



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELECTION PETITION NO.9 OF 2013**

**IN THE MATTER OF ARTICLES 81, 86 AND 87 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF ELECTIONS ACT, NO. 24 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTION (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF ELECTION TO THE SENATE**

**AND**

**IN THE MATTER OF KISII COUNTY**

**AND**

**IN THE MATTER OF THE PETITION OF CHARLES OIGARA MOGERE**

**BETWEEN**

**CHARLES OIGARA MOGERE ..... PETITIONER**

**VERSUS**

**CHRISTOPHER MOGERE OBURE ..... 1ST RESPONDENT**

**NYANGAU SHEM OBWORO .....2ND RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 3RD RESPONDENT**

**JUDGMENT**

Introduction

1. On 4<sup>th</sup> March 2013, Kenya conducted a general election that has been touted as one of the most complex general elections to be conducted in any country on the globe. On that day, there were 6 elections in one. Kenyans of all walks of life came out to cast their votes to elect the President and his Deputy, Members of the National assembly, Women

Representatives to the National Assembly, Senators, County Governors

and Members of the County Assembly. The elections were the first to be conducted under the new Constitution which was duly promulgated on 27<sup>th</sup> August 2010 at a most colourful ceremony that can only be likened to the ceremony that saw the lowering of the British flag and the hoisting of the Kenyan flag on 12<sup>th</sup> December 1963.

2. At the conclusion of the above stated elections, the 1<sup>st</sup> Respondent herein, Christopher Mogere Obure (Obure) was declared the winner of the Kisii Senatorial election by the 2<sup>nd</sup> Respondent herein, Nyangau Shem Obworo (Obworo). Consequently, the 3<sup>rd</sup> Respondent, the Independent Electoral and Boundaries Commission (the IEBC), published the results of the elections vide Gazette Notice Number 3156 of 13<sup>th</sup> March 2013 (the Gazette Notice) declaring to the whole world that Obure was the duly elected Senator for Kisii County.
3. The Petitioner, Charles Oigara Mogere (the Petitioner), who was a duly registered voter at Nyabigege Primary School in Tabaka Ward of South Mugirango Constituency, was aggrieved by the declared results of the Senatorial elections and on 10<sup>th</sup> April 2013, he filed this petition challenging the aforesaid results. From the evidence, whose details will come out later in the course of this judgment, the petition was filed on behalf of James Omingo Magara (Magara), who was one of the 7 contestants for the Kisii Senatorial seat during the elections. All the candidates who vied for the seat of Kisii County Senator and their respective results were as follows:-

Names of Candidate	Name of Party	Number of Votes
Christopher Mogere Obure	ODM	120351
Frederick Amboga Onwonga	TIP	2581
George Omari Nyamweya	UDF	6541
James Omingo Magara	PDP	100754
Raphael Machuki Raini	FORD KENYA	2525
Rueben Oyondi Onserio	FORD PEOPLE	3876
Samson Kegengo Ongeru	TNA	106325

The Petitioner's pleadings

4. In his petition dated 9<sup>th</sup> April 2013 duly filed in court on 10<sup>th</sup> April 2013 under **Articles 22, 81, 86 and 87** of the **Constitution of Kenya** (the Constitution) and **sections 39 and 75** of the **Elections Act, No.24 of 2011** (the Act) and **Rules 8 and 10** of the **Elections (Parliamentary and County Elections ) Petition Rules 2013** (the Rules) and all enabling provisions of the law, the Petitioner alleges that both Obworo and the IEBC conducted the elections of 4<sup>th</sup> March 2013 in a manner substantially inconsistent with and contrary to the express provisions of **Articles 8, 86 and 88** of the **Constitution** and **Section 39** of the **Act**; that the said elections were also conducted in a manner that was substantially inconsistent with the principles laid down in the Laws of Kenya, and in particular, the principles laid down in the **Constitution** and the **Act** and also in

contravention of the Elections (General) Regulations, 2012 (the Regulations) and more particularly that both Obworo and the IEBC neglected, refused and or otherwise failed to take any measures to ensure that the election was transparent, accurate, verifiable, free and fair as provided under **Articles 10, 81, 86 and 88** of the **Constitution**.

5. The Petitioner set out a raft of breaches attributable to both Obworo

and the IEBC, namely that:-

- a. *Despite Obure not receiving the greatest number of valid votes cast, Obworo declared him winner of the elections in total disregard to **Articles 81, 86 and 88** of the **Constitution** and **Section 39** of the **Act**.*
- b. *The IEBC endorsed the illegal declaration of Obure as winner by publishing the Gazette Notice on 13<sup>th</sup> March 2013.*
- c. *Obworo declared Obure the winner without verifying and authenticating the Forms 36 which had been received at County Tallying Centre from the Constituency Tallying Centres;*
- d. *Obworo declared Obure the winner without first of all verifying and completing Form 36 in the presence of the Petitioner who was the accredited Chief Tallying Agent for the Peoples Democratic Party (PDP) contrary to **Regulation 79** of the **Regulations**.*
- e. *Obworo unlawfully and unjustifiably declined the Petitioners request for verification, recount and retallying of votes cast contrary to the express provisions of **Regulation 80** of the **Regulations**;*
- f. *Obworo unlawfully and unjustifiably tallied returns from polling stations in which the votes allegedly cast exceeded the number of registered voters contrary to **Regulation 83** of the **Regulations**;*
- g. *Obworo made a tally to the IEBC which grossly differed with the votes actually counted, verified and announced at many polling stations in which Obure's tallies were inflated while those of Magara and other contestants in the race for Senator were decreased contrary to the provisions of inter alia, **Article 81** of the **Constitution** as read with **Regulations 79 (2) (a)** and **83** of the **Regulations**;*
- h. *Obworo and his subordinates unlawfully and unjustifiably refused to issue and or allow the Petitioner to verify and sign Form 36 in respect of Kisii County contrary to, inter alia, **Regulation 79 (2) (c)** of the **Regulations** and thereby tallied and declared results on the basis of incomplete, fraudulent, unauthenticated and illegal statutory form;*
- i. *The returns submitted by the IEBC prima facie indicate gross inconsistencies between Forms 35 and 36 in respect of many polling stations within Kisii County. Details of the affected stations are set out in the petition constituency by constituency at paragraph 20 of the petition;*
- j. *Obworo allowed Obure's voters to double vote or to vote on behalf of dead or absent voters contrary to the express provisions of, inter alia, **Sections 56 (c)** and **58 (k)** of the **Act**;*
- k. *Obworo and his subordinates unlawfully and unjustifiably tallied and declared results whose totals were at variance and/or inconsistent with the votes spread out in favour of and/or garnered by the various candidates, to wit, the total votes declared were less than the total number of votes spread out and allocated to the candidates.*
- l. *Obworo and the IEBC tallied declared and announced results anchored on the basis of incomplete, unauthentic and fraudulent statutory forms, more particularly Forms 35 and 36 respectively whose contents were neither verified nor attested by most of the political parties' agents in general and the petitioner in particular;*
- m. *Obworo, without any lawful cause and/or basis, denied and/or deprived the petitioner of the opportunity to verify the results declared and announced at the constituency tallying centres vis-à-vis - the County Tallies before making the final declarations and/or announcements, thereby infringing and violating the petitioner's fundamental rights as provided under **Article 38** of the **Constitution**.*
- n. *Obworo, without lawful authority and/or reasonable cause allowed the Constituency Returning Officers and the Presiding Officers to multiply the number of voting streams and the attendant vote tallies in many polling stations, thereby grossly inflating the tallies of particular candidates*

and thereby affecting the outcome of the Senate Elections.

6. The petitioner also alleges that both Obworo and the IEBC so misconducted themselves during the elections that the outcome of the Senatorial election for Kisii County was affected. In particular, the petitioner alleges that –
  - a. *Obworo and the IEBC so mismanaged the conduct of the election that the same did not constitute an accurate transparent, free and fair election as required by **Articles 81 and 86 of the Constitution.***
  - b. *The breaches, irregularities, illegalities and violations vitiate the result, validity and integrity of the election.*
  - c. *The results tallied, declared, announced and gazetted by Obworo and the IEBC in relation to the election do not and cannot be deemed to reflect the manner in which the people of Kisii County voted.*
7. The Petitioner therefore contends that by reason of the above breaches irregularities and inconsistencies, the results of the election for Senator Kisii County are void in law and contrary to the democratic wishes of the residents of Kisii County. Accordingly, the Petitioner prays that:-
  - a. *The Honourable Court be pleased to order and/or direct Scrutiny, Verification, Re-count and Re-tallying of votes with a view to establishing the validity of the votes cast.*
  - b. *A declaration that the 1<sup>st</sup> Respondent herein was not validly elected as the Senator for Kisii County, whatsoever and/or howsoever.*
  - c. *A declaration be made that candidate for the Peoples Democratic Party (PDP), namely, JAMES OMINGO MAGARA, is the one who received and/or garnered the highest number of valid votes cast and was thereby validly elected as the Senator for Kisii County, in lieu of the 1<sup>st</sup> Respondent.*
  - d. ***In the alternative and without prejudice to the foregoing**, a declaration be and his hereby made that the Election was not held in compliance with the law relating to the Conduct of the Senate Elections, for Kisii County and in particular with the provisions of **Articles 81 and 86 of the Constitution, 2010.***
  - e. ***In the alternative and without prejudice to the foregoing** a declaration be and is hereby made that fresh elections be held for and/or in respect of the Senator, Kisii County.*
  - f. *An order be and [is]hereby issued directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and/or their successors in office and other relevant public officers to take remedial action to give effect to the declaration in (b) to (c) above.*
  - g. *The costs of and incidental to this petition be and are hereby awarded to the petitioner; and*
  - h. *Such other or further orders as this Honourable Court may deem fit, just and expedient.*

#### The 1<sup>st</sup> Respondent's Pleadings

8. Through his advocates, M/s Oraro and Company Advocates, Obure filed a response to the petition together with a Replying Affidavit. Obure also filed witness affidavits by Thomas Ondara, DW2, Thomas Gwaro Makori (not called as a witness) and George Luka Kombo (DW3). In the response to petition dated 6<sup>th</sup> May 2013 and filed in court on 7<sup>th</sup> May 2013, Obure denies all allegations of breach made against Obworo and the IEBC and avers that both Obworo and the IEBC discharged their duties in accordance with the law, and that he duly won the subject election after which he was declared winner in accordance with the Constitution, the Act, the Rules and the Regulations. He also avers that he garnered the most votes among the 7 contestants; that all the candidates were represented at the County Tallying Centre; that announcement of results was done after verification and authentication of the primary documents brought from the polling stations and constituency tallying centres to the County Tallying Centre and that there were therefore no fraudulent and invalid documents that formed the basis for declaration of the results in which he was the winner. It is Obure's contention that the results announced by Obworo and gazetted by the IEBC reflect the will of the people of Kisii County and that the election leading to the said

result was conducted in accordance with the law. Obure prays that the petition herein be dismissed with costs.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Pleadings

9. The 2 Respondents filed a joint Answer to the Petition on 7<sup>th</sup> May 2013. The same is dated 6<sup>th</sup> May 2013. In addition, Obworo swore a Replying Affidavit dated 6<sup>th</sup> May 2013 which affidavit was filed alongside the Answer to the Petition. Other Replying Affidavits were sworn by Ruto K. Wesley, DW5, Peter Resa, DW6 and Mungai Maina James, DW7.
10. In their joint response, both Obworo and IEBC categorically deny all the averments set out in paragraphs 8-29 of the petition and put the petitioner to strict proof of the same. The 2 Respondents contend that the election conducted by themselves on 4<sup>th</sup> March 2013 in respect of the Member of the Senate for Kisii County was carried out in accordance with the Constitution, the Act, the Rules and the Regulations and that at no time did any of them deviate from the said law. Allegations that the petitioner was denied an opportunity to verify and sign Forms 35 and 36 are denied, and both Obworo and the IEBC aver that it was the petitioner's duty to ensure that all results were verified. In summary, Obworo and the IEBC contend that the petitioner's allegations and assertions are unsupported by concrete facts and law and that in the circumstances, the petition should be dismissed with costs for lack of merit and for falling foul to the provisions of **section 78** of the **Act**.

The Evidence

a. The Petitioner's Evidence

11. The Petitioner and his witnesses filed their affidavits together with the petition before this court on 10<sup>th</sup> April 2013. The petitioner also paid security by deposit of the sum of Kshs.500,000/= on the same date vide receipt number 0228706 through the Petitioner's advocates, M/s Oguttu-Mboya & Company Advocates. Apart from the Petitioner, the following persons filed witness affidavits:- John Mauti Machini (PW2), Karen Nyamoita Magara (PW3) and Richard Orange Mokera who was not called to testify.
12. It is not necessary at this point to set out the detailed averments in the affidavits, as the contents thereof came out during the testimonies of the respective witnesses.
13. The Petitioner testified as PW1. He told the court that as Chief Tallying Agent for PDP, he was required to remain at the County Tallying centre until all the Form 36's from all the 9 constituencies were received, verified, tallied and final tally announced. He testified that during his presence at the County Tallying Centre which was at the Gusii Institute of Technology (the GIT), he witnessed votes validly cast in favour of Magara being reduced and/or diminished as follows:-

Polling centres	Entry in Form 35	Entry in Form 36	Difference
<b>Manyansi Primary School, 016</b>	231	23	208
<b>Rianyabaro Primary School (Stream 1), 030</b>	123	2	121
<b>Botoro Primary School (Stream 2), 033</b>	104	4	100
<b>Suneka Baraza Hall (Stream 2), 042</b>	194	4	190
<b>Orencho Primary School</b>	230	30	200
<b>Ensoko Primary School, 056</b>	159	3	156

<b>Nyansembe Primary School, 099</b>	256	2	254
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and that the end result was that Magara's votes recorded in Form 35 were not correctly transferred to Form 36. The votes lost by Magara are what the petitioner reflected as the **"Difference"** in the above table, totaling 1229 votes.

14.The Petitioner also testified that his concerns about the mispostings of votes as reflected above were answered by being told by the CRO that they would meet in court hence these proceedings.

15.The Petitioner also testified that there was unlawful multiplication of polling streams than those authorized, with the result that the votes cast exceeded the number of registered voters. According to the petitioner the following polling centres had more streams than those authorized:- Miranga Primary School, 008 had 2 streams instead of 1 stream; Itierio Girls Boarding Primary School, 027 had 3 streams instead of 2 streams; Itierio Mixed Primary School, 031 had 2 streams instead of 1 stream while Kiabosura Primary school, 035 had 2 streams instead of 1 stream. He also stated that Miranga Primary School had 2 different code numbers, namely 008 and 009 and that code 009 was the code for Riamage Primary School. The Petitioner also testified that because of the multiplication of voting streams, a polling station like Miranga had 251 excess votes while Itierio Girls Primary Boarding School was also coded as 059. The latter number admittedly was for Nyotamia Primary School. Itierio thus ended up with 271 more votes cast over and above the number of registered voters.

16.The Petitioner also testified that Itierio Mixed Primary school – 031 – which was supposed to have only one stream was shown to have had 2 streams in Form 36 so that the total declared votes thereat were 335 more than the registered voters. Concerning Kiabosura Primary School – 035 – which was also coded as 053, a code that belongs to Kerina polling station, the petitioner stated that there were 433 more votes cast than the number of registered voters which stood at 611. It was Petitioner's testimony that where votes cast exceeded registered voters, the excess votes should not have been taken into account during the final tally. The Petitioner also stated that because of this multiplication of polling streams, Obure received 719 more votes than he was entitled to, and that such a benefit to Obure was unlawful.

17.The Petitioner also testified that the total valid votes cast in Bomachoge Borabu Constituency totaling 31587 was less than the number of votes spread out and allocated to the various candidates. According to the petitioner, the total number of votes spread out and allocated to the 7 candidates was 32870, giving a difference of 1281 votes between the votes spread out and allocated and the total valid votes cast.

18.The Petitioner also testified that out of the 9 constituencies in Kisii County, 7 of them had malpractices that affected the outcome of the Senatorial elections. The details of the Petitioner's complaints are as follows:-

#### **BOBASI CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID DECLARED VOTES</b>	<b>VALID ALLOCATED VOTES</b>	<b>DIFFERENCE</b>
<b>Orogare (code 006)</b>	315	300	15
<b>Giasaiga (code 009)</b>	416	372	44
<b>Bogesaka (code 019)</b>	358	361	3
<b>Nyaineke (code 030)</b>	364	363	1
<b>Sugubo (code 059)</b>	484	454	30

<b>Ekeonga (code 086)</b>	298	194	100
<b>Nyamache (code 087)</b>	408	452	44
<b>Bonyancha (code 091)</b>	264	254	10

**BOMACHOGE BORABU CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID DECLARED</b>	<b>VOTES</b>	<b>VALID ALLOCATED</b>	<b>VOTES</b>	<b>DIFFERENCE</b>
<b>Magena - 2 (code 002)</b>	469		373		96
<b>Igora - 1 (code 007)</b>	453		353		100
<b>Igenga (code 008)</b>	350		346		4
<b>Kiango HC (code 010)</b>	268		271		3
<b>Riokindo (code 027)</b>	574		474		100
<b>Senta (code 044)</b>	548		103		445
<b>Rianyangita (code 049)</b>	614		664		50
<b>Riama (code 064)</b>	307		300		7

**KITUTU CHACHE NORTH CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID DECLARED</b>	<b>VOTES</b>	<b>VALID ALLOCATED</b>	<b>VOTES</b>	<b>DIFFERENCE</b>
<b>Ragogo (code 005)</b>	444		450		6
<b>Ngenyi (code 014)</b>	483		493		10
<b>Nyasaga (code 045)</b>	262		192		70
<b>Metembe (code 067)</b>	621		652		31
<b>Nyakego (code 069)</b>	585		655		70

**BONCHARI CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID DECLARED</b>	<b>VOTES</b>	<b>VALID ALLOCATED</b>	<b>VOTES</b>	<b>DIFFERENCE</b>
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<b>Nyabieyo (code 002)</b>	268	265	3
<b>Entake (code 010)</b>	363	263	100
<b>Matongo (code 015)</b>	459	409	50
<b>Kirwanda (code 016)</b>	532	534	2
<b>Mosando – 2 (code 021)</b>	433	453	20
<b>Riamoncha (code 023)</b>	376	426	50
<b>Botoro (code 033)</b>	472	455	17
<b>Kiabusura (035)</b>	517	522	5
<b>Suneka Baraza Hall – 2 (code 042)</b>	453	253	200
<b>Gesero – 2 (code 052)</b>	426	436	20
<b>Kerina – 1 (code 053)</b>	388	384	4
<b>Nyamweya (code 055)</b>	275	273	2

**BOMACHOGE CHACHE CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID DECLARED</b>	<b>VOTES</b>	<b>VALID ALLOCATED</b>	<b>VOTES</b>	<b>DIFFERENCE</b>
<b>Mangere (code 026)</b>	166		165		1
<b>Bombaba (code 028)</b>	389		387		2
<b>Nyaburumbasi (code 029)</b>	534		527		3 – court (should be 7)
<b>Nyansaka – 1 (code 034)</b>	431		335		96
<b>Rianyabwari TBC (code 040)</b>	314		312		2
<b>Kimai (code 054)</b>	637		647		10
<b>Nyamasege (code 059)</b>	455		453		2
<b>Rianyakwa (code 061)</b>	233		235		2

**NYARIBARI CHACHE CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID</b>	<b>VOTES</b>	<b>VALID</b>	<b>VOTES</b>	<b>DIFFERENCE</b>
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	<b>DECLARED</b>	<b>ALLOCATED</b>	
<b>Kegati – 2 (code 001)</b>	484	481	3
<b>Jogoo – 2 (code 005)</b>	516	518	2
<b>Nyamage – 2 (code 007)</b>	453	457	4
<b>Kionganyo (code 010)</b>	378	379	1
<b>Gekomu (code 020)</b>	591	601	10
<b>Nyanchwa (code 023)</b>	505	305	200
<b>Otamba – 1 (code 027)</b>	353	403	50
<b>Otamba – 2 (code 027)</b>	264	364	100
<b>Mobamba (code 028)</b>	274	474	200
<b>Nyaboribonge (code 044)</b>	299	319	20
<b>Matunwa (code 049)</b>	515	519	4
<b>Kiogoro TBC – 1 (code 050)</b>	374	274	100
<b>Irondi (code 055)</b>	339	348	9
<b>Nyangeni (code 056)</b>	556	186	400
<b>Boruma – 2 (code (060)</b>	263	363	100
<b>Kerera (code 070)</b>	348	343	5
<b>Gesere (code 074)</b>	486	484	2

**SOUTH MUGIRANGO CONSTITUENCY**

<b>POLLING CENTRE</b>	<b>VALID DECLARED</b>	<b>VOTES</b>	<b>VALID ALLOCATED</b>	<b>VOTES</b>	<b>DIFFERENCE</b>
<b>Nyakorere (code 026)</b>	368		370		2
<b>Gesonso (code 028)</b>	497		567		70
<b>Orencho (code 030)</b>	318		111		200 – court (should be 207)
<b>Kenयोरो (code 042)</b>	475		473		6 - court (should be 2)

<b>Matangamano (code 055)</b>	317	417	100
<b>Nyangweta SDA (code 063)</b>	579	574	5
<b>Ndonyo (code 091)</b>	386	390	4
<b>Nyansembe (code 099)</b>	319	288	31

19. The Petitioner charged that the tallies which were declared in the final results were thus founded and/or anchored on incomplete unauthentic and outright fraudulent Form 35's which had not been executed, signed and/or attested to by the accredited agents; and that there was no agreement in the information contained in Form 35's and Form 36's which were used to announce the final results. The petitioner also testified that the Form 35's which formed the basis for the purported figures in Form 36's were also lacking in requisite statutory comments by the respective Presiding Officers (PO's) and that in fact even the Form 36's supplied by Obworo and the IEBC together with their Answer to the Petition are neither stamped nor signed by the Returning Officers (RO's); and that some of the Form 36's are neither stamped nor signed by anybody. The Petitioner stated that because of the anomalies set out above from the 7 constituencies, a total of 3458 votes could not be accounted for; that the effect of such votes on the outcome of the result is not nominal.
20. The Petitioner also testified that Form 36 from Bonchari Constituency clearly showed that there was a difference between the votes cast which were 34971 and the votes spread out and rejected standing at 34688, giving a difference of 283 votes less than the votes declared. The petitioner pointed out to similar inconsistencies in Nyaribari Chache which showed a difference of 530 votes, Bobasi with a difference of 137 votes, Bomachoge Chache with a difference of 101 votes and South Mugirango with a difference of 78 votes, with the cumulative total being 1129. The petitioner stated that these 1129 votes had a big impact on the final tally, whether negatively or positively.
21. The petitioner also testified that all the Form 36's from Kisii County did not appear authentic since they did not bear IEBC stamps, were not signed either by RO's or agents. He singled out Form 36 for Bobasi Constituency which he said was not signed by the RO. The witness testified that even the Form 36's availed by the IEBC in respect of Bobasi Constituency do not have their stamps or signatures of the RO's. Concerning Bomachoge Chache, the Petitioner stated that the Form 36, though signed by the RO was not signed by any agent contrary to the evidence given by PW2, John Mauti Machini who said he signed the Form before leaving the tallying centre at Tendere Secondary School. The petitioner further testified that his concerns about the unsigned Form 36 and the different figures between what PW2 recorded and those posted in the Form 36 presented to the CRO fell on deaf ears. The petitioner said that as a result of the differentials, Magara lost 4000 votes while Obure gained 4002 votes; figures which he said would have an effect on the final tally.
22. The petitioner dismissed the Respondents' contention that all the Form 36's from the 9 constituencies were duly signed and executed by all concerned. It was thus the petitioner's testimony that taking into account all the breaches highlighted by himself in the petition and during his testimony, the election for Senator Kisii County could not have been validly, accurately and verifiably held.
23. During cross examination, the petitioner stated that despite having been granted orders in **Kisii Constitutional Petition No.12 of 2013 – Charles Oigara Mogere –vs- IEBC & another** by which the IEBC was compelled to provide the Petitioner with certified copies of the statutory Forms 35 and 36 in relation to the Senate Election for Kisii County during the general election of 4<sup>th</sup> March 2013, he had not provided together with his petition such Forms and that he had not shown by any other documentary evidence the results that he says Magara or the other candidates got. He confirmed that he had access to all the Form 36's, but only a few Form 35's. He also

conceded that he had not attached any of the Form 35's given to him by his agents to show who between Obure and Magara garnered the higher number of votes. The petitioner, however, insisted that the IEBC gazetted illegal results. He agreed with counsel for Obure that Obworo could only be at the County Tallying Centre and not at the voting centres and that he (petitioner) was supplied with Form 35's by his agents on the ground. The Petitioner was unable to produce the Excel Sheet from his laptop on which he said he recorded the results as they were given to him directly from the field.

- 24.Regarding the alleged multiplication of streams, the petitioner stated that at each of the affected polling centres, the candidates each received exactly similar number of votes at each of the streams and that apart from the double entry, there was no other problem with the figures. He also stated that when the extra votes are removed, the votes for each candidate remain the same.
- 25.In answer to other questions put to him by counsel for Obure, the petitioner stated that though he has complained about loss of votes by his principal, no other candidate raised any complaint and that it could very well be that the actual problem was one of arithmetic and that he was not in a position to say who got the benefit of any unallocated or unaccounted for votes. The petitioner also said that he had never seen the Form 36 for Bomachoge Chache which PW2 said he had signed as PW2 never gave it to him. The petitioner also testified that he had no evidence to show that some agents were not furnished with either Form 35's or 36's. He agreed that such of his agents who did not give him the results or copies of either Form 35's or 36's as the case may be, did not do their work well. The petitioner also testified that apart from John Mauti Machini, PW2, and Karen Nyamoita Magara, PW3, he did not call any of the other agents to come to court and say what they saw in connection with the senatorial elections for Kisii County. It was also the Petitioner's testimony that he did not attach any letter of complaint written to the IEBC by himself either in connection with the breaches highlighted in his petition or IEBC's failure to comply with the court orders in Constitutional Petition No.12 of 2013 (supra).
- 26.During cross examination by counsel for Obworo and the IEBC, the petitioner stated that though he was at the GIT as his party's Chief Tallying Agent, he was not given an opportunity to peruse Form 36 which form the CRO only waved at the agents. The witness also testified that though he had accused the CRO of vote tallying and declaration of results at the County Tallying Centre without reference to Form 35's, he was aware that the CRO had no access to Form 35's because the said Forms remained at the Constituency Tallying Centres. The petitioner further stated that the multiplication of polling streams at Miranga -008, Itierio Girls Boarding Primary -027, Itierio Mixed Primary -031 and Kiabosura Primary -035 had the effect of having more votes cast than registered voters especially in Nyaribari Chache where the votes cast are shown to be 48411 against the number of registered voters standing at 46361, showing a difference of 2050 votes. On the whole, the petitioner said that he would not tell which candidate could have benefitted from those excess votes.
- 27.The petitioner also told the court that the mere fact of agents not signing the requisite Form 35's or 36's would not invalidate the elections, but that where an IEBC official failed to sign such forms, then the election result would be invalidated.
- 28.On re-examination, the petitioner clarified that the total number of votes which he believed Magara legitimately lost were 1229. He also maintained that whatever figures are in dispute, whether more or less, the same would have an effect on the result of the election. He did not agree that the positive and negative errors committed by the IEBC could cancel out and stated that the total numbers of votes in contest are 14322. The witness also contended that it was the duty of the CRO to ensure that the Form 36 from the constituencies were properly filled, signed by all parties required to sign and the results therefrom properly transferred to the County Form 36 at the County Tallying centre. He denied that the reason why he did not exhibit the excel results spread sheet was to hide information from the court. The petitioner also testified that the absence of a Form 35 from Bobasi would not affect declaration of results. Regarding the results for Bobasi, the petitioner stated that if there were verifiable documents laid before the court showing that Magara garnered the highest number of votes, then Magara should be declared winner of the Senatorial elections Kisii County, and that if there are no such documents, then he should not be so declared.
- 29.John Mauti Machini, PW2, stated that he was appointed by PDP as Chief Agent at Tendere

Secondary School, which was the Tallying Centre for Bomachoge Chache Constituency. That he took the oath of Secrecy before the Election Day and on the Election Day, he reported to the Tallying Centre at Tendere at 3.30 p.m. and after being cleared, he was allowed into the Tallying Centre. He testified that he witnessed the results from about 7.30 p.m. on 4<sup>th</sup> March 2013 and that as each result was received, it was announced by the Tallying Officer who gave members of the public information concerning where the results had come from and the total number of votes from the polling station. He also said that at about 1.00 p.m. on 5<sup>th</sup> March 2013, the Tallying Officer announced the final results and according to his evidence found at p.259 of the petition, the vote scores for Obure and Magara were as follows:-

- *Obure – 7015 votes*
- *Magara – 14545 votes*

although the witness could not tell how many votes Professor Sam Kegengo Ongeru got; his only interest having been in Obure and Magara contest. The above figures were allegedly recorded by PW2 on a plain handwritten chit of paper appearing at p.259 of the petition as follows:-

“Tendere Secondary School

Tallying Centre

Bomachoge Constituency

Obure – 7015

Onwong’a – 197

Nyamwaya – 340

Magara – 14454

Raini – 197

Oyondi – 212

Ongeru – 4085

Total 27172

John Mauti Machini.”

30. PW2 testified that he is the one who gave the results as indicated above to the petitioner. He also stated that after the announcement of the results, he signed the requisite Form 36 and that other agents, including Tom Ondara of Ogembo (DW2) also signed the duly filled Form 36; after which he (PW2) proceeded to the County Tallying centre and handed over the results to the petitioner. He was later surprised to find that the Form 36 which has been exhibited to court does not have his signature. He also testified that he was surprised to learn that Obure garnered 11017 votes against Magara’s 10546 within Bomachoge Chache Constituency.

31. During cross examination, PW2 stated that he gave the wrong year of birth in his national identity card; that he underwent training by the IEBC on 01/03/2013; that he took the oath of secrecy on 27<sup>th</sup> February 2013; that the various party agents from voting centres did not enter the tallying hall with the Returning Officers (RO’s); that when the results from the polling centres were brought, he did not ask his agents to give to him Form 35; that he was not interested in results from polling stations; that he did not use the booklet provided to him by the IEBC for recording the results as they were announced at Tendere Tallying Centre; that he instead tore a piece of paper from the booklet on which he recorded the results; that it was not his duty to ensure that the results in Form

- 35 were correctly entered into Form 36; that he never read the Elections Manual either before or after the elections; that after the petitioner informed him that the results that were announced at the County Tallying Centre were different from those he had handed over to the Petitioner he never made a formal complaint of the same to any authority complaining about the variance.
- 32.PW2 also stated that the document which contains the results he recorded is neither signed nor dated, explaining that his only interest was in the figures and not the dates or his signature; that throughout the voting, he had no complaints about the voting process from any of his agents. The witness maintained that the Form 36 he signed at Tendere Secondary School has not been exhibited in court.
- 33.Karen Nyamoita Magara testified as PW3. She told the court that she was assigned the duty of Chief Tallying Officer at Nduru Secondary School Hall for South Mugirango, and that she witnessed the results being received and declared at the South Mugirango Constituency tallying centre though the announcement of the results was not done until about midnight. PW3 testified that all the other agents were responsible to her and that she expected them to sign the Form 35's at the close of voting at their respective polling centres.
- 34.PW3 also stated that the agents had the responsibility of communicating the results of each candidate in the polling station and that before she went to the Constituency Tallying Centre, she was in constant touch with the agents. The witness referred to a number of polling stations at which the results announced did not appear to agree with the results her agents had given her such as Orencho – code 030, Nyansembe – Code 099. She testified further that on noting the discrepancies, she made a formal complaint to the Constituency Tallying Officer though her complaint did not elicit any response.
- 35.PW3 also stated that as follows:- she attended the tallying at the GIT; the last results to arrive at the GIT were from Bobasi Constituency and that immediately those results arrived it became apparent to her and to the petitioner who was the Chief Tallying Agent for PDP and to whom she was an alternate, that the Form 36 from Bobasi was not signed. She raised the complaint loudly but all she could hear from the County Returning Officer (CRO) was **“go to court.”** On the instructions of the CRO, PW3 says she was mishandled and thrown out of the GIT. A report to that effect appeared in the DAILY NATION of 7<sup>th</sup> March 2013. Copies of the report in the DAILY NATION accompanied by pictures were exhibited to her affidavit.
- 36.During cross-examination, PW3 admitted that a RO was not obliged to admit more than one tallying agent for any political party at a time, that since she was an alternate to the Petitioner, she was only to be seen once the petitioner was in the Tallying centre and that if an issue arose while both herself and the petitioner were in the tallying hall, it was the Petitioner to deal with the issue and not herself. She however said she had to intervene when the CRO did not pay attention to the petitioner's complaint about the unsigned Form 36 for Bobasi Constituency. She however conceded that she did not take time to check the Form 36 downloaded from the IEBC website for the signatures. PW3 also admitted that she had entered the GIT without a badge, oath of secrecy Form and Letter of Appointment. She also admitted that while at the GIT, she raised her voice when there seemed to be a delay in availing results from Bobasi Constituency.
- 37.PW3 also testified that out of 111 polling stations in South Mugirango, only 3 had problems which problems involved vote switch, namely at Orencho Code 030, Nyansembe Code 099 and Ensoko Code at 056. With regard to Orencho polling centre, paragraph 7 on page 235 of the petition, PW3 says that Magara's votes are shown as 30 when the true votes should have been 230, giving a decrease of 200 votes; while at Nyansembe Magara's votes are given as 2 when the actual figure should be 256, a decrease of 254 votes and at Ensoko, Magara's votes are given as 3. The 3 votes were infact for George Omari Nyamweya while Magara's 159 votes were shown against Raphael Machuki Raini of Ford Kenya.
- 38.PW3 further stated that during the vote switch on the Form 35's, both Obure and Magara either lost or gained votes. She confirmed that though the results for Bobasi raised some doubt at the GIT, the petitioner had not lined up any witnesses to come to court and testify about the goings on during the voting in that Constituency. PW3 also stated that her shouts at GIT did not relate to a form that had come from Bobasi. The witness did not agree with counsel for IEBC that the errors noted at Orencho, Nyansembe and Ensoko polling centres were clerical, although she agreed that on the overall, IEBC conducted a fair election in South Mugirango Constituency.

b. The 1<sup>st</sup> Respondent's Evidence

39. Obure testified and called 2 witnesses. He testified as DW1. He told the court that he has been in active politics since 1983 and has participated in 9 general elections, 2 of which were pre-1983. During the 7 elections, he has been elected as a Member of Parliament, except during one such election when he was not elected. He told the court that he has never filed an election petition nor had anybody petitioned against his election as a Member of Parliament.
40. Regarding this entire petition and the evidence adduced on behalf of the Petitioner, Obure stated that there was no sufficient evidence to warrant a nullification of his election as Senator, Kisii County. It was Obure's testimony that the campaigns leading to the elections on 4<sup>th</sup> March 2013 were conducted very peacefully; that there was neither violence nor confrontation and that the general environment on the Election Day was very good with a large voter turnout. The only incident he could say which tended to dent the otherwise peaceful and fair elections was the one involving PW3 and the Returning Officer at GIT.
41. Obure further testified that the real contest for the Senatorial seat was between ODM and Jubilee coalitions represented by himself and Professor Ongeru respectively. He also said that because of prior arrangements between himself and the gubernatorial and other candidates for the various elective posts, he had election agents throughout the County. He had his personal secretariat at his office at Sameta while ODM's party secretariat was located at Daraja Mbili in Kisii town; and through these secretariats, he was able to access incoming and outgoing information. He was at the GIT as the results from the 9 constituencies trickled in and during the whole time, he did not hear of any complaints that certain agents had been denied access to the table where the tallying of the results took place. The witness recounted how the results from the various constituencies were brought in by the respective Presiding Officers and handed over to the CRO who then would announce the area/constituency whose results he had received before opening the envelope containing the results and giving the figures to the respective candidate/party agents for perusal.
42. Obure also testified that as he and other candidates and their agents waited for the results at GIT, one could feel palpable pressure being exerted on the CRO to announce the results before all the results from the 9 constituencies were received. He also said that some of the people present at GIT did not want the results from Bobasi to be announced. Incidentally, Bobasi is Obure's home constituency and he expected it to be his stronghold. The witness testified that he could not remember what the CRO did with the Form 36's after getting them back from the agents. He added that Form 35's were not brought to GIT as all the forms ended up at the constituency level. He confirmed the fact that both himself and Magara lost votes at the 3 polling stations, namely Orencho, Ensoko and Nyansembe in South Mugirango. The witness denied any conspiracies between himself and the Respondents herein to award him victory at the polls for Kisii County Senator.
43. Concerning the allegation that there was multiplication of voting streams at a number of polling centres for his benefit, Obure testified that the effect of multiplication of voting streams, if any affected all the 7 Senatorial candidates in equal measure when it came to the number of valid votes cast and the total number of registered voters. The witness denied that the CRO announced any results that diminished and/or reduced Magara's votes. He maintained that he garnered the highest number of votes at Miranga primary school – Code 008; Itierio Mixed Primary school – code 031 and Kiabosura primary school – Code 035 while Magara garnered highest votes at Itierio Girls B. Primary School – Code 027.
44. Regarding alleged decrease of Magara's votes, Obure stated that Magara benefited from 556 votes arising from the difference between the total valid votes spread out and allocated to the various candidates totaling 32870 votes and the total valid votes cast for Bomachoge Borabu Constituency totaling 31587 votes. Obure also testified that the petitioner and his witnesses failed to prove to the court that they had an agent at each of the 877 polling streams throughout the county so as to confirm that each voter at each of those centres was given 6 ballot papers. He said none of the candidates raised any complaints regarding the votes garnered by each Senatorial candidate in Bomachoge Borabu Constituency. The witness also denied that there were any ghost voters at any of the polling centres, and especially that there were such ghost voters at Ekeonga polling centre – Code 086.

- 45.Regarding votes cast at Nyansakia Primary School, Code 034, Obure testified that the petitioner's allegations of the centre having had 96 ghost votes was unsubstantiated and that he himself never heard either candidates or agents complaining that their votes were taken away from them. Obure was emphatic that since Form 35's did not end up at the County Tallying Centre at GIT, it was not possible that Obworo could have manipulated results contained on Form 35's when such forms remained at the Constituency Tallying Centres. It was also Obure's testimony that any complaints targeted at the CRO touching on Form 35's were unfair since the CRO did not handle the Form 35's, and that in any event, no complaints were raised by anybody touching on lack of statutory comments by the respective Presiding Officers on Form 35's. The witness also testified that no complaints were raised by either the candidates or their agents regarding Form 36's from the Constituency Tallying Centres.
- 46.Concerning the Petitioner's allegation that the CRO refused the petitioner's request for recount and/or re-tallying of votes, Obure was emphatic that the CRO could not have acceded to such a request because there were no ballot papers at the County Tallying Centre that could either have been recounted or re-tallied. Regarding the Petitioner's allegation that the number of registered voters in Bonchari Constituency was lower than the number of valid votes cast, Obure stated that the documentary evidence presented to court by the petitioner clearly shows that the number of valid votes cast in Bonchari standing at 34971 was lower than the number of registered voters which stood at 39750.
- 47.Regarding alleged multiplication of votes, Obure told the court that since the figures involved affected all the 7 candidates it would be alright if the repeated votes were removed from each of the candidates valid votes cast because each of the candidates would be affected equally and that at the end of such an exercise, he would have benefited to the extent of 719 votes while Magara would have benefited to the extent of 556 votes, thus giving Obure a positive margin of 163 votes.
- 48.On the general complaints and allegations made by the petitioner in the affidavit, Obure testified that the petitioner has laid no factual basis for the same and has instead gone on a fishing expedition with the hope of finding some fish to catch somewhere within the large expanse of waters. Obure also stated that though the petitioner has talked of ballot stuffing, he (Petitioner) has failed to adduce evidence in support of the said allegation. Obure asked the court to find that the errors which may have occurred here and there during the voting exercise were both human and arithmetical, and that the same do not affect the result for the Senatorial election in Kisii County, which elections he said were fair and free with a large turnout which meant the people of Kisii County had the opportunity to express their will at the ballot box. He asked the court to dismiss the petition with costs to himself.
- 49.During cross examination by counsel for the Petitioner, Obure told the court that he expected Bobasi constituents whom he had represented for a total of 15 years to be his strongest supporters and that the delay in submitting the results from Bobasi truly caused some concern to Magara's supporters, and in particular to Karen Nyamoita Magara, PW3. He also confirmed that results from Bobasi were the last to arrive. He also said that the result of the senatorial elections in Kisii County would only be affected upon confirmation of the scale and motive for deduction of any votes either from his tally or that of Magara; and that on the overall, he was not happy with any additional votes that do not represent real people voting for him.
- 50.In answer to questions touching on the various Form 35's and

36's for Bomachoge Borabu Constituency, Obure testified that on some of the forms, there was no indication of the total number of rejected votes, while on others there was no indication of total number of votes cast. The witness also testified that the total votes in Bomachoge Borabu spread out among the 7 candidates totaling 32508 was bigger than the total votes cast but he could not say whether such extra votes were cast by actual people, nor could he agree that the extra votes spread out to candidates represented ghost or miraculous votes.

- 51.An issue also arose concerning certain polling stations namely Orogare polling centre – Code 006; Ekeonga polling centre Code 086 both in Bobasi Constituency and Nyansakia 1– Code 034 in Bomachoge Chache Constituency. Obure told the court in answer to a number of questions by counsel for the petitioner that there was a difference of 5 votes between the total valid votes of 315 and the votes spread out to candidates of 310 votes for Orogare, a difference of 100 votes for

- Ekeonga and 96 votes for Nyansakia, but he was quick to add that the petitioner's theory about ghost votes was a fallacy.
52. In re-examination, Obure stated that as long as the election was conducted in accordance with the laws of the country, which is what he believed the 4<sup>th</sup> March 2013 election was, then such an election can be said to have been fair and accurate. He added that nowhere in the world has any election been held that can be said to have been 100% accurate. He also said that taking all the circumstances of the Kisii County senatorial elections into account, including correction of all mistakes highlighted by the Petitioner, he would still emerge winner of the elections.
53. DW2, Thomas Ondara was one of the ODM agents at Tendere Secondary School in Bomachoge Chache Constituency. He testified that one of his chief duties was to oversee the tallying exercise after close of voting. He testified that at the end of the tallying exercise for Bomachoge Chache Constituency the 3 top candidates were Obure with 11017 votes, Magara with 10545 votes and Prof. Sam Ongeri with 4085 votes. He did not agree with the figures given by John Mauti Machini, PW2, to the effect that Obure got 7015 votes while Magara had 14545 in Bomachoge Chache Constituency, but confirmed that Prof. Sam Ongeri's figure of 4085 was correct. He also said he was at the GIT when the final results for senator were announced. It was also DW2's testimony that after the final results were announced, he went back to Tendere for celebrations and that he did not sign the Form 36. He also said that he was not asked to sign the form.
54. George Luka Kombo testified as DW3. He was the County Chief Tallying Agent for FORD-Kenya. His testimony was that he reported to the GIT at about 8.00 a.m. on 4<sup>th</sup> March 2013 but after one hour, he went out to Masimba, Nyamache and Tendere which were some of the constituency tallying centres. He returned to the GIT at about 3.00 p.m. and remained at the centre until about 4.00 p.m. on 6<sup>th</sup> March 2013. This witness explained that results from the constituencies were brought to the GIT by the respective PO's under the escort of security officers. The results were in sealed envelopes which would be given directly to the CRO for study before being opened and the results handed over to the agents for verification. After verification, the agents then gave back the results to the CRO.
55. DW3 also told the court that at about 2.00 p.m. on 6<sup>th</sup> March 2013, he witnessed PW3, Karen Nyamoita Magara shouting angrily at the CRO while saying, **"it cannot happen."**
56. During cross-examination, DW3 testified that no party was allowed to have more than one (1) agent either at the polling or tallying centre, and that the fact of PDP having more than one agent at the GIT was not the norm. DW3's view was that PW3 was not legally present at the GIT.
57. During further cross-examination, DW3 admitted that he was not a registered voter for the 2013 General Elections for the reason that his national identity card got lost on 17<sup>th</sup> December 2012 as he travelled from Nairobi to Suneka for registration. DW3 also testified that on the morning of 4<sup>th</sup> March 2013, he arrived at the GIT at about 8.00 a.m. and an hour later he left for Masimba in Nyaribari Chache Constituency, and later went to Nyamache and Tendere constituency tallying centres. He further testified that during the 4<sup>th</sup> March 2013 General Elections, FORD-Kenya did not field a presidential candidate, and accordingly there was no FORD-Kenya tallying agent at Tendere Secondary School. According to the witness he did not receive any complaints from the PDP agent regarding the results announced at Tendere. He however said he heard an objection from PW3 who was sitting in the crowd. When DW3 was led to an apparent discrepancy concerning the date on which the results from Tendere were received at GIT, he confirmed that the date was 6<sup>th</sup> March 2013 sometime in the morning and not 10.00 p.m. on 5<sup>th</sup> March 2013 as indicated in his affidavit. He also told the court that there were no Form 34's and 35's at the GIT.

#### The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Evidence

58. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents called a total of 4 witnesses, including Obworo who testified as DW4. He served as the CRO after he was duly appointed to the position vide a Gazette Notice dated 1<sup>st</sup> March 2013. He testified that before the elections, he and his support staff were trained on 17<sup>th</sup> and 18<sup>th</sup> February 2013 at Sameta and that his major task was to manage and conduct elections for the various elective posts in Kisii County. He said party agents were trained at

Marsh Park Hotel in Kisii Town.

59. At the outset, Obworo stated that the IEBC structure did not provide for the position of Alternate Chief Agent, which position PW3 alleged to have held. He also testified that the content of the training conducted by the IEBC for all its officials in preparation for the 4<sup>th</sup> March 2013 General Elections was on electoral laws and processes, the role of agents in the whole process vis-à-vis the role of the IEBC. According to him, both the petitioner and PW3 did not attend the training and that in the circumstances, the two had no competence for the task of Chief Party agents during the election. In his view, the 4<sup>th</sup> March 2013 elections were held in accordance with the law and that all strategic and non-strategic materials were provided by the IEBC to facilitate a free and fair election.
60. Regarding the role of agents who were to be found at all polling stations, their chief duty was to verify that all materials required for the elections were on site before voting commenced; that ballot boxes were empty before the first vote was cast. He testified further that during the voting on 4<sup>th</sup> March 2013, he did not receive any complaint of tampering with ballot boxes, ballot stuffing and either double voting or absentee voters having cast their votes, nor did he receive any complaints to the effect that dead people had resurrected to vote. Obworo confirmed that he received at the GIT Form 36's for Bonchari and Bomachoge Chache Constituencies. He also confirmed that the number of votes garnered by the candidates in Bomachoge Chache constituency were as follows:-

- *Obure – 11017*
- *Frederick Amboga Onwonga – 197*
- *George Omari Nyamweya – 340*
- *Magara – 10545*
- *Raphael Machuki Raini – 199*
- *Rueben Oyondi Onserio – 212*
- *Samson Kegengo Ongeru – 4085*

61. With the above figures in mind, Obworo disputes the figures given by PW2 vide the document exhibited at page 259 of the petition, which shows that Obure garnered 7015 votes against Magara's 14545. Obworo questioned the authenticity of the said exhibit which he said was neither signed nor dated. He also said that there was a difference between the figures on his Form 36 and those contained on the exhibit at page 259 of the petition resulting in "**loss**" of 4002 votes for Obure and a "**gain**" of 4000 votes for Magara.

62. In his further evidence, Obworo stated that on scrutiny of the 3 problematic polling stations in South Mugirango constituency, the implications would be as follows:-

- *At Orencho, Magara seems to have lost 200 votes with no loss to Obure.*
- *At Nyansembe, Magara seems to have lost 254 votes while Obure lost none.*
- *At Ensoko, Magara seems to have lost 156 votes while Obure lost none, resulting in an aggregate loss by Magara of 610 votes.*

The witness explained that the wrong entries made against Magara at the above named polling centres were normal and not intentional errors which arose because of the sheer volume of data which was being handled by his officers.

63. Obworo also testified that he received results from Bobasi Constituency vide the Form 36 in both soft and hard copy brought to him by the RO and that he used the hard copy to declare the results for Bobasi. The document exhibited at pages 60-64 of the petition was, according to Obworo, the soft copy of Form 36 and that it contains information that was contained in the hard copy. According to the results for Bobasi, Obure garnered 37673 votes; Onwong'a 226; Nyamweya 469; Magara 3096; Raini 318; Oyondi 395 and Ongeru 14182 votes.

64. Referring to Form 35 from Bonchari Constituency, Obworo admitted there were double entry results at the following polling centres: Miranga primary – Code 008; which also appears as code 009 both with similar figures; Itierio primary school appearing as code 027 and 031 with similar results and Itierio Girls Boarding school having 3 entries as code 027 (twice) and 059 all with

similar results. It was Obworo's testimony that what caused the double entries was human error which should not be blamed on either himself or the IEBC. He also testified that it was not correct for the petitioner to allege that results were declared at polling stations. He went on to explain that results at polling stations are only announced. The witness also criticized the petitioner's selective presentation of results at the various polling centres in Bobasi, Bomachoge Borabu, Kitutu Chache North, Bonchari, Bomachoge Chache, Nyaribari Chache and South Mugirango Constituencies. He said that tallying the results for Obure and Magara at the exclusion of the other 5 candidates in the 7 constituencies named above gave a wrong view of the performance of all the 7 candidates. The witness also testified that the petitioner's failure to refer to Form 35's in compiling the selective results does not give a true analysis of the results.

65. Obworo went on to testify that the last results to be brought to the GIT were from Bonchari and Bobasi in that order with the results from Bobasi being received between 2.00 p.m. and 3.00 p.m. on 6<sup>th</sup> March 2013 and that when he finally declared the results for the senatorial election, the 3 top candidates were as follows:-

- *Obure – 120551 votes*
- *Ongeri – 106325 votes*
- *Magara – 100754 votes*

and based on the above stated figures, he declared Obure the winner of the Kisii County Senatorial Elections and thereafter issued him with the certificate. Obworo also testified that after declaring Obure the winner, he gave copies of Form 36 to Party agents and also affixed a copy thereof at the entrance of the GIT and another copy at the IEBC regional office before travelling to Nairobi to deliver the results from Kisii County to the IEBC national tallying centre at Bomas of Kenya. In his view, the elections in Kisii County were free, fair, transparent and reflected the will of the people of Kisii County.

66. In answer to questions put to him by Mr. Chacha Odera for Obure, Obworo stated thus: the flash disks from the RO's were handed back to the RO's after the results were copied therefrom into the IEBC system. As regards the allegation that Obure was declared a winner when he did not have the highest votes, Obworo stated that such an allegation is hollow because the petitioner has not provided figures of the votes garnered by the other candidates showing that Obure did not indeed have the highest number of votes nor has the petitioner given what he thinks were the votes garnered by Obure and the other candidates. On the allegation that he declared Obure winner of the election without verifying and authenticating Forms 36 which had been forwarded to him from the various constituency tallying centres, Obworo stated that upon receipt of the Form 36's from constituency tallying centres, he tallied all those forms in the presence of the candidates' agents who also had the opportunity of seeing the Form 36's before the results were finally declared. He went on to explain that each time a result came in, he would announce that the results for this or that constituency had been brought after which he passed the hard copy to the agents and that it was only after the hard copy was returned to him by the agents after verification that he would proceed to the next step of declaring the results.

67. Obworo denied the allegation that he declared Obure winner without verifying and completing Form 36; that in any event, until he read the petition, he had not received any complaint that he had declared the results without completing Form 36, nor did he receive any request from the petitioner for verification, recount and/or re-tallying and that if such a request had to be made, the same was required to be in writing. The witness also told the court that a request for verification would mean that the petitioner had his own Form 36 for comparison with the Form 36 in the possession of the CRO, but that from the evidence adduced by the petitioner, the petitioner did not have his own copy of Form 36 for purposes of verification. It was also Obworo's testimony that since ballot boxes were not brought to the County Tallying centre, he could not have carried out a recount even if the petitioner had made a request to that effect. Such a request could only have been dealt with at the constituency Tallying Centre. Further that even if the ballot boxes were at the GIT, he would have had no power to break into any of the boxes without an order of the court.

68. With regard to the complaint that he accepted and tallied returns from polling stations in which the

number of votes cast allegedly exceeded the number of registered voters in those polling stations, Obworo denied the existence of any such polling stations. He denied that he unlawfully and unjustifiably refused to give and/or allow the petitioner the opportunity to verify and sign Form 36 in respect of the Kisii County. It was his evidence that the results he declared were not incomplete, fraudulent and unauthenticated as alleged by the petitioner. He added that if there had been such a situation, the petitioner, as the Chief Tallying Agent for PDP would have made either an oral or written complaint. No complaint emanating from anyone else on the floor would be entertained as happened in this case when PW3, who was not on the list of party agents at the GIT tried to do. Obworo explained that shouting at the CRO from the floor, as PW3 did was not one of the ways of resolving complaints against any action of the CRO or any of his subordinates.

69. Regarding the petitioner's complaint that there were gross inconsistencies between Forms 35 and 36, in respect of many polling stations in Kisii County, Obworo stated that as CRO he had no access to Form 35's which are left at the Constituency Tallying centres. He hastened to add that the complaints about impersonation by voters, multiplication of streams, double voting or dead people being allowed to vote were not brought to his attention and that in any event, the error of multiplication of streams which indicated a double entry of the exact number of voters and votes cast could be corrected by simply deleting the extra stream, and that the effect on each of the candidates would be exactly the same. He further testified that the exercise of removing the extra streams in the named centres in Bonchari Constituency would reduce the vote tally for the 3 top candidates to the following extent:-

- *Obure – 719 votes*
- *Ongeri – 307 votes*
- *Magara – 556 votes*

70. The witness was also questioned about the differences between total votes allocated to candidates and the figure indicated in Form 36 for Bomachoge Borabu constituency. The witness agreed that the correct figure of the votes cast and allocated to candidates should have been 32108 and not 32098 as shown on the form, resulting in a difference of 10 votes. While admitting that the error existed, Obworo stated that the error was mathematical and that it did not affect the result of the election.

71. When questioned about the delay in having the results from Bobasi constituency delivered to the County Tallying centre, Obworo was quick to say that the cause may have been Bobasi's sheer size and population plus the fact that the number of candidates in Bobasi was also very large. He confirmed that people complained about the delay in receiving the Bobasi results, with Magara's supporters demanding that he proceeds to announce the results for the senatorial election minus the Bobasi results. Obworo however said he did not bow to the pressure and only declared the results after the results for Bobasi were received. Obworo also said that the Form 36 for Bobasi Constituency as exhibited by the petitioner and also by the IEBC had no signatures because it was the soft copy downloaded from the IEBC website. The witness also agreed that the Form 36 exhibited by the petitioner and that exhibited in the Answer to petition by himself and the IEBC appear different.

72. Obworo also stated that the document attributed to PW2, which appears at page 259 of the petition, containing alleged results for Bomachoge Constituency cannot be correct for two reasons: one that there was no Constituency known as Bomachoge Constituency during the last general election and two that the figures given on the said document could not possibly represent the genuine results announced at Tendere Secondary School in respect of Kisii County Senatorial elections because party agents had notebooks in which to capture results and not on such rough pieces of paper whose source was not even given. To make matters worse, Obworo said the results as given by PW2 were not supported by any Form 35.

73. Obworo was also cross examined by Mr. Oguttu-Mboya, counsel for the petitioner. He confirmed that while at the GIT, PW3 created some two scenes. He also confirmed that for each of the Form 36's received from the 9 constituencies in Kisii County, he took time to verify the results by comparing such details as number of registered voters' vis-à-vis the total number of votes cast and also compared the aggregate figures with total votes cast with a view of establishing how each

- candidate had failed. He said he also looked out for signatures of both the agents and the IEBC officers. He said Form 36, for Bomachoge Chache Constituency had no agents' signatures for reason that the agents had left the tallying centre for celebrations before they appended their signature on the form. He also confirmed that the form did not have the statutory remarks by the IEBC and that despite these apparent anomalies there was no complaint made to him after he announced the Bomachoge Chache results. The witness also confirmed that the kind of paper used by PW2 to record results found at page 259 of the petition, though not illegal in the eyes of the IEBC, was not the kind of paper expected to be used by Chief Tallying Agents because the agents had Notebooks supplied to them by the IEBC in which they could record the results or use Form 36 if they had a copy. The witness confirmed his earlier assertion that the plus or minus votes at certain polling stations in South Mugirango would not significantly affect the result of the elections as far as Obure and Magara are concerned though the margin between their respective tallies would reduce.
- 74.Regarding the Form 36 for Bomachoge Borabu Constituency, Obworo admitted that the form did not have the figure for total rejected votes though it showed total votes cast as 31589.
- 75.In response to questions in re-examination by Mr. Rigoro for the IEBC, Obworo told the court that though agents' signatures and signatures by IEBC officials on the various Statutory Forms used during the voting were not mandatory, the same were important and would have been a good practice for such signatures to be appended.
- 76.DW5 was Ruto Kipyegon Wesley, the IEBC official in charge of elections within Bomachoge Chache and the RO for Bomachoge Chache Constituency. He was the IEBC Manager for the election process which included recruitment of IEBC officials to man the elections within that Constituency which had its tallying centre at Tendere Secondary School. DW5 (Wesley) testified that he was in charge of receiving and announcing the results for each polling station. The tenor of Wesley's entire testimony was to the effect that after he received the Form 35's from polling stations, he verified the results with the respective Presiding Officers before making the announcement. He also testified that agents received copies of the Form 35 at their respective polling stations.
- 77.For Bomachoge Chache, Wesley stated that he tallied the results up to about 1.00 p.m. on 5<sup>th</sup> March 2013 and after declaration of the results on the Form 36, agents who were present at the constituency tallying centre, if they so wished, would get a copy of the Form 36 containing the announced results. He however told the court that as soon as the results for Bomachoge Chache were announced, all the agents present at the hall joined the crowd and went out in celebration. The witness stated further that the results purportedly recorded by PW2 were not the correct results and that if the said results were to be accepted instead of the results contained in the Form 36 exhibited by both the petitioner and the IEBC, the result would be a loss of 4002 votes for Obure and a gain of 4000 votes for Magara, resulting in a net variance of 8002 votes. Wesley dismissed PW2's version of the results which he said were neither signed nor dated, apart from the fact that during the 4<sup>th</sup> March 2013 General Elections, there was no constituency by the name Bomachoge throughout the entire Kisii County. He asked the court to ignore the purported results as per the evidence of PW2.
- 78.During cross-examination by Mr. Chacha Odera, Wesley confirmed that Form 35's are filled at polling station level, whose results would then be lifted and entered into Form 36 at the Constituency Tallying Centre. He also testified that any party who had any dispute with the results would resort to Form 35 to resolve the dispute. He said that during the announcement of results from the Form 35's, persons at the tallying centre who had any question asked him to repeat the result, and that he did so before the results were keyed into Form 36 for all the 70 candidates who stood for the various elective posts within Bomachoge Chache Constituency. The results for Senator were announced at about 4.00 p.m. on 5<sup>th</sup> March 2013, and not between noon and 2.00 p.m. on that same date. He testified further that after the results had been announced, he made copies of Form 36 and gave them out to party and other agents who asked for a copy of the form. He then transported the Form 36 for Bomachoge Chache to the County Tallying Centre at about 11.00 p.m.; duly accompanied by his deputy, security officers, 5 presiding officers and tallying clerks. Wesley recalls that after the Bomachoge Chache results were announced by the CRO, no complaints were raised about the same.
- 79.In response to questions put to him by Mr. Oguttu-Mboya for the petitioner, Wesley re-affirmed

his testimony both in examination in chief and on cross-examination by Mr. Chacha Odera for Obure. He confirmed that he did everything relating to the elections in accordance with the law. He also testified to the following:- he did not personally admit agents to the constituency tallying centre at Tendere; he did not keep a register for chief tallying agents, he could not say whether Pw2 was at the tallying centre when the results were announced nor could he tell whether Thomas Ondara, DW2, was a chief tallying agent for any candidate; the first results he announced were for presidential election while the results for senator were announced at about 4.30 p.m. on 5<sup>th</sup> March 2013. He denied keeping some results aside without announcing. He also confirmed the following: Form 36 for senatorial results were not signed by agents despite having asked those present in the hall to do so including PW2. The witness denied a suggestion that he destroyed the original Form 36 which was duly signed by all agents and which form contained the results for the senatorial election as recorded by PW2. He conceded that there was some discrepancy in the number of registered voters on Form 35 and the figure factored into Form 36 for the constituency, but maintained that the correct number of registered voters for Bomachoge Chache is what is factored in Form 36. The witness did not however produce the original Form 36 which he said was at IEBC headquarters at Bomas of Kenya and could also not say whether he gave copies of the form to the agents.

80. Resa Peter Otieno (Resa) testified as DW6. He also swore a Replying Affidavit dated 6<sup>th</sup> May 2013. He was the RO for Bonchari Constituency as well as the Election Co-coordinator for the Constituency. He was based at St. Peter's Suneka Secondary School from where he coordinated the results. He testified that there were 65 polling stations with 81 polling streams within Bonchari constituency. The polling stations were manned by Presiding Officers while parties and their candidates had agents spread throughout the constituency. DW6 conceded that some 4 polling stations namely Miranga primary, Itierio Girls Boarding School, Itierio Mixed Primary School and Kiabosura primary school had polling streams repeated, but pointed out that these double entries were a mistake which he only became aware of after he had declared the results though he did note the same on Form 36. He suggested that the error should be corrected by making a reversal entry. The witness also conceded that there were varied complaints from 8 polling stations in Bobasi constituency, 8 stations from Bomachoge Borabu, 5 stations from Kitutu Chache Constituency, 12 stations from Bonchari constituency, 8 stations from Bomachoge Chache, 17 stations from Nyaribari Chache and 8 stations from South Mugirango Constituency. He confirmed that from the double entries, Obure gained 719 votes while Magara gained 556 votes. It was Resa's testimony that any errors that have been pointed out by the petitioner were not deliberate errors on the part of the IEBC officials.

81. On cross-examination by Mr. Oguttu-Mboya, Mr. Resa freely admitted there were errors in the declared results, but maintained that those errors were mere clerical errors. He denied that he filled Form 36 before actual results were received from certain polling stations. Regarding the anomalies touching on wrong lifting of results from Form 35's to Form 36, Resa stated that the mistakes were made by his officers to whom he had delegated the task. Concerning the variance in the figures for the various candidates for votes cast at Suneka Baraza Hall, which had 453 valid votes cast and 253 votes allocated to candidates, Resa testified that the difference of 200 votes were not for the benefit of any of the candidates; and that the error did not give any of the candidates a win or a loss.

82. The last witness for the Respondents was James Mungai Maina who testified as DW7, (Maina). He was the Constituency Election Co-ordinator, South Mugirango Constituency and was RO for South Mugirango during the 4<sup>th</sup> March 2013 elections. The constituency tallying centre for South Mugirango was at Nduru. Maina also swore a Replying Affidavit dated 6<sup>th</sup> May 2013. He conceded that an error was committed while transferring the results of Orencho polling centre – code 030 – from Form 35 to Form 36 to the extent that Magara was denied 200 votes. Similar wrong transfers were made for Nyansembe – code 099 – where the votes for Obure were indicated as 1 on Form 36 while Form 35 showed 24 votes for Obure; and 2 votes instead of 246 votes for Magara. From these discrepancies, the witness said Magara lost 254 votes while Obure lost 23 votes. It was also conceded by Maina that the correct votes cast for Magara at Ensoko polling centre code 056 – were 159 and not 3 as shown in Form 35, explaining that the 3 votes were those cast for Nyamweya. It was also Maina's evidence that these errors, meant that he read out the

- wrong figures in Form 36 for both Obure and Magara, and that the mix-up affected the final tally for the 2 candidates, though he stated that the errors were not deliberate.
83. According to Maina, party agents were not allowed to touch Form 36 but were at liberty to compare the figures as they were being read from Form 36 with the results contained in their own copies of Form 35. Maina denied a suggestion that he was part of a large conspiracy to alter the senatorial election results to the detriment of Magara.
84. In response to questions put to him by Mr. Oguttu-Mboya, Maina stated that he did his work in accordance with the law and the training he had received prior to 4<sup>th</sup> March 2013. He said he was fair, accurate and transparent in what he did and that the 3 errors pointed out by the Petitioner were as a result of wrong data entry from the hard copy forms to the computer. Maina also said that the discerned errors as reflected in Form 36 affected all the candidates by way of either decrease or increase of votes. He admitted having caused the errors as he transferred the data from Form 35's to Form 36. Maina also testified to the following facts: he did not share Form 35's with either the candidates or their agents; he did not verify the results, though he availed an opportunity to agents at the tallying centre to sign the Form 36, the agents were not in the hall by the time he asked them to sign the form; he did not make the statutory comment on Form 36 explaining why the agents did not sign the Form 36; he did not transcribe the number of votes garnered by each candidate in words due to what he called an oversight on his part; the number of registered voters on the county Form 36 for South Mugirango standing at 51246 was at variance with the constituency Form 36 and that the declared votes for Matangamano polling station – code No.055 – was 317 as compared to 417 votes spread out among the candidates. Finally, Maina told the court that failure to sign Form 36 would not invalidate the results of an election that has been held in accordance with the law.

#### Application for Recount and Scrutiny

85. The Petitioner mounted a Notice of Motion dated 22<sup>nd</sup> May 2013 seeking an order for scrutiny and recount of all the votes cast to and/or in favour of all the candidates who contested for senatorial seat Kisii County during the General Elections held on the 4<sup>th</sup> March 2013. The Petitioner also asked the court to pronounce and/or announce the results of such scrutiny and recount prior to the substantive hearing of the petition and in any event to take the results of the scrutiny and re-count exercise into account [in determining the outcome of the petition herein].
86. That application, which was opposed by all the respondents on the grounds, *inter alia*, that the application for recount did not lie by virtue of **Rule 32** of the **Rules** in view of the nature of the petition and that an application for recount and scrutiny are by virtue of **Rules 32** and **33** of the **Rules** mutually exclusive of each other and cannot be sought concurrently.
87. The application proceeded before me both by way of written submissions and oral highlights of those submissions on 29<sup>th</sup> May 2013.
88. On the 11<sup>th</sup> June, 2013, after due consideration of the law and the submissions, the petitioner's notice of motion was dismissed on the ground that the rules did not allow a composite application for retallying and recount to be brought under one roof, and on the further ground that the petitioner had not laid a basis for the order for scrutiny. Costs of the application were to await the outcome of the petition. The issues of both recount and scrutiny were not revisited during the trial, either by the court or any of the parties.

#### Written submissions and authorities by Parties

89. Following the directions taken on 24<sup>th</sup> May 2013 during the status conference, all the parties filed their written submissions and relevant case law. The submissions were filed within the agreed time lines.
90. The petitioners' submissions dated 15<sup>th</sup> July 2013 together with the first list of authorities were filed on 15<sup>th</sup> July 2013. The petitioner filed a Supplementary List of authorities dated 23<sup>rd</sup> July 2013 on the 24<sup>th</sup> July 2013.
91. Obure's 2-volume submissions dated 22<sup>nd</sup> July 2013 were filed on 23<sup>rd</sup> July 2013. The 2<sup>nd</sup> and 3<sup>rd</sup>

Respondents' submissions dated 22<sup>nd</sup> July 2013 were filed on the same day.  
92. The written submissions were highlighted before me on 26<sup>th</sup> July 2013. Details thereof will become apparent during analysis of the issues that are due for determination.

#### Agreed Issues for Determination

93. During the status conference held on 24<sup>th</sup> May 2013, the parties isolated and agreed upon the following issues for determination:-

1. *Whether the 4<sup>th</sup> March 2013 General Election in respect of Member of Senate for Kisii County was substantially conducted in conformity with the Constitution, the Law and practice of Elections;*
2. *Whether the electoral process followed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect of the election of Member of Senate in Kisii County was lawful and legally sanctioned;*
3. *Whether the outcome of the election of Member of Senate for Kisii County was valid;*
4. *Whether the declaration and the subsequent Gazettement of the 1<sup>st</sup> Respondent as the duly elected Senator for Kisii County was valid;*
5. *Whether the Petition is legally competent;*
6. *Who is to bear the costs of this petition?*
7. *Whether the petition as drawn discloses a reasonable cause of action and/or is competent; and*

94. Before I proceed to analyze the issues that are before me for determination, I find it necessary to deal with some preliminary matters which I consider important to the analysis.

#### (a) Nature of Election Petitions

95. The courts in this country and in other world democracies have come to accept that election petitions are no ordinary disputes. This may explain the reason why elections are not held every other day. In Kenya, elections are held once every 5 years when duly registered voters go to the ballot to express their will and to elect various political leaders. To my mind therefore, anyone who goes out to the ballot to cast their vote on election day makes a serious political decision which carries serious political consequences. If the right to vote is exercised flippantly and without much thought the consequences can be dire not only for the individual voters, but for the whole country, county or county assembly ward.

96. Because of the serious nature of elections, the law governing the conduct of elections and by who is enshrined in the Constitution, the Act and the Rules. This being the case, the courts are conscious of the onerous task cast upon them by the law when dealing with electoral disputes. The decisions made by courts in resolving electoral disputes have social, economic and political undercurrents as well as outright consequences in those spheres. In the case of **Joho –vs- Nyange & another [2008] 3 KLR (EP) at page 500**, Maraga J (as he then was) had the following to say regarding the uniqueness of electoral disputes:-

**“Election Petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great importance – Kibaki –vs- Moi, Civil Appeal No.172 of 1999. This is because when elections are successfully challenged, bye elections ensue which not only cost the country colossal sums of money to stage, but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election court’s decision in Wanguhu Ng’ang’a & another –vs- George Owiti & another, Election Petition No.41 of 1993 that election petitions should not be taken lightly.”**

97. This is why this court is not oblivious of the fact that the outcome of this election petition is not only awaited by the combatants herein, but is awaited with bated breath by all the residents of Kisii County. There are those who may already be engaged in a game of alternative equations; there are others who may be preparing themselves for big celebrations whether or not the petition

is won and there are also others who are preparing to mourn whatever the outcome of this petition. The court is also aware that coming to this point in the petition has not been easy for all the concerned parties. The litigants have had to find money not only to fund this petition, but they also spent money on the campaigns and other logistics for a considerable period of time before 4<sup>th</sup> March 2013. They must be wondering whether they will celebrate or mourn with the outcome of this petition. There are those supporters who consistently filled the court room during the hearing of the petition. They too are waiting to hear the verdict and what it portends for them. The lawyers have, in my view, also burnt the midnight oil poring over volumes and volumes of material from which they isolated the authorities they have presented to court in support of the positions they have taken. There is no doubt therefore that the lives of the many stakeholders in this petition have had both their social and economic lives disrupted. The court has therefore not taken this case lightly.

98. These huge expectations also mean that each side to this petition has to live up to the standard of proof required in such cases and to discharge its onerous burden of proof. Counsel in this case liberally provided the court with authorities on the question of burden and standard of proof. I refer to these authorities without specifying the party who availed the authority since the greater number of these were common in the submissions. I commend all counsel for their diligence and industry in sourcing for these authorities.

(b) Burden and Standard of Proof

99. The burden and standard of proof is at the heart of this petition and whether the petition succeeds or fails depends on how the petitioner has handled the double-edged issue of proof. The Supreme Court of Kenya in the case of **Raila Odinga –vs- IEBC & 3 others – Election Petition NO. 5 of 2013 (2013) e KLR** has set the standard of proof to be observed by Kenyan courts when handling election petitions. The court said the following on the issue:-

**“The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the guaranteed 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 fulfillment 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 called upon to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond any reasonable doubt – save that this would not affect the normal standard where criminal charges linked to an election are in question. In the case of date specific 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.”**

It is to be noted that there being no Article 38 (4) of the Constitution, the Supreme court subsequently amended its judgment to this extent.

100. In another paragraph in the same **Raila case** (above), the Supreme Court stated that:-

**“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the 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 is mine].

101. And in the Joho case (supra) the court had this to say on the issue:-

**“--- Election petitions should be proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made, instances of the bribery should be given. The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof, required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences, a very high degree of proof is required.”**

102. Further afield, the courts are also agreed that the burden of proof in election petitions as in civil cases is settled and it lies on the petitioner to prove his case to the satisfaction of the court, the only controversy being the standard of proof required. See Colonel Dr. Kizza Besigye –vs- Museveni Yoweri Kaguta & another – Election Petition NO.1 of 2001 (Uganda). Also see the majority opinion in Opitz –vs- Wrzesnewskij 2012 SCC 55-2012-10=256. In Buhari –vs- Obasanjo [2005] CLR 7K, the Supreme Court of Nigeria echoed similar views and stated that where a petitioner alleges non-compliance, he/she must not only prove that the non-compliance has taken place, but must also prove that such non-compliance has substantially affected the results of the election. The court also stated that the petitioner who makes the assertions must prove each and every fact by adducing credible evidence and if the petitioner fails to do so, his case will fail. Once the petitioner places credible evidence before the court on the facts alleged, the respondents will now bear the evidentiary burden of proof that the facts established by the evidence given by the petitioner could not on the strength of such evidence result in a court giving judgment in favour of the petitioner. This was the same position held by the Supreme Court of Nigeria in Ibrahim –vs- Shagari & others [1985] LRC (Const.) 1. The court therein stated that once the court is satisfied that the disputed election has been conducted substantially in accordance with the governing law, it will not invalidate it, minor breaches of regulations here and there notwithstanding. It was further held that an election will only be invalidated or avoided if the non-compliance complained of is established in court by credible evidence and is substantial. Even where the non-compliance is substantial, the court will [have to] consider the effect of such non-compliance on the result of the election. [Emphasis is mine].

103. In Bernard Shinali Masaka –vs- Bonny Khalwale & 2 others [2011] e KLR, a case cited with approval by Mutuku J in Garissa High Court EP No.1 of 2013 – Mohamed Ali Mursal –vs- IEBC & 2 others, the High Court sitting in Kakamega held, *inter alia*, that:-

**“Further, I agree with the propositions grounded on the decision of Mbowe –vs- Eliufoo [1967] EA 240 that any allegations made in an election petition have to be proved to the “satisfaction of the court.” ---- I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond doubt, but because of the quasi criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.”**

104. Further, the Supreme Court of India in Rahim Khan –vs- Khurshid Ahmed AIR [1975] SC 290 observed that:

**“An election once held is not to be treated in a light hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantiated grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein**

**strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded.”** [Emphasis is mine].

105. From the above authorities, it is clear to me that the burden of proof of all the allegations of fact in this petition falls squarely on the shoulders and at the feet of the petitioner. The standard of proof to be met by the petitioner is one that is much higher than balance of probabilities but not as high as proof beyond reasonable doubt demanded in criminal cases although in the **Raila Case**, the Supreme Court said that the legal burden of the petitioner where there are strict timelines to be met is beyond any reasonable doubt. There being no allegations of criminal offences having been committed by any of the Respondents, this court will thus apply the higher than balance of probabilities standard of proof.

106. Now I move on to the issues.

Analysis and Findings on the 7 Issues framed and agreed by parties and adopted for determination by the court.

107. I have set out all the evidence adduced by all the parties in the preceding paragraphs of this judgment. The rival written submissions are all on record and though no summary of the same is given, I have read each set of submissions in detail and with much care. This court will consider the submissions during the analysis of the issues for determination. It is also important to note that this court shall be guided by the principles set out in the authorities cited to court on burden and standard of proof, and shall also be duly guided by the provisions of the Constitution, the Act, the Rules and the Regulations. I shall now proceed as follows:-

Issues 5 and 7 - Whether the Petition is Legally competent and whether the petition as drawn discloses a reasonable cause of action

108. Regarding these issues, the IEBC submitted that the petition as

filed is incompetent for the reason that though the same is properly paginated, running from page 1 to page 267, and though the same is accurately captured in the index to the petition, the petition is lacking in one material particular: nowhere in the petition does the petitioner state the date of the declaration of the results of the election he is challenging. It is submitted that failure by the petitioner to state the date of the declaration of the results of the election being challenged is a breach of the mandatory provisions of **Rule 10 (1) (d)** of the **Rules** and is therefore incompetent. It was submitted that without the date of the declaration of the results being made known to the court, the court is ill-equipped to determine the competency of the petition before it.

109. The above arguments were supported by **Article 87** and **Rule 10** of the **Rules**. **Article 87** provides thus:-

**“87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.**

**(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.**

**(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.”**

110. On the other hand Rule 10 of the Rules provides as follows:-

**“Contents and form of an election petition**

**10(1) An election petition filed under rule 8, shall state –**

- a. the name and address of the petitioner;
- b. the date when the election in dispute was conducted;
- c. the results of the election, if any, and the manner in which it has been declared;
- d. the date of the declaration of the results of the election;
- e. the grounds on which the petition is presented; and
- f. the name and address of the advocate, if any, for the petitioner which shall be the address for service.

(2) The petition shall be divided into paragraphs, each of which shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.

(3) An election petition shall –

(a) be signed by the petitioner or by a person duly authorized by the petitioner;

(b) be supported by an affidavit made by the petitioner containing the grounds on which relief is sought and setting out the facts relied on by the petitioner; and

(c) be in number of copies as are sufficient for the court and all Respondents named in the petition.

(4) The petition shall conclude with a prayer, requesting the court to make the appropriate relief which may include –

- a. a declaration on whether or not the candidate whose election is questioned was validly elected;
- (b) a declaration of which candidate was validly elected; or
- (c) an order as to whether a fresh election should be held or not.”

111. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' case is that since the election results herein were declared on 6<sup>th</sup> March 2013 or the very latest on 7<sup>th</sup> March 2013, then the last day for filing this petition was 3<sup>rd</sup> April 2013 and not 10<sup>th</sup> April 2013. In this regard, counsel for IEBC cited the case of **Clement Kung'u Waibara & another –vs- Francis Kigo Njenga & 3 others [2013] e KLR** in which Mwongo J had occasion to deal with a similar issue and said the following at paragraph 59 of his ruling:-

**“Whereas in this case, there is failure to comply with the constitutional requirement and no excepting the constitutional requirement and no excepting provisions are available, to remedy the failure and rescue the proceedings, it must lead to a declaration by the court that the petition is incurably defective and should be struck out. I so hold.”**

112. In the submissions filed on behalf of the petitioner, it is submitted

that the petition herein raises many salient points relating to the fairness, accuracy and transparency of the election of the member of Senate for Kisii County and that in the premises, the petition discloses a reasonable cause of action for the due consideration of this court. See the holding of Madan JA in the case of **DT Dobie & Company (Kenya) Ltd –vs- Muchina [1982] KLR 1** where the learned appellate judge held (obiter) that courts should strive to allow suits to go to full hearing unless the suit is so hopeless that it cannot even be remedied by amendment. Counsel urged this court not to strike out the petition.

113. On the part of Obure, it is contended that the petitioner herein has failed to plead with specificity as to the grounds upon which he requires the respondents' election to be voided. See **Hove –vs- Gumbo (HC 7752/2002 in the High Court in Zimbabwe) and the Indian Case of Charan Lal Sahu & others –vs- Singh [1985] LRC (Const)**. In the latter case, Chief Justice Chandrand

expressed himself thus on specificity of pleadings:-

**“The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says “connivance” here or whether the petitioner has used that expression as meaning ‘consent’. It is remarkable that in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly it is impermissible to substitute the word “consent” for the word “connivance” which occurs in the pleading of the petitioner.”**

114. From the local case law, counsel for Obure cited the case of **John Waweru Kiarie –vs- Beth Wambui Mugo & 2 others – Election Petition No.13 of 2008** in which the court, in dealing with a petitioner who sought to adduce evidence on matters not pleaded held thus:-

**“The petitioner raised several issues concerning the validity of the Form 16As that were produced in evidence by the 2<sup>nd</sup> Respondent. It was evident that the petitioner did not consider the manner in which the Form 16As were filled to be of such an importance as to merit consideration by the court. The petitioner did not plead failure by the 2<sup>nd</sup> Respondent to properly fill the Parliamentary Form 16As. It is trite law that a party is bound by his pleadings. The petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition. This court will not therefore address the issues raised by the petition regarding the validity of the Parliamentary Form 16As.”**

115. What is stated above is indeed the law with regard to what constitutes a competent petition. However, by the time the final submissions were highlighted before me on 26<sup>th</sup> July 2013, the issue of whether or not this petition is competent and whether it discloses a reasonable cause of action had been resolved through the Court of Appeal decision in **Hassan Ali Joho & another – vs- Suleiman Said Shahbal & 2 others – Court of Appeal at Malindi CA No.12 of 2013**. The issue that had been contested by the parties before Ochieng J in Mombasa High Court Election Petition No.8 of 2013, was that the petition against Joho was incompetent for having been filed outside the 28 days limitation period as provided under **section 76 (1) (a) of the Act**.

116. The Court of Appeal held, *inter alia*, that the election period ends with the gazette of the outcome of the result, and that it was only after such gazette that one may file an election petition which can then be heard by a Bench thereafter duly constituted by the Chief Justice. I wholly agree with the Court of Appeal.

117. With the said judgment, the respondents abandoned their pursuit

to have the petition struck out for having been filed out of time. The position taken by the Respondents notwithstanding, this whole issue of the legality of the petition ought to have been taken before the pre-trial conference as a preliminary point of law to be determined before the petition proceeded. The Respondents having not taken that course of action, the issue does not, strictly speaking fall for determination. In **Kitale EP No.11 of 2013 – Charles Maiywa Chedotum & another –vs- IEBC & 2 others**, J.R. Karanja J quoted the Court of Appeal in the case of **J.M.N. Mututho –vs- Jayne N.W. Kihara & others [2008] e KLR** in the following words:-

**“Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a peoples’ representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it ---. Besides, the**

**petitioner does not have results even now. Her advocate stated as much. If she does not have the results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issue raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the results, it might not be possible to relate the irregularities to the result.”**

118. The instant petition would have therefore died a natural death if the argument had been raised as a preliminary objection.

Issues No.1 and 2 - Whether the 4<sup>th</sup> March 2013 general election in respect of Member of Senate for Kisii County was substantially conducted in conformity with the Constitution, the law and practice of elections and whether the electoral process followed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in respect of the said election was lawful and legally sanctioned.

119. The petitioner alleged at paragraphs 8 and 9 of the petition that

the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted the election in a manner substantially inconsistent with and contrary to **Articles 81, 86 and 88** of the **Constitution** as well as **Section 39** of the **Act**. He also alleged that the election was conducted in a manner substantially inconsistent with the principles laid down in the Law of Kenya in the following instances:-

Instances where votes lawfully cast and counted in favour of Petitioner’s Principal were excluded from the final tally.

120. The polling stations in issue here are Orencho primary School – Code 030 – where Magara’s 230 votes appearing in Form 35 were not included in his final tally; Nyansembe Primary School – Code 099 – where Magara’s 256 votes captured in Form 35 were also not included in his final tally; Ensoko Primary School – Code 056 – where Magara’s 159 votes reflected in Form 35 were also excluded in the final tally. It was also submitted that votes lawfully cast and counted in favour of Magara at Manyansi, Rianyabaro (stream 1), Botoro and Suneka Baraza Hall (stream 2) were erroneously decreased and/or excluded from the final tally, and that in the aggregate, Magara was denied a total of 1229 votes. It is the petitioner’s contention that had the said votes been included in Magara’s final tally, his final standings would have been proportionately enhanced and that in the circumstances the elections relating to Member of Senate for Kisii County cannot be said to have been fair, accurate and transparent. Counsel submitted that the number of votes so excluded does not matter, and it also does not matter whether such exclusion affects or does not affect the final tally. Counsel urged the court to find that by such exclusion, the elections for Member of Senator for Kisii County were so badly conducted that the elections cannot be said to have been conducted in accordance with the law as to elections. See **Wabuge –vs- Limo & another [2008] 1 KLR (EP) 417-424** where the court held that it would not shut its eyes to such illegal acts despite the numbers in dispute being minimal.

121. While conceding that the errors do indeed exist, counsel for the IEBC has urged this court to find that these isolated human errors should not form the basis for a finding that the election herein was not substantially conducted in conformity with the Constitution, the law and practice of elections. Relying on **section 83** of the **Act** and the decision in **Munyao –vs- Munuve & 4 others [2008] 2 KLR (EP) 20**, counsel urged the court to find that these errors were minor and could not have affected the result of the election.

122. **Section 83** of the **Act** provides as follows:-

**“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.”**

123. Counsel for the IEBC further submitted that there is clear evidence on record, which shows that

the entire election was not only conducted in accordance with the principles laid down in the Constitution but that the IEBC also ensured that all election officials and party agents were duly trained and made to take the oath of secrecy before the elections took place, as evidenced by the testimony of PW2 who said in answer to some questions put to him by Mr. Chacha Odera for Obure:-

**“I have seen the Election Agents’ Manual (shown one) but I have never read it. I did not read it because I did not get a copy. I was however well equipped to discharge my duty as a tallying agent.”**

124. Counsel also referred the court to the testimony of PW3 during cross examination where she said the following in answer to questions put to her by Mr. Rigoro for Obworo and the IEBC:

**“Partly, I can commend the IEBC for carrying out a fair election in South Mugirango.”**

125. In response to the complaints raised by the petitioner that the election for Member of Senate for Kisii County was not fair, accurate and transparent, counsel for Obure submitted that any genuine errors have been admitted and well explained by Obworo and further that the said errors even when corrected do not affect the final result of the elections. Counsel also submitted that the errors complained of benefited Obure to the tune of 719 votes and Magara to the tune of 556 so that it cannot be said that Obure was the beneficiary of such errors. He also submitted that at no time during the hearing of the petition has evidence been adduced showing that any of the candidates received or was allotted votes exceeding or less than what they actually polled; and that in any event, once each candidate accepts the votes allocated to each of them, no prejudice is suffered by any of them if there is an error in the mathematics. Further that the petitioner in this case has not shown how the errors complained of affected the end result contained in Form 36. Further, that the number of votes complained of being 1229 votes overall cannot affect the final result of the entire Kisii County of the election of Obure as Member of the Senate. See **Raila Odinga case** (above).

126. The petitioner also alleged that votes spread out to the candidates were less than the total valid votes declared. The petitioner claims that if this cluster of votes, totaling 2056 were lawfully factored in favour of whichever candidate was the beneficiary, the final result herein would have been affected. The question that this court must ask itself is: what is the effect of these errors on the final result? Can it be concluded that because of these errors, the election for Member of Senate for Kisii County was not fair, accurate and transparent? Can it also be said, flowing from the answer to the above two questions that the said election was therefore invalid?

127. In **Morgan & others –vs- Simpson [1974] 3 All ER**, the Court held the view that an election court could only declare an election invalid if it was proved that there was substantial non-compliance with the law and the rules and that such non-compliance was aimed at producing a substantial effect upon the election. The court was also of the view that small-scale omissions and errors during elections cannot be avoided and whether deliberate or substantial such errors can only be punished if they result in substantial departure from the law as to elections. I entirely agree with these views of the court expressed so that unless the petitioner proves that the errors pointed out herein were aimed at subverting the course of justice in favour of Obure, and that such errors constitute substantial departure from the law as to elections, then they cannot form the basis of nullifying the election for senator.

128. In the Indian case of **Y. Mahabaleswarappa –vs- S. Ramanchandra Row & others on 15<sup>th</sup> April 1936 Equivalent Citations: 165 Ind Case 433, (1936) 71 MLJ 199**, Cornish J stated as follows:-

**“The next question was whether this non-compliance had materially affected the result of the election. Rule 10 (c), which makes this the basis of the Commissioner’s power to declare the election void, has been extracted from section 13 of the Ballot Act. The words “result of the election” in the section has been held to mean the return of the candidate and not the amount of his majority. (see Rogers on Election, Vol. II, p.41 and the cases there cited). The words must have the same meaning in the rule. So that if the number of ballot papers**

**rejected by reason of non-compliance with the rules did not suffice to turn the scale against the elected candidate, though the extent of his majority might be affected, the result of the election could not be held to have been materially affected.”**

129. A similar finding was made in Woodward –vs- Sarsons (1875( LR 10C.P 732 where no less than 294 votes were spoiled by the mistake of the presiding officer, but they would not if admitted have turned the scale against the successful candidate. It was held that those votes did not affect the result of the election, and therefore that the result could

not be rendered invalid. Further in the same judgment, the learned judge had this to say:-

**“There were 143 electors in the area of this polling booth who did not vote. Even on the assumption that they had all gone to the poll, they would have voted for the respondent, the petitioner would still have had a majority upon all the ballot papers. It is manifest, therefore, that non-compliance of the polling officer with Rule 16 and the consequent invalidation of the ballot papers under Rule 20 did not materially affect the result of the election, and the commissioner was wrong in his decision to the contrary.”**

130. In the case of Mbowe –vs- Eliufoo (supra) the High Court of Tanzania defined the phrase “affected the result” in these words:-

**“In my view, the phrase “affected the result; the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”**

131. From the above authorities and all the other authorities referred to under the heading “Burden and standard of proof” the courts in all those jurisdictions are in agreement that in spite of certain breaches of the rules, where one or more of the candidates would have polled more or less votes than were recorded at the count, but the same candidate would still have been elected, the result of the election will not have been affected and the election can only be declared invalid if it appears to the court that the election was not so conducted as to be substantially in accordance with the law as to elections.

132. In the instant case, I do not find that the errors pointed out by the petitioner were a substantial departure from the law and principles as to elections, nor do I find that 1229 votes which should have been included in Magara’s final tally affected the result of the Senatorial election since Obure would still have had a substantial lead and Magara

would still have maintained his third position in the race.

Instances where votes neither cast nor counted were factored in

favour of various candidates

133. In paragraph 20 of the Affidavit in Support of the petition, the petitioner alleges that a total of 952 votes neither cast nor counted at various polling stations in 7 out of the 9 constituencies, namely: Bobasi, Bomachoge Borabu, Kitutu Chache North, Bonchari, Bomachoge Chache, Nyaribari Chache and South Mugarango were factored in favour of various candidates; thereby conferring an undue advantage to such candidates. The Petitioner also alleges that some votes not cast and counted found their way into the final tally especially in Bomachoge Borabu Constituency. Such votes were said to be 519, being the difference between 32108 votes spread out to candidates and 31589 total votes cast. There is also a complaint that the Bomachoge Borabu Form 36 does not show the number of rejected votes, though admittedly the total number

- of rejected votes worked out to be 420. The petitioner alleges that there exists an excess of 939 votes (519 votes not cast and counted plus 420 rejected votes) which were spread out and allocated to the candidates though such votes were neither cast, counted nor declared. The petitioner has accused Obworo and the IEBC of “**cooking**” votes whose origin is both uncertain and unverifiable. These are the votes which the petitioner has baptized as “**ghost**” votes.
134. From the record, it is confirmed that the number of rejected votes for Bomachoge Borabu was 420 and it is therefore not true as alleged by the petitioner that the number of rejected votes was unknown or not indicated. It is also clear from the evidence on record that the petitioner failed to prove that the votes that were allegedly neither cast nor counted were factored in favour of Obure. The petitioner agreed during cross examination that the errors which he has pointed out in his petition were merely matters of arithmetic and that he could not say who of the 7 senatorial election candidates got the benefit of any unallocated or unaccounted for votes. I am also satisfied that these errors were well explained by Obworo, DW6.
135. In any event, there is no evidence on record to show that any of the other candidates complained that they had been given votes they were not entitled to, or votes that were either more or less than the votes they actually polled. I have taken a close look at Form 36 for Bomachoge Borabu Constituency and I am satisfied that the error therein is immaterial, it is arithmetical and does not affect the result of the election. It is also to be noted that despite having a court order empowering him to extract all Form 35’s and 36’s from the IEBC in support of his claims against the Respondents in this case, the petitioner failed to take advantage of the court order and ended up failing to produce factual and documentary cogent evidence to support his claims.
136. In the premises, I find and hold that the petitioner’s allegations under this sub-heading were not supported by cogent evidence. The complaints are accordingly dismissed as the contested votes would not have altered the result of the election for Senator for Kisii County.

Instances of multiplication/repetition/duplication of polling streams and attendant votes

137. At paragraph 25 of his petition, the Petitioner singled out 4 polling stations from Bonchari Constituency whereby results from some non-existent streams were factored in and declared in favour of all the 7 candidates. These allegations of multiplication/double streaming/repetition and/or duplication are admitted by both Obworo and the IEBC vide the evidence given by Resa, DW6. The petitioner submits that due to the additional streams which resulted in ghost votes, the number of votes awarded to candidates doubled or trebled depending on whether the voting streams became 2 or 3, although the number of registered voters would remain the same. The petitioner therefore claims that the total votes cast in this election exceeded the number of registered voters. The petitioner also contends that in the final analysis when these multiplied, repeated and duplicated votes are taken into account, the final tally for each candidate would be affected; and that Obure in particular benefited from 719 votes from this anomaly.
138. In response to the petitioner’s contentions on this issue, counsel for Obure submitted that there is no evidence put before the court by the petitioner to show that the number of votes cast, arising out of the alleged multiplication of streams exceeded the number of registered voters. It was also submitted that the double entry of results in respect of the four polling stations was an inadvertent error and that even when corrected the ultimate result of the Senatorial contest does not change. Further, that the double entry affected only 4 out of the 65 polling stations in the entire Bonchari Constituency, and that it cannot be said that the number of votes cast exceeded the number of registered voters since the effect of the double entry of the votes equally affected the numbers of registered voters.
139. Counsel for the IEBC responded to these allegations of multiplication and double streams by stating that unless this court is satisfied that the errors complained of were so fundamental as to go to the root of the entire election, then the errors should be excused and ignored.
140. The guiding principle in determining this issue is: what effect if any did the multiplication/repetition and/or duplication of polling streams have on the election?
141. Upon careful consideration of the evidence on record, I find that

where there was such multiplication/repetition/duplication, the error affected all the candidates, and no single candidate can be said to have benefited from the error. The error in my view has

also been adequately explained by the Respondents. In any event, the error affected only 4 polling stations out of the 65 polling stations in Bonchari Constituency. I also find that there is no evidence to show that the number of votes cast exceeded the number of registered voters at these polling stations. The petitioner admitted on oath that the number of registered voters remained the same save for the fact that the result was reflected twice or thrice for the same polling station. The petitioner did not prove that Obure was the beneficiary of the multiplication/repetition or duplication. The petitioner also failed to prove his allegations of manipulation and doctoring or cooking of the results so as to favour Obure. For the above reasons, I find that the result of the multiplication/repetition and duplication did not materially affect the result of the senatorial election in Kisii County. The allegation is accordingly dismissed.

(e) Open decrease of votes garnered by Magara

142. The petitioner submitted that from the evidence given by PW2, John Mauti Machini, Magara's total tally from Bomachoge Chache Constituency was reduced by 4000 votes from 14545 as recorded by PW2 to 10454 indicated in Form 36. The petitioner also contended that while Magara's votes were reduced, Obure's votes were inflated by 4002 from the figure of 7015 as recorded by PW2 to 11017 votes. It is alleged that this anomaly, coupled with the fact that the Form 36 which was signed by PW2 and other party agents has not been produced in court by Obworo and the IEBC clearly shows that the Respondents intended to suppress and/or suffocate evidence which would be in favour of Magara. It was also submitted that the 4000 votes that were deducted from Magara's final tally if added back would significantly alter the result to Magara's advantage and to Obure's disadvantage.
143. Counsel for Obure submitted that even if all the votes in contest totaling 1299 together with the alleged 4000 were added onto Magara's tally and taken away from Obure's tally the result of the election would still remain intact. This argument on Obure's behalf was supported by counsel for the IEBC.
144. My considered view of the above allegations is that they were not proved. The Petitioner did not adduce evidence in the form of either Form 35 or Form 36 to show that the votes from Bomachoge Chache were as recorded by PW2 whose evidence in my view was inconclusive. To my mind, PW2 was a poor agent who did not do his work properly. He did not say whether or not he got a copy of the Form 36 and if not, why not. Further the petitioner who was under a duty to prove his claims and who said that he entered all the results as they came to him from the field into the Computer Excel sheet never produced the Excel Sheet to prove his claims. The allegation is accordingly dismissed.

Issues No.3 and 4 – Whether the Election of Member of Senate for Kisii County was valid and whether the declaration and subsequent gazettment of the 1<sup>st</sup> Respondent as the duly elected Senator for Kisii County was valid.

145. It is the Petitioner's contention that both Obworo and the IEBC failed in their obligation to ensure that all the statutory Forms used for purposes of declaring results were duly executed in accordance with **Regulation 83 (1) (c)** of the **Regulations**; and in particular that the declaration of the results for Bobasi Constituency could neither be authenticated nor validated because of this failure.

Failure to sign the Form 36 for Bobasi and Bomachoge Chache Constituencies

146. The petitioner alleged that these Forms were neither signed by the Constituency Returning Officer, the Deputy nor the agents; and that in the circumstances, the said form should not have been used to declare the results especially for Bobasi Constituency. The Petitioner submitted that the non-signing of the Form 36 for Bobasi Constituency by all the concerned election officials rendered the Form invalid.
147. The Respondents submitted that the Form 36 produced by themselves was a copy downloaded from the IEBC website and that in the absence of the relevant Form 35's whose duty it was the

petitioner to produce, the petitioner's complaints about non-signing of Form 36 for Bobasi Constituency should not lead to the invalidation of the results.

148. Upon evaluation of the evidence and the law, I find that the petitioner failed to prove that the results contained in the Form 36 for Bobasi Constituency did not agree with the results in the primary documents, Form 35's, so as to make the said results invalid. Further, the Petitioner failed to call his chief agent for Bobasi Constituency to appear before court and to testify regarding the results in Form 36 as compared to the result in the Form 35's and to tell the court whether he signed the said Forms. It is also evident that the Form 35's for Bobasi and Bomachoge Chache were not produced in court to show any disparities between the said Forms and the Form 36 availed to Court by the Respondents.
149. I am therefore satisfied that taking into account the provisions of **Regulation 83** of the **Regulations** and the evidence offered by the Respondents, and in particular Obworo's testimony to the effect that the Form 36 exhibited in court by himself was the original copy downloaded from the IEBC website, I can only conclude that the petitioner's allegations remain mere allegations without any iota of evidence to support them.

Failure by agents to sign Form 36 and lack of Statutory Comments.

150. The petitioner alleged that failure by the Constituency Returning Officer to supply reasons and/or comments as to why agents did not sign the Form 36 for Bomachoge Chache Constituency was fatal to the result of the senatorial election. The petitioner alleged and so did PW2, that the Form 36 for Bomachoge Chache was signed by PW2 before he left the Constituency tallying centre at Tendere Secondary School. It is also alleged that DW2, Thomas Ondara signed the said Form. The petitioner says Obworo and the IEBC ought to have availed to court the signed Form 36 for Bomachoge Chache Constituency.
151. Upon consideration of the evidence and the law and in particular **Regulation 83**, I find no merit in this complaint by the petitioner and accordingly dismiss the same. For this finding I am guided by the holding in **John Fitch –vs- Tom Stephenson & 3 others QBD [2008] EWHC 501** in which the court stated, *inter alia*, that –

**“The decided cases including those which Lord Denning considered in Morgan –vs- Simpson established that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the result of the election, was unaffected by those breaches. This is because where possible, the courts seek to give, effect to the will of the people.”**

152. In the instant case, I find that though some Form 36's may not have been signed and no reasons given on others as to why agents did not sign the requisite forms, the breaches did not affect the result of the election. There is no evidence before court to show that the election for Senator for Kisii County was basically unsound and that the errors complained of were calculated to produce a substantial effect on the result. Nor can it be said from the evidence adduced by the petitioner that the integrity of the whole election process was questionable. See **Opitz case** (above).
153. It follows therefore that the gazettement of Obure as the duly elected Senator for Kisii County was valid. **Regulation 87 (3)** of the **Regulations** provides as follows:-

**“87(3) The County Returning Officer shall upon receipt of the results from the returning officers as contemplated under regulation (1) –**

- a. **tally and announce the results for the presidential elections, elections for the county governor, senator and county woman representative to the national assembly; and**
- b. **submit all the results received from returning officers together with the results tallied under this regulation to the Commission; and**
- c. **issue to the persons elected pursuant to the results announced under paragraph (a) with certificates indicating their election in Form 38 set out in the Schedule.”**

154. The Petitioner alleged at paragraph 12 of the petition that Obure

was declared winner of the election notwithstanding that he did not receive and/or garner the greatest number of valid votes cast and that such declaration was done without verification and authentication of Form 36. The petitioner also alleged at paragraph 16 of the petition that Obworo refused his (Petitioner's) request for verification, re-count and retallying of votes cast, contrary to **Regulation 80** of the **Regulations**. **Regulation 80** reads as follows:-

**“80 (1) A candidate or agent, if present when the counting is completed, may require**

**the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes counted.**

**Provided that the recount of votes shall not take place more than twice (2) No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation.”**

155. The court has considered the evidence as a whole and finds that at no point during the hearing did the petitioner show or prove that Obure did not garner the highest number of votes cast. The only point the petitioner made was that if the results for Bobasi Constituency were removed then Magara would win the election. Such a wish is simplistic and does not amount to proving that Obure did not garner the highest number of votes cast. At the same time, the petitioner did not avail to the court the results for Bobasi which he said he had received from his agents to prove that indeed those results showed that Magara was the winner.

156. Further and as was held by the Court of Appeal in **CA NO.12 of 2013 – Hassan Ali Joho & another –v-s Suleiman Said Shalibal & 2 others** (supra), it was the duty of the IEBC to gazette Obure as the duly elected Senator for Kisii County as provided under **section 60** of the **Evidence Act, Cap 80 Laws of Kenya**. It was only through such gazette that the citizens of this country would be informed of who the duly elected Senator for Kisii County was. The Court of Appeal also held, and I wholly agree that with that position, that the Gazette has the full force of the law and it is through that medium that the IEBC could carry out its mandate of informing the world about the result of the Kisii Senatorial election held on 4<sup>th</sup> March 2013.

157. In the circumstances of this case, and as it is the case in all

elections petitions, the duty of the court is to ensure that the ultimate will of the electorate is ascertained and upheld at all costs. (See **Wavinya Ndeti –vs- IEBC and 4 others, Machakos EP No.4 of 2013** whose findings were applied by Ong'udi J in **Embu EP No.1 of 2013 – Kithinji Keragu –vs- Martin Nyaga Wambora & 2 others**.)

158. As stated earlier in this judgment this court has not taken this election petition lightly. I have set out the evidence and analyzed the issues with the view of establishing that the will of the people of Kisii County, as expressed at the polls on 4<sup>th</sup> March 2013 is respected. In the Canadian case of **Camsell –vs- Rabesca [1987] N.W.T.R 186 (S.C)** it was held that:-

**“It is clear that in every election a fortiori those in urban midways with large numbers of polls, irregularities will virtually always occur in one form or another. A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days, or in many cases, a single 14 hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical on the job experience.”**

159. In this case, there is evidence that election officials worked day

and night for three days, and that by the end of the exercise, most of the agents who had participated in the election were too tired and too sleepy to respond to requests to sign the requisite Form 35's and 36's. The PO's and CRO's were equally tired and as would be expected,

they did make errors. The election officials were infact candid enough to admit that some errors were made, but not deliberately, but such errors did not amount to a drastic departure from the law and principles as to elections.

160. In view of the above, this court has had to exercise caution in this delicate task of deciding whether on the basis of the allegations made by the petition, the election should be annulled. The petitioner was under a duty to show that there were errors and irregularities and that the result would indeed have been different if the irregularities and errors had not been committed. He was under a duty to prove that such irregularities not only exist, but that they substantially affected the result.
161. Whereas, the petitioner has indeed shown that there were some irregularities and errors, he has not proved that the said irregularities were so substantial as to affect the result. The petitioner also alleged that Obure colluded with Obworo and the IEBC to deny Magara victory but from the record, no iota of evidence pointing to any such collusion either perceived or real, between Obure and the IEBC and its officials was proved. Nor has the petitioner shown that the irregularities committed by the election officials were committed with the approval and/or knowledge of Obure or that the said errors favoured anyone specific candidate.
162. It is also clear that even when the admitted errors are taken into account and adjustments made, Obure would still win the elections by a margin of 18368 votes.
163. In any event, failure to sign the declaration forms 35's does not in itself give rise to the invalidation of the election result. Further, **Regulation 79 (6)** of the **Regulations** is clear that *“the refusal or failure of a candidate or an agent to sign a declaration form under **subregulation (4)** or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under **subregulation (2) (a)**.”*
164. In effect, this court is saying that the will of the people of Kisii County was duly exercised in a free and fair electoral process as provided under **Article 81** of the **Constitution**. The person the people of Kisii County chose for Senator was Obure. Obworo declared him as such and the IEBC proceeded to complete the process through the Gazette Notice Number 3156 dated 13<sup>th</sup> March 2013.
165. The above being the position, this whole petition is devoid of any merit, the petitioner having failed to meet the threshold of the burden and standard of proof required of him. The petitioner is therefore not entitled to the prayers sought. The petition is dismissed in its entirety with costs. This court accordingly declares that Christopher Mogere Obure was validly elected Senator for Kisii County. This determination will be certified to the IEBC as provided by **section 86 (1)** of the **Act**.

Issue Number 6 – Who is to bear the costs of this petition.

166. The Petitioner's position on this issue is that since the petition was occasioned by the incompetence, sheer lack of diligence, abuse of office and/or deliberate acts of manipulation by Obworo and the IEBC for the unfair advantage to Obure, then the Respondents should all be condemned to pay the costs. He relies on **section 27** of the **Civil Procedure Act, Cap 21 Laws of Kenya**.
167. In spite of the cited irregularities, this court has found that the 4<sup>th</sup> March 2013 General Election in respect of Senate for Kisii County was substantially conducted in accordance with the constitution, the Law and Practice of Elections. This court is satisfied that the people of Kisii County exercised their free will on 4<sup>th</sup> March 2013 to elect their Senator in the person of Christopher Mogere Obure. The fact that Obure received the highest number of votes has not been displaced by the Petitioner's evidence.
168. Under **Section 84** of the **Act**, this court, being an Election Court is empowered to **“award costs of and incidental to a petition and such costs shall follow the cause.”** This court also has the power to determine who pays the costs and to whom. See **Richard Kalembe Ndile & another – vs- Dr. Patrick Musemba Mweu & 2 others – Machakos High Court EP No.1 of 2013** as consolidated with **EP No.7 of 2013 and Charles K. Waibara & another –vs- Francis Kigo & others** (supra).
169. Under **Rule 36** of the **Rules**, the Court is further empowered in the following terms:-

**“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;**

**(2) When making an order under subrule (1), the court may –**

**(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and**

**(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.**

**(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.**

170. The petition was heard in full, with all the parties participating to the fullest extent. Huge volumes of material in terms of submissions and authorities were filed by all counsel. It is therefore imperative that the winning party be adequately compensated for the work done save to note that whatever costs are awarded are neither too low nor too high in the circumstances of this case. There is no doubt that this money will eventually come from public coffers and should therefore not be awarded to injure the body politic or to make it impossible for future litigants to access the court for fear of being condemned with huge costs in the event that they lose their cases. This would be contrary to **Article 38 of the Constitution**.

171. In this case, each of the parties was represented by one advocate, but it is obvious that the said advocates spent much time in research, on drawing the pleadings and examining and cross-examining witnesses in court. It is however not lost to the court that the irregularities that gave rise to this petition, though not substantial enough to alter the result of the election, were committed by the IEBC and its officials.

172. In **Kisii High Court EP No.10 of 2013** – this court capped the costs at Kshs.3 million for the reasons therein. The petitioner contested the election of the Kisii County Woman Representative to the National Assembly. In the **Richard Kalembe Ndile case** (supra), the court capped the costs at Kshs.1,500,000/= while in **Richard Hamid Ahmed Amana –vs- IEBC & others – Malindi EP NO.6 of 2013**, the costs were capped at Kshs.2.5 million.

173. In the instant case and considering all the circumstances herein,

the costs for this petition shall be capped as follows: Kshs.1.8 million for 1<sup>st</sup> Respondent and Kshs.1.0 Million for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. These costs shall be taxed by the Deputy Registrar of this Honourable Court.

#### Commendation

174. Before I conclude this matter, I would like to thank counsel for

their diligence and industry and for their maturity during the entire trial. They presented their clients' cases in a very collected manner and carried themselves with dignity. The counsels' conduct during the proceedings thus greatly assisted the court in concluding the hearing within the agreed time frames. I also thank the Deputy Registrar, my court clerks, the Legal Researcher and all the security personnel who ensured that everything ran smoothly during the trial. Lastly I want to thank my secretary for her fidelity to her oath of secrecy and her diligence in getting this judgment to this final stage.

#### Final Orders

1. *I hereby declare that Mr. Christopher Mogere Obure was validly elected as Senator for Kisii*

County.

2. The certificate in accordance with **section 86(1)** of the Act shall issue to the IEBC.
3. Costs of this petition shall be paid by the Petitioner to the Respondents as follows:-
  - a. Maximum of Kshs.1.8 million to the 1<sup>st</sup> Respondent, Obure.
  - b. Maximum of Kshs.1.0 Million to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  - c. The Security deposit shall be utilized towards payment of the costs.

**Dated and delivered at Kisii this 16<sup>th</sup> day of September, 2013**

**RUTH NEKOYE SITATI**

**JUDGE**

In the presence of:

Mr. Oguttu-Mboya for Petitioner

Mr. Chacha Odera for 1<sup>st</sup> Respondent

Mr. Charles Rigoro for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Bibu - Court Clerk