



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**ELECTION PETITION NO. 8 OF 2013**  
**IN THE MATTER OF THE ELECTIONS ACT NO. 2 OF 2011**

AND

IN THE MATTER OF THE ELECTION OF THE NATIONAL ASSEMBLY KILIFI SOUTH  
 CONSTITUENCY

PETITION OF SARAH MWANGUDZA KAI

BETWEEN

SARAH MWANGUDZA KAI

.....PETITIONER

VERSUS

MUSTAFA

IDD.....1<sup>ST</sup>

RESPONDENT

AISHA ABUBAKAR (SUED IN CAPACITY AS THE COUNTY RETURNING OFFICER (IEBC)  
 KILIFI.....2<sup>ND</sup> RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....

.....3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

**INTRODUCTION**

1. The first General Election under the Constitution of Kenya 2010 was held throughout the Republic of Kenya on 4<sup>th</sup> March 2013. In that election, Kenyan citizens went to the polls to elect their leaders by voting for their preferred candidate for the position of the President, Governor, Senator, Member of Parliament, Women Representative and County Representative.

The election was conducted and supervised by the Independent Electoral and Boundaries Commission (IEBC) pursuant to its mandate under **Article 88(4)** of the **Constitution** and **Section 4** of the **Independent Electoral and Boundaries Commission Act**

2011.

2. This Petition relates to the conduct of elections for the seat of Member of Parliament for Kilifi South Constituency (hereinafter referred to as the Constituency). The constituency is comprised of two Divisions namely Chonyi and Kikambala Divisions. It had a total of 53,476 registered voters.

A total of sixteen candidates offered themselves for election as Member of Parliament for the Constituency. They included the 1<sup>st</sup> Respondent Mustafa Idd Salim, Richard Chonga Kiti and Nicholas Mrima who testified in this Petition in support of the Petitioner's case.

3. At the conclusion of the election, the 2<sup>nd</sup> Respondent Aisha Abubakar who had been appointed by the 3<sup>rd</sup> Respondent (IEBC) to be the Returning Officer for the constituency announced the results of the election on 6<sup>th</sup> March 2013. She returned the 1<sup>st</sup> Respondent as the duly elected Member of Parliament for the constituency having garnered the majority votes in the sum of 7,305.

The first runner's up was Nicholas Mrima with 6,687 votes. Richard Chonga Kiti came in third with 6,629 votes.

4. The Petitioner Sarah Mwangudza Kai was dissatisfied with the manner in which the election was conducted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the declaration that the 1<sup>st</sup> Respondent had won the election. She filed this Petition on 3<sup>rd</sup> April 2013 in her capacity as a registered voter in the constituency.

The petition was supported by an affidavit sworn by the Petitioner and twenty three other affidavits sworn by persons she intended to call as her witnesses. In her prayers, the petitioner invited the court to make the following orders:-

**(a) That the said Mustafa Idd Salim was not duly elected as the Member of National Assembly for Kilifi South Constituency.**

**(b) That the said election of the 1<sup>st</sup> Respondent be declared null and void**

**(c) That there be a recount, scrutiny and reconciliation of all ballot papers, counterfoils and registers of all the votes cast on the election day in Kilifi South Constituency.**

**(d) That the Respondents be condemned to pay your Petitioner costs.**

**(e) That such further orders to be made as this honourable court may deem fit**

5. During the pretrial conference held on 12<sup>th</sup> June 2013, learned counsel for the Petitioner Mr. Wameyo informed the court that twenty three witnesses would testify in support of the Petitioner's case but in the course of the hearing only 20 witnesses testified. Learned Counsel for the 1<sup>st</sup> Respondent informed the court that the 1<sup>st</sup> Respondent intended to testify on his own behalf without calling any other witness while Mr. Sigei, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents indicated that eight witnesses were lined up to testify on behalf of his clients. However, only six of the eight witnesses eventually testified. Lastly, Parties consented to filing agreed issues for determination by the court.

#### **THE PETITIONER'S CASE**

6. The Petitioner's case is grounded on pleadings in her Petition and the affidavit evidence filed

in support of her petition.

In the petition, the Petitioner pleaded that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to conduct the election in accordance with the principles set out under **Article 81** of the **Constitution**, **The Elections Act** and the **Regulations** made thereunder which are meant to ensure that the elections are free, fair, transparent and credible and that they reflect the will of the electorate. According to the petitioner, the elections were not free from violence, intimidation or improper influence.

She complained that the entire election exercise in the constituency was flawed as it was tainted and marred by irredeemable irregularities and commission of election offences by the 1<sup>st</sup> Respondent and his supporters. She specified such offences to be use of violence, threats, intimidation and undue influence to the voters particularly those in some of the candidate's stronghold.

She in addition averred that there was collusion between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent to rig the election by stuffing ballot boxes with pre-marked ballot papers in favour of the 1<sup>st</sup> Respondent which greatly altered the results.

7. In paragraph 14 of her petition, the petitioner averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had failed and/or neglected to open the polling stations on time and closed them hurriedly without compensating for time lost thereby barring innumerable voters from casting their votes thus disenfranchising them; that this ultimately affected the results. It is the petitioners case that many voters who had turned up to vote at the affected polling stations and were actually queuing waiting to vote were turned away without having exercised their constitutional right to vote due to premature closure of the polling stations. She identified the polling stations which had been opened late and closed early as follows;

- a. **Vevwesi Primary School opened at 9.00a.m and closed at 4.00 pm**
- b. **Kidutani Primary School opened at 7.30a.m and closed at 3.00 p.m.**
- c. **St. Martins Primary School opened at 8.30 a.m and closed at 3.30 p.m.**
- d. **Mbuyuni Primary School opened at 8.30 a.m and closed at 4.05 p.m.**
- e. **Ziani Primary School opened at 8.45 a.m and closed at 6.00pm**
- f. **Mwarakaya Primary School opened at 9.00 a.m and closed at 4.20 p.m**
- (g) **Kolongoni polling station opened at 6.00 am and closed at 5.00 p.m**
- h. **Chasimba Primay School opened at 7.00 a.m and closed at 4.00 p.m**
- i. **Katikirieni Primary School opened at 8.00 a.m and closed at 4.15 p.m**
- j. **Bemba Primary School opened at 8.00 a.m and closed at 3.30p.m**

It is the petitioner's contention that the above polling stations were in areas where the 1<sup>st</sup> Respondent allegedly enjoyed minimal support and this worked to his advantage as prospective votes which would have been garnered by other candidates were reduced and had they been cast, they would have reduced the 1<sup>st</sup> Respondent's chance of winning.

8. The petitioner further pleaded that on the eve of the elections, that is, on 3<sup>rd</sup> March 2013 there was a violent attack at M'mwaya Pub in which one of the candidates Richard Chonga Kiti popularly known as Ken Chonga was nearly attacked by unknown assailants who also killed his

campaign manager Mr. Emmanuel Mwambao.

It is the Petitioner's case that following this attack largely attributed to members of the outlawed Mombasa Republican Council (MRC) which had threatened to ensure that elections did not take place in the Coastal Region, there was widespread fear and anxiety in the whole Coastal region including Kilifi South which in turn led to low voter turn out on the polling day; that the low voter turn out affected the results of the election.

9. The Petitioner advanced the position that given the tension, sense of insecurity, anxiety and fear generated by the violent attack at Chonyi which was made worse by rumours intentionally circulated on the polling day that MRC had regrouped and was planning to attack selected polling stations, the election was not held in an atmosphere conducive to a free and fair election and the 3<sup>rd</sup> Respondent ought to have postponed it to another suitable date.

10. The Petitioner also alleged that due to panic and sense of insecurity caused by rumours of impending attack by elements in the MRC on some polling stations, ballot boxes were hurriedly transported unsealed to the tallying center at the Kenya Agricultural Research Institute (KARI) unaccompanied by the candidates or their agents: that tallying and counting of votes cast in polling stations particularly those in Chonyi division took place not in the polling stations but at the tallying centre.

The Petitioner averred that counting votes at the tallying centre in the absence of candidates and or their agents denied them an opportunity to scrutinize and verify votes cast at the polling station.

11. The Petitioner further alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to put in place systems that ensured that the elections were conducted in a simple, secure, verifiable, accountable and transparent manner. That instead it employed systems which were chaotic and inefficient leading to disorder and confusion of grand proportions. That consequently, the results announced by the 2<sup>nd</sup> Respondent were inaccurate, invalid, unfair and were not an expression of the will and choice of the people of Kilifi South.

12. In her supporting affidavit, the petitioner substantially reproduced the pleadings in her petition. She did not provide any evidence to prove the allegations in her pleadings save for the allegation that Kidutani polling station was opened late and closed early. In her evidence in cross-examination, she stated that the polling station was opened at 8.00a.m and closed at 4.30p.m. This contradicted the deposition in her affidavit which suggested that the polling station was opened at 9.00a.m. She however confirmed that she peacefully casted her vote at 11.00 a.m after which she went home.

In an attempt to prove her claim that voters were disenfranchised, she deposed that her mother together with other voters had been turned away from Kidutani polling station without voting when voting was stopped at 3.00p.m following rumours of an impending attack. Her mother was however not one of the witnesses who swore an affidavit or testified in support of the Petition.

13. Through her witnesses for example PW3 Peter Mwamuye Chando and PW4 Mrima Tsuma Mrima an election observer stationed at Kidutani polling station, the petitioner quantified the number of voters who were allegedly disenfranchised at Kidutani polling station. The witnesses gave different accounts. PW3 claimed that about 300 voters were unable to vote while PW4 gave an estimate of about 50 voters.

14. She also adduced further evidence to confirm that most of the polling stations particularly in Chonyi Division opened late between 8.00a.m – 9.30 am and closed early between 3.00p.m and 4.30p.m due to the insecurity situation obtaining at the time. She claimed that the irregular hours

observed by the 3<sup>rd</sup> Respondent contributed to low voter turn out. In her evidence in cross-examination, she asserted that Chonyi Division had a poor voter turn out of 35%.

The position regarding observance of voting time by the election officials in Kikambala division appears to have been different since according to PW10 who claimed to have been Nicholas Mrima's chief agent, most polling stations in that division were closed at 6.30 pm.

15. It is also the Petitioner's case that Chonyi Division was the stronghold of one of the candidates Richard Chonga Kiti (Mr. Chonga) and that had all the registered voters who had turned up to vote actually voted, their vote would have gone to Mr. Chonga and this would have altered the outcome of the election. Put another way, Mr. Chonga would have won the election.

This is the thrust of the evidence tendered by PW7, PW13, PW14, PW15, PW16, PW17, PW18, PW19 and PW20. The gist of their evidence was that due to the tension and sense of insecurity pervading the constituency on 4<sup>th</sup> march 2013 and though some of them had presented themselves at the polling stations ready to vote, they were unable to cast their vote but had they voted, they would have voted for Mr. Chonga.

16. In the course of the hearing, the Petitioner introduced another claim of an alleged irregularity committed by the 3<sup>rd</sup> Respondent which had not been specifically pleaded in the Petition. This came in the form of the evidence of Mr. Chonga and Mr. Mrima who were among the candidates who participated in the election. They testified as PW6 and PW11 respectively. They both claimed that despite having requested the 3<sup>rd</sup> Respondent to include their preferred names "**Ken Chonga**" for PW6 and "**Wanyepe**" for PW11 in the ballot papers, a request the 2<sup>nd</sup> Respondent had accepted by issuing them with nomination certificates containing their preferred names, the 3<sup>rd</sup> Respondent proceeded to print the ballot papers with their official names of **Richard Chonga Kiti** and **Nicholas Mrima** which were not known by their supporters in the constituency. They wanted their names reflected in the ballot papers as "**Richard Ken Chonga Kiti**" and "**Nicholas Mrima Wanyepe**" and that failure of IEBC to effect their request costed them votes and adversely affected their candidature.

On the basis of this the petitioner urged the court to find that the elections were marred with grave irregularities: that the 1<sup>st</sup> Respondent had not been validly elected and that consequently, his election should be nullified.

### THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENT'S CASE

17. Upon being served with the Petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their respective responses in accordance with **Rule 14(1)** of the **Elections (Parliamentary and County Elections) Petition Rules 2013**.

The 1<sup>st</sup> Respondent filed his response on 29<sup>th</sup> April 2013 accompanied by a replying affidavit sworn by him on 27<sup>th</sup> April 2013.

In his response, the 1<sup>st</sup> Respondent started off by challenging the validity of the petition by claiming that the petitioner being a registered voter had no capacity to file the petition and that the petition had been served out of the time limited by the law.

These issues were the subject of two interlocutory applications filed by the 1<sup>st</sup> Respondent on 29<sup>th</sup> April 2013 and 22<sup>nd</sup> May 2013 which were determined by this court in a ruling delivered on 12<sup>th</sup> June 2013. In that ruling, this court upheld the validity of the petition by holding that it had been served within time and that the petitioner had locus to institute it.

18. The 1<sup>st</sup> Respondent maintained that he had been validly and duly elected as the Member of Parliament for Kilifi South in elections which were free, fair and credible and which had been conducted in accordance with the law.

In particular, the 1<sup>st</sup> Respondent denied that he was involved either directly or through persons associated with him in the commission of election offences involving violence, threats, intimidation or undue influence of voters.

19. He claimed that the petitioner had failed to make out any case against the Respondents as her supporting affidavit did not contain any evidence to prove the allegations pleaded in her petition. He contended that there was no violence on the election day and that any voter who desired to go and vote could have done so without any hindrance. It was his further contention that the averments in the petition were based on rumours of violence whose source the Petitioner and her witnesses had failed to disclose.

20. In response to the claim that part of the electorate did not vote for Mr. Chonga owing to the confusion created by the non-inclusion of his popular name Ken Chonga in the ballot paper, the 1<sup>st</sup> Respondent asserted that only Mr. Chonga could shoulder the blame for the alleged confusion among his supporters because he had campaigned using a name he knew was not his official names and would not therefore appear in the ballot paper.

That in any event, the affidavit sworn by Ken Chonga requesting IEBC to include his preferred names in the ballot paper did not amount to a deed poll which is the only instrument which could have legally authorized the IEBC to effect his request. He concluded by asking the court to dismiss the petition with costs.

21. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their joint response on 29<sup>th</sup> April 2013 which was presented in the form of a lengthy and detailed replying affidavit sworn by the 2<sup>nd</sup> Respondent on her own behalf and on behalf of her employer the 3<sup>rd</sup> Respondent. In the course of the hearing, these two Respondents called a total of six witnesses including the 2<sup>nd</sup> Respondent who testified as DW2.

For ease of reference, the 2<sup>nd</sup> Respondent will hereinafter be referred to as DW2 but when reference is being made to her and the 3<sup>rd</sup> Respondent together, they will be referred to as ***“the Respondents”***.

In her replying affidavit, DW2 contended that the elections in Kilifi South Constituency were conducted in strict compliance with the provisions of the **Constitution**, the **Elections Act (the Act)** and the **Elections (General) Regulations 2012 (the Election Regulations)** in a free, fair and transparent manner. She denied the Petitioner’s allegation that the results she declared returning the 1<sup>st</sup> Respondent as the winner of the disputed election did not reflect the choice and true will of the people in the constituency.

22. While admitting that there was a violent attack at Chonyi on the eve of the election in which two people including a police officer were killed and that there had been threats of violence in the whole coastal region including Kilifi South, she stated that there was no violence on the polling day and that the voting process continued smoothly throughout the constituency without any major disruption. She deposed that because of the threats made by the MRC in the region, adequate security arrangements which included deployment of additional security personnel had been put in place to secure the safety of voters and all polling stations on the election date. She averred that the Chonyi attack was an isolated incident which did not warrant the postponement of elections.

23. She contended that in polling stations which opened late due to security concerns, the presiding officers compensated for time lost by keeping the polling stations open till all voters had

cast their vote. She cited the example of Gandini Primary School polling station which remained opened until 8.00p.m and Ziani Primary School polling station which closed at 6.45p.m. She denied the allegation that any prospective voter was turned away without voting due to early closure of any polling station.

The Respondents also denied having committed any electoral offences as alleged by the Petitioner or that the election was marred with manifest irregularities which could have compromised the integrity of the results. The 2<sup>nd</sup> Respondent in particular denied that election officials colluded with the 1<sup>st</sup> Respondent to stuff ballot boxes with pre-marked ballot papers in favour of the 1<sup>st</sup> Respondent or that they took any action aimed at assisting the 1<sup>st</sup> Respondent win the elections.

24. In response to the claims by Richard Chonga Kiti and Nicholas Mrima that they were disadvantaged as candidates in the election by the 3<sup>rd</sup> Respondent's failure to include their preferred names in the ballot paper, DW2 explained that the 3<sup>rd</sup> Respondent printed names of all candidates using their official names shown in the formal documents submitted by them to the 3<sup>rd</sup> Respondent. That this was done in accordance with the law and IEBC cannot be faulted for following the law.

25. Lastly, on the allegations concerning the transfer of ballot boxes to the tallying centre for vote tallying and counting, DW 2 admitted that all polling stations in Chonyi Division had their votes counted at the tallying centre and only two polling stations in Kikambala Division had their votes counted in a different polling station. She denied that ballot boxes were transported unsealed and unaccompanied by Agents. She maintained that the ballot boxes were transported to the tallying centre after consultation with the candidates accompanied by agents who could have been accommodated in the 3<sup>rd</sup> Respondent's vehicles. That Agents present at the tallying centre and at the polling stations in Kikambala Division participated in the tallying and counting exercise, scrutinized ballot papers and verified results before signing Form 35's.

She disclosed that out of the 96 polling centres in the constituency (streams), only 20 centres had votes counted outside the respective polling centres. Her evidence was by and large corroborated by the other witnesses who were called to testify in support of the Respondents case.

The other witnesses were all Presiding Officers in polling stations in Chonyi Division namely;-

- Chisamba Primary Polling Station (DW3)
- Ziani Primary Polling Station (DW4)
- Mwarakaya Primary School Polling Station (DW5)
- Kidutani Polling Station (DW6) and
- St. Martins Primary Polling Station (DW7)

26. In a nutshell, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case was that the election was properly conducted in a transparent, free, fair and credible manner and that the results were an expression of the will and choice of the people of Kilifi South.

They urged the court to find that the 1<sup>st</sup> Respondent had been validly elected and invited the court to dismiss the Petition with costs.

27. At the close of the hearing, parties filed written submissions which their advocates on record

highlighted before me on 23<sup>rd</sup> July 2013.

On the same date, the parties filed a long list of agreed issues for determination by the court. They included issues touching on preliminary matters which have already been determined by the court.

28. Taking into account the pleadings, the evidence adduced by the parties alongside the written and oral submissions made by learned counsel for the parties, I will summarize the issues arising for determination in this Petition as follows:-

i. ***Whether there was violence, general insecurity in the***

***constituency both prior to and during the election day and whether the violence or insecurity if any, affected the conduct and results of the election. Put another way, did the violence or threats of violence impede the holding of a free, fair, transparent and credible election?***

ii. ***Whether any election offences were committed by the 1<sup>st</sup> Respondent either individually or collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with the aim of giving him unfair advantage over other candidates.***

iii. ***Whether the elections were conducted in accordance with the principles laid down in the constitution and the law and whether instances of non-compliance with the law if any affected the validity of the results.***

iv. ***Whether the 1<sup>st</sup> Respondent was validly elected as the Member of Parliament for Kilifi South Constituency.***

v. ***What orders should be made on costs?***

29. Before proceeding to determine the issues raised in this petition, it is important for this court to address its mind to the burden and standard of proof required in election petitions. This is because election petitions are not like ordinary civil suits. They are unique in many ways.

Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under **Article 38** of the Constitution. This means that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned.

It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases. The reason behind requiring a higher burden of proof for election petitions was succinctly captured by Maraga J. in **JOHO V NYANGE & ANOTHER 2008) 3KLR (EP) 500** when he stated,

***“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 in WANGUHU NGANGA & ANOR v GEORGE OWITI & ANOR, Election Petition No. 41 of 1993, that “Election Petitions should not be taken lightly.”***

30. It is settled law that the burden of proof in election petitions rests with the Petitioner. This is in accordance with the cardinal principle of the law of evidence that he who alleges must prove. In election petitions, it is incumbent upon the Petitioner to prove by cogent and credible evidence all the allegations of irregularities, malpractices or breaches of the law cited in the petition on the basis of which the election of the winning candidate is sought to be nullified.

In determining whether a Petitioner has satisfied both the burden and standard of proof required to nullify an election, the court must be guided by **Section 83** of the **Elections Act** which is in the following terms;

***“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. The effect of this provision is that a Petitioner is required to establish by credible evidence that not only did irregularities or instances of non-compliance with the law occur in the conduct of the elections but that they were of such a magnitude that they substantially and materially affected the validity of the results.

This legal position was expounded by the Supreme Court in the recent case of **RAILA ODINGA v UHURU KENYATTA & 3 OTHERS Election Petition No. 5 of 2013** where the court stated:

***“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 respondent bears 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 esse acta: all acts are presumed to have been 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.”***

32. Regarding the standard of proof, the law is that the standard should be higher than a balance of probabilities required in civil cases but lower than proof beyond reasonable doubt in criminal cases. But where allegations of commission of electoral offences are concerned, a high standard of proof applies similar to proof beyond reasonable doubt. I cannot put it better than J. Maraga (as he then was) did in **JOHO v NYANGE (supra)** when he said;

***“The burden of proof in election petition lies with the Petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof in election petitions is proof beyond any reasonable doubt. Like in fraud cases, the standard is higher than a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.”***

In view of the foregoing, I am in agreement with the submissions made by Mr. Sigei that in order to succeed in this Petition, the Petitioner must prove all the allegations contained in the Petition to the satisfaction of the court. And in determining whether such allegations have been proved to the required standard, this court will be guided by the relevant Articles of the **Constitution of Kenya 2010**, the Provisions of the **Elections Act** and the **Elections (General) Regulations 2012** which together comprise the law governing the conduct of Elections in Kenya.

With that said, I now turn to deal with the issues framed for determination in this Petition.

**(i) Whether there was violence or insecurity prior to and during the election day and its effect on the conduct and results of the election;**

33. From the totality of the evidence adduced in this Petition and the submissions made by learned counsel for the parties, it is common ground that during the entire campaign period, no single incident of violence occurred throughout the constituency. It is also common ground that on the eve of the Election on 3<sup>rd</sup> March 2013 at around 9.00p.m, there was an attack at M'mwaye Bar and Restaurant in Chonyi Division in which an Administration Police Officer and the Chief Campaigner for Mr. Chonga were killed. This incident will hereinafter be referred to as the "**Chonyi attack**".

34. It is also not disputed that the attack was executed by unknown assailants suspected to be Members of the illegal group MRC. That the MRC while propagating their secessionist agenda had previously made threats of violence through circulation of leaflets and other platforms warning voters in the Coast Province not to turn out to vote on the election day; that MRC had threatened to ensure that elections did not take place in the whole region.

. It is also not contested that the Chonyi attack created tension, Panic, fear, and a sense of insecurity among voters and election officials alike which was made worse by rumours of violence which were circulated on the polling day that MRC had regrouped and was planning to make similar attacks on some polling stations. Parties were however in agreement that no actual violence took place in any of the polling stations in the constituency on the election day.

35. Having set out the uncontested facts regarding the issue of violence, I now propose to analyse the evidence presented to the court on the issue with the aim of establishing whether any acts of violence or insecurity made it impossible for the conduct of a free and fair election.

I will start from the premise that a free and fair election is one which is conducted in accordance with the constitutional principles enumerated under **Article 81** of the **Constitution**. The election must comply with the principle of universal suffrage based on the aspiration for fair representation and equality of vote. The casting of votes must be by secret ballot, free from violence, intimidation, improper influence or corruption and must be conducted in a transparent, impartial, efficient and accountable manner by an independent body like the 3<sup>rd</sup> Respondent in this Petition.

36. The Petitioner complains that the elections in Kilifi South were not free and fair because they were not free from violence. She adduced evidence to the effect that due to the violent attack at Chonyi and the subsequent rumours circulated on the polling day that MRC was planning to attack some polling stations, there was despondency and apprehension of violence among voters which made them choose not to go to the polling stations to vote and that even those who turned up at polling stations ended up not voting due to concerns for their safety. It is the Petitioner's case that the violence and sense of insecurity led to low voter turn out and disenfranchisement of voters which ultimately affected the results.

37. In support of this claim, PW13 Kadoro Charo Mwambaro testified that he did not go to vote as he feared for his life in view of the attack at Chonyi on the eve of the elections. He also claimed that most of his neighbours did not leave their homes to go and vote since they feared an out break of violence in polling stations. However, in his evidence on cross examination by Mr. Sigei, he confirmed that he was aware that other people went to vote at M'buyuni Primary School where he was registered as a voter. PW17 Paulina Tokali gave similar evidence. PW3 Peter Mwamuya Charo, PW5 Elinah Dzizah Dume and PW16 Festus Matembo Rimba testified that they were actually on the que at Kidutani, Mwarakaya and Bembo Polling Stations when they were told that the polling stations were about to be attacked. They left in a panic without having voted.

According to PW3, about 300 people left without voting and according to PW16 about 200 people were unable to vote at Bembo polling station.

38. PW12 Chiro James Dzenge, a registered voter at Ziani Primary School and PW15 a

registered voter at Vwevvesi Primary School testified along similar lines but PW9 Gladys Chikando Mbagwa who had been Mr. Chonga's chief agent told the court that while supervising agents in the 54 polling stations in the constituency, from 6.00a.m to 4.30p.m, she noted that voting was proceeding smoothly without any serious irregularity.

39. The Respondents on their part while conceding that the Chonyi attack and threats by MRC generated fears of insecurity, stated that the rumours did not translate into any act of violence on the polling day and security arrangements had been put in place to ensure that voters exercised their constitutional right to vote in a relatively peaceful environment. DW2 testified that due to the threats made by MRC to disrupt elections in the region and the attack at Chonyi, IEBC had liaised with security organs in the constituency and adequate security measures including deployment of additional security personnel were in place to ensure that security was maintained throughout the constituency and in all polling stations. The Respondents maintained that the security situation was good illustrated by the fact that many voters turned up at polling stations to vote and actually voted.

40. During the pre-trial stage, this court appreciated that the issue of insecurity would be material and would take centre stage in this Petition. Consequently, on its own motion, the court summoned the police officers who were in charge of coordinating security operations in the constituency prior to, during and after the elections. They were the OCPD Kilifi County Clement Gituku Wangai who testified as PW21, his then deputy superintendent of police Ben Changuko (PW22) and Inspector David Kipsugut (PW23) who had been in charge of security patrols in the area. These three officers testified on the security situation in the constituency before and during the voting day.

41. The sum total of their evidence was that there was no insecurity witnessed during the campaign period despite threats from MRC that no elections would be held in the Coast Province.

PW21 told the court that on the voting day, he deployed a total of 277 armed police officers to cover the 54 polling stations in the constituency. Twenty officers were deployed at the tallying centre while 233 officers secured polling stations. Each polling centre was assigned a minimum of two police officers but where a polling station had only one stream, additional officers were provided. 24 police officers were on standby. All the security personnel were obviously armed.

42. The security personnel were drawn from the Kenya Police, the General Service Unit, Prisons Department and the National Youth Service. The witnesses were consistent in their evidence that the security situation was calm and voting proceeded peacefully on the election day; that no single incident of violence or insecurity was reported to any of them or disruption of the voting process at any polling station.

PW23 confirmed to the court that he patrolled polling centres and other areas in the constituency on the eve of the elections and during the voting day and other than the attack on M'maye bar at Chonyi at 9.00p.m, he did not come across or receive any reports from his officers on the ground about any other incident of violence. While answering a question posed by the court, the OCPD reiterated that he treated the incident at Chonyi as a normal case of arson and murder as the scene of the attack was not in a polling station.

43. Given the foregoing evidence, the question that this court must now answer is whether there is any merit in the Petitioner's claim that violence denied innumerable voters their constitutional right to vote for their preferred candidate in the election.

In dealing with this issue, it is important to take cognizance of the fact that the right to vote is one of the fundamental rights guaranteed to all adult Kenyan citizens by **Article 38** of the **Constitution**.

**Article 38(2)** provides that:-

***“ 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;***

***(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.***

44. The importance of the right to vote in a democratic form of Government like the one we have in Kenya cannot be gainsaid. It is the bedrock of democratic governance and unless there are exceptional circumstances that do not permit the exercise of that right, it is a right that must be safeguarded and jealously protected by our courts. To further illustrate this point, I wish to refer to the South African case of **RICHTER V MINISTER FOR HOME AFFAIRS & 2 OTHERS (2009) ZACC3** where the constitutional court while emphasizing the importance of this right stated:-

***“The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues,...democracy itself will be imperiled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.”***

I cannot agree more.

45. Turning now to the issue at hand, as stated earlier, it is common ground that there was no violence on the voting day. The only incident of violence was at around 9.00p.m at Chonyi in a bar. And though the attack undoubtedly caused fears of insecurity among residents, some of whom opted not to go and vote, there is evidence that in the whole, the security situation in the constituency on 4<sup>th</sup> March 2013 was calm for the better part of the day. The rumours of impending attacks started filtering in some polling stations late in the afternoon. PW21 to PW23, who were independent witnesses summoned by the court and therefore gave a truthful and fair assessment of the matter confirmed that no security related incident was reported to them and that the voting process had proceeded peacefully. From their evidence, it is clear that there was heavy security presence throughout the constituency and particularly in polling stations which guaranteed the safety of voters who were willing to go out and cast their vote.

46. Though I agree with the petitioner that the threats of violence could have made some voters refrain from going to the polling stations to vote, the petitioner’s claim that this caused voter apathy leading to a low voter out is incorrect. There is evidence to prove that a majority of the voters in the constituency courageously refused to be intimidated and came out in large numbers to vote for their preferred candidate.

The Form 36 availed to the court confirms that 65.8% of the registered voters in Kilifi South exercised their constitutional right to vote.

Even in polling stations pleaded by the Petitioner in paragraph 14 of the Petition which according to the Petitioner were opened late and closed early, as will be shortly demonstrated, the records supplied to the court by the 3<sup>rd</sup> Respondent show that there was an impressive voter turn out averaging 60.75%.

In Chonyi division which appears to have been the worst hit by the apprehension of violence, a study of form 35's for polling stations in that area show that there was a high voter turn out of 65%.

47. Though in ideal circumstances all registered voters should be able to cast their vote for their preferred candidates without any impediments the truth of the matter is that in reality, it is impossible to attain a 100% voter turn out in any election and that is why democracy is predicated upon the will of the majority.

Granted that some voters may have been prevented from voting by concerns for their safety, the truth is that there may have been others who for personal and other reasons purely unrelated to insecurity chose not to cast their vote. I find support in this view from the Supreme Court of India where, when considering a claim that change of a polling station had resulted in low voter turn out the supreme court stated in **KALYAN KUMAR GOGOI V ASHUTOSH AGNIHOTRI & ANOR – Civil Appeal No. 4820 of 2007** that:-

***“...all the voters do not always go to the polls. Voting in India is not compulsory, and therefore, no minimum percentage of voters has been prescribed either for treating an election in a constituency as valid or for securing the return of the candidate at the election. The voters may not turn up in large numbers to cast their votes for variety of reasons such as agitation going on in the State concerned on national/ and or regional issues or because of boycott call given by some of the recognized State Parties, in the wake of certain political developments in the state or because of disruptive activities of some extremist elements etc. It is common knowledge that voting and abstention from voting as also the pattern of voting, depend upon complex and variety of factors, which may defy reasoning and logic.”***

In this case, it is therefore not possible to conclude that the 34.5 % of the registered voters who did not cast their vote failed to do so solely because they were apprehensive about their safety.

48. It was also the Petitioner's case that had the voters who were unable to vote cast their vote, the election results would have been different as they would have voted for another candidate in the race namely, Ken Chonga (PW6).

This claim was based on the argument that Chonyi Division was Ken Chonga's stronghold and if some voters had not been turned away from the polling stations without voting, he would have won the elections.

This claim was strongly disputed by PW11 Nicholas Mrima, another candidate who stated that Chonyi Division was not a preserve of any candidate and that he equally had his support base in Chonyi. It is important to note that PW11 was the runner's up in the election with 6,687 votes.

49. I found this assertion by the Petitioner rather interesting. It is one that falls squarely in the realm of speculation. This is so because it is not possible to tell with any degree of certainty which way a voter would vote. Again, I borrow from the wisdom of the Indian supreme court when it stated as follows in the **KALYAN KUMAR case (supra)**

*“This court has taken judicial notice of the fact that in India all the voters do not always go to the polls and that the casting of votes at an election depends upon a variety of factors and it is not possible to predict how many or which proportion of votes will go to one or the other of the candidate. ....Therefore it is very difficult to accept the ipse dixit of the appellant and his witnesses that if 200 to 300 people had gone away without casting their votes, due to non-setting up of notified polling station , they would have voted in favour of the appellant. There is no warrant for drawing presumption that those, who had gone away without casting votes, would have cast their votes in favour of the appellant, if there had been no change of venue of voting. In the opinion of this Court, the matter cannot be considered on possibility. There is no room for reasonable guess.’*

50. My view is that nobody including the court can tell the mind of a voter. A voter’s will or choice of candidate can only be expressed through or ascertained from a cast vote. It is common knowledge that voters can change their minds at the last minute and it is also possible for a voter to express support for one candidate but vote for a different candidate since voting is by secret ballot.

A good example of this kind of scenario can be found in the evidence of PW14 Esther Mbeyu Mwatua who told the court that she was an Agent of PW11 but had she voted, she would have voted for Ken Chonga.

The foregoing illustrates that there is no merit in the petitioner’s claim that had all voters in chonyi division cast their vote, the result of the election would have been different in that Ken Chonga would have won.

51. Having evaluated the evidence on the issue of violence, I am persuaded to find that the security situation in Kilifi South Constituency during the time of the election was not compromised by the attack at Chonyi on the eve of the elections or by rumours of threats of violence on polling day to an extent that it was not possible for the 3<sup>rd</sup> Respondent to hold a free and fair election. The voting process was not disrupted in any significant way and a majority of the voters were able to cast their vote. This must be because the security organs in the constituency jointly with the 3<sup>rd</sup> Respondent had made elaborate and comprehensive security arrangements to ensure that voters were secure and they were able to exercise their constitutional right to elect leaders of their choice including their representative to the National Assembly.

52. If there were any pockets of insecurity, they affected all candidates equally. There is no evidence that the 1<sup>st</sup> respondent stood to gain any advantage by reason of any violence or rumours spreading insecurity in the constituency.

I find that the Petitioner has failed to establish to the required standard of proof that there was violence and general insecurity on the eve and on the day of the elections in Kilifi South which would have affected the conduct of a free and fair election. As demonstrated earlier, the voter turn out was satisfactory and therefore, there is no basis for holding that insecurity could have affected the results of the election.

53. Before leaving the issue of violence, I wish to deal with Mr. Wameyo’s submissions that given the volatile security situation in the constituency, IEBC should have been diligent enough to conclude that the atmosphere then prevailing was not conducive to the holding of a free and fair election. That it should have used the discretion donated to it by **Section 73** of the **Elections Act** to postpone the elections to another suitable date.

Mr. Wameyo submitted that given the Chonyi attack and the threats of violence perpetuated by members of MRC which had been widely published, IEBC should have anticipated breach of the peace and postponed the election.

**Section 73** of the **Elections Act** is in the following terms:-

**S73(i)** *“The Commission may, where election offences of such a nature as to make it impossible for an election to proceed are committed in a constituency, county or ward and where it considers it necessary, postpone the elections in that constituency, county or ward for such a period as it may consider necessary.*

**(2)** *Where a date has been appointed for holding an election and –*

**(a)** *there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date; or*

**(b)** *it is impossible to conduct the elections as a result of a natural disaster or other emergencies The Commission may postpone the election and shall in respect of the Constituency concerned, appoint another date for the holding of the postponed election.”*

54. From the above provisions, it is not in doubt that the IEBC is empowered by the law to postpone the date of elections but only in specified circumstances. Postponement of elections is only allowed if:-

- a. *Election offences are committed in a Constituency, County or ward of a nature that would prevent the holding of an election.*
- b. *The Commission (IEBC) has reason to believe that a serious breach of peace was likely to occur if the election is held on the scheduled date.*
- c. *If there is a natural disaster or emergency that makes the conduct of scheduled elections impossible.*

55. Applying the provisions of **Section 73** of the **Act** to the circumstances prevailing in the constituency at the time the elections were held, it is my considered view that none of the above conditions were present to justify the postponement of the election.

I make this finding because there is no evidence to suggest that any election offences which would have made it impossible to conduct the elections had been committed. Infact, the petitioner did not offer any evidence to prove that any electoral offences had been committed either by the 1<sup>st</sup> Respondent or any other person in the constituency.

56. Secondly, the evidence adduced in this petition concerning the security situation in the constituency does not show that IEBC had any reason to believe that if the election was held as scheduled, there would be a serious breach of the peace. There is undisputed evidence that there was only one isolated incident of violence which happened at Chonyi at around 9.00p.m on 3<sup>rd</sup> March 2013. No other attacks occurred later during the night or early morning of the polling day.

57. It is important to note that there is credible and unchallenged evidence from DW2 and the police officers who testified in this case that adequate and elaborate security arrangements had been effected well before the election day to counter any threats that could have been posed by criminal elements in the constituency. IEBC was party to the making of these security arrangements and was therefore aware that no serious breach of the peace was likely to occur on the election date given the security measures already undertaken. There was therefore no good reason to postpone the election and I so find.

**(ii)** *Whether the 1<sup>st</sup> Respondent committed any electoral offences*

58. In her Petition at paragraph 11, 12 and 25, the Petitioner alleged that the 1<sup>st</sup> Respondent had committed electoral offences namely violence, threats, intimidation and undue influence of voters.

The 1<sup>st</sup> Respondent in his evidence denied having committed any electoral offence leave alone the ones specified in the Petition.

In this case, I wholly agree with Mr. Buti's submission that the Petitioner had failed to establish by any evidence that the 1<sup>st</sup> Respondent had committed any of the alleged offences.

The Petitioner did not call any witness to link the 1<sup>st</sup> Respondent with any violence, threats of violence or the rumours of impending attacks at some polling stations.

There was no evidence of bribery. As noted earlier, the standard of proof required to prove electoral offences is proof beyond reasonable doubt and the Petitioner in this case has miserably failed to discharge that burden.

iii. **Whether the elections were conducted in accordance with the constitution and the law.**

59. According to the Petitioner, the Respondents committed several irregularities in the manner in which they conducted elections in Kilifi South. She identified such irregularities as failure by the 3<sup>rd</sup> Respondent to observe the polling time prescribed by the law, having votes cast counted at the tallying centre not at polling stations and failing to employ systems that were simple, accurate, verifiable, accountable and transparent thus compromising the integrity of the elections.

For purposes of good order, I propose to deal with each cited irregularity on its own in a sequential manner.

a. **Failure to observe prescribed polling time**

60. It is the Petitioner's case that due to insecurity, some polling stations in the constituency were opened late and closed early thereby disenfranchising voters. In paragraph 14 of her Petition, she specified ten polling stations which were opened late and closed early without the election officials compensating for time lost. The polling stations have been stated earlier in this judgment.

The Petitioner and her witnesses gave contradictory accounts regarding what time the polling stations were opened and closed. For instance, the Petitioner in her evidence in chief claimed that Kidutani Polling Station opened at 9.00a.m but in her evidence on cross-examination, she recanted this evidence to say that it was opened at 8.00 am and closed at 4.30p.m.

61. The Respondents admitted that some polling stations were opened late and closed early. They however contended that for those stations were opened late, there was compensation of time equivalent to time lost due to late opening. They furnished the court with poll day diaries giving an account of the time the polling stations pleaded by the Petitioner were opened and closed.

I have studied the said poll day diaries and have decided to reproduce their content in form of a table in order to have a fair picture of the time the polling stations in question were actually opened and closed. Given the contradictory nature of the evidence tendered by the Petitioner on this point, I have chosen to rely on the information in the poll day diaries because they were compiled at the polling stations and information contained therein verified by Agents.

The information on the poll day dairies is tabulated in the following table.

No.	Name of Polling station	Opening Time	Closing Time

1	Mwarakaya Primary School stream 1	6.00 am	05.00pm
2	Mwarakaya Primary School stream 2	6.00am	05.00pm
3	Kolongoni Primary School stream 1	6.00am	05.00pm
4	Kolongoni Primary School stream 2	6.00am	05.00pm
5	Chasimba Primary School	6.00am	05.00pm
6	Katikirieni Primary School stream 1	8.00am	5.00pm
7	Katikirieni Primary School stream 2	8.00am	5.00pm
8	Bemba Primary	8.00am	3.30pm
9	Vwevwesi Primary School	11.00am	06.00pm
10	Kidutani Primary School	6.30 am	4.30pm
11	St. Martin's Primary School stream 1	07.00am	05.00pm
12	St. Martin's Primary School stream 1	07.00am	05.00pm
13	Mbuyuni Primary School	08.30am	4.05pm
14	Ziani Primary School stream 1	08.24am	6.45 pm
15	Ziani Primary School stream 2	08.24am	6.45pm
16	Bundacho Primary School	6.00am	5.00pm
17	Gandini Primary School	9.00am	8.00pm
18	Dandiri Polling Station	7.00am	4.00pm

62. An analysis of the above table confirms that some polling stations were indeed opened late and closed early and no compensation for time lost owing to late opening was given. It also shows that some of the pleaded polling stations kept the prescribed polling time which is 6.00a.m to 5.00p.m, namely:-

- Mwarakaya
- Kolongoni
- Chasimba
- Bundacho

**Regulation 66** of the **Election Regulations** stipulates the voting time to be observed in the conduct of elections as follows;

**66(1) “Subject to regulation 64, voting shall commence at 6 o’clock in the morning and end at 5 o’clock in the afternoon on the polling day.**

**(2) Notwithstanding subregulation (1), a person who is on a queue for the purposes of voting before 5 o’clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o’clock.”**

**Regulation 64(3) also states;**

**“A presiding officer shall, in consultation with the returning officer-**

**extend the hours of polling at the polling station where polling has been interrupted under this regulation or for other valid cause, and**

**where polling in that polling station has started late, extended the hours of polling by the amount of time which was lost in so starting late.”**

63. In view of the foregoing, it is evident that the Presiding Officers in charge of Katikirieni Primary School, Bemba Primary, Vevwesi Primary School, Kidutani Primary School, St. Martins, Mbuyuni Primary and Ziani polling stations indeed violated the law by opening their polling stations late and failing to extend voting time with the time equivalent to time lost on account of late opening. The explanation given by the 2<sup>nd</sup> Respondent that late opening and early closure of some polling stations was because of insecurity then obtaining in the constituency is not satisfactory considering that there is credible evidence to prove that the security situation had been contained by the time voting was supposed to start. And that in the course of the day, all polling stations were properly secured. I am satisfied that the failure of the 3<sup>rd</sup> Respondent’s officials to observe voting time as stipulated by the law denied some voters of the opportunity to exercise their constitutional right to vote for their preferred candidate.

The question to pose at this juncture is - Did this irregularity affect the validity of the results.

64. To answer this question, I will start by observing that the Petitioner pleaded 10 out of 54 polling stations in which voting time was not observed. The court has been able to establish through records supplied by the 3<sup>rd</sup> Respondents (poll day diaries) that only 7 polling stations out of the 10 pleaded stations did not keep the prescribed voting time. By specifying only 10 polling stations, the petitioner implied that she was satisfied that the reminder of the other 44 polling stations maintained regular voting time. I so find.

Even in polling stations which were affected by this irregularity, the evidence before the court shows that the voter turn out was still quite impressive.

For instance at Vwevvesi Polling Station which opened at 11.00am and closed at 6.00pm, there were 574 registered voters and a total of 320 of them turned out to vote. This translated into a voter turn out of 56%.

65. In Katikirieni Polling Station which opened at 8.00am and closed at 5.00pm, out of a population of 958 registered voters, 558 turned up to vote which translated into a 58% voter turn out. To give a fairer picture of the matter, the table below shows the voter turn out in all the pleaded polling stations. The statistics therein are derived from information in the form 35’s supplied to the court by the 3<sup>rd</sup> Respondent.

<b>POLLING STATION</b>	<b>REGISTERED VOTERS</b>	<b>VOTER-TURNOUT PERCENTAGE</b>
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(a)Vwevwesi	574	320	55.7
(b)Kidutani	753	391	51.9
(c)St. Martins Primary School	932	610	65.5
(d)Mbuyuni	659	389	59.0
(e)Ziani	946	507	53.6
(f)Mwarakay	1103	725	65.7
(g)Kolongoni	1064	743	69.8
(h)Chasimba	613	394	64.8
(i)Katikirini	958	558	58.2
(j)Bembo	720	419	58.2
	<b>8,322</b>	<b>5,056</b>	<b>60.75</b>

In view of the data in the above table, it is clear that failure to observe the voting time stipulated by the law did not negatively impact on the conduct of the election to an extent that it would have affected its outcome.

I am of the view that an overall voter turn out of 60.75% was not so low as to lead to the conclusion that majority of the voters in the area where the affected polling stations were located did express their will in electing their representative to the National Assembly.

**b. Transfer of counting from polling stations to tallying centre.**

66. It is not disputed that the process of counting and tallying of votes particularly for polling stations in Chonyi Division was transferred to the tallying centre at KARI. DW2 and the Presiding Officers who testified in this Petition explained that this was done as a precautionary measure given the security situation on the ground and in view of the Chonyi attack. That the action was taken after consulting candidates and/or their agents. The Petitioner did not call any witnesses to contradict this position.

67. Mr. Wameyo submitted that the transfer of ballots for tallying and counting from the polling stations to the tallying centre was an irregularity which amounted to a breach of not only the **Election Regulations** but also violated **Article 86(b)** of the **Constitution**.

He argued that there was no provision in the **Election Regulations** which allows the transfer of counting of votes from polling stations to a tallying centre. That **Regulations 64, 66 and 68** are only applicable to allow transfer of the voting process but not the counting process. He contended that under **Regulation 74(5)**, only a vehicle or vessel designated as a polling station could be moved to another appropriate place for counting of votes and this could not violate the provisions of **Article 86** of the **Constitution** since it is the vehicle or vessel which is designated as a polling station.

68. Mr. Buti and Mr. Sigei on their part submitted that the transfer of ballots for counting to the tallying centre in the security situation then obtaining was lawful and cannot be treated as a violation of the law since it was done in the exercise of the Presiding Officer's discretion under **Regulation 64**. Mr Buti in addition contended that the **Election Regulations** had been

promulgated under powers donated by the constitution.

69. In order to appreciate the different positions advanced by the parties on this point I find it necessary to reproduce Regulation 64(1) in its entirety.

**Regulation 64(1)** Provides that:-

***“Notwithstanding the terms of any notice issued under the Act or these Regulations, a Presiding Officer may, after consultation with the Returning Officer, adjourn the proceedings at his or her polling station where there are interruptions by a riot, violence, natural disaster or other occurrence, shortage of equipment or other material or other administrative difficulty, but where the Presiding Officer does so, the Presiding Officer shall restart the proceedings at the earliest practicable moment.”***

70. Having considered the rival submissions made by the parties on this point and after considering the provisions of **Regulation 64**, I take the following view of the matter: that a Presiding officer has discretion to adjourn proceedings. This power to adjourn proceedings includes the power to transfer proceedings from one polling station to another or to a public facility within the constituency.

It is not disputed that the tallying centre at KARI was a public facility within Kilifi South Constituency.

The question that must now be answered by this court is whether the counting of votes is part of proceedings in a polling station:

71. The word proceedings has been defined by Black's Law Dictionary, 9<sup>th</sup> Edition as ***“An act or step that is part of a larger action.”*** This definition is almost similar to the meaning accorded to the word “proceedings” by the Concise Oxford English Dictionary 12<sup>th</sup> Edition. This dictionary defines the word proceedings as ***“An event or a series of activities with a set procedure.”***

In view of the above definitions, I am convinced that counting of votes would be part of the proceedings in a polling stations. It is part of the activities that ought to take place in a polling station in order to establish the result of an election. An election is not an event. It is a series of events which starts with the registration of voters, the voting process, the counting and the announcement of the results. It is impossible to separate the voting process from the counting exercise. Counting is what gives meaning to the voting process. It is what makes it possible to determine the results of an election. I have no doubt in my mind that counting of votes is part and parcel of proceedings in a polling station and that where necessary, it can be transferred to another polling station or public facility within the same constituency.

72. Having said so, I am alive to the fact that Mr. Wameyo contended that the transfer of the counting of votes to the tallying centre is unconstitutional and violates the provisions of **Article 86(b)** of the constitution. This Article provides that;

***“86 At every election, the Independent Electoral and Boundaries Commisison shall ensure that-***

***(a).....***

***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;”***

73. I am thus called upon to determine the constitutionality or otherwise of the action of the Presiding officers to transfer the counting of votes to the tallying centre. To so do, I am aware that

the task at hand demands me to look at the various cardinal principles used in the interpretation of the Constitution. The starting point is **Article 259(1)** of the Constitution which has set those principles. This Article emphatically states that;

***“This Constitution shall be interpreted in a manner that;***

- a. ***promotes its purposes, values and principles;***
- b. ***advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
- c. ***permits the development of the law; and***
- d. ***contributes to good governance.”***

74. The High Court in ***John Harun Mwau & 3 others vs Attorney General and 2 others, Petition No.65 of 2011***, recognized these principles and added that while interpreting the Constitution, the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion. And that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism” and further that the entire Constitution has to be read as an integrated whole so that no one particular provision destroys the other but each sustains the other. This is what is now commonly referred to as the harmonization principle.

75. These principles as set by the High Court were adopted by the Court of Appeal in the case of ***Centre for Rights Education and Awareness and Another vs John Harun Mwau & 6 others, Civil Appeal No.74 of 82 of 2012*** where the court stated *inter-alia* that;

***“...These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result-meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise....”***

76. Having these principles in mind, I now embark on the task of interpreting **Article 86** of the Constitution to establish whether the transfer of vote counting from polling stations was in fact unconstitutional.

I think it is important at this point to reproduce **Article 86** of the Constitution in full so as to appreciate its true import.

**Article 86** states:-

***“At every election, the Independent Electoral and Boundaries Commission shall ensure that-***

***(a).....***

***(b) the votes cast are counted, tabulated and the results announced promptly by the***

*presiding officer at each polling station;*

*(a) promotes its purposes, values and principles;*

*(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*

*(c) permits the development of the law; and*

*(d) contributes to good governance.”*

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.

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 1<sup>st</sup> 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.

79. The purpose of Article 86 is to ensure that the values of transparency and accountability are observed in the conduct of elections. It seeks to embrace and enhance the national values and principles of good governance enunciated in **Article 10** of the **Constitution** which includes transparency and accountability. And unless there is evidence to prove that the decision to transfer ballot boxes to the tallying centre or to another polling station for counting of votes was made with an ulterior motive of manipulating or tempering with votes cast in order to favour the winning candidate to the disadvantage of the other candidates, the mere transfer of the counting process from polling stations to the tallying centre or from one polling station to another cannot affect the validity of results of an election.

80. In this case, the Petitioner has not adduced any evidence to prove that the election officials manipulated or tempered with the votes in the course of transporting them to the tallying centre.

It is not alleged nor proved that vote loss or stuffing of ballot boxes occurred during the transfer.

The Presiding Officers told the court that they decided to transfer the counting process to the tallying centre in view of the fact that night fall was approaching and they feared a repeat of the attack which had occurred at Chonyi at 9.00p.m.

I find this reason credible and practical in the circumstances of this case. It was prudent for the presiding officers to take precautionary measures to ensure the safety of the ballots already cast and to avoid the risk however minimal of disruption of the counting process which we all know more often than not takes place during the night. The action taken by the presiding officers was necessary in order to safeguard the integrity and credibility of the results.

In view of the foregoing, it is my conclusion and finding that the transfer of votes for counting to the tallying centre did not in this case amount to a violation of the constitution and that

it was done in the exercise of the Presiding Officers discretion donated by **Regulation 64** of the **Elections Regulations**.

c. **Chaotic and inefficient systems**

81. The Petitioner in paragraphs 26 and 27 of the Petition and in her supporting affidavit claimed that IEBC employed chaotic and inefficient systems in the conduct of the elections which was contrary to the constitutional principles enunciated under **Article 86(a)** of the Constitution. **Article 86(a)** requires that IEBC employs systems and methods which are simple, accurate, verifiable, accountable and transparent in the conduct of elections.

To further expound on this claim, the Petitioner alleged that Agents did not accompany ballot boxes to the tallying centre and that vote counting proceeded in the absence of candidates or their Agents; that agents were not given an opportunity to scrutinize the ballots or verify the results.

82. However, this claim appears to have been abandoned in the course of the hearing as no single piece of evidence was tendered by the Petitioner to prove that the elections in Kilifi South were chaotic or marred with any form of confusion. No witness was called by the petitioner to testify to prove this allegation.

DW2 testified that counting of votes was witnessed by Agents present at the tallying centre who verified the results and signed Form 35's.

I have looked at the Form 35's furnished to the court by the 3<sup>rd</sup> Respondent and I confirm that indeed majority of the Form 35's were signed by Agents. Infact 84 out of 96 forms had been signed by agents. The claim that IEBC did not allow Agents to scrutinize ballots and verify results cannot therefore be true. The Agents who signed the Forms must have participated in the counting process and must have verified the results.

83. If the Petitioner was genuine in her complaint that Agents were denied a chance to scrutinize and verify votes and that opaqueness in the counting and tabulation of results affected the credibility of the results, she ought to have pursued her prayer for scrutiny and recount of votes cast to enable the court ascertain the veracity of her claim that lack of efficient systems, transparency and accountability in the tallying process affected the accuracy hence the validity of the results.

Having established that a majority of Forms 35 were actually signed by Agents and there being no evidence to prove that systems used to conduct the election were chaotic and inefficient, it is my finding that the Petitioner has failed to prove that the election was not conducted in a simple accountable, verifiable, transparent and efficient manner as required by the constitution.

d. **Omission of candidates preferred names in the Ballot Paper**

84. It was Mr. Wameyo's submission that an election is a citizen's right, and that candidates in an election must be presented in a manner that is easily identifiable by the voters: that candidates in an election have the right to demand that their names be printed in the ballot papers as they are popularly known by the voters.

He argued that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents having issued the candidates with nomination certificates that bore their preferred names, they ought to have printed the ballot papers using the same names. It was thus his contention that the failure to do so caused confusion since some of the voters could not identify their candidates on the ballot papers.

PW6, Richard Chonga Kiti was aggrieved with the failure to include his alias name "**Ken**

**Chonga**” in the ballot paper whereas PW11 Nicholas Mrima was aggrieved with the failure to include the names **“Wanyepe”** on the ballot paper since they were their preferred names.

85. Though the correctness or otherwise in the names of any of the 16 candidates as printed in the ballot paper was not one of the grounds in the Petition, considerable time and effort was used by the Petitioner to prove that the preferred names of Mr. Chonga and Mr. Mrima were omitted from the ballot papers and that this amounted to an irregularity on the part of the Respondents. And though I am aware of the legal principle that parties are bound by their pleadings, I will briefly deal with the issue since, in my view, it would be inappropriate to leave it unresolved.

86. I will start by concurring with Mr. Buti’s submission that although PW6 and PW11 were candidates in the race for Member of Parliament for Kilifi South, in this Petition they are just witnesses and they cannot purport to seek the nullification of the 1<sup>st</sup> Respondent’s election on ground that their preferred names were omitted from the ballot paper when that ground is not part of the pleadings in the petition.

Secondly, it is difficult to see how the candidates could have been disadvantaged by the exclusion of their preferred names from the ballot paper especially PW6 because in the campaign posters he annexed to his affidavit, it is clear that he was using both his official names and his alias name of Ken Chonga in his campaigns. Besides, the candidate’s photographs and party symbols must have appeared in the ballot papers and voters including illiterate voters could have easily identified them using their photographs and party symbols if they did not know them by their official names.

87. Thirdly and most importantly, the High Court has had occasion to rule on a similar matter in the case of **RASHID HAMID AHMED AMANA V IEBC & 2 OTHERS, MALINDI PETITION NO. 6 OF 2013** where Kimaru J held that ballot papers can only be printed using the official names appearing in the documents used to identify a candidate as a Kenyan citizen namely identify card, Kenyan passport and voters card. I am in full agreement with J. Kimaru’s interpretation of the law on this matter and I have nothing useful to add.

It is therefore irrelevant and of no consequence that the 2<sup>nd</sup> Respondent had issued the two candidates with IEBC’s nomination certificates bearing their preferred names. IEBC was duty bound to follow the law and it could not have printed ballot papers using names which were not included in the candidate’s official identification documents or voter’s card.

If these two candidates wanted their preferred names to appear in the ballot paper, they ought to have changed their official names to include their preferred names through a deed poll. I will say no more on this matter.

e. **Was the 1<sup>st</sup> Respondent validly elected as the Member of National Assembly for Kilifi South.**

88. My evaluation of all the evidence presented by the petitioner in this petition leaves me with no doubt that the disputed election was conducted and supervised by the 3<sup>rd</sup> Respondent in a manner that substantially complied with the constitution and the law and in a manner that was free, fair and transparent. I am satisfied that the results of the election reflected the free choice and will of the people of Kilifi South. Any irregularities that may have occurred in the conduct of the election were insignificant and could not have altered the outcome.

It is therefore my decision that the 1<sup>st</sup> Respondent was duly and validly elected as the Member of National Assembly for Kilifi South Constituency.

In the premises, I find that the Petition lodged by the Petitioner herein lacks merit and it is hereby dismissed.

89. On the issue of costs, it is trite that costs follow the event.

This court will award costs of the petition to the Respondents. Under **Rule 36(1)** of the **Elections (Parliamentary and County Elections) Petition Rules 2013**, the court is empowered to cap the costs payable in an election petition.

Taking into account the input, level of research and effort made by each of the parties in the course of the hearing as well as the number of days taken to conclude the hearing, the costs are capped at a maximum of Kshs 2.5 million. Kshs 1.5 million will be shared by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents while the 1<sup>st</sup> Respondent's costs will not exceed Kshs.1 million.

The security deposit made by the Petitioner will be retained by the court pending taxation of the bills of costs by the Deputy Registrar. It is so ordered.

90. Finally, I would be remiss if I did not conclude this judgment by expressing my sincere gratitude to all counsel appearing in this Petition namely Mr. Wameyo, Mr. Buti and Mr. Sigei for their cooperation, their industry and able presentation of their respective client's cases. Their assistance in the eloquent articulation of issues raised in this Petition greatly enriched this judgment. I also commend my legal researcher Carolene Kituku, my secretary Leonidah Nyaboke and court clerk Caroline Kadaga and other members of staff

at the High Court in Malindi for their support in facilitating the speedy hearing and determination of this Petition.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at MALINDI this 12<sup>th</sup> day of September 2013**

**In the presence of:-**

**Mr. Wameyo instructed by Wameyo Onyango & Associates for the Petitioner**

**Mr. Paul Buti for the 1<sup>st</sup> Respondent**

**Mr. Sigei instructed by Sigei & Associates for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

**C. W. GITHUA**

**JUDGE**