REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 2 OF 2013

STEVEN KARIUKI……....
…….PETITIONER

VERSUS

GEORGE MIKE WANJOHI……...1ST
RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..…...…2ND
RESPONDENT

MILIAM WANJIRU GACHIHI…….....3RD
RESPONDENT

JUDGMENT

1. The petitioner is Steven Kariuki. He claims to be the legitimate winner of the election held on 4th March 2013 for member of the National Assembly for Mathare constituency. He was nominated by the Orange Democratic party, ODM. There were 9 other candidates including the 1st respondent, George Mike Wanjohi. The latter was a candidate on the ticket of The National Alliance party, TNA. The election was conducted by the 2nd respondent, hereafter referred to as the IEBC. The 3rd respondent was the returning officer for the poll. The bedrock of the petition is simple: that on 6th March 2013, at the constituency tallying hall at St Teresa's, the returning officer announced that the petitioner had the won. It was a *public* announcement. She then issued a certificate of results in Form 38 of the Elections (General) Regulations 2012 to the petitioner. In a nutshell, that should have drawn the matter to a close.
2. It was not to be. On or about the 8th of March 2013, the IEBC cancelled that certificate and issued a fresh one to George Mike Wanjohi. The IEBC then declared in a formal instrument, *The Kenya Gazette*, that the 1st respondent was duly elected. In a synopsis, the respondents' case is that the petitioner did not win the election; and that the certificate to him was issued in error and to that extent, a nullity. The third respondent's evidence is that she subsequently re-tallied the results and found that the petitioner only garnered 26,916 votes against the 1st respondent's 27,262 votes. It was a narrow margin of 346 votes only.
3. Meanwhile, on 7th March 2013, the 1st respondent lodged separate proceedings in the High Court at Nairobi *George Mike Wanjohi Vs Steven Kariuki et al* petition number 150 of 2013 (unreported). In that constitutional petition, he took up cudgels on the legality of the certificate of results issued to the petitioner here. A three-judge bench was constituted to hear the matter. The Court did not make a finding on the merits of the case. Instead, the parties concurred to withdraw the proceedings. The IEBC's counsel said in open court that the IEBC would cancel the

petitioner's certificate and issue a new one to the 1st respondent. That is the genesis of the present election petition.

4. The gravamen of the petition is that no such power reposes in IEBC. Put another way, the returning officer contravened the Constitution, the Elections Act 2011 and the general regulations thereunder. It is pleaded that she illegally colluded with the other respondents to overturn the petitioner's legitimate victory. It is instructive then that the petition does not generally plead any malfeasances or irregularities over the *conduct* of the election by any presiding officer at any of the 115 polling centres in Mathare: the epicenter of the dispute remains the *tallying or re-tallying* of votes by the returning officer in form 36 and *issue* of the impugned form 38. The petitioner's plea is thus three-pronged: that the form 38 to the 1st respondent and the attendant gazette notice of 13th March 2013 be impugned; that the petitioner be declared and gazette the winner; or, in the alternative, that the poll be nullified.
5. The petitioner called 5 witnesses. The petitioner (PW1) adopted his witness statement sworn on 19th March 2013 as evidence in chief. He deposed that ODM had agents in all the 115 polling stations. The party also had 13 lead agents. Two polling stations were merged on polling day. In reality then, there were 114 polling stations. He stated that there was a shortage of forms 35 in all polling stations, each polling station having received less than four. The agents recorded the tallies from the forms 35 and verified them to be correct after the counting of votes. The presiding officers had indicated that the results would be transmitted electronically to the tallying centre. At the tallying centre, the returning officers read out the results from their polling stations. Those results were then entered into a computer as Form 36. He and the 1st Respondent were present at the tallying centre and witnessed the entire exercise.
6. He stated that the following IEBC officials were present: Mathias Wangila, Vincent Njenga Kimani and Isaiah Ochieng Mboke. There were local administration and security officers. He testified that the final announcement of results was made on 6th day of March, 2013 at about 1.00 p.m as follows;-

No.	**Candidate**	**Votes**
1.	Anthony Olouch	7,588
2.	Crispin Mulu	1,259
3.	Elijah Kanyi	1,164
4.	GachekeGachihi	263
5.	George Mike Wanjohi	32,156
6.	Joseph Mbai	7,602
7.	Joseph Mwangi	571
8.	Joyce Ongero	675
9.	Sammy J. Mudanya	1,746
10.	Steven Kariuki	34,957

7. He testified that the returning officer asked the candidates present or their agents to sign Form 36 before issuing the certificate to the winner. Only one candidate, Elijah Kanyi, and two agents who included the petitioner's agent, Boniface Mosiori Osiemo, signed the form. He said that the returning officer took his details, completed a form 38, signed it and issued it to him in the

presence of all candidates, agents, observers, provincial administration and police officers. He produced a copy of the certificate marked "SK4".

8. He claimed that the impugned certificate in form 38 was issued to the 1st Respondent outside the Milimani Commercial Courts on8th March 2013 in the absence of any of the candidates, their agents, election observers and at a place other than the tallying centre. He testified that the contested form 36 was issued two days later in an effort to justify the results. In the petitioner's view the 2nd and 3rd Respondents committed election offences by cancelling the certificate issued to him and issuing a fresh one to the 1st Respondent. The particulars were as follows: collusion with the 1st respondent's political party; withdrawing the earlier petition; authoring the letter dated the 8thMarch 2013 to the petitioner cancelling his certificate; creating a new, fraudulent and "parallel form 36"; and, gazetting the 1st respondent as winner of the election.
9. The petitioner thus contended that the elections for Mathare were irregular and should be nullified. The petition had prayed for an order for scrutiny of election materials and for a recount of the votes. The Court, upon a formal application by the 1st respondent, struck out those parts of the petition for want of precision of the pleadings and for being nebulous or scandalous.
10. On cross examination, the petitioner conceded that the *"only entity authorized to declare results is the IEBC and its officials including the returning officer at the constituency level"*. He clarified that although IEBC had indicated that it would electronically transmit the results in forms 35 from the polling centres, it did not materialize. He admitted that the figures in the above table comprised about 99% of registered voters. Regarding High Court petition 150 of 2013, he said he got a call from Mr. Kinyanjui, learned counsel for the 1st respondent, informing him about the suit. He dispatched his lawyer, Mr. Oluoch Olunya, to defend him in those proceedings. In the petitioner's view, the proceedings revolved around the question of jurisdiction. Before the matter could be resolved, the 1st respondent here withdrew those proceedings. The 1st respondent was subsequently gazetted as the winner. The petitioner's case was that that was unconstitutional. He prayed to be declared the winner. In the alternative, he beseeched the Court to nullify the poll.
11. The next witness was Boniface Mosiori Osiemo (PW 2). He was also an ODM agent. He restated the evidence of PW 1. He witnessed the declaration of the petitioner as the winner on 6th March 2013. He had deposed at paragraph 13 of his statement that he signed form 36 at the tallying centre. He conceded in cross examination that only he and Mr. Kanyi, a candidate, signed form 36. He did not however produce a copy of that form 36. He said he was not given a copy by the returning officer.
12. The petitioner then called Mathias Wangila (PW 3). He said he was a presiding officer for IEBC at the tallying centre at St. Teresa's Girls Primary School. He was at the Centre from 3rd March 2013 until 6thMarch 2013. He did not however produce a letter of employment from the IEBC. He deposed in his statement that the returning officer, Milliam Wanjiru Gachihi, several presiding officers, clerks, candidates and agents as well as election observers were present when results were announced. There were also, policemen and provincial administration officers. He deposed that the 3rd respondent gave him the original Form 36 for the parliamentary election and requested him to give it to the Chief Agent of ODM, Geoffrey Ombogo Makworo. The Form was different from the one she had read out on 6th March 2013. He produced a copy of the form annexed to his statement marked "MW 3". In cross examination, he stated that the verified figures in form 35 should not be divergent with form 36. He was not sure whether the forms 35 in Court were the same as the ones he saw at the tallying centre. He insisted that the figures at paragraph 12 of his affidavit showing the petitioner was leading were correct.
13. The next witness was Edwin Mbuthia Nyambura (PW 4). He is a journalist. He was at the tallying centre, at St. Teresa's Girls Primary School on 5th March 2013. He said that at about 2.00 p.m. he witnessed the entry of data from forms 35 into a computer. It was meant to generate a form 36. He recorded the proceedings at the centre on video until 6th March 2013 in the afternoon. In particular, he recorded the announcement of Steven Kariuki as winner of the election. The witness had then transferred the recording into a computer DVD which he sought to produce as evidence. The Court declined to admit it for considered reasons including: failure to file a certificate of the maker *contemporaneously* with the deposition; the strict rules for election dispute resolution; and the unreliable nature of electronic evidence. In any event, and as is clear from the other witnesses,

the Court had already received primary evidence of the events at the tallying hall that were the primary narrative in the transcript of the DVD.

14. The petitioner's last witness was Geoffrey Ombogo Makworo (PW 5). He said he was the "overall agent of ODM" in Mathare. He produced copies of his letter of appointment and oath of secrecy. He also produced a list of the polling agents and lead agents in the 115 polling centres. He confirmed that the party had agents in all the centres and another 13 lead agents. He witnessed the announcement of Steven Kariuki as winner of the election and the presentation of form 38 to him at about 1.00 p.m. on 6th March 2013. He said that the returning officer did not give the agents the form 36.He admitted that the version of results announced at the tallying centre showed a 99% voter turn-out. On 9th March 2013, the returning officer called him to collect the form 36 from her offices at Kenya Institute of Education. He did not find her. He was told she had gone to Bomas of Kenya. He said he was asked to pick the form from Mathias Wangila (PW 3). He deposed in his statement that Mathias gave him a form 36 which was *"different from the one that was read out by the Returning Officer on 6th March 2013 and signed by [one] of his agents"*. He deposed that one Stephen Rakama, a presiding officer in the election, kept calling agents to execute some forms. The witness stated that he advised all his agents not to sign any new or "falsified" documents. That marked the close of the petitioner's evidence.

15. The 1st respondent called two witnesses. The first was George Mike Wanjohi (DW 1). He was nominated to run by TNA. He was cleared by IEBC to contest the Mathare seat for the National Assembly. He is the member of the National assembly for Mathare. His evidence in chief was based entirely on his replying affidavit sworn on 3rd April 2013. The key averments in that deposition are as follows. At the close of the poll, the petitioner was erroneously announced as the winner. He was aggrieved by that decision. He asked for a re-tally. He then filed petition 150 of 2013 in the High Court, Constitutional Division, to challenge the issue of form 38 to the petitioner.

16. In the 1st respondent's view, the IEBC had power to cancel the certificate because it did not correspond with the results in forms 35. He referred to section 75 of the Elections Act, 2011. He deposed that he withdrew the proceedings in open court after the 2nd respondent admitted the error. He stated that counsel for the 2nd and 3rd respondents informed that Court that IEBC had written to the Petitioner the letter dated 8th March 2013. He annexed a copy of the letter revoking the form 38 to the petitioner. He denied that the letter was done after the Court session. He got a copy of form 36 from the IEBC. He received the certificate in form 38 on 8th March 2013 at the IEBC headquarters upon advice of his counsel.

17. The 1st respondent denied committing or condoning any election offences. He denied colluding with his party or any other person to perpetrate such offences. He denied having been a "key player" of the "election offences and breaches of the Code of Conduct…" alleged by the Petitioner. He stated that no complaint was made to any police station.

18. The witness faulted the version of results relied on by the petitioner. He said no such announcement of results was made. He deposed that there was no way he could have been credited with 32, 156 votes while he was officially declared to be the winner with 27,262 votes. He further attacked the version of results by the petitioner as being exaggerated and unrealistic: the alleged valid votes cast of *87,981* against the total registered voters of *88, 148,* is suspicious. That would mean that only *167* voters did not vote even before factoring in any *spoilt* or *rejected* votes. The 1st respondent's case was that no such results were confirmed by form 36. Lastly he was of the view that the announcement of results by the returning officer was provisional until a final declaration by IEBC in *The Kenya Gazette*. To the 1st respondent, there were then no parallel results or parallel forms 36 as alleged by the petitioner. He in any case stated that the petitioner did not produce the initial form 36 allegedly made by the returning officer.

19. The 1st respondent then called to the stand Gabriel Ngunyangi Banice (DW 2). He claimed to have been appointed the chief or tallying agent for TNA. He said he never met Geoffrey Ombogo Makwaro (PW 5), in the constituency. He said the elections were fair, credible, and transparent. He got a copy of form 36 from the 3rd respondent after the announcement of the 1st respondent as the winner of the Mathare Constituency. He insisted, even after a series of pointed questions from the Court, that there was no announcement at any point in the tallying hall that the petitioner had

won. He said the person announced as winner at the tallying hall was the 1st respondent. He was lying through his teeth. Even the 3rd respondent admitted that she had announced, albeit prematurely, that the petitioner had won. The Court, in a considered ruling at the close of the 3rd respondent's testimony, found that Gabriel Ngunyangi had perjured himself. As a result, his evidence is tainted and of little probative value. That marked the close of the 1st respondent's case.

20. The 2nd and 3rd respondents called one witness, the returning officer, Milliam Wanjiru Gachihi (DW 3). She relied on her statement sworn on 25th April 2013. The key averments were as follows. She was appointed by the IEBC as the returning officer for all the 6 contested seats in Mathare constituency. Her key duties were to coordinate the elections in the whole constituency, to receive election results from presiding officers, tally the results and announce them. She was then required to deliver the returns of the tallies to the Commission after declaring the winner of the election.

21. She stated that initially, there were 115 polling stations but two were later combined to create 114 polling stations. After tallying all the results, she found that the 1st Respondent garnered 27,262 votes. It was the highest. Accordingly, the 1st respondent had won the National Assembly election. It was her evidence that the certificate of results in form 38 initially granted to the petitioner was erroneous and void. In her view, there is no requirement that the certificate be issued at the tallying centre or in the presence of candidates, their agents, election observers, or any other persons.

22. She produced a copy of form 36 marked "MWG 1" and forms 35 marked "MWG 2". The petitioner objected to production of copies of the forms 35. The Court overruled him for three key reasons: the petitioner did not issue a notice to produce or indicate as much at the pre-trial conference; it was going to upset the trial schedule; and in any event, the copies were admissible under the Evidence Act.

23. She narrated that once the presiding officers presented forms 35 from the various polling centres, she cross-checked them before announcing the results to the public. That data in turn was transferred into a computer to generate form 36. She made a provisional form 36 or a tallying sheet which was the basis of her announcement on 6th March 2013 that the petitioner had won. She had then issued a certificate of results in form 38 to him. She subsequently noted some errors. She deposed that she re-tallied the results from the 115 polling stations at the tallying hall in the presence of her deputy, some presiding officers and agents. She elaborated on the error: votes cast for each candidate exceeded the total votes cast in the National Assembly elections, and the total registered voters in Mathare Constituency. She said that that was a mathematical error that would have invalidated the results of the National Assembly elections. The results she had announced were adding up to 87,000 votes. When she factored in the rejected votes it came to 88,148 votes which was the total number of registered voters. She did not make an entry of the incident in her polling day diary. She said that she tried to get the petitioner in vain: he had switched off his cell phone.

24. She contacted her seniors at IEBC about the problem. She was advised to go to Bomas of Kenya to meet IEBC's legal team. She says that in retrospect she should have recalled the agents after she finished the tally. The situation in the tallying hall was however tense. She said people in the hall were shouting. She said she needed to manage the situation because she had to declare results for other contested seats in the general election and deliver them to the County returning officer at Nyayo Stadium. She conceded that she issued Mr. Wanjohi with form 38 on 8th March 2013. It was at IEBC headquarters after the Court session in petition 150 of 2013. She said IEBC headquarters was not the gazetted tallying centre. She clarified that she did not *re-tally* the results as such as she had finished the tallies at St. Teresa tallying hall. She was accompanied by an IEBC lawyer when she gave Mr. Wanjohi form 38. She could not remember if she gave Mr. Wanjohi the form 36. She did not present to court the initial tallying sheet. She admitted that the form 36 produced in Court was neither signed by agents nor did it have statutory comments. She had however signed and sealed it. She stated that if agents of candidates or candidates are present, they are entitled to execute form 36. She testified that failure to do so does not invalidate the form.

25. She conceded that she announced the results and issued form 38 from an incomplete or provisional form 36. Her view was that the announcement of results was not a *declaration* of the person validly elected. She referred to regulation 87 (4) (b) of the Elections (General) Regulations,

2012 which provides that upon receipt of a certificate, the Chairperson of the Commission shall "*in the case of the other elections, whether or not forming part of a multiple election, publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the persons elected"*. She also stated that article 88(e) of the Constitution and section 74 of the Elections Act 2011 granted the IEBC power to resolve certain post-election disputes before declaration of final results.

26. She denied that the respondents colluded to compromise High Court petition 150 of 2013. She defended the issue of the new form 38 to the 1st respondent. She said she had a duty to ensure that the correct candidate was gazetted as the winner. Her evidence was that the correct results are the ones at paragraph 5 of her sworn witness statement. The petitioner got 26,916 votes against the 1st respondent's 27,262 votes. She denied that she had contravened the Constitution, the Elections Act or Regulations. In particular, she denied that her or the 2nd respondent colluded with TNA or committed any election offences. She deposed that there were no irregularities disclosed in the petition. Finally, she testified that the elections were transparent, free and fair.
27. I have considered the pleadings, depositions, witness statements and evidence produced at the trial. I have also paid regard to the written and oral submissions by the parties. At the pre-trial conference, the following contested issues were framed:

i. *Which between the certificates in Form 38 issued to the petitioner, on one hand, on 6th March 2013 and to the 1st respondent on 8th March 2013, on the other hand, is valid or lawful?*
ii. *Whether the 3rd respondent had power and authority to retally the results of the election after the declaration of the results of 6th March 2013 in a place other than the tallying centre and in the absence of the candidates or agents.*
iii. *Whether the 2nd and 3rd respondents should be directed to honour the certificate (Form 38) issued to the petitioner on 6th March 2013.*
iv. *Whether the election for member of the National Assembly for Mathare Constituency held on 4th March 2013 should be declared null and void and a fresh election held.*
v. *Who between the 1st respondent and the petitioner was determined, declared and published by the 3rd respondent as elected member of National Assembly for Mathare Constituency in the elections held on 4th March 2013?*
vi. *Who should bear the costs of the petition?*

28. The parties agreed that *the statement of uncontested issues* dated 30th May 2013 filed by the petitioner be admitted on record save for paragraphs 3 and 7 which were deleted; and paragraph 8 which was admitted in lines 1, 2 and 3 up to the words *"Mathare Constituency"*. The line starting with words *"at a place other than"* and ending with the words *"election observers"* was deleted.
29. The net effect was that eight general facts became common ground: first, that there were 10 candidates in the election namely, Anthony Olouch, Crispin Mulu, Elijah Kanyi, Gacheke Gachihi, George Mike Wanjohi, Joseph Mbai, Joseph Mwangi, Joyce Ongero, Sammy J. Mudanya and Steven Kariuki. Secondly, that the 3rd respondent, Milliam Wanjiru Gachihi, was the gazetted returning officer and that the gazetted constituency tallying centre was at St. Teresa's Girls Primary School. Thirdly, that the 3rd respondent signed and issued the petitioner with the certificate of results in Form 38 on 6th March 2013 at about 1.00p.m at the tallying centre. Fourthly, that on 7th March, 2013, the 1st respondent filed the proceedings I referred to in Nairobi election petition No. 150 of 2013, challenging the declaration of the Petitioner as the elected Member of the National Assembly for Mathare Constituency. The petition was withdrawn on 8th March 2013. Fifth, all parties conceded that on 8th March 2013, the 3rd respondent wrote to the petitioner, notifying him of the cancellation of the certificate in form 38 issued on 6th March 2013. Sixth, on 8th March 2013, the 3rd respondent issued a new certificate in Form 38 to the 1st Respondent showing him as the candidate elected as Member of the National Assembly for Mathare Constituency. Seven, that the form 36 issued to the 1st respondent was signed but not dated by the third respondent. It was not also signed by the candidates or their agents. Lastly, on

13th March 2013, the 2nd respondent gazetted the 1st respondent as the duly elected Member of the National Assembly for Mathare constituency. I find that under section 61 of the Evidence Act, no further evidence was required to prove those eight facts.

30. I stated earlier that the petitioner conceded the election proceeded with no problems on the polling day. That was also confirmed by Geoffrey Makworo (PW 5). The latter testified that ODM was well represented by agents in all the 115 stations and that he received no complaint on the conduct of the elections. The 1st, 2nd and 3rd respondents concur on that element. The fulcrum of the petition is the conduct of the returning officer at the tallying hall and the contested documentation and declarations that flowed from there. It is then critical to evaluate the evidence of witnesses against the *burden* of proof and *standard* of proof in election petitions. The statutory and evidential burden of proof rests with the petitioner. It is underpinned by section 84 of the Elections Act which provides 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".*

31. That section of the Act is coached 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. See *Morgan and others Vs Simpson and another* [1974] 3 ALL ER 722. The court must however endeavour to uphold the democratic rights and choices of the voter enshrined in the Constitution. See also *Kakuta Maimai Hamisi vs Peris Pesi Tobiko and others* Nairobi High Court election petition 5 of 2013 (unreported), *Gideon Mwangangi Wambua vs Independent Electoral and Boundaries Commission and others* Mombasa, High Court petition 4 of 2013 [2013] eKLR. Regard must also be had to the political rights enshrined in article 38 of the Constitution; and the general principles of electoral design enumerated by articles 81 and 82 of the Constitution. Lastly, the Court must pay heed to the Elections Act 2011 and the Elections (General) Regulations 2012.

32. The formal responses to the petition join issues on the key allegations in the petition. The respondents have thus put the petitioner to strict proof. The exceptions, of course are the eight admitted statements of facts I set out earlier. The onus is then left to the petitioner to persuade the court by cogent evidence that there were irregularities that tainted the poll. The cardinal precept of the law of evidence is that he who alleges must prove; and to the required standard of proof. See section 107 of the Evidence Act, *Abdulreheman Hassan Halkamo Vs Abdi Nassir Nuh & others* Mombasa, High Court election petition 6 of 2008 (unreported), *Onalo Vs Ludeki and another* [2008] 3 KLR (E.P) 614. The standard of proof in election petitions is higher than a balance of probabilities in ordinary civil cases but not beyond reasonable doubt as required in criminal cases. See *Muliro Vs Musonye* (2008) 2 KLR (E.P.) 52, *Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 3 others*, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR, *John Lokitare Lodinyo Vs Mark Lumunokol and 2 others* Kitale, High Court election petition 5 of 2013 (unreported), *Wilson Mbithi Munguti Kabuti and others Vs Patrick Makau King'ola and others* Machakos, High Court election petition 9 of 2013 (unreported), *Rishad Amana Vs Independent Electoral and Boundaries Commission and 2 others* Malindi, High Court election petition 6 of 2013 (unreported), *Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al* Machakos, High Court election petition 1 (consolidated with petition number 7 of 2013) (unreported), *Bernard Shinali Masaka Vs Bonny Khalwale & 2 others* [2011] e KLR, *Mbowe Vs Eliufoo* [1967] E A 240.

33. In this petition, there are allegations that poll officials committed certain offences or colluded to favour other political parties or candidates. For example, the petitioner alleges that the returning officer deliberately altered the form 36 or colluded to cancel the petitioner's certificate in form 38. The burden of proof for such offences is even higher. See *Wanguhu Nganga and another vs Owiti and another*, Nairobi, High Court election petition 41 of 1993 (unreported),*Wilson Mbithi Munguti Kabuti and others Vs Patrick Makau King'ola and others* Machakos, High Court election

petition 9 of 2013 (unreported), *Halsbury's Laws of England* 4th edition Vol 15 para 695, Simon Nyaundi Ogari and another Vs Onyancha and others [2008] e KLR

34. The burden of proof was explained well by our Supreme Court in Raila Odinga and others Vs Independent Electoral and Boundaries Commission et al (supra):

> *"Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter essa acta: 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 law".*

35. The Supreme Court's propositions were not entirely novel. The Court was merely restating a view long held by the High Court in election dispute settlement. See Munyao vs Munuve et al (2008) KLR (E.P) 20. In Ole Lempaka Vs Komen and others (2008) 2 KLR (E.P.) 83, the learned judges stated that each paragraph of the petition alleging breach of law, rule or regulation or which complains of any malpractice must be proved by evidence. See also *Halsbury's Laws of England* 4thedvol 15 para 670, Hawkins vs Powell [1911] 1 KB 988.An election petition must succeed or fail on its pleadings and evidence. All that is meant by that *onus propandi* is that first, the petitioner must proffer adequate or sufficient evidence. Secondly, the evidence must be of a persuasive quality. It is then that the respondents are called to rebut it. In the end, the petitioner must show that the preponderance of evidence inures in his favour. If he fails to rise to that standard, the petition must be dismissed.

36. In the context of this petition the constitutional design of a free and fair election hovers large. Our constitution emphasizes sovereignty of the people. The political rights are underpinned by the franchise of the voters in regular elections. The Constitution has provided in articles 81 and 82 the fundamental aspects of a free, fair, transparent and credible poll. The Elections Act 2011 is the legislation contemplated by article 82. I am persuaded by the views of my learned brother Majanja J in Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al Machakos, High Court election petition 1 (consolidated with petition number 7 of 2013) (unreported). He stated as follows:

> *"The golden thread running through the Constitution is one of the sovereignty of the people of Kenya articulated in Article 1 of the constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information which are to be found in Articles 33, 36, and 35 respectively of our constitution. In addition, Article 38 articulates political rights which are given effect through the electoral system set out in chapter seven titled 'Representation of the people'.*
>
> *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."*

37. I would return briefly to the requirements of a free and fair poll. The electoral design and values are enunciated by article 81(e) of the Constitution: it decrees as follows;

> "81. *The electoral system shall comply with the following principles-*
>
> *(e) free and fair elections, which are-*
>
> *(i) by secret ballot;*

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent;

(v) administered in an impartial, neutral, efficient, accurate and accountable manner."

38. This Court dealt at length with the demands of articles 81 and 82 of the Constitution in ***Kakuta Maimai Hamisi vs Peris Pesi Tobiko and others*** Nairobi High Court election petition 5 of 2013 (unreported). From the standpoint of the Constitution and the pleadings in the remainder of the petition, the Court has to determine whether the poll and the declaration of results was free and fair, transparent and administered in a neutral and accountable manner. The spotlight must be trained firmly on the conduct of the returning officer and IEBC at the tallying hall on 6th March 2013 and to all the intervening events before gazettement of the 1st respondent as the winner on 13th March 2013.
39. The crux of this matter is whether the 3rd respondent or IEBC had *power* to cancel the form 38 of the petitioner after the public announcement of results on 6th March 2013 at the tallying hall. The petitioner's case is that no such power reposes in IEBC. Paraphrased, the returning officer became *functus officio* after her declaration and presentation of form 38 at the tallying hall: she cannot thereafter do a new tally or cancel the original form 38. The petitioner's learned counsel submitted that any subsequent electoral dispute settlement is the exclusive preserve of the Court under article 105 of the constitution. The starting point is article 88(4)(e) of the Constitution. It provides that the Commission is responsible for "*the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results."* The pivotal word in my view is *declaration*. I will return to that point later.
40. Section 109 of the Elections Act 2011 gives power to IEBC to make subsidiary legislation or regulations for the better carrying out of the purposes of the Act. The Elections (General) Regulations 2012 flow from that power. The Elections Act 2011 is itself the brainchild of article 82(d) of the Constitution: it decreed that the legislature shall enact a law to provide for conduct and efficient supervision of elections. It is thus a truism and instructive that the regulations are subservient to the Act and the Constitution. I will now analyze some of the key regulations that are central to the framed issues.
41. Regulation 83(1) is relevant in many respects. I will set it out *in extenso:*

83. (1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present –

a. *Tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;*
b. *In the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75 (2);*
c. *Complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the –*

i. *Name of the respective electoral area;*
ii. *Total number of registered voters;*
iii. *Votes cast for each candidate or referendum side in each polling station;*
iv. *Number of rejected votes for each candidate in each polling station;*

v. *Aggregate number of votes cast in the respective electoral area; and*
vi. *Aggregate number of rejected votes; and*

d. *Sign and date the form and –*

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

42. Regulation 84 clarifies that the announcement of the winner shall be made at the tallying centre gazetted for that purpose by the IEBC. Regulation 84(1) and (2)(c) state as follows;

> *"84(1) A final tallying of results for the respective posts shall be at a venue gazetted by the Commission for that purpose."*
>
> *"84(2)(c) the constituency tallying centre shall be located at the constituency or district headquarters"*

43. As stated, all the parties admitted that the gazetted tallying centre was at St Teresa's girls' primary school. The initial announcement of 6th march 2013 was made there. It is clear from regulation 84 (2) (c) that the tallying centre for Mathare was to be either at the constituency or the district headquarters. A key plank of the petitioner's case is that tallying could not be done anywhere else other than the tallying centre. I agree with that submission. That is in consonance with the constitutional decree in article 81 for neutral and transparent conduct of elections. It engenders public confidence and produces more credible electoral outcomes.
44. It thus behoved the petitioner to marshal sufficient and cogent evidence to show that the tallying or re-tallying took place *outside* the tallying centre. And it was critical for the 3rd respondent to rebut it. The petitioner ended up making a generalized allegation that tallying or re-tallying was done elsewhere. The 3rd respondent's evidence was that she remained at the tallying centre and did a fresh tally on 6th March 2013 in the presence of her deputy and some agents. It was in public. She also had to tally and announce results of other elections for president, governor, senator and so forth and deliver them later to the county returning officer at Nyayo stadium. Her evidence was that the situation was tense and that she had to manage it to conclude the assignment. The petitioner and his supporters had left the hall. He was addressing them outside. There was a lot of noise. That evidence was not shaken by cross examination. There is thus no direct evidence by the petitioner that forcibly appeals to my mind that the fresh tally was done elsewhere or on another day other than the 6th March 2013. I thus find that the final tally of results that placed the 1st respondent ahead was conducted at the constituency tallying hall in accordance with regulation 84 of the Elections (General) regulations 2012.
45. The key consideration is whether the original *announcement* that the petitioner had won was a *final* declaration. That is the elephant in the room. The answers are to be found in the law and recent pronouncements by the Court of Appeal. It also important to compare the 2012 regulations with their precursor under the National Assembly and Presidential Elections Act, which were titled the Presidential and Parliamentary Election Regulations (now repealed). A good starting point is article 86(c) of the Constitution. It requires the IEBC to ensure that *the results from the polling stations are openly and accurately collated and promptly announced by the returning officer*. Regulation 87 of the Elections Act provides a more elaborate process. At the conclusion of the tallying exercise, the regulation requires the returning officer to do the following:

> *87 (1) The returning officer shall, as soon as practicable, forward to the county returning officer, in the case of –*

a. *A presidential election, a certificate in Form 37 showing the total number of votes cast for each candidate;*
b. *A member of National Assembly, county woman representative, Senate, county assembly, county*

governor or county assembly election, a certificate in Form 38 set out in the Schedule showing the total number of votes cast for each candidate.

> *(2) The returning officer shall after tallying of votes at the constituency level –*

a. *Announce the results cast for all candidates;*
b. *Issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and*
c. *Electronically transmit the provisional results to the Commission.*

46. The results announced by the returning officer at the tallying hall and the certificate in form 38 are however *provisional*. Doubt is removed by regulation 87(9) which clearly states:

> *"87(9) the returning officer shall on completion of the tallying submit provisional, results to the Commission"*

The use of the word *Commission* there has specific reference to the Chairman or Commissioners of the IEBC. That becomes clear on a reading of regulation 87(4)(b) providing for a final declaration in the instrument of *The Kenya Gazette*. It provides as follows:

> *"87(4) Upon receipt of a certificate under sub regulation (1), the chairperson of the Commission shall-*
>
> *(a) In the case of a presidential election.……..*
>
> *(b) in the case of the other elections, whether or not forming part of a multiple election, publish a notice in the Gazette, which may form part of a composite notice, showing the name or names of the person or persons elected.*

47. The Commission is then required by regulation 87(7) *to certify to the clerk of each respective House of Parliament the candidates who have been elected in the parliamentary election*. That is what brings the mandate of the Commission to a close. After that point, any aggrieved party must lodge a petition in Court under article 87 of the Constitution to be determined in terms of article 105 of the Constitution. The learned counsel for the petitioner had submitted that the announcement and issue of form 38 closed the matter. He was of the view that those results were final and could only be challenged in an election court. That is *not* the case. There is a small open window for review of provisional results by the Commission between the *announcement* of provisional results at the tallying centre and the formal gazettement. Article 88(4)(e) of the Constitution that I set out earlier and section 74 of the Elections Act 2011 must be seen in that light.
48. The submission by the learned counsel for the petitioner that the Commission becomes *functus officio* after the announcement of a winner at the tallying centre, or that the only recourse is to a petition is faulty in three major respects. First, regulation 40 of the repealed regulations under the former National Assembly and Presidential Elections Act made no reference to *provisional* results by a returning officer. The equivalent 2012 regulations now expressly refer to *provisional* results released by the returning officer. That partly explains the *finality* of the declarations by the returning officers under the repealed legal regime. It had transformed those officers into little tin gods. It left an aggrieved party with the narrow option of filing an election petition. It was an antithesis to the will of the people. At times, it led to serious injustices. There is a long line of examples: see for example *Tett vs Moraa & 2 others* [2008] 2 KLR (E.P) 329. The presiding officers would at times announce controversial results and take off. The petition that followed in *Tett's* case (supra) was struck out by the High Court for want of proper service. See also *Dickson Karaba vs John Ngata Kariuki and another* [2010] eKLR, *William Maina Kamanda vs Margaret Wanjiru and others* Nairobi, High Court election petition 5 of 2008. In *Emanuel Karisa Maitha vs John Yau and another* election petition 1 of 1993, the Court had held that once a returning officer

announced the results, he could not change them even if he found that he had omitted to take into account some ballot papers lying elsewhere.

49. Secondly, Kenya promulgated a new Constitution on 27th August 2010. It is a clean departure from that old mould. In articles 1, 2 and 38, it emphasizes the sovereign power and political rights of the people to be exercised through free, fair and regular elections. See *Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al* Machakos, High Court election petition 1 (consolidated with petition number 7) of 2013 (unreported), *Calvin Kadongo et al vs the Transitional Authority and others* Nairobi, High Court petition 174 of 2013[2013] eKLR. I have already set out the cardinal precepts of electoral design in article 81 of the Constitution. It is required by article 86(c) that the announced results be *accurate*. Accuracy in my view supersedes *promptness* of the announcement. The Elections Act 2011 and the regulations thereunder must be viewed in that context. The new regulation 87(9) of the Elections (General) regulations 2012 is emphatic that the announcement of results by a returning officer remains *provisional*. There was thus a deliberate attempt in the Elections Act 2011 and the new regulations to make the IEBC (in this case the Chairperson or Commissioners themselves) to superintend over the conduct of their returning officers and to be the final authority to *declare* the *final* results.

50. The IEBC, as an independent constitutional commission, is vested with wide powers to manage the electoral process. An election is a continuum that starts before polling day and spills over into the Commission and the courts. Along that journey, various institutions have been granted distinct mandates to resolve certain disputes. In yester years, a person aggrieved by the nomination process had no recourse but to wait to file a petition after the elections. See *Daniel Arap Moi vs John Harun Mwau* Nairobi, Court of appeal, Civil Appeal 131 of 1994 (unreported), *Nyoike vs Electoral Commission and another* Nairobi, Court of Appeal, Civil Appeal 213 of 1995 (unreported). A lot of water has since flowed under the bridge. The Commission now has the power to resolve certain disputes such as nominations of candidates. Article 88(4)(e) of the Constitution is relevant in that respect. I said earlier that the Commission has *power* to settle electoral disputes but *excluding* election petitions and disputes *subsequent* to the declaration of election results. See *Advisory Opinion No. 2 of 2012: In the matter of the Gender representation in the National assembly and Senate* Nairobi, Supreme Court [2012] eKLR, *International Centre for Policy and Conflict vs Attorney General and 4 others* Nairobi, High Court petition 552 of 2012 [2012] eKLR,*Kituo cha Sheria vs John Ndirangu Kariuki and another* Nairobi, High Court petition 8 of 2013 [2013] eKLR, *Diana Kethi Kilonzo et al vs Independent Electoral and Boundaries Commission and others* Nairobi, High Court petition 359 of 2013 [2013] eKLR.

51. Thirdly, I have drawn an important distinction between the Commission (either as Chairperson or the Commissioners) on the one hand, and their agents or returning officers such as the 3rd respondent, on the other hand. The regulations, as I have discussed, confer *limited* powers to the returning officer to tally and *announce* the results. Those results under regulations 84 and 87(9) remain *provisional* until confirmed by the IEBC in a formal instrument to the public: *The Kenya Gazette* and are *certified* to the clerks of the respective Houses of Parliament. Article 260 of the Constitution and sections 82 and 85 of the Evidence Act give the *Kenya Gazette* special recognition. After gazettement, the results achieve *finality* that can only be reversed by an election court under article 105 of the Constitution.

52. I find support there from the learned judges of the Court of Appeal. In two separate decisions by two different benches, the Court of Appeal was asked to determine when a *declaration* of results occurs and when time *begins* to run for lodging election petitions. There was unanimity of opinion that the *announcement* of election results at the tallying centre is only *provisional*. The final declaration of results to the public is through a formal instrument of the Commission in *The Kenya Gazette*. I will begin with the decision in *Hassan Ali Joho and another vs Suleiman Shahbal et al* Malindi, Court of Appeal, Civil appeal 12 of 2013 [2013] eKLR. Githinji JA delivered himself as follows:

> *" I have come to the conclusion that the Constitution vests the exclusive responsibility of declaring the election results to IEBC and further that the intention of the legislature was to give Returning Officers power only to announce provisional election results and forward them to IEBC for formal declaration and publication of the elected candidates."*

53. Sichale JA, while concurring, found that the words *announcement* and *declaration* were used interchangeably or loosely in section 39 of the Elections Act 2011, and regulations 3, 4 and 87 thereunder. However she reached the conclusion that "*from the plain language of the Constitution, the Returning Officer announces the results which announcement is not a declaration as envisaged by article 87(2) of the Constitution"*. The learned judge watered down the status of the *announcement*: for example it can be made in the absence of the candidates, their agents or observers. Asike-Makhadia JA concurred with his two colleagues but was emphatic that *"the declaration envisaged by the Constitution at article 87(2) in our view is a formal declaration which would not surely be contained in forms 34 and 35".*This position was similar to that taken by another bench of the Court in Nderitu Gachagua vsThuo Mathenge and 2 others Nyeri, Court of Appeal, Civil appeal 14 of 2013 [2013] eKLR . The learned judges, Visram, Koome and Odek JJA were unanimous *"that the returning officer's duty is limited to 'announcement of results'.... …"*

54. My answer to issue number v) of the agreed issues is then as follows: The 1st respondent and *not* the petitioner was determined, declared and published by *both* the 3rd respondent *and the IEBC* as elected member of National Assembly for Mathare Constituency in the elections held on 4th March 2013. The *announcement* of tallying results and issue of form 38 on 6th March 2013 by the 3rd respondent at the tallying hall at St Teresa's was only *provisional*. The *final* or binding declaration of results was done by the IEBC in the formal instrument of *The Kenya Gazette* on 13th March 2013. The role of IEBC terminated *finally* upon certifying the person elected to the clerk of the respective House of Parliament.

55. The returning officer in the tallying centre announces results from the various polling centres in the constituency. Those results are contained in forms 35. Form 35 is a *snapshot* of the contents of the ballot box as documented by presiding officers and verified by agents. Form 35 in my view is the most important *primary* record of the election. All the other forms are built atop it. The sealed ballot boxes delivered to the returning officer cannot be reopened except by an order of the election court. The results in form 35 are then tallied. They are fed into a computer to generate a spreadsheet which evolves into a form 36. The winner is then issued with a form 38. In Kakuta Maimai Hamisi vs Peris Pesi Tobiko and others Nairobi High Court election petition 5 of 2013 (unreported) this Court explained the nature of those forms. In particular, I stated that form 36 is not a static instrument. I said as follows:

> "*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 and which appears at page 248 of the 3rd respondent's deposition."*

56. I have already stated that the announcement of results including the form 38 by the returning officer is *provisional*. It is also noteworthy that general regulations on tallying and announcement of results are subsidiary legislation made by the IEBC. That power is donated to the IEBC by dint of section 109 of the Elections Act. The regulations cannot therefore override the Elections Act 2011 or the Constitution. The petitioner's submissions that the tally and announcement of results by the returning officer is binding and final is thus prosaic. It does not find support in the Act, the Constitution or the precedents I have cited. I would ask a rhetorical question: Supposing the candidate who emerged last in Mathare, in this case Mr. Gacheke Gachihi who garnered only 230 votes, was announced publicly by the returning officer at the tallying centre as the winner? Would the grant of a certificate in form 38 to him be countenanced by the Elections Act and the Constitution? The answer is a resounding no. The certificate would be worthless and meaningless unless granted to the candidate with the highest number of votes.

57. In Krishna Singh vs Sub Divisional Officer Hilsa and others Civil Appeal 7822 of 1985 [1985] AIR SC 1746, the Supreme Court of India in a petition for special leave to appeal found that the

process of an election came to an end only after the declaration and consequential formalities were completed. The Court held that the oral announcement by the returning officer that the applicant had been elected had *no legal status*. The certificate in form 38 given to the petitioner here was of course not a simple oral announcement. But it was still a *provisional announcement* of results. It was issued on the basis of an erroneous provisional tally by the returning officer. The decision in *Krishnah Singh's* case (supra) is not irrelevant as urged by the petitioner.

58. The Kenyan Constitution and the Elections Act 2011 decree that the wish of the majority, in our *first-past-the-post* electoral system, be upheld. It would then be a travesty of justice and to stand logic on its head to uphold such a certificate. Looked through that prism, the demands by the petitioner are not any different from my example of the imaginary certificate to Mr. Gacheke Gachihi: unless the petitioner can *prove* he won the elections. However, I hold the view that there is something inherently wrong, perhaps even cruel, to announce that the petitioner had won but only to reverse it a few hours later. But the converse is equally true. It would be inherently wrong, cruel and against the Elections Act, the Constitution and known tenets of democracy to deny the 1st respondent his rights if he truly won the poll. The 2nd and 3rd respondents must thus fully explain or justify their conduct at the tallying centre and in all subsequent events to avoid impeachment of the poll.
59. The petitioner is relying on two sets of results as *proof* he won the election. The first is *his* tally made on 5th March 2013 at about 5.00 p.m. He deposes at paragraph 10 of his statement that in that tally, he garnered 34,556 votes. His closest competitor, the 1st respondent, received 31,997 votes. The second set of results is in the table set out at paragraph 19 of his witness statement. I reproduced it earlier at paragraph 6 of this judgment. That table shows his votes as 34,957 against the 1st respondent's 32,156. The petitioner testified that those were the results announced at *"the end of the tallying from form 36"*. Those results present some problems. The petitioner did not proffer any sufficient evidence or at all to rebut the set of forms 35 in Court. Those forms 35 are exhibited at pages 15 to 129 of the statement of the 3rd respondent. Learned counsel for the petitioner submitted that those forms are not properly on the record and were not scrutinized at the trial. That is not entirely right. The forms are annexed to the sworn statement of the 3rd respondent and marked "MWG 2". When the witness sought to produce them, the petitioner's counsel raised an objection. I captured that history at paragraph 22 of this judgment. The objection was dismissed in a considered ruling. The fresh argument now that that evidence should be disregarded because each of the forms is not distinctly marked as an exhibit is misplaced and a red herring. The commissioner for oaths has marked and commissioned the exhibit or bundle marked 'MWG 2" on the actual face of the document. The petitioner is thus stretching the requirements of Rule 9 of the Oaths and Statutory Declaration Act beyond its reach. It would be raising technical requirements to a fetish. It would be frowned upon seriously by article 159 of the Constitution.
60. The petitioner did not produce the alleged *initial* or *concealed* form 36 to support the figures in his tallies. He submitted that the respondents must have concealed it: that they should not benefit from their own wrongs. There is support in that statement in *Mohamed vs Bakari* [2008] 3 KLR (E.P) 54.Where I part ways with the submission is the demand that the Court do infer the existence of the form. The cases cited by the petitioner in *Barber vs Rowe* [1948] 2 ALL ER 1050, *Simpson vs Lever* [1962] 3 ALL ER 870, and *Ventouris vs Mountain (No 2)* [1992]3 ALL ER 414 are relevant on admission of secondary evidence to prove a fact, sometimes even by hearsay evidence. In *Barber vs Rowe* (supra), for example, the court held that since there was *satisfactory* evidence of loss of a lease, the contents in its counterpart were admissible. The petitioner urges this court on his contested oral evidence and that of Osiemo (PW 2) and Nyambura (PW 4) about a "form 36" made prior to announcement of the petitioner's win, to find that the form existed.
61. There is first the general caveat in section 62 of the Evidence Act annulling oral evidence as proof of documents. Secondly, it may be permissible in *ordinary* civil cases. But the standard of proof in election petitions is *higher* than a balance of probability. *Onalo vs Ludeki* [2008] 3 KLR (E.P) 614,[1993-2009]1 EAGR 422. The conduct in question of concealment of form 36 and generating a parallel one would also be an election offence. The burden and standard of proof then *rises even higher*. That burden cannot be discharged by asking the court to infer certain facts from a series of events. The figures or tallies by the petitioner do not agree with the official form 36 of IEBC produced as annexture "MWG1" by the returning officer. Fundamentally, those figures do not find

support in the forms 35 for the 115 polling centres produced in court marked "MGW2".

62. The petitioner conceded that only the IEBC is empowered to conduct the election and declare the results. That is a mere truism: it is the law. Fundamentally, the allegation that the returning officer made a parallel form 36 or switched forms 35 with a new set would be a serious offence under section 59(1)(a) of the Elections Act 2012. Under sub rule (k), it is also an offence for an election officer to collude with a party or candidate to give a political party or candidate an advantage in the poll. Falsifying a return or collusion with parties or candidates attracts a fine of up to Kshs 1 million or a maximum term of 3 years or both. Although the petitioner, Nyambura (PW 4) and Makwaro (PW 5) testified that the forms in court *might* be different from the ones they saw at the tallying centre, they did not provide any different forms or sufficiently question the authenticity of the forms 35 before the Court.

63. I have taken into consideration the petitioner's evidence that there were only a few forms 35 at the polling stations. He said some polling centres had as few as four forms 35 or less. Under regulation 79(2) the presiding officer should insert one copy in the ballot box, paste another outside the box, paste another on the door of the polling centre or a public place and return one copy to the returning officer. The agents and candidates are also entitled to copies. From the evidence, the petitioner and ODM had sufficient agents and lead agents in all the 115 polling centres. Even assuming there were insufficient forms 35 to go around the agents, the agents could have taken copies or details at least from the forms pasted on the doors of the polling station or on the ballot boxes. The burden of proof to show that the polling agents fiddled with the numbers on forms 35 or 36 or that they colluded with opponents of the petitioner lay with the petitioner.

64. I mentioned earlier that the standard of proof for election offences is very high. The allegations of collusion or fraudulent alteration or concealment of electoral forms to favour the 1st respondent are of a criminal nature under the Act. The 3rd respondent denied that she made a parallel form 36. The returning officer said her announcement that the petitioner had won was erroneous and based on preliminary results that she continued to tally. She based it on a tallying sheet. She did not produce that tallying sheet or provisional form 36. That is self-serving. But that did not completely shift the onus of proof from the petitioner. He is the one who asserted the fact that there was a *parallel* form 36. It cannot be answered by a presumption of evidence under section 119 of the evidence Act as proposed by the petitioner's learned counsel. The petitioner cannot cite estoppel to say that since there was an announcement of results, there must have been a final form 36.

65. I stated earlier at paragraph 55 of this judgment that form 36 is not static. It is built atop data flowing from forms 35. I said that because of the speed and flow of information, there can be arithmetical errors. Within the context of a general election for six different positions on 4th March 2013, it would be understandable. The 3rd respondent is not infallible. There are expected errors in the conduct of any human activity. See *Morgan and others vs Simpson and another* [1974] 3 ALL ER 722. The 3rd respondent discovered errors in the initial tallies. She did a fresh tally at the tallying centre. She said that in retrospect, and for transparency, she should perhaps have recalled the agents and candidates. She testified however that the petitioner could not be reached on his cell phone. It was switched off. The candidate known as Elijah Kanyi, who is alleged to have signed the form, did not testify. Boniface Mosiori (PW 2) said he signed it. He did not produce a copy. Geoffrey Makwaro (PW 5) did not sign it. He only got a copy of the form 36, the one exhibited by IEBC, the next day from Mathias Wangila (PW 3).I have developed serious doubt that there was a *final* form 36 made before the initial announcement in favour of the petitioner. Making that announcement in that manner was irregular and unprofessional. But I have seen no evidence suggesting that the returning officer was acting deliberately or dishonestly to alter the results of the election. I will return to this matter when dealing with costs of this petition.

66. As matters stand now, I have in evidence only one set of official results captured in forms 35 and 36 presented by IEBC. The forms 35 have been signed by agents on their reverse. It is also important to keep in mind two facts: the petitioner and his party had agents in all the 115 polling centres; and secondly, the petitioner or his agents have not seriously questioned the conduct of the poll or documentation in forms 35 for all those polling centres. The petitioner states that his two versions of results arise from his *own* tally (34,556 votes) or from the original announcement by the returning officer (34,957 votes) from the alleged initial form 36. There is also another problem. When you add up the results of all the candidates in the two tables made by the

petitioner, they burst the dam of the total valid votes cast. The form 36 produced in Court shows that the total votes cast in Mathare were 69,766. The valid votes were 68,593. The registered voters in Mathare were 88,148. The petitioner had stated, without documentary evidence that the latter number kept changing. The total votes shown in the petitioner's tally of 5th March 2013 are 77,385. In the initial announcement by the 3rd respondent on 6th March 2013, the total votes cast for all candidates were 87,981. Those two totals are substantially higher than the total votes cast in Mathare in the final form 36.

67. In the second tally by the petitioner, there is a total of 87,981 votes garnered by all the candidates. That figure is *only* 167 shy of *all* the registered voters in Mathare of 88,148. It is possible to have such a high voter turn-out (in this case 99.81%) but I find it highly improbable. I say so because the final record of votes cast is a far cry of 69,766 (78% turn-out). I have reached the conclusion that the version of results by the petitioner on 5th March 2013 was erroneous. I also accept the 3rd respondent's explanation that her announcement of tallies on 6th March 2013 captured in the second table by the petitioner was equally erroneous. Regulation 83(1) empowers the returning officer to disregard the results in any polling station that exceed the number of registered voters. Article 86(c) of the Constitution not only requires *prompt* announcement but that all the results be *accurately* collated. That was clearly the role of the 3rd respondent under regulation 3(3). A basis for the fresh tally was thus laid.

68. In cross examination, the 3rd respondent admitted that the figures she announced on 6th March 2013 were wrong as they exceeded the number of voters. She said she did not make a form 36 and made the announcement on the basis of a provisional tally. She had no recollection of any one signing the alleged initial form 36. She conceded that the final form 36 annexed to her statement is signed by her but not signed by any of the agents or candidates. It is not dated and has no remarks on it. But it bears the seal of the Commission. Ideally, the party agents or candidates should have signed it. That is an irregularity. But it does not invalidate the form or go to the root of the election. I say so because the form corresponds with all the forms 35 from the polling stations that had been verified by the presiding officers and agents. It is also worthy of note that under regulation 79(6), the failure by agents to sign a form 35 does not invalidate it. Form 36 like I stated, is a mathematical reconciliation of the details in forms 35. The form 36 produced here is executed as appropriate by the returning officer in all the three spaces. It has an IEBC seal. Unlike form 35, it has no requirement for statutory comments as urged by the petitioner.
69. Thirdly, the margin of votes between the two top candidates in all the editions of results is a narrow divide. In the petitioner's tally of 5th March 2013 that I mentioned, the difference is 2,559 votes. In the initial and disputed announcement of 6th March 2013, the margin between them is 2,801 votes. In both scenarios, the petitioner was leading. From the results in the final form 36 and subsequent form 38 issued on 8th March 2013 and gazetted on 13th march 2013, the 1st respondent went ahead by a very narrow margin of 346 votes. That narrow divide may explain the heated contest in Mathare and in this Court. Parts of the petition that had sought a full scrutiny were struck out by the court for want of precision of pleading, for being scandalous or nebulous. The ratio was well explained by the Court in its ruling delivered on 16th May 2013. In our *first-past-the-post* electoral system, even a razor thin majority of 1 vote would be good enough.
70. Fourthly, the petitioner had submitted that even if the IEBC had power to review the results announced at the tallying centre, there was no dispute referred to it. It is not entirely true that there was no dispute before the IEBC on the issue of form 38 to the petitioner: that would be to turn a blind eye to the litigation commenced on 7thMarch 2013 before the High Court in *George Mike Wanjohi vs Steven Kariuki and IEBC* Nairobi, High Court petition 150 of 2013. The parties are the same in this petition save that their roles have been interchanged. The 1st respondent here was seeking to impeach the form 38 then held by the petitioner in this petition. He also sought an order to compel the IEBC to cancel it and issue a fresh one to him. When that suit was lodged, the final declaration of results for Mathare had not been published in *The Kenya Gazette*. The window I mentioned earlier between the announcement of provisional results and the formal publication of results was still open. All the parties were served and appeared in that court. The original record of the proceedings that were brought before this court show that Steven Kariuki was represented by

one of his lawyers of record, Mr. Oluoch Olunya. True, there was no formal finding by the Court or a full consent on the issues before that Court. But in the final analysis, those proceedings were withdrawn because IEBC and George Wanjohi agreed to cancel the form 38 issued to the petitioner here and to issue a new one to the 1st respondent in this petition. The Court proceedings were in open court before three judges. It would thus not be true to say that there was collusion in those proceedings or that the process was opaque granted that all the parties were represented. It would also be wrong to say that there was no dispute on the results announced at the tallying centre before the IEBC.

71. Looked at from that perspective, the prayer by the petitioner to be declared the winner falls flat on its face. On the basis of which results can the Court declare him winner? On the initial form 38 not backed by a form 36? On the initial form 36 not built upon corresponding forms 35? On results tabulated by him or announced by the returning officer that I found exceeded the number of votes cast in Mathare? It would be asking the court to grope in the dark and pull out a strange result. In a word, there is no evidential or legal basis to impeach the results presented by IEBC.

72. The petitioner took a narrow path. He does not impeach the conduct of elections or officials in any polling centre. The remainder of his petition is largely founded on the conduct of the returning officer in the tallying centre and the legality of disputed forms 38 held by the opposing party. The petitioner has not made out a case challenging the forms 35. I have said that form 35 is to my mind the *most* important and direct *primary* record of the vote. Forms 36 and 38 merely rest on it. They derive from it. A challenge to form 36 without a corresponding attack on the parent form 35 is akin to fighting the flames: the fire has to be fought from the base. Without a meaningful question to forms 35, the irregularities pointed at forms 36 and 38 do not go to the root of the election outcome. The final forms 36 and 38 in favour of the 1st respondent agree with the forms 35 for all the 115 polling centres in Mathare. The petitioner's edition of form 38 was cancelled by IEBC. In the end, I have a set of forms 35 that have not been impeached sufficiently or at all. I now only have one final form 36 and one set of results that place the petitioner second. There is thus only one valid form 38 in the possession of the leading candidate, the 1st respondent. In the result, the petitioner has failed to discharge fully his evidential burden to the required standard of proof to declare him the winner of the poll.

73. My answer to issue number iii) is as follows: the 2nd respondent shall not be ordered to honour the certificate of results in form 38 issued to the petitioner on 6th March 2013. The prayer by the petitioner to be declared the winner of the election on the basis of that certificate is on a legal quicksand and is dismissed.

74. Issue number iv) was framed in the following terms: *Who between the 1st respondent and the petitioner was determined, declared and published by the 3rd respondent as elected member of National Assembly for Mathare Constituency in the elections held on 4th March 2013?* I will answer it very carefully. The petitioner's key submission on that point was that section 39 of the Elections Act requires the Commission to *determine, declare and publish* results immediately after the close of the poll. Although the Act and regulations use the terms *announce* and *declare* interchangeably, I find the 3rd respondent *only* had limited power to *announce provisional results*. She had no power to *declare* and *publish* a final winner on 6th March 2013 at the tallying centre. Under the regulations, that announcement could be made in the absence of candidates or their agents. The power to declare *final* results reposed in the IEBC in the capacity of the formal institution established by article 88 of the constitution and as distinct from its agent, the returning officer. The *finality* of the results is by *publication* in the instrument of the *Kenya Gazette.* In the final analysis, the *announcement* by the returning officer was not a full determination, declaration or publication of the winner of elections held on 4th March 2013 for member of the National Assembly for Mathare constituency. As between the parties, it was the 1st respondent who was eventually determined, declared and published as the winner of the poll for member of the National Assembly for Mathare.

75. That takes me back to issues numbers i) and ii). Did any power repose in IEBC or the returning officer to do a fresh tally, recall the form 38 issued to the petitioner, cancel it and issue a new to the 1st respondent? I have already held on the law and recent decisions of the Court of Appeal that the *announcement* of results at the tallying centre is merely *provisional*. I have also held that the

final declaration of results is the exclusive province of IEBC as the corporate body constituted in article 88 of the Constitution. I drew a clear distinction between the *powers* of the returning officer(*as anemployee or agent of IEBC*)and the Chairman and Commissioners of IEBC (*as incorporated by the Constitution at article 88 with residual power to superintend over the election and election officials*). I also stated that the IEBC is vested with powers by article 88(4)(e) to resolve certain electoral disputes *excluding* election petitions. And I observed that there is a small open window between the *announcement* of *provisional* results and *declaration* of final results. That window shuts only upon *publication* in the formal instrument of the *Kenya Gazette*. For some of those propositions, I took refuge in the binding precedents of *Nderitu Gachagua vs Thuo Mathenge and 2 others* Nyeri, Court of Appeal, Civil appeal 14 of 2013 [2013] eKLR and *Hassan Ali Joho and another vs Suleiman Shahbal et al* Malindi, Court of Appeal, Civil appeal 12 of 2013 [2013].

76. I would venture to add that the role of IEBC only terminates upon certifying the name of the person elected to the clerks of the respective Houses of Parliament. That marks the point of no return: henceforth *only* an election Court constituted under article 87 can determine the validity of the election in the manner provided by article 105 of the Constitution. The word *provisional* is defined by the *Oxford Advanced Learner's Dictionary* 8th edition as *"arranged for the present time only and likely to be changed in the future; temporary; arranged but not yet definite"*. The *Black's Law Dictionary* 9th edition, West Publishing, Minnesota defines it thus: *temporary; conditional*.
77. To my mind, and giving the law a *purposive* approach, it must follow as a corollary that the IEBC retains *residual power* to examine and validate the provisional results announced and forwarded to it by the returning officer. There is no other logical reason why the provisional results would be forwarded to it. Had the intention of the legislature been different, it would *not* have called the results provisional. Nothing would have been easier than to say that the announcement by the returning officer was a final declaration. The Elections (General) Regulations 2012 are subsidiary legislation and *subservient* to the statute and the Constitution.
78. Earlier in the judgment, I captured the historical basis for the *power* of IEBC to review or validate the actions of its returning officers. I dealt at some length with the former legal regime under the National Assembly and Presidential Elections Act and Regulations (now repealed). I stated that under that regime, the returning officers were small tin gods whose declaration of results could only be challenged in an election petition. The progressive legislation under the Constitution, the Elections Act 2011 and the Elections (General) Regulations 2012 must be viewed through those new lenses. Those regulations must be interpreted *purposively* to accord with the Constitutional aspirations and the design of elections in articles 81 and 82. Fundamentally, the interpretation must be in consonance with the principles of power of the people and sovereignty on the one hand, and political rights of the citizen on the other.
79. I dealt at length with the provisions of articles 1, 2 and 38 of the Constitution at paragraphs 36and 49of this judgment. I am of the considered opinion that the IEBC, acting transparently, in good faith and in a justifiable manner is vested with residual powers to verify, and if need be, to cancel *provisional* results announced by a returning officer. The exercise of that power logically extends to cancellation of a provisional form 38, publication in the gazette and certification to the House of the true winner. Lastly, the petitioner had testified that the new certificate was given to the 1st respondent outside the Milimani Law Courts. It was however clear from the evidence of the 1st and 3rd respondents that the certificate was issued at IEBC headquarters on 8th March 2013.
80. My answer to issue number i) is thus as follows: it is the certificate in Form 38 issued to the 1strespondent on 8th March 2013 that is valid or lawful. The fact that the new certificate was issued at the seat of the IEBC at the district headquarters does not invalidate it. I have not seen an *express* requirement that it be issued *only* at the tallying centre. I have already found that the tallying of results detailed in the new certificate had been completed at the gazetted tallying centre. The returning officer upon consultation with the IEBC and its legal advisors wrote a notice to the petitioner exhibited in court cancelling his certificate. The IEBC's legal counsel addressed the Court in proceedings before the Constitutional and Human Rights Division of the High Court in petition number 150 of 2013.He stated that IEBC would annul the petitioner's certificate and issue a fresh one to the 1st respondent. It was well within the open window for review by IEBC

and before gazettement of *final* results. All parties were represented in those proceedings. Mr. Oluoch Olunya learned counsel who appeared then for the petitioner did not object to withdrawal of the proceedings. All he stated was that he would pursue his costs. I have found that in the circumstances, the entire process was not the most ideal: but it was legitimate.

81. Issue number ii) had been framed as follows: *Whether the 3rd respondent had power and authority to re-tally the results of the election after the declaration of the results of 6th March 2013 in a place other than the tallying centre and in the absence of the candidates or agents.* It also needs to be answered very carefully. For starters, I have already held that the 3rd respondent had limited powers of *announcing provisional results* only. She could not make a final *declaration* of results on 6th March 2013. The 3rd respondent had power to tally results of the election. A tally is a mathematical addition and reconciliation of results from the various polling stations. I have dealt with the process of transposition or transfer of results from forms 35 into a computer spreadsheet that evolves into a form 36.I have opined that form 35 is the *primary* record of the election. The process involves tabulation of the aggregate votes of candidates against the total votes cast, rejected votes and registered voters. I hold that the returning officer can do a tally or tallies or even re-tally the results so long as the results in form 36 correspond with forms 35 verified by the presiding officers and agents of candidates where applicable. But there is a caveat: the whole exercise of tallying or re-tallying *must* take place at the *gazetted* constituency *tallying centre*.

82. In this petition, I did not receive any compelling or persuasive evidence that the final tally took place anywhere else other than the tallying centre. I have also found on the evidence of the 3rd respondent that she completed the tallies in the company of her deputy the same day, 6th March 2013, at St Teresa's tallying hall. Logically, and from my finding on issue number i), the fresh form 38 could be issued to the 1st respondent at the seat of the commission. It was being issued by the Commission. It would have been futile at that stage to return to St Teresa's to hand it over to the 1strespondent.It follows as a corollary that the result of the election for the National Assembly seat for Mathare contained in the special issue of the *Kenya Gazette* Vol. CXV-No 45 published on 13th March 2013 was lawful and shall not be quashed.

83. My findings on all the issues framed in this petition do not inure in favour of the petitioner. On the totality of the evidence, the returning officer and IEBC blundered by announcing the petitioner as the winner on the basis of faulty or incomplete tallies and before creation of a final form 36. The final form 36 is built atop the forms 35. I have not received any clear cut evidence that the forms 35 submitted to Court do not marry with the final form 36. In those *final* results, the petitioner got 26,916 votes against the 1st respondent's 27,262 votes. The margin is a narrow 346 votes. But it suffices for our *first-past-the-post* electoral system. I have found that the IEBC as the corporate entity formed at article 88 of the Constitution had residual *power* to verify and validate the *provisional results* announced by its presiding officers. IEBC (in this case the Chairperson or Commissioners superintending over the election) had the sole power to declare *final results,* publish them in a formal instrument of the *Kenya Gazette* and *certify* them to the relevant clerks of the Houses of Parliament. As a corollary, power reposed in IEBC under the Constitution and the Elections Act 2011 to cancel the certificate in form 38 issued in error to the petitioner and to issue a fresh one to the candidate who garnered the highest votes in the poll, the 1st respondent.

84. In the result, I have found that the irregularity of issuing the first certificate on provisional tallies was cured by grant of a valid certificate to the candidate who garnered the highest number of votes. That candidate was properly gazetted by the IEBC and certified to the Clerk of the National Assembly as the duly elected representative. In retrospect, IEBC could have acquitted itself better. It had no good reason to rush to announce half-baked results. The tallies could have been done in a more transparent manner. The 3rd respondent must shoulder the blame for this untidy situation.

85. In the very end, the petitioner has failed to impeach the certificate of results issued to the 1st respondent. The certificate in form 38 issued to the 1st respondent is lawful. Any contrary finding would be anathema to the Constitution and the Elections Act 2011. The petitioner and the 1st respondent were the most popular candidates in Mathare. But the 1st respondent has emerged triumphant by a whisker. That is the nature of our democracy. I have not found any evidence appealing forcibly to my mind to nullify the poll on the grounds pleaded by the petitioner. I am of

the considered opinion that the petitioner has failed to discharge his *onus* of proof to the required *standard* of proof. Accordingly, the entire petition is hereby dismissed.

86. That leaves issue number vi). Costs ordinarily follow the event. They are also at the discretion of the Court. Section 84 of the Elections Act 2011 provides that an election court shall award the costs of and incidental to a petition and that costs shall follow the cause. Rule 36 (1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 on the other hand provides as follows:

> *"36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –*

a. *the total amount of costs payable; and*
b. *the person by and to whom the costs shall be paid".*

87. The 2nd and 3rd respondents are not entitled to costs. They are largely the authors of the misfortune that befell the petitioner. I expressed displeasure with IEBC at paragraphs 64, 68 and 84 of this judgment. The 3rd respondent announced the petitioner as the winner of the poll on premature and erroneous tallies. She granted him a certificate in form 38. She and the 2nd respondent cancelled it and issued a fresh certificate to the 1st respondent. The petition has been lost but it does not wipe out the element of incompetence and inefficiency displayed by the returning officer in the execution of her core functions. Sadly, it did not end there: The 2nd and 3rd respondents filed and served their response to this petition and their witness statement out of time. The petitioner was magnanimous enough and by consent, the response and witness statement were admitted onto the record outside the prescribed time. I would have then thought that once bitten twice shy. It was not to be. The learned counsel for the 2nd and 3rd respondents did not file or serve the written submissions within the time ordered by the Court. It was all very tardy. A pattern emerges of serious lapses and poor diligence. Granted all those circumstances, it would be unjust to condemn the petitioner with the costs for the 2nd and 3rd respondents. I order that the 2nd and 3rd respondents shall not get any costs.

88. The 1st respondent is however entitled to costs. He has had to defend these proceedings. There are obvious pecuniary burdens and time that go to defending an election petition. The proceedings were brought by the petitioner against the 1st respondent. The 1st respondent must look up to him for redress. The losses must fall there. I thus grant the 1st respondent costs to be paid by the petitioner.

89. In *Kakuta Maimai Hamisi vs Peris Pesi Tobiko and others* Nairobi High Court election petition 5 of 2013 (unreported), I observed as follows:

> *"Successful parties have in the past abused the taxation process to exaggerate their costs to the chagrin and detriment of the losing party. That is the genesis of the rule requiring this election Court to set a ceiling on costs."*

90. Accordingly, and as per Rule 36 (1)(a), I cap the costs to the 1st respondent at Kshs 2,000,000. For the avoidance of doubt, the total costs to be paid by the petitioner to the 1st respondents *hall not* exceed Kshs 2,000,000. Under Rule 37, the Registrar of this Court shall tax the 1st respondent's bill of costs. Lastly, under Rule 37 (3), I direct that some of those costs shall be paid to the 1st respondent, upon the taxation, from the money deposited by the petitioner as security in Court.

91. A certificate of determination of this petition required under section 86 of the Elections Act 2011 shall issue forthwith.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 13th day of September 2013.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. N.H.Havi with him Mr. O. Olunya, Mr. Kariuki and Ms. Ng'ania for the petitioner instructed by Havi & Company Advocates.

Mr.H.J.Kinyanjui for the 1st respondent instructed by J. Harrison Kinyanjui & Company advocates.

Mr. Nyamodi for the 2nd & 3rdrespondents instructed by V.A. Nyamodi & Company Advocates.

Mr. C. Odhiambo, Court Clerk.