



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELECTION PETITION NO. 12 OF 2013

**ELECTION FOR THE MEMBER OF THE NATIONAL ASSEMBLY FOR NJORO
CONSTITUENCY**

KARANJA

**KABAGE.....PETITIO
NER**

VERSUS

HON. MR. JOSEPH KIUNA KARIAMBEGU

NGANGA.....1ST RESPONDENT

**MR. FIDELIS KITILI KIVAYA, RETURNING OFFICER NJORO
CONSTITUENCY.....2ND RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION.....3RD RESPONDENT**

JUDGMENT

1.0 Introduction

1.01 Karanja Kabage, the Petitioner is an educated man. He holds several degrees, including an MBA from the University of Nairobi, Kenya's premier University. He is an Advocate of the High Court of Kenya. He was born in Njoro Constituency where he owns 50 acres of farm land, but he does not live there. Like most Kenyans of his age and education, he lives and works for gain in Nairobi. He however frequents rural Njoro and sponsors needy children to Primary, Secondary and even Tertiary education. He is a son of the soil. He could not agree that he lost the election because he is a city man, because as a Kenyan, and I entirely agree with him, he has a constitutional right to register as a voter, and to vie for any elective office in any constituency in any part of Kenya.

1.02 He consequently contested in the 4th March 2013 General Elections for a seat as a Member of the National Assembly for Njoro Constituency a newly created Constituency from the previous large Molo Constituency. He sought nomination in the popular National Alliance Party (TNA). He lost with 5,000 votes against 12,000 votes garnered by his opponent, the First Respondent. He appealed to the TNA's Appeals Committee in Nairobi. There too he was unsuccessful. His wish to be

nominated under the TNA flag having been thwarted, he jumped the TNA ship, and joined the United Democratic Front Party (UDF) and contested the General Elections under that Party for the Njoro Constituency.

1.03 His principal opponent along with five other candidates was one Joseph Kiuna Kariambegu Ng'ang'a (*the First Respondent*) a retired Army Officer (*with an Honourable Discharge*), - who called himself "*a hustler*" that is "*a poor man*" and referred to the Petitioner as a "*Sonko*", a rich man. For completeness, these were the candidates, and number of votes each of them garnered in the General Election for Njoro Constituency.

	CANDIDATE	VOTES GARNERED
1.	Joseph Kiuna Kariambegu Ng'ang'a	34,748
2.	Charity Gathambi Chepkwony	13,297
3.	Karanja Kabage	8,631
4.	David Kamau Kuria	4,311
5.	Kuria Njau	2,848
6.	Patrick Kipngeno Koech	2,615
7.	Johnson Mburu Kinyanjui Mwamba	-

1.04 With those votes, the First Respondent was declared duly elected and was gazetted under Gazette Notice No. 3159 of 2013 as the Member of the National Assembly for Njoro Constituency. The Petitioner was aggrieved and unhappy with those results. He filed, High Court at Nairobi, Election Petition Number 12 of 2013 (*the Petition*). Following the appointment of Judges to hear Election Petitions, his Petition was transferred to this court for hearing and final determination. The Petitioner seeks two prayers in his Petition, namely -

- 1. that this Court do declare that Joseph Kiuna Kariambegu Ng'ang'a was not duly elected and that the elections were null and void; and***
- 2. that the costs of this Petition be provided for.***

1.05 The Petitioner set out two grounds, namely -

- 1. that during the nomination exercise for the National Alliance Party (TNA), the First Respondent committed election offences, namely, bribery of voters, use of force and/or violence and use of public resources contrary to the provisions of the Elections Act, 2011, and***
- 2. that during the campaign period and before voting in the General Elections, the First Respondent committed election offences, namely bribery of voters, use of force and/or violence and misuse of public resources contrary to the provisions of the Election Act, 2011.***

1.06 The essence of the the Petitioner's first ground as set out paragraphs 1-4 of the Petition is that the First Respondent committed election offences during the primary or party nominations. These allegations are also repeated in paragraphs 13-19 of the Petitioner's Affidavit in support of the Petition.

The Petitioner admits (*at para 14*) that he filed an appeal to the Party (TNA's) Appeals Tribunal where the appeal was found to have no merit and was rejected. As the Petitioner had jumped the TNA ship for a float in UDF, no copy of the TNA Tribunal's decision was availed to the Court.

1.07 The Petitioner was perfectly entitled to change his party in order to contest the Elections. Procedurally however, he had abandoned the proper recourse, appeal to the Returning Officer and ultimately to the I.E.B.C., in terms of Rules 11 and 13 of the Election (General) Regulations (Rules of Procedure on Settlement of Disputes (LN No. 139/2012)).

1.08 The question however remains and that question is whether the Petitioner's claim that the First Respondent was not validly nominated is a matter which is justiciable before this court.

2.0 Of whether the Disputes relating to Primary Elections (Nominations) ought to be determined by the Third Respondent.

2.01 The First Respondent submitted that the court lacks jurisdiction to determine matters arising out of nominations. In addition the Code of Conduct provides for a procedure, mechanism and means of enforcing breaches thereof and the court lacks jurisdiction to determine such complaints. This submission was also supported by the Second and Third Respondents who added that the Petitioner ought to have invoked the jurisdiction of the Third Respondent's Committee on Dispute Resolution pursuant to Section 74 of the Elections Act, Regulation 99 of the Elections (General) Regulations and the rules of procedure on settlement of disputes made under the above Regulations.

2.02 In rebuttal the Petitioner submitted that it was the Petitioner's case that the Second and Third Respondents had a constitutional mandate to conduct a free, fair and credible election and in particular to enforce the Electoral Code of Conduct which bound all the parties. It was also his case that the Second Respondent had a duty to conduct investigations on the complaints made to him by the Petitioner and the other candidates and follow up on investigations recommended to the Police and having failed to do so breached the law. The court therefore had jurisdiction to determine that issue within the Petition as there was no evidence that the matters complained of had been conclusively determined.

2.03 The contention raised by the Petitioner poses quite a dilemma to the Election Court. Where a candidate raises a complaint regarding a malpractice or potential breach of the electoral law and the complaint is not addressed by the electoral body, primary elections are held without the complaint being conclusively determined does the candidate's remedy lie in an Election Petition? To answer this question, it is necessary to establish what precisely is the mandate of the electoral body, that is the IEBC in relation resolution of primary election disputes.

2.04 The starting point is the Constitution of Kenya 2010, Articles 84 and 88(4) thereof which provide -

“84. In every election, all candidates and all political parties shall comply with the Code of Conduct prescribed by the Independent Electoral and Boundaries Commission, and

Article 88(4)(e) says -

1. - 3

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for

(a) - (d)

(e) the settlement of electoral disputes, including disputes relating to or arising from

nominations but excluding election petitions and disputes subsequent to the declaration of election results.

2.05 The Elections Act, 2011 (No. 24 of 2011) is the Act of Parliament contemplated by Article 88(4)(e) of the Constitution, and Section 74 of the Act says -

“74. (1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding elections and disputes subsequent to the declaration of election results.”

Section 110(1) of the Act provides -

“110(1) Every political party and every person who participates in an election or referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that schedule determine.”

2.06 Paragraph 6 of the Second Schedule (Code of Conduct), in turn prescribes the conduct to be adhered to during the nomination and campaign period. It binds the Government, political parties, office bearers, agents, persons supporting a political party and candidates nominated under the electoral laws for any election. The Code provides in paragraph 6 that all those bound by the Code shall refrain inter alia from -

(a) -

(b) ***any action involving violence,***

(c) ***campaigning in places of worship or during burial ceremonies,***

(d) ***offering any document or reward to any person in consideration of such person either joining or not joining any party; attending any political event; voting or not voting (either at all or in any particular manner); or accepting, refusing or withdrawing such person's nomination as a candidate in the election.***

(e) ***any attempt to abuse a position of power, privilege or influence, including parental, patriarchal, state or traditional authority for political purposes including offer of reward or threat of penalty.***

2.07 The Code at paragraph 15 (1) establishes the Electoral Code of Conduct Enforcement Committee whose mandate is to enforce the said Code of Conduct and at Sub paragraph (7) vests in it powers to punish any person for infringement of the Code. It is therefore clear that the Third Respondent is vested with powers to determine allegations relating to commission of election offences under the Code.

2.08 *The same offences of bribery, use of force or violence during election and use of public resources are also provided for under the Elections Act under Sections 64, 65 and 68 respectively and the penalties for each offence provided. Section 72 of the Elections Act provides that a person who has engaged in the election offences listed therein shall be disqualified by the Third Respondent and shall not be eligible to contest for the elections. The said Section provides-*

72. “(1) A candidate who, during a nomination or an election campaign engages in or knowingly aids or abets an agent or any person who supports the candidate to engage in bribery, violence or intimidation against the opponents of the candidate or any other person, under this Part, shall be disqualified by the Commission and shall not be eligible to participate in the elections.”

2.09 It is clear that the powers to enforce the Code of Conduct and to disqualify a candidate on account of commission of an election offence under the Elections Act are vested in the Third Respondent.

2.10 Articles 88(4)(e) and Sections 74(1) and 110(1) of the Elections Act, and paragraphs 6 and 15 of the Code of Conduct are all provisions which regulate the conduct of public elections. In construing such elective statutes, no single provision would be read or construed in such a way as to render meaningless or absurd any other statutory provision. As these provisions flow one to the other, they shall be considered in *pari materia* and as they relate to the same subject matter they must be read together and applied harmoniously and consistently.

2.11 This court's jurisdiction under Article 105(1)(a) of the Constitution is to determine the validity of the election of a Member of Parliament, National Assembly or Senate not nomination to contest or vie for an election post. However an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results. This was acknowledged by the Supreme Court in Advisory opinion No 2 of 2012 In the matter of the Gender Representation in the National Assembly and Senate [2012] eKLR where that Court acknowledged that elections are not an event but a process: a continuum. The learned Judges, when considering the jurisdiction over presidential election disputes stated thus-

“It is clear to us, in unanimity, that there are potential disputes from Presidential elections other than those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a single event; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for “qualifications and disqualifications for election as President” – and this touches on the tasks of agencies such as political parties which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of the Presidential election”.

2.12 Thus in determining the Petition the court is enjoined to consider the conduct of the elections in terms of the principles of the Constitution as to free and fair elections and whether the electoral laws were upheld and adhered to, and the integrity of the election maintained and ultimately the will of the people was expressed, that is, there was substantial compliance with the law by the Third and Second Respondents.. The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration of the winner. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament. Consequently the court is not barred from determining all matters relating to nomination and qualification of candidates for election even though their determination is vested in other bodies where they failed to discharge their mandate as per the law. In the case of Kituo Cha Sheria vs. John Ndirangu Kariuki & Another [2013] eKLR the court stated-

“That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would be perfectly in order for the court to right the wrong. In Luka Lubwayo and another Vs Gerald Otieno Kajwang and another Nairobi Petition 120 of 2013 [2013] e KLR the court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene. Article 105 1 (a) seems to widen the scope of the court in a petition to determine whether a person has been validly elected as a member of parliament. The question of validity may encompass the clearance to run.”

2.13 Therefore in a case where there was clear breach of the law by contravention of the code of conduct or by failure to disqualify a candidate under Section 72 of the Elections Act as a result of which the election was compromised then the court has to consider these processes in determining the validity of the election of the candidate and in so doing it should be cautious not to usurp the powers of the Second and Third Respondents.

2.14 **Firstly** none of the witnesses who testified in this court on the commission of the offences by the First Respondent reported to the Second Respondent. **Secondly** the evidence shows that on bribery the allegations were very general and no facts were provided to the Second Respondent upon which he could act. I think that it would be unreasonable to expect the Second Respondent to conduct investigations without a proper basis. This also applies to the allegation of misuse of public resources where the Second Respondent also explained that he found as satisfactory the explanation by the First Respondent that he was no longer a member of Parliament and in any event he was only a patron of the CDF and could therefore not issue any cheque and had nevertheless referred the matter to the Police for further investigation.

2.15 In any event breach of the Code of Conduct would not disqualify a candidate from participating in an election unlike commission of an election offence under the Act. The Committee may only prohibit a defaulting party from participating in the ongoing and future elections until it has complied with the orders of the Commission and may cancel the right of the political party or candidate to participate in future elections where the party has failed to comply with other sanctions imposed by it. It is only the High Court that is vested with powers to cancel the right of a candidate or political party to participate in ongoing elections.

2.16 In addition, the Third Respondent does not have powers to determine disputes relating to commission of election offences under the Act. Section 107 (2) thereof only vests in it powers to prosecute and impose sanctions against a person who commits the offence pending the hearing and determination of the charges preferred. Therefore it can only disqualify a candidate under Section 72 where such a candidate had been convicted by a criminal court of the offence. In this case there was no conviction made against the First Respondent. It was not proved to the satisfaction of the court that he failed to take steps as provided by the law to stop the widespread allegations of bribery or to prevent further commission of such offences. I therefore find and hold that the Second Respondent acted in accordance with the electoral laws and his conduct did not materially affect the integrity of the primary election.

2.17 In Republic vs The Independent Electoral and Boundaries Commission Exparte Charles Ondari Chebet (Nakuru High Court Judicial Review Application No. 3 of 2013), this court said -

“... My understanding of Article 88 (4) (e) of the Constitution and Section 74 of the Elections Act (in its entirety) is that any dispute relating to nominations to any electoral post are required to be determined within prescribed times, and those relating to nominations of candidates should be determined before the date of nomination or elections whichever is applicable. Clearly because of the limited time spans for determination of nomination disputes, political party nominations needed to be done well before the nomination dates to the Returning Officer/ Electoral bodies. As this did not happen the aggrieved candidates must live with the choices of their political mandarins...

The court then concluded that -

“In summary therefore, I find and hold that where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court's jurisdiction is precluded. This court's jurisdiction would only arise after the due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate.”

2.18 Therefore where a matter raised in an election petition filed after the declaration of

the results is one which should, properly have been raised earlier and determined by another body then the court lacks jurisdiction to determine in the course of an Election Petition. The only exception is, where there is a breach of a mandatory provision of the law – for example the registration and election of a non-citizen. Though the power to disqualify such a candidate rests with the Third Respondent, the court would interfere to right the wrong on the grounds of illegality.

2.19 *The answer to the question of irregularities or breaches of that electoral law in relation to primary elections must therefore be that having applied to the TNA Party's dispute resolution Tribunal, and the matter having been determined, the Petitioner is estopped from raising the same issue in an Election Petition.*

2.20 The first leg of the Petitioner's grounds of the Petition that the Respondent was not validly nominated to vie for the Njoro Constituency must consequently fail, and I so hold.

2.21 However the second ground of the Petition relates to post- nomination challenges, that the Petitioner continued to commit the offences of bribery contrary to Section (64), used force or violence during the election period (*contrary to Section 65*), and used public resources (*contrary to Section 68*).

2.22 To answer these three claims by the Petitioner it is necessary to examine the evidence from both the Petitioner's and the three Respondents' perspectives.

3.01 The Petitioner's Case

3.01.1 The Petition is supported by the affidavit of the Petitioner sworn on 10th April 2013 and his Further Affidavit sworn on 22nd May 2013. He also relied on the various affidavits sworn by his witnesses and the list and bundle of documents filed on 23rd May 2013. The Petitioner does not have any complaints against the manner in which the elections were conducted and supervised by the Second and Third Respondents on 4th March 2013. Indeed the results announced reflected the votes cast and all agents signed the Forms 36 as provided for under the Elections Act. His concern related to the conduct of the First Respondent throughout the nomination and campaign period and he accused him of flaunting the electoral laws and the regulations made thereunder.

3.01.2 The Petitioner sought the nullification of the election on account of three offences allegedly committed by the First Respondent. He stated that the First Respondent had misused public resources contrary to Section 68 of the Elections Act. It was his case that the First Respondent had issued a Constituency Development Fund (CDF) cheque in a public rally while campaigning. He received this information from James Kimani and Peter Kinyanjui.

3.01.3 James Kimani Kibunja, PW2 relying on his affidavit filed on 10th April 2013 testified that he was a resident of Mau Narok in Njoro Constituency and the Chairman of the Parents Teachers Association (PTA) of Mau Narok Secondary School and that he knew the First Respondent as he was a member of the PTA, the Board of Governors (BOG) of the School and a representative of the CDF. He testified that on 17/02/2013, he was in his home at Makunguru. At around 11.00 am he was asked by Paul Kagiri to go for a bursary cheque that had been issued in favour of Mau Narok Secondary School at Jua Kali in Mau Narok Trading Centre where the First Respondent was holding a political rally at 2.00pm.

3.01.4 PW2 went to the meeting as requested and before its conclusion, he was called by the First Respondent to the podium and handed a cheque No. 001443 annexure “**(JKK1)**” for Kshs. 363,000/= which had been issued by the Project Manager of CDF in favour of Mau Narok Secondary School and a list of beneficiaries of the cheque. Before giving him the cheque the First Respondent informed the crowd that the money was bursary for the needy children of Mau Narok School. Later the same evening at around 4.30pm, he handed this cheque to Mr. Duncan Wangai who was a member of the Board of Governors of the said school to hand it over to the Principal. He was later summoned to Mau Narok Police Station where he recorded a statement over the incident.

3.01.5 PW3- Peter Ngugi Nyanjui testified that during the last election, he was the Petitioner's

agent and supporter. On 17/02/2013 he was at the First Respondent's political rally at Jua Kali and heard the First Respondent inform the crowd that he had a cheque for Kshs. 363,000/= made in favour of Mau Narok Secondary School. He witnessed as he handed over the cheque to PW2 and informed him that it was for the children of Mau Narok School.

3.01.6 During cross-examination PW3 testified that in the 2007 elections, he supported the First Respondent and in 2013 he supported the Petitioner. He had asked the First Respondent to give him Kshs. 50,000/= but the First Respondent informed him that he had given the money to another agent to deliver to PW3 which he denied ever receiving.

3.01.7 The Petitioner also claimed to have received information about violence by the First Respondent against some of the Petitioner's supporters. PW4 Mary Wanjiku Njenga relying on her affidavit sworn on 7/04/2013 and further affidavit sworn on 21st May 2013, testified that on 16th January 2013 at about 3.00pm she attended the Petitioner's political meeting at Mau Narok. After the conclusion of the meeting the Petitioner's supporters escorted him on foot to Elementaita Junction. As they were escorting the Petitioner they ran into the convoy of the First Respondent and both groups engaged in verbal exchanges with each group shouting its candidate's slogans but they were not violent. It is at that stage the First Respondent got out of his car, walked to PW4 and asked her "*NI WEWE TENA*" before slapping her on the left jaw.

3.01.8 It was her testimony that after his election in the year 2008, a group known as Mau Narok Nyakinyua Women Company Limited in which she was a treasurer requested the First Respondent to help them obtain title to its property. The First Respondent referred the group to Njuguna J. Ndung'u Advocate and gave an undertaking to cater for the legal fees. Mr. Njuguna referred the group to Karanja Mbugua Advocate who handled the transaction and charged them a fee of Kshs. 200,000/=. The First Respondent however did not settle the legal fees because it was too high. The group and in particular PW4 pursued the issue and sometimes in early 2012 PW4 addressed the issue before a crowd and this agitated the First Respondent, at the end the fees were paid by the group. It was her case therefore that the First Respondent knew her and when he said "*NI WEWE TENA*" he was referring to their previous encounters. After the assault PW4 was treated at Mau Narok Health Centre, reported the incident to the Police on the same day and was issued with a P3 Form.

3.01.9 PW5 Susan Wachu Kuria testified that she was at the Petitioner's meeting and witnessed the incident when the First Respondent assaulted PW4. She accompanied her to hospital for treatment and on 19th January 2013, recorded a statement with the Police.

3.01.10 Both witnesses made a video recording that night of the assault which was produced as an exhibit in this matter. In the recording PW4 stated that the Petitioner's supporters blocked the First Respondent's supporters although during cross-examination she denied such a case and stated that the Petitioner's supporters did not block or otherwise provoke those of the First Respondent.

3.01.11 PW4 also stated that as the Police delayed in taking action she reported the matter to Federation of Women Lawyers (FIDA), the Third Respondent and The Kenya National Commission on Human Rights who by a letter dated 22nd February 2013 asked the IEBC Regional Coordinator Njoro Office to look into the allegations and to ensure that the electoral law is adhered to. As no action was being taken against the First Respondent she therefore instructed her Advocate M/s J.Harrison Kinyanjui to request the Director of Public Prosecutions to direct the immediate prosecution of her complaint.

3.01.12 The Petitioner also alleged that the First Respondent committed the offence of bribery of voters contrary to Section 64 of the Elections Act. He received information from his agents and supporters on incidents of bribery using money and other items throughout the Constituency. He alleged that the First Respondent committed these offences during the nomination and campaign period. He filed a complaint with the TNA Nomination Tribunal but the same was rejected. His efforts to appeal to the TNA Nomination Appeals Chamber were frustrated by the failure of the Tribunal to furnish its findings in time. It was for this reason that he defected to the UDF Party under which he contested in the elections.

3.01.13 The Petitioner alleged that the incidents of bribery were prevalent in the areas of Jokeria Trading Centre, Piave, Jawatho, Industrial Area Njoro, Mathangauta, Likia, Mau Narok and Mwisho Wa Lami. He led evidence on the following areas-

3.02 Mau Narok and Mwisho wa Lami

3.02.1 PW6 Edward Mutura Ngugi testified that on 3/03/2013 at around 6pm he was informed that persons in the First Respondent's vehicle registration number KAS 575K were distributing money (Kshs. 200) to voters throughout the Constituency and was on its way from Gatimu to Mwisho Wa Lami. He was informed that the money had been given by Uhuru Kenyatta and was intended to induce voters to vote for The National Alliance Party under which the First Respondent was contesting and the vehicle was on its way to Mwisho wa Lami. PW6 followed the vehicle as it went from Mwisho Wa Lami to Tipis Centre. The vehicle was parked and a person from the vehicle gave a parcel to another person who had come from Mwisho Wa Lami. The man was instructed to ensure that the money was given to every household in the village. He presumed that both men were the First Respondent's agents.

3.02.2 During cross-examination he testified that he was the Petitioner's agent and represented him during the elections and was trained by the Third Respondent about 1 week to the election. He also testified that there were 2 envelopes given to the man from Mwisho Wa Lami. When handing over the first envelope the man from the vehicle said that it contained badges for the agents and on the second envelope he only said "*uhakikishe hiyo imefika kwa kila nyumba na msifanye makosa.*" He did not see the contents of the envelopes but assumed that it was money because of the words used by the men although they did not expound much on their contents.

3.02.2 Piave Location

3.02.2.1 PW7 Mary Waringa Mureithi was the Petitioner's polling agent and campaigner during the last General Elections. Her testimony was that on 2nd and 3rd March 2013, the First Respondent's campaigners held a meeting in Piave village where they told voters that they had been directed to vote for the TNA Party whose symbol was a dove. She also testified that she had received information that Mr. Daniel Njogu Iribe who was the First Respondent's campaign coordinator took 20 iron sheets on behalf of the First Respondent to Natu Primary School in Piave Village. He also took 10 chairs to another community whose name she couldn't remember and gave 16 iron sheet to Piave Primary School. Mr. Daniel Njogu Iribe who owns a bore hole was paid by the First Respondent to give free water to the constituents. On 28th February 2013, people were allowed to draw water from his supply and water kiosks at Subuku, Piave Center. She also testified that the First Respondent gave aluminum cooking pots to women groups and one such group was called Ngomongo in Piave. In addition on 3rd March 2013, the First Respondent visited churches in Piave village and informed the congregation that he had gone to pay his tithe and give thanksgiving to the people for supporting him. She however did not witness any incident of bribery. She was informed that it was not the First Respondent but his agents who were distributing the items. She did not report any of these incidents to the Second or Third Respondents.

3.02.3 Jawaitho area

3.02.3.1 PW8 Stephen Njoroge alleged that Mr. Peter Mwangi one of the First Respondent's campaigners distributed money to voters urging them to vote for the First Respondent in this area, and that his friends Martin, Ben, Rastar, Ngash and Njuguna were given money on 17/02/2013 to vote for the First Respondent. Mr. Peter Mwangi also distributed money from house to house during the campaigns. Mr. Soi Paul Wanjohi a village elder in Jewatha formed small groups which organized how to bribe voters. He also averred that although he did not witness Mr. Richard Kahali bribing voters, he heard him bragging of how much money he had made by only giving part of the money that had been given to him to distribute to voters as bribes. The First Respondent's agents also distributed bribes at Njoro D.E.B Primary School to voters.

3.02.3.2 On cross examination he testified that he did not see the First Respondent distributing money and did not receive any bribe. He also testified that the money which was being distributed in

homes was not distributed in his house or estate.

3.02.4 Mwisho Wa Lami

3.02.4.1 James Boro Gitau PW9 was the Petitioner's agent and whose evidence was that on 3rd March 2013 at around 7 pm, he received information from Stephen Kamau Muiro that the First Respondent was giving out bribes and on further investigation he found that Pauline Wambui Waitiki, DW5 was amongst the First Respondent's agents giving money to voters on his behalf and in fact took photos of her giving Kshs. 200 to a hawker using his mobile phone. Although she did not mention the money was a bribe or that she was giving it to the hawker as a bribe he inferred it to be so because she told the hawker "*shika hii na ujue mahali tunapiga kura.*" Upon realising that she had been recorded, DW5 and her son Rufus Kinyanjui Waitiki asked him to delete the photos and threatened to kill him if he did not comply. Rufus Kinyanjui then hit him on the face and DW5 threatened to stab him with a knife while holding a panga.

3.02.4.2 He reported the matter at Mau Narok Police Station and sought treatment at Mississipi Private Clinic and Mau Narok Health Centre. He further alleged that Pauline Waitiki had confessed to him that the First Respondent had given Mr. Francis Akamais Eroo Kshs. 60,000 which was to be used as bribes.

3.03 Petitioner's contention

3.03.1 The Petitioner contended that the above acts ultimately affected the final outcome of the Parliamentary elections of Njoro Constituency. His complaint against the Second and Third Respondents is that they failed, neglected or refused to address the grievances relating to the goings on in the Constituency. The Petitioner alleged that the issues raised by him against the First Respondent were brought to the attention of the Second Respondent who failed or neglected to investigate or take any steps. It was his case that during a consensus building meeting held by the parties on 15th February 2013, he informed the Second Respondent that he had received information on bribery of voters throughout the Constituency but the Second Respondent asked him for evidence. In a subsequent meeting with the Second Respondent he was informed that IEBC did not have powers to undertake investigations.

4.0 The First Respondent's Case

4.01.1 The First Respondent who is the current Member of the National Assembly for Njoro Constituency opposed the Petition and relied on his Response dated and filed on 2nd May, 2013 and his Further Affidavit sworn on 10th June 2013. It was his case that the elections were free and fair and that he had been duly elected with over 34,000 votes whereas the Petitioner had come third with about 8,000 votes. He had been nominated under The National Alliance Party with about 12,198 votes while the Petitioner emerged Second with 5,701 votes. He was aware that the Petitioner had lodged a complaint with the TNA Party but the same was dismissed as being unmeritorious.

4.01.2 The First Respondent testified that there were many allegations made by and against the aspirants as is the norm during an election campaign. He had also accused the Petitioner of being involved in bribery of voters. He was summoned by the Returning Officer and questioned on further details. The matter was submitted to the Police for further investigations but does not know of their outcome.

4.01.3 He denied the allegations made against him by the Petitioner..

4.02 ON MISUSE OF PUBLIC RESOURCES

4.02.1 On the allegation of misuse of public resources it was his evidence that before the amendment of the Constituency Development Act he was a patron in the CDF Committee. His role was to ensure that the CDF Fund was used to implement the projects as pledged to the people. He was neither a signatory to the account nor was he authorised to collect cheques issued by it for onward transmission to

the beneficiaries. This was the role of CDF officials at the divisional level. However, there were instances where he would present the cheque to the beneficiary institution. This would only be upon invitation by the Board of Governors (BOG) of the beneficiary institution or the community and after the cheque had been released by the CDF. The presentation had to be official and would be done at the institution.

4.02.2 He confirmed that he had invited several churches and other members of the public to his political rally which was held on 17/02/2013 at Jua Kali. In this meeting he did talk about various projects that had been implemented using the CDF Fund during his tenure including projects at Mau Narok Secondary School. He however did not mention the cheque for Kshs. 363,000/=. He also denied that he knew PW2 previously and it was his testimony that he saw him for the first time in court. He denied handing him the cheque for Kshs. 363,000/= at the rally as alleged and did not know that he had attended the meeting.

4.02.3 DW2 Paul Mushugia Kagiri adopted his affidavit sworn on 2nd May 2013 where he averred that he was a member of the BOG of Mau Narok Secondary School and a member of the CDF Committee. On 13/02/2013 he was given a CDF bursary cheque No. 001443 for Kshs. 363,000/= issued in favour of Mau Narok Secondary School. The cheque was given to him in his capacity as the representative of Mau Narok Division in the CDF Committee and also because he was a member of the BOG of the beneficiary school. His instructions were to deliver it to the Headmaster of the School but as the Headmaster was away on official duties he decided to hand it over to PW2 as the PTA Chairman.

4.02.4 It was his testimony that the two met at Jua Kali where the First Respondent was holding his rally and he personally handed the cheque to PW2 which was the procedure used by CDF when handing over cheques to schools. He further stated that he stayed throughout the meeting and the issue of handing over the cheque was not raised at all.

4.03.0 OF VIOLENCE

4.03.1 The First Respondent denied having engaged in violence during the nomination or campaign period and in particular he denied having assaulted Mary Wanjiku Njenga on 16th January 2013. It was his testimony that on this day he was with his supporters campaigning in Mau Narok Division. The campaign trail began at Top Life in Likia through Mathangauta, Bondeni, Mau Narok Centre, Mwisho Wa Lami, Tipis and finally at Gatimu. They first encountered a small group of the Petitioner's supporters at Mau Narok Centre but there was no incident and they proceeded to Gatimu. However on their way back they encountered the same group at Mau Narok Centre, near Elementaita Road. The group blocked the road and the people were chanting the “**Kiuna Must Go**” slogan. A commotion ensued between supporters of both sides and before the First Respondent could take charge of the situation, both sides confronted each other. He recalled that during the confrontation, PW2 who was well known to him came charging towards him and started waving the Petitioner's poster in his face but she was pushed away by his supporters. He denied assaulting her and stated that this was a story made up by the Petitioner to bar him from contesting during the elections.

4.03.2 Samuel Kinyanjui Njenga DW3 testified that on the material day he had gone to meet the First Respondent at Mau Narok. He wanted the First Respondent to sign some documents to enable him proceed with construction work that he was doing for him. It was very important and urgent that the documents be signed on that day as they related to payment of workers. He witnessed the commotion between the Petitioner's supporters and those of the First Respondent. He further alleged that during that commotion he was assaulted by PW2. It was his testimony that he did not see the First Respondent assaulting any one and he remained close to his car and was surrounded by security men. He did not move to the crowd which was later dispersed by the Police.

4.03.3 During cross-examination he confirmed that he did not know the identity of the person who had assaulted him but was informed later by a friend who knew her. He also stated that he drove to Njoro Hospital which was about 30 kilometers from the scene to seek treatment. He also could not remember the date or time when he recorded his Police statement although the same is dated 17/01/2013.

4.04.0 OF BRIBERY

4.04.01 On the allegation of bribery the First Respondent denied bribing anyone or authorizing any of his agent to bribe voters. He acknowledged visiting churches where he invited the congregation to his rallies and also giving tithes and offertory. He also acknowledged that he owns a motor vehicle registration number KAS 575K which was being used by his secretariat to monitor the campaign. On 3/03/2013 the said vehicle was being used to distribute documents on the oath of secrecy to agents which had only been issued by the Second Respondent earlier the same day together with their letters of appointment and badges.

4.04.02 This was confirmed by James Kariuki Kibunja, DW4, who was in charge of the secretariat. On 3/03/2013, they collected the documents from the Third Respondent's office in Njoro at around 2pm. They had over 200 agents and since it was not possible to distribute to each of them personally, one of the agents in each area would be given to distribute to the rest. The documents were in parcels and he denied distributing money to agents as it was the First Respondent who was in-charge of the finances. He was not issued with a work ticket as according to the First Respondent, the secretariat was made up of a relatively small team and he was able to monitor their activities.

4.04.03 DW5 denied accusation of assaulting PW9 and distributing bribes in Mwisho Wa Lami area. She was the First Respondent's agent as per the appointment letter annexed to her affidavit sworn on 2nd May 2013. She testified that on 3/03/2013 at around 7pm she went to collect her documents that at Githae's shop where they had been dropped by DW4. On her way back to her house, she realized that she was being followed by a motor bike but did not take any action. She testified that she bought tomatoes worth Kshs 50 from a hawker and was on her way home when she was confronted by PW9 who demanded money from her. A commotion ensued and a crowd gathered. The crowd wanted to beat PW9 but she stopped them and called the Police who came to the scene. She recorded a statement at Mau Narok Police Station but did not produce it as an exhibit. She denied forcing PW9 to delete the photos as alleged and confirmed having reported the matter to the Police.

4.04.04 DW6 Daniel Njogu Iribe who owns a borehole and sells water denied receiving money from the First Respondent and instruction to give free water to residents. He confirmed that PW7 was his neighbour and he knew her well but was adamant that he sold water throughout the campaign period. He also denied taking iron sheets to Piave school and testified that he did not know of any instance when the school was given iron sheets.

4.04.05 DW7 also denied taking iron sheets to any school on the instructions of the First Respondent or giving bribes to voters.

4.04.06 DW8 John Ndung'u Njuguna an Advocate practising under the name J. Ndung'u Njuguna & Company Advocates, testified and confirmed that PW2 had been referred to him by the First Respondent as one of the officials of Mau Narok Nyakinyua Women Group with instructions to assist them with a legal issue. However, he was unable to render the needed assistance and therefore referred them to Karanja Mbugua Advocate. If he were to help them as per the First Respondent's instructions it was agreed that the First Respondent would pay the legal fees but since he referred them to another Advocate, then they would have to cater for the fees themselves and he had explained this to PW2.

4.04.07 It was the First Respondent's case that he had been validly elected as the Member of Parliament for Njoro Constituency and urged the court to dismiss the Petition.

5.0 The Second and Third Respondents' case

5.01.1 Fidelis Kitili Kivaya testified that he is the Constituency Elections Coordinator and the Returning Officer in Njoro Constituency in election matters. In opposition to the Petition, he filed the response on 25th April, 2013 and the further affidavit sworn on 24th April, 2013 on his own behalf and on behalf of the Third Respondent which documents he adopted as his evidence in this matter and denied the allegations made by the Petitioner.

5.01.2 On the allegation of bribery the Second Respondent testified that there were allegations made by candidates against each other. The Second Respondent confirmed that the meeting was held and attached the minutes of the meeting to his Replying Affidavit. All the stakeholders in the election including the Chairman of the District Security and Intelligence Committee, the Officer Commanding Police Division Njoro District and representatives of the National Security Intelligence Service were present. The minutes show that the Petitioner herein made a general complaint regarding rampant bribery. The Second Respondent requested for co-operation and facts to back the allegations.

5.01.3 The Second Respondent denied having been informed of any allegation regarding violence. He further testified that he was informed by an officer from National Security Intelligence Service of the allegation that the First Respondent had issued a CDF cheque in a public rally. He therefore summoned the First Respondent and questioned him over the allegation and found that there was no basis for any action to be made against the First Respondent.

5.01.4 According to the Second Respondent the matters complained of herein ought to have been reported to the Third Respondent's Committee on Dispute Resolution which held its meetings on 23rd – 26th January 2013. In addition the Petitioner had not demonstrated to what extent the alleged breaches of the law impacted the elections for Njoro Constituency. He therefore urged the court to dismiss the Petition and determine that the First Respondent was duly elected.

6.0 Submissions

6.01.1 The parties herein filed written submissions in further support of their cases and the same were highlighted before this court on 2nd September 2013.

7.0 The Petitioner's Submissions

7.01 It was the Petitioner's submissions that the case of misuse of public resources by the First Respondent had been adequately proved. He submitted that PW2 was a credible witness and his evidence remained unshaken during cross-examination. The undisputed facts were that the cheque in question was one dated 14th January 2013 issued in favour of Mau Narok Secondary School and was accompanied by the forwarding letter dated 23rd January 2013, that the cheque was given to DW2 on 13th January 2013 and he kept it to 17th February 2013, that the cheque was handed to PW2 on 17th February 2013 in the First Respondent's public rally meeting at Jua Kali where the major topic was management and use of Constituency Development Fund.

7.02 According to the Petitioner's Counsel the only contested issue was whether it was the First Respondent or DW2 who handed over the cheque. PW2's testimony's that he was given the cheque by the First Respondent personally remained unshaken and credible throughout cross-examination. Although he was challenged that he did not indicate as much to the Police, he explained that the reference to "**HIM**" in his Police statement referred to the First Respondent. It was counsel's submission that DW2 was not a credible witness and his evidence that he handed the cheque to PW2 about 60 metres away from the venue was neither logical, believable nor conceivable. **Firstly**, that he held the cheque for 4 days because he could only give it to the Principal Mau Narok Secondary School was not believable because he could have given it to the Bursar of the School or given it to another board member for onward transmission to the school. **Secondly** his (PW2) evidence was also corroborated by PW3 who was at the meeting and saw PW2 being called to the podium to receive the cheque and by other independent reports including that made to the Second Respondent from an employee of National Security Intelligence Service and the evidence of KNHRC.

7.03 Counsel also submitted that the evidence proved that PW4 had been assaulted by the First Respondent. She had no reason to lie and had reported the incident to the Police which is confirmed by the Police file. Her evidence was believable and corroborated by PW5, Beatrice Wairimu who recorded a statement with the Police and Alex Ongera who was on the video recording. In addition her file, P3 Form and treatment card both dated 16th January 2013 further confirm that she was assaulted as alleged. The court was also urged to find that there is no way 50-70 people could have blocked the road

for 1,000-3,000 people as alleged by the First Respondent and that the commotion erupted when the First Respondent assaulted PW4. He urged the court to disregard the evidence of DW3 as he was not a credible witness as his evidence clearly showed that he was not at the scene of the incident and his evidence could not be relied on as corroborating the First Respondent's evidence. It was also submitted that the fact that PW9 was assaulted was admitted and that the evidence of DW5 that he was assaulted by the crowd was not believable.

7.04 On the allegations of bribery it was submitted that although the Petitioner did not witness any incident, he had adduced evidence by persons who were his agents and supporters on those allegations, that there was evidence of bribery during the nominations and campaign period, and that although the Second and Third Respondents allege that this issue was determined by the TNA Dispute Resolution Tribunal there was no evidence adduced to show that the matter had been conclusively adjudicated upon. In any event this did not oust the jurisdiction of the court to determine this matter.

7.05 It was further submitted that the First Respondent was not a credible witness and his version of what transpired on that day could not be relied on by the court. Counsel reasoned that the First Respondent had used PW3 for political reasons and had trivialized the assault on PW4 as a small matter saying that such things happen during campaigns, he did not fulfill his promise to pay legal fees of Kshs. 200,000/= and he confessed on oath that he is a hustler and counsel invited the court to accept the definition of the word "hustler" as per the *Cambridge Advanced Learners Dictionary* as "to try to persuade someone, especially to buy something, often illegally....or "to push and hurriedly jostle, shove.....". "A person who hustles, a prostitute." Counsel also submitted that DW3 was only a decoy introduced by the First Respondent and could not be trusted.

7.06 On bribery it was the Petitioner's submission that the offence of bribery was committed during and after the nomination period. Although the Second and Third Respondents' case was that this matter had been grossed upon and should have been raised during the nomination period and resolved by the TNA Dispute Resolution Tribunal it was submitted that the Petitioner had nevertheless raised incidents of bribery which were reported during the campaign period.

7.07 On the evidence of PW6 and DW4 the court was urged to take notice of the fact that the Respondent had not provided any agent from Piave to say that he received the 'agent's cards' on 3/03/2013 and no witness was availed from the households to confirm that what was delivered without fail were agents' cards.

7.08 He further alleged that the giving of tithes by the First Respondent amounted to giving bribes because his gross salary was Kshs. 850,000/= which was a large amount. In addition it was not denied that DW5 gave money to a hawker although she alleged that she bought tomatoes worth Kshs. 50. She also confirmed having seen PW9 on the material day. However she was not a credible witness and her evidence should not be relied upon.

7.09 On the law it was submitted that the jurisdiction of this court sitting as an election court emanates from the Constitution and in particular Article 87 thereof. The court therefore has jurisdiction to hear and determine this matter in terms of Article 105(a) of the Constitution. The Petitioner relied on the holding of the Court of Appeal in **Kipkalya Kiprono Kones vs. The Republic & Another Ex-parte Kimani Wanyoike & 4 Others [2006] eKLR** that an election petition was the only valid means of challenging an election and the court would only be seized with the Petition once the election results have been declared.

7.10 It was further submitted that the nature of the disputes raised in the Petition are outside the jurisdiction of the Third Respondent's Committee on dispute resolution, that the court has jurisdiction to nullify an election on the basis of election offences, that the pending investigations before the Police or any other institution have no bearing on the findings of the Elections Court. The court should be guided by the evidence before it because the Petition questions the return of elections in Njoro Constituency upon allegations of election offences committed by the First Respondent. The Petitioner relied on the holding of the court in **Isaac vs. Hussein & Another [2008] 1 KLR 786**.

7.11 The Petitioner referred the court to quite several cases, including -

1. **Diana Kethi Kilonzo & Another vs. Independent Electoral and Boundaries Commission IEBC & 10 Others** (Nairobi H.C. Petition No. 359 of 2013 [2013] eKLR).
2. **Isaac v. Hussein & Another** [2008] 1KLR 772.
3. **Kipkalya Kones vs. The Republic, ex parte Kimani Wanyoike & 4 Others** [2006] eKLR.
4. **Elima vs. Ohare & Another** [2008] 1 KLR 771.

Cambridge Advanced Learners Dictionary (New, Cambridge University Press) – on the definition of “a hustler”.

7.12 The case of **Diana Kethi Kilonzo vs. IEBC & Others** – concerned the right to be nominated as a candidate to vie for election. The Petitioner vied for nomination on a TNA Party Ticket and lost to the First Respondent. He effectively abandoned his appeal to the Party's Tribunal and decamped to another party under which he contested and again lost to the First Respondent. The Petitioner cannot rely on the **Diana Kethi Kilonzo** case to suggest that he was denied his right to vie for the Njoro Constituency National Assembly seat.

7.13 The extract of the **Report of the Independent Review Commission on the General Elections held in Kenya on 27/12/2002 Kriegler Report pp. 22-24 and 241-246**, and the **Report and Recommendation on Deputy Chief Justice Nancy Makokha Baraza by the Tribunal to Investigate the Conduct of Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya** and other academic and general material referred to are good goal-posts for the proper conduct of elections but are no substitute for hard evidence on an Election Petition.

7.14 In this regard, I found the case of **ELIMA V. OHARE and Another** along with other cases I have referred to as most instructive and relevant for the purpose of this Petition and this Judgment. Counsel for the Petitioner urged this court to follow the **Elima** case, and find the First Respondent guilty of an election offence. The three Judge bench in the **Elima** case held -

1. ***On the evidence, the Court was satisfied that indeed a ceremony known as khulia sululu indeed existed and was practised among the Bukusu people.***
2. ***On the evidence, the Court was satisfied that the Second Respondent had participated in a ceremony of khulia Sululu with the intention to bind the voters to vote for him during he general election (December 29, 1992). He was guilty of the election offences of undue influence under Section 9 of the Election Offences Act (Cap. 66) (now repealed).***

The Court said - dicta:

(Applying **Kiano vs. Matiba**, Election Petition No. 6 of 1979),

“The authenticity of the oath is irrelevant. A candidate wishing to bind people to vote for him would not necessarily follow strictly the procedure of a well known traditional oath. All he requires is something which will sufficiently resemble a traditional oath to influence voters.”

7.15 I have read this case, and I would myself, on the evidence, have come to the same conclusion. The person who organized and administered the oath testified and the persons who took the oath testified -

“I swear that I shall vote for candidate xx in the coming elections. If I do not, may I die.”

7.16 The Petitioner needed that level of evidence to discharge the burden of proof regarding the misuse of public resources, (contrary to Section 68), use of violence (contrary to Section

65) and bribery (*contrary to Section 64*).

8.0 The 1st Respondent's submissions

8.01 Counsel for the First Respondent submitted that part of the Petitioner's case arose from nominations and he admitted to having filed a case with the TNA Tribunal. He submitted that those issues that arose from party nominations and which are being raised by the Petitioner herein were heard and decided by the relevant body in accordance with the law. Therefore this court does not under Section 74 of the Elections Act have jurisdiction to determine them. As to the breach of the Code of Conduct, it was the First Respondent's submission that the Code itself provides for a procedure, mechanism and means of enforcing any breach thereof. Therefore the court lacks jurisdiction to deal with such complaints.

8.02 The First Respondent also submitted that not all offences committed during the electioneering period qualify as electoral offences, that election offences are *sui generis* and should be treated as such. At the same time ordinary offences can be committed during an electioneering period

8.03 The common law doctrine of *actus non facit reum nisi mens sit rea* (i.e the deed does not make a man guilty unless his mind be guilty) is equally applicable in election offences. As such the Petitioner must not only prove the accompanying *actus reus* of the election offence but also prove the accompanying *mens rea* as defined in the Elections Act. Therefore in an election offence the Petitioner must also prove that the said crimes were committed with an intention to duly influence the manner of voting. Lastly given the legal position under Section 67(2) of the Elections Act, that the only cognizable election offences are personation, undue influence, or bribery and that most of them are non-cognizable, it is a principal requirement that at the first instance, sufficient evidence be gathered and availed before a warrant of arrest can be issued.

8.04 Counsel submitted that the burden of proof in the matter lies with the Petitioner and never shifts to the Respondent. The standard of proof is to the satisfaction of the court and that at the same time the court must take into consideration the nature of elections and politics and what goes on during this period. For this proposition he relied among other cases, on the findings in **Mbowe vs. Eliufoo, John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others [2008] eKLR**. Taking into account the high standard of proof, then the witnesses to prove the same must pass the test established in criminal proceedings. In the case of **Kimanyi vs. Republic [1979] KLR 282** the court said -

“..The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

8.05 At the same time the evidence of such a witness must not only be strong and cogent but must also be consistent with any statements made previously by such a witness whether under oath or otherwise in relation to any fact in issue. Counsel relied on the holding in **Choge vs. Republic [1985]KLR-**

“If a witness had formerly said or written the contrary of that which he testified, unless a satisfactory reason is given for his having done so, his evidence should not have much weight except to show that he is not a credible witness.”

8.06 Counsel further submitted that for a candidate to be held criminally liable for an offence committed by his servant, agent or employee it has to be proved that they were acting for and on behalf of the First Respondent and with his knowledge and approval. On the allegation of inaction by the Police on reports of offences made to them it was submitted that the offences under the Elections Act are non-cognizable and before any arrest can be made there has to be sufficient evidence to warrant the arrest and thereafter prosecution can commence.

8.07 On the allegation of bribery, it was submitted that none of the witnesses who testified saw the First Respondent or his agent giving bribes, that their evidence was not credible and was inconsistent, unreliable and was based on hearsay, that none of the ingredients of the offence of bribery as provided for under Section 64 of the Elections Act had been proved.

8.08 Counsel also submitted that the offence of use of force or violence had not been proved, that there was conflicting evidence on the circumstances surrounding the alleged assault, that PW4 was not a credible witness, that she was evasive with her answers during cross-examination. She was also a suspect of assault against DW3 and her testimony should therefore be treated with caution as, that of an accomplice. In addition, her testimony was not corroborated by an independent witness as PW5 was not neutral having admitted that she supported the Petitioner.

8.09 On the offence of misuse of public resources, Counsel submitted that the main issue was whether the First Respondent presented the CDF cheque in his political meeting. His case was that PW2 in his statement made to the Police and in his affidavit did not mention that he was given the cheque by the First Respondent but only said so during his testimony at the hearing, that DW2 had given credible evidence on when and how he received the cheque and explained when and why he gave it to PW2.

8.10 It was also submitted that there was no evidence that the Petitioner forwarded any formal complaints to the Second and Third Respondents. He is therefore estopped from claiming that they failed in their duty whereas he failed to submit the necessary evidence to enable them take any action. These complaints were only raised after the Petitioner lost in the elections. In addition there was no prayer in the Petition for the court to make any finding in respect of the Second and Third Respondents.

8.11 As to whether the election should be declared null and void the court was urged to apply two tests laid out by Section 83 of the Elections Act, an election cannot be held to be null and void if it appears that it was conducted in accordance with the law or that the non-compliance did not affect the result of the election, that the Petitioner had not made out a case to warrant the declaration of the subject election void because-

- (1) *the evidence adduced was not satisfactory and none of the offences alleged to have been committed by the First Respondent were proved,***
- (2) *the voting, tallying of votes, filling of the various election forms and declaration of the results was not challenged,***
- (3) *there was no evidence that the alleged offences were aimed at influencing the voters,***
- (4) *there was no evidence that the alleged offences influenced voters or had any effect or impact on the voters,***
- (5) *there was no evidence that the will of the voters of Njoro Constituency was not expressed,***
- (6) *the Petitioner did not state what prejudice he or any other voter of Njoro Constituency was occasioned.***

9.0 The Second and Third Respondents' submissions

9.01 The Second and Third Respondents' submission was that the Petitioner should have challenged the nomination of the First Respondent before the Third Respondent's Dispute Resolution Nomination Committee and in addition there was no impediment to his pursuing redress before the court over his unsuccessful TNA nomination attempt. In any event he had abandoned TNA, the Party's Tribunal would have been acting in vain in allowing his complaint as he would not have been able to vie under the Party, having ceased to be a member.

9.02 On the allegation of misuse of public resources, it was submitted that failure by PW2 to

indicate in his affidavit the monumental words that were allegedly uttered by the First Respondent asking him to come collect the cheque, and when PW2 walked up to the crowd again whether they knew him, and the crowd bellowing “yes” was fatal as these would have been central in his affidavit.

9.03 In addition, granted the past relationship that PW3 had with the First Respondent, it was possible that the fall-out between the two of them was the incentive for PW3 to testify against the First Respondent and his evidence should therefore be treated with caution. Further PW2 did not specifically identify the First Respondent as the person who handed him the cheque and this brings to doubt the events as narrated by PW2.

9.04 It was further submitted that the offence of use of force or violence contrary to Section 64 of the Elections Act had not been proved against the First Respondent. It was evident that the Petitioner's supporters were the aggressors and blocked the road so that the First Respondent's convoy could not pass. In addition PW4 was not a credible witness as she was evasive during cross-examination and also because there was a history of broken promises between herself and the First Respondent. In addition from the incident that ensued, it was highly probable that neither PW4 nor DW3 could identify with certainty the persons who had assaulted them.

9.05 The Petitioner did not raise the matter with the Second or Third Respondents. PW4 testified that she reported the incident to the Third Respondent's offices in Nairobi yet there was an office in Njoro and according to Counsel, her testimony that she did not know the existence of the office was not credible. She testified that the Petitioner was her guide all through the process from the time she was assaulted to reporting to the Police, obtaining a P3 Form and making a video recording, lent credence to the compelling submission that her incident was deliberately orchestrated for the purposes of this Petition.

9.06 According to Counsel the offence of bribery had not been proved and there was no iota of evidence in that regard. PW6 had not been able to prove that his investigations revealed that there was bribery by the First Respondent's agents. PW7 who confirmed having attended the training held on 2nd March 2013, did not report any of the incidents of bribery to the Second Respondent. She did not personally witness any of the acts of bribery alleged.

9.07 It was submitted that the evidence of PW8 was not credible as firstly he claimed that he knew Peter Mwangi and Paul Wanjohi who were distributing bribes on behalf of the First Respondent yet he confirmed having sent them money on M-pesa for purposes of confirming their identity. In addition he did not identify the agents who were distributing money in the queues at the Njoro D.E.B Primary School. On PW9 it was submitted that he never confirmed whether DW5 was given tomatoes in exchange of the money that she gave to the hawker therefore leaving DW5's evidence on this unchallenged.

9.08 Counsel submitted that the burden of proving the allegations herein lay in the Petitioner who must adduce evidence and establish that the alleged offence or electoral malpractice occurred. This burden ought to be discharged beyond a balance of probability and the Petitioner must also establish that the malpractices affected the validity of the results.

10.0 Issues for determination

10.01 Each party filed its own issues for determination, the Petitioner and the Second and Third Respondents filed theirs on 28th June 2013 and the First Respondent filed his on 27th June 2013. The court nevertheless directed that the issues shall be determined by the court upon the end of the hearing of the Petition. Having considered the pleadings, the Affidavits filed in support thereof the evidence of witnesses and submissions of counsel, I find that the issues raised by the Petition are as follows -

10.01.1 what is, and who bears the burden of proof in an election petition and what is the standard by which that burden is to be discharged,

10.01.2 whether the malpractices and irregularities complained of ought to have been

dealt with by the Second and Third Respondents,

10.01.3 whether the First Respondent committed the election offences alleged,

10.01.4 whether there was non-compliance with the law in conducting the election which affected the results,

10.01.5 who should bear the costs of this suit.

10.2 The Burden and Standard of Proof in an election petition

10.02.1 The onus is on the Petitioner to establish to the required standard of proof that there were irregularities and electoral malpractices which were so widespread that they rendered the said elections null and void and therefore subject to nullification by the Court, Section 107 (1) of the Evidence Act provides-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the exercise of facts which he asserts must prove that those facts exist.”

10.02.3 The courts have also upheld this proposition. In William Kabogo Gitau vs. George Thuo & 2 Others [2010] eKLR the court held thus-

“The burden of establishing that any election offence was committed to justify the nullification by this court of the election of the First Respondent as the Member of Parliament of Juja Constituency is on the Petitioner. To discharge this burden, the Petitioner must adduce evidence that establishes the alleged election offence and alleged electoral malpractices to a standard of proof that is higher than that applied in ordinary civil cases of proof on a balance of probability.”

10.02.4 In John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others [2008] eKLR it was held-

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

10.02.5 Once the Petitioner has established that there were irregularities in the conduct of elections, the burden then shifts to the Respondents to disapprove the same or to show that even if the same did occur then they did not affect the final outcome of the election. In Raila Odinga –Vs- IEBC & 3 Others, (*supra*), the Supreme Court held thus:

“Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

10.02.6 In determining an Election Petition, the standard of proof is higher than that applicable in ordinary civil cases i.e. that of proof on a balance of probability but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. This is especially so in an Election Petition such as the one before the court where the allegations made are criminal in nature and whose consequences would lead to the disqualification of a candidate from contesting in elections. The allegations must be proved to the satisfaction of the court. That burden lies with the Petitioner.

10.02.7 In **Mbowe vs. Eliufoo [1976] E.A 240** the court stated the standard of proof to be discharged in an election petition, in these terms -

“There has been much argument as to the meaning of the term “prove to the satisfaction of the court.” In my view it is clear that the burden of proof must lie on the Petitioner rather than the Respondent because it is he who seeks to have this election declared void. And the standard of proof is one which involves proof “to the satisfaction of the court.” In my view, these words in fact mean the same as satisfying the court. There have been some authorities on this matter and in particular there is the case of Bater v. Bater [1]. The court dealt not with election petitions but with divorce, but the statutory provisions are similar i.e. the court had to be satisfied that a matrimonial offence had been proved.there Lord Denning L.J., in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exists, then it is impossible to say that one is satisfied, and with that view I quite respectfully agree that the standard of proof in this case must be such that one has no reasonable doubt that one or more of the grounds set out in s. 99 has been established.”

10.02.8 And in **Benard Shinali Masaka v. Boni Khalwale & 2 Others [2011]eKLR** it was stated-

*“Further I agree with the proposition grounded on the decision in **Mbowe vs. Eliufoo [1967] E.A 240** that any allegation made in an election petition have to be proved to the “satisfaction of the court.” Like Rawal, J in **Onalo**, I am certain that the standard of proof in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi-criminal nature of some election offences, it is almost certainly on a higher degree than merely on a balance of probability, the latter being the standard in civil cases.”*

10.02.9 Further in **Raila Odinga & 2 Others (supra)** it was held-

“The threshold of proof required should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

10.02.10 It follows therefore, that due to the standard of proof that is required, the evidence adduced in support of the Petition must be credible and concrete as was held by Maraga J in **Joho vs. Nyange & Another [2008] 3KLR (EP) 500** where at page 507 the learned Judge stated as follows:

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

10.02.11 In Rtd.Col.Dr.Kizza Besigye v Electoral Commission of Uganda and Yoweri Kaguta Museveni (Election Petition No.1 Of 2006) the Supreme Court of Uganda cited with approval a passage from the treatise *Elections Laws: Being Commentaries on the Representation of the People Act of India 1951*, by S K Gosh 3rd Edn. 1998, at page 153 -

“In order to constitute corrupt practice, which entails not only dismissal of the election petition but also other serious consequences like disbarring the candidate concerned from contesting a further election for a period of six years, the allegations must be very strongly and narrowly construed to the very spirit and letter of the law. A person may, due to sympathy or on his own, support the candidature of particular candidate but unless a close and direct nexus is proved between the act of the person and the consent given him by the candidate or his election agent, the same would not amount to a pleading of corrupt practice contemplated by law. It cannot be left to time, chance or conjecture for the court to draw an inference by adopting an involved process of reasoning. The allegation must be so clear and specific that the inference of corrupt practice will irresistibly admit of no doubt or qualm... The charge of corrupt practice will have to be proved by clear and cogent evidence as a charge for criminal offence and it is not open to the court to hold the charge of corrupt practice as proved merely on the preponderance of probabilities but it must be satisfied that evidence is sufficient to prove the charge beyond reasonable doubt.”

10.02.12 Once the allegations have been established to the satisfaction of the court and it is proven that there was non-compliance with the law, then the court is enjoined under Section 83 of the Elections Act 2011 to consider whether such non-compliance affected the results and the election. Section 83 says -

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

10.02.13 The court in **Rishad Hamid Ahmed Amana vs. IEBC & 3 Others** H.C. at Malindi E.P No. 6 of 2013 interpreted the above section as establishing a materiality test and stated-

“Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetical mistakes are bound to happen. This was the decision of Maraga J (as he then was) in Joho –Vs- Nyange (2008) 3KLR i(EP) 500. What Section 83 of the Elections Act simply provides is that in any election, because it is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the

law, materially affect the outcome of the results that the court will have no option other than to nullify the said results.”

10.02.14 These principles were also laid out by Lord Denning in the case of Morgan vs Simpson & Another [1974] 3 All ER 722 at 728. where he stated -

“I suggest that the law can be stated in these prepositions:

- 1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by Hackney case (1874) 2 O’M & H 77, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.*
- 2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the Ishington case (1901) 17 TLR 210 where 14 ballot papers were issued after 8.00 pm.*
- 3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by Gunn vs. Sharpe [1974] 2 All ER 1058 where the mistake in not stamping 102 ballot papers did affect the result.”*

10.02.15 Therefore the court has to determine the substantiality of compliance with the law and the overall effect of the non-compliance with the law. If the Court is satisfied that the results as declared reflect the will of the people, then uphold the election result.

11.0 ANALYSIS OF EVIDENCE AND CONCLUSION

11.01 Misuse of Public Resources

11.01.1 The first complaint by the Petitioner was that the First Respondent committed the offence of misuse of public resources during the campaign period. Section 68 of the Elections Act prohibits a candidate from using public resource for the purposes of campaigning. In support of the allegation, the PW2 testified that on 17/02/2013 he was summoned to Jua Kali by DW2 to collect a bursary cheque that had been issued in favour of Mau Narok Secondary School. It was his case that during the meeting the First Respondent talked of his policies which the First Respondent confirmed adding that he spoke of the CDF Fund and the various projects financed and completed with use of those funds.

11.01.2 In the previous terms, Parliament would approve the funds to be allocated to each constituency for its development. A sitting member of parliament would therefore present the needs of his constituency and various projects which he intended to implement to Parliament for approval. It was therefore not illegal for a member of parliament seeking to be elected for a second term to tell the people of projects implemented under his Term using the money allocated to his Constituency and mention of the CDF Fund in my opinion was not prohibited.

11.01.3 Nevertheless the main issue raised by the Petitioner under this allegation was that the cheque was handed over to PW2 at a public meeting with an intention to influence the voters thus constituting misuse of resources. It was submitted by all the Respondents that PW2's testimony about being given the cheque by the First Respondent was an after-thought. During the hearing PW2 clarified that on the conclusion of the meeting he was called to the podium by the First Respondent who handed him the cheque for Kshs. 363,000/= and a list of the beneficiaries. However according to Counsel, this statements were neither contained in the Police statement nor in his affidavit sworn in support of the Petition, that the reference to the First Respondent in the Police statement was in relation to the place where the cheque was to be collected and not the person issuing it.

11.01.4 *It is not denied that CDF Fund constitutes public funds and misuse thereof amounts to an offence under the Elections Act. In my view, misuse thereof would constitute use of the fund for purposes other than it is intended for thus giving the candidate an unfair advantage over his opponents.*

11.01.5 *In the present case, the cheque in question was not issued by the First Respondent but by the project manager of the Constituency Development Fund. Its beneficiaries were the students of Mau Narok Secondary School. It was not demonstrated that they were not entitled to the money hence the same was issued unprocedurally or illegally. In addition, it was not proved to my satisfaction that he in fact handed out the cheque during his rally. I accepted the interpretation that in his statement to the Police PW2 stated that it was given to him by DW2. His evidence over the issue was not clear and convincing and in my view, fell far short of the required standard of proof in an Election Petition. This ground therefore fails.*

11.02 VIOLENCE

11.02.1 The Petitioner alleged that the First Respondent was involved in instances of violence during the campaign and election period contrary to Section 65 of the Elections Act which provides-

“65. A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—

(a) so as to induce or compel that person to support a particular candidate or political party;

(b) on account of such person having voted or refrained from voting; or

(c) in order to induce or compel that person to vote in a particular way or refrain from voting,

commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.”

11.02.2 The first incident of violence was one which occurred on 16th January 2013 when it is alleged that the First Respondent assaulted PW4 who was at the time the Petitioner's supporter and was campaigning for him. The evidence showed that she was on this day carrying a placard with the Petitioner's portrait and was chanting his praises. It was her evidence that the Petitioner knew her prior to the day of the assault and according to her, he disliked her because she had pestered him for payment of legal fees for the Mau Narok Nyakinyua Women Group where she was a treasurer. She had also called him out earlier in a meeting on failure to pay the legal fees. Therefore on recognizing her amongst the Petitioner's supporters, he walked to her, slapped her and was then pulled back by his supporters.

11.02.3 The other evidence showed that on the material day, the Petitioner had just finished his rally at Mau Narok and was escorted by his supporters who included PW4 and PW5 to Elementaita Junction. The First Respondent's convoy first ran into the Petitioner's supporters at Mau Narok but according to him there was no incident that occurred at that time. He then proceeded to Gatimu off Kwa Matu and on his way back he ran into this group again at Mau Narok Center. He had a convoy of cars and his supporters.

11.02.4 Although PW4 and PW5 testified that the Petitioner's supporters did not block the First Respondent's convoy and couldn't have as they were fewer than the First Respondent's supporters, I find from the evidence adduced by all the witnesses and the video that they did in fact block the convoy. The only logical consequence of this action was that a commotion was likely to ensue which would result in violence. I therefore believe the First Respondent's testimony that he stepped out of his vehicle to try and contain the situation to prevent any violence from occurring.

11.02.5 In my opinion, the occurrence of the incident was not proved to the satisfaction of the

court. Firstly, I found PW4 not to be a credible or straightforward witness. There was a contradiction between her testimony in court and her interview in the video produced as evidence before the court on material facts as to the occurrence of the assault. I also agree with Mrs Kambuni that from the narration of the events this court cannot conclusively find that she was assaulted by the First Respondent thus holding him liable for the same. She was also not an independent witness as there was evidence of ill feelings against the First Respondent because he had refused to settle the legal fees as promised.

11.02.6 The Second incident of violence and use of force was by PW9 who alleged to have been assaulted by DW5. The evidence adduced is that on the material day, he followed DW5 from Mwisho Wa Lami on account of information received from Stephen Kamau Muiru that she was distributing bribes on behalf of the First Respondent and took photos of her as she gave Kshs. 200 to a hawker. It was his testimony that on realising that she had been recorded, DW5 and her son Rufus Kinyanjui Waitiki asked him to delete the photos and threatened to kill him if he did not comply. Rufus Kinyanjui then hit him on the face and DW5 threatened to stab him with a knife while holding a panga.

11.02.7 DW5's denied having assaulted PW9 and testified that she was apprehensive on realizing that she was being followed by a motorbike. She further testified that PW9 confronted her after she had bought tomatoes from the hawker demanding to be given the money she was distributing as bribes to the voters, that there was a commotion and a crowd gathered which wanted to attack PW9 thinking that he was an assailant and indeed he was slapped by a person in the crowd but she shielded him and called the Police. I am neither convinced nor persuaded, that PW9 was attacked by DW5 as alleged as the circumstances of the assault were not clear from the evidence adduced. Regardless it is clear that the assault was not occasioned on PW9 on account of his political affiliation or to induce him to vote or refrain from voting in a certain way, for or against a certain candidate or political party. It could only amount to one of those cases of common assault under the Penal Code. It did not bear those ingredients of an election offence.

11.02.8 An ingredient of the offence of violence or use of force under the Elections Act is that the force or violence is used against a person to induce or compel the person to vote or refrain from voting in a particular way, for a particular political party or candidate, or on account of the person having voted or refrained from voting in a particular way. It was demonstrated that PW9 was following DW5 in the course of his investigations and confronted her once she had allegedly given the money to the hawker and both started quarreling causing a crowd to gather around. The said act of violence was also not occasioned by the First Respondent's agent with his knowledge, consent or approval as it was spontaneous. In addition, PW4 testified that the cause of the assault was because of a previous misunderstanding and bad blood between herself and the First Respondent over the settlement of the legal fees and not because she was, on the particular day supporting and campaigning for the Petitioner with the intent to influence her vote.

11.02.9 For a court to nullify an election there has to be proof of widespread violence and intimidation of voters. It has to be demonstrated that voters were prevented from exercising their right to elect the candidate of their choice because of intimidation, coercion or violence. In the case of **Muliro v Musonye & another (2008) 2 KLR (EP)** the court stated thus-

“To the contrary, if any election is characterized and marred by violence of any kind to the extent of disfranchising the voters this Court shall consider whether or not the overall effect was such as to make that election a sham.”

and in **Joho v Nyange & another (No 4)(Supra)** it was stated-

“In the circumstances I find that though there were incidents of violence, which as I have said involved supporters of both the petitioner and the second respondent, the voting exercise was not affected. The skirmishes were outside the polling stations and there is no evidence that they affected the voters who were queuing in the polling areas.”

11.02.10 In this case, there was no evidence that there was contravention of electoral laws

through voter intimidation, harassment and violence, as a result of which the voters at this election in this constituency were prevented from voting for a candidate of their choice and the will of the people was subverted. This ground too fails.

11.03 Bribery

11.03.1 The Petitioner alleged that the First Respondent bribed voters using money and other items throughout the nomination and campaign period before the general elections. The Petitioner testified that he had received information from his agents and other supporters that there were incidents of bribery by the First Respondent's agents in Piave, Jawaitho, Industrial Area Njoro, Mathangauta and Likia in Mau Narok Ward, Mau Narok, Mwisho wa Lami and Tipis Centre.

11.03.2 Section 64 of the Elections Act creates an offence of bribery and provisions relevant to this Petition provide-

“64 (1) A candidate who -

(a) directly or indirectly in person or by any other person on his behalf gives, lends, or agrees to give or lend, or offers, promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any person in order to induce any voter-

- i. to vote or refrain from voting for a particular candidate***
- ii. to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate***
- iii.***

commits the offence of bribery”.

11.03.3 In determining whether an allegation of bribery has been proven the court in **Muliro v Musonye & Another** (*supra*) held thus-

“Indeed, with an allegation of the election offence of bribery as it was in this case, it is not even necessary that bribery itself be proved. It should suffice if it is shown that with intention to influence voters to vote for a given candidate, bribes were given to the voters.”

11.03.4 From the above holding I find that for an offence of bribery to be proven in relation to an election petition, it has to be shown that a bribe was offered and received with an intention to influence a voter to vote for a particular candidate. The evidence on which such a finding can be made has to be conclusive and it is not open for the court to make presumptions without a clear and concise basis. In **Ntwiga v Musyoka & 3 others (No 2) (2008) 2 KLR (EP) 276-**

“It was held in Election Petition No 9 of 1983 Mohamed Jahazi –v- Shariff Nassir A Taib again quoting Halsbury’s Laws of England 3rd edition vol 14 page 222 paragraph 384 on:

“Proof of Bribery: Due proof of a single act of bribery by or with the knowledge and consent of the candidate or his agents however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the Court is not bound by the strict practice applicable to criminal cases, but may act to the uncorroborated testimony of an accomplice”.

11.03.5 PW6 Edward Mutura Ngugi averred by his affidavit sworn on 8th April 2013 that on 3rd March 2013, he received a phone call and was informed that persons using the First Respondent's motor vehicle registration number KAS 575K were giving out Kshs. 200/= to voters to induce them to vote for Uhuru Kenyatta's Party TNA, that they were coming from Gatimu Area headed to Mwisho wa Lami and Tipis Centre. He arrived at around 6.30 pm when the vehicle was about to leave and therefore did not see the persons giving out the Kshs. 200/= nor did he receive the money.

11.03.6 He however followed the vehicle to Tipis Centre where he witnessed a meeting between a person from the First Respondent's vehicle and another man. It was around 7.00pm and he was standing about 18-20 metres from where the gentlemen were standing. He could therefore see them and hear what they were saying. The man from the vehicle said to the man from Mwisho wa Lami "*tumekuja kuwaletea vitu zenyu.*" He went back to the vehicle and came back with an envelope which he handed to the man and told him that they were Agent's badges. He then went back into the vehicle and took out a second parcel, handed it to the man and told him "*uhakikishe mzigo umefika nyumba kwa nyumba na usifanye makosa.*" He however did not see what was in the parcel nor did he follow the man to whom they were given to find out if it was money as alleged and to witness him giving it out to voters.

11.03.7 DW4 who was in charge of the First Respondent's Secretariat. His testimony, which was corroborated by the Second Respondent was that the Second Respondent had released the agents' oath of secrecy at around 2pm. This oath together with the agents' appointment letters and party badges were to be delivered to them before the morning of the election as without them the agents would not have been allowed into the polling stations. With such limited time, it was not possible to personally deliver the same to all the agents throughout the constituency. Therefore they were packed for each locality and given to an agent from that area to distribute to the rest.

11.03.8 Having considered the evidence tendered by both witnesses I am inclined to believe DW4's testimony. The same was also corroborated by DW5 who testified that on the said day, she collected her documents, which were in an envelope at Mwisho Wa Lami as instructed by DW4 and the Petitioner also acknowledged that his agents were given their documents at around the same time. In light of this evidence, I am unable to presume that the parcels which PW6 saw the First Respondent's agent give to another man contained money which was to be used to bribe voters especially when he did not see the contents thereof.

11.03.9 In her affidavit sworn on 10th April 2013 PW7 stated that she had received information that Mr. Daniel Njogu (DW6), the First Respondent's campaign coordinator had taken iron sheets on behalf of the 1st Respondent to Natu Primary School in Piave Village and given money to give free water to voters which allegations were denied by DW6. She also alleged that she had been informed that the First Respondent visited churches in Piave area and was telling the congregation that he had gone to give tithe and give thanks to the people for supporting him but this was denied by DW7 who was the chairman of St. Dennis Church at Piave. She also alleged that the First Respondent had given aluminum pots (*sufurias*) to women groups in Ngomongo Piave.

11.03.10 PW8 testified that his friends had received money from Peter Mwangi, the First Respondent's agent and Mr. Soi Paul Wanjohi a village elder used to organize meetings where they would plan how to bribe voters. He however did not attend any of the meetings and it is not clear how he received the information.

11.03.11 PW7 and PW8 did not witness any incident of bribery by the First Respondent or his agents. They relied on information given to them by their friends and not of their own personal knowledge. There was no direct evidence to link the First Respondent to the allegations of bribery. PW9 alleged to have witnessed an instance of bribery by the First Respondent's agents. His testimony as contained in his affidavit sworn on 8th April 2013 was that on 3/03/2013 he saw Pauline Waitiki, the First Respondent's agent give Kshs. 200/= to a hawker selling tomatoes. DW5 then told the hawker to remember for whom they were casting their votes during the elections. To refute these allegations, DW5 testified that she actually bought tomatoes worth Kshs. 50/= from the hawker. Whereas bribery can be inferred from the surrounding circumstances it is my view that it cannot be presumed in this instance.

Firstly the lady to whom the money was given was selling tomatoes and PW9 did not testify whether or not she was given the tomatoes in exchange of the money. There was no evidence that DW5 was seen giving money to any other person so as to lead the court to conclude that she was not buying the tomatoes and I am inclined to believe the testimony of DW5.

11.03.12 *In addition it is my opinion that for an offence of bribery to be proved under the Elections Act, there has to be evidence that voters were influenced. In the present Petition it was alleged that bribery was rampant throughout the constituency. In fact, PW8 testified that several of his friends had been given Kshs. 200 to vote for the First Respondent and PW7 testified that DW6, her neighbour, gave free water to voters on the instructions of the First Respondent. However there was no evidence by any person who received these gifts as an incentive to vote in a particular way.*

In the case of Simon Nyaundi Ogari & Another vs. Hon Joel Omagwa Onyancha & 2 Others [2008] eKLR the court held thus on a charge of bribery-

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.”

11.03.13 *The court in Wilson Mbithi Munguti Munguti Kabuti & 5 Others vs. Patrick Makau King'ola & Another [2013] eKLR relied on the above holding and further held that a corrupt motive must be proved, not only in the mind of the person being bribed but also in the mind of the receiver. I am also persuaded by the holding in the Presidential Election No. 1 of 2001, Rtd Col Dr Kizza Besigye v. Y. K. Museveni and Electoral Commission, that the offence of electoral bribery is not committed unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter. Justice Katurebe JSC stated that:*

“.....It is therefore not enough for a Petitioner or any person to merely allege that agents gave money to voters; a high degree of specificity is required: The agent must be named, the receiver of the money must be named and he/she must be a voter. The purpose of the money must be to influence this voter”.

11.03.14 *In my view, for an offence of bribery to be established in an election petition, the act itself must be proved as well as a corrupt motive on the part of the giver and receiver. Therefore the evidence of a voter who is defined by the Elections Act as one registered to vote under the Act is essential to enable the court to make a determination on the offence of bribery. It is through his evidence that the court can be able make a conclusive finding of a corrupt motive on the part of the receiver of the bribe and as a result find that bribes were given to voters as a result of which they were influenced or with an intention to influence them. The court can therefore then safely arrive at the view that the voters did not exercise their free will but were unduly influenced and the entire election was a sham.*

11.03.15 *In addition there was no evidence of widespread incidents of bribery which led to the influence of voters, that they did not express their free will, and consequently, the integrity of the elections was compromised. In the case of Beth Mugo (supra) the court held -*

“in the present petition, it was evident that the Petitioner failed to establish to the required standard of proof that the First Respondent indeed bribed voters and that the said bribery was so pervasive that it influenced the voters to vote in favour of the First Respondent”.

11.03.16 *In my view the allegation that the First Respondent gave out bribes in Njoro Constituency with an intention to influence the voters was not established. This ground too fails.*

12.0 Whether the election subject matter of the petition was conducted in substantial compliance

with the law

12.01 Mr. Gathenji learned Counsel for the Petitioner urged the court to find that once there was established an iota of evidence of the contravention of those provisions and therefore the commission of an election offence, then, the Court should proceed and nullify the election of the First Respondent.

12.02 Mr. Njenga learned counsel for the First Respondent argued to the contrary, that not only was no evidence disclosed, but that not all offences committed during “*electioneering period*” qualify to be Election Offences, and if that were so the Elections Act would have incorporated all the relevant offences under the Penal Code. He submitted that election offences are *sui generis* and should be treated as such. In addition ordinary criminal offences can be committed during election period (**BERNARD SHINKU VS. BONI KHALWALE & 2 OTHERS [2011] eKLR** (where a fight ensued after the elections). *The court held that was a matter to be addressed within the ordinary criminal justice system.*

12.03 The principle recognized throughout countries with the common law tradition such as the Commonwealth and no less, the United States, is that -

“All provisions of election laws are mandatory in the sense that they impose the duty of obedience upon those who come within their purview, but irregularities, which were not caused by fraud and which have not interfered with a full and fair expression of the voters’ choice should not effect a disenfranchisement of the voters ...”

(Martin vs. Porter, 353 NE Dd 8919, 923, (Ohio Ct. CP. 1976).”

12.04 This is because the will of the voters has been expressed, and courts prefer to ascertain and effectuate such will. As expressed by other courts-

“Ordinarily, provisions of an election law are mandatory if enforcement is sought before election in a direct proceeding for the purpose; but after an election such provision is directory only, in support of the result, unless they are of such character that their violation would effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless they affect an essential element of the Election or it is expressly declared by statute that compliance with them is essential to the validity of the election.

(Michigan Ct. Appeal – 1998 – Vorva vs. Plymouth - Canton County School Dist.).

With some exceptions, laws relating to the manner of procedure, the keeping of records, returns of results, and the like are ordinarily viewed as directory. That is, laws merely regulating the manner of conducting an election are usually regarded as directory, and hence a departure from the mode prescribed, will not ordinarily vitiate the election. So also compliance by voters with registration requirements aimed at ensuring that only eligible residents cast votes have been held directory only where the disputed votes were in fact cast by otherwise eligible voters.

(12 Mc Quillin, The Law of Municipal Corporations, Westlaw database, updated, Oct. 2006).

12.05 In our context therefore, where certain things are required to be done in the nature of conditions precedent to the validity of the election, such prerequisites are regarded as mandatory and failure to observe them in substance at least, will nullify an election. These include provisions as to secret ballot, the nomination of candidates and the qualifications of electors or candidates are mandatory, and frequently so are the provisions as to the manner of voting and the time and place of elections. Appointment of the requisite number of election officials is likewise mandatory. Under some circumstances, however irregularities in some of these respects are held not be fatal.

12.06 Being of the above mind, I will now consider whether the Second and Third Respondents carried out their mandate as per the law. **Firstly** none of the witnesses who testified in this court on the commission of the offences by the First Respondent reported to the Second Respondent. **Secondly**, the evidence shows that on bribery the allegations were very general and no facts were provided to the Second Respondent upon which he could act. I think that it would be unreasonable to expect the Second Respondent to conduct investigations without a proper basis. The minutes of the meeting convened by the Second Respondent clearly show the generality of the allegations of bribery. This also applies to the allegation of misuse of public resources where the Second Respondent also explained that he found as satisfactory, the explanation by the First Respondent that he was no longer a member of Parliament and in any event he was only a patron of the CDF and could therefore not issue any cheque satisfactory but nevertheless referred the matter to the Police for further investigation.

12.07 The Code of Conduct prohibited campaigns at places of worship or burial ceremonies. This is obeyed more in letter than in deed by their Kenyan elite and politicians. These are the only occasions when they speak without the necessity of a prior permit. In any event breach of the Code of Conduct would not disqualify a candidate from participating in an election unlike commission of an election offence under the Act as already explained. It is only the High Court that is vested with powers to cancel the right of a candidate or political party to participate in ongoing elections.

12.08 In addition, *the Third Respondent does not have powers to determine disputes relating to commission of election offences under the Act. Section 107 (2) thereof only vests in it powers to prosecute and impose sanctions against a person who commits the offence pending the hearing and determination of the charges preferred. Therefore it can only disqualify a candidate under Section 72 where such a candidate has been convicted by a criminal court of the offence. In this case as there was no conviction made against the First Respondent, I find and hold that the Second Respondent acted in accordance with the electoral laws and his conduct did not materially affect the integrity of the election. It was not proved to the satisfaction of the court that he failed to take steps as provided by the law to stop the widespread allegations of bribery or to prevent further commission of such offences.*

12.09 It is accepted that an election is an important exercise by which the voters elect the leader of their choice. Therefore an election petition is not only the concern of the Petitioner but the public as well. Indeed if an election is nullified, then the Court has to be satisfied that the election was conducted in a manner in which it was not possible to determine the true winner of the process. It is also accepted that the process cannot be perfect and there are bound to be irregularities and errors. As stated earlier, it is the overall effect of irregularities and malpractices that are complained of that is regarded by the court in making a determination of whether or not an election should be nullified. Even in a case where there are allegations of commission of an election offence, the effect of the acts on the process is relevant for purposes of determining the validity of the election. This was summarised by the court in **Bernard Shinalu Masaka vs. Boni Khalwale & 2 Others [2011] eKLR** where it held that-

“the law is therefore clear as to when an election can be nullified if it is not conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of an election. But when is an election said not to have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the result of an election?it is not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-compliant with the law as to elections when it is conducted in violation of the principles of an election by ballot. This is how Stephenson L.J expressed this point in the case of Morgan -vs- Simpson [1974] 3 ALL ER 722 at p 731 “for an election to be conducted substantially in accordance with the law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing an qualified candidate on some illegal ground or disenfranchising a

substantial proposition of qualified voters. And the result of an election is affected when the cumulative effect of the irregularities reverse it.”

12.10 The Petitioner herein has been unable to demonstrate to the required standards that the First Respondent committed the election offences as alleged. Consequently, there was no evidence that the election herein was compromised and that the voters did not express their will in the ballot papers as a result of which the election was compromised. He has also been unable to demonstrate that the Second and Third Respondents failed in their mandate to ensure that the elections were conducted in a free and fair manner. I am satisfied that the elections herein were free and fair and that the voters were not unduly influenced. I therefore dismiss the Petition herein.

12.11 I declare and certify in terms of Section 86 of the Elections Act, 2011 (*No. 24 of 2011*), that the First Respondent, Joseph Kiuna Kariambegu Ng'ang'a was validly elected as member of the National Assembly for Njoro Constituency.

12.12 The costs occasioned by the Petition shall be paid by the Petitioner subject to taxation under **Rule 37(1) of the Elections/Parliamentary and County Elections) Petition Rules, 2013.**

It is so ordered.

Dated, signed and delivered at Nakuru this 11th day of September, 2013

M. J. ANYARA EMUKULE

JUDGE