



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO.2 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
ACT NO.9 OF 2011**

**AND**

**IN THE MATTER OF ELECTION FOR BONCHARI CONSTITUENCY (NO.261)**

**BETWEEN**

**JOHN OROO OYIOKA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**PETER RESA, RETURNING OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**ZEBEDEO JOHN OPORE ..... 3<sup>RD</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**ELECTION PETITION NO.4 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
ACT NO.9 OF 2011**

**AND**

**IN THE MATTER OF ELECTION FOR BONCHARI CONSTITUENCY (NO.261)**

**BETWEEN**

**NYABARO ONDITI ..... PETITIONER**

**VERSUS**

**ZEBEDEO JOHN OPORE ..... 1<sup>ST</sup> RESPONDENT**

**PETER RESA, RETURNING OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

Introduction

1. On the 4<sup>th</sup> March 2013, the residents of Bonchari Constituency turned out in their numbers to take part in voting for Member of the National Assembly in addition to casting their votes for the President of the Republic of Kenya, the Woman Representative for Kisii County, the Governor for Kisii County as well as for the various County Assembly Representatives within the Constituency.
2. The two consolidated petitions that are before me for consideration arose out of the above stated elections. The elections for Member of the National assembly were contested by the following 11 candidates whose results were declared as follows:-

*Albert Monyancha – 160 votes*

*Charles Onyancha – 6897 votes*

*David Ogega Oyugi – 2821 votes*

*David Okeyo Getate – 100 votes*

*John Mochama Orwochi – 228 votes*

*John Oroo Oyioka – 8987 votes*

*Mwendo Geoffrey Omwando – 471 votes*

*Samwel Ongoncho – 362 votes*

*Tom Marube Maisiba – 3647 votes*

*Victor Omare Omanwa – 354 votes*

*Zebedeo John Opore – 8992 votes*

3. From the above results, Zebedeo John Opore was declared the duly elected Member of the National Assembly for Bonchari Constituency

having garnered 8992 votes. His closest rival was John Oroo Oyioka

with 8987 votes, a difference of 5 votes.

4. The Petitioners herein were not satisfied with the result and accordingly John Oroo Oyioka (Oroo) and Nyabaro Onditi (Nyabaro) filed the respective petitions which were consolidated for purposes of expediting the hearing since both petitions challenge the election of Zebedeo John Opore as Member of the National Assembly for Bonchari Constituency.

#### Petition No.2 of 2013

5. This petition was filed by Oroo on 26<sup>th</sup> March 2013. The Petition is supported by Oroo's own affidavit sworn on 25<sup>th</sup> March 2013 and the affidavits of Agaki Geoffrey Mbaka, PW3, Paul Mogire Sakawa, PW1, Albert Oanda Okenye, PW4, Cosmas Mekubo Mbaka who was not called as a witness and David Nyakoi Ongori, PW5, all of which affidavits were sworn on 25<sup>th</sup> March 2013.
6. Oroo complained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not conduct and manage the entire electoral process including tallying of votes in accord with the principles of free and fair elections such as a display of impartiality, neutrality, efficiency, accuracy and accountability; thereby contravening **Article 138 (2) of the Constitution**.
7. Oroo further complained that the 2<sup>nd</sup> Respondent herein, Peter Resa (Resa) failed to observe the principles of free and fair elections and instead chose to display favouritism and improper motives which led to the declaration of the wrong results of the election under the influence of the 3<sup>rd</sup> Respondent.
8. Resa is also accused of violating the principles of accuracy and transparency in the tallying of votes for Member of the National Assembly for Bonchari Constituency in that he (Resa) grossly infringed and manipulated the said result with trickery and unprecedented circularity with the sole purpose of declaring Zebedeo John Opore (Opore) the winner in the election regardless of the actual number of

votes garnered by the said Opore.

9. Oroo also accused Resa of abandoning the statutory procedure for tallying of votes by engaging himself in illegal acts aimed at declaring Opore the winner in the election of Member of the National Assembly for Bonchari Constituency. Oroo avers that Resa showed an open bias for Opore and that infact Resa's actions and conduct were geared towards ensuring Opore won the elections at all costs. Resa is said to have violated **Regulation 83 of the Elections (General Regulations) 2012** (the Regulations).
10. Oroo also avers that Resa misconducted himself in the manner in which he handled the entire process of tallying votes in the election in total disregard of **Regulation 83 of the Regulations and Section 59 of the Elections Act, 2011 (the Act)**. That the said misconduct on Resa's part resulted in a flawed vote tallying process which in turn manifestly affected a fair outcome of the election for Member of the National Assembly for Bonchari that gave Opore victory. Oroo claims that Resa committed the following election offences:-

- *Kept or made an entry which he knew or had reasonable cause to believe to be false or did not believe to be true;*
- *Without reasonable cause did or omitted to do anything in breach of his official duty;*
- *colluded with political party or candidate for purposes of giving undue advantage to the political party or candidate;*
- *Willfully contravened the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious gender or any other unlawful considerations.*

- *Refused to announce the results of the election, a clear indication of prejudice against Oroo and a preference for Opore.*

11. Oroo further avers that Resa declined to declare the results after the results were tallied showing Oroo as the winner, and that thereafter Resa engaged in some antics by tallying the results more than once when he (Resa) realized that Opore had not emerged the winner and proceeded to illegally and without justification, set aside the results of the first tally in which Oroo was clearly the winner. Oroo says that Resa abdicated his responsibility as Returning Officer (RO) when he publicly stated that since the margin between Oroo and Opore was too narrow for him to risk declaring the results. Oroo contends that Resa was under a duty to declare the results regardless of the margin of the win pitying Oroo's 8987 votes against Opore's 8899 during the third tally.
12. Oroo further avers that when Resa realized that Opore had not garnered the highest votes during the third retally, he (Resa) unlawfully called upon Agaki Geoffrey Mbaka (Geoffrey) PW3, to "announce the results", a request which Geoffrey allegedly declined. Oroo goes on to say that both Resa and the Independent Electoral and Boundaries Commission, (the IEBC) were in collusion to declare Opore the winner. Oroo sets out a raft of actions under paragraph 24 of the petition which actions he claims were intended to, and indeed benefited Opore. Among the actions was that Resa and Opore, the latter who was restless throughout the re-tallying process, walked out of the tallying centre together and on return to the hall, Resa is said to have told Charles Onyancha **"Your votes are way too low. At 6000 votes you cannot catch up no matter what. You have lost already. Let me deal with these two alone for now,"** and later, after having asked both Oroo and Opore to do the adding up of their votes respectively, Resa allegedly said **"I have the same figure myself. That is the total I got when tallying on my own. It is as if Opore has defeated Oroo. Now I move to the next task – tallying presidential votes."**
13. Oroo avers that during the final re-tallying exercise, Resa did not use Form 35 which is the primary document but instead relied on data from an unlawful source, namely laptop computer and thereby manipulated the results of the election; which result the IEBC finally gazetted vide the Kenya Gazette, Special Issue Vol. CXV-No.45 of 13<sup>th</sup> March 2013.
14. It is also Oroo's case that Resa unlawfully and illegally issued two different Form 36's instead of one after the results were declared, with the results of Oroo and Opore appearing thus:-

Candidate	Initial Form 36 Actual	Form Recorded	Revised Form 36 Actual	Form Recorded
John Oroo Oyioka	8987	8987	8987	8987
John Zebedeo Opore	8946	8992	8992	8992

15. For the above reasons, Oroo avers that he should have been

declared the winner of the election of Member of the National Assembly for Bonchari Constituency, had it not been for the collusion between Resa and Opore which occurred through the following conduct:-

- *Throughout the so-called re-tallying processes, Opore was restless and kept strutting in and out of the tallying centre;*
- *Resa and Opore walking out together from the tallying hall and the two*

*conversing in tones for a while, thereby making the people to shout at the two of them to stop colluding and manipulating the results before the two of them went back into the tallying hall;*

- *Resa undertaking a fourth tallying process in total disregard of the law and illegally setting aside the third tallying process;*
  - *Requiring Oroo and Opore to take part in tallying their votes;*
  - *Resa publicly telling Onyancha not to bother about the outcome of the fourth tallying exercise since he (Onyancha) had already lost the race;*
  - *Resa failing to accept Oroo's figures on the fourth retally and failing to declare the result;*
  - *Resa using unauthenticated and manipulable sources for the result that he declared with the aim of circumventing the laid down procedures so as to declare Opore the winner.*
16. Oroo also complains that the two form 36's exhibited a number of differences in the number of registered voters being 39629 against 39646; votes cast being 33294 as opposed to 33344; valid votes cast being 32954 against 32971; rejected votes being 321 as against 368 and Charles Onyancha's votes reading 6887 as against 6897 respectively. Oroo avers that the discrepancies between the two Form 36 in terms of the total votes cast being 33344 in the alleged revised Form 36 while the total valid votes and the rejected votes were 33339, led to a difference of 5 votes by which Opore beat Oroo.
  17. Oroo has also set out 9 polling stations at which he avers Opore unfairly gained 219 votes when the votes attributed to Opore are inflated in the revised Form 36. Oroo also says that at one of the named polling stations the total number of valid votes cast as per the revised Form 36 is 659 whereas Form 35 for the said station namely Nyakungu primary school – 019 – shows total number of valid votes as 620.
  18. Oroo also alleges that there were apparent discrepancies in the initial and revised Form 36 and the corresponding Form 35 in respect of Opore and that in this cluster Opore's votes went up by 165.
  19. Oroo also complains in his petition that Resa failed to accurately transfer the number of rejected votes from Form 35 for the declared election results relating to the 9 polling stations to Form 36 and in certain other cases, he inflated or reduced the number of rejected votes and that as a result of the inflation or reduction, it is not clear who of the 11 candidates benefited from the inflation or reduction. Further, Oroo accuses Resa of misrepresenting the number of valid votes in 5 polling stations, with the result that a total of 4 votes were lost while 4 votes were gained. Oroo thus avers that such votes, whether lost or gained affected the total tally of the candidates, among them himself and Opore.
  20. It is also alleged that Resa misreported the total number of votes cast at Rianyabaro Primary School – stream 2 (030) such that whereas Form 35 reflected 377 as total number of votes cast, Form 36 showed 380, resulting in a gain of 3 votes.
  21. Resa is also accused of misrepresenting the total number of registered voters in 4 polling stations: Kirwanda Primary – 016 – lost 50 registered voters; Botoro – 033 – gained 80 registered voters; Ngeri Polytechnic – 062 – lost one (1) vote while Nyasagati primary – 063 – gained 60 registered voters; with the net effect of understating the total number of registered voters by 50 votes.
  22. Oroo also avers that the total number of registered voters in respect of the 6 elections conducted on 4<sup>th</sup> March 2013 was different in the Form 36's as follows:- Presidential 39629; Senator 39750; Governor 40880; Member of National Assembly 39646; Woman Representative 40888 and that these differentials point to the fact that Resa grossly misrepresented data from Form 35's to Form 36 and also illegally altered the contents of Form 35 from various polling stations so that the figures reflected on Form 36 could agree with his manipulation of the actual tally of the votes in the election.
  23. Oroo also complains that Resa and those working under him altered Form 35 from 12 polling stations without countersigning the alterations. The alleged alterations are said to have affected Form 35's from Bomariba primary – 011; Nyamagundo Farmers – 012; Gesero Market – 013; Matongo primary – 015; Nyamokenye primary – 017; Nyamerako primary – 018; Nyakungu primary – 019; Riamaoncha primary – 023; Itierio Mixed primary – 031; Bogitaa primary school – 046; Omwari Primary – 049 and Nyamegukuna primary – 064. He said the alterations ranged from altering votes cast for various candidates to total number of valid votes cast. Oroo avers that by making these alterations without countersignatures, Resa committed several offences under the Act.
  24. Oroo also contends that the Presiding Officer (PO) for Genga Primary School – 051 – misconducted himself by acting in an opaque manner by first keeping all agents of the candidates,

some eight (8) metres away from where she was counting votes, and secondly by failing to prominently display the ballot papers so as to enable the said agents to have a clear view of which candidate had gained a particular vote and consequently disguised other candidates' votes purporting them to be Oporo's votes. Oroo avers that he was the one who garnered the highest number of votes during the election for Member of the National Assembly, a victory that was denied him by Resa and the IEBC with the collusion of Oporo. It was on the basis of these averments that Oroo asked the court to open the ballot boxes for scrutiny and recount of the votes cast in the election from the Form 35's handed over to Oroo's agents and annexed to his affidavit; Form 35 from various polling stations as submitted by Resa; Form 35's deposited in the ballot boxes of each polling station; the initial Form 36 and the revised Form 36.

25. Oroo alleges that Resa refused to supply him with the complete Form 36 from Bonchari Constituency for each of the 6 elections inspite of written requests for the same, thereby creating a clear impression that Resa was bent on protecting Oporo's interests at the election.

26. Because of the matters aforesaid Oroo prays THAT:-

- a. A declaration that the 3<sup>rd</sup> Respondent, Zebedeo John Oporo, was not duly elected and the election was void;
- b. A declaration that the Petitioner, John Oroo Oyioka was validly elected;
- c. In the alternative, an order for opening of the ballot boxes and scrutiny and counting of ballot papers therein for determination of accurate score of the candidates in the election whilst scrutinizing the accuracy of the contents of the following documents:-

- i. Form 35 from various polling stations handed to the Petitioner's agents and annexed to the supporting affidavit of

*the Petitioner;*

- ii. Form 35 from various polling stations submitted by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent;
- iii. Form 35 deposited in the ballot boxes of each polling station;
- iv. The initial Form 36;
- v. The revised Form 36.

- d. IN the alternative, an order for the conduct of a fresh election for Member of the National Assembly for Bonchari Constituency;

AND

- e. An order for costs that the Respondents pay the Petitioner the costs of this petition.

Petition No.4 of 2013

27. This petition was filed by Nyabaro who was a voter during the elections held on 4<sup>th</sup> March 2013. The petition dated 3<sup>rd</sup> April 2013 was filed on 5<sup>th</sup> April 2013. Nyabaro avers that the results announced by Resa as shown below did not reflect the true result of the election for Member of the National Assembly for Bonchari. The declared results were as follows:-

<u>Name of Candidate</u>	<u>Votes</u>
a. Albert Monyancha	160
b. Charles Onyancha	6897
c. David Ogega Oyugi	2821
d. David Okeyo Getate	100
e. John Mochama Orwochi	228
f. John Oroo Oyioka	8987
g. Mwendo Geoffrey Omwando	471

h. Samwel Ongoncho	362
i. Tom Marube Maisiba	3647
j. Victor Omare Omanwa	354
k. Zebedeo John Opore	8992

i. Registered voters	39646
ii. Total votes cast	33344
iii. Rejected votes	368
iv. Valid Votes cast	32971
v. Spoilt ballot papers	54
vi. Voter turnout%	84.10

28. The petition is supported by Nyabaro's own affidavit sworn on 3<sup>rd</sup> April 2013 and by other affidavits sworn by Kennedy Magokah Okwoyo (Okwoyo), Charles Onyancha (Onyancha) all dated 3<sup>rd</sup> April 2013.

29. Nyabaro contends that the election for Member of the National Assembly for Bonchari Constituency was not conducted in accordance with the principles laid down in the Act and the Regulations and other provisions of the law nor in accordance with the principles laid down therein nor in any law relating to such election nor in accordance with the principles of natural justice as a result of which the election was seriously affected to his detriment and that in the circumstances, Opore should not have been declared the winner of the said elections.

30. Specifically, Nyabaro contends that Resa or his subordinates committed the following unlawful and/or illegal acts: locking out or denying Onyancha's duly appointed agents access to the polling station and/or tallying hall; causing the arrest and detention of Onyancha's agents at Suneka Administration Police Station/Post; omitting, neglecting and denying Onyancha's duly appointed agents from accessing and or signing Form 35 contrary to the Act and the regulations; omitting, neglecting and intentionally manipulating the results from the polling stations in favour of Opore by inflating and/or reducing the votes cast, rejected or spoilt and indicating them in Form 36 contrary to the Act and the Regulations; refusing to show or give copies of Form 35's which was the primary document in the electoral process to Onyancha's duly appointed agents; failing to indicate all the names of the agents appointed by each candidate at each and every polling station and failing to give reasons for refusal of agents to sign Form 35 as well as failing to give his own (Resa's) statutory comments; neglecting, failing and refusing to sign Form 35 and validate the results with IEBC stamp; entering on the tally sheets results different from those indicated on Form 35.

31. Nyabaro further accuses Resa of using unofficial Form 35's which were not pre-printed to declare results which Form 35's did not contain the serial numbers, the names of the candidates, the name of the polling station and the constituency; allowing one agent to be in stream one and two at the same time contrary to the Act and the Regulations and such agent signing Form 35 in both streams; allowing agents to sign Form 35 for and on behalf of other agents and further presiding officers declaring and announcing results in the absence of agents; altering results without countersigning them and without giving the duly appointed agents of the candidates an opportunity to know the reason for the alteration and/or doctoring; announcing unsigned results from some polling stations and including them in the tally sheet when the same were invalid; allowing the votes cast at Botoro stream 2 (033) which were more than the registered voters for that stream to be included in the final tally when the said results were null and void in that the registered voters were 459 while 473 votes were declared as cast while Resa declared the registered voters as 479 instead of 459 and the votes cast as 473; and finally allowing wrong entries to be made on the tally sheet which entries were not indicative of the actual votes cast in a particular polling station thereby disenfranchising the voters and to the detriment of Onyancha. The affected stations under this last complaint according to Nyabaro were Mogumo (003), Kenyorora Primary School (007), Gesero Market (013), Nyamerako ELCK Primary School (018), Nyakungu Primary School (019), Mosando Primary School (021), Ekerore Primary School (022), Ekerubo Primary School (029), Botoro Polling station (033), Kiabusura primary school (035), Itibo Primary School (036), Ekerorano Market (045), Nyamiobo primary school (047), Gesero Primary School (052), Ngeri Polytechnic (062) and Kisii South Institute (065).

32. Nyabaro also accuses Resa as the RO and his PO's at each polling station of committing electoral breaches thus prejudicing the election results by:- entering wrong entries in the tally sheet and thereby declaring Opore winner instead of Oroo; arresting and detaining Onyanchar's agents and thereby denying the said agents the right to verify the announced results and sign statutory forms; denying the candidates the right to have the votes cast recounted inspite of oral request to do so contrary to the Act and the Regulations; failing to take control of the tallying process and thereby allowing electoral clerks to enter into the tally sheet figures which were neither representative of the votes cast nor in agreement with forms 35 and 36; making many wrong entries in the tally sheet and also failing to make correct calculations so as to arrive at the correct totals.

33. By reason of the matters aforesaid, Nyabaro asks the court for the following reliefs:-

a. *THAT it be ordered that there be a scrutiny of the votes recorded as*

*having been cast in the parliamentary elections in the constituency;*

b. *THAT it be ordered that there be a recount of the ballot papers cast at the elections in the constituency;*

c. *THAT the said parliamentary elections in Bonchari Constituency be determined and declared null and void;*

d. *THAT the said election of the 1<sup>st</sup> Respondent [Opore] to the National Assembly be declared null and void;*

e. *THAT the respondents be condemned to pay your Petitioner's costs of this petition.*

#### Opore's case in Petition No.4 of 2013

34. Opore, as 1<sup>st</sup> Respondent filed his response to petition on 26<sup>th</sup> April 2013 through his advocates M/s Marende & Nyaundi Advocates. While acknowledging the results for each of the 11 candidates as declared by Resa, Opore contends that both Resa and the IEBC carried out the elections in Bonchari in accordance with the general principles of the law regarding elections, and therefore that Oroo's allegations of breach of the law lacks substance and comprise only of half tales and without basis of law.

35. Opore avers that Regulation 63 of the Regulations empowers a PO to order the removal of any agent from the polling centre if such agent misconducts himself/herself during the voting and tallying exercise, and that in fact that is what happened with Atandi and Okwoyo. Opore also says that some of Onyanchar's agents tried to gain access into the polling stations without proper identification, and that after Atandi was asked to leave the polling station, another agent was brought in to represent the interests of Onyanchar. In brief, Opore says that none of Onyanchar's agents were arrested as alleged, or at all.

36. Opore denies that the election officials showed any preference for him during the election. He denies omission of any votes intended for his rivals from the final tally of such candidates. He also denies allegations that some agents were denied access to the table where the results were being counted and that in any event it was clear during the counting of the votes that he was the recipient of majority votes. Opore avers that both Oroo and Nyabaro are engaging in trivial litigation based on unsubstantiated claims and that if any agents did not sign the requisite primary documents, such agents did so on their own volition. Further, he asserts that failure by PO's to make statutory comments on Form 35's is not fatal to the result of the election.

37. It is also Opore's contention that the results declared as "**votes cast**" for each candidate in the Form 35's from all polling stations are accurately reflected in Form 36 and that any allegation to the contrary cannot stand the test of the scrutiny of the relevant Form 35's. It is also Opore's case that there were no unofficial Form 35's signed by his agents or at all. He also avers that allegations that some polling stations did not have the actual votes cast shown are not correct because the results in Form 35's clearly agree with those in Form 36, and that the results in Form 36 were correct, thereby leading to Resa declaring him the winner of the election of Member of the National Assembly for Bonchari.

38. Opore further maintains that in any event, he beat Onyanchar by a whole 2095 votes and that in the circumstances, Nyabaro's case is not only frivolous but is misconceived and without factual basis.

He prays that the petition be dismissed in its entirety and the court do declare that he was duly elected and the election was valid and legitimate. He prays for costs against Nyabaro.

#### Opore's case in Petition No.2 of 2013

39. Opore's response which is dated 16<sup>th</sup> April 2013 was filed on 17<sup>th</sup> April 2013. He denies that Resa conducted himself in anyway suggesting that the said Resa made attempts to give advantage to him (Opore) and further that, Oroo has not placed any evidence before court to prove such an allegation. Concerning allegations that Resa tallied the results from Form 35 more than once, Opore avers that there is no law prescribing how many times a RO may tally the results and that it was open to Resa to tally such results as many times as possible for the purpose of improving the accuracy and accountability thereof.
40. Opore also avers that at no time during the tallying process did Resa announce that Oroo had garnered 9007 votes; and that the true position is that this figure had been suggested by Oroo's agent who had obtained a wrong addition of Oroo's votes at Itierio Girls Boarding Primary School (027) streams 1 and 2 where instead of recording 167 votes, he had recorded 187 votes. Opore also avers that during the three tallies, his votes remained constant at 8992 and that at no time did he have 8899 votes as alleged by Oroo. Opore accuses Oroo of mere speculation with the election results based on illusory and fictional statements made without basis and intended only to cloud the real happenings at the tallying centre. He also says that at no time did the tallying exercise show him to be trailing Oroo.
41. Opore also denies the allegation that during the tallying exercise, he and Resa stepped out of the tallying centre together and held a discussion before Resa came back to the tallying hall to announce the results. He stated that Resa stepped out of the tallying centre only once accompanied by his (Resa's) bodyguard. To Opore such allegations had no basis. He also says that none of the three tallies gave his votes as 8946, as infact Oroo suggests that Opore's votes were allegedly 8899 votes.
42. Concerning the alleged discrepancies at Bogitaa (046), Igonga (004), streams 1 and 2, Isamwera (005), Botoro (033) stream 2, Suneka Baraza Hall (042) and Gesero primary school (052), Opore says that there were no such discrepancies either in the votes cast for himself or in respect of Form 35's and Form 36. Opore explains that Oroo's view is a misconceived attempt to explain away fictional and invented allegations which have no basis whatsoever. Opore also avers that he was unaware of any misconduct on the part of the PO for Genga primary school. He also avers that allegations that Oroo's agents were kept some 8 metres away from the counting table is not true because the room used for counting was fairly small and all agents were about one (1) metre away from the counting area.
43. Opore also denies the existence of two (2) Form 36's and says that if such two (2) Form 36's existed, the same would also have been a concern of Nyabaro in EP No.4 of 2013. It is Opore's case that Oroo's allegations in this petition are misconceived, baseless and without actual basis. He wants the petition dismissed with costs so that he is declared as having been duly elected Member of the National Assembly and that the election for the same was valid and genuine.
44. Opore's response was supported by twenty three (23) affidavits.

#### The case for Resa and the IEBC

#### Election Petition NO.2 of 2013

45. In response to EP 2 of 2013, Resa swore a Replying Affidavit dated 16<sup>th</sup> April 2013 in which he denied all the allegations leveled against him by Oroo. Resa and the IEBC also filed a response dated 16<sup>th</sup> April 2013. Both respondents aver that Oroo has completely failed to discharge the burden of proof to validate the factual assertions made in the petition and that on that basis, the petition should fail. The two Respondents also contend that there were no grave errors or at all committed nor was there contravention of the letter, spirit and object of the Constitution, the Act, the Rules and the Regulations. Both respondents affirm that the election for Member of the National Assembly for Bonchari Constituency was conducted in accordance with the law and that no favouritism of any kind was committed by either Resa or any other election official. The two

respondents deny that there was more than one tallying process or that Resa asked Agaka Geoffrey Mbaka to declare the results. The two Respondents also deny that there were two (2) Form 36's or that there were any discrepancies in the votes cast in any of the polling stations or that there were any multiplication of votes cast and the number of registered voters. The respondents also contend that any differences that may have arisen did not affect the tallying and the outcome of the election of Member of Parliament for Bonchari.

46. It is also the respondents' case that there were no alterations in Form 35's and consequently, that Resa correctly and accurately presented the number of registered voters for Bonchari in Form 36 as 39646 a figure that is in agreement with the voter register. The respondents contend that Ooro's petition comprises manifest falsehoods, misrepresentations and half truths which are calculated to mislead the court. They pray that the petition be dismissed with costs to themselves.

#### Election Petition NO.4 of 2013

47. In response to EP No.4 of 2013, the two respondents filed an Answer to Petition dated 24<sup>th</sup> April 2013 and filed in court on the same day. In addition, Resa swore a Replying Affidavit dated 24<sup>th</sup> April 2013 accompanied by annexures thereto.

48. The Respondents contend that at all stages of the electoral process, they were facilitative, open and co-operative and that all the PO's for the 65 polling stations supplied the statutory forms to the intended parties envisaged and pursuant to **sections 30 and 42** of the **Act** as read together with **Regulations 83 (1) (a) and (c)** of the **Regulations**. Resa denies locking out any duly appointed agents of any candidate, or locking out any agents and especially the duly appointed agents of Onyancha as alleged or at all.

49. The Respondents, also contend that all the Form 35's from all the 65 polling stations in Bonchari Constituency were duly signed and stamped and that the results therefrom duly entered in the tally sheet on Form 36. The respondents also aver that the duly appointed agents who were present had the opportunity to sign the Form 35's, and that all the allegations made by Nyabaro in his petition are mere falsehoods which run foul to **section 78** of the **Act** and that the same should be dismissed with costs. The court has read **section 78** of the **Act** which deals with security for costs and does not see its relevance in the context of the Respondents' submissions.

#### Various Applications

50. In EP No.2 of 2013 Ooro filed a Notice of Motion dated 9<sup>th</sup> May 2013 seeking orders THAT:-

- a. *The ballot boxes used in the election of Member of National Assembly for Bonchari Constituency be opened and the ballot papers therein be scrutinized and counted in the course of the hearing of the petition in order to determine the accurate score of the candidates in the election and the accuracy of the contents of the following documents to aid in the determination of the issues raised in the petition:*
  - i. *Form 35 from various polling stations handed to the Petitioner's agents and annexed to the supporting affidavit of the Petitioner;*
  - ii. *Form 35 from various polling stations submitted by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent;*
  - iii. *Form 35 deposited in the ballot boxes of each polling station;*
  - iv. *The initial Form 36;*
  - v. *The revised Form 36;*
- b. *Costs of this application be in the cause.*

51. In EP No.4 of 2013, Nyabaro filed a Notice of Motion dated 20<sup>th</sup> May 2013 seeking orders that the officer in charge of Suneka Administration Police Post be ordered to produce in court the Occurrence Book for 4<sup>th</sup> March 2013 and 5<sup>th</sup> March 2013; and that the costs of the application be provided for.

52. On 3<sup>rd</sup> July 2013, Nyabaro filed yet another Notice of Motion seeking orders that there be a

scrutiny of the votes cast in the election of the Member of National Assembly for Bonchari Constituency held on 4<sup>th</sup> March 2013. He also prayed that the costs of the application be provided for.

53. On the 27<sup>th</sup> May 2013, the day of the pre-trial conference, the parties agreed to canvass the application dated 9<sup>th</sup> May 2013 by way of written submissions. The submissions were highlighted before me on 3<sup>rd</sup> June 2013. By the ruling delivered on 2<sup>nd</sup> July 2013, I allowed the application for a recount and ascertainment of the number of votes cast for each candidate for Member of the National Assembly obtained in each of the 82 (actual number is 81) polling stations in Bonchari. The recount was undertaken by the Deputy Registrar of this court between 5<sup>th</sup> and 18<sup>th</sup> July 2013. More on this matter later in this judgment during the analysis of the results of the recount.
54. The application dated 20<sup>th</sup> May 2013 in EP No.4 of 2013 for production of the Occurrence Book was allowed by consent and the concerned officer in charge duly appeared in court and testified on 1<sup>st</sup> July 2013 and produced the Occurrence Book.
55. By a Notice of Motion dated 3<sup>rd</sup> July 2013, Opre also asked the court for scrutiny. When the parties appeared before me on 3<sup>rd</sup> July 2013, they agreed to submerge the application dated 2<sup>nd</sup> July 2013 filed in EP No.2 of 2013 in the application dated 3<sup>rd</sup> July 2013 in EP No.4 of 2013. Consequently, the parties entered the following consent concerning the 2 applications:-

1. *The application dated 2<sup>nd</sup> July 2013 in Petition NO.2 of 2013 and the application dated 3<sup>rd</sup> July 2013 in Petition No.4 of 2013 be and are hereby consolidated.*
2. *The said applications as consolidated be and are hereby allowed as*

*prayed.*

3. *The scrutiny agreed herein shall proceed simultaneously with the recount ordered in Petition No.2 of 2013 on 2<sup>nd</sup> July 2013.*
4. *Pursuant to Rule 21 of the Election Rules, the Returning Officer for Bonchari Constituency shall deliver to the Registrar the ballot boxes in respect of the election of Member of the National Assembly not less than 48 hours before 5<sup>th</sup> July 2013.*
5. *The scrutiny and recount shall be undertaken on a day to day basis (including the night, if necessary) starting at 9.00 a.m. on 5<sup>th</sup> July 2013.*
6. *Mention on 19<sup>th</sup> July 2013 as earlier ordered on 2<sup>nd</sup> July 2013.*
7. *The petitioners and the Respondents are allowed at the counting and scrutiny of the votes.*

It was Further agreed as follows:-

1. *The names of the agents to attend the recounting and scrutiny exercise to be furnished by parties to the Deputy Registrar of this court by 9.00 a.m. on 4<sup>th</sup> July 2013.*

56. The following 49 polling centres underwent the scrutiny/recount exercise. Nyabimwa primary school (001), Nyabieyo Secondary school (002), Mogumo primary school (003), Igonga primary school (004), Isamwera primary school (005), Kenyorora primary school (007), Miranga primary school (008), Bomariba primary school (011), Nyamagundo Farmers (012), Gesero Market (013), Matongo primary school (015), Kirwanda primary school (016), Nyamokenye primary school (017), Nyamerako primary school (018), Nyakungu primary school (019), Bogiakumu primary (020), Mosando primary school (021), Ekerore primary school (022), Riamaoncha primary school (023), Rianyapara primary school (024), Nyabioto centre Hall (026), Itierio Girls Boarding (027), Nyabioto Centre Hall (028), Ekerubo primary school (029), Rianyabaro primary school (030), Itierio Mixed (031), Botoro primary school (033), Suneka primary School (034), Kiabosura primary school (035), Itibo primary school (036), Kioge primary school (038), Suneka Baraza Hall (042), Bonyaoro secondary school (043), Suneka Airstrip (044), Ekerorano (045), Bogitaa primary school (046), Nyamiobo primary school (047), Nyamare primary school (048), Omwari primary school (049), Genga primary school (051), Gesero primary school (052), Kerina primary school (053), Nyangena primary school (057), Mwata primary school (058), Nyotoima primary

school (059), Sigisi primary school (060), Ngeri Polytechnic (062), Nyasagati primary school (063) and Nyamegukuna (064).

### Pre-Trial Conference

57. At the pre-trial conference which was held on 27<sup>th</sup> May 2013, the

court was informed that Oroo would call 6 witnesses while Nyabaro would call 7 witnesses. The court was also informed that Opore would call 25 witnesses in Petition NO.2 of 2013 and 5 witnesses in petition No.4 of 2013. The other respondents, namely Resa and the IEBC intimated that they would call 7 witnesses in Petition NO.2 of 2013 and 17 witnesses in Petition No.4 of 2013.

58. At the hearing, however, Oroo testified and called 4 witnesses, namely Paul Mogire Sakawa (PW1–Sakawa), Agaki Geoffrey Mbaka (PW3–Geoffrey), Albert Oanda Okenye (PW4 – Okenye) and David Nyakoi Ongori (PW5–Ongori), while Nyabaro testified as PW10 and called 4 witnesses: Japheth Okemwa Onderi (PW6–Onderi), Charles Onyancha (PW7–Onyancha), Kennedy Okwoyo (PW8–Okwoyo),

Atandi Machuka (PW9–Atandi).

59. Opore testified as DW12 and called 6 witnesses: Erick Oigo Nyakeya who was the Chief agent (DW7–Oigo), Florence Nyamonte, his agent at Nyamerako primary school (DW8–Florence), Joseph Mochama Ongoro (DW9–Mochama), Evans Orangi Guto (DW10–Guto), Charles Omweri Machuka (DW11–Machuka) and Resa Peter Otieno (DW13–Resa).

60. The IEBC called 4 witnesses among them Resa who testified as DW4. The other witnesses were: Alexander Okeiga Obwocha (DW1 – Obwocha), the PO at Gesero Market (013), Albert Mariaria Mekubo (DW2 – Mariaria), the PO at Bomariba primary school (013) and Susan Obachi (DW3 – Susan) PO at Genga polling station (051).

### Issues for Determination

61. By agreement of the parties, and with the approval of the court, the following issues were isolated for determination:-

- a. *Whether the 4<sup>th</sup> March 2013 election in respect of Member of the National Assembly for Bonchari Constituency was conducted in accordance with the Constitution, the Act, the Rules and the Regulations;*
- b. *Whether there existed more than one (1) Form 36, and if so, which of them was used to announce the results if there were two (2) Form 36's?*
- c. *Was it lawful to have the two (2) Form 36's?*
- d. *Whether there was collusion between the RO and Zebedeo John Opore to influence the election result in favour of Opore before Opore was announced the winner.*
- e. *Whether the mandatory electoral Form 35's were duly signed by the agents and whether the agents were given copies of the said Forms?*
- f. *Whether there were any alterations on the statutory electoral documents*

*and in particular in Form 35 and whether such alterations had an effect on the final result?*

- g. *Whether or not the agents for Charles Onyancha were arrested and placed in police cells at the instigation of Opore.*
- h. *Who shall bear the costs of this litigation?*

62. Parties made extensive submissions on all the above issues, with Oroo dwelling mainly on the alleged alterations and inaccuracies on Form 35's and their attendant effect on the election result;

while Nyabaro concentrated on issues to do with arrest and/or intimidation of agents; denial of access of agents to polling stations, alteration of results; different Form 35's with different results; polling stations whose results were not properly captured in Form 36; polling stations which had no or few agents; polling stations with more agents than the number of candidates; polling stations (rather Form 35's) without the IEBC validation stamp; polling stations with unofficial Form 35's and tally sheet Form 36's errors.

63. All the parties also made extensive submissions on the report on recount and scrutiny. Before I consider the issues in detail, I shall first of all look at the nature of election disputes and also set out the guiding principles in determining election disputes.

#### Nature of Election Disputes

64. Election petitions constitute a unique category of disputes, requiring a unique set of laws and regulations to guide the courts in a just determination of the same. Although courts are aware that election disputes are by nature political, yet the courts cannot shy away from rendering legal decisions when such disputes are brought before them. The burden on the courts is onerous because of the consequences that flow from such decisions which impact on all spheres of life of the country. The courts are therefore called upon to exercise caution when dealing with election disputes. 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 on 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.”**

I shall be duly guided by these principles in seeking to do justice in this petition.

#### Burden and Standard of Proof

65. The burden and standard of proof to be borne and met by the petitioners herein is at the heart of this petition and whether the petition succeeds or fails depends on whether or not the petitioners have attained the established threshold. The Supreme Court of Kenya in the case of **Raila Odinga –vs- IEBC & 3 others – Election Petition NO. 5 of 2013 (2013) e KLR** set the standard of proof to be observed by Kenyan courts when handling election petitions. In this regard, 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.”**

66.It was further stated by the same Court in the **Raila case** (above), 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.”**

67.And in the **Joho case** (supra) the court spoke emphatically about the burden and standard of proof in election disputes in the following words:-

**“--- 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.”**

68.Courts in other jurisdictions are also agreed that it is the duty of the petitioner in an election petition to prove his case to the satisfaction of the court, in accordance with the requisite standard of proof. This was the holding of the court in **Colonel Dr. Kizza Besigye –vs- Museveni Yoweri Kaguta & another – Election Petition No.1 of 2001** (Uganda). It was also the majority opinion in **Opitz –vs- Wrzesnewskyj 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 with the law, 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 result of the election. The court also stated that the petitioner who makes the assertions must prove each and every allegation of fact by adducing credible evidence and if the petitioner fails to do so, his case will fail. It is only upon furnishing credible evidence to the court on the facts alleged that 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 also held 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, and that even where the non-compliance is substantial, the court will still be called upon to consider the effect of such non-compliance on the result of the election before deciding whether or not to annul the result.

69.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 “any allegations made in an election petition must be proved to the satisfaction of the court on a standard of proof that is higher than balance of probability”.

70.The Courts in India have also spoken loudly on the need for petitioners to place cogent evidence before the court in election petitions. In **Rahim Khan –vs- Khurshid Ahmed AIR [1975] SC 290** the Supreme Court of India 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].

71. From the above authorities, there is no doubt in my mind that the burden on the petitioner herein is a heavy one as the court will not be moved by unsubstantiated and irresponsible evidence. Both Oroo and Nyabaro must not only prove that certain irregularities were committed during the 4<sup>th</sup> March 2013 election for Member of the National Assembly for Bonchari, but must also prove, to the satisfaction of the court that such irregularities, affected the result of the election. In **Mbowe – vs- Eliufoo [1967] EA 240**, a candidate who lost in the election for Member of the National assembly in the Kilimanjaro West Hai Constituency petitioned the High Court in Tanzania for nullification of the election on grounds that: **i)** the polling agent was appointed by the working committee of the District Executive Committee and not by the District Executive Committee as provided by the National Assembly (Elections) (Amendment) Act 1965, **section 6; ii)** voters who wished to vote for the petitioner were informed that the supply of ballot papers was exhausted; and **iii)** members of TANU YOUTH League organized a campaign on behalf of the respondent and used threats to influence electors into voting on behalf of the respondent.

72. In the judgment, GEORGES CJ, the Court said that the burden of proof in an election petition lay on the petitioner as it is him who seeks to have the election declared null and void, and that the proof required is to the satisfaction of the court. The court therefore held, *inter alia*, that:-

- i. *the term “proved to the satisfaction of the Court” as used in National Assembly (Elections) Act No.11 of 1964, s.99, meant that where a reasonable doubt existed, then it was impossible to say that one was satisfied, and the standard of proof in this case must be such that one had no reasonable doubt that one or more of the grounds set out in s.99 had been established;*
- ii. *“affected the 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;*
- iii. *the appointment of the polling agents was bad but the non-compliance with National assembly (Elections) (Amendment) Act 1965, s.6, was not substantial and did not affect the result of the election;*
- iv. *consequent on the exhaustion of the supply of ballot papers, no voting*

*could take place for three quarters of an hour but this was not a substantial non-compliance within the meaning of National Assembly (Election) Act 1964 s.99 (2) (b);*

73. In my understanding therefore, the standard of proof required of petitioners in election petitions is very high, in fact so high that this court should have no lingering doubt that the alleged irregularities were committed and that they affected the result of the election.

74. It is also important to state here that the petitioners in this matter are bound by their pleadings and nothing outside of that box is to be admitted by the court. I am duly guided in this respect by the words of Kimaru J in **Mohamud Muhumed Sirat –vs- Ali Hassan Abdirahiman & 2 others – Nairobi Petition No.15 of 2008 [2010] e KLR** to the effect that “*From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the*

*petitioner's case [on] which he adduced evidence, but which were not based on the pleadings that he had filed in court, and in particular, the petition."*

75. In a nutshell, the court must be satisfied that the claims sought to be proved by both Oroo and Nyabaro were pleaded, while bearing in mind the fact that the primary consideration of this court in this matter is whether the result that is being challenged reflected the will of the people of Bonchari and whether the electoral process that gave birth to the said result was free, fair, accurate and transparent. Lord Denning MR in the case of **Morgan & Others –vs- Simpson & Another [1974] 3 All ER 722**, stated the following at page 728:-

**“(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected or not ---**

**(2) If the election was so conducted that it was substantially in accordance with the law, as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.**

**(3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the result, then the election is vitiated.”**

76. From the holding in the **Morgan case** (above) only two circumstances will lead to nullification of an election:-

- *When the election is so badly conducted that it was not substantially in accordance with the law as to elections; and*
- *When a breach of the rules or a mistake at the pools affects the results.*

77. The Act has embodied the above principles in its provisions to ensure that in all electoral disputes the will of the electorate is respected. Section 83 of the Act provides thus:-

**“83. 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.”**

78. With the above principles in mind, I now proceed to consider the issues that were framed for determination. It is to be noted at the outset of this segment of the judgment that the issues as framed, apart from the issue of costs, are necessarily cross-cutting, with the aim of establishing whether the 4<sup>th</sup> March 2013 election in Bonchari Constituency was conducted in accordance with the Constitution, the Act, the Rules and Regulations and the Principles as to elections. Oroo's position is that the election was so badly conducted that the result therefrom should not be allowed to stand.

79. In regard to this issue, Oroo wants this court to determine the following 5 sub issues:-

- a. Whether Forms 35 were completed in accordance with the law, and if not, if the same affected the results as presented by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**
- b. Whether Forms 35 were altered and if the same affected the final results as presented by the**

## **1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

- c. Whether there were inaccuracies in Forms 35 and 36 and whether the same affected the results as presented by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**
- d. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the election in a free, fair and transparent manner.**

80. Nyabaro also alleged that the election was not conducted in

accordance with the Constitution, the Act, the Rules and the Regulations on grounds that his agents were arrested and intimidated and denied access to polling station room, that the election results were altered in addition to many other irregularities involving Form 35's such as some Form 35's having different results, some polling stations using unofficial Form 35's and results in Form 35 not being properly captured in Form 36. Nyabaro also complains that certain polling stations had few or no agents while some had more agents than prescribed by the law. Nyabaro contends that all these anomalies resulted in an election that was not conducted in accordance with the Constitution, the Act, the Rules and the Regulations.

### Arrest and/or Intimidation of Agents

- 81. Nyabaro alleged that two of Onyancha's agents, namely Atandi and Okwoyo were arrested while at Suneka Baraza polling station room; that Atandi was taken to the Suneka Administrative police post where he was held until about 6.00 p.m. and by that time the declaration and announcement of the results was made by Resa. That as a result of the arrest and confinement, Atandi did not discharge his duties as agent and therefore the results as declared by Resa were not witnessed by Atandi.
- 82. As regards Okwoyo, it was alleged that he was arrested from the Suneka Baraza polling centre after he raised concerns on certain irregularities taking place within the polling centre. Admittedly, Okwoyo did not have credentials to allow him into the Suneka Baraza polling room.
- 83. Though Nyabaro alleges intimidation of these agents, he failed to show by his evidence how the two were intimidated. Furthermore, he confirmed during cross examination that he was in fact not present at Suneka Baraza Hall when the alleged intimidation took place.
- 84. In his evidence, during cross-examination, Atandi stated that at about 2.00 p.m. on 4<sup>th</sup> March 2013, there was some commotion at the polling station.
- 85. PW6, NO.9008842 Inspector Japheth Okemwa Omweri, a witness for Nyabaro testified that about 3.00 p.m. on 4<sup>th</sup> March 2013, he went to Suneka Baraza Hall after he heard a commotion within the polling hall; that the commotion was between Atandi and other agents and that when he arrived at the hall, he found Resa had already intervened and brought some order among the agents. According to PW6, the dispute between Atandi and other agents arose from the allegation that Atandi was assisting voters to vote for the party he was representing although no voter came forward to confirm the allegations.
- 86. PW6 also testified that later the same day, Okwoyo entered the counting hall without authority and that as a result, he had to be escorted out of the polling hall so as to preserve the peace of the polling station. The evidence of PW6 is that both Atandi and Okwoyo were released without charge first because Atandi had committed no offence and two because Okwoyo showed remorse.
- 87. My findings on this allegation are that the evidence before me does not support the allegation of arrest and or intimidation. Even if it were to be accepted that there was arrest, the same would have been as a result of the unbecoming behavior by both Atandi and Okwoyo at different times while they were at Suneka Baraza Hall. The evidence of the OB produced by PW6 shows that there was no arrest of either Atandi or Okwoyo. Okwoyo had no authority to be inside the counting hall and Resa had a good reason to remove him from the hall.
- 88. As for Atandi, he appeared to be a man who had little regard for the truth and that may also explain why, in spite of witnesses who were yet to testify being asked to stay outside the court, he remained in court while other witnesses were testifying.

89.I therefore find no evidence to support the allegation of arrest and intimidation. In any event, even if such allegation were true, it was not so substantial as to affect the result of the election.

#### Denial of Access to Polling Station Room

90. Allegations of denial of access to polling station room were made by both Atandi and Okwoyo after they were removed from the Suneka Baraza hall. The evidence on record clearly shows that Atandi was removed because he had caused a commotion with fellow agents; while Okwoyo was removed because of having entered the hall without authority. The allegations by Atandi and Okwoyo are therefore not supported by evidence. I further find that any ejection of these two from the Suneka Baraza Hall was because of their own making. Okwoyo was not one of the authorized agents to be present in the tallying centre. Atandi had to be removed for causing a commotion with other agents and for apparently interfering with the voting process, thereby disrupting the peace.

91. Under **Regulation 63**, the presiding officer is under a duty to keep order at his or her polling station and **Regulation 63 (2)** in particular provides that:-

**“(2) The presiding officer may order the removal of any person who misconducts himself or herself at the polling station, or fails to obey any lawful instructions or orders of the presiding officer and such person shall be removed by the police officer present.”**

92. In the circumstances, the claims by both Atandi and Okwoyo have no basis and even if they were proved, the same could not be said to have been a departure from the law and principles of elections; nor could it be said that Atandi's and Okwoyo's denial of access to the polling station room in these circumstances affected the result of the election. And further, Resa would not have sat back in the face of such disruption that threatened the peace at the tallying centre.

#### Complaints touching on Form 35's – alterations with or without signature, lack of IEBC validation stamps, lack of signature by agents and/or IEBC Officials and use of unofficial Form 35.

93. Both Oroo and Nyabaro pleaded the above irregularities involving Form 35's and urged the court to find that the said errors, irregularities and omissions went to the root of the election in which Oporo was declared the winner, and that accordingly, the election should be declared null and void because it was not fair, accurate, free and transparent. Some of the errors and irregularities pointed out by both Oroo and Nyabaro have been admitted by both Resa and the IEBC and also by Obwocha who testified as DW1.

94. It was contented that all the alterations which were not countersigned had an effect on the final result and that the fact that the agents did not countersign the alterations proves that the unilateral alterations by the presiding officers were mischievous and effectively tampered with the results, and that such alterations cannot be said to be mere innocent errors. In the case of **William Kabogo Gitau –vs- George Thuo & 2 others [2010] e KLR** the trial court when dealing with Form 16A under the old electoral law, the equivalent of Form 35 under the current electoral law stated as follows:-

**“There are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to Form 16As where specific results of specific candidates were either cancelled or altered without the presiding officer countersigning the cancellation or alteration. The 3<sup>rd</sup> respondent explained away the cancellations and alterations to be on account of, once again, human error which, according to him, was to be expected in the circumstances. Having evaluated the questioned Form 16As, it was clear to the court that whereas the regulations did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation or alteration in a statutory form, the same should be countersigned by the concerned official. In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties, including the**

**members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the Form 16As produced in this court raised question regarding the veracity and authenticity of the said results. The said Form 16As cannot in the circumstances be said to contain valid results of the polling stations in question.”**

95. I have examined all the Form 35's complained of and confirm, as it was confirmed by the witnesses during cross examination that there were all these alterations without the same being countersigned. On some of the Forms it is not possible just by looking at the copies availed to court, to tell what the original or subsequent figures on the form were. It was because of these errors that the court ordered a recount and scrutiny of the ballots. Whereas, such errors and irregularities would not necessarily lead to nullification of the election, I will consider the issue more critically when dealing with the report of the recount and scrutiny before reaching the conclusion as to whether or not the result was affected by these breaches.

96. Both Oroo and Nyabaro also complained that the candidates' agents did not sign the Form 35's, it being established during the scrutiny and recount that Form 35's from 57 out of 64 polling stations did not have the agents' signatures. Further that some Form 35's from 12 polling stations lacked the IEBC validation and on yet other Form 35's the presiding officers did not give their statutory comments all being contrary to Regulation 79 of the Regulations which provides as follows:-

**“79 (1) The presiding officer, the candidates or agents shall sign the  
declaration in respect of the elections.**

**(2) For purposes of sub regulation (1), the declaration for –**

**a. presidential election results shall be in Form 34 set out in the Schedule;**

**b. National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.**

**(2) The presiding officer shall –**

**(a) immediately announce the results of the voting at that polling station before communicating the results to the returning officer;**

**(b) request each of the candidates or agent then present to append his or her signature;**

**(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and**

**(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.**

**(3) Where any candidate or agent refuses or otherwise fails to**

**sign the declaration form, the candidate or agents shall be**

**required to record the reasons for the refusal or failure**

**to sign.**

**(4) Where a candidate or an agent refuses or fails to record the**

**reasons for refusal or failure to sign the declaration form,**

**the presiding officer shall record the fact of their refusal or**

**failure to sign the declaration form.**

**(5) Where any candidate or agent of a candidate is absent, the**

**presiding officer shall record the fact of their absence.**

**(6) the refusal or failure of a candidate or an agent to sign a**

**declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub regulation (2) (a).**

**(7) the absence of a candidate or an agent at the signing of a**

**declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results**

**announced.**

**(8) After complying with the provisions of this regulation, the**

**presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof envelopes to the returning officer who shall take charge thereof.”**

97. In terms of the wording of **Regulation 79** of the **Regulations** (above), and **section 83** of the **Act**, mere non-compliance with the Regulation does not invalidate the result, and unless the petitioners prove that there are certain other factors that would result in a substantial departure from the law and the principles of elections, the result would not be affected. Applying the provisions of **section 83** of the **Act**, the non-compliance was not such as would invalidate the results announced under **Regulation 79 (2) (a)** (above). Further I am satisfied with the explanation given by the Respondents as to why some agents did not sign the Form 35's. In the circumstances, I dismiss the petitioner's allegation that the agents' failure to sign the Form 35's affected the result.

98. Both Oroo and Nyabaro also complained that Resa failed to make statutory comments on Form 35's and that such failure resulted in a negative effect on the result of the election, since the results contained on the improper forms are not verifiable and cannot therefore be authenticated as to their accuracy.

99. Upon evaluation of all the evidence on this issue, there is indeed evidence that Resa and some of his Presiding Officers did not give Statutory comments. The question that the court must answer is whether these irregularities or any of them materially affected the outcome of the result. **Section 83** of the **Act** provides that 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.

100. Applying the principle in **Morgan –vs- Simpson** (supra) I am of the considered view that the failure to give statutory comments on the Form 35's did not materially affect the result. In this regard, I am in agreement with the Court's view in the case of **Wawinya Ndeti –vs- IEBC & 4 others, EP No.4 of 2013**(Machakos), a case that was cited with approval by Ong'udi J in **Embu EP No.1 of 2013 – Kithengi Kiragu –vs- Martin Nyaga Wambora & 2 others** that:-

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

**is important that the ultimate will of the electorate is ascertained and upheld at all costs.”**

101. It is thus the duty of this court to ensure that the will of the people of Bonchari is ascertained and upheld by this court, because an election is not the decision of one woman or one man whether working as an election official or sitting as a judge over an electoral dispute. Those who turn out to cast their ballots are the real arbiters between the competing political interests whether such interests are between political parties or between individual candidates. In **Camsell –vs- Rabesca [1987] N.W.T.R. 186 (S.C.)** it was held:-

**“It is clear that in every election, a fortiori those in urban ridings 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.”**

102. It is common knowledge that the 4<sup>th</sup> March 2013 elections took a much longer time than any other election previously conducted in this country. Some officers did not sleep for two or more days, and in the circumstances, errors were bound to occur. The issue that this court must face and determine is whether those errors that have been pointed out by both Oroo and Nyabaro with regard to the non-compliance with **Regulation 79** in particular were such as would give rise to the nullification of the election of Member of the National Assembly for Bonchari. In my view, and from the evidence on record, that is not the position. Both Oroo and Nyabaro alleged that there was collusion between Resa and Oopore to steal the election from Oroo, but no evidence was placed before me showing that indeed such collusion took place. The allegation that Resa and Oopore walked out of the tallying room together, stood at the door and conversed before coming back to the tallying centre was demolished by Resa’s own testimony and that of Oopore. Resa stated that he went out of the tallying room only once in the company of his security detail. This court has no reason to doubt that piece of evidence since even humanly speaking; one would need to go out to answer a call of nature during such exercises. Further Oroo did not call any witness to confirm to the court that people at the tallying centre shouted at Resa and Oopore to stop

colluding and manipulating the results.

Whether there were inaccurate entries in Forms 35 and 36 and whether the same affected the results as presented by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

103. Both Oroo and Nyabaro alleged that Resa did not comply with **Regulation 83** of the **Regulations** for maliciously and/or negligently and inaccurately transferring figures from Form 35’s to Form 36. The following polling centres were singled out for the alleged malicious, negligent and/or inaccurate transfer of entries from Form 35’s to 36’s:-

- *Mogumo primary school (003) at p. 14 of 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ response to petition, where the number of rejected votes is recorded as 1 in Form 35 while the number is 3 in Form 36 at p.95 of the response, being an increase of 2.*
- *Kenyorora primary school (007) at p. 22 of the response where the number of rejected votes appears as 5 while Form 36 at p.95 of the response shows a figure of 4; being a decrease of 1.*
- *Mosando primary school stream 2 (021) at p. 39 of the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ response where the number of rejected votes is reflected as 0 in Form 35 while in Form 36 at p. 95 of the*

response, the number is reflected as 2 being an increase of 2.

- *Ekerubo primary school stream 2 (029) at p. 49 of 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response, where the number of rejected votes in Form 35 is given as 3 while in Form 36 at p. 95, the same is given as 4, being an increase of 1.*
- *Suneka Airstrip (044) at p. 69 of 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response, the number of rejected votes as reflected in Form 35 is 3 while on Form 36 at p. 96, the number is reflected as 4, being an increase of 1.*
- *Ekerorano (045) at p. 70 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response where the number of rejected votes on Form 35 is reflected as 3 while Form 36 at p. 96 shows that there is only 1 rejected vote, a decrease of 2.*
- *Gesero primary stream 2 (052) at p. 80 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response, where the number of rejected votes is reflected in Form 35 as 7 while in Form 36 at p. 96, the figure is 8, with an increase of 1 vote.*
- *Nyamegukuna (064) at p. 93 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response, the number of rejected votes as per Form 35 is 4 yet Form 36 at p. 96 of the response reflects a figure of 3, a reduction of 1 vote.*

104. **Regulation 83** of the **Regulations** reads as follows:-

**“83(1) Immediately after the results of the poll from all polling**

**stations in a constituency have been received by the returning**

**officer, the returning officer shall, in the presence of**

**candidates or agents and observers, if present –**

**(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;**

**(b) In the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75 (2);**

**(c) complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the –**

- name of the respective electoral area;**
- total number of registered voters;**
- votes cast for each candidate or referendum side in each polling station;**
- number of rejected votes for each candidate in each polling station;**
- aggregate number of votes cast in the respective electoral area; and**
- aggregate number of rejected votes; and**

**(d) sign and date the form and –**

- i. give to any candidate, or agent present a copy of the form; and
- ii. deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.

**(2) The results of the presidential election in a constituency shown in Form 34 shall be subject to confirmation by the Commission after a tally of all the votes cast in the election.**

**(3) The decisions of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition.”**

105. Though the errors are admitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they contend that such errors did not have any effect on the final result, a contention which counsel for the petitioners have rejected as being fallacious for the reason that the number of rejected votes has a direct bearing on the number of valid votes cast. The position taken by both Ooro and Nyabaro is that the noted discrepancies in the number of rejected votes directly translates into discrepancies in the number of valid votes cast which in turn affects the number of valid votes garnered by individual candidates, with a spiral effect on the result of this election, which was won by a margin of 5 votes. Reference was made to **Mbowe –vs- Eliufoo** (supra) where the phrase “affected result” was defined. As regards this issue, the result of the scrutiny showed that the discrepancies did in fact affect the final result by reversing the winning candidate, albeit with a similar margin. I shall deal with the issue further during the analysis of the report on the recount and scrutiny.

Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the elections in a free and fair transparent manner

106. Both Resa and the IEBC are accused of breaching the provisions of **Articles 81 and 86** of the **Constitution** and **Regulation 83** of the **Regulations** (supra) in tallying the results four times without explanation and for failing to publicly declare the results. It is alleged instead of declaring the results, Resa simply stated, “**it seems Opore has defeated Ooro**”, a statement which Ooro says did not amount to a declaration of results as required under the law. In the case of **Bashir Haji Abdullahi –vs- Aden Mohammed Nooru & 3 others – Garissa EP NO.7 of 2013**, Onyancha J stated clearly that the purpose of the announcement/declaration of the result and the issuing of the certificate was to inform those present and for the information of the people of the Constituency the person whom they had elected and that result would not be alterable in view of the certificate issued.” In **William Kabogo Gitau case** (supra) and in **Jayne Njeri Wanjiru Kihara –vs- Christopher L. Ajele & 2 others [2008] e KLR** the court held that the words “**this old man was ahead of Mrs. by 100 votes**” did not amount to a declaration of the results”.

107. To put this issue into perspective, it is imperative that I consider the provisions of **Regulation 80 (1)** of the **Regulations** which deals with the counting and recounting of votes at the polling station. At the close of the count, which includes a recount, the presiding officer must then seal the results in tamper proof envelopes which are then delivered to the tallying centre. Any verification of the results from the polling centres is now the work of the Returning Officer and such an exercise is undertaken at the tallying centre and the Returning Officer is thus required by **Regulation 83** to tally the results from the polling stations using the Form 35’s and thereafter publicly announce the results to persons who are present in accordance with **Regulation 75 (2)**.

108. In the instant case, it appears that Mr. Resa may have initially had some difficulty in announcing and declaring the results, but he confirmed in his testimony that he in fact announced the results. The evidence shows that even those who alleged that Resa did not announce or declare the results had to eat their humble pie when during their evidence in cross-examination, they could not confirm on oath whether indeed Resa announced the results or not. Geoffrey was one such person. In answer to a question by Mr. Nyaundi for Opore, Geoffrey stated the following:-

**“Immediately the RO said it appeared Opore had defeated Oroo, I left and I do not know whether there was an announcement after that.”**

There is also evidence from Geoffrey confirming that Oroo also left the tallying hall before the results were announced. Geoffrey told the court that **“when Oroo walked out, I walked out with him”**.

109. In the circumstances, and as far as Oroo’s complaint that the results were not announced by Resa, I give the benefit of doubt to Resa and conclude that the results were announced in accordance with the

law; although these were not necessarily the correct results.

110. In any event, Oroo pleaded that Resa announced the results, as can be seen from the following paragraphs of his petition:-

**“25. The 1<sup>st</sup> Respondent has gazetted the declaration of the 3<sup>rd</sup> Respondent in the Kenya Gazette.**

**27. The petitioner avers that the 2<sup>nd</sup> Respondent used the initial Form 36 to declare the results.**

**31. Given that the initial Form 36 is the one the 3<sup>rd</sup> Respondent used to announce the results of the election, he should have declared the petitioner the winner.”**

111. Oroo is therefore bound by his pleadings in which he says Resa both announced and declared the results of the election. Oroo also told the court that the moment he heard Resa say **“it seems Opore has defeated Oroo”** he became distressed and went home, as did Geoffrey. This being the case I am satisfied that both Resa and the IEBC conducted the elections in a free, fair and transparent manner and the results thereat were duly announced and declared. The allegation is therefore dismissed.

112. There were also allegations that the Form 35’s annexed to Resa’s affidavit were different from those given to agents as well as the Form 35’s in the possession of presiding officers such as the original Form 35 in possession of DW1, who was P.O. for Gesero Market, DW3, Susan Obachi Presiding Officer for Genga polling station and DW5, Dennis Joshua Ombati the PO at Suneka Baraza Hall, stream 3. These witnesses exhibited for the eyes of the court their original Form 35’s whose results were clearly not the same as those found on Resa’s Form 35. This allegation was proved by Oroo. The only issue is whether the irregularity affected the result.

113. To my mind, these errors affected the result for the reason that the resultant Form 36 did not have or carry the correct results contained in the respective Form 35’s. For example, there were errors in Form 35’s in the following stations:-

- Kenyrorora (007) – 2 votes lost
- Gesero Market (013) – 1 vote lost
- Nyabioto Central Hall – 1 vote lost
- Suneka Baraza Hall (012) – 1 vote lost

**Total 5 votes**

114. It is instructive to note that Oroo's fight with Opre is about 5 votes by which Opre won the election. Oroo therefore asked, and he was allowed, to have a recount and scrutiny of the votes with a view to establishing whether indeed these 5 votes were his or Opre's. I will shortly be discussing the outcome of the recount and scrutiny.
115. Other stations whose results were admittedly not properly transferred to Form 36 were Gesero Primary School (032), Ngeri Polytechnic (062), Kisii South Institute (065), Ekerubo Primary (029) Stream 2, Ekerorano Market (045), Nyamiobo Primary (047), Nyamorako ELCK Primary School (018) and Mosando Primary School Stream 2 (021). These errors are covered in the submissions on the recount and scrutiny report.

Polling Stations without or with few agents or with more agents than the number of candidates or without IEBC validation stamp.

116. Allegations were made by both Oroo and Nyabaro that some polling stations had few or no agents or that some had more agents than the law required. There was also a complaint that some Form 36's did not have the IEBC validation stamps.
117. During his testimony, Nyabaro told the court that he could not visit most of the polling stations because Onyanchara had not adequately facilitated him. To my mind, therefore, if a candidate's chief agent could not be adequately facilitated, could the candidate afford to have other agents? The available evidence therefore shows that Nyabaro could not tell whether or not all the polling stations had no agents, few agents or more agents than what he thought was the requisite number. It was therefore the duty of parties and candidates to appoint agents and send them to the polling stations and the number of agents at any one particular polling station would depend on whether all the candidates had their agents and whether the parties also had agents. **Regulation 85 (2)** only limits one agent per candidate or political party to the tallying centre.

Whether there was more than one (1) Form 36 and if so, which one was used to announce the results and whether the existence of more than

one (1) Form 36 is lawful.

118. Though Nyabaro makes no allegation about the existence of two Form 36's, Oroo in his pleadings talks of an initial and a revised Form 36 which Forms he said bore different results in various categories as shown hereunder:-

CATEGORY	INITIAL FORM 36	REVISED FORM 36
Registered Voters	39629	39646
Votes Cast	33294	33344
Valid votes Cast	32954	32971
Rejected Votes	321	368
Charles Onyanchara	6887	6897

Oroo thus alleges that Resa issued two forms in respect of Form 36,

one Form 36 having been issued on 5<sup>th</sup> March 2013 and the second one on 7<sup>th</sup> March 2013.

119. After considering all the evidence on record about this allegation, I do find that the evidence was not only inconsistent and contradictory but by the close of his testimony, Oroo had disowned the

second Form 36. His evidence as to how he got the two Form 36's ran like this:-

**“Then on 06/03/2013, I went to Mr. Resa's Office but I did not find him. I however found a copy of Form 36 – see document Marked JOO2. The document was given to me by an officer at the office of the R.O after taking photocopies at the shopping centre. The document is signed by RO and there is also IEBC's stamp.”**

Later, in answer to a question by Mr. Rigoro, Oroo stated:-

**“Yes, JOO3 was brought to me by my son. My son told me he picked it from the office of Mr. Resa. My thinking was that JOO3 was to submerge JOO2. I do not agree that JOO3 is my own creation.”**

120.Oroo's witness, Geoffrey, when cross-examined by Mr. Nyaencha for Oporo stated the following:-

**“Yes, I looked at documents JOO2 and JOO3, but petitioner did not explain how he got JOO2, but I was told now I say JOO2 was delivered to him very early in the morning of 06/03/2013 but he did not tell me who had delivered it. As for JOO3, he told me the RO called him to go for it and that he had sent someone for it.”**

121.The above allegations were in my view unsupported by evidence.

Oroo could not even name the officer in Mr. Resa's office who gave him the Form 36, nor did he call his son as a witness to come to court and confirm that he (the son) had collected the document JOO3 from Mr. Resa's office. Even when Oroo talked to Geoffrey, he did not mention that he had sent his son for the Form 36. He simply said he had sent someone for it. Who was that someone?

122.Regarding Form 36, I accept Resa's explanation that the only Form 36 which he used to declare the results was the one marked JOO2 which is duly dated and signed by Resa. I also find and hold that the document marked JOO3 is a creation of Oroo who even failed to demonstrate to the court how he came to be possessed of it.

#### Recount and Scrutiny Results.

123.The evidence from the recount and scrutiny has shown and the findings of this court in the preceding paragraphs of this judgment have confirmed that there were errors, mistakes and irregularities in Forms 35 and 36. It was because of these errors, mistakes and irregularities that the recount and scrutiny in the 49 polling stations isolated by the parties herein was undertaken. These mistakes, whether they were deliberate or innocent as contended by the Respondents, could affect the result in view of the fact that Oporo won the election by a margin of 5 votes.

124.The Deputy Registrar of this Court carried out the recount and scrutiny between 5<sup>th</sup> and 18<sup>th</sup> July 2013. From the recount and scrutiny, the results of the election is as follows from all the 65 polling stations, which had a total of 81 polling centres:-

CODE	POLLING STATION	VOTES CAST	SPOILT VOTES	REJECTED VOTES	REJECTED OBJECTED	VALID	A	LBERTC	HARI
001	NYABIMWA	629	0	9	0	620	3		88
002	NYABIEYO	269	0	1	0	268	0		8

003	MOGUMO	446	0	3	0	443	1	32
004	IGONGA	431	0	8	0	423	2	69
004	IGONGA	431	1	10	1	420	4	81
005	ISAMWERA	362	1	11	1	350	4	66
005	ISAMWERA	381	0	12	0	369	4	65
006	EBATE	473	0	4	1	468	3	113
007	KENYORORA	337	2	4	0	333	0	64
008	MIRANGA	301	0	7	0	294	1	16
009	RIAMAGIGE	276	0	1	1	274	0	77
010	ENTAKE	373	1	5	0	368	0	17
011	BOMARIBA	243	1	4	0	239	0	39
012	NYAMAGUNDO	280	0	5	0	275	0	98
013	GESERO	580	1	8	1	571	1	165
014	IRUMA	438	0	5	0	433	1	80
015	MATONGO	462	0	0	0	462	1	80
016	KIRWANDA	544	1	9	2	533	1	130
017	NYAMOKENYE	553	0	13	0	540	6	165
017	NYAMOKENYE	540	0	8	0	532	3	145
018	NYAMERAKO	399	2	10	0	389	3	71
018	NYAMERAKO	371	1	4	0	367	2	55
019	NYAKUNGU	604	1	13	0	591	0	94
020	BOGIAKUMU	655	2	5	0	650	0	397
021	MOSANDO	438	0	5	0	433	1	272
021	MOSANDO	412	2	0	1	411	2	261
022	EKERORE	675	0	6	0	669	4	382
023	RIAMONCHA	382	0	8	0	374	1	192
024	RIANYAPARA	431	0	5	0	426	3	96

025	MWAMISOKO	367	0	7	0	360	0	88
026	NYABIOTO	240	0	7	0	233	3	147
027	ITIERIO GIRLS	427	2	8	0	419	1	116
027	ITIERIO GIRLS	431	1	10	0	421	5	112
028	KIAMORO TEA	646	1	7	0	639	3	418
029	EKERUBO	425	3	3	0	422	2	42
029	EKERUBO	412	1	4	0	408	4	36
030	RIANYABARO	374	2	4	0	370	2	125
030	RIANYABARO	380	0	3	0	377	2	118
031	ITIERIO MIXED	428	0	4	0	424	1	129
032	KIBUTE	180	0	2	0	178	0	14
033	BOTORO	322	1	4	1	317	11	42
033	BOTORO	473	0	3	0	470	19	85
034	SUNKA	433	0	5	0	428	2	28
034	SUNKA	429	0	1	1	427	0	43
035	KIABUSURA	523	0	11	0	512	0	64
036	ITIBO	386	1	3	2	381	0	22
037	BITARE	482	0	2	0	480	1	31
038	KIOGE	372	0	0	0	372	1	25
039	MOTONTO	388	0	9	1	378	6	64
040	NYANGOGE	534	2	9	0	525	2	46
041	NYANGITI	353	0	4	0	349	0	80
042	SUNKA BARAZA	463	2	7	0	456	4	104
042	SUNKA BARAZA	460	2	6	0	454	1	86
042	SUNKA BARAZA	489	2	4	1	484	0	100
043	BONYAORO SECONDARY	318	0	3	0	315	2	38

044	SUNEKA AIRSTRIP	523	2	2	0	521	1	40
045	EKERORANO	243	0	1	0	242	2	28
046	BOGITAA PRIMARY	456	0	3	0	453	0	26
047	NYAMIOBO PRIMARY	417	0	1	0	416	0	94
047	NYAMIOBO PRIMARY	394	3	4	0	390	3	85
048	NYAMARE PRIMARY	430	0	1	0	429	1	43
049	OMWARI PRIMARY	478	0	7	0	471	1	52
049	OMWARI PRIMARY	493	1	4	1	488	0	50
050	CHISARO PRI	286	0	7	0	279	1	53
051	GENGA PRIMARY	556	0	5	1	550	8	79
052	GESERO PRIMARY	438	0	2	0	436	2	65
052	GESERO PRIMARY	430	0	9	0	421	1	63
053	KERINA PRIMARY	396	0	6	0	390	1	27
053	KERINA PRIMARY	377	0	6	0	371	2	31
054	ETURETI	507	0	2	0	505	1	64
055	NYAMAYA	279	0	5	0	274	3	50
056	RIAMONTINGA	250	1	1	0	249	0	5
057	NYANGENA PRIMARY	517	0	6	0	511	0	39
058	MWATA PRIMARY	338	0	6	0	332	1	79
059	NYOTOIMA PRIMARY	307	0	10	0	297	2	73
060	SIGISI	204	0	2	0	202	0	18

061	MOGOGA	388	1	2	1	385	2	74
062	NGERI POLYTECHNIC	414	0	14	0	400	0	56
063	NYASAGATI PRIMARY	267	1	2	0	265	0	10
064	NYAMEGUKUNA	246	0	5	0	241	2	14
065	KISII SOUTH	234	1	0	0	234	1	44
<b>TOTAL</b>		<b>33,319</b>	<b>46</b>	<b>426</b>	<b>17</b>	<b>32,876</b>	<b>158</b>	<b>6,883</b>

125. During the recount exercise, all the 81 ballot boxes were opened and each vote was counted. An improvised Form 35 by the court was filled in respect of each ballot box showing **(a)** the number of votes cast; **(b)** the number of spoilt ballot papers, **(c)** the number of rejected votes, **(d)** the number of rejected and objected votes, **(e)** the total number of valid votes and **(f)** the number of valid votes cast in favour of each candidate. The results of the recount which were signed by one agent for each candidate revealed the results as follows:-

- Total votes cast ..... 33319
- Spoilt votes .....46
- Rejected votes ..... 426
- Rejected and objected votes .....17
- Total valid votes cast ..... 32876

126. The individual results for the 11 candidates from the recount were as follows:-

- Albert Mochama ..... 158 votes
- Charles Onyancha .....6883
- David Ogega Oyugi ..... 2787
- David Okeyo Getate ..... 100
- John Mochama Orwochi .....224
- John Oroo Oyioka .....8967
- Mwendo Geoffrey Omwando .....447
- Samuel Onguncho .....325
- Tom Marube Maisiba .....3643
- Victor Omare Omanwa .....355
- Zebedeo John Opore .....8963

127. During the scrutiny exercise, it transpired that Form 35's were missing from the ballot boxes of the following 3 polling stations:- Nyamagundo Farmers (012), Bogitaa Primary (046), Riamotinga Primary (056). It was also noted that the Form 35 found in the ballot box for Bogitaa Primary related to the Presidential results.

128. It was noted during the scrutiny that in 57 out of 64 polling stations, the candidates' agents did not sign the Form 35, and in only 4 of them did the Presiding Officer give a reason why all the agents did not sign the Form 35. It also transpired that Form 35's from 12 polling stations did not have the IEBC validation stamps, namely Nyabieyo Secondary (002), Mogumo Primary (003), Igonga Primary Stream 2 (004), Isamwera Primary Streams 1 and 2 (005), Kenyorora Primary (007), Nyamagundo Farmers (012), Nyamerako Primary (018), Bogiakumu Primary (020), Kiamoiro Tea Buying Centre (028), Ekerubo Primary Stream 2 (029), Suneka Baraza Hall stream

2 (042) and Gesero Primary School Stream 2 (052).

129. On examination of counterfoils of used ballot paper, it was noted that the number of counterfoils of used ballot paper exceeded the number of votes cast which meant that some ballot papers were missing. The affected stations were Mogumo Primary (003), Gesero Market (013), Matongo Primary (015), Mosando Primary streams 1 and 2 (021), Botoro Primary (033), Kioge Primary (038), Suneka Baraza Hall stream 2(042), Bonyaoro Secondary School (043), Ekerorano Market (045) and Etureti Primary (054). There were no counterfoils for Bogitaa Primary (046) and Kerina Primary stream 2 (053). It was also established that the unused ballot papers were missing from ballot

boxes for Botoro primary stream 2 (033) and Ekerorano Market (045).

130. On scrutiny of the registers of all the polling stations it was established from the following polling stations that the number of votes cast exceeded the number of registered voters.

	<b>Polling station</b>	<b>Total Votes Cast</b>	<b>Number who voted as per register</b>	<b>Difference</b>
1.	Nyabimwa Primary 001	629	628	1
2.	Igonga Primary 004 stream 2	431	433	2
3.	Isamwera Primary School 005 stream 1	362	358	4
4.	Isamwera Primary School 005 stream 2	381	379	2
5.	Kenyorora Primary 007	337	335	2
6.	Bomariba Primary 011	243	241	2
7.	Gesero Market 013	586	580	6
8.	Nyamokenye Primary 017 stream 1	553	542	11
9.	Nyamokenye Primary 017 stream 2	540	536	4
10.	Nyamerako primary 018 stream 1	391	399	8
11.	Bogiakumu Primary 020	655	654	8
12.	Mosando Primary 021 stream 1	438	422	16
13.	Riamaoncha primary 023	382	387	5
14.	Rianyapara Primary 024	431	428	3
15.	Nyaboito Centre 026	240	268	28

16.	Itierio Girls Boarding 027 stream 1	427	424	3
17.	Ekerubo Primary 029 stream 1	425	422	3
18.	Ekerubo Primary 029 stream 2	412	409	3
19.	Rianyabaro Primary 030 stream 2	380	375	5
20.	Itierio Mixed 031	428	426	2
21.	Botoro Primary 033 stream 2	404	479	75
22.	Suneka Primary 034 stream 1	433	428	5
23.	Suneka Primary 034 stream 2	429	419	10
24.	Itibo Primary 036	386	380	6
25.	Suneka Baraza 042 stream 1	463	444	19
26.	Bonyaoro Secondary School 043	318	295	23
27.	Suneka Airstrip 044	523	521	2
28.	Bogitaa Primary 046	456	455	1
29.	Nyamiobo Primary School 047 stream 1	417	398	19
30.	Nyamiobo Primary School 047 stream 2	394	395	1
31.	Nyamare Primary 048	430	427	3
32.	Omwari Primary 049 stream 1	478	474	4
33.	Omwari primary 049 stream 2	493	486	7
34.	Nyangena Primary 057 stream 1	517	514	3
35.	Sigisi Primary 060	204	203	1
36.	Ngeri Polytechnic 062	414	407	7
37.	Nyamegukuna Primary 064	246	243	3

131. It was also established that in some polling stations, additional names appearing on separate sheets of papers were annexed to the registers. Those names were listed as “**missing names**” and according to the scrutiny, some of the “**missing names**” actually voted. This may be the explanation for the difference between the number of votes cast and the number of registered voters. The affected polling stations were: Suneka Baraza Hall streams 2 and 3 (042), Nyamiobo primary stream 1 (047), Nyamare Primary (048), Kerina Primary stream 1 (053) and Sigisi Primary School (060).
132. The scrutiny also revealed that in some stations, the number of votes cast was less than the number indicated as having voted as per the register. The affected polling stations in this category were:- Nyabieyo Primary (002), Mogumo Primary (003), Matongo Primary (015), Nyakungu Primary (019), Ekerore Primary (022), Kiamoiro Tea Buying Centre (028), Botoro Primary Stream 2 (033), Genga Primary (051), Gesero Primary (052), Mwata Primary (058) and Nyasagati Primary (063). Further the scrutiny exercise revealed that out of the 65 polling stations only 16 stations had the number of registered voters tallying with the number of votes cast at those stations.
133. The question of the registers is critical because from the above table, there are indeed some discrepancies between the total votes cast and the number of persons who voted as per the register. This issue arose in the **Raila Odinga case** (supra) in which the Supreme Court said the following:-
- “In the light of the provisions of the Constitution, (Articles 38(3) & 83 and Section 2, 3 and 4 of the Elections Act, 2011 and of the evidence adduced in court, we must conclude that such a register is not a single document but is an amalgam of several parts prepared to cater for diverse groups of electors. The number of parts of a register and the diversity of electors for whom it is prepared, is dictated by law, and the prevailing demographic circumstances of the country’s population. The register can also take several forms, as contemplated by Section 2 of the Elections Act which stipulates that such a register “includes a register compiled electronically.” The multiplicity of registers is a reality of Kenya’s voter registration system which is recognized in law and widely acknowledged in practice. The register once developed and finalized is disaggregated and dispersed to various electoral units, to facilitate the process of voting.”**
134. What the Supreme Court was saying is that it is not easy for anybody to stand up and say with any degree of certainty that such a register contains names and other details of all registered voters. In the instant case, the scrutiny revealed that there was a loose register which was christened “**Missing Names**” and that persons from the said register actually voted. It is not clear to the court whether the “**Missing Names**” voters are the ones who brought about the difference between the total number of votes cast and the number of persons who voted as per the register. Neither Oroo nor Nyabaro assisted the court on this point, nor did either of them point out clearly who the beneficiary of the difference in those figures was. It is my view that if there had been an apparent beneficiary of these differences, the scrutiny and the recount would have brought it out. The recount and scrutiny only confirmed Oroo’s contention that the 5 disputed votes were cast for him. In the circumstances, I am persuaded that these alleged differences between the register and the number of voters were not proved by cogent evidence.
135. Concerning the alterations in the various Form 35’s, the Presiding Officer for Gesero Market (013) who testified as DW1 confirmed that he made alterations on the Form 35 without countersigning those alterations which created a difference of 2 votes. He said that the alterations could affect the number of votes garnered by candidates. He also conceded that there were alterations on the number of rejected votes from 07 to 05 and that Oporo’s votes on the Form 35 were altered from 06 to 16. The witness also agreed that the original Form he had on him during the hearing was not the same as the copy produced by the Respondents.
136. Regarding transposition of the results from Form 35 to Form 36, Obwocha stated that whereas Form 35 from his station had 584 as the total number of votes cast, Form 36 had a figure of 582. The witness however contended that the alterations in his Form 35, especially of rejected votes from 7 to 5 did not alter the result.
137. Albert Mariaria Mekubo (DW2) conceded that Form 35 from Bomariba Primary School (011)

where he was the Presiding Officer had alterations in the results for Oporo, Tom Marube Maisiba and Mwendo Geoffrey Omwando. He denied that he made deliberate alterations, but conceded that he did not include names of all agents present in his Form 35. He also admitted he did not countersign the alterations though he explained that what is mistaken as alterations was a mere bolding of the digits because his pen had a problem with the ink. He also conceded that he did not record reason why agents did not sign the forms.

138.DW3, Susan Obachi, Presiding Officer at Genga polling station

(051) denied that she kept the agents some 8 metres away from the table where the results were being read. At the hearing actual measurements were taken to disprove Nyabaro's contention that the agents were kept some 8 metres away from the table as alleged.

139.Susan explained that agents did not sign her Form 35 because some had already left while others were asleep by the time the voting exercise was over and that it was not her duty to keep the agents inside the polling station or to stop them from leaving.

140.All the above concerns and issues notwithstanding, after the ballots were recounted and the scrutiny carried out, Ooro emerged the winner, with a margin of 4 votes with one disputed vote. The issue now before court is whether, Ooro should be declared the duly elected Member of the National Assembly for Bonchari Constituency since **section 80 (4)** of the **Act** gives this court the power to do so and to direct the IEBC to issue a certificate of election if upon recount, of the ballots cast, the winner is apparent and is not found to have committed any election offence.

141.**Section 80 (4)** of the **Act** provides as follows:-

**“80 (4) An election court may by order direct the Commission to issue a certificate of election to a President, a Member of Parliament or a Member of a County Assembly if –**

- a. **upon recount of the ballots cast, the winner is apparent; and**
- b. **that winner is not found to have committed an election offence.”**

142.Parties filed submissions on the result of the recount and scrutiny and highlighted the same as follows:-

Ooro's arguments

143.Mr. Nyamweya for Ooro submitted that since the scrutiny

exercise had revealed that certain irregularities and errors were

committed during the election, and that since the recount had revealed

144.That the said irregularities indeed affected the result as declared by Resa and the IEBC, the only way to resolve the issue is, to find and to hold that the result of the recount reflected the will of the people of Bonchari Constituency. He further submitted that the scrutiny had revealed that Ooro won the election. He urged the court to be guided by the decision in **Lord Monkswell & Others –vs- Thompson [1898] 1QB 479** in which the court held that where a recount clearly showed that the petitioner had a majority of the votes over the respondent, then the petitioner was entitled to the seat as all that was required of the petitioner was to establish that he had more votes than the respondent. Counsel also relied on **Halisbury's Laws of England Fourth Edition Reissue Volume 15 at page 622 paragraph 845** where the learned authors stated that **“on the recount against the respondent resulting in the petitioner's favour, he becomes entitled to the respondent's seat.”**

145.In the alternative, counsel submitted that in view of the irregularities proved and noted during the recount and scrutiny, the court should find that the election herein was not free, fair, accurate, verifiable and transparent and to order the same nullified in its entirety and a fresh election be ordered with costs to the petitioner against the 2<sup>nd</sup> Respondent.

### Nyabaro's arguments

146.No specific arguments on the recount, and scrutiny were made on Nyabaro's behalf. However, counsel submitted that the errors were too many to say that the elections for Member of the National Assembly for Bonchari Constituency were free and fair and particularly in view of the issues surrounding Botoro polling station.

### Opore's arguments

147.Regarding the recount, counsel for Opore submitted that since the recount did not consider ballots that did not have the IEBC stamp or those which had more than one mark, or those that had names or letters or those that contained votes that were rejected but disputed by parties, then the result of the recount should not be considered as being the final answer to the dispute herein. It was submitted that some stations such as Botoro primary, stream 2 had more votes cast totaling 473 as compared to 459 registered voters, which means that the voter turnout thereat was 103%. Counsel worked out their own tables and submitted that the court should find that Opore garnered the highest number of votes even upon recount.

148.Counsel urged the court, to consider that some agents did not sign the Form 35's, that some Form 35's did not bear the IEBC stamp, that some counterfoils of used ballot papers were missing and that in some polling stations such as Botoro primary stream 2, the unused ballot papers were missing. Counsel asked the court to exclude the result for Botoro stream 2 from the recount and scrutiny in establishing the correct tally for each candidate before proceeding further with the petition. Unfortunately, and upon counsel's own request, the petition proceeded contemporaneously with the exercise for recount and scrutiny. Counsel for Opore did not say whether the court should order for a fresh election.

### The case for Resa and the IEBC

149.Mr. Rigoro submitted that since both Oroo and Nyabaro have not

brought sufficient evidence before this court in support of their claims, Oroo should not be declared winner on the basis of the recount and scrutiny results which show that he garnered the highest votes.

150.Counsel also submitted that the errors and irregularities complained of by both Oroo and Nyabaro should be treated as mere human errors committed under a frenetic schedule in any human activity. It was also submitted that if the said errors are not fundamental, they should be excused and ignored.

### Analysis and Determination of the Recount and Scrutiny Result

151.**Section 80 (4)** of the **Act** (supra) gives this court the options to take after the result of a recount is established, namely to direct the Commission to issue a certificate of election of the concerned elective office where upon recount, the winner is found not to have committed an election offence. This subsection has to be read together with **Article 105** of the **Constitution** which provides as follows:-

**“105 (1) The High Court shall hear and determine any question whether –**

- a. **a person has been validly elected as a Member of Parliament; or**
  - b. **the seat of a member has become vacant;**
2. **a question under clause (1) shall be heard and determined within six months of the date of lodging the petition.**
  3. **Parliament shall enact legislation to give full effect to this article.”**

152. On all fours therefore, this court has both the power and the jurisdiction to give effect to **section 80 (4)** of the Act. The automatic declaration of the apparent winner on a recount has however been a subject of discussion and divergent views in a number of decisions both locally and internationally, and notably **James Omingo Magara –vs- Manson Oyongo Nyamweya & 2 others – Civil Appeal No.8 of 2010** and the **Richard Kalembe Ndile case**. In both cases, despite a recount establishing the petitioner to have garnered the highest number of votes, they were denied an automatic entitlement to the respondent's seat. In the **James Omingo Magara case** which was applied by Majanja J in the **Richard Kalembe Ndile Case**, the court was of the view that a scrutiny and recount were not an end in themselves. The Appeal Court stated the following:-

**“It is true that on the scrutiny and recount of votes, the appellant still had the largest number of votes. But as I have pointed out, that was not all the learned judge was supposed to go by though it was an important consideration to bear in mind. I quote the remarks of BARRY J in the Canadian case of [1997] MPLR (2d) Nfld. S.C cited in Dorothy E. Browton –vs- Jean Hart Kangas & others Suit No. C198-01-10265, Querns Bench Division Manitoba:- When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.”**

153. The question that now arises in my mind is: What else should I consider when the recount and scrutiny have shown that Oroo's cries for his 5 votes were not in vain? Among the other matters to be considered is **Article 81 (e) (iv) and (v)** which provide for a transparent election administered in an impartial, neutral, efficient, accurate and accountable manner. This court must also remember that the will of the electorate of Bonchari Constituency is paramount, so that even where there have been significant breaches of official duties and election rules, so long as such breaches do not affect the result, Oroo who now appears to have garnered the highest vote on recount should be declared winner if he is found not to have committed an election offence.

154. Whether to annul the result and order a fresh election or whether

to annul the election of the incumbent and declare Oroo the winner in this election is a matter that has weighed heavily on the mind of the court in view of the divergent views held on the issue. In the **Richard Kalembe Ndile case** (supra) Majanja J made reference to the case of **Steven Bortner –vs- Town of Woodbudge at 250 Conn. 241 736 A.2d 104** where the Supreme Court of Connecticut stated the following:-

**“An election is essentially – and necessarily a snap shot. It is preceded by a particular election campaign, for a particular period of time, which culminates on a particular date, namely, the officially designated election day. In that campaign, the various parties and candidates presumably concentrate their resources – financial, political and personal – on producing a victory on that date. When that date comes, the election records the votes of those electors, and only those electors, who were available to and took the opportunity to vote... Those electors, moreover, ordinarily are motivated by a complex combination of personal and political factors that may result in particular combinations of votes for the various candidates who are running for the various offices. The snapshot captures, therefore, only the results of the election conducted on the officially designated election day. It reflects the will of the people as recorded on that particular day, after that particular campaign, and as expressed by the electors who voted on that date. Those results, however, although in fact reflecting the will of the people as expressed on that day and no other, under our democratic electoral system operate nonetheless to vest power in the elected candidates for the duration of their terms. That is what we mean when we say that one candidate has been “elected” and another “defeated.” .... Moreover, that snapshot can never be duplicated. The campaign, the resources available for it, the totality of the electors who voted in it, and their motivations, inevitably will be different a second time around.**

**Thus, when a court orders a new election, it is really ordering a different election. It is substituting a different snapshot of the electoral process from that taken by the voting electorate on the officially designated election day.”**

And further, in the same case, the Supreme Court also said that:-

**“In determining whether to order a new election, to arrive at a sensitive balance among three powerful interests, all of which are integral to our notion of democracy, but which in a challenged election may pull in different directions. One such interest is that each elector who properly cast his or her vote in the election is entitled to have that vote counted. Correspondingly, the candidate for whom that vote properly was cast has a legitimate and powerful interest in having that vote properly recorded in his or her favour. When an election is challenged on the basis that particular electors’ votes for a particular candidate were not properly credited to him, these two interests pull in the direction of ordering a new election. The third such interest, however, is that of the rest of the electorate who voted at a challenged election, and arises from the nature of an election in our democratic society ... That interest ordinarily will pull in the direction of letting the election results stand...”**

155. While I agree that the result of the recount and scrutiny is not the only consideration to be taken into account in deciding whether or not to declare the petitioner entitled to the much coveted seat, as indeed I pointed out to the parties after the results of the recount and scrutiny were made known, I am aware that each case must be decided on its own circumstances. I am aware that mounting and conducting an election is not a cheap affair. Elections are not fuelled by water or air. They are fuelled by cash that must come from the public coffers through taxation. It is public knowledge that the Kenyan taxpayer is extremely overtaxed, and that taxpayer includes the Kerubos, the Wanjikus and the Nafulas of this County. Where it appears, as indeed it does appear to me in this case, that the outcome of this petition has reflected the will of the people of Bonchari Constituency in the choice of their member of the National Assembly, I see no reason for punishing the taxpayer a second time.

156. In this case, and as stated in my ruling on the application for recount and scrutiny, the real desire by Oroo was to find out from the recount whether the 5 votes by which Opore won the election were indeed cast for him or for Opore. One of the most hotly contested outcomes of this election relates to the votes cast at Botoro stream 2 where it is shown that those who voted were 473 as compared to 459 registered voters. This issue of Botoro is however covered in my findings on the question of the register to the effect that no one can stand up with any part of a register and wave it at the court to confirm with any degree of certainty that Botoro or any other polling station had more people casting their vote than the number of registered voters when we had other voters classified as **“Missing Names.”** Those missing names voted for both Oroo and Opore as well as for the other 9 contestants.

157. Having stated the above, and considering all the circumstances of this case, including the results of the recount and scrutiny, which brought out the same number of winning votes, but now in favour of Oroo, I see no reason why the apparent winner in this election should not be declared the winner. Throughout the petition, no finger has been pointed at Oroo as having committed any election offence. The only attempt made to suggest that Oroo had committed an election offence was by Resa when he alleged that Oroo had forged the second Form 36. That allegation however did not go beyond the witness box where Resa was testifying from. Resa never told the court that he had made a report of the alleged forgery to the police and if so, what the outcome of such a report was. Further, Opore’s contention that he won the election has been crushed by the evidence of the recount and scrutiny. I have considered the alternative computation of the winner by Opore’s counsel, but I am persuaded that formula has no merit. My view therefore is that the voice of the people of Bonchari Constituency was heard, and their will was expressed through their vote on 4<sup>th</sup> March 2013, where Oroo won the election by a margin of 4 votes.

158. Accordingly, I hold that it will not be appropriate to order a fresh election in this matter.

Who should bear the costs of this petition?

159. **Section 84** of the **Act** empowers this court to “**award the costs of and incidental to a petition and such costs shall follow the cause.**” In my view, the only limit to the court’s jurisdiction is the exercise of its discretion in assessing the costs payable. The court is under a duty to observe the provisions of **Rule 36** of the **Rules** which provides as follows:-

“**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.**

160. The aim of **Rule 36 (2)** in my view is to ensure that the costs awarded are neither too high nor too low. In considering the costs payable in this case, I have taken note of the fact that the petition was heard in full and completed within the set timeframes. The court heard and determined one interlocutory application, while two other applications were resolved by consent of the parties. The three applications for recount and scrutiny were also resolved by consent which gave rise to the scrutiny and recount.

161. Oroo has succeeded in his petition and since costs follow the cause, he is entitled to full costs of the petition. On the other hand, most of Nyabaro’s allegations were found to have no merit though his request for recount and scrutiny was of value to the court in knowing that all the parties were of one mind on the need for recount and scrutiny. He is therefore entitled to some costs.

162. The allegations of collusion against Opore remained substantially unproved; but because the case was filed against him, he had to defend himself. In my view, he is entitled to full costs of the petition.

163. The petitioners’ allegations against Resa and his officers were substantially proved, though not found weighty enough to affect the result. I am however persuaded that it is Resa and the IEBC who have caused the expense of coming to court.

164. In my opinion therefore, and going by recent awards in the 2013 election petitions determined to date, I award a maximum of Kshs.750,000/= to Nyabaro. The cost for Oroo and Opore shall be capped at Kshs.1,500,000/= each which in my view is reasonable.

165. The costs shall be taxed by the Deputy Registrar.

### Conclusion

166. Before I make the final orders in this matter, I would like to thank all learned counsel appearing for their diligence and industry in handling this petition. The court gained immensely from their depth of knowledge of the law governing electoral disputes. I also want to thank the Deputy Registrar of this court for her effort and industry right from the date of filing of the petition to date. I thank the security personnel for assisting the court to keep law and order, especially during those times when members of the public tried to take the law into their own hands. Finally

I wish to thank my staff for remaining focused on the assignment that was before us and for giving the court all the necessary support.

### Final Orders

167. From my findings in the petition, these are now the final orders.

1. *I hereby declare that Zebedeo John Opore was not validly elected as the member of the National Assembly for the Bonchari Constituency Seat.*
2. *I hereby declare that John Oroo Oyioka was validly elected as the Member of the National Assembly for Bonchari Constituency Seat.*
3. *The Certificate in accordance with Section 86 of the Elections Act shall issue.*
4. *The IEBC shall bear the costs of the petition as follows:-*
  - a. *Oroo shall get full costs of the petition.*
  - b. *Opore shall also get full costs of the petition.*
  - c. *Nyabaro's costs shall be capped at Kshs.750,000/=.*
  - d. *The total costs for Oroo and Opore are capped at*

*Kshs.1, 500,000/= for each party.*

- e. *The deposit paid in court shall remain so deposited pending the outcome of the taxation by the Deputy Registrar*

**Dated and delivered at Kisii this 20<sup>th</sup> day of September, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Nyamweya & Mamboleo for Petitioner in EP No. 2 of 2013

Mr. Omwenga for Petitioner in EP No.4 of 2013

Mr. Rigoro for 1<sup>st</sup> & 2<sup>nd</sup> Respondents in EP NO.2 of 2013 and 2<sup>nd</sup> & 3<sup>rd</sup> Respondents in EP No.4 of 2013

M/s Nyaundi & Nyaencha for 3<sup>rd</sup> Respondent in EP No.2 of 2013 and 1<sup>st</sup> Respondent in EP No.4 of 2013

Mr. Bibu - Court Clerk