



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 4 OF 2013
AND IN THE MATTER OF THE
COUNTY GOVERNOR ELECTION FOR
MACHAKOS COUNTY

BETWEEN

WAVINYA NDETI.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC)1ST RESPONDENT

ISAAK HASSAN (RETURNING OFFICER OF THE NATIONAL TALLYING CENTRE)
.....2ND RESPONDENT

THE MACHAKOS COUNTY RETURNING
OFFICER3RD RESPONDENT

ALFRED NGANGA MUTUA4TH
RESPONDENT

MUTUA KATIKU5TH
RESPONDENT

JUDGMENT

Introduction

1. The petitioner has filed this petition to challenge the election of the Machakos County Governor conducted on 4th March 2013. The petitioner, Wavinya Ndeti was one of the contestants on a Chama Cha Uzalendo (“CCU”) party ticket. Alfred Nganga Mutua, the 4th respondent who ran on a WIPER party ticket, was the successful candidate and was duly returned as the elected Governor of Machakos County. The 5th respondent was the 4th respondent’s running mate.

2. The Machakos County governor's race attracted a total of six candidates and the results announced by the County Returning Officer were as follows;

Alfred Nganga Mutua	257,607
Antony Mwau Wambua	5,355
Mumina Fidel Jimi	1,837
Thomas Nzioka Kibua	4,801
Titus John Ndundu	2,951
Wavinya Ndeti	92,644

Petitioner's case

3. The petitioner's case is set out in the petition dated 26th March 2013. The petitioner alleged that the County Returning Officer never declared the gubernatorial election results as required by law by reading them out in public. She accused the 4th respondent of declaring himself the duly elected Governor at the Machakos Bus Park contrary to the provisions of the ***Elections Act, 2011***.
4. The petitioner contended that the return of Alfred Mutua Nganga as the duly elected governor was procured through breaches of the ***Elections Act, 2011***. In particular, the petitioner alleged that the 4th respondent committed several election offences including bribery, treating, voter intimidation, violence and undue influence of voters, ballot stuffing, illegal voter lists and breach of electoral code of conduct.
5. As against the Independent Electoral and Boundaries Commission ("IEBC"), the petitioner alleged that it failed to conduct the election in accordance with the standards provided under **Article 81** of the Constitution. The petitioner contended that the election was not free and fair and that it was not conducted in a transparent manner. She further averred that the election was not administered in an impartial, neutral, efficient, accurate and accountable manner.
6. The petitioner focused her case against Independent Electoral and Boundaries Commission ("IEBC") on the discrepancies in the statutory forms, the Forms 35 and 36, and contended that the discrepancies were such that the entire election ought to be invalidated.
7. In support of her case the petitioner testified and called 17 witnesses on her behalf. She also filed 24 affidavits in support of the petition excluding her own. She also filed a replying affidavit dated 12th June 2013 and annexed a schedule of discrepancies in various polling stations.

Respondents' Case

8. The 1st, 2nd and 3rd respondents filed a Response to the Petition dated 7th May 2013 in which they denied all the petitioner's allegations. They also contended that the petitioner had failed to prove that the election was not free and fair. Their case was supported by affidavits of 13 witnesses including the County Returning Officer and the Returning Officers of the eight constituencies comprising Machakos County; Mavoko, Matungulu, Kangundo, Machakos Town, Mwala, Kathiani, Masinga and Yatta.
9. The 4th and 5th respondents opposed the petition on the basis of the Response to the Petition dated 19th April 2013. They denied all the allegations of the electoral offences and malpractices levelled against them by the petitioner. They averred that the election was carried out in accordance with the Constitution and the law and was in fact free and fair.

10. The 4th and 5th respondents filed 50 affidavits in opposition to the petition. The 4th respondent testified and called 11 witnesses.

11. Before I consider the evidence presented, I will consider the principles applicable in making the determination.

Applicable Principles

12. The general principles governing elections and election petition are not in dispute and have been set out in the parties' oral and written submissions. The electoral process is a realisation of the principle of the sovereignty of the people of Kenya which is articulated in **Article 1** of the Constitution. **Article 38** which sets out political rights underpins this sovereignty. It provides;

38(1) Every citizen is free to make political choices, which includes the right -

- a. *to form, or participate in forming, a political party;*
- b. *to participate in the activities of, or recruit members for, a political party; or*
- c. *to campaign for a political party or cause.*

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

- a. *any elective public body or office established under this Constitution; or*
- b. *any office of any political party of which the citizen is a member.*

(3) Every adult citizen has the right, without unreasonable restrictions-

- a. *to be registered as a voter;*
- b. *to vote by secret ballot in any election or referendum; and*
- c. *to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

13. The rights protected by **Article 38** are actualised through the electoral system set out in **Chapter Seven** titled, "**Representation of the People.**" Under **Article 81(e)**, the electoral system should comply with the principle of free and fair elections. Elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

14. The 1st respondent, the IEBC, is the independent body established under **Article 88(1)** and **Independent Electoral and Boundaries Commission Act (No.9 of 2011)** to conduct and supervise referendum and elections in accordance with the **Elections Act, 2011** and the regulations made thereunder.

15. As regards the conduct of voting the Constitution imposes specific obligations on the IEBC. **Article 86** provides that:

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that-

- a. *whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- b. *the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- c. *the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and*

- d. *appropriate structures and mechanisms to eliminate electoral malpractices are put in pace, including the safekeeping of electoral materials.*
16. Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible while upholding the principles that underlie a free and fair election (see ***Richard Kalembe Ndile and Another v Patrick Musimba Musau & Others, Machakos EP No.1 & 7 of 2013 [2013] eKLR*** at para 32).
17. In establishing their case, the petitioner is bound by the matters which they have set out in the petition. Kimaru J., in ***Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi EP No. 15 of 2008 [2010]eKLR*** dealt with the importance of pleadings in election petitions. He stated 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 which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.”* I shall accordingly limit my observations and judgment to what was pleaded in the petition and supported by the witness affidavits.
18. An election is a process; mistakes will be made and malpractices will occur. I echo what was stated by Muchelule J., in ***William Odhiambo Oduol v IEBC and Others Kisumu EP No. 2 of 2013 (Unreported)*** that, *“An election, by its very nature, is a fiercely competitive exercise in which each contestant wants to win. In the campaign, the various parties and candidates concentrate their resources – financial, political and personnel – on producing a victory on the election date. The last general election was actually six elections in one, all conducted in one day at the same time by the same officials. Extreme pressure was placed on the electoral officials, the candidates, their agents and even the electors, to deliver a credible election. The Electoral officials remained awake for long hours to be able to produce the results. It should also be borne in mind that, an election is not an event but a process. It begins with the registration of voters up to the time the results are declared. Lastly, the players are many. Given this scenario, things can, and sometimes, go wrong. Mistakes and errors, some honest and others not, will be made. There will be non-compliance with the law and/or regulations. There will be malpractices and breaches. Section 83 foresees all these, and asks the court dealing with a petition to always look at the bigger picture. The court would always consider whether the election, with all its imperfections, was substantially conducted in accordance with the principles enshrined in the Constitution and the electoral law. The court will determine whether the imperfections compromised the process so much that an ordinary man cannot say that the win as declared was a valid one.”*
19. In cases of allegations of election malpractices and other irregularities, the petitioner is not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election. The primary consideration in an election petition is whether the will of the electorate has been affected by the irregularities. This principle was distilled in the famous case of ***Morgan and Others v Simpson and another [1974] 3 ALL E.R. 722, 728***, Lord Denning stated as follows; *“(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 was 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.”*

20. The principle in *Morgan and Others v Simpson and Others (Supra)* is firmly set in **section 83** of the *Elections Act, 2011* (“the Act”) which states as follows;

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.*

21. Kimondo J., in *Steven Kariuki v George Mike Wanjohi and Others Nairobi EP No. 2 of 2013 (Unreported)* noted that, “[31] That section [Section 83] of the Act is couched in negative language to emphasize the caveat placed on the election court. There is in it a rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law. It also implied by that provision that elections are not always perfect. Consequently, not all malpractices will lead to nullification of the result.”

22. The meaning of ‘affected the result’ was discussed in *Mbowe v Eliufoo [1967] EA 240, 242*, where Georges CJ., in the High Court of Tanzania observed that, “In my view in the phrase “affected the result,” the word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

23. Another important principle is that of burden and standard of proof. Every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that the irregularities and electoral malpractices complained of render the said elections invalid. The burden is on the petitioner to prove the allegations he or she makes to the required standard.

24. Our courts have had the opportunity to deal with the standard of proof which ought to be applied in determining whether a petitioner established the allegations made in respect of electoral irregularities and malpractices. In the case of *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others Nairobi Petition No. 5 of 2013 [2013]eKLR* the apex Court held thus, “Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the laws 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, *Omnia praesumuntur rite etsolemniteresseacta*, 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 departures from the prescriptions of the laws. ”

25. The Supreme Court decision does not set out a novel proposition; it restates a principle established in a long line of cases decided by the High Court in this area of law. In *Onalo v Ludeki and 2 others (No.3) (2008) 3 KLR (EP) 614, 675* Rawal J., held as follows, “in any event, our court in *Election No.1 of 2005 between Hassan Ali Joho and Hotham Nyange* has adopted the standard of proof held in Tanzanian case of *Mbowe vs. Eliufoo* to the effect that the election offence has to be proved to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt. It went further to state on page 10 of the Judgment and I quote: “where a reasonable doubt exists then it is impossible to say that the court is satisfied.” (See also *Joseph Wafula Khaoya v Eliakim Ludeki and Lawrence Sifuna Nairobi EP No.12 of 1993 (Unreported)* and *Bernard Shinali Masaka v Boni Khalwale and 2 Others Kakamega EP No. 2 of 2008 [2011]eKLR* at para. 38)

26. The requirement on the burden and standard of proof underlies the fact that election petitions are not ordinary suits. In **Joho v Nyange and Another (2008) 3 KLR (EP) 500, 507** Maraga J., held that, “*Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance Kibaki v 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 election court’s decision on Wanguhu Ng’anga and Another v George Owiti and Another, Election Petition No.41 of 1993 that election petitions should not be taken lightly.*”
27. After reviewing several local and foreign decisions on the issue of standard of proof, the apex Court, in **Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others (supra)** stated that; “[203] *The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. 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.*”
28. Finally, in an election petition, just like in the elections themselves, each party is set out to win and therefore the court must cautiously and carefully evaluate all the evidence adduced by either party in this light. What is a mole hill in the heat of election campaign is turned into a mountain during the election petition. In **D. Venkata Reddy v R. Sultan and Others AIR 1976 SC 1599**, the Supreme Court of India elucidated the admissibility of partisan evidence as follows; “Where the election petitioner seeks to prove charge by purely partisan evidence consisting of his workers, agents, supporters and friends, the court would have to approach the evidence with great care and caution, scrutiny and circumspection and would, as a matter of prudence, though not as a rule of law require corroboration of such evidence from independent quarters, unless the court is fully satisfied that the evidence is so creditworthy and true, spotless and blemishless, cogent and consistent that no corroboration to lend further assurance is necessary. It has to be borne in mind that the attempt of the agents or supporters of the defeated candidate is always to get the election set aside by means fair or foul and the evidence of such witnesses, therefore, must be regarded as highly interested and tainted evidence which should be acted upon only if the Court is satisfied that the evidence is true and does not suffer from any infirmity. Where, the evidence led by the election petitioner even though consistent is fraught with inherent improbabilities and replete with unnatural tendencies the court may refuse to accept such evidence, because consistency alone is not the conclusive test of truth. Judicial experience shows that sometimes even a tutored or parrotlike evidence can be consistent and free from discrepancies and yet not worthy of credence.”[Emphasis added]. In the Tanzania case of **Nelson v Attorney General and Another [1999] 2 EA 160 (CAT)** the court held that evidence of partisans must be viewed with great care and caution, scrutiny and circumspection while in a Ugandan case, **Karokora v EC and Kagonyera EP No. 2 of 2001(Unreported)** the Court observed that, “*It would be difficult for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil.*” I agree with these sentiments.

Issues for determination

29. After hearing the evidence in support of and in opposition to the petition and the submissions by counsel, I think two broad issues emerge for consideration;
- a. Whether the petitioner has proved election offences, malpractice and breaches of the Election

- Code of Conduct by the 4th and 5th respondents and their agents as alleged or at all.
- b. Whether the 1st respondent conducted the election in accordance with the Constitution and the law.
30. I shall consider allegations in the petition in light of the general principles I have outlined above and the relevant evidence. Although the facts and evidence in respect of both issues overlap, I will first deal with the specific allegations of election offences, malpractices and other breaches attributed to the 4th and 5th respondents.

Election offences and malpractices against the 4th and 5th respondents

Voter Bribery

31. The petitioner accused the 4th respondent and his agents of procuring votes through payment of money. She alleged that he promised to pay voters in the County in order to induce them to vote for him or refrain from voting for her. She deponed that on the 4th March 2013, the 4th respondent's agents or campaigners were stationed at strategic points at Kathukini Market, and at Mungala Polling Station, bribing voters with a view to influencing them to vote in favour of the 4th respondent. That the agents bribed one Nduti with Kshs 200 and directed him to vote for the 4th respondent.
32. In order to prove the bribery allegations against the 4th respondent, the petitioner called three witnesses.
33. Phillip Mwenze Manthi (PW2) deponed that he was attending AIC Mungala Church on 3rd March 2013 when he was approached by Gideon Kavuu, a councillor, at about 1 pm. He was given Kshs. 200 and a piece of paper with six names and told to vote for the persons indicated on the paper on the following day. The names of the six persons appearing on the list were; Kavuu, Mutisya, Susan, Muthama, Mutua and Kalonzo. When he was cross-examined, he stated that he knew he was being bribed and knew it was wrong but did not refund the money. It was his testimony that he was not forced to vote for any person and eventually voted for his preferred candidates.
34. Peter Mutua (PW3) deponed that on 4th March 2013 while at Mung'ale Polling Station, he was informed by Kavuu's son known as "Papa" that he ("Papa") had been distributing a sum of Kshs. 250,000.00 on Election Day with a view to influencing vote results of all the positions in Machakos County and that this money was being distributed about 100 metres from Mung'ale polling station. Kavuu was one of the contestants in the race for the County Ward Representative.
35. Titus Mwangangi Kasau (PW4), an aspiring candidate on a CCU ticket for Muthesya Ward, Masinga Constituency deponed that on 4th March 2013 from about 7.00 am after voting, he moved around various polling stations to check on the voting process. While at Kaseve Polling Station at about 10.00 am, he met a group at the gate which was involved in voter bribing by giving out Kshs 200 notes and conducting illegal campaigns on behalf of the 4th respondent. He stated that he reported this to the security officer at the polling station who dispersed the group but the illegal activity continued relentlessly. He also stated that he witnessed bribery at Katwikini Polling Station and later at Lungulueni Market. At Katwikini, he found another candidate, Nzioka and his supporters buying votes at the gate of the polling station and he made a report to the security officer who sent them away. He admitted in cross-examination that he did not make any report to any IEBC official. He also testified that he did not know the people at Kaseve who were meeting and did not have their names and that he did not have the name of any person who bribed on behalf of the 4th respondent or who was bribed to vote for him but that he saw the Kshs 200 notes being given and did not know whether those people voted or whether they had voted.
36. Another incident of bribery was recited by Beatrice Nthambi Boniface (PW12) who was the Chief

- Constituency agent for CCU party in Masinga Constituency. Beatrice alleged that she was informed that the 4th respondent's supporters were dishing out money at the market place next to Masinga Polling Station. She alleged that one of the agents was asking people to vote for the 4th respondent and giving out Kshs 200. She readily admitted, in cross-examination, that she did not know the names of the people who were dishing out money and those who were receiving. She stated that she received this information from an agent who called while she was in another polling station.
37. Michael Mutua, a registered voter, swore an affidavit in support of the petition alleging that on his way to vote at Kathukani Polling Station at about 7 am he found a Mr Kioko and Mrs Victoria Mutuku, giving out money in Kshs 200 denominations enticing people to vote for the WIPER party slate of candidates. The dishing out of money was still going on at 2 pm when he returned to the polling station. He stated that Kioko was using his motorcycle to ferry people to vote and at the same time giving them money in denominations of Kshs 200. He further stated that he reported the issue to the police who informed him that the incident was normal.
38. Another affidavit was sworn by Patrick Mutua Wambua who deponed that an aspirant for the County Representative position on a WIPER party ticket, Peter Nzioki was outside Kathukini Polling Station dishing out money in Kshs 200 notes. He states that he declined to accept the money and when he threatened to report the matter to the police, Nzioki drove away and was later seen at Kathukini Market dishing out money to the voters while asking them in return to ensure they voted for him and the 4th respondent.
39. In ***Mohamed Ali Mursal v Saadia Mohamed and Others Garissa EP No. 1 of 2013 (Unreported)***, Mutuku J., described bribery in the context of an election petition as follows; *“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under **Section 64** and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof. The penalty found under Part VIII – General Provisions of the Act, specifically **Section 106 (1) of the Act** is a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.”*
40. As bribery is an election offence, the petitioner bears the burden of proving the offensive act or acts by clear and unequivocal evidence proving the act of bribery and such proof must be beyond reasonable doubt. Mere suspicion is not enough and the mere fact that the person alleged to have been bribed confesses is insufficient. (See ***Halsbury's Laws of England, 4th Edition, Vol 15 para. 780, Simon Nyaundi Ogari and another v Joel Omagwa Onyancha and 2 others, Kisii EP No. 2 of 2008 [2008] eKLR*** and ***Ntwiga v Musyoka and Others (No.2) (2008) 2 KLR (EP) 276***).
41. Does the evidence presented by the petitioner prove the offence of bribery or implicate the 4th respondent in bribery? I do not think so for several reasons. First, the petitioner does not plead with particularity the allegations of bribery against the 4th respondent. Second, the evidence itself is insufficient to show that money exchanged hands with the intention of influencing voters either to vote for the 4th respondent or refrain from voting for the petitioner. Third, the evidence of the three witnesses has no causal connection to the 4th respondent or his agents. In other words the relationship between Kavuu, Papa and Nzioki and the 4th respondent has not been established. Likewise, the evidence of bribery led by Beatrice Nthambi Boniface (PW12) does not establish any bribery on the part of the 4th respondent or his supporters. The petitioner's own evidence is at best hearsay and cannot be relied upon to support a serious charge. The evidence of Peter Mutua Wambua must also be disregarded as it does not connect the alleged bribery to the 4th respondent,

quite apart from the fact that it is based on hearsay.

42. The situation in this case is not unlike that in *John Kiarie Waweru v Beth Wambui Mugo and 2 others Nairobi EP No. 13 of 2008 [2008] eKLR* where Kimaru J. observed as follows; “In the present petition, it was evident that the petitioner failed to establish to the required standard of proof that the 1st respondent indeed bribed voters and that the said bribery was so pervasive that it influenced the voters to vote in favour of the 1st respondent. Although there was no doubt that PW2 and PW4 were given money by persons who purported to be agents of the 1st respondent, the petitioner offered no evidence to establish to the required standard the nexus between the said persons giving the money and the 1st respondent...PW2 and PW4 were unable to give the names of the persons who allegedly bribed them at Shalom house at Dagoretti Corner. It was therefore difficult for this court to reach conclusion with certainty that the persons who were dishing out money to potential voters at Shalom house were doing so at the behest of the 1st respondent.”

43. In light of the evidence presented I find and hold that the petitioner has not established the offence of bribery against the 4th and 5th respondents.

Treating

44. Treating is a species of bribery and corruption. It refers to the offering or giving rewards or money to voters to vote in a particular way or to refrain from voting. The same principles regarding the burden and standard of proof I have outlined above apply to treating as it is an offence under **section 62** of the *Elections Act, 2011*. It provides thus:

62.(1) *A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election*

(a) before or during an election

(i) undertakes or promises to reward a voter to refrain from voting;

(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or

(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.

(2) A voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.

45. The petitioner accused the 4th and 5th respondents of treating the voters within Machakos County by paying and undertaking to pay expenses for giving food, drinks, refreshments and provision of transport for the purpose of corruptly influencing persons to vote for him and to refrain from voting for the petitioner. She also alleged that the 4th respondent paid expenses to host voters who had aided and abetted his election.

46. This allegation of treating set out in the petition merely recited the provisions of the **Elections Act, 2011**. The petition in this respect was vague, did not contain particulars of material facts such as would be necessary to identify specific incidences, persons involved and the manner in which treating was done and the connection with the accused respondents. In discussing the issue of 'material facts and particulars', PDT Achary in **Bharat's Law of Elections, Bharat Law House (2004) at page 75** remarks that; "A petition which alleges a corrupt practice should contain the material facts and full particulars of the corrupt practice alleged. Otherwise, the petition will be rejected....The election petition should not only contain facts but also set forth particulars of corrupt practice...An election petition without the material facts is no election petition at all." The learned author then goes on to cite the Supreme Court India case of **Samant N. Balakrishnan v George Fernandes AIR 1969 SC 1201** where it was held that; "A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the obtaining or procuring of assistance unless the exact type and form of assistance and the person from whom it is sought and the manner in which the assistance is to further the prospects of the election are alleged as statements of facts."

47. Apart from failing to plead material facts, the petitioner did not lead any evidence to establish the facts and demonstrate a corrupt intent on the 4th respondent's part to influence voters contrary to **section 62** of the **Elections Act, 2011**. Consequently, the allegations of treating made against the 4th and 5th respondents are dismissed.

Voter intimidation

48. The petitioner alleged that the 4th respondent, through his agents impeded or prevented the petitioner's representatives and her party agents from gaining access to many areas within Machakos County for the purpose of canvassing. The petitioner also alleges that the petitioner's agents were denied access to polling stations in order to verify the transparency, validity and process of voting for Election Day.

49. As regards intimidation, the court in the old **North Louth Case 6 O'M. & H., 172-173**, observed that; "Intimidation operates on the mind of the intimidated, and when this influence pervades the electors to such extent as to render the action of the constituency other than free, the election held under the circumstances is void and of no effect at common law, irrespective of any question of agency between the authors of the intimidation and the candidate in whose interest it has been exercised... But its existence is a conclusion to be inferred from the evidence given in the case as well of general conduct as of specific acts, and from a consideration of the nature of the undue influence alleged to have been brought to bear upon the electors, and of the action of the constituency; a matter in regard to which the amount of the majority by which the seat was won and the number of electors polled, relatively to the entire constituency and also to other elections, are proper to be considered."

50. The petitioner it seems cast her net too wide in accusing the 4th respondent of preventing her from campaigning within the County. This allegation does not set out the particulars of dates, places and the manner in which voters were intimidated. Moreover, the 4th respondent testified that since the petitioner party, CCU and his party, WIPER were part of the CORD coalition, they in fact held some rallies together. None of her witnesses testified to the allegations regarding interference with the right to campaign and canvass and I dismiss it.

Impeding of agents

51. The petitioner alleged that her party agents were impeded from accessing polling stations to verify, transparency, validity and the process of voting on Election Day. The petitioner called several witnesses to support these allegations. Muthengi Wambua (PW5) was an agent of TIP party at Mulolonggo Polling Station. He stated that TIP was part of CORD coalition which included CCU and each party had agents and that he and other party agents were denied access to the

various streams. Victor Nyamai (PW6) testified that he was an agent of TIP party. On the voting day he went to Mulolongo Polling Station, Stream 8 and was informed that there were TIP agents so he went to stream 11. He was once again informed that there were agents and he did not believe this.

52. Virginia Mueni (PW 17), the CCU Chief Agent for Yatta Constituency testified that CCU agents were refused entry in polling stations across the constituency which information she had gathered from the agents in the polling stations. In cross-examination, she admitted that CCU was an affiliate party of CORD whose agents were present but denied that CORD agents were looking after CCU's interests. Mueni further admitted that she did not have a list of all the stations where agents were refused entry nor the specific agents who were actually denied entry into polling stations.

53. Ali Abdalla Omar (PW18) testified that he was the petitioner's chief agent at Mavoko Constituency. He was mainly stationed in Mavoko but he visited other polling stations in Mavoko and found that agents were only allowed into the polling stations between 10.00 am and 12 noon. These polling stations were ones mentioned in at paragraph 3 his affidavit namely: Kanaani Primary school, Makadara Imani, Mlolongo, Syokimau, Borehole, Ivalini, Kwa Mboo, Githunguri, Nzoiani and Mathatani. He testified that he received information from other agents that they had been denied entry into polling stations.

54. The Returning Officer of Mavoko, Faith Wambui Mugo (RW2) denied that CCU party agents were kept away from polling stations in Athi River as they all signed forms 35 and 36. Furthermore, she did not receive any complaints.

55. Muthengi Wambua (PW5) and Victor Nyamai (PW6), who testified on the petitioner's behalf, were TIP agents and not CCU agents. The conclusion I draw from this is that either the petitioner did not have her own agents or that her agents were in fact not denied access to the polling stations. The statement of Ali Abdalla Omar that several agents were denied access to polling station lacks any probative value as he did not identify the agents who were denied access or the specific polling station where access was impeded. On the whole there is no evidence that the 4th respondent's supporters impeded the petitioner's agents access to the polling stations.

56. The petitioner testified that Mavoko Constituency was one of her strongholds hence a lot of evidence was focused on demonstrating irregularities in the area. So convinced was the petitioner of her victory in what she terms as her stronghold that at paragraph 76 of her affidavit, she stated, *"There was no way in my own constituency I would have lost in the gubernatorial contest on March 4th 2013 had there been a fair election being conducted by the 1st respondent I.E.B.C. and I believe that the fraud and theft of election votes gave the 4th Respondent unfair advantage."* According to the petitioner the elections would only be considered free and fair if she won in her stronghold of Mavoko Constituency where she had been the Member of Parliament.

57. The evidence before the court compels the court to reach a different conclusion. The results of the constituency evidenced by Form 36 were in fact signed by two CCU party agents, Julius Mutisya and Ali Abdalla Omar (PW18). If indeed the results were irregular due to the allegations made by the petitioner that her agents were barred from accessing the polling stations would no less than two CCU agents sign the Constituency Form 36 for her stronghold?

58. I am therefore inclined to believe the evidence of the Returning Officer that there were no complaints raised regarding the petitioner's agents. Finally, nothing in the evidence connects the 4th respondent to the allegations that the petitioner's agents were denied access to polling stations.

Violence

59. The petitioner alleged that her father, Peter Nzuki Ndeti, was shot on 19th December 2012 while

in his house just before she launched her political campaign. She avers that the 4th respondent was instrumental in the said attack. She also accused the 4th respondent of perpetrating violence on the petitioner and her supporters. The petitioner accused the 4th respondent of indirectly using threats of force, violence and harassment against her, her father and her supporters aimed at preventing political meetings and other campaign related events.

60. In the paragraph (o) and (p) of the petition, the petitioner has accused the 4th respondent of indirectly inflicting violence on her father. The petitioner stated that, “*The matter was reported in the Police Occurrence Book and to date no conclusive investigations have been performed to bring the perpetrators to book, yet it has the hall marks of political motivation indirectly linking the 4th Respondent who saw me as his strongest competitor.*”

61. In ***Benson Maneno v Jacob Machekele and Others Malindi EP No. 14 of 2013 (Unreported)***, Kimaru J., remarked that, “*For the Petitioner to sustain the claim that violence disrupted the election, he was required to establish that the Respondents were either responsible for the violence or condoned or connived in the perpetration of violence.*” The petitioner must also establish that the violence was so pervasive that it affected the right to vote (See ***Kajembe v Nyange and Others [2008] 2 KLR 1***).

62. In this case the petitioner did establish by evidence that the 4th respondent was directly or indirectly responsible for the incident affecting her father. The petitioner did not lay any complaint to the police against the 4th respondent and according to her own evidence the investigations were inconclusive. The petitioner’s allegation against the 4th respondent lack any basis, is flimsy and irresponsible and is dismissed. Likewise, I find and hold that the petitioner has not proved that the 4th and 5th respondents and their supporters committed any acts of violence during the election.

Undue influence

63. Voters are supposed to exercise the right to vote freely hence **Section 63** of the ***Elections Act, 2011*** makes it an offence to use force or threaten to use force of whatever nature to induce or compel a person to vote in a particular way. The threats of violence may be physical or spiritual, harmful cultural practices, damage or loss, or by any fraudulent device, trick or deception.

64. The petitioner is aggrieved by and complained about the consistent use and unleashing of undue influence by the 4th respondent whom she stated campaigned on the basis that he had been the Government spokesman and thereby impeded and prevented free exercise of the franchise by voters. She further stated that the 4th respondent had openly stated that the President has endorsed him stating, “*Mutua Tosha.*”

65. The petitioner accused the 4th respondent of using threatening, abusive and insulting language to describe her in order to discredit her as a worthy gubernatorial candidate. She accused him making these defamatory statements on radio, public forums and through his agents. Thus, she states she was subjected to a campaign of hate aimed at influencing voters on the grounds of gender discrimination. For example, the petitioner depones that the 4th respondent specifically stated in Kikamba that, “*Tuyitikila ndamiyikalilekivilakya Masaku*” which when translated means, “*We will not permit a female to take the Machakos Seat.*” She also complained that the 4th respondent kept referring to her, in political rallies, as a thief. This, she contended, had the effect of discrediting her in the eyes of the electorate. The petitioner relied on certain transcripts of ***Mbaitu FM***, a vernacular radio station that broadcasts in the area. Part of the transcript, loosely translated, also recorded the 4th respondent as having said, during an interview, that the seat of the governor required someone who was fully committed and one who would focus on development and not a person who was in politics and shackled by the responsibilities of party leader.

66. The 4th respondent admitted that he gave interview at ***Mbaitu FM*** but denied that he made any

statements that were threatening, abusive or in any manner discrediting of the petitioner. He stated that he referred to the petitioner as “Kiveti Kiseo” which means “an honourable and distinguished woman.” He also denied that he ever made any statement to the effect that the petitioner was not suited to run for office as a woman.

67. The petitioner also referred to an incident before the Election Day when the 4th respondent drove to a rally next to her residence with the sole intention of abusing her and calling her a thief. She also claims that at a Machakos Catholic Bishops Forum, the 4th respondent claimed that she was involved in the fraudulent selling of land in a scheme designed to swindle prospective purchasers hence was unfit for to be governor. The petitioner accused the 4th respondent of referring to her as a Nigerian who was not fit to be governor as she is married to a Nigerian.

68. The 4th respondent denied that he abused her in any way. He only admitted that he drew attention to the fact that some of her family members were involved in a land scandal in Mulolongo and it was necessary for her to extricate herself from those allegations if she wanted to be governor. He stated that the issue of the land scandal was actually raised in a live TV show and that is why he responded to it by challenging the petitioner.

69. Election campaigns are political battles where words are the weapons of choice. Politicians use strong language and parties are free to engage in robust political speech and the Courts should be slow to interfere lest such interference narrows the sphere of such rigorous exchange. Politicians are entitled to campaign on their record hence there is nothing wrong with the 4th respondent campaigning on his record as a Government Spokesman just as the petitioner was entitled to campaign on her record as an Assistant Minister. ***Bharat’s Law of Elections (supra at page 106)*** explains the margins between acceptable political speech and undue influence in the following terms; “*The promise given by a candidate or his supporters to the people that if elected, the constituency would be developed does not amount to undue influence. Such a promise does not in any way interfere with the free exercise of electoral right of the Electors. Free exercise of the electoral right does not mean that voter is not to be influenced. This expression has to be read in the context of an election in a democratic society and the candidates and their supporters must be allowed to canvass support by all legitimate and legal means. What amounts to interference with the free exercise of electoral right is ‘tyranny over the mind.’*” [Emphasis mine]

70. The petitioner has not alleged that the statements made by the 4th respondent fall outside the kind of speech that is prohibited like hate speech or speech that is intended to cause hatred or incitement to violence or that which would terrorise the minds of voters. Apart from the words which were admitted, the petitioner did not call witnesses to testify to the abusive language allegedly used by the 4th respondent and his supporters at the public rallies and forums. What also matters in a case like this is the effect of the statement on potential voters and the petitioner did not call any independent witness to testify who understood the meaning of what was stated and was affected by the words. On the other hand political statements made during the campaign period are intended to influence voters and unless the petitioner proves that anything stated by the 4th respondent amounted to prohibited speech or amounts to an election offence or malpractice, then no liability for making statements can arise. I would adopt the statement from the Supreme Court of Uganda in ***Rtd. Col. Dr. Kizza Besigye v Electoral Commission and Another SC.EP No. 1 of 2006*** where Kanyeihamba, JSC remarked that, “*The statements complained of in this petition are nothing more than boasts, exaggerations and vulgarities typical of political insults intended to enhance the speakers’ chances of success in an election and dampen those of his or her opponents in turn. For a political rival to call another a failure or an opportunist or a weakling does not, in my opinion amount to anything capable of being interpreted as an offence against the law, sections 23 and 24 of the Presidential Elections Act notwithstanding.*”

71. Notwithstanding the fact that the parties may use harsh or colourful language during the campaign, **Paragraph 6** of the ***Electoral Code of Conduct*** (“the ***Code of Conduct***”) binds all political parties and candidates to observe certain standards of behaviour throughout the election

period set out under the **Second Schedule** to the **Elections Act, 2011**. They are, *inter alia*, required to observe the following; –

(a) *publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any kind of advantage, or for any other reason;*

(b) *refrain from any action involving violence or intimidation;*

(c) *ensure that no arms or weapons of any kind are carried or displayed at political meetings or any march, demonstration or other event of a political nature;*

(j) *avoid any discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth in connection with the election and political activity.*

72. Under **section 110(4)** of the **Elections Act, 2011** a violation of the **Code of Conduct** is a criminal offence. Moreover, a committee of the IEBC is charged with enforcing **the Code of Conduct**. **Paragraph 15(4)** thereof provides,“(4) *The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.*”

73. There is no evidence that the petitioner, aggrieved by the alleged insults hurled at her, during the campaign period, by the 4th respondent and his supporters, invoked the provisions of the **Code of Conduct** so that the IEBC could take action against him.

74. On the whole therefore, my review of the evidence does not show that the 4th respondent used language that would constitute any threat of whatever nature to induce persons to vote for him or refrain from voting for the petitioner. In short, I do not find the words used by the 4th respondent to be of such nature as to bear “*tyranny over the minds*” of the Machakos County voters. I also do not find any evidence that the 4th respondent advocated hatred against the petitioner. These allegations of undue influence, like those of violence and intimidation, are therefore dismissed.

Breach of the Electoral Code of Conduct

75. In the previous part, I have set out the nature of the **Code of Conduct** and the manner in which it is enforced. The petitioner accused the 4th respondent of breaching the **Code of Conduct** by campaigning beyond the 4th March 2013 gazetted campaign period. The petitioner’s contention was that the 4th respondent maintained his posters and billboards in areas close to polling stations on Election Day. The petitioner alleges that the 4th respondent used unauthorised electoral material within polling stations to gain voters and influence by use of agents with his details inside polling stations on the Election Day.

76. Benbarry Muange Nthiwa (PW8) testified that on 4th March 2013, he went to Katani Polling Station in Mulolongo Division where he called a camera man who took a video of the posters. He also took photographs of a Bill Board opposite Naivas in Machakos Town (annexed to his affidavit as exhibit “**BMN 2**”). Imprinted on the photo is ‘7/3/2013’ suggesting that the photo was taken on that date. He stated that the Bill Board had the 4th respondent’s picture and campaign message emblazoned on them. He also testified that there were campaign posters displayed strategically in town electricity poles on the way to the polling station.

77. Faith Wambui Mugo (RW2), the Mavoko Constituency Returning Officer did not deny the fact that she saw the 4th respondent's Bill Board near Machakos Town. She deponed that she spent a considerable time at Mulolongo Primary School Polling Centre and she did not see any campaign posters in the vicinity. She stated that she did not receive any complaint from any candidate, agent or voter about campaign posters.
78. The 4th respondent, in his testimony, did not deny that he had bill boards in Machakos. He denied that the existence of the bill boards amounted to a violation of the **Code of Conduct. Paragraph 5(j)(ix)** of the **Code of Conduct** provides that candidates and parties participating in elections commit to remove all banners, placards and posters erected during the election period. I also take judicial notice of the fact that pursuant to **section 109(1)(dd)** as read with **section 2 of the Act**, the IEBC, by a notice dated 11th February 2013 notified the public that, *"The Campaign period for purposes of the 4th March, 2013 General Election SHALL CEASE ON 2ND MARCH, 2013 BEING 24 HOURS before the Election Day which is 4th March, 2013."*
79. Did these provisions include the taking down of bill boards prior to Election Day? I do not think so. The **Code of Conduct** does not set out a specific date by which the bill boards and posters should be taken down as the IEBC has not issued a specific regulation requiring the removal of bill boards at the close of the campaign period. What it seems to imply is that the candidates and parties must take down their campaign material after the election. However, even if I were to find that there was a contravention of the **Code of Conduct** by the 4th respondent in maintaining the two bill boards on Election Day, there is no evidence that the two bill boards induced voters in the other Constituencies to the extent that County election result was affected to the detriment of the petitioner.
80. The petitioner has also accused the 4th respondent of using his agents who were wearing badges emblazoned with his details and name inside polling stations in order to influence voters. The allegation is that such conduct violated **regulation 62(6)** of the **Elections (General) Regulations, 2012 ("General Regulations")** provides that, *"No person shall be admitted into a polling station if that person is wearing a badge or has any dressing, signifying symbols or other indication of support for any political party, a candidate in the election or a referendum committee."*
81. The petitioner called several witnesses to confirm this allegation. A sample of the badge was annexed to the affidavit of Patrick Maingi Nguku (PW11). The badge is rectangular and has the words, *"Dr Alfred Mutua Centre [Name of Constituency] Elections Agent."* He testified that while at Mulolongo Primary School Polling Station, Stream 19, he saw one of the 4th respondent's agents with the badge bearing his name. He states that he tried to protest to the Presiding Officer but he was ignored.
82. Loise Mwikali (PW9), a voter at Mulolongo Primary School Polling Station deponed that she saw a man with the 4th respondents badge written, *"Alfred Mutua"* standing at the gate talking to some people. She also saw a lady whom she states that she knew as the 4th respondent's campaigner in the area. The lady came and tried to persuade her and her friend not to vote. She admits she proceeded to vote anyway. Upon cross-examination, Loise testified that despite the lady's statement that Mutua had already won, the two of them on the queue were not influenced by the lady's statement and were happy to have voted for their choice.
83. The 4th respondent admitted that his agents and campaign staff had badges in order to prevent people from impersonating his agents but denied knowledge of them wearing them inside the polling stations. Faith Wambui Mugo (RW2), the Mavoko Returning Officer stated that nobody was allowed in the polling stations/centres wearing badges or clothing ascribing them to any of the candidates and that in any event she did not receive any complaint on this issue from anyone.
84. While it is possible that some agents may have entered polling stations with badges, I take the

view that the petitioner has not established that the 4th respondent's agents were campaigning in the polling stations. While the wearing of such badges is an infraction of the regulations, campaigning implies much more than just wearing a badge. It implies active persuasion of votes to vote for a particular candidate. In my view, this evidence does not in any way demonstrate that any person was actively influenced to vote for the 4th respondent. The petitioner has also not established that the wearing of badges by the 4th respondent's agents was so widespread as to negate a free and fair vote.

Conclusion

85. On the first issue framed for determination, I find and hold that the petitioner has not proved any election offences, malpractice and breaches of the **Code of Conduct** committed by the 4th and 5th respondents and their agents as alleged or at all.

Whether the election was carried out in accordance with the law

86. This issue mainly concerns the conduct of the election by the IEBC and its agents. As stated earlier, it is presumed that the official acts of the electoral body and its agents are lawful and valid unless evidence is tendered to the requisite standard to rebut that presumption.

87. Some of the allegations made against the IEBC and its agents coincide with some of the issues that I considered in determining the first issue regarding allegations of electoral offences and malpractice against the 4th and 5th respondents. The matters alleged against the IEBC include the exclusion of candidates' agents from the polling stations/centres, disorganisation in conducting the election, creating dubious streams, double voting, use of illegal voter lists and ballot stuffing.

88. A substantial part of the petitioner's case was that there were substantial irregularities in the statutory forms; Forms 35 and 36. The nature of these irregularities were as follows; there were material alterations of the primary documents, there was a mismatch between the election result tallied and the number of registered voters in the constituencies and various polling centres, that the results for the petitioner were reduced while those of the 4th respondent inflated and that the results were totally inaccurate and could not be verified. I dealt with these issues in **Ruling No. 3** dated 2nd July 2013 where I declined to order scrutiny and recount and shall advert to it later.

Voting procedures, organisation, double voting etc

89. The petitioner complained that there was deliberate disorganisation of the polling stations where the petitioner had strong voter backing in Kathiani, Athi River, Masinga, Yatta and Mavoko. For example, there were claims that there was unclear labelling of the voters' names initials in the streams, causing confusion and a standstill which caused voters to leave without voting for her.

90. The petitioner testified that on voting day she received a call from her friend who informed her that there was chaos at Mulolongo Primary School Polling Centre. She felt helpless and called the Mavoko District Commissioner who promised to look into the matter. She then drove there and found that chaos had not subsided at all. She averred that voters only began to vote at 10.00 am in the whole of Athi River.

91. Justus Sambo Kili (PW16), a registered voter, stated that on voting day he arrived at Mulolongo Primary School Polling Station at 6.00 am. He then proceeded to check where he could vote by looking for the queues marked JU, JA and JO in Stream 5 and did not get his name. He also checked a stream starting with K or KA without success. Though his family name is Sambo he confessed that he did not go to any stream with 'S' or 'SA'. He complained to the security officers at the station. When he informed the Presiding Officer, he was informed to come back at 3pm and

- check. He stated that he left the station and came back at about 3 pm and queued again until 9 pm when the Presiding Officer came and cut people off the queue as it was late. He and other voters who were on the queue refused to leave the Station until a police officer came and threatened them with arrest and that is when they left.
92. Muthengi Wambua (PW5), an agent for TIP party, testified that when he arrived at Mulolongo Primary School Polling Centre at about 4.30 am to drop agents he found that there were already 8 queues of people and while on the way out there were 6 buses full of people on the way to the polling station. He returned to the station and he found the place was so crowded that he and the other agents could not access the polling streams. He states that he only stayed there until 7.45 am when he *“couldn't take it anymore.”* He however states that he could see WIPER party agents in the polling stations. At this time the crowd was pushing to get into the polling station until the doors broke. His agents then rushed to their respective streams and only 2 out of the 23 agents were able to get to their assigned streams. He states that his agents later got into the streams except stream 15 and 17. He attempted to get police intervention but he was informed by the Athi River Police Station Commander (“OCS”) that the issue was one for the IEBC.
93. Victor Nyamai (PW6), a TIP party agent, confirmed that he arrived at the Mulolongo Primary School polling station at 4.30 am accompanied by the other agents. He stated that there were many people at the gate of the polling station and they struggled to get space to enter but they couldn't. The crowd around stayed outside until 7 am when it surged towards the gate and broke in.
94. James Musyoki Kili (PW14) a registered voter at Mulolongo Primary School in his affidavit of 21st March 2013 depones that when it came to his turn to vote, he was told his name was missing from the voters' register and was asked to go back later. He did so two more times at about 2.00 pm and 4.00 pm and got similar response. To use his words at paragraph 6 of his affidavit, *“I got upset by this and felt angry and left knowing that I was not going to vote at all because there was only one hour left before the polling station officially closed. I knew I was not going to make it. I went straight home and decided to watch the voting process through television.”* At about 9.00 pm, Kili heard the petitioner on television stating that more time had been given for Mulolongo and voters should vote without worrying. He then went back to the polling station and arrived at about 10.00 pm to vote but he and together with the people behind him were denied entry at the gate by IEBC official and asked to leave the polling station. They tried to plead with them but the officials called the police forcing them to leave the polling station. In cross-examination, Kili stated that he went to vote in Stream 25 with his national identity card and the acknowledgment of registration but was refused to vote. He testified that he had confirmed his name to be on the register during the register inspection process.
95. Martha Kilulu Githendu (PW15) testified to the situation at Makadara Athi River Polling Station. She states that she arrived at 9.00 am and queued on the Stream marked “G.” When it was her turn to vote her name was not listed and she was instructed to check on the stream with “M”. She protested and during the commotion an IEBC official came and took her ID to confirm the registration. He came back and allowed her to vote. She states that she was alarmed that after she voted, the sign on the stream marked “G” was removed and replaced with “M.” She believed that this caused a lot of confusion among the voters.
96. The Mavoko Returning Officer, Faith Mugo (RW2) conceded that Mulolongo Primary School Polling Centre, which had over 20,000 voters, had special challenges and in order to accommodate the voters, it was divided into 23 streams each having 959 voters. With the expected turnout, she personally requested that the General Service Unit (GSU) be brought to beef up existing police security to avoid disruption. In addition she addressed the voters and asked them to remain calm. In the circumstances she stated that there was no chaos and that voting proceeded peacefully.
97. The petitioner's evidence of the confusion in initialling of streams to facilitate voting is cogent and credible, corroborated by the fact of the large number of voters and streams in the station and the fact that security had been beefed up to contain any possible chaos. The Returning Officer

(RW4) confirmed in cross-examination that she received complaints from Presiding Officers at Mlolongo Polling station about mislabelling of streams. Indeed the evidence of Muthengi Wambua (PW5) and Victor Nyamai (PW6) confirms as much. Morris Mugambi, who swore an affidavit in support of the petition, deponed that voting at Mulolongo started at about 8.30 am but there was confusion because people did not know the exact stream to find their names. He depones that he went to stream 16 but was told by IEBC officials that there were many agents inside. He then proceeded to Stream 17 where he was also told that by IEBC officials that CCU agents in the stream were many but that he could not see none. The evidence of Martha Kilulu Githendu (PW15) confirms that there was assistance for votes at Makadara Athi Polling Station where a similar situation obtained.

98. There is no evidence that there was no assistance offered to those who were locating the queues to vote or that those who were able to vote were turned away at Mulolongo or any other polling station to the extent that voting was impeded. As regards PW16, he does not state whether he requested for assistance when he was asked to return and check if his name was on the register. The evidence of PW 14 may be convincing but it is also not clear how many people in similar situations as him were denied an opportunity to vote. Even if I was to accept that his evidence that he was turned away, the evidence is insufficient to enable me to conclude that the incident was replicated elsewhere in the eight constituencies in the County or was of such a magnitude as to lead me to void the election.

99. While the voting in Mulolongo may have been disorganised, I find and hold that the petitioner has not proved that voting in Mulolongo was so chaotic to the extent that people were denied the right to vote. The petitioner has not demonstrated by evidence that the turnout in Mulolongo and indeed Mavoko Constituency was affected by disruptive chaos at the polling stations or people were dissuaded from voting in view of the long queues or extra streams put in place or general 'disorganisation' of the voting process to the extent that the court would invalidate the vote.

Double voting, Dubious streams

100. The petitioner also alleged that there were people who voted more than once, and those who applied for and received more than one ballot paper in the name of another person or of a fictitious person, thereby breaching the one man one vote democratic principle.

101. To support these allegations, Shadrack Muema Muia (PW13), a Safina party agent testified that on Election Day he arrived at Mulolongo Primary School Polling Station at about 4.00am and assigned to stream 23. That at about 5 pm, he noticed a woman being issued with two ballot papers to cast votes for the member of the National Assembly. He also stated that he saw the 4th respondent's agent take her out of the polling stream. The agent later informed Muia that the lady had been handed over to the police. Muia also narrated an incident that happened thereafter where a man was issued with less than 6 ballot papers. He said that he requested the IEBC officials to give the man the rest of the ballot papers that had not been given to the man. He discovered that the man had only been given ballots for the governor's election and not for the other elective positions. Upon cross-examination, Muia confirmed that he saw someone being issued with seven ballot papers; two ballot papers for the Member of National Assembly but that he did not see anyone being given two election ballots for Governor.

102. Faith Wambui Mugo (RW12), the Returning Officer, denied the allegations and stated that no complaint had been received from the agents alleging that a voter has been given two ballot papers for the same elective position.

103. The petitioner also deponed in her further affidavit sworn on 26th March 2013 in which she stated that she was called by one of her supporters and informed that two persons had been arrested for having ballot papers and that she established that the incident was recorded at Machakos Police Station and that the people were indeed arrested.

104. The evidence proffered by the petitioner to support the allegation of double voting is far from sufficient. The fact that two persons were caught with ballots does not prove double voting as they were in fact caught before voting. The evidence of Shadrack Muema Muia (PW13) does not prove a wrongdoing. The man who had been given one ballot paper initially was subsequently issued with the five others to enable him vote for the full slate of candidates. As regards the woman issued with two ballot papers for the National Assembly seat, no complaint was made to the election officials. In any case, if she voted, it would not affect the Governor's race. On the whole the evidence led by the petitioner does not establish double voting to such an extent that would invalidate the vote.
105. In order to prove a scheme of double voting, the petitioner relied on the evidence of two witnesses, both TIP party agents; Muthengi Wambua (PW5) and Victor Nyamai (PW6). Victor Nyamai deponed that on 3rd March 2013, at about 7 pm he was at a Mulolongo pub called "Cheers" when he saw a group of people come and arrange a table for a meeting. More people continued to come in and join the meeting. He stated that he heard them talk about WIPER party issues and that on election day they would identify themselves using stickers which they would stick on their arms and conceal them and only show them to reveal their identity. He further stated that he gave this information to his Chief Agent.
106. Muthengi Wambua (PW5) deponed that about 2.30 pm, while at Mulolongo Primary School Polling Station, Stream 16 to vote, he saw five men wearing long sleeved shirts with white stickers on their wrists enter the polling station. They went straight to the IEBC polling clerk checking identification documents. The clerk did not check the details and passed the identity cards to the other clerks who proceeded to issue ballot papers. He further depones that he tried to raise the issue with the Presiding Officer but he was ignored. He then proceeded to the voting booth to vote and as he did so he noted another man wearing a stud and long sleeved shirt come in. The man then went straight to the clerk and was issued with ballot papers without his identification being checked. The man's index finger was not examined to see if he had already cast his vote. The man came to the booth next to him and voted.
107. Muthengi averred that he decided to investigate the matter. He went outside and saw the man who had just voted proceed to Stream 17. He peeped through the transparent window and was shocked to see the man pull his sleeve and show the hidden sticker. The man was quickly issued with ballot papers without undergoing the usual identity check and he voted. When he came out Muthengi accosted him, grabbed his identity card but he ran away. He then decided to look for a police officer to report the incident but before he could reach the officer, he found about 5 men who menacingly demanded the culprit's identity card. The men grabbed him and took the ID. He then decided to go home and change clothes as he did not want to be identified by the men.
108. The evidence of PW5 and PW6 does not prove the "white sticker" conspiracy of certain persons to vote twice. First, what was the connection between Nyamai and Muthengi. How did Muthengi know about this plot? If Nyamai knew of the plot why didn't he inform the IEBC of the same given the fact that he was a party agent? The coincidence between Muthengi voting and the appearance of the five men at the same time is incredible. Did Muthengi, a party agent, decide to vote just about the same time the five men came in? It is also left to question why Muthengi did not report the matter to the IEBC officials immediately he saw the person attempting to vote twice. Why didn't he report to the IEBC officials or the police after he was assaulted by the five men. It is also surprising that Muthengi despite having in his possession the identity card of the malefactor did not record or recall the name of a person who voted twice! All this leads me to conclude that the so called conspiracy did not in fact exist.
109. The petitioner also pleaded that there were dubious double streams not originally created. The petitioner believed that they were deliberately created in order to, and with a view to, cover up the bloated votes attributed to the 4th respondent. At paragraph 97 of her supporting affidavit, she cites a number of polling stations in Matungulu Constituency in which there was bloated number of registered voters and/or additional streams: These included Kyeleni Primary (089), Komarock

Ranch (056), Tala S.A Primary School (059), Nguluni Township (072), Mukengesya Secondary School (082), Mwisyani (060), Tithauni Primary (062), Nguluni Primary (064), and Matuu Wendano Secondary (080).

110. The petitioner also claims that there was also a discrepancy in the number of streams at the polling station level and those at the county level. She cited the example of Railways Station Nursery School which was indicated as having 7 Streams, yet the County officers return reported that there are 6 streams. That in Syokimau Borehole Polling Station (041), at constituency level was indicated 7 streams but that at the county level, *“there was an additional mysterious stream, totalling 8.”* It was the petitioner’s case that there was a marked discrepancy between the list of streams in the records furnished by the IEBC in respect of the Machakos County and the list for the Machakos County constituencies, *“to the point that the results therefrom could not possibly be valid, verifiable, or reliable.”*

111. The petitioner also pointed to instances where Forms 35 has two parallel numbers of registered voters’ lists. These were Mwanza Primary School (077), Kithaayoni Youth Polytechnic (061), Kyambuko Primary School (066) and Ngalani Primary School (045). She averred that these voters dubiously “cast” their votes majority of which were credited to the 4th respondent.

112. I think this is a very general allegation without any basis. I have evaluated the Forms 35 for the respect of Polling Centres and Streams. It is not in doubt that voting took place in each and every Polling Centre and no protest was lodged by any agent of the petitioner or any candidate that these streams were illegal. The petitioner testified that she had the list of polling station and her agents were spread all over the County. If indeed there were dubious voter streams, the issue would have been raised at the very beginning of the poll before people could begin voting or at the rallying of the results. The issue is an afterthought and as I earlier found, the petitioner’s own agents certified the results contained in the Mavoko Constituency Form 36 signifying that they were satisfied with the manner in which the poll was conducted.

113. This allegation about dubious streams is itself dubious and is dismissed.

Illegal voter lists

114. The petitioner alleged that the IEBC used fictitious voters’ lists in many polling stations favouring the 4th respondent. She deponed that there were alternate figures for registered voters to create room for inflation of votes to the credit of the 4th respondent.

115. The petitioner stated that her party obtained the entire voters register which was sent by the Registrar of Political parties by email on 20th February 2013. It was her testimony that she compared the figures in this register and those found in the Forms 35 and 36 and found massive discrepancies. She stated in cross-examination that she was aware that there were other registers; the bio metric register, the special register of people without biometric features and the green book.

116. The nature of the register was dealt with by the apex Court in ***Raila and Other v IEBC and Others (supra)***. The Court noted that the register was not a single register but an amalgam of registers. The court opined that; “[248] *In the light of the provisions of the Constitution [Articles 38(3) and 83] and of the Elections Act, 2011 [Sections 2, 3, 4], 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 divers 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.” [249] 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. Such units include the polling stations, the wards, the constituencies, the counties, and even the Diaspora voting centres. [252] ... The legal burden of showing that the voters' register as compiled and used, was in any way in breach of the law, or compromised the voters' electoral rights, was not, in our opinion, discharged by the Petitioners. [Emphasis mine]

117. It is clear that the burden is on the petitioner to demonstrate that the IEBC used fictitious voters' lists or lists other than the legally permitted voter's registers. The petitioner did not prove that the IEBC did not use the register or that the figures inserted in the Form 35 came from elsewhere other than the recognised voters register which were clearly identified by the apex court. I am afraid that no testimony was led to prove this allegation and it is baseless. None of the agents who were at the polling stations, and who testified, dealt with this important and critical issue in their testimony. The petitioner did not even establish a basis to persuade the court to order a scrutiny of the register and the vote in order to establish whether in fact this allegation is correct.

118. The allegation of illegal voter lists is therefore dismissed.

Excess Voter ballot books

119. In support of the allegation that there was double voting across the County on the polling day, the petitioner led evidence to prove that more ballot booklets were used in the gubernatorial elections as compared with other elections. Paragraphs 11 and 12 of the affidavit of Shadrack Muema Muia (PW13), the Safina agent stationed at Mulolongo Stream 23 deponed that seven booklets were issued, six of which were used and the seventh one was not exhausted but that *"funny enough the presiding officer did not allow us to know exactly how many ballot papers remained from the 7th booklet for the Governor election."* According to Muia's evidence, each booklet contained 100 ballot papers and the total number of valid votes cast in the polling station was 585 votes. He further stated, *"[12]...The number of ballot papers used exceeded 600 because 6 ballot booklets had been used and the 7th one had been used halfway, so my unanswered question was and remains is what happened to the other ballot papers."*

120. This evidence was however uprooted upon cross-examination by the respondents' counsel. According to Form 35, for Mulolongo Primary School Polling Station (040) Stream 23, the total number of valid votes was 578, the rejected votes were 35 and 3 spoilt ballot papers giving the total number of votes cast in that station as 616. If each booklet contains 100 ballot papers as per the evidence, then simple arithmetic leads me to conclude that more than six ballots books would have been used in the elections. The figure of 585 used by the witness as the total number of votes cast cannot be relied on in the face of the evidence of the primary document. Muia even admitted in cross-examination that the figure of 585 that he gave at paragraph 12 of his affidavit was not correct. No evidence was adduced to establish that more than 16 ballot papers were plucked from the 7th ballot book to assist the petitioner's case and indeed this court make a conclusive finding of double voting. Even assuming that there was double voting, the evidence tendered fails to prove to the requisite standard that these were used to the 4th respondent's advantage.

121. Another incident related to the issue of ballot books was that narrated by Beatrice Nthambi Boniface (PW12) where she states that at Masinga Primary school polling station, ballot booklet number 3 was used before number 2. That she noticed that the officials continued issuing the ballot papers up to book 5 for Governor elections yet book 2 had not been recorded as given out or used. At paragraph 11 of Nthambi's affidavit she says, *"I was concerned at such specific conduct because the possibility then existed that Governor ballots book assigned to Masinga polling station may very have been used to cast illegal ballots not backed by any corresponding voter and thereby give the 4th respondent undue advantage."* She further stated that when she asked the Presiding Officer about the 2nd ballot book, the presiding officer allegedly removed all the plucked ballots and threw them at the agents. She further states at para. 15 of her affidavit; *"I was also told by my CCU part agents that there were unnecessary breaks in between the voting*

that was taking place and no good reason was given, **and very likely the 2nd booklet for Governor election ballots may have been used at that stage.**” Like an epilogue of a sad story, the witness concludes stating that, “Up to now, I have no information as to what transpired to the ballot book No. 2 for the Machakos County governor election, by reason of which I believe that the Court is entitled to scrutinize the ballots allegedly cast in favour of the 4th Respondent during the said election.”

122. Rather than providing facts, the petitioner’s witnesses have raised questions. The court findings in electoral matters cannot be anchored on possibilities and presuppositions. The law requires proof and there can be no room for judicial guesses. I therefore reject the evidence that were excess ballot books available for clandestinely increasing votes in favour of the 4th respondent.

Issue of Assisted voters

123. On the issue of assisted voters, the petitioner averred that the old were not allowed with their assistants. Beatrice Nthambi (PW12) deponed that she went to Katotya Polling Station with Mr Kising’o. She states that she found that aged people were not being allowed to enter polling stations with assistants of their choice and that the IEBC officials were unilaterally deciding for them as to who to vote for. On confronting the officials, she was told that the place was very congested and that is why they were not allowing assistants for the aged. She however talked to the Presiding Officer who let the respective assistants in. The petitioner also cited Chamatenza Polling Station where the 4th respondent’s agents allegedly routinely communicated with the aged and illiterate upon them receiving ballots to vote for the 4th respondent.

124. The law regulating assisted voting is to be found in Regulation 72 of the **General Regulations**. **Sub-regulation (1)** thereof provides that, “On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, and who shall not be a candidate or an agent.”

125. The law provides that the person assisting need not be qualified to vote though he must have attained the age of 18 years. Where the person applying to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer is to assist such voter in the presence of the agents. The person assisting the voter is required to make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule. A person cannot assist more than one voter in an election and the presiding officer is required to record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance. The section goes on to make it an offence for the assisting person to breach the declaration.

126. The witness admitted that the persons who were denied their assistants were eventually allowed to vote after she protested. The numbers of the assisted voters was not mentioned and the issue was not explored in the oral testimony and I say no more on the matter. The petitioner did not demonstrate that the violation of **Regulation 72** of the **General Regulations** was so ubiquitous as to affect the election result.

Denial of Forms 35 and 36

127. At this juncture let me deal with the allegation by the petitioner that her agents were denied the Forms 35 and 36. This issue was raised in several letters which are annexed to her further affidavit sworn on 26th March 2013. In her letter dated 6th March 2013 to the Returning Officer Machakos County, the petitioner stated that, “None of my agents were furnished with these documents which by law I am as of right entitled to and accordingly I demand that you forthwith furnish me with each of the polling stations’s declaration of results. Please note that your refusal, neglect and/or refusal to furnish me with these documents constitutes actionable breach of the law.” The letter was also copied to the National Tallying Centre in Nairobi.

128. **Regulation 79(2)(c)** of the **General Regulations** provides that the Presiding Officer shall, “provide each political party, candidate, or their agent with a copy of the declaration of results.” It is to be noted that Form 35 is prepared at the polling station and the Presiding Officer can only comply with this provision if the candidate or party agent is present at the time the results are declared. It is the burden of the petitioner to prove that her agent was present when results were declared and the Presiding Officer actually refused to give the Form 35.

129. I have considered the evidence and I find and hold that the petitioner has not proved that her agents were denied Forms 35. The CCU party agents whose evidence was proffered by affidavit; Jacinta Mutua, Virginia Mueni (PW17) and Alex Mulwa did not attest to the fact that they were at the polling stations when the results were announced and that they requested and were denied the forms by the respective Presiding Officers. It is also apparent from the evidence that the petitioner relied on the evidence of SAFINA and TIP party agents which implies she may not have had agents in all polling stations in the County.

130. The letter addressed to the Returning Officer seeking copies of Forms 35 is at best misguided in view of the fact that it is the Presiding Officer, at the Polling Station, who has the responsibility to issue Form 35 under the applicable regulation. The Constituency and County Returning Officers are only responsible for tallying of results and may not be in a position to issue the Form 35 as they are brought one original Form 35 for tallying. They do not bear responsibility of giving agents Form 35.

131. Likewise, the responsibility of the Returning Officer to issue the Form 36 is to be found in **regulation 83(1)(d)(i)** of the **General Regulations**. The petitioner has not proved that her agents were present at the Constituency Tallying centres when the results were announced and that they were actually denied Form 36.

Declaration of results

132. The petitioner contested the manner in which the results were declared and whether they were declared at all.

133. The petitioner’s allegations are summarised in her deposition sworn on 26th March 2013 which is in support of the petition and in which she states, in part, as follows;

[27] On March 8th 2013 at the Machakos (sic) County tallying center the 3rd respondent purported to declare the 4th Respondent herein as the duly elected Machakos County Governor following the March 4th 2012 elections ...

[29] Although I am aware that I am entitled to a copy of the Form 36 which by law ought to be executed by the 3rd Respondent in accordance with the law, I was NEVER furnished with a copy of the said statutory Form 36 in respect of the Machakos County governor elections, and there is not a single of my agents, including my chief agent, who were ever furnished with a copy of the said Form.

[37] I believe that the 3rd Respondent has therefore NEVER declared the said Machakos County Governor results to date as the same were never signed by the duly appointed and Gazetted Machakos County Returning Officer and verified by the party agents of the candidates or even the candidates themselves.

[38] I recall that on March 8th 2013 when the 3rd Respondent purported to announce and declare the 4th Respondent as the winner of the Machakos County Governor election the 4th Respondent had proceeded to Machakos Town to purportedly declare HIMSELF as the duly elected Machakos Governor in violation of the law. He even had a podium to boot. I annex hereto and marked as exhibit “WN5A” a copy of the Daily Nation newspaper

report on this breach of the Law.

134. The 4th respondent testified that on the material day he was declared the winner of the election just before midnight on 7th March 2013 and was issued with Form 38 soon thereafter. He did not deny that he addressed an impromptu rally at the Machakos Bus Park. He stated that he was already aware from his own tallies that he was the winner and he addressed the people to thank them for conducting themselves peacefully.
135. The Machakos County Returning Officer, David Mutisya Musyimi (RW10) testified that on 7th March 2013 at about 11.30 pm at the Tallying Center, which was at the Machakos Municipal Social Hall, he declared the final results of the Governor, Senator and County Woman representative seat and accordingly issued the Form 38 certifying the respective winners. He confirmed that he declared Alfred Mutua the winner of the Governor's position and issued him with the Form 38. He further stated that though the petitioner was not present, her party CCU was represented by the Chief Agent, Musembi Katuku, who was also the Machakos County Kenya Union of Post Primary Teachers (KUPPET) Executive Secretary.
136. David Musyimi (RW10) further testified that after the results were announced and certificates issued to the winners, the party agents present were requested to sign the Form 36. Those who were present duly signed the form and were given copies. He confirmed that Musembi Katuku, though present, declined to sign claiming that he had been instructed not to do so by the petitioner. He then endorsed on the Form 36 that, "*The agent for Wavinya Ndeti refused to sign the Form 36, claiming that he had been instructed not to sign by the candidate.*"
137. The evidence of the events at the Tallying centre was also confirmed by John Mutuku Nzioka (RW4), the deputy lead agent of the Wiper Party, who confirmed that he was present at the Tallying Hall when the results were announced and as an agent he signed the Form 36 on behalf of his party. He confirmed that Katuku was present and that he declined to sign the results after they were announced.
138. I am afraid that the petitioner's allegations about the results are completely without merit. They are not founded on any admissible evidence as the petitioner was not present at the tallying centre. She also did not call her agent Katuku, an admittedly well-known personality in Machakos, to give evidence on her behalf. She also did not call any person who was present in the Tallying Hall to testify on her behalf. The petitioner admitted on cross-examination that she instructed Katuku not to sign the Form 36. Although the petitioner raised several grievances, there is no evidence that her agent, who was entitled to be present at the tallying by virtue of **regulation 83(1)** of the **General Regulations**, raised any complaints for consideration by the County Returning Officer during the tallying process.
139. The overwhelming evidence is clear and I find and hold that the results were announced in public by the County Returning Officer and the Form 38 declaring the 4th respondent the winner was duly signed on 7th March 2013 just before midnight and delivered by the County Returning Officer to the 4th respondent. That the returning officer thereafter prepared and signed Form 36 which was endorsed by seven party agents present on 8th March 2013 just after midnight.
140. The petitioner averred that pursuant to **regulation 83(1)(d)(i)** of *the General Regulations*, the 3rd respondent declared the 4th respondent Governor election results without availing to the petitioner a copy of thereof as required. In view of the petitioner's instructions to her agent, the petitioner cannot be heard to complain that the Form 36 was not issued to her or her agent in accordance with the regulation.

Errors, alterations, mistakes in Forms 35 and 36

141. The statutory forms are designed to ensure that the objects of a free and fair election are met by

providing a simple, accurate and transparent and verifiable process consistent with **Articles 81 and 86** of the Constitution. In his submissions, Mr Kinyanjui, laid emphasis on these principles and values. He contended that if the process could not meet the standards set out in the Constitution, then the election must be annulled.

142. The question whether breach of the **Article 86**, being a breach of the Constitution, results in the annulment of an election was considered by Githua J., in **Sarah Mwandgudza Kai v Mustafa Idd and Others Malindi EP No. 8 of 2013 (Unreported)**. In that case, it was argued that failure to count the votes at the polling station as required by **Article 86** was unconstitutional and as such the election had to be annulled. The learned judge stated; “[77] *In my view, Article 86 read as a whole requires IEBC to employ systems and methods of voting that would ensure free and fair elections. It sets a standard which IEBC should strive to achieve in the conduct of elections. If for any number of reasons it is unable to attain the threshold envisaged in the constitution in the organization of an election, it would mean that IEBC had performed below par but this in my view cannot be said to be a violation of the constitution. Failure of IEBC’s officials to count votes at the polling stations by itself without more cannot lead to the conclusion that the methods employed by IEBC in arriving at the result of an election were unconstitutional and provide a basis for nullifying an election.*”

143. I agree with the sentiments by the learned judge. The Constitution must be read as a whole and as I stated earlier in the judgment, the common thread of sovereignty of the people effected through election must be given full effect and as such a violation of the standards in **Article 86**, of themselves, should not lead to annulment of the will of the electorate. Indeed **Sarah Mwandgudza Kai v Mustafa Idd and Others (supra)**, the judge went further and stated, “[78] *If the court were to adopt the construction proposed by Mr. Wameyo, it would require the court to take the drastic action of nullifying the election of the 1st Respondent simply because counting of votes was not done in polling stations but in the tallying centre without the Petitioner having demonstrated that counting at the tallying centre was not transparent or that IEBC committed irregularities or malpractices of such a magnitude as would lead to a reasonable conclusion that the elections were not free and fair. Such a construction in my opinion would lead to an absurdity.*”

144. A substantial part of the petitioner’s case was the Forms 35 and 36 contained so many errors, alterations and mistakes so as to render the election of the 4th respondent invalid. Mr Kinyanjui took the Returning Officers through the minutiae of errors, mistakes and alterations on the Forms 35 and 36. The County Returning Officer and the Constituency Returning officers all admitted that there were errors, alterations and mistakes in the statutory forms but stated that these were not intentional and were in fact corrected.

145. I considered all these factors when I heard the petitioner’s application for scrutiny and recount. In **Ruling No. 3** I concluded that; “[21] *An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.*”

146. As the petitioner’s application for scrutiny and recount was rejected, to proceed on an analysis of each and every Form 35 and 36 would amount to a recount and re-tallying of the results. I decline to embark on such an analysis in this judgment. I shall therefore limit my observations and findings to a consideration of the pertinent issues that were pleaded in the petition and which the respondents were specifically able to respond to where necessary.

Forms 35 and 36

147. In order to deal substantially with the petitioner’s case, I think it is important to understand the place of statutory Forms 35 and 36 within the electoral process. Essentially these forms are for

recording the votes tallied. In the words of the Kimondo J., in ***Kakuta Hamisi v Peris Tobiko and Others Nairobi EP No. 5 of 2013 [2013]eKLR***, “*Form 35 is a snapshot of the votes cast. Its contents are then transposed into form 36 that captures the constituency total tallies for all the candidates.*”

148. The form and contents of the forms is provided for in **Part XIII** of the ***General Regulations, 2012***. The manner in which they are prepared and filled is clearly set out in the regulations. In most cases the Presiding Officers were furnished with computer printed Form 35 which was pre-filled with the details of the polling station and candidates. A lucid elaborations and demystification of these statutory forms was set out by Kimondo J., in ***Kakuta Hamisi v Peris Tobiko and Others (supra)*** and which I adopt fully in my analysis.
149. Form 35 contains three distinct parts. The first part, which I shall refer to as Part A, requires the Presiding Officer to insert the following details; Total number of registered voters for the polling station, Number of spoilt ballot papers, Total number of votes cast, Number of rejected votes, Number of disputed votes, Number of rejected objected votes and Total number of valid votes cast.
150. The second part, which I shall refer to as Part B, is to my mind, the crucial part which captures the actual vote tally. The part contains the name of the candidate and against it a space to fill in the number of valid votes cast in favour of each candidate.
151. The last part, Part C, contains the declaration where the Presiding Officer, Assistant Presiding Officer are required to sign and date the form and declare that they were present when the results were announced and that the results shown on the form are true and accurate count of the ballots. There is also a space for the candidate or his or her agent to sign. If the agent refuses to sign, there is space for the Presiding Officer to record the reasons. Finally, there is a space for the Presiding Officer to record any necessary comments that are pertinent to the process of counting votes. These comments are referred to as statutory comments.
152. Mistakes may be made in the first part because the Presiding Officer may insert the wrong number of registered voters. It should be recalled that the number of registered votes is already fixed at the close of the registration process and therefore an error in the number is not fatal to Form 35 as this number can readily be ascertained by reference to the voter register.
153. The petitioner in his petition cited 21 polling stations where the number of registered voters was discrepant. These were as follows; Kyaani(042), Kyasila(043), Kasaini(044), Ngelani (045), Mutituni (049), Ikokani (058), Kithaayoni Youth Politechnic (061), Kyambuko (066), Eastleigh Nursery School (071), St Mary’s Boys (070), St Mary’s Girls (067), Machakos Recreational Park (073), Manza (077), Miwoyoni (081), Kyanguli (082), Machakos Technical Training Institute (088), Machakos Girls Rescue Centre (091), Kivandini (094), Kathaayoni (097), Kyanguli (111) and St John Academy (109). The discrepancies in the Form 35 related to the registered voters attributed to those polling stations. As I stated elsewhere in this judgment, the petitioner did not tender evidence to prove that these numbers were different from the specific voters register identified by the Supreme Court.
154. The other figures in the Part A of Form 35 require reconciliation of the votes cast vis-a-vis the other numbers. Thus to obtain the total valid votes cast, the rejected and disputed votes will be subtracted from the total votes cast. This mathematical exercise, carried out in dead of night or the wee hours of the morning, when the officers are tired and agents weary may lead to mistakes. This number is easy to ascertain by a simple arithmetic exercise. Where the number of votes cast for each candidate is clear on the Part B of the Form 35, it is easy to reconcile the figures once mistake is detected in order to come up with the total tally of valid votes cast.
155. However, where errors are evident in the votes cast for each candidate and that number exceeds the registered voters then the court’s sense scrutiny is heightened. The errors may be self-evident

or may be corroborated by party or candidates agent tallies and the court in appropriate circumstances may decide to order a recount if it is satisfied that a basis has been laid or it is in the interests of justice to do so. Under **regulation 83(1)(a)** of the **General Regulations**, the Returning Officer shall disregard the results where votes cast exceed the number of registered voters.

156. The last part of Form 35, Part C, requires the Presiding officers and their deputies to sign the form to confirm that the contents are true and correct. The signature of the Presiding officer is essential for validity as he or she is the person charged with the responsibility of carrying out the election on behalf of the IEBC at the polling station or centre. The candidates' agents are also required to sign the form. Whether the failure of the agent to sign the form or not is fatal is a matter of fact. **Regulation 79(6)** of the **General Regulations** provides that, "*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).*"

157. The issue here is whether Form 35 is null and void if any of the particulars is missing or is incorrect, altered or overwritten. Mr Kinyanjui equated Forms 35 to a cheque to cash the electoral outcome, so that if the cheque is unsigned, or undated, has alterations which are not countersigned then it cannot be honoured. In a similar vein, defective forms cannot be used to declare results or validate an election outcome. This, I think, is gilding the lily!

158. This issue must be interrogated from the position that it is the duty of the court to sustain the will of voters. Since Form 35 is a record of persons who voted, the court should not be quick to discount it as to do so would amount to disregarding the fact that people went to the polls, stood in line and voted. The court must address itself to the particular circumstances of each case. I would also add what was stated by Muchelule J., in **William Odhiambo Oduol v IEBC and Others (supra)** when he considered whether to disregard form which has alterations, errors and mistakes. He stated, "*Each petition has to be decided on its own merits. It would depend, for instance, on the number of the Forms in question in relation to the total Forms in the petition. It would also depend on the explanations given by the electoral officials, whether or not the agents signed the Forms, or what questions they (the agents) raised about them. But the correct thing should always be that every alterations and/or cancellation be counter-signed and stamped by the maker....*"

159. After Form 35 is compiled and the winner announced at the polling station, the forms are issued to the agents, one is pinned to wall at the polling centre, one is deposited in the sealed ballot box and another is forwarded with the election material to the Constituency Tallying centre for the Returning Officer to undertake the Constituency tally and declare the Constituency winner. Form 36 is based on the Form 35 but the Returning Officer both at the Constituency level and County level does not copy the contents of Form 35 lock, stock and barrel, he or she is required to audit the Form and confirm that it is correct hence the officer will re-calculate the contents of the Part A of the Form 35 to correct any errors. Thus the contents of the Form 36 may differ in certain respects with the Form 35 once the corrections are effected. What the Returning Officers cannot do is to change the votes cast for each candidate, reflected in Part B, as the Form 35 is the primary document for recording the vote. Once again at this stage of transposing the information, errors are bound to occur. It must also be recalled that the tallying is not done in secret, it is done in the presence of agents who may raise any issues at the tallying. What is clear in this case, and the evidence suggests, is that the petitioner's agents were absent from this process.

160. I also adopt the words of Kimondo J., in **Kakuta Maimai Hamisi v Peris Pesi Tobiko and others (supra)** where he explained that Form 36 is not a static instrument. He observed that, "*I am satisfied that the process can result in clerical errors due to the speed and flow of information. What is material is whether the final form 36 corresponds in all particulars with entries in part B of all the forms 35. It is not a static form: it is built as more and more entries are filled. That is the primary duty of the returning officer at regulation 83(1) (a) of the Elections (General) Regulations 2012. It is thus not entirely true that there were two forms 36. In reality, there is only*

one final and valid form 36 for Kajiado East constituency that evolved from forms 35”

161. The Form 36, which is in the form of a spread sheet, has four parts. The first part, which is the main body requires the Returning Officer to fill in the details of each Polling Station from the Form 35 that is, the Polling Station Number, Polling Station Name, the Name of each candidate and votes cast in their favour. The last three columns contain the votes cast, rejected votes and valid votes. The second part is the part for the candidates or their agents to sign and the last part has space for the number of registered votes and the voter turnout percentage and place for the Returning officer to sign.
162. Although the petitioner has raised issues with the manner in which Form 35 were prepared, there is no evidence that the issues of irregularities were raised at the polling station. All the Returning Officers were resolute that the complaints now raised in this petition in respect of the Forms 35 were not brought to their attention. **Regulation 80 (1)** of the **General Regulations** provides for rechecking and recounting on request by the candidate or agent or by the Presiding Officer at the Polling Station. There is no evidence that the petitioner agents sought a recount of the vote which was their candidate’s entitlement. Once this exercise is completed the ballot boxes are sealed and delivered to the Tallying Centre. They cannot thereafter be re-opened except by an order of the court.
163. The petitioner and her agents also had the opportunity to verify the results by the Returning Officer at the Tallying Centre under **Regulation 83** of the **General Regulations**. This Returning Officer actually deals with the Forms 35 and if there are any issues about Forms 35, the candidate and their agents are given the opportunity to raise them at the Constituency Tallying Centre when the Form 36 is being prepared.
164. The failure of the petitioner and her agents to invoke the provisions of the regulations makes me conclude that in fact the allegations made by the petitioner lack seriousness. The agents are the responsibility of the candidate and party and where they fail or neglect their responsibilities to their candidate, such failure cannot be imputed upon the IEBC.

Use of Statutory Forms

165. I will now deal with the petitioner’s complaints in light of what I have stated about the statutory forms. The petitioner complained that some of the tallying information was not recorded on the pre-printed Form 35 and 36. The petitioner complained that some of the statutory forms were not in the form provided in the Schedule to the **General Regulations**. For example, Form 36 for Matungulu Constituency was not in the pre-printed format. It did not contain the logo of the IEBC. Leonard Okemwa (RW6), the Returning Officer, confirmed that this was the form he prepared and he signed it together with three party agents. He conceded that the form did not have the statutory information like the number of registered voters and the voter turnout percentage.
166. At paragraph 101 of the petitioner’s affidavit, she states; *“In Kangundo Constituency, my agents were not given the Form 35/Form 36 returns with the total registered voters by the 1st respondent polling agents and the Returning officer declined my agents’ requests. The results availed by the I.E.B.C. do not have the list of registered voters at all, so that the validity of the eventual outcome is NOT verifiable.”*
167. The issue whether the use of the statutory form is mandatory is dealt with by **section 72** of the **Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which provides;
- 72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.*
168. As long as the information contained in the form is consistent with what is prescribed by the

General Regulations it cannot be disregarded. The Returning Officers who used other forms other than the pre-printed forms explained the reasons they used the forms and I find that the reasons given were satisfactory. As I stated the purpose of Form 35 is to record the tally of votes cast which the Presiding Officer is obliged to record and unless there is fraud, the form ought to be accepted. Furthermore, I did not hear the petitioner to allege that those forms originated from other places other than designated polling stations where actual people voted. Since people voted at prescribed polling stations, it was incumbent of the Presiding Officer to count and record those votes and thereafter the Returning Officer to tally the votes and announce the result based on the tallies.

169. It ought to be remembered that the parties concerned in an election are the community to be affected, the electors who participate and the candidates. The electoral officers charged with the conduct of elections are merely agents, whose duty it is to facilitate the electors in the free and fair expression of their will. Where that has been accomplished, it would be unreasonable to hold, in the absence of an express provision of law to that effect, that the interest of the community shall be sacrificed, the will of the electors set at naught, and the results as to the candidates defeated merely because in its accomplishment or after its accomplishment, the agents under whose direction the election had been held, have failed to follow each and every formal direction prescribed for their guidance.

170. The above sentiments were expressed by the Supreme Court of Louisiana in **Andrews v Blackman**, 131 La. 355, 59 So. 769 (La. 1912) cited in Barry H. Weinberg's *'The Resolution of Election Disputes: Legal Principles That Control Election Challenges, IFES (2008)* at page 135. The court went on to state that; *"If the framers of the existing statutes regulating primary elections had intended that such elections should be decreed of no effect, notwithstanding that a free and honest expression of the will of the voters may have been obtained, merely because some election officers, either during the progress of the election or after the fact, failed to sign or forward a particular document in a particular manner, or because such officers failed to provide for the elector a booth of particular dimensions, particularly situated or constructed of particular material in which to prepare his ballot, they would, no doubt, have found language in which thus to provide a punishment of the innocent for the dereliction of the guilty; but we do not find language in the existing statutes, and we have neither the authority nor the disposition to supply it."* The court then concluded; *"It would, perhaps, not be going to an extreme to say that, if no election is to be regarded as valid unless every person having any function to discharge in connection with it shall discharge such function according to the letter of the law, there will never be a valid election, unless it be confined to a very few well-informed persons."*

171. This brings me to Form 36 for Machakos County Gubernatorial election which the petitioner impugned. The petitioner has made the point that the form contained mistakes and lacked the required information to make it comply with the law. The petitioner contended that Form 36 lacked statutory data; it did not contain or enumerate the total number of registered voters for Machakos County, it did not set out the voter turnout percentage for election.

172. The County Returning Officer, David Mutisya Musyimi (RW10) readily admitted that these were mistakes but that the information contained in the form was substantially correct. He testified that he identified the errors in the Forms 35 and also those brought to his attention. In my view, the failure to set out the total number of registered voters or to state the voter turnout did not render the form invalid. To annul the election based on these grounds would be to ignore the fact that people voted and those votes were actually recorded and tallied.

173. The general principle for examination of these statutory forms is clearly stated in **section 83** of the **Elections Act, 2011** and the decisions I have cited earlier in the judgment. The issue is whether the errors, mistakes and alterations were substantial enough to affect the overall result. This is the lens I have used to examine the Forms 35 and 36. In my view the errors compared to the overall result were not substantial to affect the result and the petitioner has not discharged her burden to prove otherwise.

174. My conclusion is fortified by the fact that the errors, mistakes and alterations were neither deliberate nor intentional; they affected all the candidates. If indeed the 4th respondent benefitted more in certain cases, it is only because he obtained the largest share of votes cast for the position of governor. The duty of the court is uphold the will of the electorate which is determined by the number of votes and in this case the 4th respondent was the clear and expressed winner of the Machakos County Gubernatorial election. The margin of votes between the petitioner and the 4th respondent which is 164,963 is a clear indication of this fact and of the fact that the voters preferred him to the petitioner and it is the kind of margin described by Georges CJ in *Mbowe v Eliufoo (supra)*.

Conclusion

175. Based on my analysis of the evidence presented by the petitioner, I conclude that the petitioner has not discharged the burden placed on her to establish that the election was not carried out in accordance with the Constitution and the law to the extent that it must be annulled. It is clear that the petitioner's case failed to reach a threshold that would even require the Court to weigh it against the 4th and 5th respondent's evidence.

176. In answer to the two questions I framed for determination, I wish to state as follows;

- a. Whether the petitioner has proved election offences, malpractice and breaches of the Election Code of Conduct by the 4th and 5th respondents and their agents as alleged or at all. **No**
- b. Whether the 1st respondent conducted the election in accordance with the Constitution and the law. **Yes**

177. In the circumstances, the petition is dismissed and I find and hold that the 4th respondent was duly and validly returned as the Machakos County Governor at the election held on 4th March 2013.

Costs

178. Under **section 84 of the Elections Act, 2011**, "*An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.*"

179. As the petitioner has failed to prove her case she is liable to pay the costs of all the respondents. **Rule 36 of the Elections (Parliamentary and County Election) Petition Rules, 2013** empowers the court to apportion and cap costs.

180. In *Kalembe Ndile and Another v Patrick Musimba and Others Machakos HC EP No. 1 and 7 of 2013 [2013]eKLR* I stated that, "[C]osts awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in **Article 38 of the Constitution.**"

181. I have considered other cases where the court has capped costs particularly gubernatorial election petitions. In *Ismail Suleman and Others v Returning Officer, Isiolo County and Others Meru EP No. 2 of 2011(Unreported)* and *Mohammed Ali Mursal v Saadia Mohamad and Others (Supra)*, the amount was capped at Kshs. 2 million and Kshs. 1 million for each respondent respectively. In *Kithinji Kiragu v Martin Nyagah Wambora and Others Embu EP No. 1 of 2013 (Unreported)*, the court capped costs at Kshs. 750,000.00 for each party. The petition herein was not complex and the issues were fairly straight forward as manifested by the pleadings and submissions tendered in court and the number of witnesses and the nature of their evidence on record. I have taken into account the time spent on research, preparation of pleadings, applications and submission, preparation of witnesses and in court during the actual hearing of the case. In my view the costs for each party shall be capped as follows; the 1st, 2nd and 3rd respondent at Kshs.

2.0 million and for the 4th and 5th respondent at Kshs. 2.5 million.

Disposition

182. I would like to thank all the counsel for their diligence in prosecuting and defending this matter. I also appreciate the work of the Machakos High Court staff and the staff at the Constitutional and Human Rights Division of the High Court, Nairobi who ensured that this matter proceeded smoothly. Special mention must be made of Ms Makungu, the Deputy Registrar, for her administrative support.

183. These then are the final orders:-

- a. The petition be and is hereby dismissed.
- b. I hereby declare that Dr Alfred Nganga Mutua was validly elected as the Governor of Machakos County.
- c. The certificate shall issue in accordance with **section 86(1)** of the *Elections Act, 2011* to the IEBC.
- d. The petitioner shall bear the costs of the petition which are capped as follows;
 - i. As against the 1st, 2nd and 3rd respondents, Kshs. 2.0 million only.
 - ii. As against the 4th and 5th respondents, Kshs. 2.5 million only.
- e. The costs shall be taxed and certified by the Deputy Registrar and the security deposit utilised to pay the respondents' on a pro-rata basis.

DATED and DELIVERED at MACHAKOS this 17th day of September 2013.

D.S. MAJANJA

JUDGE

Mr Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the petitioner.

Mr Muhoro instructed by Kimani Muhoro and Company Advocates for the 1st, 2nd and 3rd respondents.

Mr Mutula Kilonzo Junior instructed by Kilonzo and Company Advocates for the 4th and 5th respondents.