



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELECTION PETITION NO. 3 OF 2013

PETER GICHUKI KING'ARA.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JAMES MBAI.....2ND RESPONDENT

MARY WAMBUI MUNENE.....3RD RESPONDENT

JUDGMENT

Peter Gichuki King'ara, the Petitioner herein, contested for the seat of member of National Assembly for Othaya constituency in the general elections held on 4th March, 2013. The race for this seat attracted eight other contestants out of whom Mary Wambui Munene, the 3rd Respondent herein emerged the winner and was so declared by the Independent Electoral and Boundaries Commission (the Commission), the 1st Respondent herein vide a special issue of the Kenya Gazette, that is, Gazette Notice No. 3155 of 13th March, 2013. The Returning Officer who was responsible for conduct of the elections in Othaya constituency is the 2nd Respondent herein.

According to the declared election results for the member of National Assembly for the Othaya constituency, voters in that electoral area voted for each of their favourite candidate as follows:

<u>CANDIDATE</u>	<u>VOTES</u>
David K Waititu	112
David Ringaru Gichane	395
Emilio Kibui Mwangi	162

Esau Kihumba Kioni	755
Gerald Warogo Mwangi	65
James Gichuki Mugambi	10,972
Peter Gichuki King'ara	14,218
Joshua Mwangi Mugo	616
Mary Wambui Munene	16,285

The Petitioner was not satisfied with the electoral process and generally the conduct of the Respondents, jointly and severally, before and during the election period and being so aggrieved, he filed this petition on the 8th April, 2013, to challenge the outcome of the results for the election of the member of National Assembly for Othaya constituency. He was represented in this Petition by Mr Kyalo Mbobu, Mr Kithinji Marete and Ms Carol Kimere.

The 1st Respondent is sued in its capacity as the body responsible for conducting or supervising elections to any elective body, including the National Assembly pursuant to its mandate under **Article 88 (1) and (4) of the Constitution. Rule 9 of the Elections (County and Parliamentary Elections) Petition Rules 2013 (the Elections Petition Rules)** also requires that in a Petition such as this the Commission must be sued. The 2nd Respondent has been joined to this Petition as an agent appointed by the Commission under **Regulation 4(1) of the Elections (General) Regulations, 2012 (the Elections Regulations)**, to conduct the elections in issue, in Othaya constituency. As the declared winner of what the Petitioner considers to be a flawed election, the 3rd Respondent has of necessity been sued to respond to the adverse comments not only against her as a person but also against her election as the member of National Assembly for Othaya constituency. The 1st and 2nd Respondents were represented Mr Peter Munge while Mr Cecil Miller, Mr Peter Wena and Mrs Pauline McAsila represented the 3rd Respondent in the Petition.

The Petitioner has sought, in the main, an order for recount of the votes cast in the election of the member of National Assembly for Othaya constituency in the elections held on 4th March, 2013; he has also sought to be declared as the duly elected member of the National Assembly for Othaya constituency in the elections held on 4th March, 2013 and he has asked this court to certify him as such and inform the Speaker of the National Assembly accordingly. In the alternative, he wants the court to find that the Commission failed and/or neglected to inquire whether the 3rd Respondent was eligible to contest as a candidate to the office of member of National Assembly; that the 1st and 2nd Respondents jointly or severally abetted election offences in the course of the election for member of National Assembly for Othaya constituency; that the election of the member of the National Assembly for Othaya constituency was not free and fair but was vitiated by illegalities; and finally an order do issue on whether fresh elections to the office of the member of National Assembly for Othaya constituency should be held or not. The Petitioner also wants the Respondents to pay the costs of the petition herein.

In support of his Petition, the Petitioner filed an affidavit sworn by himself on 26th March, 2013. Pursuant to **Rule 12(1) of the Elections Petition Rules** the Petitioner also filed twenty two witness affidavits sworn on 26th March, 2013 by witnesses he intended to call at the trial. Indeed all those witnesses except one were called to testify. The witnesses' affidavits were filed contemporaneously with the petition on 8th April, 2013. In the Petition, the Petitioner has listed several grounds upon which his Petition is hinged. In summary these grounds are that:

- a. The Petitioner offered himself and was indeed eligible to contest for election as a member of National Assembly for Othaya constituency in the 4th March, 2013 general elections on the Grand National Union party ticket;

- b. It was the legitimate expectation of the Petitioner and the electorate in Othaya constituency that the elections would be conducted in accordance with the letter and the spirit of the Constitution, the Elections Act and the Regulations made thereunder and ultimately the results thereof would represent the democratic will of the electorate in that constituency;
- c. The 4th March, 2013 elections were held against the background of a redesigned electoral system and legislation in the wake of the new constitutional dispensation thereby raising the expectations of the electorate of a more fair election;
- d. Contrary to the expectations of the electorate in Othaya constituency, the 1st and 2nd Respondents conducted the elections in disregard of the provisions of the Constitution, the Elections Act and the Regulations thereunder thereby rendering the results thereof inaccurate and invalid;
- e. The 1st and 2nd Respondents abdicated their constitutional mandate to conduct the elections as by law established leaving the electoral process open to malpractice and inaccuracies rendering the outcome thereof shambolic;
- f. The office of the member of the National Assembly being an elective office must be held by a person whose election must not only be verifiable but is also accurate; and finally,
- g. It is the duty of this honourable court to interrogate the conduct of the elections in issue to uphold the Constitution, the electoral law and more importantly, the democratic will of the people of Othaya constituency.

The Petition is brought under the **Constitution**, the **Independent Electoral and Boundaries Commission Act, No. 9 of 2011**, the **Elections Act, No. 24 of 2011** and the **Regulations** made thereunder.

The factual background of the Petitioner's case constitutes a raft of accusations levelled against the Respondents, jointly and severally; these accusations range from blatant failure to comply with and enforce the electoral laws to erroneous counting and tallying of votes.

To begin with, the 1st Respondent has been faulted for its failure to inquire into the eligibility of the 3rd Respondent as a candidate to an elective office, in this case the office of the member of National Assembly. According to the Petitioner, the 3rd Respondent's eligibility to contest for a parliamentary seat is an issue that was a subject for determination in the **Nairobi High Court Constitutional Petition No. 549 of 2012, Michael Wachira Nderitu & 3 Others versus Mary Wambui Munene & 2 Others** in which some constituents of Othaya constituency petitioned the court and questioned her eligibility to contest for the constituency's parliamentary seat in the 4th March, 2013 general elections. The pleadings and the ruling of the court in that constitutional petition are marked as **exhibit "PGK 3"** on the affidavit of the Petitioner sworn in support of the petition. In the petitioners' view, which view is shared by the Petitioner in this petition, the 3rd Respondent was ineligible to contest for this seat since her integrity, leadership and educational qualifications were not only wanting but were also short of the threshold set in **Chapter 6 of the Constitution**.

To back the Petitioner's allegations on 3rd Respondent's integrity, the Petitioner attached to his affidavit two reports in which the 3rd Respondent is alleged to have been adversely mentioned. One of the Reports which is titled "**On the brink of precipice: A human rights account of Kenya's post 2007 election violence**" authored by the **Kenya Human Rights and Equality Commission** previously referred to as the **National Commission on Human Rights** cites the 3rd Respondent as a person who organised financing and importation of arms to Kenya during the violence that rocked the country in 2007 and 2008. The second report on which the Petitioner has based his claim is a report by the **Joint Session of the Departmental Committees on Administration, National Security and Local Authorities, and Administration of Justice and Legal Affairs** of the ninth parliament. This report was on the investigation into the conduct of the "Artur Brothers" and their associates. The so-called "Artur Brothers"

were foreigners of Armenian origin whose presence in Kenya was said to be part of a conspiracy to commit atrocities in the country yet they are claimed to have enjoyed protection at the highest levels of government. From the documents filed by the Petitioner, it appears that the Joint Session of the two parliamentary committees adopted the report on 20th September, 2007. The Petitioner claims that the 3rd Respondent is said to have been an associate of the two mercenaries and was recommended for investigation in the parliamentary report.

In the Petitioner's view, since the Constitutional Court held that it was the 1st Respondent's responsibility to inquire into allegations raised against the 3rd Respondent, the 1st Respondent's apparent failure to conduct such an enquiry prior to clearing her to contest for the parliamentary seat in issue was in breach of the provisions of the **Independent Electoral and Boundaries Commission Act, 2011**, the **Elections Act and the Political Parties Act, 2011** and thereby rendering the 3rd Respondent's candidature illegal and unprocedural.

Apart from the question of the 3rd Respondent's eligibility, the Petitioner has also taken issue with the 1st Respondent's alleged failure to issue directives on several aspects of the electoral process in Othaya constituency including; the Petitioner's access to the electorate and the electorates' access to polling stations; use of public resources in the political campaigns and the participation in those campaigns by the then Member of Parliament for Othaya constituency who also happened to have been the out-going President of the Republic of Kenya, Honourable Mwai Kibaki. The then President's security detail obstructed, so the Petitioner alleges, the Petitioner and his supporters from accessing the venues the President visited including public funded development projects' sites during the campaigns. Of the nine candidates contesting for the Othaya parliamentary seat, only one candidate accompanied the President in his tour of the constituency and addressed the President's political gatherings. The Petitioner also contends that on the 4th March, 2013, the then President made an impromptu tour of the constituency and as a security measure, various roads leading to and out of Othaya constituency were inaccessible to the electorate and thereby disenfranchising them. The ultimate result of the then President's conduct was to tilt the electoral ground in favour of one candidate who, in the Petitioner's view, was erroneously presented to the electorate in Othaya constituency as the only development minded candidate amongst a host of other candidates contesting for the Othaya constituency parliamentary seat.

To prove the allegations of inaccessibility and bias, the Petitioner's 3rd witness, **Lucy Njeri (PW3)** captured a video footage in which, it is alleged, parliamentary candidates including the 3rd Respondent herein were seen being barred from accessing Othaya Boys High School where the then President held a public function on 14th February, 2013. This witness said that she misplaced the footage but managed to download a similar one from the internet; this footage is contained in a flash disk marked as **exhibit "LN1"** on her affidavit sworn in support of the Petition.

Apart from failing to control the then President's movements prior to and on the voting day, or as the Petitioner has put it, failing to issue directives regulating such movements, the 1st Respondent is also accused of failing to investigate publication or circulation of what the Petitioner has described as negative propaganda and defamatory leaflets. The Petitioner has alleged that the leaflets, a copy of which is attached to his affidavit and marked as exhibit **"PGK 4"**, depicted his party, the Grand National Union (GNU), as an affiliate of the Coalition for Reform and Democracy (CORD) which was unpopular party in Othaya constituency. These innuendoes which, according to the Petitioner, were also propagated by the 3rd Respondent impacted negatively on his candidature. The Petitioner asserts that it was the 1st Respondent's responsibility, but in which it failed, to bring to book the authors of such leaflets and publications since their conduct was in breach of the Elections Act and the Code of Conduct of Elections to which all the candidates had subscribed.

In his Petition, the Petitioner also alleges that the 3rd Respondent and her agents bribed voters in Mahiga Ward in Othaya constituency on the eve of 4th March, 2013 and also on the polling day; despite the Petitioner's protest to the 2nd Respondent no action was ever taken and that in itself compromised the integrity of the electoral process.

The 1st and 2nd Respondents are alleged to have failed to secure several polling stations and their environs and thereby allowing the 3rd Respondent's agents within the prescribed four hundred metres radius of the polling station to bribe voters at those polling stations. In his evidence, **Mr Francis Mwangi Thuita (PW4)** claimed that his agent at Rukira Polytechnic polling station informed him that voters were being bribed at the station and indeed when he proceeded to the station, he saw what he claims to be the 3rd Respondent's vehicle parked outside the polling station. Mr Thuita claims to have seen one **Dr Ngatia (3RW3)** dishing out money to voters apparently to lure them to vote for the 3rd Respondent. The said Dr Ngatia is said to have proceeded to Kagonye Primary School polling station on the same mission after he had been spotted by this witness.

Similar allegations of bribery against the 3rd Respondent were made by **Rhoda Nyawira Maina** who testified as the 11th witness for the Petitioner (**PW11**). Rhoda was the Petitioner's chief agent at Early Childhood Development (ECD) polling station in Iria-ini ward; Rhoda saw two people whom she identified as **Dr Maina Kiragu (3RW4)** and **Muthoni Ngige (3RW2)** who allegedly bribed voters on behalf of the 3rd Respondent at the polling station. Apart from taking their photographs which she annexed and marked as **exhibits "RNM2 (a)"** and **"(b)"** on her affidavit in support of the Petition, Rhoda testified that she reported the incident to the presiding officer but no action was taken; she had reason to believe that the presiding officer had been compromised because he was seen interacting with the same people who had been seen bribing voters.

Bribery incidents are also reported to have taken place in Karima ward of Othaya constituency; the Petitioner's party chief agent in the ward **Godfrey Githogori Nderitu (PW12)** stated in his evidence that he saw certain people whom he identified as Samuel Wanjau, Esther Wakaria Mwangi and Kanyi wa Kabachi who were either buying voters' cards including identification cards or bribing voters at Gatugi Primary and Secondary Schools polling stations. In Kairia Primary School polling centre, **Esther Njeri Ndonga (PW18)**, the Petitioner's agent at the centre alleged that one Nyambura Apollo bribed voters; she also alleged that one Ritho bribed voters on behalf of the 3rd Respondent. Just like it was in Mahiga ward, it is alleged that no presiding officer ever took any action on these bribery or vote buying allegations.

On the question of appointment of polling clerks, the Petitioner claims that the list of persons appointed as polling clerks ought to have been made available within fourteen days of the date of their appointment and such list was indeed provided before the polling day; however, on the eve of the elections date, new polling clerks and presiding officers who the Petitioner alleges were never trained to undertake the enormous task of conducting the elections were appointed without any notice to the political parties in the contest including the Petitioner's GNU party. Inevitably, so the Petitioner alleges, the said clerks and presiding officers mismanaged the elections on the polling day. The Petitioner also claims that though he requested the 2nd Respondent to supply him with a list of all presiding officers and their deputies, the respondent did not provide the list until he was threatened with a court action. The list, a copy of which is attached to the Petitioner's affidavit in support of the Petition and marked as exhibit **"PGK 5"** was given to the Petitioner on 20th March, 2013.

The Petitioner has also complained of the 1st and 2nd Respondent's unilateral decision to relocate certain polling stations from centres gazetted and publicized as required by **Regulation 7** of the **Elections Regulations**. The case in point is Witima Health Centre which was duly gazetted but relocated on the polling day to Unjiru Community Hall that the Petitioner claims was never gazetted as a polling centre. As a result of the transfer of the polling centre, the Petitioner alleges that many voters were disenfranchised since they were not aware of where the centre had been relocated to; according to him the 1st and 2nd Respondents never took any steps to direct the voters to the alternative voting venue. Coupled with this unilateral relocation of the polling station was the danger of insecurity of the polling materials in the course of their movement from Witima Health Centre to Unjiru Community Hall; the Petitioner suggests that he was vindicated when ballot papers ran out in the course of voting at the new polling station. The Petitioner's case in this regard was supported by the evidence of **Eustace Maina Nderitu (PW16)** and **Agnès Musangi Mwangi (PW23)** both of whom swore affidavits in support of the Petition. According to the Petitioner, failure to supply enough ballot papers was contrary to **Regulation 61 (1) of**

the Elections Regulations which enjoins the 1st and 2nd Respondents to provide each polling station with such a number of ballot boxes and papers necessary for conduct of elections; by disregarding this Regulation the Respondents undermined the validity of the elections at Unjiru Community Hall polling station.

In further alleged contravention of the **Elections Act** and the regulations made thereunder, the 2nd Respondent is said to have failed to issue identification badges to the Petitioner's agents in specified polling stations and thereby hampering their duties and responsibilities as political party agents. For example, they were not provided with the serial numbers of the ballot boxes and papers used in the elections; the presiding officers assisted voters who required assistance to cast their votes in the absence of the parties' agents contrary to provisions of **Regulation 72(2) of the Elections Regulations** and two polling stations, that is, Kamoko Primary School and Kamoko Tea Buying Centre were closed after the official closing time which was 5.00 p.m. One of the Petitioner's witnesses, **Elijah Nderitu Muita (PW10)** who was the Petitioner's agent at Thokoini Tea Buying centre polling station said he witnessed the presiding officer and the 3rd Respondent's agents assisting voters who required assistance to the exclusion of the rest of party agents. Similar allegations were raised by **Luka Kiminda Thuita (PW9)** in respect of Kiinu Primary School polling station. **Margaret Kabura Ndegwa (PW14)** who described herself as Petitioner's campaigner in Karima ward raised similar allegations against the presiding officer at Irindi Primary School polling station. Similar incidents are alleged to have been witnessed at Wagura Primary School by **Esau Kihumba Kioni (PW7)** who contested for the same seat as the Petitioner but on a Democratic Party of Kenya party ticket. The Petitioner claims the 1st Respondent's failures and omissions in this regard were also contrary to the "Elections Agents Training Notes" published and distributed by the 1st Respondent for use by political parties' agents. A copy of this manual is attached to the Petitioner's affidavit in support of the Petition and marked as **exhibit "PGK 6"**.

The Petitioner's chief agent in Chinga Ward, **Stephen Muito Muruthi**, who testified as the 2nd Petitioner Witness (**PW2**) swore an affidavit in support of the Petition in which he enumerated instances of inaccessibility of the Petitioner's agents to the polling halls until he personally intervened. For example, at Kariko Secondary School, the Petitioner's agent, one John Gacau, was simply asked by the presiding officer to observe the voting exercise from outside the polling hall for the reason that there was not sufficient space to accommodate him in the hall. This witness testified that in stations like Kiaguthu Youth Polytechnic, Karuthi Tea Buying Centre, Gichami Primary School, Mucharage Primary School and Ngaru Primary School, GNU's agents were barred from accessing the voting rooms or halls yet they had the necessary identification credentials. The agents were later allowed into the polling halls after this witness' personal intervention.

Similar evidence was given by the Petitioner's chief agent in charge of Mahiga ward in Othaya Constituency, **Mr Francis Mwangi Thuita (PW4)**. Just like **Stephen Muito Muruthi (PW2)** who was moving from one polling station to another when he was called and informed by GNU party agents that they had been barred from accessing polling halls, Mr Thuita swore that the party agents in Mahiga ward raised the same problems with him while on tour of the ward he was in charge of. The solution to the problems of accessibility assumed the same trend; the agents would be allowed in the polling halls after the intervention of the chief agent. The polling stations in issue in Mahiga ward were Rukira polytechnic, Kirai Primary School, Kamoko Primary School, and Kina Tea Buying Centre. At Kiganjo Tea Buying Centre, the GNU's party agent is alleged to have been denied participation in the vote counting exercise.

When it came to counting of votes, the Petitioner felt short-changed because his votes, so he claims, may have been given to his competitor, James Gichuki Mugambi with whom he shares his middle name, "Gichuki". According to the Petitioner although it was the duty of the presiding officers to read the full name of a candidate and display each ballot to the agents present to ascertain in whose favour the ballot had been cast, the presiding officers only called out the name "Gichuki" and without the display of the ballot, it was not clear who between Peter Gichuki King'ara and James Gichuki Mugambi was a beneficiary of such a vote. The Petitioner alleged in his affidavit that his agents' request for a recount because of this confusion was not only ignored but that his agents were threatened with expulsion from the polling rooms if they insisted on a recount. **Luka Kiminda Thuita (PW9)** in his evidence swore that

no verification of the names was done at Kiinu Primary School where he was an agent for Petitioner's GNU party. Similarly, at Kairia Primary School polling centre, the Petitioner's agent **Esther Ndori Ndonga (PW18)** alleged that the ballots were never displayed to the party agents. At Thokoini Tea buying centre polling station the party's agent **Elijah Nderitu Muita (PW10)** alleged that folded ballots were handed over to 3rd Respondent's agent apparently without verification whether such ballots had been cast in her favour. It is alleged that the 1st and 2nd Respondents' conduct in this regard was allegedly systematically orchestrated throughout Othaya constituency for the sole benefit of the 3rd Respondent.

The vote count itself was neither properly recorded in Form 35 nor was that form given to the Petitioner's agents, so the Petitioner alleges. Thus out of the 112 polling stations in Othaya constituency, the Petitioner's agents did not sign the forms in 90 of those stations since they were neither given the opportunity to sign nor state their reasons for refusal to sign. In five polling stations in particular, that is, Kihome Primary School, Kianguru Tea Buying Centre, Thunguri Primary School and Kianjwe Tea Buying Centre, it is alleged that none of the party agents present was allowed to sign Form 35. **Peter Mureithi (PW13)** who was the Petitioner's agent at Kagumo Primary School polling station that was later relocated to Kagumo Catholic Church stated that though all the agents at the station signed Forms 35 none was issued to any of them. At Thokoini Tea Buying Centre, the Petitioner's agent there, **Elijah Nderitu Muita (PW10)** alleged that he could not verify or confirm the ballot papers since he apparently did not participate in the counting exercise. Again those forms were also not displayed at the polling stations as is required under the law. **Mr Francis Mwangi Thuita (PW3)** claims that in a post-election meeting he convened on 6th March, 2013 it was found that none of GNU's party agents had been given Form 35 in any of the polling stations. This witness alleged that it was also established that in none of polling stations except the precincts of Kihome Primary School was Form 35 displayed. The presiding officers are also accused of not placing the Form 35 in the ballot boxes which the Petitioner alleges were ultimately transported and delivered to the tallying centre without being accompanied by any of the Petitioner's agents.

The seals with which those ballot boxes are said to have been sealed at the time of their delivery to the tallying centre are alleged to have been tampered with and markedly different from those issued by the 1st Respondent. The Petitioner's suspicions were backed by one of his agents, **Francis Mwangi Thuita (PW3)**, who found an assortment of 23 used and unused pieces of ballot box seals discarded at Kagere Primary School polling station. In his evidence Mr Thuita said that the seals were from Kenyatta High School (Mahiga) polling station. These seals were marked as **exhibit "FMT 1"** on his affidavit which he swore in support of the Petition. According to the Petitioner, there is no doubt that those seals belonged to the 1st Respondent; 20 of those seals had been used and only 3 had not been used. In another instance, **Elijah Nderitu Muita (PW10)** stated that the boxes from Thokoini Tea buying centre polling station were not sealed at the station prior to their transportation to the tallying centre. Similar allegations were raised by **Cyrus Maingi Gichimu (PW15)** the Petitioner's agent at Kianguru Tea Buying Centre polling station.

In his evidence- in- chief, **Stephen Muito Muruthi (PW2)** said that the GNU's agents at Mumbuini Primary School polling station were not issued with Form 35 and they could also not be allowed to accompany the ballot boxes to the tallying centre; although according to the presiding officer, there was limited space in the van ferrying the ballot boxes, the witness alleged that the agents of the 3rd Respondent's party travelled in the same van. **Francis Mwangi Thuita (PW4)** also raised the same concerns in his evidence- in- chief; in particular the witness identified Kiganjo Tea Buying Centre as a station where his agent, one Patrick Wanjohi was not only barred from participating in the counting exercise but he was also excluded from those accompanying the ballot boxes to the tallying centre.

The integrity of the results from the respective polling stations was also allegedly clouded in doubt because the presiding officers did not transmit the results in electronic form; in the Petitioner's view, this failure compromised the integrity of the results as provided for under the Elections Act and in the face of such omission, it was not possible to establish whether the results announced at the tallying centre were the same results that had been received from the polling stations.

According to the Petitioner, the tallying discrepancies were noted in Forms 35 and Forms 36; the Petitioner identified several polling stations where the number of votes cast in his favour and duly entered in the Form 35 was at variance with the number entered in his favour in Form 36. Apart from the variations in the number of votes garnered by the Petitioner in Forms 35 and 36, the Petitioner also identified other discrepancies in several polling stations which, in his view, brought into disrepute the entire tallying process. For example, in five of the polling stations the total number of votes cast is alleged to have been more than the number of the registered voters; these stations were Gatugi Primary School, Mahiga Primary School, Iriaini Primary School, Gatugi Secondary School (Stream I) and Kagundu Tea Buying Centre. In the Petitioner's view, the 2nd Respondent ought not to have announced the results from those polling stations in view of **Regulation 83(1) (a)** of the **Elections Regulations** which bars a returning officer from announcing results from a polling station where he finds the total valid votes in that station exceeds the number of the registered voters.

Other discrepancies alleged to have been identified include understatement of the Petitioner's results in Form 36 as compared to those declared in Form 35; this was the case in Gituiga Primary School, where though the Petitioner got 43 votes none was credited to him in form 36; Kagumo Primary School, Kagundu Tea Buying Centre and Mucharage Primary School. At Kagundu Tea Buying Centre, the Petitioner garnered 76 votes and the 3rd Respondent 30 votes yet Form 36 showed that he did not get any vote while the 3rd Respondent was credited with 75 votes; at Mucharage Primary School, where the Petitioner was credited with only one vote in Form 36 when he in fact garnered 365 votes. In other cases the total number of votes cast for each candidate differed from the total number of valid votes cast in 15 polling stations; the total number of votes cast differed in Form 35 and Form 36 in 92 polling stations and; the total number of rejected votes indicated in Form 35 is different from that indicated in Form 36 in 9 polling stations. To back his case the Petitioner obtained a copy of Form 36 from the 2nd Respondent on 7th March, 2013 and he has attached and marked it as **exhibit "PGK2"** on his affidavit in support of the Petition. The Petitioner also obtained from the 2nd Respondent copies of Forms 35 from all the polling stations on 19th March, 2013 and these copies are marked as **exhibit "PGK 7"** on the affidavit of the Petitioner in support of the Petition herein.

One of the polling stations that seems to have elicited a lot of interest from Petitioner and many of his agents who testified in court is Rukira Primary School polling station. This polling station was, to a great extent, the focus of allegations of electoral malpractices and irregularities including alleged use of unmarked ballot boxes; use ballot boxes and seals that appeared different from the rest of the boxes and seals; interferences with the ballot boxes and their seals; omissions of Forms 35 on the ballot boxes and irregular delivery and announcement of results at the tallying centre.

This station dominated **Mr Stephen Muito Muruthi's (PW2's)** evidence as a station whose ballot boxes were delivered at the tallying centre in unclear circumstances and whose results are said to have been announced even before the ballot boxes and Form 35 were presented to the returning officer. According to Mr Muruthi's evidence, poll results from this station were announced at least twice without the presiding officer having presented Form 35 which contained the results that ought to have been announced. This witness said in his evidence in chief that despite the results of Rukira Primary School polling station having been announced by the returning officer, he identified the ballot boxes from this station at the reception desk of the tallying centre together with other three sets of unmarked ballot boxes. The unmarked ballot boxes' seals appeared different in their features from those seals ordinarily used by the 1st Respondent.

According to Mr Muruthi, even after the 2nd Respondent had announced the poll results from Rukira Primary School polling station, he saw the presiding officer from that station attempting to present the ballot boxes and brown A4 envelopes containing results for Rukira Primary School. In his own words, the witness confronted the presiding officer and after warning him against his attempts to deliver the results, the presiding officer left the hall. However, the officer is alleged to have gained entry into the hall through an alternative entrance and handed over the A4 envelopes to the 1st Respondent's officers who allegedly passed them over to a Mr Maina. Although the witness says he complained to the 2nd

Respondent of the presiding officer's conduct, the Respondent never took any action but instead proceeded to announce results from Rukira Primary School polling station for the third time. The witness contended that he later on lodged a formal complaint to the 2nd Respondent, a copy of which is marked as **exhibit "SMM 1"** on his affidavit in support of the Petition.

Francis Mwangi Thuita (PW4) described the same events a bit differently. From his evidence in chief, it is apparent that this witness was strategically seated at the front of the hall to monitor the arrival of ballot boxes and also the activities at the podium where the tallying process was being conducted. According to Mr Thuita, four ballot boxes were brought in by a man described as wearing a black suit but without the 1st Respondent's badge or reflective identification jacket. The ballot boxes are alleged to have been different from the rest of the boxes and did not bear any seals and the suspicious man behind them declined to identify himself or present any identification credentials. This man is claimed to have whipped three size A4 envelopes from his jacket and quickly handed them over to the Deputy Returning Officer who mixed them up with the rest of the results. This witness claimed that it is the 2nd Respondent who came to the rescue of the unidentified man from the apparently agitated crowd; the 2nd Respondent also marshalled the services of senior and other police officers present to have this witness and his colleagues leave the hall. They allegedly left to the back of the hall but were still keen to see where the suspect ballot boxes had been placed despite the efforts to mix them up with the rest of the boxes. Although the announcement of the results was temporarily stopped, it resumed afterwards and this witness left only after the final results had been announced.

Reference to these allegedly unmarked ballot boxes was also made by **Rhoda Nyawira Maina (PW11)** in her evidence in chief. The witness claims to have seen ballot boxes without Forms 35 at the tallying centre. The source of the ballot boxes is said to be unknown and that they bore unique seals and serial numbers. The witness took the pictures of the ballot boxes which she annexed to her affidavit and marked as **exhibit "RNM3"**; she also took photographs of the seals which she marked as **exhibit "RNM 4(a)" and "(b)"** on her affidavit. According to Rhoda Nyawira Maina, she together with **Mr Stephen Muito Muruthi (PW2)** reported the matter to the police and the 2nd Respondent who not only ignored them but the police are said to have also used violence to force them out of the tallying centre.

This witness also said that on 5th March, 2013, an unidentified man came to the tallying centre at around midday carrying several envelopes that were allegedly handed over to the tallying officers. The said man, so the witness contends, attempted to run away but was restrained from doing so. The man is said not to have had any form of identification. Apparently this is the same person that has been referred to by **Stephen Muito Muruthi (PW2)** and **Francis Mwangi Thuita (PW4)** in their evidence respectively. An additional angle in Nyawira's evidence with regard to this man, is that chaos erupted at the tallying centre because the man could not identify himself; the witness is categorical that agents of GNU party candidates confronted the 2nd Respondent and the rest of the 1st Respondent's officers because of what they suspected to be a deliberate attempt by the 1st and 2nd Respondents to influence the outcome of the election in favour of what the witness has described as 'their preferred candidate'.

The confrontation and chaos that erupted were captured on a video clip which has been annexed and marked as **exhibit "LN1"** on the affidavit of **Lucy Njeri (PW3)** sworn in support of the Petition. Referring to this incident, **Lucy Njeri (PW3)** who had been detailed by the Petitioner's secretariat to record such incidents on video or still cameras said that she left for the tallying centre at around 8.00 a.m. According to her evidence, there were ballot boxes at the centre without Forms 35 affixed on them and therefore it was difficult to tell from which polling station they had come. The seals on those ballots are said to have been "luminous green" and not green and the serial numbers were made up of four digits only instead of seven. Chaos, according to Lucy, erupted when a man accompanying the ballot boxes handed over two A4 envelopes to the 1st Respondents' officers who are said to have mixed them up with the rest of the documents at the table. This witness confirmed that the Petitioner's party agents demanded that the man identifies himself and explains the contents of the envelopes he handed over to the officers. The man is described as wearing a suit without any documentation to show that he was the 1st Respondent's official.

Yet another Petitioner's witness **Modesto Mugo Mwangi (PW8)** related the events at the tallying centre regarding the same person whose appearance in the hall is said to have been the source of the commotion. According to Mr Modesto, the man came into the hall carrying three different envelopes and proceeded beyond the cordoned area to the dais where the 2nd Respondent, his deputy and the 1st Respondent's clerks were seated; he reached for his jacket removed three envelopes which he handed to the 1st Respondent's clerk who in turn placed them on the tallying table. The witness asked the 2nd Respondent to halt the announcement of the results until such time that the man and the contents of the envelopes he was carrying had been identified. He later learned that the man was known as Mr Kariuki and in spite of lack of identification documents, the 2nd Respondent came to his rescue and asked the police to get the witness and his colleagues out of the hall. The witness claimed after being questioned the man admitted having been sent by the 3rd Respondent to bring the envelopes that he had handed over to the 1st Respondent's officers.

On his part, **Joseph Nderitu Muturi (PW5)**, the Petitioner's chief agent in Iria-ini ward concluded the varied versions of description of events surrounding the presentation of results from Rukira Primary School polling with his testimony that the man in question entered the tallying hall in a black suit with size A4 envelopes hidden in his jacket. This witness claims he together with those seated with him raised the alarm and the man was apprehended. The witness claims that he took the envelope from him and handed it over to the 1st Respondent's officials at the dais.

As a result of what the Petitioner claims to have been irregularities, inconsistencies in counting, the tallying of votes and filling of Forms 35 and 36 the Petitioner contends that the 2nd Respondent returned inaccurate results in respect of the election of the member of National Assembly for Othaya constituency. More so, the results declared by the 2st Respondent at the Othaya tallying centre as either votes cast, rejected or valid votes varied substantially with those declared by the 1st Respondent at the national tallying centre.

It is the Petitioner's case that given the discrepancies in the tallying of the votes cast, he is confident that if the votes can be scrutinized and tallied he would not only erase the margin of 2067 votes by which he was beaten by the 3rd Respondent, but he would also emerge as the candidate who garnered the most number of votes and therefore the rightful representative of the people of Othaya constituency in the National Assembly.

That is as far as the Petitioner's case went.

The Respondents opposed the Petition and in compliance with **Rules 14 and 15** of the **Elections Petition Rules** they filed and served upon the Petitioner's counsel their respective responses and affidavits of all those witnesses they intended to call and testify. Except where they expressly admitted certain errors or mistakes, they denied all the allegations in the Petition.

In their response, the 1st and 2nd Respondents have reiterated that, having garnered the highest number of votes amongst the candidates contesting for the seat of member of National Assembly for Othaya constituency in the elections of 4th March 2013, the 3rd Respondent was declared and returned as the duly elected member of the National Assembly for that particular constituency and was gazetted as such in the Kenya Gazette of 13th March, 2013. The gazette is attached to the affidavit of the Petitioner in support of the Petition and marked as exhibit **"PGK 1"**. These Respondents contend that the elections were conducted in accordance with the letter and the spirit of the **Constitution**, the **Elections Act** and the **Regulations** made thereunder. In particular, the 1st Respondent is said to have met the threshold set out in **Articles 88 (4) and 86** of the **Constitution** because the management of the electoral process was simple, accurate, verifiable, secure, accountable and transparent. In achieving these attributes, the 1st Respondent is alleged to have crafted a legal framework which was approved by parliament prior to the elections in issue; this framework consisted of, **the Elections (General) Regulations, 2012, the Elections (Rules of Procedure and Settlement of Disputes) Regulations, 2012** and the **Elections (Registration of Voters) Regulations 2012**. The 1st Respondent is also said to have designed and implemented internal integrity

and quality control mechanisms, including manual and electronic audit mechanisms for its election officers. This framework was subsequently adhered to in the ensuing elections and the results thereof were free, fair and credible.

As far as the eligibility of the 3rd Respondent to contest for the parliamentary seat is concerned, the Respondents contend that in clearing the 3rd Respondent to contest in the parliamentary elections, the provisions of **Chapter 6** of the **Constitution** on leadership and integrity were strictly upheld notwithstanding the **Nairobi High Court Constitutional Petition No. 549 of 2012** (supra) challenging her eligibility to contest for an elective public office. The Respondents thus never abdicated their responsibility under the law and are confident that they duly cleared the 3rd Respondent who ultimately successfully contested for the seat of member of National Assembly for Othaya constituency.

In answer to the issues raised about the conduct of the former President in Othaya constituency prior to and on the elections day, the 1st and 2nd Respondents' position is that there was nothing unusual about the former president touring a constituency for which he was the then Member of Parliament or being accompanied by heavy security detail while on such a tour; the state, so the respondents argue, has an obligation to ensure that its sitting president is secure at all times. The Respondents acknowledge that indeed the President visited various projects in Othaya constituency but that he did so in his official capacity as the Member of Parliament of that constituency and also as the President of the Republic of Kenya. As an independent non-partisan constitutional body, the 1st Respondent had nothing to do with the President's itinerary. In any event, if the movement of the former President in his constituency caused any inconveniences, then the 3rd Respondent was adversely affected as much as the Petitioner because she was even at one point barred from attending a function presided over by the President at Othaya Boys' High School. The Respondents also denied that all roads leading to and out of Othaya Constituency were blocked on 4th March 2013 as alleged by the Petitioner but admit that there was heavy security presence at Karima where the President cast his vote and for the reasons that such presence of heavy security would be expected wherever the President was. Accordingly, the presence of the President in his own constituency did not in any way disenfranchise the voters in Othaya constituency.

On allegations of voter bribery, the Respondents have not only denied that voters were bribed but it is also their case that there is no evidence or proof of such allegations.

The recruitment of the poll officials, so the Respondents contend, was an open exercise with various positions being advertised in the press and that only successful applicants were recruited and trained on the electoral exercise. In his evidence, the 2nd Respondent said that no objection was ever raised by any candidate including the Petitioner on recruitment of clerks. According to the 2nd Respondent, the successful applicants, including the presiding officers were trained on the electoral process which they competently handled in accordance with their training and the law.

The Respondents admit that some gazetted polling centres were relocated on the polling day but that these relocations were necessitated by unforeseen circumstances which were well beyond their control. However, such relocation could not have resulted in any disenfranchisement of voters because a station such as Witima Health Centre was relocated barely 30 meters away from the original gazetted centre; the poll officials also ensured that a notice for the information of the public of the alternative centre had been pinned at the appropriate place at Witima Health Centre. According to the Respondents, the voter turnout of 87% and 99% in the two respective streams for this centre was a demonstration enough that the relocation of this station could not have disenfranchised any voter who was intent on casting his vote. The allegations that election materials were exposed or insecure as a result of the relocation of the polling station are also baseless because once the poll officials were informed that Witima Health Centre was not available for the polling exercise they immediately set up the polling station at the alternative centre before polling commenced.

In his evidence, the 2nd Respondent confirmed that Unjiru Community Hall which was set as an alternative polling station to Witima Health Centre is right across the health centre and it was only resorted to because the sister-in-charge of Witima Health Centre had objected to the health centre's use as

a polling centre. Being close to Witima health centre, Unjiru Community Hall was easily accessible to any voter who showed up at Witima Health Centre and the eventual huge voter turnout demonstrated that the movement of the polling station could not have affected the voters in any way. In any event, no objection was raised or noted in Form 35 which was signed by all the agents present at the station including the Petitioner's agents. The signed Form 35 is annexed to the affidavit of the 2nd Respondent and is marked as **exhibit "JMM-3"**. The presiding officer at the station, **Jane Mumbi Muligu (RW3)** confirmed in her evidence that the station was relocated mainly because the use of the health centre as a polling station would have inconvenienced the patients at the centre. She said that she duly notified the agents of this transfer and an appropriate notice was put at the entrance of Witima health Centre redirecting voters to the new station. She also confirmed that since the objection to use the health centre was raised before the station was opened the issue of movement of

materials did not arise; she confirmed that she was supplied with adequate materials and in fact she was left with extra materials at the close of the polls.

The Petitioner's complaint on his agent's inaccessibility to polling halls for lack of identification badges has been explained by the Respondents as a problem of the agents' own making; according to the Respondents, more particularly the evidence of the 2nd Respondent (**RW5**), much as the badges were necessary, accessibility to polling stations was not restricted to those agents with badges only. The Respondents admit that the badges were inadequate but they have explained that due to this inadequacy, any agent who had taken the oath of secrecy or had an appointment letter from a political party was accorded an unconditional access to the polling station and to the best of the 2nd Respondent's recollection no objection or dispute was ever raised after his directive to the presiding officers over this issue. In the Respondent's view the Petitioner's complaint stemmed from his agents' claim for his agents' unlimited access to the polling stations yet the law required that only one agent of a particular political party would be allowed in a polling station at any one given time. The 2nd Respondent's evidence in this respect was supported by the evidence of **John Mathenge Macharia (RW2)** who was the presiding officer at Kairuthi Secondary School polling station. This witness confirmed that since badges for party agents were not available at the time of opening the polling station, he was instructed by the 2nd Respondent to admit those party agents who had taken the oath of secrecy and had a letter of appointment from their respective political parties; this he did and none of the agents who complied with these requirements was barred from accessing the polling centre or hall for lack of badges. According to the evidence of **Habel Rugu Kamau (RW1)**, the presiding officer of Mahiga Primary School, the same scenario was replicated at the station and party agents whose names are listed in a document marked as **exhibit "HRK-1"** were allowed in the station and polling halls on the basis of the oaths of secrecy documents and party letters of appointment.

It has also been denied that ballot boxes were neither sealed nor their serial numbers provided. The 2nd Respondent states in his evidence that he was aware the Presiding officers in the entire constituency of Othaya complied with the law and the instructions following the 1st Respondent's training on handling election materials including ballot boxes and seals and the elections generally. For example, at the commencement of the polling, the serial numbers of the ballot boxes were noted and that at the close of the polling the ballot boxes thereof were sealed and their serial numbers thereof noted; this was done in the presence of party agents. In Mahiga Primary School for example, the presiding officer at the station, **Habel Rugu Kamau (RW1)** stated in his evidence that at the opening of the station he issued the party agents present with the serial numbers of the ballot boxes and the seals that were being used at the station and to confirm this assertion, he annexed an extract of a polling day diary which he marked as **exhibit "HRK-2"** on his affidavit; the diary was signed by the agents signifying their confirmation of the particulars of the ballot boxes and seals.

A presiding officer at Kairuthi Secondary school, **John Mathenge Macharia (RW2)** said that he also issued serial numbers of the ballot boxes and seals to all accredited party agents at the school none of whom raised any objection. The witness admitted having assisted those voters who required assistance but in strict compliance with the law and to prove that all was well at the station, the witness annexed Form 35 on his affidavit, marked as **exhibit "JMM-1"**, showing that all party agents signed it without

raising any objection. The presiding officer at Mahiga Primary School, **Habel Rugu Kamau (RW1)** also admitted in his evidence that he assisted voters who required assistance to vote but that this was done in the presence of the party agents none of whom raised any objection as evidenced by Form 35 annexed to his affidavit and marked as **exhibit "HRK-5"**. This witness further refuted claims that there was shortage of ballot papers at the station he presided over and confirmed by an extract of the polling day diary marked as **exhibit "HK-4"** on his affidavit that there were 530 ballots which remained unused at the end of the polling. The Respondents also contend that in stations where voting extended beyond 5.00 pm like Kamoko Primary School and Kamoko Tea Buying Centre polling stations, it is only those voters who were on the queue at that time that were allowed to vote.

The Respondents contend that security to all polling stations was guaranteed and each one of them was assigned two police officers while twenty-three officers were engaged at the Othaya tallying centre; in addition there was a stand-by anti-riot police force. In support of this contention, the 2nd Respondent produced a copy of what he described as "an operational order" for Othaya constituency showing deployment of various police officers at different polling stations and at the tallying centre. This document is marked as **exhibit "JMM-2"** on the affidavit of the 2nd Respondent.

On the issue of counting and verification of votes, it is the Respondents' case that their polling clerks executed this exercise in accordance with their training; they would open up a ballot box, empty the contents thereof in the presence of party agents and pick out a ballot which would be lifted and the name of a candidate in whose favour the ballot had been cast read out aloud.

The Respondents have denied the Petitioner's allegations that party agents were not given Forms 35 to sign; they contend that all those party agents who were present at the polling stations at the close of the polls signed the forms and many of the agents who did not sign them were not at the stations. The Respondents are also firm that the duly filled forms were displayed at the polling stations but the Petitioner's agents ripped them off from the stations and also from the ballot boxes.

The Respondents admit that the results were not transmitted in electronic form but have explained that it is not a mandatory requirement that the poll results be transmitted in electronic form; under **Section 44** of the **Elections Act**, they had the option to apply appropriate technology as they deemed fit. In any event, the Respondents argue, use of electronic devices which are generally powered by electricity would not have been possible, in areas without electricity in the constituency.

The allegations that there were discrepancies in posting of results in Forms 35 and 36 are admitted by the Respondents; in particular it is admitted that there were instances where the votes cast in favour of the Petitioner were understated and do not tally in the two forms; the same discrepancies appear in Form 35 itself in the sense that the total votes cast in Form 35 varies with the totals of votes cast for each of the candidates as entered in the same form. It is also admitted that there were instances where the entry of the total number of votes cast in Form 35 is inconsistent with the figure entered in Form 36. The Respondents' explanation is that these errors were not intended; they are described as typographical and transposition errors mainly attributed to human error, long working hours and exhaustion of the Respondents' officers but that they are errors which, in the Respondents' view, do not affect the final results for each of the candidates as posted in Form 36. In Kagumo Polling Station, for instance, the Respondents admit that no results were returned by the presiding officer from that station but that they were accounted for in the final figure announced at the national tallying centre at the Bomas of Kenya. In support of the 1st and 2nd Respondent's case on this issue, the 2nd Respondent annexed to his affidavit Forms 35 for the polling stations in question.

The 2nd Respondent confirmed that he was aware that the Petitioner's agents attempted to interfere with the tallying process at the Othaya CDF hall by harassing one of the presiding officers present, one **Godfrey Kariuki Wandurua (RW4)** but that the security agents present together with Mr Nderitu Gachagua, who apparently was contesting for gubernatorial seat for Nyeri County on the same party ticket as the Petitioner, prevailed upon them and the tallying proceeded to its conclusion.

Mr Godfrey Kariuki Wandurua himself swore an affidavit and testified in court as the 4th Respondent witness (**RW4**). In his evidence, he confirmed that indeed he was the gazetted presiding officer at Rukira Primary School polling station and to the best of his knowledge the polling at that station was conducted in a credible and peaceful manner as evidenced by the execution of form 35 by himself, his deputy and the various party agents at the close of the polling. A copy of the Form 35 is annexed to his affidavit and marked as **exhibit “GK-1”**. This witness, whose entry to the tallying hall sparked chaotic scenes in the hall, said that when he arrived at the centre he surrendered what the 1st Respondent describes as non-strategic materials which included an identification badge, a reflective jacket and his bag before entering the hall to return the results from his polling station. He stated in his evidence he was accosted and harassed by the petitioner’s supporters since he could not be identified as an officer of the 1st Respondent. According to his evidence, although the 2nd Respondent intervened and informed the Petitioner’s agents that this witness was a presiding officer, they weren’t willing give him a chance.

On the allegations of misuse of public resources, the former President’s conduct and circulation of the scandalous pamphlets, the Respondents urged this court to find that no proof for any of those allegations; no proof was given of the use of public resources to campaign for any particular candidate. It was not proved that the former President breached any electoral law at times material to this petition and finally it was never demonstrated that the Respondents were aware of the distribution of the pamphlets allegedly scandalous of the Petitioner. Besides lack of proof of these allegations, it is the 1st and 2nd Respondents’ case that the Petitioner never lodged any form of complaint with the Respondents.

The 1st and 2nd Respondents’ plea is for this court to hold that they were not in breach of or in contravention of the Constitution, the Elections Act, or any other law relating to elections and that the electoral process for the elections of the member of National Assembly for Othaya Constituency held on 4th March 2013 was credible. The Respondents have urged the court to have the Petition herein dismissed with costs to them because they discharged their mandate in compliance with the Constitution, the relevant statute law and the regulations thereto and ultimately declared a valid outcome of the elections of the member of National Assembly for Othaya constituency in the 4th March, 2013 general elections.

The 3rd Respondent’s response to the Petition is substantially consistent with the 1st and 2nd Respondents’ response; it is the 3rd Respondent’s position that the elections in issue were free, fair, transparent and held in accordance with the spirit of **Article 81 of the Constitution, the Elections Act** and the **Elections Regulations**. Irregularities, if any, were minor and clerical and could not alter the final results.

It is the 3rd Respondent’s case that she satisfied all the eligibility requirements to contest for the seat for member of National Assembly for Othaya Constituency, not least the requirements of leadership and integrity as stipulated in Chapter Six of the Constitution. Her nomination papers were presented to the 1st Respondent’s officers who scrutinised them and apparently having been satisfied with the 3rd Respondent’s bid for candidature for the parliamentary seat, she was duly nominated as such. To support her case that she was eligible to contest, the Respondent contends that she met the educational requirements; she also states that she has neither been charged nor convicted of any criminal offence that would bar her from contesting for an elective public office post. As far as the Parliamentary Report on Artur brothers is concerned, the Respondent says that she was only mentioned in the Report as a potential witness and not as a suspect. She has also distanced herself from any involvement in the 2007 and 2008 post-election violence maintaining that she is a morally upright and respectable citizen.

The 3rd Respondent has denied that the former President Hon. Mwai Kibaki ever campaigned for her to succeed him as the member of National Assembly for Othaya constituency; if the President campaigned for anybody, so the Respondent argues, it was for James Gichuki Mugambi’s benefit whom the Petitioner admits was endorsed by the former President. The 3rd Respondent argues that in any event, as the outgoing Member of Parliament for Othaya constituency, the former president was entitled to tour the constituency and inspect the development projects he had initiated in the constituency. Such tours or inspections did not benefit her in any way since was she was not only barred from attending the President’s functions in the constituency at the material time but the President himself was even opposed

to her candidature.

On the question of printing and distribution of leaflets discrediting the Petitioner as a candidate, the 3rd Respondent has denied any role in such a scheme.

The 3rd Respondent has also denied that she colluded with the 1st Respondent to lay off trained clerks and substitute them with the inexperienced ones; she alleges that the 1st Respondent's action to lay off clerks was not limited to Othaya constituency alone but was a countrywide exercise taken to mitigate alleged budgetary constraints. In the Respondent's view the layoffs did not compromise the conduct of elections of 4th March 2013 in any way.

One of the allegations that dominated the Petitioner's case against the 3rd Respondent was the allegation of bribery. In response to the allegations that she bribed voters prior to and during the elections, the 3rd Respondent has specifically denied that she toured Mahiga ward bribing voters on the eve of polling day. Contrary to those allegations, the 3rd Respondent has stated that she remained in her residence in Nyeri from 2nd March, 2013 to 4th March, 2013 when she left to vote. In her view, there is no credible evidence of bribery claims against her; for example, no names have been given of the persons who are alleged to have bribed voters on behalf of the 3rd Respondent; there is no proof that the vehicle in which those alleged to have been bribing voters were driving belonged to the 3rd Respondent; there is no proof that motor vehicle Registration Number KBN 342 R was either ferrying voters or was being used for bribery purposes and even if it were, the Petitioner has not provided evidence to prove that these vices were being committed for the benefit of the 3rd Respondent.

The Respondent has refuted claims that **Dr Maina Kiragu (3RW4)** and **Muthoni Ngige (3RW2)** whose photographs were captured by **Rhoda Nyawira Maina (PW11)** were bribing voters; according to her those photographs by themselves do not provide proof that the named persons were giving out bribes and neither do they show on whose behalf such bribes were being given. The photographs also do not show, on their face, where they were taken or the date and time they were taken. The named persons admitted in their evidence that the photographs attached to the affidavit of **Rhoda Nyawira Maina** and marked as exhibits "**RNM-2(a)**" and "**(b)**" were indeed their photographs but they denied having bribed any person as alleged by the Petitioner.

The 3rd Respondent has dismissed bribery claims by **Godfrey Githogori Nderitu (PW12)**, **Luka Kiminda Thuita (PW9)** and **Esther Njeri Ndonga (PW18)** as lacking in substance and therefore baseless. It is her case that neither she nor her agents bribed any voters prior to or during the elections and that in her view the allegations of bribery have not been proved satisfactorily. The persons who were named as bribing voters on behalf of the 3rd Respondent filed affidavits and testified in court to deny the allegations; these were, the 3rd Respondent's chief agent, **Jeremiah Wachira Ichaura (3RW5)**, **Dr Peter Muchiri Ngatia (3RW3)** and **Jacinta Wakaria Mwangi (3RW1)**. If there was any credible claim of bribery against her, so the Respondent contends, then an appropriate complaint ought to have been made to the police.

On the issue of relocation of the Witima Health Centre polling station to Unjiru Community Hall, the 3rd Respondent has adopted the same response raised by the 1st and 2nd Respondents that the high voter turnout in that station was enough demonstration that nobody was denied the opportunity to vote because of the change of the voting venue; in any event, the relocation of the station was well within the law and the new centre was within the 400 meters radius of the original station and voters were guided accordingly. The 3rd Respondent's Chief Agent, annexed photographs of the two centres to his affidavit and which he marked as exhibits "**JI 1(a)**", "**JI 1 (b)**", "**JI (c)**", "**JI (d)**" and "**JI 1 (e)**" to demonstrate their close proximity.

In answer to the discrepancies in the entry of figures in Forms 35 and 36 the 3rd Respondent relied on a computation by one of her witnesses **Jeremiah Wachira Ichaura (3RW5)** annexed and marked as

exhibit “JI-2” on his affidavit to demonstrate that those discrepancies did not affect the distribution of votes cast for each of the candidates. According to the 3rd Respondent, while the Petitioner has been credited with less votes in Form 36 than what he actually garnered as entered in Form 35 in some areas, he has also erroneously been credited with more votes than what he obtained in other areas. According to **Mr Jeremiah Wachira Ichaura’s** computation, the Petitioner was credited with 636 less votes than what he actually got in some areas but was at the same time credited with 251 more votes than what he got in other areas as a result of the mistakes in entries in Forms 35 and 36. Similarly, the 3rd Respondent was credited with 45 more votes and 274 less votes in form 36. These errors, in the 3rd Respondent’s view could not have affected the final vote count for each of the two candidates.

Finally, the 3rd Respondent has denied any knowledge of one **Godfrey Kariuki Wandurua** whom the Petitioner claims was accosted by his agents at the Othaya CDF tallying centre without any identification. She denies having sent that person to bring three envelopes to the 1st Respondent’s officers at the tallying centre as alleged or at all. The 3rd Respondent contends that she was validly elected as the member of National Assembly for Othaya constituency.

In a hotly contested dispute such as the petition herein, where allegations are raised on the one hand and denials are made in rebuttal on the other hand, there are bound to be issues which the court must necessarily interrogate and determine. To the credit of counsel for the respective parties in this petition, they agreed on the issues whose resolution, in their respectable view, would ultimately resolve questions raised in this Petition. As early as the 10th May, 2013 the contestants in the petition unanimously endorsed a statement of issues that was duly drawn and filed in court by the Petitioner's counsel on the even date. These issues are as follows:-

1. Whether the 3rd Respondent was eligible to contest as a candidate for the elections held on 4th March 2013 for the position of the member of National Assembly.
2. Whether the court should order a scrutiny and recount of the votes cast in the election of member of the National Assembly for Othaya constituency in the elections held on the 4th March, 2013.
3. Whether the 3rd Respondent was validly elected as the member of the National Assembly for Othaya constituency in the elections held on 4th March, 2013.
4. Whether Peter Gichuki King'ara was duly elected to the office of the Member of National Assembly for Othaya constituency in the elections held on 4th March, 2013.
5. Whether the Respondents jointly or severally committed election offences in the course of election of member of National Assembly for Othaya constituency.
6. Whether the elections of the Member of Parliament for Othaya constituency were free and fair and conducted in accordance with the law.
7. What orders should be issued by the court under the circumstances?

A quick glance at the issues as framed would reveal that they overlap to some extent; if for instance, in determination of the first issue, the court was to hold that the 3rd Respondent was not eligible to contest as a candidate for the position of the member of National Assembly for Othaya constituency in the 4th March 2013 polls, then scrutiny or recount of the votes would be an issue of little relevance; that finding also would, as a matter of course, resolve the issue of the validity of the election of the 3rd Respondent as the member of National Assembly for Othaya constituency. The findings on whether the elections for the member of National Assembly in this particular constituency were conducted in accordance with the law will have a bearing on the orders that the court ought to make in the context of the prayers in the petition. If the Respondents were to be found to have committed election offences, the court will have to decide whether the Petitioner should benefit from their acts or omissions and be declared the duly elected

Member of National Assembly for Othaya constituency or whether fresh elections should be called. The point is, a finding on one issue, whether in the affirmative or in the negative will more or less have a ripple effect on the rest of the issues. It is upon this understanding that this court will now proceed to interrogate and determine the issues as agreed upon by the parties.

The determination of these issues and ultimately the petition itself is at the backdrop of the presumption of law that elections were regularly conducted and ought to be upheld; it is upon the petitioner to firstly, prove the contrary and secondly, to demonstrate that the proof is beyond a balance of probabilities. It has been held in the English case of **John Fitch versus Tom Stephenson & 3 others (2008) QBD 501**:

“The decided cases...establish that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches...this is because where possible, the courts seek to give effect to the will of the electorate.”

This reasoning has been followed and adopted locally in the **Nairobi High Court Election Petition No. 10 of 2008 William Kabogo Gitau versus George Thuo & 2 Others (2010)eKLR** in which the court cited its decision in the case of **John Kiarie Waweru –vs- Beth Wambui Mugo & Others (2008)eKLR**. The court, (Kimaru, J) stated at page 9 of the decision that:-

“This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right of voters of Dagoretti constituency to elect a representative of their choice. This court will not therefore interfere with the democratic choice of the voters of Dagoretti constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December, 2007.”

This position of the law is now encapsulated in **Section 83** of the **Elections Act** which is to the effect that:-

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that non-compliance did not affect the result of the election.”

It is obvious therefore, the law places a burden, which is by no means light, on the petitioner who wants to upset what would otherwise be the will of the electorate in an election. I am bound to take this path in interrogating the evidence placed before the court in support of the petition herein.

I will begin with one of the issues that took centre stage in this Petition which is the 3rd Respondent's capacity to vie for an elective political office.

The eligibility of the 3rd Respondent to vie for a parliamentary seat in Othaya constituency is an issue that featured prominently amongst the grounds upon which this petition is based. As I understood it, this issue assumed two levels in the Petition and in the evidence proffered in support of the petition. At one level, the 3rd Respondent is alleged to be morally bankrupt and deficient of integrity or any integrity that would be required of an elective leader such as a member of National Assembly. At another level, her level of literacy is questioned; she is said to be too inadequately educated to be a parliamentary representative at a constituency level. In the Petitioner's view, if the 3rd Respondent could neither stand the integrity test nor the educational threshold, her victory as the member of National Assembly is of no consequence and therefore null and void since she ought not to have contested in the first place.

A deeper insight into the Petitioner's allegations would help us understand whether this ground on its own or in combination with other grounds in the Petition is viable in law to upset the election of the 3rd Respondent as a member of the National Assembly.

The Petitioner's case that the 3rd Respondent was ineligible to contest for the parliamentary seat stems from his understanding of reports by various institutions and the media which, in his view, raised doubts on the 3rd Respondent's integrity and more importantly, her capacity to hold a public office such as that of a member of National Assembly. The reports that have been cited are, "**On the Brink of the Precipice. A Human Rights Account of Kenya's Post 2007 Election Violence**" rendered by the **Kenya Human Rights and Equality Commission** which was previously called the **National Commission on Human Rights**; a report by the Commission of Inquiry into the 2007-2008 post-election violence, commonly referred to as "**the Waki Report**"; **A Parliamentary Report on the investigation into the conduct of two Armenians** popularly referred to as "**Artur Brothers**" and their associates; a report by the **Commission of Inquiry into the activities of the "Artur Brothers"**. This Commission of Inquiry was chaired by a former Commissioner of Police, Mr Shadrack Kiruki. The final report is an investigative report referred to as "Jicho Pevu" by a local media house, Kenya Television Network.

The first two reports share a common subject—the 2007/2008 post-election violence; similarly the last three reports are also related in the sense that they share the same theme which is the "Artur Brothers" saga. According to the Petitioner, the 3rd Respondent was adversely mentioned in all the reports because she was not only involved in the 2007/2008 post-election violence but was also associated with the Armenian brothers; in a way she was the common thread that ran through all the five reports. While the Waki Report is alleged to have identified the 3rd Respondent as one of the people involved in the planning and organisation of the post-election violence, the Commission on Human Rights Report was allegedly particular that the 3rd Respondent, who was then described as a "PNU activist", funded the supply of arms through Ethiopia for retaliatory attacks on non-Kikuyu communities at the height of the violence.

The reports on the "Artur Brothers" were in agreement that the two foreigners were involved in acts of lawlessness in this country and apparently it is their illegal activities and public outcry that set in motion the creation of a commission of inquiry and a subsequent investigation by a joint session of two parliamentary committees into the conduct of the Armenian brothers and their associates. None of the three reports was formally produced in court though the parliamentary report was annexed to the Petitioner's affidavit; it was not, however, marked as an exhibit.

In the Parliamentary Report the relevant parliamentary committee was categorical that in view of the evidence adduced before it, the Artur brothers' presence in Kenya was initiated and protected by the highest levels of government and their presence was part of a conspiracy to commit atrocities. During their presence in Kenya, so the committee found, several illegalities known to law enforcement agencies were perpetrated by these Armenian brothers yet no action was taken against them by these agencies. These illegalities included importation of goods without payment of taxes, appointment to the police force as Deputy Commissioners of Police and misuse of government vehicles. The state agencies' apparent complicity in the Armenian brothers' activities left the Committee with the conclusion that the two brothers were enjoying state protection at the highest levels of government. The relevance of that parliamentary report to this petition, at least in the Petitioner's view, is that the 3rd Respondent and her daughter, identified as Winnie Wangui Mwai, were established by the Committee to be close associates of the Artur brothers.

The 3rd Respondent's alleged involvement in the 2007/2008 post-election violence and her association with the Artur brothers in the manner described in the foregoing reports is, in the Petitioner's view, a link that deprives her of the attributes of integrity, moral aptitude and leadership qualities which, in law, are not only essential but are also mandatory for any person holding or aspiring to hold a public office such as that of a member of National Assembly.

In this regard the Petitioner relied upon and adopted the pleadings and the ruling delivered on a

preliminary objection in the **Nairobi High Court Constitutional Petition No. 549 of 2012, Michael Wachira Nderitu & 3 Others versus Mary Wambui Munene & 2 Others**. In that petition, the Petitioners sought, *inter alia*, a mandatory injunction against the Director of Public Prosecutions and the Attorney General to compel them to implement the Reports on the post-election violence and the Artur brothers. The constitutional petition also sought to bar the 3rd Respondent from seeking nomination from or being nominated by The National Alliance party (TNA) and the Independent Electoral & Boundaries Commission to contest for the seat of member of National Assembly for Othaya constituency on account of her failure to meet the leadership and integrity requirements in view of her alleged involvement in the post-election violence and her association with the Artur brothers.

Since the two petitions, that is, the constitutional petition and the election petition, share the same grounds against the 3rd Respondent on the issue of her eligibility to vie for the parliamentary seat in issue and in any event the pleadings in former have been adopted in the latter, it is necessary here to quote some of the averments in the constitutional petition in so far as they are relevant to the election petition herein. The petitioners stated in their petition as follows:-

3.23 The 1st Respondent's (the 3rd Respondent herein) close association with the said brothers (Artur brothers) leads the Petitioners to the reasonable apprehension that the 1st Respondent may be closely associated with illegal and unlawful activities rendering her incapable of complying with the strict requirements on Leadership and Integrity set out at Chapter Six of the Constitution of the Republic of Kenya and thereby ineligible for election as a Member of Parliament or any other elective post for that matter.

3.24 The Petitioners are also aware that the 1st Respondent has been adversely mentioned in an investigative journalistic report on drug trafficking aired on local media titled "JICHO PEVU" and to the best of their knowledge she has not counteracted the said report.

3.25 It is the constitutional duty of the 2nd and 3rd Respondents (that is, the Director of Public Prosecutions and the Attorney General) to investigate the aforesaid aspersions cast against the 1st Respondent (the 3rd Respondent herein) in *inter alia* the Report by the Human Rights Commission, the Artur Brothers Report and other media reports as the same raise matters of great public interest and to prosecute if the same are found to be credible and indicative of criminal culpability.

3.26 The 2nd and 3rd Respondents (Director of Public Prosecutions and the Attorney General) in manifest abdication of their constitutional duty and in scant regard of public interest have to date failed and/or neglected to carry out the requisite investigations into the matters touching on the 1st Respondent(3rd Respondent herein).

3.34 The allegations against the 1st Respondent (the 3rd Respondent herein) are serious and plausible enough to warrant a proper inquiry by the 2nd and 3rd Respondents.

3.36 The allegations against the 3rd Respondent are serious enough to warrant a reasonable person especially one charged with the constitutional responsibility to investigate such allegations such as the 2nd and 3rd Respondents (Director of Public Prosecutions and the Attorney General) to conduct a proper inquiry into the same.

3.37 Indeed only a proper inquiry by the 2nd and 3rd Respondents (Director of Public Prosecutions and the Attorney General) into the allegations made against the 1st Respondent (the 3rd Respondent herein) can ascertain her suitability to election to the office of Member of Parliament.

Thus, in the Petitioners' view, which view is shared by the Petitioner in the election petition herein, allegations had been raised in various reports against the 3rd Respondent; those allegations were serious and merited investigations; the only persons who could undertake the requisite investigations and who

were constitutionally mandated and obligated to carry out such investigations were the Director of Public Prosecutions and the Attorney General. Having so laid their case, the Petitioners prayed for the orders, *inter alia*, that:-

“3. A declaration that there are serious and plausible allegations levelled against 1st Respondent (3rd Respondent herein) in:

- a) The Report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled "on the Brink of the Precipice. A Human Rights Account of Kenya's Post 2007 Election Violence".**
- b) The Report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007- 2008 Post Election Violence commonly called "The Waki Report."**
- c) The Parliamentary Report on the investigation into the conduct of the Artur Brothers and their Associates.**
- d) The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brothers, commissioned by His Excellency the President of Kenya and released in August 2006.**
- e) The Journalistic Investigative Report by the Kenya Television Network (KTN) titled "JICHO PEVU"**

which allegations demonstrate that the 1st Respondent by herself or in association with others has breached Articles 10 and 75 (1) of the Constitution of the Republic of Kenya.

4. A declaration that the 2nd and 3rd Respondents (the Director of Public Prosecutions and the Attorney General) have failed and or neglected to perform their constitutional duty to inquire into the allegations levelled against the 1st Respondent (the 3rd Respondent herein) in:

- a) The Report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled "on the Brink of the Precipice. A Human Rights Account of Kenya's Post 2007 Election Violence".**
- b) The Report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007- 2008 Post Election Violence commonly called "The Waki Report."**
- c) The Parliamentary Report on the investigation into the conduct of the Artur Brothers and their Associates.**
- d) The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commissioner of Police) into the activities of the Artur Brothers, commissioned by His Excellency the President of Kenya and released in August 2006.**
- e) The Journalistic Investigative Report by the Kenya Television Network (KTN) titled "JICHO PEVU"**

AND such failure is in breach of Articles 27(1), 35, 47, 156 (6), 157(4) and 157(11) of the Constitution of the Republic of Kenya.

5. An injunction do issue compelling the 2nd and 3rd Respondents (the Director of Public Prosecutions and the Attorney General) to inquire into the allegations against the 1st Respondent (the 3rd Respondent herein) in:

- a) **The Report by the National Commission on Human Rights (now the Kenya Human Rights and Equality Commission) titled "on the Brink of the Precipice. A Human Rights Account of Kenya's Post 2007 Election Violence".**
- b) **The Report by the Commission of Inquiry led by the Honourable Court of Appeal Judge Philip Waki on the 2007- 2008 Post Election Violence commonly called "The Waki Report."**
- c) **The Parliamentary Report on the investigation into the conduct of the Artur Brothers and their Associates.**
- d) **The Report on the Commission of Inquiry chaired by Shadrack Kiruki (former Commission of Police) into the activities of the Artur Brothers, commissioned by His Excellency the President of Kenya and released in August 2006.**
- e) **The Journalistic Investigative Report by the Kenya Television Network (KTN) titled "JICHO PEVU"**

AND to make public the results of their findings pursuant to their Constitutional mandate and duty as set out in Articles 35, 47, 156(6), 157 (4) and 157(11) of the Constitution of the Republic of Kenya."

These prayers have far-reaching ramifications on the position taken by the Petitioner in the Petition herein hence the need to quote them here verbatim.

The law on qualifications and disqualifications for election as a Member of Parliament is anchored in **Article 99** of the Constitution. It provides as follows:-

99(1) unless disqualified under clause (2), a person is eligible for election as a Member of Parliament if the person-

(a) is a registered voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament;

And

(c) is nominated by a political party, or is an independent candidate who is supported-

- i. **in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or**
- ii. **in the case of election to the Senate, by at least two thousand registered voters in the county.**

(2) A person is disqualified from being elected as a member of Parliament if the person-

(a) is a State officer or other public officer, other than a Member of Parliament;

(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;

(c) has not been a citizen of Kenya for at least ten years immediately preceding the date of election;

(d) is a member of county assembly;

- (e) is of unsound mind;
 - (f) is an undischarged bankrupt;
 - (g) is subject to imprisonment of at least six months, as at the date of registration of a candidate, or at the date of election; or
 - (h) is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter Six.
- (3) A person is not qualified under clause (2) unless all possibility of appeal or review of the relevant sentence has been exhausted.

For purposes of determining the dispute in this petition on the 3rd Respondent's eligibility to vie for a parliamentary seat only **Article 99 (1) (b)** and **Article 99(2) (h)** of the **Constitution** would be most relevant. There is no doubt and it is not in dispute that the 3rd Respondent was a registered voter and was nominated by a political party to contest for the seat of member of National Assembly and therefore was qualified in terms of the requirements of **Article 99 clause (1) (a)** and **(c)** of the constitution at the time material to this petition. The dispute is whether she satisfied the requirements in clause **(1) (b)** of that Article pertaining to education, morality and ethics as prescribed in the Constitution itself or by an Act of Parliament.

It is apparent that **Article 99(1) (b) of the Constitution** contemplates some educational, moral or ethical threshold that is set either by the Constitution itself or by an Act of Parliament; that is a threshold which any candidate for a parliamentary seat must satisfy before he can be considered eligible for election as a Member of Parliament. While that provision is particular that some threshold must be set (for I can find no other reason why the word "any" is used), it is left for Parliament to legislate on the level of such threshold, if it is not so prescribed in the Constitution. Indeed Parliament has taken up its legislative duty and enacted the **Leadership and Integrity Act, 2012** which is an Act of Parliament that gives effect to, and establishes procedures and mechanisms for effective administration of Chapter Six of the Constitution that apparently address moral and ethical issues. It has also legislated the **Elections Act, 2011** which provides in **Section 22** thereof that one is eligible to be nominated as a candidate for election under the Act if the person holds a post-secondary school qualification recognised in Kenya. This provision was, however, suspended until the next general elections through an amendment which counsel for the Petitioner has asked this court to find and declare unconstitutional. I will deal with this issue after I have addressed the Petitioner's contention that the 3rd Respondent ought not to have contested for the parliamentary seat because of what has been alleged to be her ethical and moral depravity.

The pertinent question in this regard appears to me to be that, if the basis of the Petitioner's allegations against the 3rd Respondent are the diverse reports in which her ethics, integrity and morals have been questioned would those reports constitute sufficient grounds, in the context of **Article 91(1)** of the **Constitution**, to deny her qualification for election as a member of National Assembly? Or could the 3rd Respondent be disqualified under **Article 99(2)** of the **Constitution** from contesting for the seat of the member of National Assembly because of the allegations raised against her in those reports? Can allegations or even findings in parliamentary committee reports or commissions of inquiry or in private investigative reports by a media house or any other independent person constitute grounds that would disqualify one from contesting for a parliamentary seat or render his or her candidacy for such a seat ineligible?

My understanding of the **High Court Constitutional Petition No. 549 of 2012 (supra)**, which as noted, has been adopted in this Petition, is that the Petitioners were clear in their mind from the very beginning that the allegations in the reports against the 3rd Respondent were never investigated. In their view, which I entirely agree with, the serious nature of crimes that may have been committed either by the 3rd Respondent or any other person or persons, as alleged, called for a thorough investigation and possibly prosecution of the culprits. I also agree with the Petitioners that the institution that is constitutionally

responsible and mandated to carry out the investigations and prosecutions is the office of the Director of Public Prosecutions. There is no doubt that the allegations, if established to be true, would constitute felonies as defined in our criminal statutes. The current prosecution of three Kenyans at the International Criminal Court at The Hague goes to emphasise that the crimes committed during the 2007/ 2008 post-election skirmishes, were crimes that are not only of local significance but they also assume an international dimension; they fall into the category of most serious international crimes as defined in the Rome Statute.

The significance of the **Nairobi High Court Constitutional Petition No. 549 of 2012** on the question of the 3rd Respondent's eligibility to vie for a parliamentary seat is that the allegations against the 3rd Respondent in the various reports alluded to by the Petitioners in that Petition and the Petitioner in this Petition, however grave they may be, were never investigated by government agencies mandated to do so, to establish whether indeed the 3rd Respondent had any role in the illegal escapades of the Armenian nationals or was an accessory or a conspirator in the 2007/2008 post-election violence or that she is a drug trafficker as insinuated by the Kenya Television Network media house.

The 3rd Respondent herself has vehemently disputed the petitioner's allegations the bases of which, she contends, are unfounded. She confirmed in her testimony in court and indeed it has been admitted by the Petitioner that to date she has neither been investigated nor charged with any of the offences that could possibly ensue from those allegations.

The excerpts from the High Court constitutional petition which have been quoted hereinbefore would suggest that the Petitioner acknowledges the significance of investigation of any allegation against any person that may want to run for a parliamentary seat before such an allegation can form a basis for questioning his or her candidacy or disqualifying him or her from such a contest altogether. If this were not the case and if allegations alone were sufficient there would have been no reason why the constitutional petition should have sought orders to compel the Director of Public Prosecutions and the Attorney General to investigate the allegations against the 3rd Respondent in this petition. I understand this to be the meaning of such statements as;

“the allegations against the 3rd Respondent are serious enough to warrant a reasonable person especially one charged with the constitutional responsibility to investigate such allegations such as the 2nd and 3rd Respondents (read the Director of Public Prosecutions and the Attorney General) to conduct a proper inquiry into the same.”

To emphasise that allegations alone are not enough and that investigations are necessary before one is condemned and precluded from contesting for a public office the Petitioner admits that;

“Indeed only a proper inquiry by the 2nd and 3rd Respondents (Director of Public Prosecutions and the Attorney General) into the allegations made against the 1st Respondent (the 3rd Respondent herein) can ascertain her suitability to election to the office of Member of Parliament.”

Taking the Petitioner at his own word, it would be drastic and draconian, in the premises, to condemn the 3rd respondent on allegations which, for all intents and purposes, amount to felonies for which she has neither been investigated nor charged. It would, in my view, amount to condemning the 3rd Respondent unheard if she was denied her political rights under **Article 38** of the Constitution to participate in political activities and contest for a political office on the basis of suspicions. The constitution itself frowns at such a possibility; it provides that even if the 3rd Respondent had been investigated and charged for all or any of the possible offences that could possibly ensue from those allegations, that in itself would not disqualify her candidacy for the electoral seat. **Article 99(3)** thereof suggests that she can only be disqualified if she has been convicted to serve a sentence of more than six months and all avenues for appeal or review of the conviction and sentence have been exhausted.

This court cannot proceed as if the allegations on the 3rd Respondent's morals and integrity have been proved. Neither can it turn itself into an investigative agency to determine the 3rd Respondent's criminal culpability in the light of the allegations raised against her. That should be left to the investigative agencies. Owing to its special jurisdiction under the Elections Act this court cannot subject the 3rd Respondent to a criminal trial of any offences, assuming that investigations were complete and those offences had been established. That should be left to the criminal trial court. The inevitable conclusion that this court can come to is that there is no evidence that the 3rd Respondent was ineligible to contest for a parliamentary seat on moral or ethical grounds. The Petitioner's assault on the 3rd Respondent's candidacy from this front is founded on quicksand; I hold that the reports that have been cited by the Petitioner are not sufficient ground to challenge the 3rd Respondent's candidacy or disqualify her from such candidacy.

The Petitioner asked the court to find that the 1st Respondent should have inquired into the same allegations and found the 3rd Respondent ineligible to contest for the seat of member of National Assembly. In the High Court constitutional petition whose pleadings the Petitioner adopted, the petitioners acknowledged that, owing to the nature of allegations against the 3rd Respondent, the only bodies that have the constitutional mandate to investigate those allegations are the office of Director of Public Prosecutions and that of the Attorney General; it is for this reason that they sought specific orders to compel them to undertake the investigations. This would also explain why those orders were not sought against the 1st Respondent though it was a party to those proceedings. If that is the position that the Petitioner adopted, it would be inconsistent with his position in this Petition that the 3rd Respondent should have inquired into the same allegations that ought to have been investigated by the Director of Public Prosecutions and the Attorney General.

In my view, the inquiry that the Petitioner is referring to could only be made in the context of **Article 88(4) (e)** of the Constitution which empowers the 1st Respondent to settle electoral disputes including disputes relating to or arising from nominations. If it is Petitioner's case that the allegations against the 3rd Respondent could well form a basis for a dispute for inquiry by the 1st Respondent pursuant to its jurisdiction under **Article 88(4)(e)** of the **Constitution**, it is apparent in these proceedings that no such dispute was lodged with the 1st Respondent; in the absence of such a dispute or without evidence of such a dispute having been lodged it is simply difficult to fathom out how such inquiry could have been conducted.

The ruling in the constitutional petition itself adverted to this position. In dismissing the Petition, the judge said;

“If there is any issue of qualification as to whether Mary Wambui is qualified to be a person to contest or vie for a parliamentary seat, it is not a matter for determination by the High Court in terms of Article 88(4) (e). It is a matter to be determined according to the procedures and mechanisms provided by law applicable to the electoral process under the provisions of the IEBC Act, 2011, the Elections Act, 2011 and where applicable the Political Parties Act, 2011.”

Even after the court dropped that hint, the Petitioner seems to have missed it and failed to lodge any dispute with the 1st Respondent on the 3rd Respondent's candidacy or nomination in accordance with the prescribed procedure or at all.

The other aspect of the 3rd Respondent's eligibility to contest for which the Petitioner took issue with and which I now revert to is the 3rd Respondent's education or lack thereof. As previously noted, **Section 22 of the Elections Act** provides for the academic threshold for the candidates or prospective candidates. It provides as follows:-

22. (1) A person may be nominated as a candidate for an election under this Act only if that person-

- a. is qualified to be elected to that office under the Constitution and under this Act; and
- b. holds a post-secondary school qualification recognised in Kenya

(2) notwithstanding subsection (1) (b), a person may be nominated as a candidate for election as President, Deputy President, county Governor only if the person is a holder of a degree from a university recognised in Kenya.

As noted earlier in this judgment, this provision finds its basis in **Article 99** of the **Constitution**; **Article 99(1) (b)** thereby provides as follows:

99. (1) unless disqualified under clause (2), a person is eligible for election as a Member of Parliament if the person-

(a)...

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament;

By **Kenya Gazette Supplement No. 212 of 2012, Section 22 of the Elections Act** was amended vide, **The Elections (Amendment) (No.3) Act, 2012** by including a new subsection which reads as follows:-

(2A) For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24 (1) (b) save for the position of the President, Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the Parliament and county assembly representatives.

The effect of the **Elections (Amendment) (No. 3) Act, 2012** was to hold in abeyance, at least in the first general elections held under **the Constitution of Kenya, 2010**, the operation of **Section 22(1) (b) of the Elections Act**, which requires one to hold a post-secondary qualification before he can be nominated as a candidate for an election under the **Elections Act**. When the Petitioner, who told the court that he is an advocate of the High Court of Kenya of twenty-three years standing, was asked in cross-examination whether he is aware of this amendment, he said that he only heard about it in the media; he nonetheless regarded the amendment as illegal.

In the application dated 9th July, 2013 in which the Petitioner sought for production of the 3rd Respondent's academic certificates, counsel for the Petitioner was more particular in his submissions that indeed he is aware of the amendment that suspended the operation of **Section 22 (1)(b) of the Elections Act** until after the 4th March 2013 general elections. His only point of departure was that the amendment of that section of the law was contrary to **Article 99(1) (b) of the Constitution**. He therefore urged the court to declare the amendment unconstitutional, null and void. Counsel relied on the decision by the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another versus Kenya Commercial Bank Ltd & 2 Others (2012) eKLR 37** in which the Supreme Court declared **Section 14 of the Supreme Court Act, 2011** unconstitutional because it was deemed to be inconsistent with **Article 163 (3) (a) and (b) of the Constitution** that provides for the jurisdiction of the Supreme Court. **Section 14** of the Supreme Court Act, purporting to give effect to **Article 163(9) of the Constitution** which gives parliament powers to make further provision for the operation of the Supreme Court, gave the Supreme Court what it described as "special jurisdiction" to review judgments and decisions of any judge removed from office on account of a recommendation by a tribunal appointed by the president, whether before or after the commencement of the Supreme Court Act; or is removed from office pursuant to the **Vetting of Judges and Magistrates Act, 2011**; or who resigns or opts to retire, whether before or after the commencement of the Supreme Court Act, in consequence of a complaint of misconduct or misbehaviour. The Supreme Court held that parliament could not purport to confer upon it jurisdiction beyond that expressly provided for by the Constitution. Counsel asked me to follow the same reasoning and declare **Section 22A of the Elections Act** unconstitutional to the extent that it is inconsistent with **Article 99(1) (b) of the Constitution** which requires parliament to set some educational qualification threshold for any parliamentary candidate. Having set that threshold in **Section 22(1) (b) of the Elections**

Act, parliament could not purport to suspend that provision by way of an amendment to the Act; such an amendment is null and void, so the counsel argued.

In rebuttal on this issue, counsel for the 3rd Respondent brought to the court's attention the decision in **Nairobi High Court Constitutional Petition No. 198 of 2011, Hon. Johnstone Muthama versus Minister for Justice & Constitutional Affairs & Another (2012) eKLR** in which the High Court (Mumbi Ngugi J) declared **Section 22(1)(b)** of the **Elections Act** unconstitutional in the sense that it was discriminatory in effect and therefore inconsistent with **Article 27** of the **Constitution** that guarantees equality before the law and non-discrimination of persons on any ground including ones social origin which would include his or her educational status. This decision, it would appear, preceded the amendment to the **Elections Act** that suspended the operation of **Section 22(1) (b)** of that Act.

While the Court in the *Hon. Johnstone Muthama* case declared **Section 22(1) (b) of the Elections Act** unconstitutional, the Petitioner has asked this court to declare as unconstitutional the subsequent amendment to **Section 22** of the **Act** which rendered **Section 22(1) (b)** thereof inoperative until after the first elections under the **Constitution of Kenya, 2010**.

In my humble view, the court's declaration in the *Johnstone Muthama* case and the amendment of **Section 22** of the **Elections Act** had the same effect, which is, candidates for parliamentary or county assembly seats could lawfully be nominated to contest for those seats without proof of academic qualifications envisaged in **Section 22(1) (b)** of the Elections Act in the 4th March, 2013 general elections. Like many other contestants for various elective positions under the **Elections Act**, the 3rd Respondent stepped forward and was nominated to contest for the parliamentary seat of Othaya constituency under these circumstances.

Since neither the decision in *Hon. Johnstone Muthama* case had been overturned nor the amendment to **Section 22** of the **Act** had been declared unconstitutional, it would be logical to conclude that the nomination of the 3rd Respondent was consistent with the law as it is known today.

There is no doubt that being a decision of a court of concurrent jurisdiction, the decision in the *Hon. Johnstone Muthama* case does not bind this court; however, if this court was to be persuaded and follow that decision, the issue whether the 3rd Respondent was not eligible to contest for the parliamentary seat on grounds her lack of academic qualifications would not arise. If on the other hand the court was to depart from that decision and declare **Section 22A** of the Elections Act unconstitutional, the consequences would be more far-reaching; it would mean that in the absence of any evidence of academic qualifications as contemplated in **Section 22 (1) (b)** of the Elections Act, the 3rd Respondent was not fit for nomination to contest for the parliamentary seat. This will no doubt influence the determination of the Petition itself.

It is quite apparent, in the circumstances, that the issue of the 3rd Respondent's eligibility to contest for the parliamentary seat in issue, at least on educational grounds, has been escalated into a constitutional issue whose determination may very well reverberate beyond this petition and affect directly or indirectly any other candidate or candidates whose academic qualifications could have been an issue in their quest for the respective elective positions under **the Elections Act, 2011** in the 4th March, 2013 general elections. Considering the gravity of the determination of this issue one of the questions that this court is bound to consider is whether, as a constitutional issue, it is properly before the court and in doing this the court need not look no further than the pleadings before it more particularly the Petition itself in the context of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**.

Looking at the issue from this perspective, there are a number of Rules in the **Elections (Parliamentary and County Elections) Petition Rules, 2013** that will guide the court on whether this issue is properly before the court. **Rule 10(1) (e)** of those Rules provides that an election petition shall state the grounds on which the petition is presented. **Rule 10(4)** of the Rules provides that a petition must conclude with a prayer which may include a declaration on whether or not the candidate whose election is questioned was validly elected; a declaration of which candidate was validly elected; or an order as to whether fresh

election should be held or not. The list of prayers is neither exhaustive nor exclusive. **Under Rule 17(1) (a) and (b)** the court and the parties must frame issues in the petition, whether contested or not and analyse the methods of resolving them.

One common thing in all these Rules is that the requirements in all of them are couched in mandatory terms and therefore a Petitioner must, as a matter of law, observe them. The rationale behind them is that the petition, in all its facets, must be certain and clear to the court and the respondents as much as it is to petitioner himself. The certainty and clarity aspects will obviously guide the court and the parties in framing of issues. Framing of issues and analysing the method of resolving them is necessary particularly where an issue whose determination *in limine* may very well dispose of the entire petition. Where such an issue arises, the court may, for instance, direct that it be dealt with as a preliminary point or even owing to its ramifications request that a three-judge bench be constituted to determine it in terms of **Article 165(4)** of the **Constitution**. The prayers on the hand will inform the court on what it can grant, for the court can only grant that which has been pleaded and prayed for. In a recent judgment delivered on 10th September, 2013 on an appeal arising out a ruling on two interlocutory applications in this Petition, that is, **Civil Appeal No. 23 of 2013, Peter Gichuki King'ara versus Independent Electoral & Boundaries Commission & 2 Others, the Court of Appeal (Visram, Koome and Otieno-Odek, JJ.A.)** said:-

“It is trite law that a court cannot pronounce itself on an issue that is not in the pleadings of the parties. As was stated in the case of Galaxy Paints Co. Ltd versus Falcon Guards Ltd, EALR(2002) 2 EA 385; the issues for determination in a suit generally flow from the pleadings or such issues as the parties framed for the court’s determination.”(see page 12 of the decision).

Apart from the Rules, the dictum in the High Court’s decision in the case of **Anarita Karimi Njeru versus Republic (No 1) (1979) KLR 154** has always been followed in subsequent decisions as the proper law in determination of questions making references to the Constitution. In that case, the court (Trevelyan and Hancox JJ) (as they then were) was of the view that;

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to have been infringed.”(see page 155).

In the context of this Petition, that reasonable degree of precision, the provisions of the constitution said to have been infringed and the manner in which they are alleged to have been infringed could easily have been spelt out in the Petition within the framework of the **Elections Act** and its procedural rules.

When the Petition before the court is considered through the foregoing spectrum, it becomes apparent that this court’s capacity to determine the constitutionality of **Section 22A** as a constitutional issue in the context of the petition as framed is inhibited. To be more precise, nowhere in the grounds upon which the Petition is based, has the constitutionality of the **Elections Act, 2011** or any provision thereof been questioned. Similarly, the constitutionality of **the Elections Act** or any of its provisions has not been raised as an issue for determination amongst the agreed issues for determination. Finally, there is no single prayer in the petition seeking that any of the provisions of the **Elections Act, 2011** should be declared null and void for their inconsistency with the constitution. In the application out of which the issue of the constitutionality of **Section 22A** of the Act arose, none of the prayers in that application sought for a declaration that the impugned Section be declared null and void.

It then follows that, in the face of these glaring omissions, it would be drastic, in my humble view, to make a declaration on the constitutionality or otherwise of **Section 22A** of the **Elections Act**. Suffice it to say, the nomination of the 3rd Respondent to contest for the seat of member of National Assembly for Othaya constituency was consistent with the law as it is known today.

One may be tempted to ask whether this is not just an issue of procedural technicality and which the court should have ignored as such. In my humble view, this is not an issue that may be dismissed as a

procedural technicality in the context of **Article 159(2) (d)** of the **Constitution** which prods the courts and tribunals to administer justice without undue regard to procedural technicalities. As I have explained, the determination of the constitutionality of **Section 22A** of the **Elections Act** goes to the root of this petition; it is a fundamental issue and not merely a technical one. In any event, if for a moment, it is assumed that this is purely an issue of procedural technicality I do not see how such interpretation would be of any help to the Petitioner because **Article 159(2)(d)** itself does not appear to suggest that courts and tribunals will always disregard what may be considered as a procedural technicality in every case that comes before them; these institutions have only been asked not to give undue regard to procedural technicalities where justice of the case demands that such technicalities be relegated to the periphery. In that same breath, courts and tribunals will not disregard the technicalities if to do so would result to injustice or prejudice to any party or parties in a dispute. In other words, while courts and tribunals will not be obsessed with procedural technicalities in exercise of their judicial functions, they must have due regard to such technicalities whenever circumstances of the case dictate that those technicalities must be given prominence if justice to the parties in the contests before them is to be done and be seen to be done. I suppose this is one of the reasons why **Article 159 (2) (d)** of the constitution and rules of procedure co-exist side by side albeit at different levels of hierarchy. If peradventure the rules contradict the provisions of the constitution or their enabling Act, that will not be a case of procedural technicality; it is a case of the rules being unconstitutional or *ultra vires* their parent Act as the case may be.

The next major issue in this Petition is the question of scrutiny and recount of votes cast for the election of member of National Assembly for Othaya constituency in the 4th March, 2013 elections.

Amongst the prayers sought in the petition, the Petitioner has urged the court to order for a scrutiny and recount of the votes cast in all the 112 polling stations in the Othaya constituency. A similar prayer for scrutiny and recount of the votes had been sought in two previous interlocutory applications by the Petitioner. For reasons given in the ruling delivered by this honourable court on 24th May, 2013 the first application dated 2nd May, 2013 was rejected. The second application dated 3rd July, 2013 was also rejected in the ruling delivered by this court on 6th August, 2013. At the time the latter of the two applications was argued, all the witnesses had testified on the basis of the affidavits filed in support of and in opposition to the Petition. It is for this reason that in the ruling delivered on 6th August, 2013, this court was of the view that considering the evidence that had been received, it was capable of making a determination of this Petition, one way or the other, without necessarily ordering for a scrutiny and recount of the votes.

It has been apparent to this honourable court that the basis of the Petitioner's application for scrutiny and recount in the two applications and in the Petition itself constitutes various allegations that could conveniently be summarised as electoral irregularities, illegalities and malpractices. They are set out at page 4 and 5 of the Petition as the grounds on which the Petition is based. The rest of the petition constitutes the factual details of these grounds culminating in a prayer for several reliefs one of which is, of course, a prayer for scrutiny and recount of votes cast. The quest for scrutiny and recount of votes is therefore rooted on allegations on which the Petition itself is founded. It follows that the evaluation and analysis of the evidence on the question of scrutiny and recount of votes will substantially provide solutions to the rest of the agreed issues and ultimately the question whether the Petition itself is merited or not.

In order to ascertain the veracity of the Petitioner's contentions it is apt at this point to examine the electoral legal framework on the subject of scrutiny and recount of votes and thereafter analyse the evidence on record against this electoral legal background.

The law on the scrutiny of votes is found in **Section 82** of the **Elections Act**. Due to its significance in determination of the issue of scrutiny and recount of the votes cast in Othaya constituency in the 4th March, 2013 general elections, it is necessary that this provision of the law is reproduced herein below:-

82.(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such

manner as the election court may determine.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off:-

- a. **the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;**
- b. **the vote of a person whose vote was procured by bribery, treating or undue influence;**
- c. **the vote of a person who committed or procured the commission of personation at the election;**
- d. **the vote of a person proved to have voted in more than one constituency;**
- e. **the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or**
- f. **the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing disqualification, or after sufficient public notice or when the facts causing it were notorious.**

(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.

It is apparent that once scrutiny of votes has been ordered under **Section 82(1) (a) to (f)** of the **Elections Act**, examination of those votes in compliance with that order will be focussed on whether any, some or all of those votes are deficient in any of the respects that have been expressly stated in **Section 82(2)** of the Act. It is those votes that are found to be lacking in certain particular respects that will be struck off from the votes cast. This would then imply that an applicant for an order for scrutiny of votes can only invoke **Section 82(2) (a) to (f)** (both inclusive) if he has demonstrated to the satisfaction of the court that in any particular polling station, a voter was not registered as such or that though he is a registered voter, he was not authorised to vote in a polling station where he purportedly voted; or a voter did not vote independently but was unduly influenced, or he was bribed or he was induced; or a voter impersonated; or a voter voted in more than one constituency; or a voter was disqualified from voting either because he had committed an election offence or had been disqualified by the court; or the vote was cast for a disqualified candidate. My understanding of this provision of the law is that without evidence of the specific flaws or any reason to believe that such flaws exist, there would be no basis for scrutiny for purposes of striking off votes cast or any part thereof.

While **Section 82** of the **Elections Act** appears to be particular about striking off of certain votes in a scrutiny exercise, **Rule 33** of the **Elections Petition Rules** is explicit on when an application for scrutiny of votes may be made and how the exercise shall be conducted once the court issues the appropriate order; it sets the threshold in respect of particular polling stations where scrutiny may be ordered and also details the materials to be examined in execution of an order for scrutiny; the Rule provides as follows:-

33. (1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.

(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.

(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to examination of-

(a) the written statements made by the presiding officers under the provisions of the Act ;

(b) the copy of the register used during the elections;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt papers;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers; and

(j) the statements showing the number of rejected ballot papers.

There are at least three important criteria for scrutiny that may be discerned from this rule; firstly, scrutiny is to establish the validity of the votes cast; secondly, scrutiny can only be ordered in respect of those polling stations in which the results are disputed and thirdly, once an order for scrutiny has been issued only particular ballots and documents will be examined. From the description given in **Rule 33 (4)** of the **Rules**, these documents are the valid ballots cast, the rejected ballots or the spoilt ballots and other documents that are either directly or indirectly connected with the ballots, whether spoilt, rejected or cast. Examination of ballots and documents in execution of a scrutiny exercise only comes into play once it has been established that in any particular polling station where results are disputed, the validity of the votes cast is in doubt or there is a reason or reasons to believe that those votes or any part thereof is not valid.

This being the law on this issue, the pertinent question at this stage is whether the Petitioner's bid for scrutiny and recount satisfies the threshold set for such an exercise. To answer this question, it is necessary to look closely at the evidence on record and determine whether it is sufficient enough to support allegations of electoral irregularities, illegalities and malpractices and thus necessitate scrutiny and recount of votes in the context of **Section 82** of the **Elections Act** and **Rule 33** of the **Elections Petition Rules**. It is important to reiterate that owing to the potential overlap of the agreed issues, the evidence analysis and findings thereof are answers that are not exclusive to the question of recount and scrutiny only; they are answers that cut across the rest of the issues for determination and as noted earlier in this judgment, an answer to one issue may very well inform the solution to the other issues.

Before delving into allegations that may be said to be directly connected to the Petitioner's quest for scrutiny and recount of votes, there two other issues that can conveniently be disposed of at this juncture; these are questions that relate to allegations of the former President's conduct prior to and on the polls day and the claims on the distribution of pamphlets that are alleged to have been derogatory of the Petitioner. The events out of which these allegations arose, though not directly linked to the votes cast for which scrutiny and recount is sought nevertheless preceded the cast of those ballots and it is appropriate to deal with them at this stage in this judgment.

The allegations of election offences against the Respondents on account of the conduct of the former President in Othaya constituency and as a result of the distribution of scandalous leaflets are too generalised to invite a finding of an election offence, malpractice or even irregularity.

The contention that the President's conduct prior to and during elections disadvantaged the Petitioner appears to have no grounding in law. The Petitioner admitted that as the former Member of Parliament for Othaya constituency, the former President had every right to tour the constituency and inspect the development projects. It was also admitted that if the President's itinerary in the constituency adversely affected the candidates in any way, then the 3rd Respondent was affected as much as the Petitioner; the Petitioner himself confirmed in his evidence that the 3rd Respondent was barred from attending any of the former President's meetings in the constituency during the campaign period. The Petitioner's allegations that the President's endorsement of a particular candidate as the most suitable candidate for election as the member of National Assembly for Othaya constituency tilted the electoral ground against him was not merited. The Petitioner did not point out any electoral law that the President and his entourage may have breached or infringed and neither did he demonstrate that he lodged any complaint with the 1st Respondent against the President's conduct in the constituency if indeed the president's behaviour was contrary to the elections code of conduct or any other regulation.

On the question of pamphlets that are alleged to have scandalised the Petitioner's candidature, no evidence was led to link the 3rd Respondent with the pamphlets. The petitioner admitted that he did not know the authors. He did not make any report to the police or the 1st Respondent to take any action. I find no merit in these allegations.

Turning back to the allegations that form the basis for scrutiny and recount in particular and the foundation upon which the Petition is based generally, claims of bribery of voters dominated the Petitioner's case. These allegations were mainly directed at the 3rd Respondent.

The 3rd Respondent is alleged to have bribed voters either by herself or through her agents or supporters. One Dr Ngatia is said to have been seen in the 3rd Respondent's car dishing out money to voters at Rukira Polytechnic and Kagonye Primary School polling stations. Bribery incidents are also alleged to have been rampant in Karima Ward. A motor vehicle Registration Number KBN 342 R is alleged to have been used at the behest of the 3rd Respondent for ferrying and bribing of voters. The 1st and 2nd Respondents allegedly abetted this vice by failing to secure polling stations. The Respondents denied these allegations.

The Petitioner did not present sufficient evidence to support these allegations; no evidence was given to prove that the 3rd Respondent either personally bribed voters or she did so through her agents. There was no evidence that Dr Ngatia bribed the voters as alleged or that the vehicle in which he was driving belonged to the 3rd Respondent as alleged. Dr Ngatia himself testified to deny the allegations. Again no link was established between the people who were cited as having been seen bribing voters in Karima Ward and the Respondents or any of them. The ownership of motor vehicle Registration Number KBN 342 R was not established and no evidence was led to prove that it was being used to perpetuate electoral malpractices on behalf of the 3rd Respondent.

The only evidence that the Petitioner presented before court in support of the allegation of bribery against the Respondents were photographs of two of the 3rd Respondent's supporters identified as **Dr Maina Kiragu (3RW4)** and **Regina Muthoni Ngige (3RW2)**. The photographs were taken separately by one of the Petitioner's witnesses, **Rhoda Nyawira Maina(PW11)** who was the Petitioner's chief agent at Early Childhood Development polling station in Iria-ini ward. During her cross-examination, the witness confirmed the photographs did not show any of the two persons giving out bribes. The pictures did not show any of the persons alleged to have been bribing people holding any form of bribe. They were bare photographs that spoke nothing about the allegations of bribery. The two persons whose photographs were taken testified and denied having bribed anybody. In my view the photographs, by themselves, cannot be said to be evidence of bribery.

The Petitioner also linked bribery allegations to lack of security at the polling stations; however, I find that allegation bare since there was no proof of such omission on the part of 1st and 2nd Respondents who bore the responsibility of providing the necessary security. The 2nd Respondent provided uncontroverted statistical evidence that sufficient security made up of regular, administration and anti-riot police was

provided not only in all the polling stations but also at the tallying centre. That evidence was not rebutted and without such rebuttal, claims of bribery of voters or any other electoral malpractice for that matter have no basis to the extent that they are based on allegations which have been proved to be unfounded.

Apart from lack of evidence in support of bribery claims against the Respondents, the court also notes that the Petitioner's agents either signed Forms 35 in those polling stations in which bribery of voters is alleged to have been witnessed without recording any objection, complaint or observation in that regard or they did not give any reasons for failure to sign. Form 35 is an important statutory document that does not just reflect a declaration of a true and accurate count of ballots in a polling station but it also gives any agent an opportunity to record his reservations, if any, on the results in a polling station. A candidate or his agent has the option to sign the form signifying his agreement with the results or he may decline to sign it as long as he gives his reason for declining. In my view, it is incumbent upon the Petitioner's agents who are said to have witnessed bribery incidents to have recorded their objections, complaints or observations in Forms 35 in their respective polling stations. Such objections, complaints or observations could be a reason or reasons for refusal to sign where one opts not to sign because the results could, for instance, have been influenced by the bribery incidents. Indeed, under **Section 82(2) (c)** of the **Elections Act** a vote procured by bribery is one of those votes that will be struck off on a scrutiny exercise ordered under that provision of the law. A mere allegation that an agent or agents reported the matter to the presiding officers without any evidence of such a report in a form that would ordinarily bear that information lends credence to conclusion that the allegations of bribery are baseless.

The other issue which the Petitioner relied upon in this petition is what he alleged to be irregular appointment of poll officials. Regrettably, I could not find any evidence in the Petitioner's contention that the polls in Othaya constituency were manned by untrained polling clerks. There was no evidence to prove the allegations that new presiding officers and polling clerks who had never been trained in electoral process were recruited and appointed on the eve of the elections date to undertake the enormous task of conducting elections without any notice to the political parties. Of all the presiding officers and their deputies in the polling stations throughout the Othaya constituency, none was identified as having been incompetent ostensibly because he was not procedurally recruited or properly trained. The Petitioner himself was supplied by the 2nd Respondent with a list of the names of presiding officers and their deputies; he produced this list in court but never pointed out any particular poll official who was allegedly untrained and appointed on the eve of the 4th March, 2013 to man the elections in Othaya constituency.

The evidence by the 2nd Respondent that the recruitment of the poll officials was an open exercise with various positions being advertised in the press and only successful applicants were recruited and trained on the electoral exercise was not shaken at all. According to him, and it was not controverted, no objection was ever raised by any candidate on the recruitment of the clerks. There is nothing on record to raise doubts about the 2nd Respondent's evidence that all those officers who manned polling stations were procedurally recruited and properly trained to man the electoral process at their respective polling stations.

Closely related to the issue of recruitment of poll officials was the question of gazettment of polling stations in which these officials were supposed to discharge their duties and tasks as election officers. It is true as the Petitioner contended that **Regulation 7(1) (b) and (c)** of the **Elections Regulations** require of the 1st Respondent to appoint and gazette a place or places where polling stations are to be established; in accordance with this Regulation the 1st Respondent indeed gazetted particular places as the appointed polling stations in Othaya constituency. However, on the polling day, so the Petitioner complained, certain stations were relocated to places other than the gazetted venues. In his view this was not only contrary to this Regulation but also that certain voters were disenfranchised and the security of the election material compromised as a result of this relocation. This position appears to be inconsistent with the Petitioner's own pleadings more particularly paragraph 4.40 of the Petition in which he acknowledges the territorial jurisdiction of a gazetted polling station extends to a radius of 400 metres; the 2nd Respondent confirmed in his evidence that an alternative station may be set up within this jurisdiction if for one reason or another, the original gazetted place cannot be used.

I have also noted that **Regulation 64 (1)** of the **Elections Regulations** contemplates relocation of polling stations in emergency situations or in the event of unforeseen circumstances that may render use of a gazetted venue as a polling station impossible or impracticable. Under this Regulation the presiding officer has discretionary powers to move the polling station so long as he has consulted the returning officer and the alternative station is within the same constituency.

In the case of Witima Health Centre polling station, the uncontroverted evidence of the presiding officer of one of the streams in the station, **Jane Mumbi Muligu**, was that the alternative site that was identified for polling purposes was barely 30 metres away from the original gazetted place and therefore well within the 400 metres allowed by law. This site was preferred because, the health centre was engaged and patients being attended to at the centre would have been inconvenienced if it was to be retained as a polling station. The alternative site, Unjiru Community Hall was only separated from Witima Health Centre by a road and in the absence of any barrier between the two places, the hall was clearly visible from the health centre. Evidence was also led to show that precautionary measures were taken to ensure the voters who were intent on voting did vote at Unjiru Community Hall; these measures included posting of an appropriate notice at the health centre, setting up of a banner and use of sisal strings and directional arrows to direct the voters. The Petitioner's agents at the station never objected to the relocation and in view of the reasons given for the relocation, it would have been unreasonable to raise such an objection because the alternative to relocation would have been disenfranchisement of the entire electorate registered to vote in the polling station. The evidence of Jane Mumbi Muligu was not controverted at all. Considering that the turnout at the station was over 90% there is nothing to suggest that voters were disenfranchised by the relocation of the station to Unjiru Community Hall. In any event no evidence was proffered to demonstrate that any of the voters who did not vote failed to do so solely because the voting venue had been changed.

Similarly, Kagumo Primary School polling station had to be relocated to the Catholic Church hall because of lack of electricity at Kagumo polling station. It was not disputed that the Catholic Church is next to Kagumo Primary School. Again no evidence was led to demonstrate any irregularity or compromise of the electoral process as a result of this movement. The Petitioner did not provide any proof to demonstrate how the relocation of this polling station affected him.

On the security of the election materials, the presiding officer testified that she was informed of the unavailability of Witima Health Centre before she set it up as a polling station and therefore all the election materials were taken to Unjiru Community Hall in the same state they were in when she received them from the returning officer. Thus the election materials were not only adequate for the exercise but also that their security was never at any time compromised. No evidence was led by the Petitioner to the contrary; instead, his agents at the station duly signed Forms 35 without raising any objection. In the premises, I find it more plausible to believe the Respondents than the Petitioner on this issue.

Other than allegations of voter bribery, irregular recruitment of poll officers, insecurity at polling stations and relocation of poll centres, the Respondents are also alleged to have jointly and severally contravened electoral regulations governing voting in several other respects; the 1st and 2nd Respondents are alleged to have failed to display the votes or count and record them in statutory forms in accordance with the electoral law; they are said to have also failed to avail Forms 35 or transmit the results thereof in electronic form. The irregularities and inconsistencies in counting, tallying and recording of the votes in Forms 35 are, in the petitioner's view, discrepancies that led to a declaration of wrong results.

In support of these allegations, it was testified on behalf of the Petitioner that contrary to the Elections Act and the Regulations made thereunder, the 2nd Respondent failed to issue identification badges to the Petitioner's agents in specified polling stations and thereby hampering their duties and responsibilities as political party agents. Voters, for instance, are alleged to have been assisted in casting their votes exclusively by the presiding officers contrary to **Regulation 72(2)** of the **Elections Regulations** and that the Petitioner's agents were not provided with serial numbers of ballot boxes and papers used in the elections. The polling stations that were identified as stations affected by these irregularities and malpractices included Kamoko Primary School and Kamoko Tea Buying Centre, Thokoini Tea Buying Centre, Kiinu Primary School, Irindi Primary School and Wagura Primary School. In the absence of the

identification badges, so it is alleged, agents could not also access polling halls and in this respect polling stations like that of Kariko Secondary School was cited. In Kiaguthu Youth Polytechnic, Karuthi Tea Buying Centre, Gichami Primary School, Mucharage Primary School, Ngaru Primary School and Karuthi Tea Buying Centre polling stations it is alleged that accessibility was denied yet the Petitioner's agents are said to have had the necessary identification credentials. Similar problems are said to have arisen in Mahiga Ward with the polling stations in issue being Rukira polytechnic, Kirai Primary School, Kamoko Primary School, and Kina Tea Buying Centre. At Kiganjo Tea Buying Centre, the GNU's party agent is said to have even been denied participation in the vote counting exercise.

The Respondents admitted insufficiency of identification badges but confirmed that parties' agents' accessibility to polling stations and halls was not restricted to those with badges only. According to the 2nd Respondent, any agent who had taken oath of secrecy and had an appointment letter from his political party was allowed unlimited access subject only to such restrictions as to the number of agents from a particular party or candidate that could be allowed in the polling hall at any particular time. This position was not only confirmed by two of the presiding officers, **John Mathenge Macharia (RW2)** the presiding officer at Kairuthi Secondary School polling station and **Habel Rugu Kamau (RW1)**, the presiding officer of Mahiga Primary School, but also by the Petitioner's own agents who testified that they were allowed into the polling station and halls on the basis of their national identification cards, oaths of secrecy documents and appointment letters from their GNU Party.

It would appear that the problem of agents' accessibility to polling halls was to do more with the number of agents that either the Petitioner's party or the Petitioner himself would have wanted in any particular polling hall at a polling station than with the 1st Respondent's identification badges. This is so because while the Petitioner's witnesses testified that they had two agents for each polling station, the 2nd Respondent confirmed that the law requires only one agent for each party at the polling station. Some of the agents, for instance Peter Gachau of Kariko Secondary school polling station and Patrick Wanjohi of Kiganjo Tea Buying centre polling station who are alleged to have been barred from accessing polling stations or halls never testified or swore any affidavit to the effect that they were denied access to these places.

In the circumstances I find it improbable that the Petitioner's agents' accessibility to the polling stations and halls was restricted ostensibly for lack of identification badges and there is no sufficient evidence on record to prove that any of the Petitioner's agents was restricted from those stations or halls or was barred from these venues to perpetuate illegalities or other alleged electoral malpractices and irregularities.

I also note that the Petitioner himself confirmed while being cross-examined that he had no evidence that the presiding officers were working with TNA agents to the exclusion of his agents. According to him this could only be deduced or inferred from the conduct of the agents.

The rest of the allegations against the Respondents revolved around the votes cast. According to Petitioner, the ballots or votes were not displayed to the agents and verified before being assigned to particular candidates. Having shared a middle name with one of the contestants, the Petitioner felt most aggrieved by this omission because, apparently that was the only name that was read out aloud and by omitting to read a candidate's full name, it was difficult to ascertain whether a ballot in respect of which only the common name was read out was cast for the Petitioner or was for his competitor.

In five polling stations, the number of votes cast is alleged to have been more than the registered number of voters. The number of votes cast in all the polling stations is alleged to have been improperly recorded on Forms 35 and even so, the Petitioner's agents were denied those forms. It is the petitioner's case that out of the 112 polling stations, his agents signed Forms 35 in 22 polling stations only. The forms, it is alleged were not displayed at the polling stations. The entries in those forms, according to the Petitioner, were at variance with the entries in Forms 36 in respect of the same results. Again the sealing of the ballot boxes in which the parliamentary votes were cast is alleged to have been interfered with. It was doubted whether the seals used on some of the ballot boxes were the 1st Respondent's seals considering that some of its genuine seals had been found discarded in one of the polling stations. It is also alleged that the integrity of the results from various polling stations was cast in doubt because they were not transmitted

in electronic form as required under the Elections Act.

There is no doubt that these allegations are allegations which if proved to the required standard would raise doubts on the credibility of an election; however, looking at the evidence on record, I am unable to find any proof of these allegations. For instance, while the Petitioner claims that failure to read out aloud the full names in respect of those ballots cast for him or his competitor with whom he shares the name “Gichuki”, was a widespread conspiracy throughout Othaya Constituency to favour the 3rd Respondent to the detriment of the Petitioner, only one person, **Esther Ndori Ndonga (PW18)**, the Petitioner’s agent at Kairia Primary School polling centre deposed to this issue in an affidavit. The only other witness who complained in his affidavit that ballots were allocated to the 3rd Respondent without having been displayed to the agents was **Elijah Nderitu Muita(PW10)**, the Petitioner’s agent at Thokoini Tea Buying centre polling station. Even then, there is no evidence that these agents or any of the other Petitioner’s agents exercised their right under **Regulation 80(1)** for verification and recount of the ballots in any of the polling stations in which this irregularity is alleged to have been perpetuated. In his evidence, the Petitioner confirmed that;

“...no request for a recount was made at any of the polling stations”. (See page 32 of the proceedings).

Apparently, the reason for not asking for a recount is because there was no time. This is recorded at page 35 of the proceedings. His chief agent who testified as **PW2** confirmed that the only recount requested for was at the tallying centre.

Regulation 80 of the **Elections Regulations, 2012** avails any party to the contest the opportunity to demand for scrutiny and recount before the results are announced for up to two times. The Regulation says:-

80(1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted:

Provided the recount of votes shall not take place more than twice.

(2) No steps shall be taken on completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation.

In my view, the rationale behind this Regulation is that if for any reason a candidate or his agent is not satisfied with the verification of the ballots cast or the counting exercise or the result thereof, he should exercise his right at the earliest opportunity to have the votes rechecked and recounted prior to the announcement of the results to clear any doubt as to the validity of the votes cast or the tally thereof. Failure to exercise this right at the opportune moment may legitimately be interpreted to mean that one is satisfied with the results and therefore no dispute is anticipated. Conversely, where the right for scrutiny and recount is unreasonably denied, the validity of the votes cast in that particular polling station and the result thereof will be cast in doubt and an election court will certainly look favourably at a subsequent dispute as to the outcome of the vote count in that station.

The Petitioner and his agents chose not to seize the opportune moment and have the ballots verified and recounted to ascertain who the rightful beneficiary of each of those ballots was. It is apparent from this provision that the proper and opportune moment for a recheck and a recount of ballots is at the conclusion of the counting at the polling station and not at the tallying centre as the Petitioner’s chief agent may have thought.

In the judgment of **Kisii High Court Election Petition No. 3 of 2008 Manson Oyongo Nyamweya versus James Omingo Magara & 2 Others (2009) eKLR**, a decision that has been cited and relied upon by the Petitioner in this petition, Musinga J (as he then was) addressed the issue of verification and

recount of votes in the context of **Regulation 37(1) and (2) of the then National Assembly and Presidential Elections Regulations** which was similar to **Regulation 80(1) the Elections (General) Regulations, 2012**. The learned judge said:-

“The petitioner’s evidence was that he made a request for a verification of his votes at the tallying centre but the second respondent did not accede to it. That was after he realised that some of the results had been announced by the Returning Officer were different from the ones he had been notified of by his agents. Although he was proved right in respect of some stations when the recount was done, the second respondent would not have opened the ballot boxes for purposes of doing a recount at the stage of tallying the results. At that stage, the Returning Officer can only open a ballot box to verify the rejected or spoilt votes upon receipt of a complaint by a candidate.”

In this petition there was no proof from any of the polling stations that the returning officer was presented with a case of any disputed votes in respect of which he could rightly exercise his limited powers under **Regulation 83(1) (a)** to open the ballot boxes in issue and recount the ballots that ought to have been classified and packaged as the disputed ballot papers under **Regulation 81(1) (c)** of the **Elections Regulations**.

Having admitted in his evidence that he did not ask for a recount in any of the polling stations, it can safely be concluded that his averment in the petition, more particularly paragraphs 4.44, 4.45 and 4.46, that the presiding officers throughout Othaya constituency declined to a recheck or recount of the votes at the request of the Petitioner’s agents is not only lacking in evidence but it is also inconsistent with the Petitioner’s own testimony.

On the allegations of over voting, it is true as stated by the Petitioner, that where the number of votes cast exceed the number of the registered voters in any particular station, the Returning Officer is enjoined to disregard results from that station; this is provided for under **Regulation 83(1)** of the **Elections Regulations**. However, the stations mentioned do not show that this was the case. The number of votes cast is less than the registered voters. At Gatugi Primary School (1), out of the 445 registered voters, 438 voters voted; at Gatugi Primary School (2), out of the 446 registered voters, 390 voters voted; at Mahiga Primary School 220 voters voted out of the 231 registered voters; at Iriaini Primary School, 525 voters voted out of the possible 551 registered voters; at Gatugi Secondary School (2) 338 voters voted out of the possible 403 registered voters and at Kagundu Tea Buying Centre 75 voters voted out of the 83 registered voters. It is only at Gatugi Secondary School (1) where the number of cast votes was more than the registered number of voters by six votes. The explanation given by the 2nd Respondent for the extra votes cast was that there were 11 voters who were deliberately omitted from the principal register in Othaya constituency because they lacked biometrics. In the absence of any evidence to the contrary, it would appear the allegations of over voting in Othaya constituency are wild and without any factual basis.

The allegation that the seals on some of the ballot boxes were different from the ones used by the 1st Respondent was controverted by the 2nd Respondent that the texture of the seals, the embossment or franking of serial numbers on the seals depends on the manufacturing company. The candidates or their agents were also allowed to use their own seals which may be different from the ones ordinarily used by the 1st Respondent. The seals, he testified are used and broken at several stages of the polling process; in particular at the start of the polling, the ballot box is sealed at four different places by the returning officer or his deputy or both. In addition, agents of political parties may also seal the same places with their own seals which they are allowed to use or with seals provided by the 1st Respondent. At the close of the voting the aperture through which the ballots are cast into the ballot box is sealed in a similar manner. Except for the sealed aperture, these seals are broken at the end of the voting to empty the ballots in preparation for the vote counting exercise. Since there were six elective positions in the 4th March, general elections, there were six ballot boxes in any particular polling station; these boxes would be sealed and unsealed in the manner described and accordingly, there would be a minimum of 24 used and broken seals at the end of the polling and vote counting exercise. Evidence was led to the effect that except for the serial numbers, the seals used for the six ballots were similar in every other respect and therefore the Petitioner could not say with any certainty that the seals that his agents recovered discarded

at a polling station were for ballot boxes for member of National Assembly. They could have been for the ballot boxes for the election of the President, Senator, Member of County Assembly, Women Representative or the Governor. Most importantly, in view of the fact that the seals were expected to be used and broken in any particular polling station, the finding of the broken seals cannot of itself be evidence of electoral malpractice or irregularity.

It is also alleged that failure to transmit election results in electronic form cast those results in doubt; however, although **Regulation 82(1)** of the Election Regulations is couched in mandatory terms and enjoins the presiding officer to submit to the returning officer the provisional results in electronic form before submitting the actual results, **Section 44 of the Elections Act** which makes provision for the use of technology in the electoral process gives the 1st Respondent the discretion to use or not use technology in such a process. The Section says:-

44. The Commission may use such technology as it considers appropriate in the electoral process.

My understanding of this provision is that failure to use any form of technology in the electoral process, which obviously includes transmission of results, is neither fatal to the electoral process nor is it an irregularity. More over the results that are required to be transmitted electronically are considered provisional and subject to confirmation under **Regulation 82 (2)** of the **Elections Regulations**; this would then suggest that without the actual results and without confirmation, provisional results may count for nothing. The petitioner never demonstrated how this omission affected him adversely.

The Petitioner made most of his agents' signature or lack thereof on the declaration form, Form 35. In support of his petition, the Petitioner claimed that his agents did not sign Forms 35 in 90 polling stations thereby implying that these forms were signed on his behalf in 22 polling stations only. Paragraph 4.48 of his Petition states:

“In about 90 polling stations out of the 112 polling stations within Othaya Constituency, the Presiding Officers failed and/or neglected to allow the Petitioner’s agents sign the respective form 35s and/or state the reasons for their refusal to sign.”

While being cross-examined, the Petitioner was referred to paragraph **67 (a) (b)and(c)** of his affidavit in support of the Petition in which he deposed that his agents signed **Forms 35 in 74** polling stations and that it is only in 38 stations that his agents were not allowed to sign Forms 35. When asked which version of the pleadings the court should adopt, the petitioner chose to go by his depositions in his affidavit. This would imply that in the absence of an amendment to the petition, his evidence was inconsistent with the petition as pleaded. Further, it is noted that although it is claimed in the affidavit that the presiding officers failed or neglected to have his agents sign Forms 35 in 38 polling stations he only identified five stations where this problem is said to have occurred.

In view of these contradictions and inconsistencies it cannot be concluded with any certainty that the Petitioner’s agents were not given Forms 35 to sign or record their reasons for refusal to do so as alleged.

Regardless of the reasons for refusal or failure to sign Forms 35 or failure to record reasons for such refusal or failure to sign, it would appear from the regulations that such omissions may be of little consequence on the validity of the results announced at a polling station. **Regulation 79 (6)** provides as follows:

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

It is apparent from this regulation that while much weight may be given to the agent’s signature on Form 35 in the sense that it signifies his declaration that the results as presented in the form represent a true and accurate count of the ballots in any particular polling station, nothing much turns on failure to sign or failure to record reasons for refusal or failure to sign; such failure or refusal to sign is deemed

inconsequential under **Regulation 79(6)**. In my view, the rationale behind this Regulation is that it is possible for an agent or agents, for whatever reason, to deliberately avoid signing the forms even where they have no issue with the electoral process at the polling centre or centres; whenever such a case occurs, it is the position of the law that nothing much should be read from such an omission. It is assumed that if a candidate or his agent has any problem with the result of a particular station, he will not be deemed to have protested against that result by merely avoiding to sign the declaration; that protest is only recognised if it is expressed in writing in the Form 35 as the reason for not signing.

While being cross-examined by the counsel for the 3rd Respondent, the Petitioner confirmed that there were stations in which he had no problem with but still his agents in those stations did not sign the Forms 35. There are yet other stations where the figures entered in the forms did not tally but his agents signed the Forms 35 in those stations; this was done despite the Petitioner's chief agent's (PW2's) evidence that he had instructed his agents to make remarks on Form 35 if they had any problems. In these circumstances, besides the inconsistencies between the averments made in the petition and evidence given in court, no case turns on the Petitioner's agents' failure to sign Forms 35. I am not satisfied that failure to sign Form 35 is in itself a proof of an electoral irregularity or malpractice on the part of the Respondents or any of them.

The contradictions in the Petitioner's witnesses' evidence on electoral irregularities and malpractices were quite remarkable in relation to Rukira Primary School polling station. A myriad of allegations ranging from corruption to unmarked and unsealed ballot boxes different from those used by the Commission were raised in relation to Rukira Primary School polling station. The presentation of the results from this particular polling station at the tallying centre caused much uproar from the Petitioner's supporters and agents; the reasons given by the Petitioner's witnesses' for this commotion and their description of the events before and during the commotion are as varied as the number of the petitioner's witnesses who testified on this particular issue. It would have been difficult to make out from the Petitioner's witnesses' evidence of what exactly happened were it not for a video footage that was taken by one of the Petitioner's witnesses and admitted in evidence in this petition. The video footage was played out in court on several occasions and part of what emerged from that clip is as follows:-

- 1. There are at least seven uniformed police officers at what appears to be an entrance to the tallying hall;*
- 2. Together with the police officers are two officers wearing IEBC reflective jackets each carrying a set of two ballot boxes as they enter the hall;*
- 3. The third person following the two officers is a man who was identified as the presiding officer of Rukira Primary School polling station; he is also carrying two ballot boxes. He is carrying one ballot box with his right hand and carrying the other ballot box in his left hand;*
- 4. Apart from carrying the ballot box in his left hand, he is also holding in the same hand what appears to be a brown envelope and a note book;*
- 5. The Petitioner's chief agent, Stephen Muito Muruthi (PW2) is identified and is seen walking behind the presiding officer and pointing at the envelope;*
- 6. The presiding officer hands over the envelope to the tallying desk; a commotion ensues, **Joseph Nderitu Muturi (PW5)** picks two envelopes from the desk and is seen holding them; he eventually hands them over to an IEBC official seated at the podium; he is identified as Mr Maina;*
- 7. The Petitioner's agents are agitated; the police are seen trying to bring order; the 2nd Respondent is seen trying to talk to the agitated crowd that is apparently fronted by the **Stephen Muito Muruthi (PW2)**;*
- 8. The Petitioner enters the hall; the 2nd Respondent attempts to talk to him but he is stopped by*

Stephen Muito Muruthi (PW2) who insists he must brief him first; He is joined by a person identified as Nderitu Gachagua who identifies himself as the Secretary General of GNU party;

9. **Stephen Muito Muruthi (PW2)** raises a number of issues concerning the electoral process; Mr Nderitu Gachagua intervenes and he engages the returning officer in a conversation occasionally interrupted by the **Stephen Muito Muruthi (PW2)**. There appears to be some compromise.

This video footage was taken by the petitioner's agent and it was admitted in evidence as **exhibit "LN-1"**. Despite its clarity the Petitioner's witnesses' account of the events captured by this video is inconsistent with what appears in the video footage itself and contradictory as between one witness and another; this is revealed in their following evidence:-

Stephen Muito Muruthi (PW2) testified that the ballot boxes were delivered at the tallying centre in unclear circumstances and the results announced before the delivery of the ballot boxes; these boxes are said to have been cited at the reception desk at the tallying centre together with other unmarked ballot boxes whose seals appeared unique. According to this witness he saw the presiding officer from Rukira Primary School polling station attempting to deliver ballot boxes and brown A4 envelopes containing results for that particular polling station. The witness said he confronted the presiding officer and after warning him against his attempts to deliver the results, the officer left the hall. The witness claimed that the officer gained entry to the hall through an alternative entrance and handed over the results to the 1st Respondent's officers who handed them over to a Mr Maina. The witness alleged that he complained to the 2nd Respondent who never took any action but instead read the results from Rukira Primary School polling station for the third time.

Francis Mwangi Thuita (PW3) testified that he was strategically seated at the front of the hall to monitor the arrival of ballot boxes and the activities at the podium where the tallying process was being conducted. This witness saw four ballot boxes being brought in the tallying hall by a man described as wearing a black suit but without the 1st Respondent's badge or reflective identification jacket. The ballot boxes are alleged to have been different from the rest of the boxes and did not bear any seals and the suspicious man behind them declined to identify himself or present any identification credentials. This man is claimed to have whipped three size A4 envelopes from his jacket and quickly handed them over to the Deputy Returning Officer who mixed them up with the rest of the results. This witness claimed that it is the 2nd Respondent who came to the rescue of the unidentified man from the apparently agitated crowd; the 2nd Respondent also marshalled the services of senior and other police officers present to have this witness and his colleagues leave the hall. They allegedly left to the back of the hall but were still keen to see where the suspect ballot boxes had been placed despite the efforts to mix them up with the rest of the boxes. Although the announcement of the results was temporarily stopped, it resumed afterwards and this witness left only after the final results had been announced.

Rhoda Nyawira Maina (PW11) said that on 5th March, 2013, an unidentified man came to the tallying centre at around midday carrying several envelopes that were allegedly handed over to the tallying officers. The man, according to this witness, attempted to run away but was restrained from doing so. The man is said not to have had any form of identification. The witness testified that chaos erupted at the tallying centre because the man could not identify himself; agents of GNU party candidates confronted the 2nd Respondent and the rest of the 1st Respondent's officers because of what they suspected to be a deliberate attempt by the 1st and 2nd Respondents to influence the outcome of the election in favour of their preferred candidate.

Lucy Njeri (PW3) who captured the video footage testified that she left for the tallying centre at around 8.00 a.m. According to her evidence, there were ballot boxes at the centre without Forms 35 affixed on them and therefore it was difficult to tell from which polling station they had come. The seals on those ballots are said to have been "luminous green" and not green and the serial numbers were made up of four digits only instead of seven. Chaos, according to Lucy, erupted when a man accompanying the ballot boxes handed over two A4 envelopes to the 1st Respondents' officers who are said to have mixed them up

with the rest of the documents at the table. This witness confirmed that the Petitioner's party agents demanded that the man identifies himself and explains the contents of the envelopes he handed over to the officers.

Modesto Mugo Mwangi (PW8) testified that the presiding officer came into the hall carrying three different envelopes and proceeded beyond the cordoned area to the dais where the 2nd Respondent, his deputy and the 1st Respondent's clerks were seated; he reached for his jacket removed three envelopes which he handed them over to the 1st Respondent's clerk who in turn placed them on the tallying table. The witness asked the 2nd Respondent to halt the announcement of the results until such time that the man and the contents of the envelopes he was carrying had been identified. He later learned that the man was known as Mr Kariuki and despite of lack of identification documents, the 2nd Respondent came to his rescue and asked the police to get the witness and his colleagues out of the hall. The witness claimed after being questioned the man admitted having been sent by the 3rd Respondent to bring the envelopes that he had handed over to the 1st Respondent's officers.

Joseph Nderitu Muturi (PW5), the Petitioner's chief agent in Iria-ini ward testified that the man in question entered the tallying hall in a black suit with size A4 envelopes hidden in his jacket. This witness claims he together with those seated with him raised the alarm and the man was apprehended. The witness claims that he took the envelope from him and handed it over to the 1st Respondent's officials at the dais.

It is clear that the description of the events by the Petitioner's six witnesses is inconsistent with what transpired at the tallying centre as captured in the video footage. In the face of these contradictions and inconsistencies I can only conclude their evidence is neither cogent nor credible.

In his evidence, the 2nd Respondent described the procedure for presentation of results from polling stations. According to him every presiding officer accompanied ballot boxes from the polling stations to the tallying hall. The ballot boxes would be placed at a designated place in the hall while the results would be given to his officers at podium where they would be tallied and announced. The presentation of results from Rukira Primary School followed a similar pattern; the ballot boxes were brought in to their designated place and the results handed over to the 1st Respondent's officers at the podium. While it is true that the presiding officer was not wearing his reflective identification jacket, he identified himself as an officer of the 1st Respondent. It is also clear from the evidence on record that the Petitioner's chief agent (**PW2**) also knew him as a presiding officer before he presented the results. He also confirmed that the procedure of presenting results from Rukira Primary School was the common trend in presentation of results from other polling stations. Most importantly, the Petitioner's agent at Rukira Primary School polling station had committed himself to the results; he signed Form 35 at the station acknowledging that the results from that station were true and accurate. Those were the results that were announced and entered in Form 36. In the premises there was no reason whatsoever for the commotion that was witnessed at the tallying centre.

The allegations that the ballot boxes from this particular polling station were unmarked, or the boxes themselves and their seals appeared different from the rest of the boxes or seals or that they were not properly sealed would be of little consequence, assuming they were proved, since the results that were returned are the same results that had been announced at the polling station and which the Petitioner's agent in that station had ratified in Form 35 as the true and accurate count of the votes.

One other issue that preoccupied the Petitioner's case in pursuit for recount and scrutiny of the ballots cast was the errors in the summation of the votes cast in Form 35. Indeed there were errors in posting of numbers in Form 36 from Form 35. The respondents did not contest these errors. I understood the 1st Respondent to say, and I have no reason to doubt him since his evidence is consistent with the entries in Forms 36 and Forms 35 which form part of the record and evidence in this petition, that the figures in error were arithmetical errors in the narrative part of Form 35 and these were never converted into actual votes to the advantage or disadvantage of any candidate. The votes cast for each of the candidates as

indicated in Forms 35 are the same number of votes that were posted in Form 36 save for ten polling stations where the number of votes posted in Form 36 for both the Petitioner and 3rd Respondent was either less or more than what they actually garnered and posted in Form 35. The polling stations in which these type of errors occurred were identified and the uncontroverted evidence of the **Jeremiah Wachira Ichaura (3RW5)** revealed not only the number of votes involved but also demonstrated how negligible their impact was on the final tally of the votes cast for each of the two erstwhile competitors.

According to **Jeremiah Wachira Ichaura's** evidence, were it not for the errors in the ten polling stations, the Petitioner would have obtained 385 more votes than what was entered as his total votes in Form 36 while the 3rd Respondent would have garnered 229 more votes than what she was given as her total votes in that form. The final tally of the votes for each of them would therefore have been 16,514 votes for the 3rd Respondent and 14,603 votes for the Petitioner. His evidence, in my humble view, demonstrates that notwithstanding the errors in Forms 35 and Form 36, the 3rd Respondent still maintained unassailable lead in the vote count which left no doubt as to whom between the Petitioner and the 3rd Respondent garnered the majority votes. This witness' evidence also discounted any notion of a particular trend of errors that could be described as having been calculated and executed to the advantage or disadvantage of any particular candidate or generally to disregard the electoral law and bring the electoral process into disrepute.

It is worth recalling that during the cross-examination of the Petitioner on this issue, counsel for the 3rd Respondent took him through all the 92 polling stations in which he had identified mistakes in recording of the votes he got in Forms 35 and Form 36; the Petitioner confirmed that what he and the 3rd Respondent garnered in those stations was what was recorded in forms 35 and entered in form 36. There were, as noted, a few stations where there were variances where the number of votes that both the Petitioner and the 3rd Respondent garnered were either understated or overstated. These variances were explained by the 2nd Respondent and Mr. Jeremiah Wachira Ichaura whose evidence was not controverted.

Looking at the evidence on record and having had the opportunity to hear the witnesses, I am of the view that these errors could be described as honest mistakes and not a deliberate or elaborate scheme orchestrated by any of the parties in these Petition to undermine the electoral process as by law established; neither can they be said to have been deliberately occasioned to frustrate the plebiscite or the democratic will of the electorate in Othaya constituency. They are at most irregularities, which in the words of **Section 83** of the **Elections Act**, do not affect an election outcome where it appears, as it appears to me in this Petition, that the conduct of the elections for member of National Assembly for Othaya Constituency was consistent with the principles of the Constitution and the electoral legal framework.

I have found that the errors pointed out by the Petitioner were explained by both the 2nd Respondent and **Jeremiah Wachira Ichaura**. The evidence of **Jeremiah Wachira Ichaura** was not only uncontroverted but counsel for the petitioner is on record as confirming that he agrees with it. If the Petitioner is in agreement with the 3rd Respondent's evidence which addressed the errors in posting of figures in Forms 35 and Forms 36 I find it difficult to appreciate the petitioner's quest for scrutiny and recount of ballots ostensibly to address those same issues which have been addressed by the evidence he has embraced. The two positions are, in my view, irreconcilable.

The law on scrutiny and recount that I have addressed hereinbefore suggests that scrutiny and recount in a petition such as the present one is not an exercise that is supposed to place an election court on a level higher than that of the presiding officer or polling clerks in the electoral structure of counting or recount of votes; neither is it a gambling exercise that sets the court to rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the Petition is based on any particular electoral malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice or irregularity must be pleaded and the evidence of such malpractice must be laid out or established prior to an order for scrutiny or recount; the court must be satisfied that, on the basis of

the evidence before it, it is necessary to call for a scrutiny and recount, if not for anything else, to confirm the truth of that particular evidence. Asking the court for a scrutiny or recount where there is no evidence or basis for such an exercise would be more or less engaging the court on a mission of searching for evidence where none exists, a practice that would not only be prejudicial to the respondents but would also be deprecatory in a legal system that believes in fair and impartial administration of justice.

Counsel for the Petitioner relied on several decisions in support of his case some of which I will now consider from the perspective of the foregoing analysis of the evidence and the law.

On account of court decisions that had been cited on the question of recount and scrutiny in **Mombasa High Court Election Petition No. 1 of 2005, Joho versus Nyange & Another (2008) 3KLR 188, Maraga J** (as he then was) was of the view that;

“the common thread that runs through all of them is that there is no rule that a petitioner must first call evidence and lay a basis before scrutiny is ordered. Nor is there one that the scrutiny will always be ordered whether or not a basis has been laid”.

The judge was however emphatic that;

“an order for scrutiny can be made when it is prayed in the petition itself and when reason for it exists. As stated in 15 Halsburys Laws of England 4th Edition paragraph 846 it is not made as a matter of course. It is made when there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other election officials. (See page 194).

In disallowing the application for scrutiny and recount the court ruled at page 195 that:-

“As we all know counting was done in polling stations and the Returning Officer collated the figures. Though counting mistakes cannot be ruled out they are, in my view, minimal. With a margin of 1061 votes in this petition I am not persuaded that an order for scrutiny and recount should be made before a foundation is laid.”

It is clear from this decision that an order for scrutiny and recount must be based on some reason and that reason will not include mistakes on the part of the returning officers or other election officials if those mistakes are, in the court’s view, minimal. I suppose what amounts to minimal mistakes will depend on the circumstances of each particular case. The margin of votes between the contesting parties will also count; where it is wide, the court is unlikely to order for scrutiny or recount until a foundation for it has been laid.

In the light of the evidence before me, I can find no sufficient reason to order for scrutiny and recount. The difference in the margin of votes garnered by the Petitioner and the 3rd Respondent is by no means narrow. The mistakes which have been brought to the fore have been explained to my satisfaction and after considering all the evidence I find that no foundation has been laid or reason given for an order for scrutiny or recount either under **Section 82** of the **Elections Act** and **Rule 33** of the Election Petition Rules or at all.

In the **Nairobi High Court Election Petition No. 5 of 2008 William Maina Kamanda versus Margaret Wanjiru Kariuki & 2 Others** the court ordered a scrutiny and recount of the votes after court Kariuki J (as he then was) considered several factors which have not been proved to obtain in this petition. The court established as a fact that there were massive irregularities in the election of the Member of Parliament for Starehe Constituency for which no explanation was offered by the Electoral Commission. For instance, the Commission could not account for 37% of the Forms 16A which, in the current electoral legal regime, would be equivalent to Forms 35. The court noted that the difference in votes between the Petitioner and the then sitting Member of Parliament was only 895 votes and held that the incidence of the missing Forms 16As on the final results of the elections as declared was likely to be quite significant. While I agree with the learned judge’s decision I hold that the order for scrutiny and

recount was made in circumstances that were peculiar to that case and for which find no similarity in the petition herein.

It must be noted that scrutiny and recount of votes, in the language of **Section 82** of the **Elections Act and Rule 33** of the Elections Petition Rules is a discretionary remedy which the Election Court is not bound to grant as long as it states its reasons for the decline.

Over and above the question of recount and scrutiny, I do find that the entire petition is founded on generalised allegations deficient of proof or any proof that scales up to the required standard. The court decisions that have been cited by the Petitioner's counsel suggest that in a petition such as this proof of any allegation is not "deduced or inferred from conduct" as the Petitioner suggested in his evidence during his cross-examination; the Petitioner must do more than excite doubts in the mind of the court that the allegations on which the petition is founded could be true. The allegations must be proved though not beyond doubt but beyond probabilities.

In the **Nairobi High Court Election Petition No. 10 of 2008 William Kabogo Gitau versus George Thuo (2010) eKLR 9** I understand the Court (Kimaru, J) to have said that in determination of an election petition, the court will consider first, whether a particular electoral malpractice, or irregularity has been established and secondly whether that electoral malpractice or irregularity impacted on the rights of the electorate to have a representative of their choice. I have found that there was no evidence of malpractice or irregularity of such magnitude as to impact on the outcome of the elections of the member of National Assembly for Othaya constituency. The allegations have been found to be generalised and as was stated in the case of **Nairobi High Court Election Petition No. 41 of 1993, Wanguhu Ng'ang'a & Another versus George Owiti & Another**, generalised allegations are not the kind of evidence to prove election petitions. The allegations must be proved by cogent, credible and consistent evidence.

The court went further to state that it is now established that the standard of proof in election petitions is higher than that which is applied in ordinary civil cases. The learned judge referred to the case of **Muliro versus Musonye & Another (2008) 2KLR (EP) 52 at page 54** where the court held that the standard of proof in establishing an election offence is higher than that of proof on balance of probabilities although it is not equal to the standard of proof beyond a reasonable doubt that is applied in criminal cases. The court referred to the case of **Ng'ang'a & Another versus Owiti & Another (No.2) 2008 1KLR (EP) 799** where the court held at page 806 that:-

"The allegation in the Petition as laid above is a grave one indeed. Consequently the party laying it is expected to present evidence that is cogent, consistent and credible. Election offences approximate to criminal charges. It has been said proof thereof should be beyond reasonable doubt. On our part the proof should be as such a high standard as to be above, and quite above the balance of probabilities in civil litigation."

It was proved in Kabogo case that amongst other irregularities, the Forms 16A were not authenticated by presiding officers and those purportedly authenticated were signed by persons who were not presiding officers. The returning officer in turn accepted them as valid results when he ought not to have done so. Similar irregularities were proved in evidence in the **Kisii High Court Election Petition No. 3 of 2008, Manson Oyongo Nyamweya versus James Omingo Magara & 2 Others (2009) eKLR** and in **Kisii High Court Election Petition No.2 of 2008 (2008)eKLR Simon Nyaundi Ogari & Another versus Hon. Joel Omagwa Onyancha & 2 Others**. I have not found irregularities of such magnitude in this petition; instead the alleged electoral malpractices, irregularities and illegalities have not been proved to the required standard.

In **Joho versus Nyange & Another (No. 4) (2008) 3KLR (EP) 500, Maraga J** (as he then was), said of the standard of proof that ought to be discharged in an election:-

"I agree with counsel for the second respondent that the Petitioner being the one seeking to nullify an election Petition he has the burden of proof. As to the standard of proof, whereas I agree with the holding in Mbowe versus Eliufoo (1967) EA 240 that it has to be proved to the satisfaction

of the court and that the court cannot be said to be satisfied when it is in doubt, I would however not say that the standard of proof required in election petitions is higher than on a balance of probabilities. And where there are allegations of election offences having been committed, as the election in Joseph Wafula Khaoya Petition No. 12 of 1993 held a very high degree of proof is required.”

One other court decision cited by the Petitioner and which merits consideration in this judgment is the decision in the case of **Morgan & Others versus Simpson & Another, (1974) ALL ER 722**. This was a petition resulting out of a local government election in England. In that election 82 ballots of the votes cast were rejected by the returning officer. Forty-four of those rejected were rejected because they were not stamped as required by the election rules. If the 44 ballot papers had not been rejected, the petitioner would have won the election by a majority of 7 votes over the respondent. As a result of the rejection of the 44 ballots the respondent had the majority of 11 votes and was accordingly declared to be the successful candidate. It is in these circumstances that the Court of Appeal (Lord Denning MR, Stephenson and Lawton LJJ) held that under **Section 37** of the **Representation of the People Act 1949** an election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been ‘so conducted as to be substantially in accordance with the law as to elections’, or (b) if the irregularities had affected the result.

Section 37(1) of the **Representation of the People Act 1949** says:

‘No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.’

This provision, in its pertinent aspects, is in *pari materia* with **Section 83** of the **Elections Act, 2011** which provides:

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 non-compliance did not affect the result of the election.

To the extent that the two provisions are similar, the interpretation of **Section 37(1)** of the **Representation of the People Act 1949** by the Court of Appeal of England in the Morgan case would be of persuasive value to the interpretation of **Section 83** of the **Elections Act, 2011** in the context of this Petition. The retallying of the votes after taking into account the mistakes occasioned by poll officials in the Morgan case would resonate, quite squarely, with the retallying of votes in this Petition after consideration of the errors in transposition of entries on Form 36 from Form 35. However, while the retallying in the Morgan case affected the result of the election in a fundamental way, the retallying of votes in this Petition did not have such an effect; the ballots cast in the Morgan case were not stamped and had they been stamped the election result would have been affected as the petitioner would have been declared the winner. There is no such possibility in this Petition even after correction of the errors.

While I agree with the court’s interpretation of the circumstances under which an election court can declare an election invalid, I am not persuaded that such circumstances have been demonstrated in this case. There is nothing to suggest, as far as I can see, that the election of the member of National Assembly for Othaya Constituency was conducted so badly that it was not substantially in accordance with the law as to elections. Instead, from the evidence presented in court, there is everything to suggest that the elections for member of National Assembly for Othaya constituency were conducted in accordance with the principles of the constitution and the electoral legal regime and any mistakes that emerged were not as material as to affect the result of the election.

In conclusion therefore, considering the evidence presented before this court, the submissions by counsel

whose industry and diligence in presentation of their respective clients' cases in this petition is acknowledged with gratitude, the inevitable answers that appeal to me on the questions which were framed as issues for determination in this petition are as follows:-

1. The 3rd Respondent was eligible to contest as a candidate for the elections held on 4th March 2013 for the position of the member of National Assembly.
2. There is neither a reason nor basis for this court to order a scrutiny and recount of the votes cast in the election of Member of the National Assembly for Othaya Constituency in the elections held on the 4th March, 2013.
3. The 3rd Respondent was validly elected as the member of the National Assembly for Othaya Constituency in the elections held on 4th March, 2013.
4. Peter Gichuki King'ara was not duly elected to the office of the Member of National Assembly for Othaya Constituency in the elections held on 4th March, 2013.
5. There is no proof that the Respondents jointly or severally committed election offences in the course of election of Member of National Assembly for Othaya Constituency.
6. The elections of the Member of Parliament for Othaya constituency were free and fair and conducted substantially in accordance with the law.

I hereby so hold.

Accordingly, the Petitioner's Petition dated 26th March, 2013 and filed in this court on 8th April, 2013 is dismissed with costs to the Respondents. I certify costs for two advocates for the 3rd Respondent. These costs shall be taxed by the Registrar pursuant to **Rule 35** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**.

Signed and delivered in open court at Nyeri this 12th day of September, 2013

Ngaah Jairus

JUDGE

In the Presence of:

Court clerk: -

Joel Njiru/Peter Ndungu

Counsel for the Petitioner: -

Mr.Kyalo Mbobu, Mr. Kithinji Marete

Counsel for the 1st and 2nd Respondents: -

Peter Munge

Counsel for the 3rd Respondent: -

Mr. Cecil Miller, Mr. Peter Wena and Mrs Pauline Mc Asila