evidence on record is clear that the petitioner was not present at both venues and no single witness was called to confirm the petitioner's allegation. Further no evidence was ever tabled to demonstrate that the 1st respondent either used or threatened to use force or violence (including sexual violence), directly or indirectly whether in person or through another person to compel anyone to vote or not to vote for him or another particular candidate or political party so as to make him culpable of the offence of undue influence. Neither was evidence tabled to show that he directly or indirectly in person or by any other person on his behalf gave, lent or agreed to give or lend, or offered, promised to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter to vote for him or to refrain from voting for any particular candidate so as to make him culpable of the offence of bribery.

The petitioner's witness from Nguthiru primary school Polling Station Christine Kananu (PW6) who had alleged to have been an agent of TNA admitted during cross-examination she had not annexed her letter of appointment. In her witness's affidavit she did not mention any bribery of the voters at the said polling station and if as alleged there was widespread bribery, PW6 who claimed she was a TNA agent, she would have witnessed the occurrence and would not have forgotten to put the same down in her affidavit. PW6 alleged the 1st respondent's "people" were conducting door to door campaigns giving each voter Kshs.100/- and a piece of paper bearing the list of candidates they were to vote for. She also alleged to have seen one Magdalene Kaburi(DW1), a well-known supporter of the 1st respondent urging groups of women that if they vote for the 1st respondent she would give each Kshs.50/-. PW6 though aware that was an election offence she did not call police nor has she indicated or disclosed the so called the 1st respondent's "people". The witness did not produce any of the alleged papers containing list of candidates to be voted for though she claimed to have picked them and gave them to her advocates.

On the allegations by PW6, Margaret Kaburi, DW1 testified and denied the allegations leveled against her by PW6. She testified that she voted and left for her home. I note the allegations by PW6 against DW1 were not specifically averred in her affidavit. That piece of evidence is extraneous as facts were not set out in the petitioner's supporting affidavit and the witnesses affidavits. I find this piece of evidence to be contrary to Rule 10(3) (b) of the Elections (Parliamentary and County Elections) Petition Rules 2013 which specifically requires that the petition to be supported by an affidavit setting out the grounds and facts relied on by the petitioner for the relief sought. The witnesses affidavits filed pursuant to Rule 12 of the Petition Rules are simply evidence in support of the facts and grounds set out in the petition. I therefore find that any evidence that is extraneous as in this case, must be disregarded. The courts have time and again stated very clearly and specifically that any evidence that is contrary to the pleadings must either be rejected or disregarded as a party is always bound by his pleadings.

As regards the allegations of widespread bribery and unduly influencing voters and election officials at Pig and Whistle in Meru Town and Nguthiru Primary school Polling Station the petitioner and his witnesses have failed to adduce any cogent and independent evidence to back their allegations. The same has not been proved to the requisite standards. There was no complaint registered with IEBC officials, nor written complaint was made nor was there report made with the police. Bribery and undue influence is a serious offence which he who alleges must take it seriously and be ready to offer cogent and independent evidence to prove it. Mere allegation without proof to the required standard remains mere speculation which court cannot accept as truthful.

The petitioner under paragraph 6(c) of the petition alleges that the 1st respondent engaged in widespread violence, intimidation and harassment in Antuanuu, Kinang'aru, Nchuui, Charuru and Nduluma Polling Stations in Tigania East Constituency and further that the 1st respondent orchestrated chaos in larger Meru County in order to twist the elections in his favour.

Section 65 of the Elections Act in relation to the use of violence provides that:

“A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—

(a) So as to induce or compel that person to support a particular candidate or political party;

(b) On account of such person having voted or refrained from voting; or

(c) In order to induce or compel that person to vote in a particular way or refrain from voting,

Commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.”

In relation to the use of the word “WIDESPREAD” by the petitioner and the definition given under Section 65 of the Elections Act, widespread violence can only be taken to mean, a systematic, planned or organized inflicting of injury, harm, damage or loss on any person because they have voted in a particular way or to induce them to vote in any particular way.

The petitioner called only two witnesses alleged to have been at Antuanuu polling station being David Kamenchu(PW2) and John Kamenchu(PW5); who in their respective affidavits did not reveal any single incidence of violence which occurred at Antuanuu Polling station. In their evidence before the court none of them revealed of any outbreak of any violence. As regards the other polling stations mentioned by the petitioner no evidence was tabled before the court to support this thread bare allegation of widespread violence. The only evidence that came up during trial was that of Esther Kabebi(PW3) who stated that the 1st respondent threatened to injure her for being at Nchuui polling station. PW3 during cross-examination admitted that though her affidavit was allegedly commissioned by Mr. Nyenyire, she did appear before him but before Mr. Kariuki. She stated partly:-

“I did not meet Mr. Nyenyire advocate. I signed before Mr. Kariuki Advocate. I am surprised that M/S Kelvin Nyenyire stated I appeared before him and signed the affidavit before him. The signature is mine.”

The affidavit of PW3 is in contravention of Section 4 and 5 of the Oaths and Statutory Declaration Act(Cap.15)

The affidavit of PW3 was not properly commissioned as per her admission. She had not annexed a letter of appointment as agent to her affidavit and as such she cannot be heard to say she was an authorized agent who was ejected from a polling station and yet fail to show that she was indeed a duly appointed agent of TNA. The duly appointed agent for TNA at that polling station was one Miriti who signed Form

35. PW3 averred that the 1st respondent voted at 10.00 a.m. he saw her and had no problem with her, however, at 1.45 pm the 1st respondent returned inside the polling station and in presence of other agents threatened to beat her. The witness did not complain or report to the police officers just outside the polling station. The witness evidence is not corroborated by any independent witness. I therefore find the affidavit by PW3 was not properly commissioned and the same is struck out. I further did not find PW3 to be an honest witness and I did not believe her evidence.

Further as regards the alleged intimidation and harassment of voters, Abdi Sheikh Mohammed(DW9)the Returning Officer from Tigania East confirmed that he did not receive any complaint at all from any candidate or their agents of any intimidation or harassment of voters. I find that if there were such incidences, they would have been raised with this Officer who had the mandate under Regulation 3(3) of the **Elections(General) Regulations, 2012** to conduct elections at the Constituency level. On perusal of Form 35s from all aforesaid stations none reveals any comment on intimidation of any agent. The alleged electoral offences alleged to have been committed have not been proved beyond reasonable doubt as required by law or at all.

The petitioner under paragraph 6(b) of the petition alleged that the 1st respondent was engaged in widespread buying of voter cards at inter alia Antuanuu, Kinang'aru, Charuru, and Nduluma polling stations in Tigania East Constituency. I would like to start by stating that in the 4th March, 2013 elections, it is clear from the evidence that there were no voter's cards in use.

The allegation as such is founded on shaky and unsubstantiated grounds. The 3rd respondent had issued before 4th March, 2013 voters with acknowledgement slips to confirm the polling stations where a voter was designated to vote. That the only document which was required to facilitate identification of voters during voting was the National Identity Card or Passport. The petitioner during cross-examination stated:-

“I was told the 1st respondent and his supporters were engaged in buying voters cards. I accept no single witness told me voter's cards were purchased.”

I therefore find this allegation to be false and malicious as no voters cards were being used during the 4th March, 2013 election. This allegation is dismissed in its entirety.

The petitioner made allegation that the District Commissioner and the Senatorial Candidate were at the South Imenti tallying Centre, and that their presence was used to intimidate and unduly influence voters. The petitioner alleges that since DW10 conceded that the two actually visited the tallying Centre, this was tantamount to proof that the intimidation did actually take place.

Under Regulation 85(1) (b) of the Elections (General Regulation) 2012 provides that among the people who shall be allowed by the Returning officer to be present at the tallying Centre shall include the candidates. In this instance and contrary to the petitioner's allegations, nothing barred the Senatorial candidate from being at the tallying Centre given that he was a candidate and additionally no evidence is on record as having been present to support the petitioner's allegation of impropriety on the part of the said senatorial candidate. DW10's testimony in Court was merely a confirmation that the Senatorial Candidate was at the tallying Centre and so was the D.C. who we can only presume was present to maintain security and order as the petitioner has not provided any shred of evidence to the contrary. More importantly, it should be noted that there was no allegation of impropriety or electoral offences in South Imenti Constituency and in light of the same, the petitioner did not avail a single agent/witness from the constituency.

On the above allegation it is not strange for senior government officers and various political candidates to be seen together during public functions and even during the election period. Their presence may have nothing to do with intimidation and undue influence to the voters. A candidate has interest which is totally different from that of Senior Government Officers say, a DC would be interested in ensuring law and order is maintained whereas the candidate may be interested in free and fair election as well as

safeguarding of votes against being tampered with. So the two together should not be taken as plotting to commit an electoral offence. Applying to the above burden of proof and the standard of proof thereof I find the petitioner's allegation completely out of place and incredible. It should not be the actions per se complained of that should be subject of investigation by this court but the action and their effect that should be. That even if the two were present at the tallying Centre there is nothing in our laws barring a candidate and the in charge of security being at the tallying Centre subject to public order and not interfering with the works of IEBC officials. What would be unlawful would be intimidating or influencing or interfering with the work IEBC officials or being involved in any electoral offences.

The petitioner had an obligation of proving beyond reasonable doubt that election offences he alleged did take place. The petitioner has failed to discharge the burden of proof as against the 1st respondent. The petitioner's evidence together with that of the witnesses tabled before this court was insufficient and fell far too short from proving any of the alleged complaints against the 1st respondent.

The second issue for determination is whether the 2nd and 3rd respondents conducted the March 4th 2013 gubernatorial elections in contravention of the Constitutional and Electoral laws.

The petitioner in his petition has alleged that general electoral irregularities were occasioned by the 2nd and 3rd respondents. The petitioner in support of his allegation gave evidence and called five(5) witnesses. It should be noted that out of the five (5) witnesses called only two David Kamenchu(PW2) and Stephen Mugambi (PW4) were able to prove that they were authorized agents as tallying agents at Muthara Youth Polytechnic, Tigania East with authorization to participate in the tallying process at that particular tallying Centre only. The respondents contended that in relation to the electoral irregularities alleged by the petitioner only those two witnesses would have perceived such electoral irregularities(if at all) and only at the tallying centre only. The respondents further contended that most of the allegations against the 2nd respondent were in relation to various polling stations yet the petitioner failed to bring agents who would prove that they were authorized agents at any of the polling stations.

On alleged denial of agents the right to participate in the election, under paragraphs 7 and 8(c) of the petition and paragraph 6 of the supporting affidavit it is alleged that agents were denied right to participate in the elections at Muthara Youth polytechnic tallying Centre, Kaguru tallying Centre, Nguthiru Primary School, Nchuui primary school, Karurune Polling Station, St. Mary's Immaculate Primary School, Mikinduri Polling Station, Mikinduri Factory and Murembu Primary School.

The court on perusal of the petitioner's evidence, that of his witnesses affidavits, it notes that there was no single agent who was called to testify who alleged to have been present at Kaguru Tallying Centre, Nchuui Primary School, Karurune Polling Station, St. Mary's Immaculate, Mikinduri Polling Station, Mikinduri Factory and Murembu Primary School. The allegations in respect of the above polling stations were not even backed by Witnesses Affidavits.

As regards the allegations relating to Muthara Youth Polytechnic, Nguthiru Primary School and Nchuui Primary School, the Petitioner called the following witnesses: David Kamenchu who was allegedly a tallying agent for TNA at Muthara Youth Polytechnic, John Kamenchu who allegedly visited Muthara Youth Polytechnic on 5th March 2013 at 10.00 a.m., Stephen Mugambi who was allegedly at Muthara Youth Polytechnic, Esther Kabebi who allegedly was at Nchuui Primary School and Christine Kananu George who was allegedly at Nguthiru Primary School.

An agent as defined under Section 2 of the Elections Act is a person duly appointed by a political party or independent candidate and includes a counting and tallying agent. **Regulation 2 of the Elections (General) Regulations** defines an agent as a person appointed under Section 30 of the Elections Act. The agents are required to take an oath of secrecy prescribed in the third schedule to the Act.

Regulation 62(1) of the Elections (General) Regulations, 2012 provides that only authorized agents were to be allowed into polling stations. **Further Regulation 62(4) of the Elections (General) Regulations, 2012** requires such agents to display their official badges supplied by the commission.

Regulation 74(1) of the Elections (General) Regulations requires candidates and political parties to submit the names and letters of appointment of the agents to polling stations. At the tallying Centre, only authorized agents are allowed to enter pursuant to the provisions of **Regulation 85(1)(e) of the Elections (General) Regulations, 2012**. As such, to be an authorized agent and therefore liable to be admitted to a polling station or tallying Centre, one must demonstrate that:

- a. *The person was duly appointed as an agent of a candidate or party and has a letter of appointment*
- b. *The person must have sworn an oath of secrecy*
- c. *The person must have been issued with a badge by the 3rd Respondent*

Under Regulation 63(2), presiding officers are allowed to remove anyone who misconducts himself or fails to obey lawful instructions. Moreover, under Regulation 74(2), the presiding officer is mandated not to allow anyone to attend counting of votes whose names, address and authorization is not submitted, notwithstanding the appointment of such person is in order. Further, even though the agents are duly appointed, a Returning Officer is permitted to decline admission to authorized agents to the tallying Centre if there are more than one agent per candidate or political party at the tallying Centre. These are the yardsticks against which the 2nd and 3rd Respondents' conduct must be measured against.

David Kamenchu Akwalu (PW2) stated that the petition was inconsistent with his affidavit as he was not denied to be in the tallying Centre. He stated the Returning Officer announced the results and he was happy with the results. PW2 had no complaint on primary document Form 35 but though he complained of Form 36 he did not specifically point out what was his main complaint. He participated in the election contrary to the allegation by the petitioner, so I find the witnesses' evidence did not proof the allegation made by the petitioner.

Esther Kabebi(PW3) admitted that she did not meet Mr. Nyenyire Advocate who is alleged to have commissioned her affidavit. I have found the affidavit of PW3 to be inadmissible in evidence and for that reason struck it off. In her affidavit she had referred to an annexure being letter of appointment showing she was an agent, yet the same was not annexed at all. In view of the witnesses' failure to attach such an important document in a serious matter as this one, to confirm that she was an authorized agent and indeed she was entitled to be at the polling station, the witness cannot be believed. To make the matter worse the TNA agent at Nchuui polling station was Miriti and PW3 agreed she had no authority to be at the station and that is why she was locked outside.

I find the evidence of PW3 to be unbelievable to say the least, as she did not report the alleged threats apparently made by the 1st respondent to the police station just outside the police station or any nor was her evidence corroborated by any other agent who was at the polling station.

Stephen Mugambi(PW4), who stated on oath he was a public civil servant employed by the Teachers Service Commission insisted he was appointed tallying agent of GNU. The 1st respondent in his submission contends that PW4's duties as a tallying agent were being done in strict contravention of the **Public Ethics Act (Cap.183) Laws of Kenya** and more specifically under Section 16 which provides that:

“16 (1) A public officer shall not, in or in connection with the performance of his duties as such-

(a) Act as an agent for, or so as to further the interest of, a political party; or

(b) Indicate support for or opposition to any political party or candidate in an election.

(2) A public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.”

The 1st respondent requests the court to employ its judicial powers to order for the immediate arrest and prosecution of PW4 on his own admission of guilt as it would be improper for a court of law to condone such an admission and as deterrence to future offenders. The 1st respondent referred to the case of **George Aladwa Omwera v Benson Mutura Kang'ara & 2 others, Election Petition No 4 of 2013** where J. Mwongo stated **"This court is a court of law. An offence has been admitted to have been committed by witness Daniel Nyakundi. It would be improper if such actions, admitted in court, should not be further investigated so that all who are culpable face the consequences. Aiding and abetting any crime is also a criminal offence. Accordingly I am inclined to, and do order as follows: Daniel Nyakundi ID No. 24634472 be arrested forthwith on his own clear and unambiguous admission of culpability..."**

The same witness in his affidavit had deponed that the Presiding Officer only allowed one Tony Gitonga an APK agent to access the electoral data at the tallying station yet in court during his testimony he pointed out to a member of public in court alleging he was a witness and was in court throughout claiming he was Tony Gitonga but on the member of public being asked whether he was Tony Gitonga, he denied and produced his National Identity Card. He turned out to be one Miriti Ayub Kobia(ID No.27100114). The witness's honesty and capability to discern what he alleges happened on the material day of election is no doubt questionable. This same witness in his witness affidavit attached a letter of appointment showing he was polling agent of GNU but did not annex any document showing that he was a tallying agent for any candidate or party and therefore entitled to be present at Muthara Tallying Centre. On perusal of his witness affidavit he has not deponed that he was denied a chance to participate in any election process. It is worthy noting that this witness made wild accusations about irregularities in the election which he purportedly recorded in his diary and a document written in the Returning Officer's own handwriting which according to him showed inconsistencies with Form 36.

This witness did not see it prudent to produce the alleged diary before court nor did he attach the alleged document in the said officer's handwriting. I find PW4 to be incredibly unreliable witness who did not take court matters seriously. In view of the witness own admission on oath of having breached **Section 16 of the Public Officer Ethics Act(Cap.183) Laws of Kenya; I direct the OCS Meru Police Station to have Stephen Mugambi ID No.11259218 who admitted on oath that it was not right for him to be identified with one political party in a partisan manner should not be investigated any further for acting as an agent for or so as to further the interest of a political party being a public officer which activity compromised the political neutrality of his office,** but should be arrested forthwith and prosecuted accordingly as for the court to condone such an act would not be proper and may not deter future offenders in election matters.

John Kamenchu(PW5) alleged to have been at Antuanuu polling station as a ward Coordinator. He did not state anywhere in his affidavit that he was an agent and if so for which party. He did not annex any letter of appointment as a polling agent, oath of secrecy or badge to confirm he was an authorized agent. The witness could not therefore prove that he was either a polling agent or a tallying agent and thus unlawfully precluded participating in the election. One wonders how he could as such be able to state the 1st respondent used provincial administration, being chiefs to influence voters and intimidate the election officials at Antuanuu polling stations and that the two chiefs pressed for the release of the purported 1st respondent's agent who had purportedly been arrested for interfering with the voters. PW5 had in his evidence stated that he was being followed by the said two chiefs namely Joel Gitirikia Nkunja of Muthara location and Peter Kalung'e M'Arunga of Thabuku location. PW5 in his testimony apparently went from *Antuanuu* polling station (In *Thubuku* location and 11 kms from where Joel Gitirikia the Chief of *Muthara* was seen voting at *Nchui* Primary School) to *Lubuathirua* polling station (In *Muthara* location and approximately 6 kms from *Antuanuu*) to *Lanyiruu* polling station (In *Buuri* Location and approximately 12 kms from *Lubuathirua* polling station) then back to *Antuanuu* polling station again (approximately 18 kms). All this while, the two chiefs were always where he was at the very exact time.

The two administrators gave evidence. Joel Gitirikia Nkunja(DW2) and Peter Kalung'e M'Arunga(DW5) and in their evidence they specifically testified that they had received orders to stay within their areas of jurisdiction in case of incidence or unlawfulness during the elections. I find contrary to PW5's allegations that it would have been unlikely that the two administrators would have been blatantly been

trotting through different jurisdiction just to follow PW5. I find the story by PW5 to be far-fetched and do not believe him as a truthful witness.

Peter Kalung'e M'Arunga DW5 subsequently testified before the court and denied the allegations by John Kamenchu(PW5) which he termed as malicious fabrication because he had beaten John Kamenchu's brother in the interview and subsequently appointed for the position of chief. His testimony was therefore a matter of sour grapes aimed at settling of old scores. Cyprian Kailikia, (DW6) the person allegedly arrested by the police, also testified that he had not been in good books with PW5 as he (PW5) had defrauded him of 6,000 shillings which matter saw Kailikia take Kamenchu before the Njuri Ncheke. Kailikia(DW6) actually confirmed that he was never arrested at all which is highly probable as he would not have been allowed to sign the form 35 for Antuannu primary school Polling station (079), stream 1 otherwise.

Christine Kananu George(PW6) in her affidavit alleged to have been denied a chance to enter the polling station and witness assistance of illiterate voters. PW6, who alleged to have been an authorized polling agent, did not adduce any proof of appointment as an authorized agent, whether by letter of appointment, badge or oath of secrecy. The witness alleged she witnessed bribery taking place at Nguthiru primary school, Tigania East. She did not attempt to make any report either with police officers at the polling station or any police station or with the 2nd respondent's Officials as per training she claimed she attended for party agents. She even alleged that there was ballot stuffing at Edward Kobia Primary School, however during cross-examination she admitted on oath the allegations were rumors, after finding out that Edward Kobia Primary School was indeed not a polling station for the purposes of 4th March, 2013 elections. This court notes that the person alleged to have informed her of the bribery at Nguthiru primary school one JULIUS MAILUTA and who subsequently ostensibly alerted the police was not called as a witness and further no police record was produced before the court to support the said allegation. Further Kilemi Mwiria's Assistant who went to investigate ballot stuffing at Edward Kobia Primary school escorted by police was not called as a witness nor was police report produced before the court in support of the allegation.

PW6 further stated that the 1st respondent's "people" bribed voters with Kshs.100. That piece of evidence was strangely enough not corroborated by any other person including ostensibly bribed persons. The people who informed PW6 of bribery and stuffing of ballot paper at Edward Kobia primary school were not called as witnesses nor were they named. During cross-examination it transpired from PW6 own admission on oath that she illegally communicated with voters queuing to vote while she claimed to be an agent. She stated in cross-examination."

"I was supposed to inform the presiding officer of what was happening and not to talk to the voters.I asked many women as they were queuing to vote."

In re-examination PW6 further stated:

"I talked to voters outside. I did not influence them in their voting. I did not campaign for any candidate as I talked to those women."

Section 65(1) of the Elections(General) Regulations 2012 provides:

65. No person other than an election officer or police officer on duty shall, except with the authority of the Presiding Officer, have any communication whatsoever with a voter who is in, or in the immediate precincts of, a polling station for the purpose of voting.

2. this regulation shall not prevent the companion of an assisted or supported voter from communicating with that voter.

I have not found PW6 to be a credible and honest witness. She is not worthy believing for she even admitted relying on rumors.

PW6 has admitted on oath of having communicated with voters at the polling station in cross-examination and even in re-examination. It would be outrageous to condone such a serious election offence which was deliberately committed by a trained agent, who knew she ought not to have communicated to voters and urge them to vote. She might not have indicated to the voters on how to vote, but being an agent of TNA, she must have implied that voters were to vote for her party and whether that was so or not an offence was committed contrary to Section 65(1) of the Elections(General) Regulations, 2012. I therefore direct that there should be no further investigation and the said CHRISTINE KANANU GEORGE(ID NO.20657163) should forthwith be arrested and prosecuted for an offence relating to elections in that she communicated with voters at polling stations on her own clear and unambiguous admission of culpability as per evidence in cross-examination and re-examination. The OCS, Meru Police Station is directed to forthwith arrest and have the said Christine Kananu George prosecuted as indicated herein above.

Further in the petitioner's petition major allegations has been raised to the effect that party agents were refused the right to participate in the electoral process and as such the elections were not free and fair.

Section 62(1) of the Elections(General) Regulations 2012 provides:-

“The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except—

- a. **a candidate;**
- b. **a person nominated as a deputy to the candidate, where applicable;**
- c. **authorised agents;**
- d. **.....**

Subsection (3) of the same Section further provides that **“The absence of agents shall not invalidate the proceedings at a polling station.”**

This court has carefully considered the petitioner's witnesses evidence. It has found that Christine Kananu George(PW6), Esther Kabebi(PW3) and John Kamenchu M'Alaine(PW5) could not provide any evidence to prove that indeed they were authorized agents at any polling station and as such were denied the right to participate in the electoral process. In this instance and in absence of evidence to the contrary, the court can only presume that the Presiding Officers acted within their powers, if at all, the three were prevented from accessing the polling stations as agents notwithstanding the court's finding that the witnesses were not truthful in their evidence.

On signing of Forms 35's at the polling stations the alleged agents averred they were not allowed to sign Form 35's. The witnesses did not prove to the required standard that they were agents to begin with leave alone being denied to sign Form 35's.

In addition to the above Regulation 62(1) of the Elections(General) Regulations, already quoted above, Regulation 79 (6) of the Elections(General) Regulations,2012 provides:

“The refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub regulation (2)(a).”

Further Regulation 79 (7) of the Elections (General) Regulations, 2012 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.”**

In the case of Thomas Malinda Musau & 2 Others Vs. IEBC & 2 Others (2013) eKlr, the Court held at Paragraph 77 that **“...though it was crucial for the agents/candidates to sign the form 35, failure to do so does not necessarily nullify the elections.”**

In Manson Oyongo Nyamweya v James Omingo Magara & 2 Others [2009] eKLR, it was held (*inter*

alia) that—

- g. ***although the failure or refusal of a candidate or agent to sign a Form 16A [now Form 35] would not (without more) invalidate an election, the failure of the presiding officer to record the fact of the failure or refusal in such cases was a serious breach of the law which would invalidate the election;***
- h. ***a Form 16A (now Form 35) not signed by agents or presiding officers cannot be accepted in computing final results;***
- i. ***where the law requires a document to be signed by a particular person, if it is not so signed or not signed at all such a document is worthless and ought to be rejected; and***
- j. ***Where there is non-compliance with mandatory and important provisions of the law, an election cannot be said to be transparent, free and fair. In the instant case, the person mandatorily charged the task of correctly filling the Forms in compliance with the law was the 2nd and 3rd Respondents. They cannot fail to observe basic constitutional and statutory safeguards and at the same time contend that the election was free and fair. Moreover, it must also be remembered that the 2nd and 3rd Respondents and their officers were not doing their work for charity; they were handsomely paid by tax payers to ensure that the election was conducted in strict compliance with the safeguards set out in the constitution and the law. In the circumstances, they cannot be heard to seek any indulgence from the Court.”***

The petitioner further relied on the case of **JAMES OMINGO MAGARA V MANSON OYONGO NYAMWEA & 2 OTHERS (2010)** Eklr where the Court of appeal held(inter alia) as follows:-

“There can be no doubt from these provisions that Form 16A [now Form 35] is an important document in the electoral process. It deals with a particular polling station, the number of registered voters in that station, the number of the candidates, the votes which each of them has secured in that station and, for obvious reasons, is to be signed by the presiding officer at that particular station and by the candidates or their agents...if a candidate or his agent refuses to sign, the reason for the refusal should be given and recorded. It is the Forms 16A from all the polling stations in a constituency that the returning officer who is in charge of the whole constituency will carry out a tally of all the votes polled in the constituency and having tallied all the votes from each polling station, entre them on Form 17A [now Form 36] and declare the winner of the election in that constituency. A transparent, free and fair electoral process must involve an adherent to this process and such adherence to the process can only be shown by the presiding officer himself signing the form and then inviting the candidates or their agents to sign. The process must be carried out in the presence of the candidates or their agents and if they refuse to sign an explanation for that refusal is to be recorded. I suppose that if a candidate or his agent refuses to sign and gives no reason for the refusal, the presiding officer will simply record the refusal and say that no reason for it has been given. But there is absolutely no reason for a presiding officer not signing Form 16A...Similar considerations must apply to Form 17A [now Form 36] which is really a tally sheet composed of Forms 16A. The entries that go into Form 17A must come from all the Forms 16A from all polling stations in the Constituency. The learned Judge himself thought that the returning officer himself must personally make all the entries on Form 17A. I would myself doubt the reasonableness of that assertion taking into account the amount of work that would involve and the impatience of the electorate to know the results of the voting. But one thing is clear: Whatever the method used by the returning officer in the preparation of Form 17A that officer is the only person responsible for the correctness or otherwise of the entries made therein.”

The petitioner further relied on the case of **William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR**, Kimaru J. held (inter alia) that—

Failure by a presiding officer to state reasons why a candidate or his agents failed or refused to sign a Form 16A [now Form 35], or failure to record the absence of such candidate or agent, renders the results contained in the said Form 16A invalid. In the instant case, this would render the results of 48 polling stations (involving more than

20,000 votes) invalid. It should be noted that the law on this issue has not changed, save for the renaming of the Form from 16A to 35;

A Form 16(A) [now Form 35] with cancellations and alterations that are not countersigned cannot be said to contain valid results of the polling stations in question. In the instant case, it is clear from the Form 35 filed in court that this irregularity affects more than 50 polling stations. Furthermore in this instant case, it became clear that Forms 35 for 48 polling stations as filed in court did not bear signature of even a single candidate or agents and convincing reasons for this omission was never provided. Again, the law on this issue has not changed since the delivery of this decision, save for the renaming of the form from 16A to 35;

The defence of “human error” was not available to explain multiple serious errors and irregularities or failure to fill Form 16A (now Form 35) in strict compliance with mandatory provisions of the law; and

It was not legally open to the returning officer to delegate the filling of Form 17A [now Form 36] to data entry clerks. In the instant case, Mr. Onditi (DW10) and Mr. Abdi (DW9) admitted that they had delegated the responsibility of verifying information on Form 35 and filling Form 36 to the data entry clerks, when the law clearly tasks this important responsibility on returning officers. The delegation of this important task, therefore, is an act of negligence on individuals whose responsibility was to safeguard the integrity of the election process.

The 1st respondent contends that the petitioner’s allegation that the 2nd and 3rd respondents denied the agents to participate in the electoral process, if at all, is not enough to invalidate the election of Meru County and that cannot be proved merely by pointing out that such Form 35s were not signed by the agents. The petitioner is of contrary view and submits the election should be nullified.

The 2nd and 3rd respondents denied the petitioner’s allegations and averred that no evidence was produced that results reflected in Form 35’s were not a correct representation of the counting process across the County. The 2nd and 3rd respondents further averred that under Regulation 76(6) of the Elections (General) Regulations 2012, is clear that refusal or failure of a candidate or agent to sign a declaration form under sub-paragraph 4 or to record reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2) (a). They further contended under Regulation 79(7) of the Elections(General) Regulations that absence of a candidate or agents or the signing of a declaration form or the announcement of results under sub-regulations (2) shall not of itself invalidate the results announced.

The 2nd and 3rd respondents further contend that they were obligated to accept Form 35s and declare results from the same in spite of lack of signatures from agents and therefore acted in compliance with the law in accepting such forms.

The petitioner did not prove to the required standards that the 2nd and 3rd respondents denied the party agents participation in the electoral process though it was crucial for agents’ candidates to sign Form 35. The alleged agents did not prove that they were indeed authorized agents and were indeed entitled to sign Form 35. It is one thing to allege but another to prove.

Form 35s whose entry of each candidates respective results in Form 35 are not challenged in the petition itself or in the supportive affidavit as is the case in this petition, can not be a justification to nullify the elections.

On evidence of the petitioner Dickson Mwenda Kithinji (PW1) he admitted he was financed by Dr. Kilemi Mwiria, to file this petition who is also catering for costs of the petition in addition to paying the petitioner’s three advocates on record. He further confirmed that it was Dr. Kilemi Mwiria who had

deposited the security for payment of costs of the petition in court. As regards the alleged irregularities in polling and tallying centres, the petitioner testified on oath that he was only present at two tallying centres namely Kaaga Church tallying station in North Imenti and Kaguru tallying station in South Imenti during the whole electoral process. He further admitted in both stations he was at the fence of tallying centres about 100 metres away. He stated partly:-

***“I was not an agent of any party. I was not supposed to be at the tallying center. I was at the fence. The information I have is what I was told by witnesses and what I saw. I have no knowledge of what was happening inside the tallying center.*”**

On page 5 of the petition under No.6 (b), Antuanuu, Kinangaru, Chururu and Nduluma are at Tigania East. I was told 1st respondent and his supporters were engaged in buying voters cards. I accept no single witness told me voter’s cards were purchased.”

The petitioner on being asked about widespread bribery and source of information he was unable to answer and kept quiet. He eventually said he was told by Christine Kananu George (PW6). On bribery at Pig and Whistle he admitted that no one had told him about it. He further stated that:

“I do not know the seriousness of alleging there was widespread violence in an election petition. The information I have is not true..... I admit my affidavit has mistakes”

On allegations that votes cast exceeded registered voters he stated:

“I did not tell the court the truth. I relied on document of Kelvin even when it is not correct.”

On page 42 of the typed proceedings petitioner testified that:

“My affidavit is not correct. I agree my analysis “DMK2” is incorrect.”

On allegation of authorized agents signing Form 35 he stated:-

‘I have no names of the alleged unauthorized agents.’

On allegation touching on Gambela, Mukuani and Kirimachuma the petitioner stated:

***“I have nothing to show voting was not done at that station in question.*”**

On page 44 of the typed proceedings the petitioner is putting ice on the cake by stating:

“On my allegation so for none of them is true”

The petitioner admitted on oath most of his allegations as stated in his supporting affidavit and the petition were indeed untrue. The petitioner was unreliable witness from the way he was responding to questions during the cross-examination. It is strange that the petitioner made serious allegations against the respondents and on being asked the source of his information he would be unable to give the names of even the agents he claimed had given him the information on the allegations in his petition. He even choose for example not to call a single witness on allegations raised in South Imenti, on bribery of teachers at Pig and Whistle Hotel, on allegation of the 1st respondent’s agents engaging in bribery and even he was unable to call Francis Mutuma, who swore an affidavit on bribery to testify.

The allegations made by the petitioner were of criminal nature and required to be proved beyond reasonable doubt. The allegations by the petitioner were not proved nor was there an attempt to prove the same. They remain just mere allegations which this court cannot rely on as they have not been proved to the required standards.

In a nutshell the petitioner’s allegations of presenting fraudulent tallying/returns where votes allegedly

exceeded registered voters as set out in the petitioner's petition under paragraph 7(b) (c),(8(a),9(a) and 10)and (a) of the petition, paragraph 6(e) 6(f),(i),(j),(i) in respect of Kiremu, Rumanthi,Kisima Polling Stations in Tigania East, Yururu Primary in Imenti South, CID, Forest Camp, Gachiege Coffee Factory, Thuura Primary, Ruriine Primary School and Ciothirai Market in Imenti North Constituencies can be answered by analyzing the Form 35s for these stations as below.

ITEM NO.	POLLING STATION AND STATION CODE	CONSTITUENCY	REGISTERED VOTERS IN FORM 35	VOTES CAST IN FORM 35	REGISTERED VOTERS PER PETITIONER'S DOCUMENT
1.	Kiremu (063)	Tigania East	367	327	367
2.	Rumanthi (072)	Tigania East	218	202	218
3.	Kisima (061)	Tigania East	58	55	58
4.	Yururu (stream 1) (070)	Imenti South	463	425	926
5.	Yururu (stream 2) (070)	Imenti South	538	503	
6.	CID (Non-existent)				
7.	Forest Camp (001)	Imenti North	366	288	234
8.	Gachiege Coffee Factory (046)	Imenti North	340	312	340
9.	Thuura (088)	Imenti North	423	357	423
10.	Ruriine (079)	Imenti North	431	392	431
11.	Ciothirai Market (092)	Imenti North	254	213	254

The petitioner during the cross-examination admitted the votes cast did not exceed the registered voters in the above-mentioned stations and admitted he had no proof of votes cast exceeded registered voters.

On Yururu Station (stream 1 and 2) and Forest Camp, the 2nd and 3rd respondents submitted that on the votes cast exceeding the registered voters, the Petitioner was required to confirm the number of registered voters as appears in the Biometrics Register, the Register of People without Biometrics and the Green Books which were used during the elections and demonstrate that the votes cast at these polling stations exceeded the number of registered voters. The 2nd and 3rd respondents submitted that the Green Books were used during voting.

The 2nd and 3rd respondents submitted further in Supreme Court Petition No. 5 of 2013 Raila Odinga v IEBC & Others,(supra) at paragraph 254, the court found that indeed the Special Register also known as the Register with people Without Biometrics was used during the 4th March 2013 elections. Further, at paragraph 250, the court was satisfied that the Biometrics Register (BVR) all by

itself was not the Principle Register of voters.

The Supreme Court stated the following about the green book at paragraph 255 of its decision:-

“In our finding, from the evidence the “Green Book” though not provided for in law, is a primary document that was used by the 1st Respondent to originate the primary register of voters, which later evolved into a provisional register and then a Final Principle Register. It is not apparent to us that such an original record, the “Green Book” employed by IEBC required to be provided by law.”

At paragraph 236 of its decision, the Supreme Court further stated as follows

“...The ultimate safeguard for the voter registration process, namely, the “green book” has data that is not backed up, just in case of a fire or other calamity.”

I note the document relied upon by the petitioner and referred to as “IEBC Voter Register for Meru County As Of 24/02/13” is not one of the components of the registers used during the 4th March 2013. Its origin, accuracy and authenticity cannot be verified. The 2nd and 3rd Respondents’ witnesses Habiba, Abdi and Onditi all confirmed that the said document was not the register used as it does not bear the names of the voters; it does not have the voters’ identity card/passport numbers, serial numbers and gender. It cannot therefore be the basis for alleging that votes cast exceeded registered voters because its identity and status in law is unknown. The allegation that votes cast exceeded registered voters is further not backed by any independent and cogent evidence. Such evidence would be, for instance an affidavit of any person who was allowed to vote and is not registered.

The court’s attention has been drawn to report filed by the Deputy Registrar following scrutiny ordered by this Honourable Court on seven (7) polling stations including Yururu Polling Station. The Deputy Registrar confirms that votes cast at Yururu Primary School Stream 1 were 422 while the registered voters were 493.

The Deputy Registrar’s report it should be noted was premised on the manual biometrics register which was in the ballot boxes. The Deputy Registrar did not examine the Green Book which was also used during the election to confirm the number of registered voters in the Green Book before arriving at his conclusion. It should also be noted that the Deputy Registrar went beyond his mandate in arriving at conclusions of law and his mandate which this court had set out was as follows:-

“The scrutiny and recount in these polling stations referred above shall be restricted to the ascertainment of the number of votes that each candidate obtained as compared with the results that were announced in Form 35 that were later collated in Form 36 by the 3rd Respondent.”

The conclusion arrived at by the Deputy Registrar amounts to usurping the role of this court in arriving at conclusions on the basis of fact and law when his duty were only to examine and ascertain the number of votes cast and avail them to this court. The conclusion arrived at was contrary to the rules of natural justice in that it was arrived at without giving parties chance to be heard on that issue.

In view of the foregoing I find that the petitioner failed to satisfy this court that the votes cast at the complained polling stations exceeded the registered voters. The allegation was therefore not proved to the required standard.

On whether the votes garnered by candidates in Form 35s materially differing with Form 36 and duplication. The petitioner under paragraph 7(d) 10(b), and (c) and 6(g) (ii), of the petition averred that votes obtained by different candidates in Form 36 differed materially with those in Form 35 in Nkubu Primary School, Muguru Coffee Factory, Kathera Tea Buying Centre, Igandene Primary School, Ithitwe Primary, Bubui Primary School, Rurama Primary School, Kaubau Primary School. A perusal of Form 35s and Form 36s for these polling stations situate in Tigania East Constituency, Imenti North and Imenti

South Constituencies reveals the following:

NKUBU PRIMARY (138) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36	VOTES AFTER RECOUNT
Hezekiah Gichunge	07	8(+1)	
Jasto Mati Maore	25	13 (-12)	
Kilemi Mwiria	253	175 (-78)	
Peter Gatirau Munya	334	400 (+66)	
Reuben Marambii	10	7 (-3)	

NKUBU PRIMARY (138) STREAM 2-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	9	9
Jasto Mati Maore	9	9
Kilemi Mwiria	203	203
Peter Gatirau Munya	283	283
Reuben Marambii	6	6

NKUBU PRIMARY (138) STREAM 3-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	8	8
Jasto Mati Maore	13	13
Kilemi Mwiria	175	175
Peter Gatirau Munya	400	400
Reuben Marambii	7	7

MUGURU COFFEE FACTORY (001) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	11	11

Jasto Mati Maore	7	7
Kilemi Mwiria	169	169
Peter Gatirau Munya	419	419
Reuben Marambii	7	7

KATHERA TEA BUYING CENTRE STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	8	8
Jasto Mati Maore	7	7
Kilemi Mwiria	149	149
Peter Gatirau Munya	217	217
Reuben Marambii	2	2

KATHERA TEA BUYING CENTRE STREAM 2-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	5	8 (+3)
Jasto Mati Maore	4	7 (+3)
Kilemi Mwiria	125	149 (+24)
Peter Gatirau Munya	207	217 (+10)
Reuben Marambii	5	2

IGANDENE PRIMARY (086) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36	VOTES AFTER RECOUNT
Hezekiah Gichunge	21	21	21
Jasto Mati Maore	8	8	8
Kilemi Mwiria	86	86	88

Peter Gatirau Munya	303	303	301
Reuben Marambii	7	7	07

IGANDENE PRIMARY (086) STREAM 2-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36	VOTES AFTER RECOUNT
Hezekiah Gichunge	21	21	21
Jasto Mati Maore	9	9	10
Kilemi Mwiria	86	86	88
Peter Gatirau Munya	320	320	317
Reuben Marambii	7	7	7

ITHITWE PRIMARY (078) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	14	14
Jasto Mati Maore	6	6
Kilemi Mwiria	32	32
Peter Gatirau Munya	170	170
Reuben Marambii	4	4

BUBUI PRIMARY (088) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	16	16
Jasto Mati Maore	2	2
Kilemi Mwiria	43	43
Peter Gatirau Munya	187	3 (-184)
Reuben Marambii	3	0

RURAMA PRIMARY (015) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	9	9
Jasto Mati Maore	9	9
Kilemi Mwiria	343	343
Peter Gatirau Munya	127	127
Reuben Marambii	14	14

KAUBAU PRIMARY (120) STREAM 1-IMENTI SOUTH

CANDIDATE	VOTES AS PER FORM 35	VOTES AS PER FORM 36
Hezekiah Gichunge	18	18
Jasto Mati Maore	16	16
Kilemi Mwiria	123	133 (+10)
Peter Gatirau Munya	405	405
Reuben Marambii	7	7

The Petitioner's allegation that votes garnered by candidates in Form 35 materially differed from Form 36 is incorrect and is not supported by the evidence adduced in respect of Nkubu Primary Stream 2, Nkubu Primary School stream 3, Muguru Coffee Factory, Kathera Tea Buying Centre Stream 1, Igandene Primary School Stream 1 and 2, Ithitwe Primary, Rurama Primary School and Kaubau Primary School.

The 2nd and 3rd respondents submitted that even for Nkubu Stream 1, Kathera Stream 2, Bubui Primary and Kaubau Primary where some of the candidates votes had a discrepancy between votes garnered in Form 35 and Form 36, the differences were not material as suggested when viewed against the total number of votes.

Taking into account the polling stations petitioner complained of in North Imenti and South Imenti, revealed after the above analysis it is clear that the petitioner has not proved to the required standard the votes garnered by the candidates in Form 35s have materially differed in Form 36.

The petitioner complained of manipulation of results by altering figures in Form 35 and 36 without countersigning and duplication of results.

That Out of the stations which had differences between the results in Form 35 and Form 36, to correct this anomaly, Hezekiah Gichunge would lose 4 votes, Jasto Mati Maore would require to be added 12 votes to his total votes, Kilemi Mwiria would require to be added a net of 44 votes, Peter Munya would require to be added an additional 108 votes to his total tally. The difference in votes between Peter Munya and Kilemi Mwiria is 3,436 votes. If the foregoing votes are taken into account, the margin will increase from 3,436 to 3, 544 votes.

The Petitioner alleged that this irregularity occurred at Kathera Tea Buying Centre, Igandene Primary School and Nkubu Primary Polling Station. A perusal of Form 35s for Kathera Tea Buying Centre

Streams 1 and 2 does not show any alterations which would require countersigning. To that extent, the Petitioner's allegations are baseless. Further, a perusal of Form 35 for Nkubu Primary Streams 1, 2, and 3 indicates that no alterations were made to any of the candidate's votes. The only apparent rectification is valid votes in Nkubu Stream 1 to read 629 from a figure which had been indicated earlier. Valid votes cast are arrived at from totaling the respective candidates' votes. Any other figure would have been incorrect. Pursuant to the 3rd Respondent's overall Constitutional obligation under **Article 86(c) of the Constitution** to ensure that the tallies of votes submitted from the polling stations are accurately collated, nothing stops the Presiding Officers from making corrections on the Form 35. Further, the said corrections were made before the five (5) agents signed the Form. No evidence was adduced by the Petitioner to show that the alterations were made after those agents signed the Form 35. In view of the foregoing, the Petitioner has not demonstrated that there was manipulation of the results as suggested.

Further, in paragraph 10(i) of the Petition, the Petitioner alleged that there were cancellations to Form 35 for St. Aloysius Primary School (062) and Maguru Polling Station. A perusal of Form 35 for St. Aloysius primary school in Imenti South shows that there was no alteration of any sort and hence there was no need for countersigning. It is noteworthy that in Meru County, there was no polling station called Maguru polling station.

In paragraph 3(e) of the Supporting Affidavit, the Petitioner alleges that Form 35 for Muguru Coffee Factory (001) had cancellations and alterations which are not countersigned. A perusal of the Form 35 indicates that there was an apparent overwriting in respect of valid votes cast and the votes for the 1st Respondent, both of which were countersigned. Clearly, the Petitioner's allegations in this regard are misplaced. The form is signed by 5 agents and none of them have approached the court to indicate that the Form adduced in court was altered after they appended their signatures. In addition, the Petitioner's allegation that the total number of votes cast was inaccurate is also without basis because 613 valid votes added to 7 rejected votes results in 620 cast votes as is correctly indicated in Form 35.

That as regards the allegation on duplication of results, from above, it is clear that where duplication of results occurred, *to wit*, in Kathera Stream 2 and Nkubu Stream 1, the said duplication was clearly an honest transcription error as results from Stream 1 Kathera were erroneously transferred to both stream 1 and 2 in Form 36 and in Nkubu, the results for Stream 3 in Form 35 were erroneously transferred and reflected in Form 36 Stream 1 and 3. The honesty of such a mistake is demonstrated by the fact that the error affected **all** the candidates across the board and that no unique disadvantage was sustained by Kilemi Mwiria. If anything, as indicated above, the 1st Respondent is the greatest casualty of the said transcription errors. Further, the 2nd and 3rd Respondents owned up about this transcription errors during the trial.

This court notes that the allegations that the alterations were in bad faith, tailored to manipulate the results in favour of the 1st Respondent was not proved to the required standard as no evidence was tendered to that effect before this court. . If anything, the alterations were clearly made so that the 2nd Respondent adheres to its Constitutional mandate of collating results accurately as is required under **Article 86(c) of the Constitution**.

In a Nigerian case of Alhaji Waziri Ibrahim v Shehu Shagari(1983) All N.L.R 507 it was held:-

“An amended document by itself does not speak of the motive behind the amendment. Without more, an altered or amended document is as genuine as an unamended one. Therefore, the admission of exhibits C to V, the returns from the States form which exhibits Band B 1 were collated without any evidence to add a sting to the innocent amendment appearing on some of them offers no help to the case of the appellant.”

*I find myself therefore unable to accept the submission of the 'earned counsel for the appellant that because returning officers amended and altered the returns exhibits C to V from 15 States that fact ipso facto means that the returning officers have not complied with sections 65 (4), 66, 70 and 119 of the Electoral Act 1982. **There must be evidence of indictment or of immoral, unlawful and illegal motive.**”*

... It is conceivable that the occasion may genuinely arise when a statement of votes cast may of necessity be altered or amended for instance where a mistake in arithmetic is discovered during the counting of the votes or when a recount is made under S.68 of the Electoral Act, 1982”

I therefore find that the petitioner has failed to prove to the required standard the allegations of manipulation of results by altering figures in Form 35 and 36 without countersigning and duplication of results. Whether there were alterations or amendments the petitioner was obligated to call evidence of indictment or of immoral, unlawful and illegal motive and show that the alteration by the respondents did not adhere to their constitutional mandate of collating results accurately as required under Article 86(c) of the Constitution of Kenya.

I therefore find and hold that Form 35s were altered or amended for instance where a mistake in arithmetic was disclosed during the filling of the forms and was done in good faith and in accordance with the respondents’ Constitutional mandate.

On complicity in harassment of TNA agents by officers of the Provincial Administration, the petitioner under paragraph 7(g),8(m) and 8(n) alleges the 2nd and 3rd respondents conspired with the 1st Respondent to expel the TNA agent in Nchuui Polling Station. As indicated above, the Petitioner’s witness Esther Kabebi(PW3) alleged to have been a TNA agent. She failed to adduce a letter of appointment, oath of secrecy or badge to show that she was a lawful agent. The said witness in her evidence confirmed that the presiding officer did not harass her. She did not file any complaint about the harassment at all.

The Petitioner also alleged at paragraph 10(k) and (p) of the Petition that the 2nd and 3rd Respondents instigated the arrest, harassment and threatening of Kilemi Mwiria’s agent at Kaguru Tallying Centre. He also alleged that the 2nd and 3rd Respondents’ official were hostile to agents at Kaguru Tallying Centre. No witness present at Kaguru Tallying Centre was called to adduce evidence in support of this contention. This allegation was not proved at all.

Similar allegations were made in paragraph 6 of the supporting affidavit regarding harassment of TNA agents at Muthara Youth Polytechnic and St. Immaculate Tallying Centres. No witnesses were called to testify in respect of St. Immaculate Tallying Centre. Further, as indicated above, the Petitioner’s witnesses who alleged to have been TNA agents at Muthara Youth Polytechnic, that is, David Kamenchu (PW2) in his affidavit and evidence did not indicate that he was harassed. All he talked about was an attempt to evict all agents and that when he resisted, he was allowed to remain at the Centre. John Kamenchu (PW2) also alleged to have gone to Muthara Youth Polytechnic tallying Centre. As noted by court, he had no proof of authorization as an agent. The witness alleges to have been threatened at Lanyiruu Polling Station by the two chiefs. The two chiefs mentioned testified in favour of the 1st Respondent. Joel Gatirikia Nkunya(DW2) and Peter Kalunge M’Arunga (DW5). Both of them refuted the allegations of David Kamenchu(PW2) as being false. DW 2 testified that he had had differences with David Kamenchu which would explain why David Kamenchu(PW2) would want to implicate him. DW5 on the other hand stated that David Kamenchu(PW2) was unhappy that (DW5) had defeated his brother in an interview for the position of chief. Peter Kalung’e M’Arunga (DW5) stated that he voted at 6.00 a.m to 7.00 a.m. and did not go to any other polling station.

There was no evidence that the 2nd and 3rd Respondents were informed about any allegations of harassment of agents. No evidence was adduced confirming that DW2 and DW5 were agents or sympathizers of the 1st Respondent and that the 1st Respondent was privy to and approved their actions. No evidence was adduced to establish the alleged complicity between the 2nd and 3rd Respondents on the one hand and the 1st Respondents on the other. In view of the foregoing, I find that these allegations are not proved to the requisite standards.

On conducting the election in a partisan and biased manner by misleading illiterate and incapacitated voters to vote in favour of the 1st respondent, the petitioner alleges at paragraph 7(i) of the Petition that the 2nd and 3rd Respondents conducted the elections in a partisan and biased manner by misleading

illiterate and incapacitated voters in favour of 1st respondent at Antuanuu and Mikinduri Polling Stations. Notably, in Mikinduri, there are two polling stations, namely, Mikinduri Primary School (027) and Mikinduri Coffee Factory (039) in Tigania East Constituency. The Petitioner's allegation falls short of the requirements of specificity as set out in Rule 10(3) (b) of the Petition Rules. No witness affidavit from any witness in respect of Mikinduri Primary School or Mikinduri Coffee Factory was filed to support the Petitioner's allegations. None of the Petitioner's witnesses alluded to the alleged bias and partisanship at any of the Mikinduri polling stations. The Petitioner in his evidence before court confirmed that he received information about Mikinduri from one Stephen Gitonga who was not at Mikinduri. Such evidence is clearly hearsay and therefore unreliable and inadmissible.

Christine Nkananu George alleged that at Nguthiru, illiterate voters were misled to vote for the 1st Respondent. The names of such illiterate voters and their number was not disclosed. No affidavit was filed from any one of them. An examination of Form 35 for Nguthiru (077) in Tigania East reveals that it was signed by 2 agents from different parties. No complaint was noted in Form 35. Christine Kananu(PW6) in her evidence admitted that a presiding officer would assist illiterate voters in the presence of authorized agents. Her allegation is therefore baseless and falls short of the required standards.

As regards Antuanuu polling stations, David Kamenchu(PW2) in his affidavit deposed to be a voter at Antuanuu polling station but in his affidavit did not make any statement regarding the polling station. John Kamenchu(PW2) on the other hand alleged to have been a ward coordinator for Kilemi Mwiria at Antuanuu. He alleged to having been a TNA agent at Tigania East Constituency but he did not adduce any proof thereof. His only statement regarding the polling station was that one Cyprian Kailikia an agent at the station was asking voters to vote for the Alliance Party of Kenya both outside the station and inside the room. The said Cyprian Kailikia was arrested and kept in an adjacent room. He then heard two chiefs arguing with the security officer to release him. The witness confirmed that the said Cyprian Kailikia (DW6) was arrested on the orders of the presiding officer. From the witness affidavit, the only witness from Antuanuu, there is no single fact in support of the allegations that the 2nd and 3rd Respondents' officials at Antuanuu were biased or partisan.

All the Petitioner's witnesses had a vague and general statement in their witness affidavits that they believed that election officials deployed to their constituencies conducted the elections in a partisan and biased manner. **Under Rule 12 of the Petition Rules; 2013**, Witness Affidavits should contain the substance of the evidence in support of the facts and grounds in the Petitioner's Petition and Supporting Affidavit. The evidence must be targeted at a specific allegation of fact. The court notes that the witnesses failed to offer any evidence to support the Petitioner's allegations of fact.

In analyzing the evidence on these allegations I have to bear in mind the petitioner's witnesses were not specific in their evidence but gave a sweeping and vague statements. None of the witnesses gave evidence that they had been to more than one polling station to enable them evaluate the conduct of the election officials to reach to the conclusion of bias and partisanship and as such I find no basis whatsoever for them to hold that belief.

In the case of **Mokwaledi Bagwasi v Seabe Morueng & Anor Miscellaneous Applic No. F228 of 2004** from the High Court seating at Botswana it was held as follows:

“Where a petitioner asserts that an election official was biased against him, he should adduce evidence to show the manner in which the election official was biased. In the instant case, the petitioner made what amounted to bald allegations and did not adduce any evidence to prove those allegations.”

I therefore find that where a petitioner asserts that an election official conducting an election is biased and partisan he is obligated to give full particulars in his petition and call evidence in support of his allegation and prove the same to the required standards failure whereof the allegations are nothing more than malice and made in bad faith. Evidence must be produced to support all the allegations of bias or partisanship. It is not enough to make general allegations which cannot be proved.

On denying voters the right to vote at Limoro and Antuanuu polling stations the petitioner in paragraph 7(k) alleges that voters were denied the right to vote at Limoro and Antuanuu Polling Stations. An examination of all the Form 35s and Form 36s for all the Constituencies in Meru County would reveal that there is no polling station known as Limoro. Further, an examination of the witness affidavits of David Kamenchu(PW2) who is allegedly a registered voter at Antuanuu and John Kamenchu(PW5) who alleged to have been at Antuanuu show that they have not mentioned in their witness affidavits that they witnessed any voters being denied a chance to vote. No affidavit was filed or witness called to confirm that any registered voter at the station was denied a chance to vote. In view of the foregoing, the Petitioner's allegation is unsupported by evidence and therefore not proved to the required standards.

On failing to transmit results electronically to the tallying Centre, the petitioner alleged in paragraph 7(m) of the Petition that the 2nd and 3rd Respondents failed to project results at the tallying Centre and failed to transmit the results electronically to the tallying Centre.

It is now public knowledge that the Results Transmissions System employed during the 4th March 2013 elections did not work as envisioned due to a server breakdown in circumstances beyond the control of the 2nd and 3rd Respondents. Nevertheless, the integrity of the system was safeguarded by the manual system employed hence no prejudice was occasioned to any candidates from the said failure. The purpose of the results transmission system and projection was to transmit provisional results for verification purposes. The same purpose could be and was attained by use of Form 35s which had been supplied to the agents at the polling stations, which the tallying agents had in their possession for verification against the results which the returning officers were announcing at the tallying centres. In view of the foregoing, the purpose of the results transmission system was served and no prejudice was occasioned to any candidate.

The issue of use of technology has been a subject of litigation at the Supreme Court in the Raila **Odinga Case** where the court stated as follows at page 235

“But as regards to the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion but to revert to the manual electoral system, as was done.”

Further at paragraph 237, the court stated as follows:

“...since such technology has not achieved a high level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process.” “..It follows that the Petitioner's case in so far as it attributes nullity to the presidential election on the grounds of failed technological devises, is not sustainable.”

In view of the foregoing this court is guided accordingly by the Supreme Court decision and find that the petitioner allegation on this point unsustainable.

On failing to safeguard the safety of ballot boxes the petitioner in paragraph 7(n) of the Petition, alleged that the 2nd and 3rd Respondents failed to safeguard the safety of ballot boxes by allowing seals to be compromised. The Petitioner does not specify the name of the polling station(s) whose boxes were affected, the elective seat whose boxes were broken and other necessary details in breach of **Rule 10(3)(b) of the Petition Rules.**

I have examined the witness affidavits filed by the Petitioner and the evidence tendered. I note further that no evidence was adduced by the Petitioner to support the allegation that ballot boxes were received without seals. Obviously, the Petitioner has failed to prove this allegation in any way or at all.

On destroying valid votes in favour of Kilemi Mwiria at Mikunduri area the petitioner contends in paragraph 7(P) of the Petition that Kilemi Mwiria's valid votes cast at Mikunduri area were destroyed. The Petitioner testified in this regard in cross examination and no other witness was called to support this

assertion. The Petitioner testified that he got the information from a TNA agent he could not remember. He confirmed that he did not see the destroyed or thrown away votes. He did not have those votes and that he did not have anything in support of his allegation that there were votes destroyed and found. I find this allegation to be without any basis and I find that it remains a mere allegation without proof.

On irregularly requiring agents to sign blank Form 35 and 36, the petitioner in paragraph 8(b) of the Petition and paragraph 6(e)(ii) of the supporting affidavit, the Petitioner alleges that the 2nd and 3rd Respondents irregularly required candidates to sign blank Form 35s and 34 ahead of vote counting at Luuma Primary School and at Muthara Youth Polytechnic. Notably Form 34 is the declaration for presidential elections and has no nexus to the matter herein.

No witness was called from Luuma Primary School to testify that he/she was an authorized agent and that he had been required to sign a blank Form 35. I have also carefully examined the witness affidavits of the witnesses who alleged to have been present at Muthara Youth Polytechnic. I find that none of them mentioned in their affidavits or during their testimony that any agent was required to sign blank Form 35s or 36s as alleged by the Petitioner. As such, the Petitioner's allegation is not proved to the required standards.

On petitioner's allegation of failure to address agents concerns and objections, the petitioner alleges at paragraph 8(e) of the Petition that the 2nd and 3rd Respondents failed to address concerns and objections raised by the candidates or agents at Mikinduri Factory (039) and Muthara Youth Polytechnic (094) Polling stations in Tigania East Constituency. The Petitioner does not state what those complaints and objections were in breach of Rule 10(3) (b) of the Petition Rules 2013.

Further, no witness testified from Mikinduri Factory (039) and Muthara Youth Polytechnic Polling (094) stations regarding the nature of objections which arose which allegedly were not addressed. No evidence was adduced by the Petitioner to demonstrate the nature of the objections raised at the two polling stations. It should be noted that Form 35 for Mikinduri Factory is signed by two agents and no complaint had been raised. Further, it is noted that Form 35 for Muthara Youth Polytechnic is signed by three agents and no complaint has been noted on the form.

Even if this Honourable Court were to consider the evidence of the witnesses in this matter on this issue that agents objections were not addressed, which is not hinged on any pleadings, it is noted that David Kamenchu(PW2) confirmed that he did not complain to the 3rd Respondent. Stephen Gitonga(PW4) in his evidence confirmed that he did not write a complaint to the 3rd Respondent, Esther Kabebi confirmed that she did not file any complaint with the 3rd Respondent, John Kamenchu (PW5) confirmed that he did not notify the 3rd Respondent of the incidents he allegedly witnessed. In view of the foregoing the Petitioner's allegations have not been proved to the required standards.

On allegation of allowing unauthorized persons to impersonate genuine agents and sign Form 34s and 36 at Muthara Youth Polytechnic, the petitioner alleges at paragraph 8(f) of the Petition that the 2nd and 3rd Respondents allowed unauthorized persons to impersonate genuine agents and sign Form 34 and 36 at Muthara Youth Polytechnic. Notably, Form 34 which is the declaration of results form for presidential elections at polling stations has no relevance in these proceedings.

The affidavit of David Kamenchu (PW2) purports that the Returning Officer allowed strangers who were not constituency tallying agents to sign Form 34s and 36 on behalf of Jubilee. Form 34s are signed by agents at the polling station and only relate to presidential results. Further, on an examination of Form 36 for Tigania East Constituency it is clear that it was not signed by any agent for Jubilee. It was only signed by agents from APK, ODM and Nark-Kenya parties. In view of the foregoing, the witness affidavit is untrue. The witness it should be noted that he confirmed that he did not have a list of the genuine agents for the parties. He also confirmed that he had no evidence that the Returning Officer procured strangers. Clearly, this allegation is baseless and without substance.

On refusal to display results on the doors of the polling stations the petitioner alleges at paragraph 8(g) of

the Petition and paragraph 6(e) (VI) of the supporting affidavit that the 2nd and 3rd Respondents failed to display results on the doors of polling stations. The Petitioner did not specify the number of the polling stations where this anomaly happened and which stations and as such the allegation is bad in law as it breaches the requirements of **Rule 10(3)(b) of the Petition Rules, 2013** and is prejudicial as it denies the Respondents a chance to respond specifically to the allegation. The allegation has not been proved.

On forcing agents to take long breaks, the petitioner at paragraph 8(i) alleges that agents were forced to take long breaks at Muthara youth polytechnic from 2pm to 6 pm. Further at paragraph 10(n) the Petitioner alleges that Kaguru tallying Centre was closed on 5th March 2013 at night to allow the Imenti South Constituency to go and sleep.

The court notes that no witness was called from Kaguru tallying Centre to confirm the assertion. That as regards Muthara Youth Polytechnic, David Kamenchu(PW2) who alleged to have been a tallying agent for TNA at Muthara Tallying Centre makes no mention of long breaks taken at the tallying Centre where he was stationed. John Kamenchu(PW5) who alleges to have also gone to Muthara Youth Polytechnic indicates at paragraphs 23 and 25 of his Affidavit that the Returning Officer called for a lunch break at 12.00 and that the tallying process resumed at 2.00 p.m. This evidence is clearly contradictory to the Petitioner's allegations. Stephen Gitonga(PW4), who also alleged to have been at the tallying Centre, makes no mention of the long breaks.

Abdi Sheikh Mohammed (DW9), the Returning Officer stated that a health break was taken at the tallying Centre for one hour. He testified that no one left the tallying Centre and the polling station was not closed. DW9 further testified that the break was necessary to allow for Muslims to pray, to allow people to eat and stretch. This was not contrary to any regulations. This allegation, in the result, has not been established.

In the case of of **Harun Meitamei Lempaka v Lemanken Aramat EP No. 2 of 2013 Nakuru, (2013) eKLR Hon. Justice M. Emukule**, considered breaks during the counting process and stated as follows:

It was the Applicant's counsel's case for a recount that there was a long break in the counting of votes, thus giving room for manipulation of the votes. I find no evidence to support that the break was for the purpose of manipulating any votes or the tallying forms. It is a fact behoving the courts to take judicial notice, that in a constituency bereft of infrastructure, social amenities and other facilities, without mentioning lack of adequate or any feeding at all and where ballot papers and boxes are delivered on the eve of elections, the officers concerned including agents get extremely fatigued, and must I think get opportunity to stretch from doing the long hours of counting votes. . . It is bad faith to impute improper motive for such breaks to mean manipulation of votes.

I agree with the holding by Hon. Mr. Justice Emukule and would like to add that in life health breaks are necessary and no man has control when the nature demands we take a health break to relief ourselves or to eat or to communicate with our maker through prayers. In elections people get extremely fatigued for staying for long hours without rest or sleep or without decent meal and it is human nature for election officials, agents and candidates to get a break to stretch their feet or arms or take medication and rest for a while before proceeding with the long hours of tallying. It is not in good taste for anyone to implicate bad faith and improper motive for such deserved breaks to be taken as means to manipulate votes in favour of one candidate.

I have considered this allegation and find that it was purely actuated by malice as no cogent evidence was adduced in support of the said allegation. The said allegation has not been proved to the required standards.

On refusing the count and tally valid votes at Gambela, Mukuani and Kirimachuma polling station, the petitioner at paragraph 8(j) of the Petition alleges that the 2nd Respondent failed to count and tally votes from Gambela, Mukuani and Kirimanchuma polling stations. An examination of Form 35s from Tigania East in Volume 3 of the annexures to the affidavit of Mr. Onditi indicates that results from all those stations were announced at the polling stations. No evidence to the contrary was adduced at all. I

therefore find that the Petitioner's allegations are therefore without basis.

On succumbing to pressure and undue influence from the 1st respondent and Alliance Party Senatorial candidate, the petitioner alleges in paragraph 8(k) of the Petition that the 2nd and 3rd Respondents succumbed to unlawful pressure, harassment and undue influence from the 1st Respondent and the senatorial Alliance of Kenya Party candidate. The 2nd and 3rd Respondents refuted this sweeping allegation, which is wanting in particulars in breach of **Rule 10(3) of the Petition Rules, 2013**. Further, the 2nd and 3rd Respondents' witnesses Habiba Godana, Abdi Sheikh Mohammed and Kennedy Onditi all denied this allegation in their Affidavits. The allegation is therefore not proved.

On refusing to conduct vote counting at Mitunguu primary school, the petitioner alleges in paragraph 16(c) of the Petition that the 2nd and 3rd Respondents failed to conduct vote counting at Mitunguu Primary School and instead transported the votes to Kaguru Tallying Centre. The Petitioner did not call any witness from Mitunguu to confirm the aforesaid allegations. He was not at the said polling station. A perusal of Form 35s for the three streams at Mitunguu Primary School(008) reveals that Form 35 for stream 1 was signed by 5 agents, Form 35 for stream 2 by 4 agents and Form 35 for stream 3 was signed by 2 agents. Strangely none of the agents who were present at the polling station were called to testify in support of the allegations of the Petitioner.

On the other hand, Kennedy Onditi, the Returning Officer Imenti South Constituency where the polling station is located testified and confirmed that he received Form 35s from the said station. He further confirmed that no agents complained to him about the fact that no counting took place at Mitunguu. In view of the foregoing, I find that the Petitioner failed to prove this allegation to the requisite standards.

On instigating arrest, harassment and threatening of an agent at Kaguru Tallying Centre, the petitioner alleged at paragraph 8(k) of the Petition that the 2nd and 3rd Respondents instigated the arrest, harassment and threatening of an agent of Kilemi Mwiria at Kaguru Tallying Centre. The same allegation is reiterated at paragraph 6(g)(ix) of the supporting affidavit of the petitioner. The allegation is in breach of Rule 10(3) (b) of the Petition Rules because it does not name the agent who was allegedly arrested, threatened or harassed. No witness testified from Kaguru Tallying Centre to prove this allegation. This allegation is unfounded.

On accepting and including in the final tally ballots and ballot boxes of questionable origin brought to Kaguru tallying Centre, the petitioner alleges at paragraph 8(l) of the Petition and paragraph 6(g) (xii) of the supporting affidavit that the 2nd and 3rd Respondents accepted and included in the final tally ballots and ballot boxes of questionable origin at Kaguru Tallying Centre by motor vehicle registration number KAB 029T. The Petitioner confirmed that he was given this information by John Gitobu Nkanata who was not called as a witness. No other evidence of evidential value to the petitioner's case was adduced and as such, I find that the allegation was based on hearsay.

On the other hand, Kennedy Onditi, (DW10) confirmed that he hired motor vehicle registration number KAB 029T to ferry ballot boxes from Murembu Polling Station. He testified that, the said motor vehicle was properly hired by the 3rd Respondent for its lawful work and the ballot boxes ferried in the said motor vehicle were not from a questionable origin, but from Murembu Primary School, one of the gazetted polling stations in the constituency. The Petitioner's allegation is not proved at all.

The third issue for consideration is whether if the said elections were carried out in accordance to the principles of the constitution and written law, whether non-compliance materially affected the outcome of the results.

In the course of hearing of this petition, the petitioner made an application for scrutiny and recount of votes. The court considered the application after the close of the hearing cases of the petitioner and the respondents. In its ruling delivered on 2nd August, 2013, the court granted the application allowing scrutiny and recount for seven (7) polling stations.

The Deputy Registrar of this court Mr. David W. Mburu carried out scrutiny and recount and presented to the court the findings of the scrutiny and recount. The findings are contained in a report which forms part of this court record. The petitioner's and the respondents appointed agents. The parties' advocates were supplied with copies of the report by the court. The Deputy Registrar's observation was that the ballot boxes for the affected polling stations were received intact and had not been tampered with. All the seals were intact. That the exercise was completed without any major incident on 6th August, 2013 at around noon.

The said scrutiny revealed the following:

NO.	POLLING STATION	1 ST RESPONDENT'S RESULTS		1 ST RUNNER'S UP RESULTS		RESULTS ON RECOUNT AND SCRUTINY	
		FORM 35	FORM 36	FORM 35	FORM 36	1 ST RESPONDENT	1 ST RUNNERS UP
1.	<u>YURURU PRIMARY SCHOOL(070)</u> STREAM 1 STREAM 2	243 326	243 326	120 132	120 132	243 325 (-1)	120 133 (+1)
2.	<u>MWICHIUNE PRIMARY SCHOOL(083)</u> STREAM 1 STREAM 2	178 144	178 -	207 223	207 -	177 (-1file copy) +144	208 (+1) +222
3.	<u>IGANDENE PRIMARY SCHOOL(086)</u>						

	STREAM 1	303	303	86	86	301 (-2)	88 (+2)
	STREAM 2	320	320	86	86	317 (-3)	88 (+2)
4.	<u>KATHERA TEA BUYING CENTRE(123)</u>		217			215	149
	STREAM 1	217		149	149	(-2)	
	STREAM 2	207	217	125	149	207 (-10)	125 (-24)
5.	NKUBU PRIMARY SCHOOL(138)		400		175		252
	STREAM 1	334		253		336 (-64)	(+77)
	STREAM 2	283	283	203	203	282 (-1)	204 (+1)
	STREAM 3	400	400	175	175	321	243

						(-69))	(+68)
6.	MUREMBU PRIMARY SCHOOL	520	520	119	119	518 (-2)	121 (+2)
7.	ST. ALLOYSIOUS PRIMARY SCHOOL(062) STREAM 1	292	292	171	171	293 (+1)	170 (-1)
	STREAM 2	286	286	164	164	286	163 (-1)

As it turns out from the above results of scrutiny and recount, it is clear that there were no massive material discrepancies between the results declared by 2nd and 3rd respondents in the respective Form 35s of polling stations and Form 36 of tallying stations that were under scrutiny and the finding made by this court.

The difference observed from the above results of scrutiny and recount is that the 1st respondent and the runners-up is that both gained and lost from the seven (7) polling stations. The 1st respondent after calculation was added ten (10) votes all in all whereas the runners up was deprived 350 votes. The results from the above-mentioned polling stations point out that the discrepancies noted in the report of scrutiny and recount affected all candidates and mainly the two major candidates that is Mr. Peter Munya and Dr. Kilemi Mwiria. The seven (7) polling stations where scrutiny and recount was conducted were the only stations where the petitioner could make reference to any form of irregularity and/or omissions out of total of 953 polling stations in Meru County. All seven (7) polling stations were from South Imenti Constituency which had 141 polling stations. The petitioner's contention that the seven (7) polling stations be used in an analytical way as representative sample of the rest of the polling stations in Meru County where no irregularities were noted cannot be acceptable in this petition and the same cannot be used in any scientific or analytical way as a representative sample. This is a court of law and can only rely on evidence but not on any speculation.

The scrutiny and recount further revealed that the minor errors discovered were not just meant for the benefit of one person as alleged by the petitioner, as it is evident that one Dr. Kilemi Mwiria had also erroneously gained 24 votes at Kathera Tea Buying Centre, 2 votes at St. Alloysious Primary School and

one in Mwichiune Primary School. It would therefore be wrong and illogical to say any candidate systematically and deliberately manipulated results in those seven polling stations. The errors noted in the said polling stations are improbable that they were manipulated in favour of any particular candidate as alleged by the petitioner but can be attributed to normal human errors which cannot vitiate the overall gubernatorial election results, as several candidates gained from the minor errors just as much as several candidates were prejudiced. It should be noted following the scrutiny and recount the margin between the winner and runners up of 3436 votes could only be reduced by (350+10), 360 votes. In the circumstances the 1st respondent still remains leading with 3076 votes.

The issue that this court has to determine is whether the irregularities exposed during the scrutiny and recount materially affect the results.

Section 83 of the Elections 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 non-compliance did not affect the result of the election.”

The Section hereinabove has been given Judicial interpretation by various courts, some of which I intend to refer to.

In a Nigerian Court of Appeal in the case of **Olusola Adeyeye v Simeon Oduoye (2010) LPELR-CA-1/EPT/NA/67/08** in which the court stated as follows:

“It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election against his interest. The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices.”

My understanding of the above-mentioned authority as read together with **Section 83 of the Elections Act** is that the petitioner is obligated to tying up alleged malpractices to the votes affected and the impact on the overall results as irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. In other words the petitioner is not only required to establish that there were irregularities which were committed during the elections but must also establish that such irregularities(non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test.

In addition to that, the petitioner is required to establish that the irregularities and errors were either occasioned by the outright negligence or deliberate action or omission on the part of the guilty party. Irregularities which can be attributed to innocent mistake or an oblivious human error cannot constitute a reason for impeaching an election result.

In Kenya election takes long hours to complete. This court takes judicial notice that election officials are required to tally the results under difficult conditions and situations. Most of the election officials would have stayed awake for at least more than (36) hours and even without decent meals while being exposed to harsh conditions and therefore simple arithmetic mistakes are bound to happen due to lack of concentration or due to fatigue.

In the case of **Joho v Nyange (No.4) (2008) 3 KLR (EP)500** where the court stated as follows:

“Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored.”

“It is not every non-compliance or every act in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored.” “...And the result of an election is affected when the cumulative effect of the irregularity reverses it. For instance when a large portion of the voters are by some blunder in the conduct of the election as happened in ...do not turn up to vote, the result is said to have been affected.”

In my view Section 83 of the Election Act simply provides that in any election, because it is conducted by human beings, there is bound to be errors which can be explained. There is no election without errors nor is there any election that can be said to be perfectly conducted, however it is only when such errors or irregularities, which constitutes non-compliance with the law, materially affects the outcome of the results that the court will have no alternative but to nullify the said results.

In the instant petition, the irregularities that the petitioner was able to establish following scrutiny and recount are not of such a nature that this court can come to a finding that they were so material as to affect the outcome of the results. As indicated earlier on the runners up votes were reduced by 350 votes and the 1st respondent added 10 votes from the seven polling stations subjected to scrutiny and recount, even if the votes garnered by the 1st respondent were to be deducted by 360 votes being votes the runners up was deprived and 10 votes added to the 1st respondent the difference between votes garnered by the 1st respondent and those of the runners-up, Dr. Kilemi Mwiria, the runners-up would not garner sufficient votes to raise the doubt in the mind of the court that the elections were not conducted in a free and fair manner. I find that the results of the scrutiny did not support the petitioner’s assertion of massive irregularities that would lead to court to reach a finding that the results obtained from the said election ought to be nullified.

Infact, the scrutiny and recount ended up establishing that the electoral officials substantially did their work in compliance with the law.

In conclusion, this court has been guided by the Constitution in determining this petition. Article 81 of the Constitution of Kenya, 2010 upholds the right of the citizens to exercise their political rights as set out under Article 38 of the Constitution to elect leaders of their choice.

The voters of Meru County elected the 1st respondent in an election that in the opinion of this court was free, fair and transparent and whose results reflected the will of the electorate of Meru County. This court as such cannot interfere with the right of the voters to elect their representative in Meru County, unless it is established that the election was marred with irregularities to an extent that a tribunal reviewing the conduct of the said election is unable to reach a finding that the results reflected the will of the electorate. The petitioner has failed to establish that there were massive irregularities of such a nature that negated the expression of the will of the electorate at Meru County. The allegations were not proved to the required standards of proof and as such the petition lacks merit and is hereby dismissed.

This court is greatly indebted to the Advocates who had conduct of this petition. The court is obliged to thank Mr. Muthomi Thiankolu with Mr.M. Kariuki and Mr. V. P. Gituma for the Petitioner, Mr.Okongo Omogeni, Snr Counsel with Mr. Arithi Kiautha for the 1st respondent and Mr. Munyu with Mr. Nyaburi for the 2nd and 3rd respondents. The said Counsel showed a lot of courtesy to each other and to the court during the entire hearing of the case. They showed a lot of commitment to their brief and were always punctual. The said Counsel exhibited diligence in their research and presentation of their respective client’s case in court. They relied on recent and relevant authorities in support of their respective opposing positions. For M/S Muthomi Thiankolu, Mr. M. Kariuki and V.P Gituma, the fact that the petition was unsuccessful is no reflection at all whatsoever on their competence. In fact the court benefitted and learned a lot from the style and amount of their advocacy and the manner of presentation in court which is borne out of long experience in the bar. This court also wishes to thank my most able and committed Researcher M/S Lucianna Thuo, though based at Nairobi was able to furnish the court with timely upto date research, my Secretary Felicity N. Murugu for commitment in ensuring proceedings, rulings and judgment was completed in time, C/clerk Penina Wangui Gachura and Duncan Kathurima for being punctual and dedicated to their work, without whom this court would not have been able to hear

and conclude the petition in the record time that it did.

On costs, costs usually follow the event but before concluding on the issue of costs I would like to deal with a point raised on who should pay costs. The 1st respondent's counsel Mr. Omogeni on costs urged the court to condemn the petitioner's sponsor to pay the cost. The 1st respondent asserted that this petition was filed by the petitioner as a proxy of Dr. Kilemi Mwiria who was one of the gubernatorial candidates for Meru County. The 1st respondent further asserted that the petitioner admitted on oath that he was unqualified Secondary School Teacher earning Kshs.11, 000/- per month and do not have any other source of income. He submitted that the petition is sponsored by Dr. Kilemi Mwiria, who even paid the required deposit for costs of Kshs.500,000/ and who is also paying the cost of the petition including paying the fees for three advocates prosecuting the petition. The three petitioner's advocates apparently did not deny having been instructed by the said Dr. Kilemi Mwiria, however on costs, they submitted if the petition is dismissed, the petitioner should not be condemned to pay costs but should the petition succeed the IEBC should be condemned to pay costs to the petitioner and 1st respondent.

This court observes that the proxy arrangement between Dr. Kilemi Mwiria and the petitioner was made outside this court. That when the fact dawned on the respondents that the petitioner had brought this petition as a proxy of Dr. Kilemi Mwiria they did not move this court to have Dr. Kilemi Mwiria enjoined as an interested party in the petition or have him compelled to attend court as an interested party for cross-examination on the allegation by the petitioner or sought to have the deposit enhanced, if they felt the petitioner, in case the petition was dismissed could not meet the costs of the petition.

The issue before this court is whether this court can condemn the principal to pay costs without affording him an opportunity of being heard on the allegations labeled against him by the petitioner. The allegation of the proxy arrangement could only be proved upon hearing both the petitioner and the said principal, upon which the court could decide who would be condemned to pay costs of the petition.

Rule 36(1) of the Election Petition(Parliamentary and County Elections) Petition Rules 2013 provides:-

36. (1) the court shall, at the conclusion of an election petition, make an order specifying—

- a. the total amount of costs payable; and***
- b. The persons by and to whom the costs shall be paid.***

The Election Petition Rules 2013 gives this court wide powers to direct the person by and to whom the costs shall be paid. The use of the word "persons" under Rule 36 is not accidental and in my view is intentional and deliberate. In my view in appropriate circumstances, a person other than the petitioner or the respondent may be ordered to pay costs but upon being given an opportunity to respond to any allegation made against him in an election petition. It would be against the rules of natural justice to merely order one to pay costs upon dismissal of a petition merely because the petitioner alleges he had brought the petition as a proxy of that person.

The petitioner who accepts to be sponsored should in the proxy arrangement be prudent enough to make arrangements on how he would be able to settle costs in case the petition is dismissed.

The petitioner who agrees to bring a petition on behalf of an unsuccessful candidate should be ready to meet the consequences of a failed petition and cannot hide behind the fact of being a sponsored petitioner. He should make arrangements with the principal in advance. The petitioner in my view should not be left unpunished for his actions as by failing to do so would encourage the unsuccessful candidates to use men of no means to file petition with hope of getting away with nonpayment of costs in case the petitioner does not succeed. This court would not let such petitioners get away without paying costs as one way of deterring the abuse of the court process; by both unsuccessful candidates and the sponsored petitioners of low income.

Having said this, this court is of the view that it cannot condemn the sponsor of the petition Dr. Kilemi Mwiria to pay the costs for reasons stated herein-above.

The court will therefore award costs of the petition to the respondents against the petitioner pursuant to **Rule 34(1) (a) of the Elections(Parliamentary and County Elections) petition Rules 2013**, under which this court is granted power to specify the total amount of costs that shall be paid in a petition. This court has noted the length of time it took for this petition to be heard and determined. The type of input, in terms of time, research, preparation of the pleadings, and the time spent in court during actual hearing of the petition. The court is also oblivious of the fact that Counsel for the parties travelled from their usual places of business to attend to this court from Nairobi. That the petitioner was represented by three able advocates, the 1st respondent by two able advocates, one of whom is a Senior Counsel and the 2nd and 3rd respondents by two able advocates.

This court therefore orders that the maximum amount of cost that shall be paid to the respondents is Kshs.5M. The 1st respondent shall be paid a maximum of Kshs.2.8M while the 2nd and 3rd respondents shall be paid a maximum of Kshs.2.2M. In that regard, the sum that was deposited in court shall remain so deposited pending the taxation of the costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2013.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. *Mr. Muthomi Thiankolu. jointly with Mr. M. Kariuki and Mr. V. P. Gituma for the petitioner*
2. *Mr. Omogeni Snr. Counsel with Mr. A. Kiautha for the 1st respondent*
3. *Mr. Munyu jointly with Mr. Nyaburi for the 2nd and 3rd respondents.*
4. *C/clerk Penina/Kathurima.*

J. A. MAKAU

JUDGE