



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
ELECTION PETITION NUMBER 6 OF 2013
(HEARD BEFORE THE HIGH COURT OF KENYA AT NAIROBI)

IN THE MATTER OF THE ELECTIONS ACT, 2011

HASSAN MOHAMED HASSAN. 1ST
PETITIONER

ABDIKARIM NUNOW AMIN. 2ND
PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION. 1ST RESPONDENT

FESTUS NGEERAH (RETURNING OFFICER). 2ND
RESPONDENT

ABDKAIR ORE AHMED.....3RD
RESPONDENT

J U D G M E N T

This judgment arises from the petition filed in the High Court of Kenya at Garissa by Hassan Mohamed Hassan and Abdikarim Nunow Amin against the Independent Electoral & Boundaries Commission (IEBC), Festus Ngeerah and Abdikair Ore Ahmed.

Hassan Mohammed Hassan was one of the several candidates in the 4th March, 2013 General Election in the Wajir West Constituency in respect of the Member of the National Assembly seat. His co-Petitioner was a registered voter in the constituency and a citizen of the Republic of Kenya.

The 1st Respondent, the IEBC, conducted the above stated elections as by the law authorized through the 2nd Respondent, Mr. Festus Ngeerah who was its Returning Officer in the said Mander West Constituency.

Abdikadir Ore Ahmed, the 3rd Respondent was one of the competing candidates in the Constituency who on the 13rd March, 2013, declared the winner and therefore the present Mander West Constituency National Assembly Member.

This election petition challenges the said election victory declaration made in the Official Gazette Notice dated the 13th March, 2013. The grounds upon which the petition is based are as follows:-

- a. **That the conduct of the said election by the 1st and 2nd Respondents was in contravention of the Elections Act, and the Regulations made under it, intended to govern the Parliamentary Elections.**
- b. **That the 1st and 2nd Respondents, contrary to the law, used illiterate, untrained and ill-equipped polling clerks to conduct the said election process, to the detriment of the Petitioners.**
- c. **That the 1st Respondent used partisan Presiding Officers to conduct the election.**
- d. **That the 1st and 2nd Respondents unlawfully locked out or, ejected Petitioner's lawfully appointed election agents.**
- e. **That the 1st and 2nd Respondents allowed double voting contrary to law.**
- f. **That the 1st and 2nd Respondents unlawfully allowed or authorized, unverified voting, made inaccurate, inconsistent, unreliable and flawed counting and tallying of votes.**
- g. **That the 1st and 2nd Respondents authorized or allowed: -**
 1. **voting beyond official hours**
 2. **manipulation of voter registers**
 3. **allowed Chief and Assistant Chiefs' undue and improper influence in favour of the 3rd Respondent**
- h. **That the 3rd Respondent or his agents carried out voter bribery, double voting, voter intimidation, violence and disenfranchisement of/on voters.**

The 1st and 2nd Respondents filed their Response to the petition on 29th April, 2013. They generally denied all the above grounds of the petition. The 3rd Respondent also filed his response with the leave of court on 15th May, 2013. He also denied the said grounds of the Petition.

The hearing of the petition took place on 8th, 9th and 16th July, 2013. The Petitioners called the following witnesses: -

P W1 – Ibrahim Mohammed Abdirahiman

PW 2 – Dr. Mohamed Yusuf Elmi

PW 3 – Ahmed Adan Hefow

PW 4 – Roble Moahammed Adan

PW 5 – Amina Abdi Gedow

PW 6 – Hassan Mohammed Hassan – 1st Petitioner

The 2nd Petitioner, who had indicated intention to withdraw from the petition, did not do so. He did not however, testify. The summary of the evidence adduced by the Petitioner's witnesses is as follows: -

Ibrahim Mohammed Abdirahman, PW I, stated that he was a TNA Wajir West Constituency National Assembly seat candidate. On 4th March, 2013, he visited several polling stations. At Forest Primary School Polling Station, he saw a man later identified as Hassan Noor Abdille, dish out to voters in a voting queue, Ksh.500/- notes. He took out the 500/- notes from an A4-size envelope in his hands. He was telling each voter who received a note, to vote for ODM's Abdikadir Ore Ahmed, herein the 3rd Respondent. The witness saw at least two voters received a Ksh.500/- note each. That when the said Hassan Noor Abdille saw the witness, he abandoned the bribery act and ran away. The witness further testified that he immediately tried to report to a female police officer at the polling station but the officer became hostile. The witness then reported the incident to the Presiding Officer at the polling station and later to the Returning Officer. That he also reported the matter to Griftu Police Station in Occurrence Book No. 5 of 4th March, 2013.

At Lagbogol Secondary School Polling Station, the witness saw that there was only one voting stream although there were 857 registered voters expected to vote, for which reason, there were still many voters who had not got a chance to vote and were finally locked out at 10.45 p.m. when the polling station closed.

At Kurman Centre Polling station the witness was denied access into the polling station. He filed a complaint with the Returning Officer.

Finally, the witness also testified that he was present at the Returning Officer's Tallying Centre when the latter announced the election results when the Returning Officer announced that the witness had garnered 6778 votes across the constituency. PW I noticed however, that the Form 36 filed in court shows only 5813 votes. He also noticed that Form 35 for Forest Primary School and Lagbogol Secondary Polling stations, filed by the 1st and 2nd Respondents, differed from the Forms those released to party agents in relation to signatures of the agents.

PW 2 was Dr. Mohamed Yussuf Elmi, a KNC Party Candidate for National Assembly seat for Wajir West Constituency. He testified that before the 4th March, 2013 elections, he formed some apprehension arising from the information he got, that the selection of Presiding Officers and their Deputies and clerks to various polling stations in Wajir West was influenced by the other candidates and could not turn out to be proper for a fair, just and transparent election. He accordingly wrote to the Returning Officer, Wajir West, asking for the actual list after personally meeting him. He feared that due to the fact of high illiteracy of voters, partisan or influenced selection of election officials would jeopardize fairness of elections. He did not however receive any response and the list of election official was not posted on the local IEBC constituency Notice Board at Griftu until the 3rd March, 2013 – a day before the elections.

The witness further testified that as a result of the alleged influence One Ahmed Omar Haji was appointed the Presiding Officer at Elkali Mobile Polling Station and yet he was the son of Omar Haji, the ODM County Representative Ward aspirant in Hadado Anthibohole Ward, as well as being an uncle to the 3rd Respondent who finally won the challenged seat.

A further unfair result, PW 2 stated, was that one Halima Bashir and Saadia Ahmed were appointed Presiding Officers in Wajir West Constituency although they were reputed to be the supporters of the 3rd Respondent herein. The witness testified that he got information that the two actually marked assisted votes in favour of the 3rd Respondent against the expressed wishes of the voters.

At Hadado Waberi Polling Station, PW 2 testified, he found the ODM agent, Abdihakim Mohamed Hassan marking the voter's register as a polling official. At the time, while the Presiding Officer, Halima Bishar, was assisting illiterate voters. The witness also testified that he was unlawfully ejected by the Presiding Officer from the said polling station on the ground that he questioned the alleged conduct on the part of the Presiding Officers.

Dr. Elmi also testified that all his agents in all stations except Wajir Girls Secondary School, were not allowed to sign Form 35's. Touching on the issue of bribery, he said that the malpractice was reported

to him from Bahati Primary, Makaror Primary and Wajir Girls Polling Stations. He also testified that one Abdi Billow whom he knew well and is connected with the 3rd Respondent, campaigned for the 3rd Respondent although he was an accredited independent observer. The latter influenced the election because he nursed a promise that his own brother would be appointed the C.D.F Chairman for the constituency when the 3rd Respondent would win the parliamentary seat.

Dr. Elmi further testified that there was bribery and wrongful marking of ballot paper for assisted voters. That counting and tallying was also incorrect as reflected in Form 35s as compared with Form 36, especially as concerning the votes he garnered where one showed 1883 and the other 1243. He concluded that he reported the irregularities of bribery and other electoral malpractices to the OCPD Wajir West.

PW 3, Ahmed Adan Hefow, testified that he was a TNA Party Agent at Gersogoftu Primary School. He saw an administrative Chief called Abdirashid and his Assistant Chief, both in uniform, at the polling station on the voting day. They were telling the voters to vote for ODM candidates. The Assistant Chief was allowed to mark ballot papers for assisted voters without caring to ask who the voters wanted to vote for. When PW 3 raised objection to the Presiding Officer, his mobile phone was forcefully taken away by one Abbey Salat who was a councilor's son but also an official polling clerk. That Abbey Salat was a close relative of the 3rd Respondent. This witness concluded his evidence by stating that he was ejected from the polling station because he raised objection to the abovementioned malpractices allowed to be committed by the Presiding Officers.

The fourth witness was PW 4, Roble Mohamed Adan. He testified that he was a TNA party agent at Hadado North Primary School. That he saw double voting taking place and his protestations to the Presiding Officer were harshly overruled by him and by the polling clerks. He saw polling clerks issue more than one ballot paper at a time. The Presiding Officers further, allowed voting beyond the official hours until midnight when he announced that counting would take place the next morning. The next morning, the witness realized that counting had been done the night before, in his absence. The witness also accused the Presiding Officer of refusing him to be transported to the tallying centre with other agents because he had refused to sign Form 35 due to the anomalies on it.

The fifth witness to testify for the Petitioner was Amina Abdi Gedow. She said she was a TNA agent at Lagbogol Secondary School Polling Station where there were just over 800 registered voters. He accused the 1st and 2nd Respondents of having given only one voting stream, instead of two to such large station. He also testified that at the end of the voting day at 10.30 p.m., about 50 voters were shut out without being allowed to vote. The witness gave three names of people who were denied a chance to vote although he said, they had arrived at the polling at about 12 noon. For that reason, she asserted, she had refused to sign Form 35.

The Petitioner also testified as the last witness before his case closed. He complained that the Returning Officer failed to publish names of Presiding and Deputy Presiding Officer 14 days before elections and waited until only a day before. He saw the presiding Officer wearing an ODM T-shirt within the Polling Station and saw him mark ballot papers for assisted voters without following the wishes of the voters. He saw 17 voters brought to the polling station after voting hours at 7.30 p.m. That they were allowed to vote. When he raised the malpractice with the Presiding Officer, he was ordered to leave the Polling station, which he did.

It was the Petitioner's view that the conduct and the result of the election, did not have the expected integrity, fairness and transparency. That the election was tainted with the stated malpractices and irregularities. That the tallies were inaccurate and that procedure laid down by law were so seriously breached as to render the election so totally tainted and lacking in integrity that it should not be left to stand; that it should accordingly be annulled and a fresh election be called.

The 1st and 2nd Respondents called one joint witness, the Returning Officer for Wajir West Constituency, Festus Mari Ngeerah. He said that he stayed at the Tallying Centre most of the voting day. He stated that the minimum qualification for polling clerks was KSCE C- and C+ in most areas. He

admitted that he had not in his evidence affidavit, exhibited any document to confirm the minimum qualification of polling clerks but asserted that those selected met the minimum qualification. He agreed that he based his evidence on the information he received from his Presiding Officers who were conducting elections in various polling stations. He confirmed the following: -

- a. *That it was a legal requirement for Presiding Officers to fully and properly fill and file Forms 35's and Form 36 and that a number of the forms 35's were not properly filled or signed by some Presiding Officers. Some forms were signed on 5th March, 2013 and others on 4th March, 2013.*
- b. *That there were some discrepancies in tallies on Form 35 as compared to Form 36 but the same did not substantially undermine the announced election results.*
- c. *That some alterations on form 35's were not authenticated by counter signatures but the alterations were not substantial and did not undermine the figure on the forms.*
- d. *That the Form 36 had omitted the results of Arbajahan Primary School Polling Station, Stream 2 but the garnered votes omitted were included in the final announced result.*
- e. *That figures in Form 36 did not tally with the totals from Form 35's but only with very minor variations.*

The 3rd Respondent, Abdikadir Ore Ahmed, called four witnesses to testify in his favour. The first was Abdi Billow Elmi, who in summary stated as follows: -

That he was a programme Co-ordinator at Wajir Peace and Development Agency an N.G.O. That he was an accredited observer recognized by IEBC. On 4th March, he used his personal Motor vehicle Registration No. KBR 925Z to make movement. He said that his brother Nassir Billow Elmi was the Chairman of Wajir West Constituency C.D.F. The C.D.F. appointment was made recently after the 4th March election. He concluded that although he had prepared an observer's report, he had not found it necessary to bring it to these court proceedings.

The second witness who testified for the 3rd Respondent was Abdihakim Mohamed Hassan. He said that he was an ODM party agent at Hadado Waberi Primary School Polling Station Stream I where there were other 7-10 party agents from other parties. Voting had began at 8 a.m. and closed at 10.30 p.m. that there were 460 registered voters who turned and voted. He however saw about 50 voters being assisted to vote by the Presiding Officer – one Bishar.

The 3rd witness was Hassan Noor Abdile. He said he was an ODM party agent at Griftu Primary School Polling Station but did not carry his appointment letter to court. He on the material day never left the station from 5.30 a.m. until 11.30 p.m. when the station closed after counting was completed. He however said that he did not sign Form 35 and did not explain why. He knew one Ibrahim Abdirahiman who was a candidate for the 4th March, 2013 election.

The fourth witness who testified for the 3rd Respondent was Yussuf Mohamud Farah. He said he was the Chief Agent for ODM in Wajir West. He said that out of the 70 polling stations in the Constituency, he visited 12, staying there for up to 30 minutes in Wajir Girls Polling Station. He finally visited Gesoquoftu at 3.30 p.m. after covering a distance of 200 kms in the course of the day. He said he was at Arbajahan Polling Station when a disrupting incident took place. He conceded that some of the information in his sworn evidence was based on information he got from the junior agents in various polling stations. He stated that the minimum educational qualification for polling clerks was C- (minus) to the best of his knowledge and could not explain why 1st Respondent's witnesses could give a different qualification.

The counsel for the Petitioner's and the Respondents filed written submissions which this court has carefully perused. Both sides have variously analysed the evidence on the record to support their case. Before this court also analyses the evidence and makes rationalized conclusions on the facts, the court

will first review the law as is contained in the Elections Act of 2011 and in the Regulations made under the said Act. The court will also take into account the current state of case law where the basic issue of any relevant petition, was the nullification of the election result.

In this case, the issue of determination in summary, is whether the election for member of the National Assembly for Wajir West Constituency conducted on 4th March, 2013 and whose result was declared on 13th March, 2013, was conducted in accordance with the principles of the Constitution, the Elections Act and the Regulations promulgated under the Act. If the court finds that there was non-compliance of the law, it will still go further to establish whether such non-compliance affected the final outcome of the results to the extent the same would be unfair and unjust; in which case the court would be inclined to nullify the result and proceed to order for a fresh election.

I will first deal with the burden of proof. Like in other cases of a civil nature, the party who alleges the basic facts upon which the case is based, has the burden to prove them. Similarly, the Petitioner has the burden to adduce evidence to support his assertions in the petition. In the case of **Raila Odinga and Others Vs Independent Electoral and Boundaries Commission –Petition No. 5 of 2013**, the Supreme Court of Kenya put the issue as follows: -

“A Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden.”

Kimaru, J made a similar pronouncement in **John Kiarie Waweru Vs Beth Wambui Mugo & 2 others [2008] eKLR** at page 4 when he stated thus: -

“The burden of establishing all these allegations regarding the conduct of the said election and results announced thereafter is on the Petitioner....”

This court will accordingly be guided in this petition. The next point to consider is what is generally referred in law as the **“Standard of Proof”**. That is to say, in my understanding, the extent the Petitioner is to go to sufficiently persuade the election court to interfere with the election results declared in favour of the candidate who scored victory.

In my view it is now correct to say that Section 83 of the Elections Act, lays down the standard of proof required in election petitions in Kenya. It provides: -

“No elections shall be declared to be void by reason of non-compliance with any written law relating to that elections 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.”

My understanding of the above provision is this: that the Constitution and the Elections Act have laid down the main principles which a free, fair, just and transparent election must comply with free, fair and transparent election must comply with in order to achieve such a purpose. Regulations and/or rules were then created to lay down and operationalize the practical aspects of the principles in order to achieve maximum compliance or obedience of the said basic election, i.e. the Elections Act. The main purpose of the regulations is therefore to enforce compliance so that the end election results do achieve maximum integrity and respectability.

Section 83 of the Act aforesaid therefore, is understood by this court to state that breach of the regulations or procedure laid down by those regulations, which does not go far enough as to interfere with the democratic choice of the voters, will not persuade the court to interfere with an election result. Put differently, unless the irregularities or malpractices proved by the Petitioner are such that they actually interfered with the free choice of the voters, the court will not be willing to interfere with the existing voter's choice.

In the aforesaid case of **John Kiarie Waweru** the court stated the point as follows: -

“This court will not therefore interfere with the democratic choice of the voters of Dagoretti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the Petitioner to establish that irregularities or electoral malpractices did (not) occur; he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election held on 27th December, 2007.”

Clearly then the proof by the Petitioner of the irregularities and malpractices which he will have pleaded in the petition and which accordingly formed his case, is not adequate and is not all; more is required in order to persuade the court to nullify an election result. Put differently the mere proof on the balance of probabilities of the grounds of a petition based on malpractices and/or irregularities is below the standard of proof set by Section 83 of the Act. The irregularities and malpractices or the breach of electoral procedures as laid down by the Act and Regulations, must materially and/or substantially have adversely affected the free or democratic choice of the voters before the court would be persuaded to interfere with the declared election result.

Clearly then, the standard of proof discussed above cannot be the usual standard of proof on the balance of probabilities applicable in civil cases. Such a standard in election petitions must be much higher. In the Ugandan case of **Toolit Simon Akecha Vs Oulanya Jacob L”Okori & Another EP No. 1 of 2011 [2011] UGHC, 56 (unreported)** the High Court felt the said standard of proof is at a higher level in which the petition was to be ***“Proved to the satisfaction of court”***; and expression considered by the Supreme Court of Uganda in the case of **Col. (RTD) Dr Kiiza Bisegye Vs Yoweri Kaguta Museveni; in Presidential Petition No. 1 of 2001**. The Supreme Court of Uganda (Mulenga JSC as he then was) had stated thus: -

“I do share the view that the expression proved to the satisfaction of court connotes absence of reasonable doubt... the amount of proof that produces the court’s satisfaction must be that which leaves the court without reasonable doubt.”

It seems clear to this court, therefore, that a petition as compared to other matters of a **“civil nature”**, has to be proved on a much higher standard of proof. Such higher standard was expressed by the High Court in **John Kiarie Waweru Vs Beth Wambui Mugo & 2 others (supra)** at page 5 as follows: -

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

This court agrees entirely with the pronouncements above and will apply the stated standard. The basis for requiring such a higher standard in electoral petitions, was effectively explained in the case of **Joho Vs Nyange & another [2008] 3 KLR 500 at page 507**. Maraga J, (as he then was said: -

“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance - Kibaki Vs Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the Elections Court’s decision in Wanguhu Nganga & Another Vs George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”

This court also agrees with the above sentiments and will apply the principle involved while considering

and deciding on the evidence in this case. The court carefully notes from the cases cited above that the legal burden to establish the Petitioners case, lies on the Petitioner, but depending on the effectiveness with which he/she discharges the said burden, the evidential burden may or may shift to the Respondents. It will only be the court that will determine whether the Petitioner has established a firm and unanswered case that will persuade it to interfere with the election result, unless the Respondents lead evidence to shift the burden back to the Petitioner. The common law approach in respect of public bodies such as the Independent Electoral and Boundaries Commission, is that all their acts as touch on the conduct of elections are presumed to have been done rightly and regularly and lawfully until shown to the contrary by the Petitioner.

To conclude on the issue of the standard of proof, this court notes that election courts have generally handled the **burden of proof** and the **standard of proof** contemporaneously, while carefully showing that the two are separate concepts. In **Raila Odinga Vs the Independent Electoral and Boundaries Commission (supra)** the Supreme Court of Kenya stated thus at page 75: -

“But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt-save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

The court will now turn to the evidence adduced by both sides, to analyse the same and make conclusions of fact before applying the above principles of law to them.

The court reminds itself of the summary of issues between the parties in this petition, which are these: -

- a. **Whether or not the election of Member of the National Assembly Wajir West Constituency conducted on 4th March, 2013, was conducted in accordance with the principles of the Constitution, the Elections Act and the Regulation promulgated under the Elections Act.**
- b. **If there was non-compliance of the principles of the Constitution, the Act or the Regulations, whether or not such non-compliance through irregularities and/or malpractices, materially and/or substantially affected the election results.**
- c. **The consequential orders of the court.**

The grounds upon which the Petition is based as also propped by the Petitioners supporting affidavits can be summarized into three major issues: -

1. **That the Respondents failed to comply and breached electoral law and regulations.**
2. **That the 1st and 2nd Respondents allowed intimidation, violence and/or bribery to be committed before and during the 4th March, 2013 in election polling stations to the extent that the same materially and substantially affected the election of the member of the National Assembly for Wajir West Constituency.**
3. **That the Respondents themselves committed election offences.**

The court first considers the allegation of voter bribery; Petitioner's evidence came from Ibrahim Mahamud Rahman who was Petitioner's first witness. He was a contestant for the same seat on TNA ticket. His testimony is that he on 4th March, 2013, saw one Hassan Noor Abdile, Respondent's witness 3, dishing out Ksh.500/- notes to voters who were in the voting queue at Forest Primary School Polling Station. The notes were being dished out of an A4 envelope. When Noor Abdile saw the witness, he ran away. Although the witness said that he saw two voters receive the Ksh.500/- votes, neither of the two were called to testify. He said he did record any police statement nor report it to the Presiding Officer. He

however said that he reported to Griftu Police Station although no Occurrence Book record was annexed to his evidence affidavit. He said he reported to a Police Officer at the Polling Station who also was not called to testify. The witness confirmed that Forest Primary School was his stronghold and he obtained more votes there than any other candidate. What made him unhappy is the fact that he did not obtain all or almost all the votes there. He was of the view that bribery with cash made many voters among them many some of his relatives and friends, not to vote for him.

I have carefully considered this piece of evidence. If the witness really saw money exchange hands, his evidence in support is not directly supportive of the fact. The person, who was allegedly dishing out money, is said to have run away immediately the witness arrived. Being a polling station in which PW I was popular and where as he said, he knew people well, it would not have been difficult to get corroborative evidence from other people who saw bribery take place especially since the alleged briber denied the allegation and said that he was himself an ODM agent in another Polling station. The witness could also easily have sought the help of the Police Officer who was present to arrest any of the briber or bribed. The evidence in support of this allegation is too transitory to be credible. The witness claimed that massive bribery must have taken place there in order to change the minds of many voters who greatly liked him at that station and who now voted elsewhere and yet he produced no credible evidence to support the claim. The court reaches the conclusion that the bribery claim at Forest Primary School Polling Station has not been proved. The court believes that the witness could have been wrong in thinking that the voters of that polling station were all in his support.

A second witness Dr. Mohamed Yussuf Elmi, testified that he witnessed bribery at Bahati Primary School, Makoror Primary School and Wajir Girls Secondary School Polling Stations. He said that the persons he saw bribing voters were Fatuma Kalai at Wajir Bahati primary School and Abdi Billow at Wajir Girls Secondary School. He also said that Lul Ore was doing the same at Makoror Primary School.

That Lul Ore was bribing at Makaror Primary School Polling Station was admittedly hearsay because the witness depended on a report he got. Dr. Elmi also conceded that they did not record any police statement about Bahati Polling Station although he said he reported the incident to the Police officer at the Polling Station. There is also no good reason given by Dr. Elmi why Fatuma Kalai whom he saw bribing voters at Wajir Girls School Polling Station was not reported to the Police Station for arrest. He conceded he could but did not take photographs of those giving out Ksh.500/- notes. He did not even try to enlist any of those allegedly bribed to testify, although that is not easily achievable. He however could have persuaded other onlookers to testify. Finally, Dr. Elmi said in his evidence that he had voted at Wajir Girls Secondary School at 6.30 a.m. and left to visit other polling stations as one of the candidates in the same elections. He did not attempt to obtain corroborative evidence from the agents of other parties in the relevant polling stations.

The court has carefully considered Dr. Mohamed Yussuf Elmi's evidence on bribery. While he appeared a candid and truthful witness, his evidence lacked quality and was lightweight. He tended to make generalized conclusions. His evidence accordingly was not convincingly acceptable. The court is unable to rely on his evidence as the same was superficial.

The third witness who gave evidence on bribery was Hassan Mohammed Hassan, the 1st Petitioner. He was an agent for TNA at Adhibohole Primary School Polling Station. He said that although he saw ksh.500/- being exchanged in bribery, he did not know who bribed who. He did not report to the police on the issue of bribery.

The court has carefully considered totality of the evidence on bribery. The conclusion the court reaches is that the evidence of bribery is sketchy and the quantity and quality is lacking to prove the claim on the earlier stated standards.

The next issue to be considered is intimidation, violence and insecurity to voters. The Petitioner Hassan Mohammed Hassan, alleged that voters were intimidated and their security threatened to scare the Petitioner's voters or people from his ethnic group. The Petitioner and P.W. 3 Ahmed Adan Hefow testified on this issue. They asserted that even Petitioner's agent at the polling stations were threatened

and lacked security. They further claimed that Administrative chiefs and assistant chiefs were in support of the 3rd Respondent. The two witnesses also alleged in their affidavits that the agents of the 2nd and 3rd Respondents used violence to intimidate and cause disruption of voting, counting and tallying.

The court has perused the two witnesses' evidence in their supporting affidavits and in their court testimonies. It finds the evidence sketchy and too generalized. The evidence does not point to the specific voters who were adversely affected by any intimidation, if any there were. It does not specifically show where any such incidents occurred to disrupt voting, counting or tallying.

It is probable that Hassan Mohamed Hassan, PW 6, was ejected from the polling station at Athibohole but he also conceded in his evidence that voting continued after his ejection. His ejection, if any there was, did not disrupt the process of voting.

Ahmed Adan Hefow was the Petitioner's agent at Gaserkoftu Polling Station. His evidence is that he was verbally and physically assaulted by the opposing party's agents in full view of the police officers and Poll observers at the polling station, who did nothing. Although the witness said that he reported the matter at the police station the next day, no documentary evidence of the report, such as the daily Occurrence Book was produced. This would have probably assisted the court to more look at this evidence in his favour. More so because he changed his affidavit facts in what he orally testified in court. For example, he had claimed in his affidavit of having been attacked by several agents and clerks. In his evidence in court he claimed that he was attacked by only one clerk called Abbey Salat.

The conclusion that the court has reached is that the claim of intimidation violence and insecurity which would adversely affect voters to vote for a person not of their choice, has not been sufficiently supported by the evidence on the record. Furthermore, if indeed there occurred acts of intimidation and violence and insecurity, there is no sufficient evidence to directly link them to any of the Respondents, particularly the 3rd Respondent.

Put differently, those who are said to have committed the acts, were not proved to be necessarily agents of the Respondents sent and authorized by the Respondents to commit the alleged unlawful acts. For example if one Abbey Salat, a clerk attacked the Petitioner, there was no proof that he acted so within the authority given to him as a polling clerk. He most likely acted outside his employment and without the authority of his employer. He could only be reported to the police for criminal prosecution. The evidence adduced by the Petitioner accordingly falls short of what is required to prove that the 1st and 2nd Respondents either or through their agents committed any of the alleged criminal acts.

The next Petitioner's claim to be considered is the claim of double voting. Petitioner asserted that the 3rd Respondent's voters were allowed to vote more than once without their fingers being dipped in the available indelible ink. PW 4, Roble Mohamed Adan who was a TNA agent at Hadado North Primary School Polling Station, said that he saw people he knew vote more than once. He did not give any names although he also said that he reported the malpractice to his TNA Chief Agent.

The Petitioner, Hassan Mohammed Hassan, also testified that he saw the Presiding Officer at Hadado North Polling Station allow ten people to vote more than once before he was ejected at 11 a.m.. He gave no names either.

The court has considered the available evidence on double-voting, which also is a criminal offence under Section 58(m) of the Act and finds no sufficient evidence in support thereof. Available evidence on double-voting is sketchy and unspecific.

In conclusion, the court has considered the evidence regarding the alleged malpractices of intimidation, bribery and corruption, violence and double voting, taking into account the fact that they all amount to criminal conduct proscribed under Section 65 of the Elections Act. In the view of the court independent strong and cogent evidence as was found in the case of **Toolit Simon Aketcha vs Oulanya Jacob L'okari & Another (Supra)** was required on the part of the Petitioner to prove them. The standard of proof for such is proof beyond reasonable doubt.

Mere or sketchy and generalized allegations are not sufficient to prove these serious criminal acts.

The court now turns to the alleged contravention of the Elections Act and Regulations. Several irregularities have been alleged, mainly in these written submissions with some in the adduced evidence. They include: -

Forms 35s and 36 not signed by agents or Presiding Officers. Evidence came from Hassan Mohammed Hassan that Form 35s from Garsekoftu, Bahati Primary, Mau Mau, LMD Primary I, Adema Sajida Secondary School, and Baji Mobile Polling Stations were not signed by the party or candidates agents. He gave the reason for failure to sign as absence of all TNA party agents because they had been thrown out or sent away from polling stations by the Presiding Officers. Amina Abdi Gedow who was a TNA agent at Lagbogol Secondary School Polling Station, testified that she did not sign the Form 35 because she was not offered one by the Presiding Officer. She did not raise the issue in her evidence affidavit. She did not either complain to the Presiding Officer or demand the form to sign it although she said she was present when others signed the Form 35. Roble Mohamed Adan testified that he also refused to sign the Form 35 for Hadado North Polling Station because the Presiding Officer had refused to enter on the form, his protest that counting had been done at night when he had left the polling station after being assured that counting would be done the following morning.

I have carefully considered the evidence on the issue of failure to sign Form 35's by mainly TNA party and candidate and agents. They stated that where the agents refused to sign or were absent and could not sign, there is nothing the Presiding Officers could do. They also argue that the agents did not indicate reasons for failing to sign on the Forms themselves. That however, begs the question. The Forms were in the hands and control of the Presiding Officers. In the courts view the agents could not indicate their reasons on the forms unless they themselves had physical access to the Forms. If the reasons for refusing to sign by the agents was valid and damning to the process, it is unlikely for the Presiding Officers who were at fault to record such grounds or reasons.

The court has however considered the evidence on the record. It finds that, notwithstanding the absence of agents signatures there was admission that the figures on the unsigned Form 35's were correct with one or so exceptions. The agents also admitted randomly, that they were either absent when the forms were being signed for various reasons, or they refused to sign because of some reasons which they gave. All in all, the court's view, is that failure by the agents to sign the Form 35's did not materially or substantively alter the results in the relevant polling stations. It is also observed that mere failure to sign the forms is not regarded by Regulation 79(6) as going to the root of the validity of the figures on the form.

Some similar reasoning as above is adopted for failure by a few Deputy Returning Officers to sign the Form 35's. This court makes a finding that where Form 35 is properly signed by the Presiding Officer, failure by his Deputy to sign it, although his space is thereon provided, cannot alone damnify the validity of the forms contents. More so because Regulation 79(1) appears to imply that the obligation to sign the Form 35 and authenticate its contents at the end of the vote tallying, is that of the Presiding Officer, rather than that of the Deputy Presiding Officer.

The relevant worrying point out of this signing issue, however, is that some Presiding Officers did not indicate on their Form 35's the reasons for some candidates and/or their agents failure to sign Form 35's as required by Regulation 79(4). This omission in the face of claims by some agents and candidates that they were denied a chance to sign or to record reasons for refusal to sign, gains them some credibility. The court accordingly, reserves opportunity to comment later over the effect of the Presiding Officers failure to record the reasons for omissions of some agents' signatures or reasons for omissions.

The court now turns to the allegations of partisan and incompetent clerks and other officials. Dr. Mohammed Yussuf Elmi claimed in his affidavits and court testimony that the 1st and 2nd Respondents employed unqualified clerks and also employed relatives and close friends of the 3rd Respondent. He also claimed that the 2nd Respondent refused and/or failed to post for inspection by the public, the list of Presiding Officers and clerks 14 days before elections as required by law. He testified that he was forced

to write to the 1st Respondent about it on the 26th February, 2013 but that he got no response. He further claimed that the list was posted on the IEBC Notice Board in the Constituency only on 3rd March, 2013, a day before elections. He however, agreed that when he wrote his complaint letter on 26th February, 2013 he relied on rumours as the list had not been posted in the public Notice.

In his evidence in court Dr. Elmi testified that one Ahmed Omar Haji was a Presiding Officer at Elkali Polling Station while he was the son of the Adado, Athibohole Ward Representative who also was a close relative of the 3rd Respondent. He however, also conceded that he had sworn in his affidavit that Ahmed Omar Haji was a presiding Officer not at Alkali as testified in court but at Bukuma as sworn in the affidavit. He also, conceded that both were not correct although he stuck on his claim that Ahmed Omar Haji was a Presiding Officer in a place he did not know.

Further evidence on the issue came from Hassan Mohammed Hassan, the Petitioner. He said that at Garsekoftu Polling Station, the clerks there were standard eight drop-outs who were illiterate, untrained and therefore ill-equipped to conduct elections on the 4th March, 2013. He however, conceded also that he did not know the names and back-ground of any of the clerks.

The Petitioner further, claimed in his affidavit and testimony, that at Athibohole Primary School Polling Station, the Presiding Officer there was related to the ODM Governor of Garissa although he was not sure the same was the correct fact. He had not sworn so in his affidavit nor complained of it to the Returning Officer. He conceded in court evidence that he heard of the said relationship from others and much later after elections. As to the issue of clerks, he stated that he did not know who were the clerks that were illiterate or untrained.

The Retuning Officer, 2nd Respondent, for himself and the 1st Respondent denied the above allegations. He categorically testified that all clerks and Presiding and Deputy Presiding Officers were all sufficiently qualified and trained to conduct the 4th March, 2013 elections. He said they were all qualified in their education and met set standards under the law. He said that Presiding Officers were appointed on 11th January, 2013 and trained on February, 2013. He said that the list was published, posted and supplied to all political parties by 14th February, 2013 and that it was upon the parties to notify their candidates and agents.

The court has carefully considered the above issue of the alleged partisan and/or incompetent officials. The court has not been convinced by the relevant evidence that the election officials were partisan or incompetent. There was no specific evidence as to who among the clerks was not qualified, was incompetent, or was a drop-out. The allegations were mere allegations without cogent evidence to support them. So was the evidence touching the relationship of one or two Presiding Officers to the 3rd Respondent? The evidence was denied and controverted. In the circumstances the court does not stand persuaded that the allegations are true or reliable.

What about the allegation that Petitioner's agents were locked out? Hassan Mohammed Hassan swore and testified that he was ejected at Athibohole Polling station for one hour from 11.00 a.m. because he protested of some irregularities being committed by the Presiding Officer. He said that he stayed outside for one hour before returning to his post.

The Respondents did not really deny the act of ejection of the witness for a short period. They however, counter stated that the Presiding Officer had authority to eject the agent as he did because of his conduct which could disrupt the election process.

The court has considered the issue. The removal of the witness was brief and has been accounted for. The court accepts that not much harm to the voting process has been demonstrated by the Petitioner's agent's absence of one hour.

The second person who alleged ejection was Ahmed Adan Hefow, PW 3. He was a TNA agent at Garsekoftu Primary School Polling Station. He claimed that he was attacked by clerks and agents and

ejected from the polling station. He later changed and said he was physically and verbally assaulted by only one clerk called Abbey Salat who robbed him of his mobile phone.

The court believes the evidence of ejection. However, the same did not demonstrate that the clerks and agents who removed the witness did so at the behest of the Respondents and with Respondents' authority. The conduct was clearly criminal and the witness should have pursued it as so. It appears that the commotion made the Presiding Officer to halt the voting process for one hour. The witness also admitted that he did not include this serious issue in his original evidence affidavit nor did he make a report to his Party Chief Agent. His alleged report to the Griftu Police Station was not as well produced in evidence. Most important however, the removal for one hour although it halted voting process, is not shown to have adversely affected the Petitioner to the exclusion of the other candidates.

Dr. Mohammed Yussuf Elmi testified that one of his agents, Hussein Sugule, was also ejected from Hadado Waberi Polling Station. Since Hussein Sugule did not swear any affidavit and Dr. Elmi did not personally witness the ejection, the same remains at the level of hearsay to which nothing more will be said. In any case the allegation was categorically denied by RW 3 Abdihakim Mohammed Hassan who said that Hussein Sugule was not an agent at that Polling Station and little was adduced to show that he indeed was.

The general conclusion about the ejections of agent's issue, is that the Petitioner failed to show that the ejection in any material way affected the final elections a result. As stated in the case of **Bura Vs Jarwat [1967] EALR, 234**

“His exclusion from the station was a non-compliance with the provisions of the Ordinance, but certainly it was not substantial and we have no reason to think that it could in any way have affected the result.”

In this case however the exclusion from the polling stations of alleged Petitioner's agents would appear to have been done for good reasons; for example where an agent caused disruption at a polling station and the Presiding Officer had to halt voting for an hour to enable the return of peace and orderliness, the court would hesitate to fault the Presiding Officers discretionary act.

The next issue to be considered is whether or not the ballot papers and ballot boxes in Wajir West were handled with integrity. The matter is pleaded in paragraphs 10, 11 and 17 of Petitioner's petition. However, little evidence was led on this matter. Mention was made of a ballot box noticed with a hole, by the Petitioner. He did not specify to which polling station it belonged. He did not allege that the ballot papers it contained were irregular or were unlawfully stuffed. He did not ask the court to scrutinize the ballot box for any specific information. In the court's view, the allegation by the Petitioner proved nothing.

The Petitioner further stated that at Lagbogol Secondary School Polling Station, voters were prevented from voting at 10.45 p.m. This came from PW 5, Amina Abdi Gedow. She said three voters confirmed to her that they did not vote although they were in the queue. She estimated that about 50-80 people were in the queue but were not given opportunity to vote.

The court has considered the witness's evidence. It notes that out of the 854 registered voters in the Lagbogol Polling Station, 767 had actually voted. Only 87 of the registered voters did not come to vote. If about 80 voters were prevented from voting as alleged by the witness, it then means that virtually all the voters registered in Lagbogol Polling Station had turned out to vote – a very unlikely and incredible scenario. The court does not accordingly believe and accept Amina Abdi Gedow's evidence on this point. Indeed, the voter turnout in Wajir West was one of the highest in the country.

In paragraphs 28 and 43 of the Petition, the Petitioner alleged that the 1st and 2nd Respondents unlawfully declared the 3rd Respondent as the winner. The Petitioner based his claim on the fact that no true and complete elections took place in Wajir West Constituency. He did not specify whether he based this generalized argument on the various votes garnered by each candidate who participated in the election or

on the integrity of the election conduct process.

In the view of the court, the Petitioner should have objected to the counted figures of votes, if he was aggrieved over the counting or tallying process, which he did not do. If his grievance is on the integrity of the election process, then he should have demonstrated the same by material evidence, to the standard required by law. He did not seek recount of votes at the polling stations or even at the tallying centre. In fact the Petitioner and his witness Ibrahim Mohamud Rahman, PW I, conceded in their testified evidence that the counted figures finally shown in Form 36 were correct for 3rd Respondent and the Petitioner. They both stated that their grievances were really on election malpractices believed to have been committed during the elections.

The above conclusion leads the court to the issue of alleged disparity of numbers of votes on Form 35's and Form 36 in Wajir West Constituency. Forms 35's showed the following garnered votes: -

Abdikadir Ore Ahmed	11579
Ibrahim Mohamud Abdirahman	5771
Mohamed Yussuf Elmi	1883
Ibrahim Ali Hassan	80

Form 36, on the other hand showed: -

Abdikadir Ore Ahmed	12051
Ibrahim Mohamud Abdirahman	5813
Mohamed Yussuf Elmi	1928
Ibrahim Ali Hassan	82

Clearly the above figures should be similar, but they are not. However, the 2nd Respondent admitted the disparity which he also explained. He said that the votes garnered in Arbajahan Primary School by all the candidates had while tallying, been inadvertently not captured while being keyed-in by the clerk who gave evidence and confirmed the arithmetical error. The return from Arbajan Primary School Stream One showed the following votes garnered: -

Abdikadir Ore Ahmed -	452
Ibrahim Mohamud Abdirahman	42
Mohammed Yussuf Elmi	45
Ibrahim Ali Hassan	3

It is in evidence that the final votes shown above in Form 36 included the Arbajahan Primary Polling station figures after an error was promptly noticed and corrected by the 1st Respondent. The fact is not controverted by the Petitioner. In the circumstances, the court concludes that the error did not lead to a different or incorrect final election result and cannot alone be used to condemn final result.

Having analyzed the issues and the evidence adduced thereon from both sides, the court makes the following points: -

Article 86 of the Constitution sets out the threshold to be met by IEBC when conducting an election in

order to make the election results acceptable to the people who participate in it. That is to say that: -

- i. **the system used to conduct the election must be simple, accurate, verifiable, secure, accountable and transparent, notwithstanding the voting method used.**
- ii. **the votes should have been counted, tabulated and results announced promptly at the polling stations.**
- iii. **the results from the polling stations should have openly and accurately been collated and promptly announced by the Returning Officer.**
- iv. **there should have been effective structures and mechanisms to eliminate electoral malpractices, including the safekeeping of election materials.**

The court has carefully considered the evidence on record in support and against the petition, taking into account the above election threshold points. It has come to the conclusion that the alleged irregularities may possibly have occurred here and there but the extent to which the same went was generally very limited. As conceded by several witnesses, including the Petitioner, Hassan Mohammed Hassan, the final results as obtained at the various polling stations and at the tallying centre, were correct, with very minor and ignorable disparities.

Here and there, time and again, the court noticed minor flaws arising from irresponsible acts of clerks and occasionally, a presiding officer. However, the irregularities or malpractices noticed, were minor and arising from circumstances that could not be avoided taking into account the conditions under which the elections were conducted nationwide. The mistakes or flaws that were accordingly pointed out by the Petitioner, were those that did not materially or substantively affect the election results obtained at the various polling stations and at the Wajir West Constituency Tallying Centre. In that respect, this court adopts the statement made by the Supreme Court of Zambia in the case of **Lewanika and Others Vs Chiluba [1999]ILRC 138** as follows: -

“Although the flaws in relation to the electoral system.... did not reflect well on those managing the electoral process, they did not by their very nature go to the integrity of the system and did not necessarily suggest that the electoral system had been comprehensively massaged or predisposed in advance to grant an unfair or any advantage or disadvantage to any candidate. It followed that although the elections were not perfect and some aspects were quite flawed they had been conducted substantially in conformity with the law and practice governing elections.”

At this moment the court once more refers to the words and meaning of Section 83 of the Elections Act earlier cited and discussed by the court. The Petitioner seeks a nullification of the election results of the Wajir West Constituency in respect to the member of the National Assembly upon the evidence that he adduced and which has been analysed point by point. Section 83 aforecited in effect states that no election result should be nullified, as sought by the Petitioner, by reason of non-compliance with any written law relating to that election if it appears to the court that the election was conducted in accordance with the principles laid down in the Constitution and in the written law and if the non-compliance did not substantially or materially affect the result of the election. The court has already found that notwithstanding the few flaws or irregularities or malpractices noticed by this court, the same did not substantially or materially affect the result of the elections in question.

The court further, in that respect, adopts the finding in the case of **Mbowe Vs Elinfoo [1967] EA 240 at 242** where Chief Justice Georges held as follows: -

“in my view in the phrase ‘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. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said

that the result of the election would be affected by any particular non-compliance of the rules.”

In this case, as earlier pointed out, the Petitioner had abandoned challenging the election result in relation to majority votes garnered by the 3rd Respondent who won the election. This was so because the margin between the victor and the run-up, was over 6000 votes. This is why it was logical for the petition to be based, not on the votes garnered, but on the alleged irregularities, malpractices, or non-compliance of the law by the 3rd Respondent.

Since the court has come to the conclusion that the alleged irregularities, malpractices or non-compliance with the relevant laws, were not proved to the satisfaction of the court and also since the court has concluded that any irregularities, malpractices or non-compliance with the Constitution and/or the written law, were minor and did not affect the result of the Wajir West Constituency, the court hereby rejects this petition forthwith.

Before the court makes the final orders, it commends counsel for the Petitioner, Mr. Thiga and Mr. Mwaniki who acted before him. The court equally commends the counsel for the Respondents Mr. Melly and Mr. Issa. They all did their best. I finally, thank my Legal Researcher M/s Irene Naserian and the Court Clerk Miss Adline Murunga for their support.

ORDERS

- 1. The Petitioners’ petition is hereby dismissed with costs to the Respondents.**
- 2. The costs due to each Respondent shall be limited to Kenya Shillings One Million Only (Ksh.1,000,000/-) where the 1st and 2nd Respondents shall be regarded as one party.**
- 3. A certificate shall issue forthwith in accordance with the provisions of Section 86(1) of the Elections Act.**

Dated and delivered at Nairobi this 19th day of September, 2013.

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D A ONYANCHA

JUDGE